

## **Hill v. Hamilton-Wentworth Regional Police Services Board: a review of the tort of negligent police investigation 10 years later**

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### Introduction

In 2007, in a 6-3 decision, the Supreme Court of Canada recognized the tort of negligent police investigation<sup>2</sup>. The dissent would not have imposed a duty of care in negligence to suspects being investigated, raising the following question among others: “is it fair to saddle the police with the entire cost when responsibility for wrongful convictions has been attributed to all players in the justice system, including witnesses, scientists, Crown attorneys, judges and juries”<sup>3</sup>.

Other questions raised by *Hill* included the extent to which expert evidence would be necessary to make determinations of liability, given the recognition that police exercise professional discretion<sup>4</sup>, and whether the test of reasonable and probable grounds could be met by a purely ‘objective’ assessment of the evidence – without also taking into account the individual officer’s subjective belief, which is part of the test in the criminal context<sup>5</sup>. Some of these questions have been addressed in the jurisprudence since *Hill*.

With the September 2, 2016 decision of the Ontario Court of Appeal in *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*<sup>6</sup>, the evidentiary contours of the tort of negligent police investigation are now significantly clarified. Overall, what has emerged is that expert evidence and determinations made in the underlying criminal proceedings are crucial factors in the liability analysis. Although *Hill* no doubt spawned more litigation against the police than otherwise would have been the case, the evolution of the cases has been toward the proposition that successfully suing the police is far from an easy undertaking.

Furthermore, recent developments in the case law suggest a growing embracement of the *Hill* dissent's concern over saddling the police with "the entire cost" to the exclusion of other "players in the justice system".

### Hill re-visited

Although *Hill* resulted in confirmation that the tort of negligent investigation exists in Canada, the police were not found to be liable in that case.

Jason George Hill was an aboriginal man who became a suspect in the course of the investigation of certain robberies. At the time of his arrest, the police were in possession of potentially exculpatory evidence, namely, an anonymous Crime Stoppers tip suggesting that two hispanic men ("Frank" and "Pedro") were the perpetrators. As time passed, other exculpatory evidence surfaced. Two similar robberies occurred while Hill was in custody. The descriptions of the robber and the *modus operandi* were similar to the original robberies, except for the presence of a threat of a gun in the last two robberies. The police received a second Crime Stoppers tip implicating "Frank", which indicated that Frank looked similar to Hill and that Frank was laughing because Hill was being held responsible for robberies that Frank had committed. The police detective investigating the last two robberies received information from another officer that a Frank Sotomayer could be the robber. The detective proceeded to gather evidence and information which tended to inculpate Sotomayer, i.e., that Sotomayer and Hill looked very much alike, that there was evidence tending to corroborate the credibility of the Crime Stoppers tip implicating "Frank", and that photos from the first robberies seemed to look more like Sotomayer than Hill. Information from the investigation of the later

robberies was conveyed to the detective supervising the investigation of the earlier robberies<sup>7</sup>.

Two of the charges against Hill were dropped in response to this new evidence, the police having concluded that Sotomayer, not Hill, had committed the later robberies. However, the police did not drop all of the charges<sup>8</sup>. Legal proceedings against Hill in relation to the remaining eight charges began. Two more charges were withdrawn by the Crown during the preliminary inquiry because a witness testified that Hill was not the person who robbed her. Five more charges were withdrawn by the Assistant Crown Attorney assigned to prosecute at trial. The Crown elected to proceed with the remaining charge, largely because two eyewitnesses (bank tellers) remained steadfast in their identifications of Hill<sup>9</sup>.

Hill stood trial and was found guilty of robbery in March 1996. He successfully appealed the conviction based on errors of law made by the trial judge. His appeal was allowed and a new trial was ordered. He was ultimately acquitted of all charges of robbery<sup>10</sup>. Thereafter, he pursued an action against the police alleging negligence, malicious prosecution and breach of *Charter* rights<sup>11</sup>.

The case made its way to the Supreme Court which recognized: "The police must investigate crime. That is their duty"<sup>12</sup>. It also recognized that "[p]olice, like other professionals, exercise professional discretion"<sup>13</sup> and that "[c]ourts are not in the business of second-guessing reasonable exercises of discretion by trained professionals"<sup>14</sup>. Rather, an "appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence"<sup>15</sup>.

