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MALICIOUS PROSECUTION AND NEGLIGENT INVESTIGATION:

WHERE ARE WE?

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INTRODUCTION

Traditionally, police have enjoyed protection from civil liability for the manner in which they conduct criminal investigations and prosecute offenders. More recently however, police have seen these protections diminish and their exposure to civil liability increase as the common law has evolved to meet the demands of the modern welfare state and is brought inline with the values enshrined in the *Charter*. While the tort of malicious prosecution has been around in some form or other since the 18th century in England, it has only been recently used as a means of holding police accountable to those wrongly accused. Even more recently, the tort of negligent investigation, a tort unique to Canadian jurisprudence, has emerged. No other common law jurisdiction has yet seen fit to impose upon police a duty of care to suspects under investigation.

Recently, these two torts have received significant consideration from this country's highest court, the full implications of which remain to be seen for police liability. This paper will first discuss the tort of malicious prosecution and canvass recent developments in the case law, and in particular how the concept of inferred malice will impact police civil liability. This will be followed by a discussion of the newly emergent tort of negligent investigation, with a particular focus on the Supreme Court of Canada's analysis of the standard of care expected of police in carrying out criminal investigations and its practical implications.

MALICIOUS PROSECUTION

(i) Brief History of Malicious Prosecution in Canada

The tort of malicious prosecution has its genesis in 18th century England. At the time, the Crown was immune from civil liability and the tort was limited in application to private prosecutions only. This continued in Canada until the landmark Supreme Court of Canada decision in *Nelles v. Ontario*, where Crown immunity was relaxed and malicious prosecution was extended to apply to Crown attorneys, the Attorney General and its agents.¹

¹ *Nelles v. Ontario*, [1989] 2 S.C.R. 170 [*Nelles*].

In the course of his reasons in *Nelles*, Justice Lamer adopted a four-part test for malicious prosecution:

- (i) the proceedings must have been initiated by the defendant;
- (ii) the proceedings must have been terminated in favour of the plaintiff;
- (iii) the absence of reasonable and probable cause; and
- (iv) malice, or a primary purpose other than that of carrying the law into effect.²

Although *Nelles* was a case that considered malicious prosecution in the context of Crown attorneys and the Attorney General, subsequent case law also determined that police officers could also be held civilly liable under this tort where “they are sufficiently connected with the laying of the charges or with the carriage of the prosecution once begun.”³ Indeed, courts across Canada have applied the *Nelles* test for claims of malicious prosecution against police officers.⁴

Since *Nelles*, the application of this four-part test has been inconsistent. While the first two elements are reasonably easy to analyse, problems soon arose when courts turned their attention to the remaining two elements; absence of reasonable and probable cause and malice. Prior to *Miazga*, the concept of “inferred malice” where there was a lack of reasonable cause had gained favour in our courts and effectively collapsed these two distinct required elements into one.

According to Justice Lamer in *Nelles*, the malice requirement extended beyond mere ill-will, spite or a spirit of vengeance against the plaintiff but also “‘includes any other improper purpose such as to gain a private collateral advantage’. To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove ... malice in

² *Nelles* at paras. 42 - 47.

³ *Wiche v. Ontario*, [2001] O.J. No. 1850 at para. 46 (S.C.J.); aff'd [2003] O.J. No. 221 (C.A.) [*Wiche*].

⁴ The inverse is also true. In the Crown attorney malicious prosecution case of *Folland v. Ontario*, *infra* note 17, at para. 14, the Court of Appeal relied on several paragraphs from its earlier malicious prosecution decision involving police officers in *Oniel v. Toronto (Metropolitan) Police Force*, *infra* note 6, at paras. 49 - 51.

the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of ‘minister of justice’”.⁵

In *Oniel v. Marks*, the majority in the Ontario Court of Appeal lowered the standard required to establish a claim for malicious prosecution when it reasoned that malice does not necessarily require a finding of an improper purpose but rather could be inferred from the absence of reasonable and probable cause to cause or to commence a prosecution in order to establish the fourth element of the tort.⁶ On reviewing the sufficiency of a trial judge’s charge to the jury, the majority of the Court of Appeal held that in light of the fact that the jury found the defendant police officers did not have reasonable and probable grounds (the third element of the test), they “should have been instructed that they could infer malice from the absence of reasonable and probable cause to continue the prosecution.”⁷ Indeed, this was because “there can be no doubt that in the appropriate case it is proper to infer malice from the absence of reasonable and probable cause to commence or to continue a prosecution.”⁸ In reaching this conclusion, the majority relied upon and referred to various academic support for this conclusion and also referred to older caselaw involving private prosecutions.⁹ It is also noteworthy that the various academic texts quoted by the majority to support their reasons reference the old caselaw involving private prosecutions.

Macpherson J.A., wrote a strongly worded dissent in *Oniel* questioning whether it was appropriate for an appeal court to reverse the finding of the jury that the respondent defendants were not actuated by malice.¹⁰ His Honour noted that the failure by the appellant plaintiff to prove that the defendant respondents were actuated by malice was fatal to his claim for malicious

⁵ *Nelles*, *supra* note 1, at para. 45.

⁶ *Oniel v. Toronto (Metropolitan) Police Force*, [2001] O.J. No. 90 (C.A.) [*Oniel*].

⁷ *Ibid.*, at para. 52.

⁸ *Ibid.*, at para. 47.

⁹ *Ibid.*, at paras. 44-47 .

¹⁰ *Ibid.*, at paras. 107 and 126.

prosecution and accordingly, he would have dismissed the appeal.¹¹ He would have done so even though the jury had also found that the respondent defendants lacked reasonable grounds to continue the prosecution against the appellant.¹² His Honour referenced the improper purpose test set out by the Supreme Court of Canada in *Nelles* and noted that it was clear from the jury's verdict that it had not accepted that the respondent defendants had any improper purpose.¹³

Following the Court of Appeal's decision in *Oniel*, the Supreme Court of Canada in *Proulx v. Quebec (Attorney General)* raised the standard required to prove malice to include "evidence that reveals a wilful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system."¹⁴ In finding malice on the part of the Crown prosecutor in *Proulx*, the majority considered the absence of reasonable and probable cause as only one factor in the totality of the circumstances. The majority commented that the absence of reasonable and probable cause was particularly noteworthy and that "no prosecutor acting in good faith would have proceeded to trial on a first degree murder charge with such substandard and incomplete proof."¹⁵ Nevertheless, the totality of the circumstances must be considered.

Following *Oniel*, the Ontario Court of Appeal has adopted the concept of inferred malice in two other decisions.¹⁶ The concept also appears to have gained favour in the Alberta Court of Queen's Bench.¹⁷

¹¹ *Ibid.*, at para. 107.

¹² *Ibid.*, at para. 98.

¹³ *Ibid.*, at paras. 102 and 107.

¹⁴ *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9 at para. 35 [*Proulx*]

¹⁵ *Ibid.*, at para. 38.

¹⁶ See, for example: *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.) [*Folland*]; *Ferri v. Root* (2007), D.L.R. (4th) 643 (C.A.) [*Ferri*].

¹⁷ *Dix v. Canada (Attorney General)*, [2002] A.J. No. 784 (Q.B.) [*Dix*].

(ii) *The Miazga Decision*

In 2009, the Supreme Court of Canada had the opportunity to deal directly with the issue of whether malice could be inferred against a Crown prosecutor where there was a finding made at trial that the prosecutor could not have had a subjective belief in the accuseds' having committed the crimes they were charged with. The unanimous Court ruled that the absence of reasonable and probable grounds alone could not be used to support an inference of malice against a Crown prosecutor. Rather, the plaintiff must demonstrate on a balance of probabilities that "the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a 'minister of justice'."¹⁸ The decision in *Miazga* dealt with a claim in malicious prosecution against a Crown prosecutor.¹⁹ What remains unclear is the impact that *Miazga* will have on malicious prosecution claims brought against police. Although the same underlying reasoning in *Miazga* should apply to police officers because of their similar public roles, early post-*Miazga* decisions from the lower courts suggest some differences of opinion in this regard.