In holding that police owe a duty of care in negligence to suspects being investigated, the majority held that “the standard of care is that of a reasonable police officer in all the circumstances”<sup>16</sup>. The Court explained that the applicable standard is not one of perfection or what is judged in hindsight to be optimal. Further, the standard is to be applied in a manner that recognizes police officers’ professional discretion<sup>17</sup>:

This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made - circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results (Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere “errors in judgment” which any reasonable professional might have made and therefore, which do not breach the standard of care. (Citations omitted.)

Thus in *Hill*, the Supreme Court concluded that while the investigation that led to Hill’s arrest and conviction was “flawed”, it did not breach the applicable standard judged by the standards of the day<sup>18</sup>. For example, while “the fact that two witnesses were interviewed together and the failure to blind-test the photos put to witnesses [were found to not be] good police practices, judged by today’s standards”, the Court concluded that “the evidence does not establish that a reasonable police officer in 1995 would not have followed similar practices in similar circumstances”<sup>19</sup>.

Nor was it clear, the Court held, that “if these incidents had not occurred, Hill would not have been charged and convicted”. In the latter regard, the usual “but for” test applies<sup>20</sup>.

In summary, although the tort of negligent investigation was recognized in *Hill*, the decision squarely affirmed that the mere fact of an acquittal would not automatically translate to civil liability.

#### Moving to an objective standard?

In *Romanic v. Johnson*, which was affirmed by the Ontario Court of Appeal, it was clarified that the tort of negligent investigation consists of the same elements as the tort of malicious prosecution, with the exception of malice<sup>21</sup>:

- (a) the proceedings must have been initiated by the defendant;
- (b) the proceedings must have been terminated in favour of the plaintiff;
- (c) there must have been an absence of reasonable and probable grounds to commence the proceedings against the plaintiff; and
- (d) in conducting the investigation the defendant owed a duty of care to the plaintiff, and did not meet the objective standard of a reasonable police officer in similar circumstances.

Justice Charron, who wrote the dissent in *Hill*, subsequently authored the Supreme Court's unanimous decision in *Miazga v. Kvello Estate*<sup>22</sup> which considered the tort of malicious prosecution. With respect to the requirement that a claimant establish an absence of reasonable and probable grounds (a common element between the torts of malicious prosecution and negligent investigation), Justice Charron noted that the tort of malicious prosecution originated at a time when prosecutions were conducted by private litigants<sup>23</sup>. While the elements of the four part test for malicious prosecution "are identical no matter the parties"<sup>24</sup>, the Court identified an important distinction between the application of the test to public versus private actors<sup>25</sup>:

In the absence of the requisite subjective belief, the private prosecutor, who is not charged with the execution of any public duty, has no reason for invoking the criminal process against the plaintiff and hence no defence left on the third element of the tort [i.e., even if objective cause existed] (emphasis added).

Unlike the situation in a purely private dispute, the public interest *is* engaged in a public prosecution. Therefore, the Court held, “in the context of a public prosecution, the third element of the test necessarily turns on an objective assessment of the existence of sufficient cause”<sup>26</sup> (emphasis added).

Although *Miazga* was concerned with alleged malicious prosecution by a Crown prosecutor, and did not explicitly articulate the “public” versus “private” distinction in relation to the police, there would appear to be no reason in principle why the police should not also be treated as “public” actors in this context. Clearly they cannot be likened – particularly in light of *Hill* – to the historical private prosecutor who was not charged with the execution of “any” public duty.