In *Miazga v. Kvello Estate*, the Supreme Court of Canada directly addressed the issue of inferred malice and further clarified the test for malicious prosecution. In a unanimous decision, it was held that malice could not be inferred to make out the fourth element of the tort of malicious prosecution. The reasoning behind this conclusion is sound:

In appropriate circumstances, for example when the existence of objective grounds [reasonable and probable] is woefully inadequate, the absence of a subjective belief in the existence of sufficient grounds may well be inferred. However, even if the plaintiff should succeed in proving that the prosecutor did *not* have a subjective belief in the existence of reasonable and probable cause, this does not suffice to prove malice, as the prosecutor's failure to fulfill his or her proper role may be the result of inexperience, incompetence, negligence, or even gross negligence, none of which is actionable: *Nelles*, at p. 199; *Proulx*, at para. 35. Malice requires a plaintiff to prove that the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice. **The third and fourth elements of the tort must not be conflated.**

¹⁸ *Miazga v. Kvello Estate*, [2009] S.C.J. No. 51 at paras. 88 and 89 [*Miazga*].

¹⁹ **Note:** there was a claim of malicious prosecution against a police officer at trial however the officer never appealed from the trial decision.

...

By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence.²⁰ [emphasis added]

The holding in *Miazga* was clear: an absence of reasonable and probable grounds to initiate prosecution is, in and of itself, insufficient to establish malice; there must also be evidence of an improper purpose. Although the Court does recognize that the absence of reasonable and probable cause could be considered as a factor in determining malice.²¹

In coming to this conclusion the Court reviewed the historical malicious prosecution cases in which malice was inferred and distinguished those cases on the basis that they involved private prosecutions as opposed to public prosecutions. The Court made the following important statements about this older line of authority:

As we have seen, historically cases of malicious prosecution involved disputes between private litigants. In that context, a case can be made that the absence of a subjective belief, regardless of the actual facts, should satisfy the third element of the tort...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.

...

Unlike the situation in a purely private dispute, the public interest is engaged in a public prosecution and the Crown attorney is duty-bound to act solely in the public interest in making the decision whether to initiate or continue a prosecution.

...

While it may have made sense in the context of historical private prosecutions to infer malice from absence of reasonable and probable cause in certain

²⁰ *Miazga*, *supra* note 18, at paras. 80 and 81.

²¹ *Ibid.*, at paras. 85, 86 and 89.

circumstances, a public prosecution presents a very different context. [emphasis added]

While the Court did not deal directly with how the tort would be applied in the context of a police claim, it is certainly arguable that the same test for malice should be applied. The role of police, although different than a Crown prosecutor, are also involved in the context of public prosecutions as opposed to private prosecutions and are also executing a public duty when they are required to investigate crimes and to use their discretion when determining whether to lay criminal charges.

(iii) *Post-Miazga Jurisprudence*

The question has arisen as to whether the holding in *Miazga* only applies to Crown attorneys or whether it extends to situations where the police are defendants? Not surprisingly, the decisions of lower courts thus far have been divided on this issue.

Mere weeks after the *Miazga* decision was released, malicious prosecution was considered in the context of a summary judgment motion brought on behalf of the police. In *Wong v. Kyriacou*, the plaintiff brought an action against the defendant police officers and Crown attorney after he was acquitted of murder.²² In considering the malicious prosecution claim against the police officers, the motion judge clearly accepted that the test for malice as stated in *Miazga* applied equally to claims against the police. Specifically, the motion judge summarized the element of malice as follows:

Even if there were evidence of the absence of reasonable and probable grounds, this alone does not constitute malice. In order to be malicious, a prosecution must be fuelled by an improper purpose, and no such improper purpose was identified in the pleadings or at trial. While it may be possible to infer malice from the absence of reasonable and probable cause to commence or to continue a prosecution, it is only appropriate to do so where the “circumstances [are] such that prosecution can only be accounted for by implying some wrong or indirect motive to the prosecutor, although it may be impossible to say what it was.”²³

²² *Wong v. Kyriacou*, [2009] O.J. No. 5067 [*Wong*].

²³ *Ibid.*, at para. 85.

Ultimately, Mr. Wong was unable to provide any evidence that the detectives were motivated by malice and his malicious prosecution claim was dismissed.

In January 2010, the topic of inferred malice was again addressed in the context of a motion to strike a Statement of Claim. In *Ettinger v. Peters (c.o.b. Carla Industries)*, the plaintiff claimed malicious prosecution against both the police defendants and Crown attorney.²⁴ The defendants brought a motion to strike the statement of claim for disclosing no cause of action. In considering the particulars required in a pleading where malice is alleged, the motion judge made a clear distinction between malicious prosecution allegations against a police officer and those against a crown attorney. It was noted that “as a result of the Supreme Court’s decision in *Miazga, supra*, malice is not to be inferred from the absence of reasonable and probable grounds at least insofar as the Crown Attorney, Mr. McConnery, is concerned.”²⁵ After finding there were sufficient particulars plead to sustain a claim in malicious prosecution against the police officer, the motion judge made a distinction between the standard applied to the defendant police officer and crown attorney:

The requirement of malice as it pertains to Mr. McConnery is a little different. When the defendant is a crown attorney, the Supreme Court has held in *Miazga, supra*, that malice cannot simply be inferred from the absence of reasonable and probable cause.²⁶

With the heightened standard for malice against McConnery, the malicious prosecution claim against the crown attorney was struck.

The possible emerging double-standard between Crown attorneys and police officers in *Ettinger* is inconsistent with the jurisprudence prior to *Miazga*. While it is true that *Miazga* involved the malicious prosecution claim against a Crown prosecutor, it is no different in that regard to both *Nelles* and *Proulx*, both of which have been applied in actions against police officers.

²⁴ *Ettinger v. Peters (c.o.b. Carla Industries)*, [2009] O.J. No. 22 (S.C.J.) [*Ettinger*].

²⁵ *Ibid.*, at para. 14.

²⁶ *Ibid.*, at para. 17.

Moreover, the same reasoning used in *Miazga* with respect to Crowns applies to police officers. There, the court reiterated the test espoused in *Nelles* (a case that has been applied consistently to police officers) and maintained that it required proof of an improper purpose to determine malice. This high standard ensures that liability for malicious prosecution will not be imposed for non-malicious conduct, such as “incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence.”²⁷ It would be illogical to hold police officers liable in malicious prosecution for non-malicious conduct where Crown attorneys are afforded the benefit of such protection.

Further, the policy considerations supporting the finding in *Miazga* apply equally to police officers. The majority referred to *Nelles* for the requirement of an “improper purpose” on the part of the prosecutor to maintain the balance between ensuring that Crown prosecutors are not hindered in their execution of the public duty and providing a remedy to plaintiffs have been wrongly and maliciously prosecuted.²⁸ Much like Crown prosecutors, a balance must also be struck with respect to police officers. A police officer performs his or her public duty for the public good. Much like Crown prosecutors, police officers should be held liable only in circumstances when their conduct is so egregious that they step outside their role as police and no longer execute their public duty for the public good. It is noteworthy that in *Proulx*, the Court was dealing with Crown attorneys in Quebec and noted that their role includes laying criminal charges. The Court recognized that this role was a public law role and that the Quebec Attorney General and the Quebec Crown prosecutors were subject to the tort of malicious prosecution as set out in *Nelles*.²⁹

Finally, the Court in *Miazga* also held that “care must be taken not to transpose principles derived in the context of private prosecutions, where an inference of malice from absence of cause does not carry the same difficulties, to cases involving Crown defendants.”³⁰ Historically,

²⁷ *Miazga*, *supra* note 18, at para. 81.

²⁸ *Ibid.*

²⁹ *Proulx*, *supra* note 14, at paras. 114 and 119.

³⁰ *Miazga*, *supra* note 18, at para. 86.

malicious prosecution involved parties that had a pre-existing relationship, creating circumstances that permitted an inference of malice. This does not apply in the context of police officers much like it does not apply to Crown attorneys. To permit an inference of malice from the absence of reasonable and probable grounds (a separate required element of the tort) would eliminate the purpose of the malice element required to be proven independently of the third element. By doing so, it would also lead to a blurring of the tort of malicious prosecution with the tort of negligent investigation.