*Miazga* also emphasized another point that was addressed in Justice Charron’s dissenting judgment in *Hill*. She noted in *Hill* that, once the standard of reasonable and probable grounds is met by the police, “it is left to others within the criminal justice system, namely the Crown prosecutor, the preliminary hearing justice, and the ultimate finder of fact, to delve more deeply into the legal and factual merits of a case”<sup>27</sup>. Subsequently in *Miazga*, Justice Charron – again, writing for a unanimous Supreme Court in that case – had this to say on the subject of prior judicial determinations in criminal proceedings<sup>28</sup>:

... While a determination of guilt at a criminal proceeding is not determinative of the reasonable and probable cause question under the third prong of the test for malicious prosecution, it is a relevant factor that may be properly considered in ascertaining the existence or absence of reasonable cause. Giving weight to

antecedent judicial determinations works to ensure consistency between the criminal and civil justice systems. The intervener the Attorney General of Canada explains the justification for this practice at para. 20 of its factum:

Giving evidentiary weight in a civil action to the fact that a *prima facie* case of guilt was found in earlier criminal proceedings takes into account the jurisdiction of the criminal court and the similarity of the facts in dispute. Neither a committal after a preliminary inquiry nor a dismissal of a non-suit motion at the close of the Crown's case in a trial is necessarily determinative of the reasonable and probable cause issue, but those determinations are objectively compelling, at least where no new facts have emerged. The judicial decisions in the criminal process may thus support a finding by a civil court that reasonable and probable cause for prosecution existed.

**Absent a fundamental flaw in the criminal proceedings relied upon, it is perfectly reasonable that antecedent judicial determinations may support a finding by a civil court that there existed reasonable and probable cause for an impugned criminal prosecution.** (Emphasis added.)

This point had found expression in a number of other decisions over the years, at varying levels. The Ontario Court of Appeal had held almost 20 years earlier that, while committal for trial in the underlying prosecution may not be “conclusive proof” that the prosecution was instituted based on reasonable and probable grounds, it goes “a long way toward negating the lack of probable cause”. In a subsequent civil action, the committal thus “becomes a formidable obstacle” in the claimant’s path<sup>29</sup>.

In *R. v. Scott*, which was a motion for summary judgment, the motion judge, citing the above decision, held<sup>30</sup>:

... whether a committal for trial is conclusive of, or strong evidence for, reasonable and probable cause, at the very least it shows that the evidence did not lean towards the probable innocence of the accused. Therefore, a committal for trial precludes implied malice by default. (Emphasis added.)

The motion judge went on to state, in somewhat more qualified terms, that the “allegation of implied malice may be negated by the finding of reasonable and probable cause in light of the committal for trial” (emphasis added). In the case at bar, based on

among other things the “substantial weight of the committal order”, the motion judge concluded that there was no genuine issue “deserving of trial” on the issue of the alleged malice of the Crown attorney<sup>31</sup>. The granting of summary judgment was affirmed by the Court of Appeal<sup>32</sup>.

In *Proulx v. Quebec (Attorney General)*, Justice L’Heureux-Dubé (Justices Gonthier and Bastarache concurring), in dissent regarding the final disposition of the appeal, had also commented on the relevance of committal<sup>33</sup>:

... It must not be forgotten, in this analysis, that at the preliminary inquiry the judge committed the appellant for trial. It is difficult to argue, in these circumstances, that the evidence in the Crown’s possession was so non-probative, or so tenuous, as one would have us believe. It seems to me that if that was the case, there would have been no committal for trial. Moreover, the appellant was found guilty by the jury at the end of his criminal trial. The standard of proof beyond a reasonable doubt does not apply to the Crown attorney at the time the charge is laid, it applies only at trial; otherwise, more would be asked of the Crown attorney than of the judge at the preliminary inquiry and at trial (Citations omitted).

Justice L’Heureux-Dubé went on to hold<sup>34</sup>:

[209] Finally, recently, in *R. v. Arcuri*, [2001] 2 S.C.R. 828, 2001 SCC 54, at paras. 30 and 32, McLachlin C.J. discussed the task of the judge at a preliminary inquiry:

In performing the task of limited weighing, the preliminary inquiry judge does not draw inferences from facts. Nor does she assess credibility. Rather, the judge’s task is to determine whether, if the Crown’s evidence is believed, it would be reasonable for a properly instructed jury to infer guilt.

...

This result would obviously be inconsistent with the mandate of the preliminary inquiry justice as is expressed in s. 548(1), which requires the preliminary justice inquiry to consider “the whole of the evidence”. Further, it would undermine one of the central purposes of the preliminary inquiry, which is to ensure that the accused is not committed to trial unnecessarily: see *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 20. Thus the traditional formulation of the common law rule should not be

understood to foreclose consideration of defence evidence. ... Whatever the evidence of the Crown and defence, the judge must consider “the whole of the evidence”, in the sense that she must consider whether the evidence, if believed, could reasonably support a finding of guilt. The question is the same whether the evidence is direct or circumstantial. [Emphasis added.]

[210] One must assume that the judge at the preliminary inquiry was cognizant of the state of the law when he committed the appellant for trial. If he considered the evidence offered by the Crown attorney to be sufficient in that respect, the Crown attorney cannot be criticized for reaching the same conclusion.

[211] The fact that the Court of Appeal concluded on appeal of the guilty verdict that the evidence presented at trial did not prove the appellant’s guilt beyond a reasonable doubt, as it said, and that the trial judge committed errors, is one thing. Assessing the conduct of the Crown attorney when the criminal charge was laid is quite another.

(Emphasis in original.)

Recent decisions have picked up this theme and emphasized an objective analysis based on determinations made in the underlying criminal proceedings.

*McCullough v. Hamilton Police Services Board*<sup>35</sup> is one of the small number of cases that have proceeded to trial since *Hill* on an allegation of negligent investigation. The plaintiffs in that case were charged with murder in 1990. The jury acquitted one (Nossey) but convicted the other (McCullough). McCullough’s conviction was set aside by the Court of Appeal based on fresh evidence, and a new trial was ordered. The Crown elected not to proceed with a new trial. The plaintiffs subsequently sued the police for malicious prosecution, false imprisonment, negligent investigation and breach of *Charter* rights.

In his trial judgment, Justice Ramsay observed that the plaintiffs were “wise” not to press for a finding of malice, as there was no basis to infer that the goal of the police was anything other than the “obvious one” (solving the crime)<sup>36</sup>. He went on to hold that the standard of a reasonable police officer “requires that the police have objectively

reasonable grounds before making an arrest<sup>37</sup>. This is consistent with the Supreme Court's guidance in *Hill* that the standard is that of a "reasonable" police officer in all the circumstances. The committal for trial was cited as "further support for the existence of reasonable grounds"<sup>38</sup>, and the existence of probable cause was held to be sufficient to dispose of the negligence claim<sup>39</sup>.

A similar approach was taken by the court in *Du Carmur v. Cole*, where the arrest and charging of the plaintiff arose from wiretap evidence obtained by judicial authorization. The court undertook a straightforward objective analysis on the basis that, if the authorization was valid, then there could be no negligence on the part of the police for taking reasonable steps in accordance with its terms<sup>40</sup>.

*495793 Ontario Ltd. et al. v. Barclay et al.*

Against the foregoing backdrop, the Ontario Court of Appeal had the opportunity to comprehensively consider the tort of negligent police investigation in the *Barclay* case.

The facts in *Barclay* were that Ricardo Mercuri ran an auto recycling business known as Central Auto Parts in Thunder Bay. In April 1999, in connection with an investigation into stolen vehicles and auto parts in the community, the Thunder Bay Police Service – led by Officer Frank Barclay – executed a search warrant on Mercuri's business premises, and subsequently charged him with eleven counts of possession of stolen property. Mercuri was committed for trial on all eleven counts. After the Crown was required to disclose information relating to confidential vehicle identification numbers following an unsuccessful application under s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, six charges were withdrawn to avoid making the disclosure. An amended

indictment of five charges was presented at trial, however, the Crown withdrew two more charges. Three charges proceeded to trial before Wright J. of the Superior Court of Justice. Mercuri was acquitted (after directed verdicts) with respect to two of the charges. Finally, on June 8, 2005, Wright J. found Mercuri not guilty on the remaining charge, without calling on the defence for submissions. In December 2005, Mercuri and Central Auto Parts sued Barclay and the Thunder Bay Police Service alleging negligent investigation<sup>41</sup>.