NEGLIGENT INVESTIGATION BY POLICE

(i) Brief History of the Tort of Negligent Investigation

The tort of negligent investigation was first recognized in Ontario in 1995 in the trial decision of Mr. Justice Binks in *Beckstead v. Corporation of the City of Ottawa Chief of Police et. al.*³¹ That decision was affirmed in 1997 by the Court of Appeal. In *Beckstead*, the plaintiff was charged with fraudulent use of a complainant's bank card but the Crown withdrew the charges once the Crown prosecutor reviewed the evidence. The investigating officer's conduct in *Beckstead* was not above reproach. For instance, the plaintiff bore little resemblance to the actual culprit whose photograph had been captured on a security camera; the officer charged the plaintiff on this evidence without having met the complainant face to face; the officer testified at trial that he had already made up his mind to charge the plaintiff before having interviewed her; and the officer failed to follow up on information provided by the plaintiff that may have given the plaintiff an alibi.

A key issue in *Beckstead* was the lack of existing authority to support more traditional tort claims against the police in either false arrest (the plaintiff was not arrested but charged by way of summons) or malicious prosecution. Nevertheless, it was clear that a poor investigation had resulted in the plaintiff being improperly charged. In holding that police were not immune from a claim in negligence for the manner in which they carried out their investigation, Justice Binks held that police owed a duty to the accused to carry out a careful investigation before laying

³¹ (1995) 37 O.R. (3d) 64 (Gen. Div.); aff'd on appeal: [1997] O.J. No. 5169 (C.A) [*Beckstead*].

charges and, where they failed in this duty, they could be held liable for damages.³² Interestingly, the claim was defended on the basis that police were immune from claims in negligence in much the same way as Crown prosecutors and not on the basis that negligent investigation was a cause of action unknown at law.

Both the trial decision and the Court of Appeal's review of that decision offered surprisingly little in the way of meaningful analysis of this newly recognized tort. In the wake of the *Beckstead* decision therefore many questions about negligent investigation remained. For example, what were the policy implications surrounding the imposition of such a duty on police; what was the nature and scope of the duty owed; and what was required to meet the standard of a "careful investigation"?³³

In the years following the *Beckstead* decision, at least in Ontario³⁴, the tort of negligent investigation, although still somewhat nebulous in form, had taken shape. Subsequent Ontario cases would further define the parameters of this tort. For example, in *Lloyd v. Toronto (City) Police Services Board*³⁵ Justice Stinson held that where the first three elements of the test for malicious prosecution were met, an action in negligent investigation would be made out.³⁶ There was, however, far from general consensus in other common law jurisdictions in Canada at that time that negligent investigation was truly a recognizable cause of action.³⁷

Ultimately, any lingering questions as to whether the tort of negligent investigation was a cause of action known to Canadian law were answered in the affirmative by the Supreme Court of

³² *Ibid.*, p. 7 (QL).

³³ *Ibid.*

³⁴ In Quebec, a civil law jurisdiction, a duty of care on police officers with respect to how they conduct criminal investigations was specifically set out in their Civil Code (Civil Code of Quebec, Art. 1457); see also *Lacombe v. Andre*, [2003] R.J.Q. 720; *Corriveau v. Quebec (Attorney General)* (2003), File No. 200-09-003449-011; and *Jauvin v. Quebec (Attorney General) et al.*, [2004] R.R. A. 37.

³⁵ [2003] O.J. No. 83 (S.C.J.) [*Lloyd*].

³⁶ *Ibid.*, at para. 200.

³⁷ See for example: *Dix*, *supra* note 17; see also *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 (NB. C.A.) dismissing a claim for negligent investigation in the absence of bad faith.

Canada in its seminal decision in *Hill v. Hamilton-Wentworth Regional Police Services Board*.³⁸ The police suspected Hill had committed 10 robberies. During the investigation, Hill's photo was released to the media. The police asked witnesses to identify Hill from a photo lineup consisting of Hill, an Aboriginal, and 11 Caucasian foils. Further, the police also had information that two Hispanic men, one of whom apparently looked like Hill, were responsible for the robberies. Further, while Hill was in custody two additional robberies were committed. Out of the 10 counts of robbery against Hill, 9 were withdrawn and only 1 proceeded to trial. At trial, Hill was convicted largely based on eyewitness testimony. He appealed and a new trial was ordered. Hill was acquitted at his second trial and subsequently brought a civil action for negligent investigation against the police.