The case proceeded to trial in 2014. The trial judge found in favour of Mercuri and Central Auto Parts, concluding that the police failed to meet the standard of care expected of reasonable police officers. In reaching this conclusion the trial judge rejected admissions made by the plaintiffs' expert that the police did have reasonable grounds to proceed with an arrest. Instead, the trial judge rejected the expert's evidence altogether and elected to define the standard of care expected of police officers engaged in this type of investigation herself, identifying a number of areas where she felt the investigation fell below the expected standard of care. The total judgment, which was in excess of 1 million dollars, included an award of \$200,000 in non-pecuniary damages for the public humiliation in the press and worry suffered by Mercuri while the charges remained outstanding for six years<sup>42</sup>.

Barclay and the Thunder Bay Police Services Board appealed the finding of negligent investigation, and were successful<sup>43</sup>. In reversing the trial judge's finding, the Court of Appeal – citing its earlier decision in *Meady v. Greyhound Canada Transportation Corp.*, 2015 ONCA 6 – held: “The general rule is that the content of the standard of care of a professional, such as a police officer, will require expert evidence”<sup>44</sup>. The case at bar,

involving a “technical, complicated investigation”, was no exception<sup>45</sup>. With respect to the alleged failures in the police communications with the media, the court similarly held: “Without expert evidence of what normal police practices in communicating with the media are or should be, the trial judge was not in a position to evaluate whether the action of the police chief in calling a press conference fell below the standard of care in this case”<sup>46</sup>. The trial judge therefore erred, the Court of Appeal held, in deciding the case without any expert opinion as to the applicable standard of care in the particular circumstances. Importantly, the court rejected the plaintiffs’ argument that by not calling their own expert on the standard of care the police consented to the trial judge’s proceeding without expert evidence<sup>47</sup>.

Justice Juriansz, writing for a unanimous court, further held that even if the trial judge could have determined the standard of care without relying on expert evidence, she erred in formulating the content of the standard of care. In particular, it was an error to consider “whether the police could prove Mr. Mercuri had knowledge that the auto parts were stolen rather than whether the officers had reasonable and probable grounds to believe that an offence had been committed”<sup>48</sup>. In Juriansz J.A.’s view, this error was compounded by the trial judge’s failure to accord proper weight to the fact that there had been a committal to trial on all charges after a preliminary hearing, or to the role of the Crown and the criminal justice system as the prosecution proceeded<sup>49</sup>. Both points were tied back to *Hill* where the Supreme Court had emphasized that the police “are not required to evaluate evidence according to legal standards or to make legal judgments”, that being the task of prosecutors, defence counsel and judges<sup>50</sup>.

In summary, with *Barclay*, the Court of Appeal has strongly re-affirmed that police are professionals and as such expert evidence with respect to the standard of care is almost always required. Further, police are investigators: they are not expected to weigh evidence to a legal standard, and are entitled to be wrong as long as their decision making was something that a reasonable police officer would have engaged in. It is important to keep their role isolated from that of the Crown or the trier of fact. Generally, the actions of the police need only be based on the “reasonable and probable grounds” standard – the thresholds beyond that are reserved for other actors in the criminal justice system. It is a fundamental error to approach a claim of negligent investigation from the standpoint that the police must prove guilt in order to be acting reasonably.

Cases decided since *Barclay* have continued the trend of assessing the existence of reasonable and probable grounds on an objective basis, including giving proper effect to prior determinations such as the committal for trial.

*Farley v. Ottawa Police Services Board* arose from a murder committed in 1997. After being convicted by a jury, the plaintiff appealed. The Court of Appeal ordered a new trial based primarily on its finding that the trial judge had not adequately warned the jury about the danger of relying on the evidence of the Crown’s main witness. That witness refused to participate in the second trial, however, and the plaintiff was acquitted. He sued for malicious prosecution, negligent investigation and breach of *Charter* rights. The police moved for summary judgment<sup>51</sup> prior to Examinations for Discovery being held and without any affidavit evidence from the involved officers, based on the underlying criminal proceedings including the Court of Appeal’s order for a second trial.

This approach was based on authorities canvassed above as well as the 1998 decision of the Court of Appeal in *Thompson v. Ontario*. In that case the plaintiff sued the Crown and police after his acquittal on a third trial for murder, following a mistrial and a conviction at the first trial. No affidavits were filed on the defendants' motion for summary judgment, which instead proceeded on the basis of the "extensive record" with respect to the criminal proceedings<sup>52</sup>.

*Farley* was argued prior to the release of the Court of Appeal's decision in *Barclay*. The decision in *Barclay* was subsequently provided to the motion judge on consent of counsel. Summary judgment was granted, citing *Barclay*, on the ground that the Court of Appeal's order for a second trial – constituting a finding that the jury could have convicted the plaintiff on the basis of the evidence presented at the first trial – was a "complete answer" to all of the claims<sup>53</sup>.

Shortly after *Farley*, the court also granted summary judgment to the police in *Rotondo v. Ottawa Police Services Board*<sup>54</sup>. That case arose from a massage parlour investigation. The charges were stayed following a ruling at the criminal trial that the police search violated the accused's rights under s. 8 of the *Charter*. In dismissing the subsequent civil action, the motion judge held that while there was a finding of a *Charter* breach in the criminal proceedings, the judge at the criminal trial did not rule on whether reasonable and probable grounds existed for the arrest<sup>55</sup>. The motion judge found that there were reasonable and probable grounds, which was fatal to the claims for false arrest and false imprisonment, negligent investigation, and alleged breaches of the plaintiff's rights under ss. 7 and 9 of the *Charter*<sup>56</sup>. In addition, it was held that the plaintiff was not entitled to damages for the s. 8 *Charter* breach because the exclusion

of evidence at the criminal trial, which resulted in a dismissal of the charges, already constituted a “significant remedy”<sup>57</sup>.

The court’s growing emphasis on the “role of the Crown”<sup>58</sup>, and on determinations made subsequent to the involvement of the police, may be viewed as somewhat of a vindication with respect to concerns expressed by the dissent in *Hill*.

### Expanding Crown liability

In tandem with the above developments in the jurisprudence regarding negligent police investigation, a very interesting case arose in British Columbia that made its way to the Supreme Court of Canada.

In 1983, Ivan William Mervin Henry was convicted of 10 sexual offences. He was subsequently declared a dangerous offender and sentenced to an indefinite period of incarceration. He remained imprisoned for almost 27 years. On October 27, 2010, the British Columbia Court of Appeal quashed all 10 convictions and substituted acquittals for each. Henry subsequently sued the provincial Crown for violation of his *Charter* rights, alleging that wrongful non-disclosure by the prosecutors resulted in his wrongful conviction and ensuing imprisonment. The Crown brought a motion to strike the claim, and it was that issue that ultimately came before the Supreme Court<sup>59</sup>.

The issue was whether *Charter* damages were available in the absence of an allegation of malicious conduct. A majority of the Court held that malice did not need to be proven in a claim against the Crown for wrongful non-disclosure; rather, it was sufficient if there was intentional withholding of information<sup>60</sup>. While the majority rejected a lesser

standard of negligence<sup>61</sup>, the dissent (McLachlin C.J. and Karakatsanis J.) would not have required any fault threshold beyond proof of a breach of the *Charter*<sup>62</sup>.

With respect to the appropriate threshold in circumstances not involving wrongful non-disclosure, the majority stated that it was not necessary to decide this in the case at bar and that “the prudent course of action is to address new situations in future cases as they arise, with the benefit of a factual record and submissions”<sup>63</sup>.

A new situation has since arisen. In *Smith v. Her Majesty the Queen in right of Ontario et al.*<sup>64</sup>, the police undertook an undercover investigation of the plaintiff with respect to an unsolved murder committed in 1974. In the course of a so-called “Mr. Big” operation, the plaintiff confessed to the murder. The confession was subsequently excluded from the criminal trial, however, leading to an acquittal. The plaintiff sued not only the police for negligent investigation, but also the Crown Attorneys who allegedly gave negligent advice to the police during the investigation which resulted in the police employing investigative techniques that allegedly breached the plaintiff’s *Charter* rights. The police delivered a Statement of Defence and Crossclaim taking the position that they were not liable because they relied in good faith on legal advice provided to them by the Crown Attorneys in the context of a solicitor-client relationship, and that, if they were found to be liable, the Crown Attorneys were required to indemnify them due to negligent legal advice and/or breach of retainer. As in *Henry*, the Crown Attorneys brought a motion to strike both the plaintiff’s claim as against them and the police crossclaim.

Justice Matheson, in comprehensive reasons, held that the plaintiff’s claim against the Crown Attorneys had no chance of success because of Crown immunity<sup>65</sup>, to which the only exception is the tort of malicious prosecution (which was not advanced by the

plaintiff). Justice Matheson did not, however, strike the police crossclaim against the Crown Attorneys for negligent legal advice. She held that the case law relied on by the moving parties “simply does not focus on lawsuits by police against Crown Attorneys”; rather, the “focus of these cases is the rights of individual citizens, not the rights of the police”<sup>66</sup>. While Justice Matheson allowed for the possibility that an immunity defence could be advanced against the crossclaim, she was not satisfied – on this preliminary motion in the context of a fact pattern “accepted by the parties as novel” – that there was a “recognized dispositive defence” making it plain and obvious that the crossclaim should be struck out at the pleadings stage<sup>67</sup>.

The Crown Attorneys are seeking leave to appeal to the Divisional Court.

In the meantime, the plaintiff in *Henry v. British Columbia*, above, succeeded at trial in his claim against the provincial Crown. He was found to have discharged the standard of proof laid out by the Supreme Court of Canada. With respect to the police defendants who had allegedly been negligent in the investigation of the plaintiff, the trial judge held that the Crown’s non-disclosure in breach of the plaintiff’s *Charter* rights “broke the chain of causation and negates any finding of contributory negligence on the part of the VPD for any failings that might be attributed to them in their investigation”<sup>68</sup>. The plaintiff was awarded *Charter* damages of over \$8 million, payable by the Crown.

### Conclusion

When it was rendered in 2007, the *Hill* decision was viewed by many as heralding a new era of litigation against the police. Undoubtedly there have been more cases, but establishing liability has proven elusive. This is not a function solely of the requirement

that expert evidence be tendered to support allegations of police negligence. Rather, given that many criminal cases proceed beyond a preliminary inquiry, proving an absence of reasonable and probable grounds can be a formidable obstacle for a plaintiff.

As endorsed by Justice Charron in *Miazga*: “Giving weight to antecedent judicial determinations works to ensure consistency between the criminal and civil justice systems”<sup>69</sup>. The evolution of the cases to the point reached in *Barclay*, along with the Supreme Court’s call in *Hryniak v. Mauldin* for a “culture shift” to create an environment promoting timely and affordable access to the civil justice system<sup>70</sup>, make clear that a civil action for negligent investigation is not a ‘blank slate’ and counsel taking on such cases will need to scrutinize the underlying criminal proceedings very carefully.

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Mr. Zacharias has significant experience representing municipalities, police services and other public entities, as well as physicians. Following completion of his articles at a major national firm in 2005, and his call to the Ontario Bar that year, he was the Judicial Law Clerk to The Honourable Allan Lutfy, Chief Justice of the Federal Court, in 2005-2006. Mr. Zacharias is certified by the Law Society as a Specialist in Civil Litigation. In 2012, he was the recipient of the Richard B. Lindsay, Q.C. Exceptional Young Lawyer Award which is given annually to one member of Canadian Defence Lawyers of up to 10 years at the bar. In 2014, he was named by LEXPERT in its Guide to the Leading U.S./Canada Cross-border Litigation Lawyers in Canada as a “Litigation Lawyer to Watch”. He has acted in matters before the Ontario Superior Court of Justice, Divisional Court and Court of Appeal, as well as the Supreme Court of Canada. Mr. Zacharias regularly writes and presents on a variety of civil litigation topics. He is also on the

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<sup>2</sup> *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [**"Hill"**]

<sup>3</sup> *Hill*, at para. 181

<sup>4</sup> *Hill*, at para. 52

<sup>5</sup> *Hill*, at para. 55; see *R. v. Storrey*, 1990 CanLII 125 (SCC)

<sup>6</sup> 2016 ONCA 656

<sup>7</sup> *Hill*, at paras. 6-7

<sup>8</sup> *Hill*, at para. 8

<sup>9</sup> *Hill*, at para. 9

<sup>10</sup> *Hill*, at para. 10

<sup>11</sup> *Hill*, at para. 12

<sup>12</sup> *Hill*, at para. 1

<sup>13</sup> *Hill*, at para. 52

<sup>14</sup> *Hill*, at para. 54

<sup>15</sup> *Hill*, at para. 54

<sup>16</sup> *Hill*, at para. 68

<sup>17</sup> *Hill*, at para. 73

<sup>18</sup> *Hill*, at para. 74

<sup>19</sup> *Hill*, at para. 78

<sup>20</sup> *Hill*, at paras. 78, 93

<sup>21</sup> 2012 ONSC 3449, at para. 9, affirmed, 2013 ONCA 23, at para. 6

<sup>22</sup> 2009 SCC 51 [**"Miazga"**]

<sup>23</sup> *Miazga*, at para. 42

<sup>24</sup> *Miazga*, at para. 44

<sup>25</sup> *Miazga*, at para. 72

<sup>26</sup> *Miazga*, at para. 73

<sup>27</sup> *Hill*, at para. 153

<sup>28</sup> *Miazga*, at para. 97

<sup>29</sup> *Temilini v. Commissioner of the Ontario Provincial Police et al.*, 1990 CanLII 7000 (ON CA), at p. 8; leave to appeal to SCC refused

<sup>30</sup> *R. v. Scott*, 2002 CanLII 15489 (ON SC) [**“Scott”**], at para. 50

<sup>31</sup> *Scott*, at para. 84

<sup>32</sup> *Scott v. Ontario (Attorney General)*, 2003 CanLII 50081 (C.A.)

<sup>33</sup> 2001 SCC 66 [**“Proulx”**], at para. 206

<sup>34</sup> *Proulx*, at paras. 209-211

<sup>35</sup> *McCullough v. Hamilton Police Services Board*, 2016 ONSC 2638 [**“McCullough”**]

<sup>36</sup> *McCullough*, at para. 56

<sup>37</sup> *McCullough*, at para. 58

<sup>38</sup> *McCullough*, at para. 71

<sup>39</sup> *McCullough*, at para. 72

<sup>40</sup> 2016 ONSC 4930, at paras. 32-35

<sup>41</sup> 2016 ONCA 656 [**“Barclay”**], at paras. 2-4

<sup>42</sup> *495793 Ontario Ltd. et al. v. Barclay et al.*, 2014 ONSC 3517

<sup>43</sup> *Barclay*

<sup>44</sup> *Barclay*, at para. 53

<sup>45</sup> *Barclay*, at para. 65

<sup>46</sup> *Barclay*, at para. 116

<sup>47</sup> *Barclay*, at paras. 71-75

<sup>48</sup> *Barclay*, at para. 97

<sup>49</sup> *Barclay*, at para. 98

<sup>50</sup> *Barclay*, at para. 103

<sup>51</sup> 2016 ONSC 7817 [**“Farley”**]

<sup>52</sup> 1998 CanLII 7180 (ON C.A), at paras. 2-3, 7, 32

<sup>53</sup> *Farley*, at paras. 43, 59-60

<sup>54</sup> 2016 ONSC 8101 [**“Rotondo”**]

<sup>55</sup> *Rotondo*, at paras. 27-28

<sup>56</sup> *Rotondo*, at paras. 16, 32

<sup>57</sup> *Rotondo*, at paras. 30-31

<sup>58</sup> *Barclay*, at paras. 98, 106

<sup>59</sup> 2015 SCC 24 [**“Henry”**]

<sup>60</sup> *Henry*, at para. 31

<sup>61</sup> *Henry*, at para. 74

<sup>62</sup> *Henry*, at para. 133

<sup>63</sup> *Henry*, at para. 33

<sup>64</sup> 2016 ONSC 7222 [**“Smith”**]

<sup>65</sup> *Smith*, at para. 128

<sup>66</sup> *Smith*, at paras. 136-137

<sup>67</sup> *Smith*, at paras. 138, 143

<sup>68</sup> 2016 BCSC 1038, at para. 342

<sup>69</sup> *Miazga*, at para. 97

<sup>70</sup> 2014 SCC 7, at para. 2