In the civil trial, the trial judge dismissed Hill's claim in negligence. On appeal, the Court of Appeal was unanimous in recognizing the tort of negligent investigation, however, the majority found the police were not negligent in the circumstances. Hill appealed and the police cross-appealed.

The Supreme Court of Canada dismissed both the appeal and the cross appeal. Writing for the majority, Justice McLachlin held that the tort of negligent investigation was a recognized tort in Canadian law. In this respect, the majority of the Court was of the view that the particular relationship between police and a suspect under investigation was proximate enough to ground a *prima facie* duty of care. This was held to be "consistent with the values and spirit underlying the Charter, with its emphasis on liberty and fair process".³⁹ In other words, when a suspect is singled out and investigated by the police that suspect's interests (*i.e.* freedom, reputation, liberty and general concerns of fairness) reduced the proximity between the parties enough that the imposition of a duty of care was appropriate. Policy considerations supported rather than negated the establishment of this duty.⁴⁰ It is noteworthy that underlying the determination of

³⁸ *Hill v. Hamilton-Wentworth Regional Police*, 2007 SCC 41 [*Hill*].

³⁹ *Ibid.*, at para. 28.

⁴⁰ *Ibid.*, at para. 47.

whether a duty of care is owed by officers to suspects was an effort made to look for a potential remedy for the wrongfully convicted.⁴¹

(ii) *The Standard of Care in Negligent Investigation*

Much of the legal debate in *Hill* centered around the issue of whether a duty of care was owed by police to Hill in the circumstances. It is not surprising therefore that much less time was spent attempting to clearly define the requisite standard of care in the circumstances. The majority of the Court held that police conduct during an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The standard was not one of perfection judged from the vantage of hindsight, but required police to live up to accepted standards to the extent that it was reasonable given the circumstances. Police officers, it was held, are professionals and just like lawyers or doctors, “professional standards require police to act professionally and carefully, not just to avoid gross negligence”.⁴² As with other professional negligence claims, the officer’s conduct is to be judged based upon the standards prevailing at the time.⁴³

In defining the standard of care analysis in this way, the majority appears to have dismissed entirely and without any meaningful commentary post-*Beckstead* case law in Ontario that had previously applied a standard of gross negligence when assessing the conduct of police in carrying out their investigations. For example, in *Wiche v. Ontario Justice Ground* stated that “granting immunity to police officers and other investigators from liability for negligent investigation should prevail in all but the most egregious circumstances.”⁴⁴ In *de Jung v. Midland Police Services Board*, Justice Glass applied the same standard in finding the police were not negligent in investigating and charging the plaintiff with careless driving, a charged

⁴¹ *Ibid.*, at paras. 36 and 187.

⁴² *Ibid.*, at para. 70.

⁴³ *Ibid.*, at para. 77.

⁴⁴ [2001] O.J. No. 1850 at para. 83 [*Wiche*].

which the plaintiff was ultimately acquitted of at trial, since there was no evidence of egregious conduct by the investigating officer.⁴⁵

In our view, the lower courts had developed these higher standards to account for the very unusual relationship between an officer and an accused. The nature of this relationship does not fit into the usual mold of that of a professional and their client.

(iii) *The Relationship Between Police and Suspect*

Clearly police officers are professionals in their field. What is arguably much less clear, however, is whether police officers ought to be viewed in a similar light as other professionals when it comes to assessing their conduct in carrying out criminal investigations.

For illustrative purposes, consider the relationship between lawyer and client. The lawyer is obligated to use skill, diligence and prudence in acting in the best interests of the client. Where the lawyer falls short in the conduct of his duties, he may be found liable to the client for damages. This is one end of the ‘lawyer’s duty spectrum’, the duty of loyalty to the client. Somewhere in the middle of this spectrum is a less onerous duty the lawyer may have to those individuals who, while not clients, may otherwise be affected by the lawyer’s actions.⁴⁶ On the opposite end of this spectrum are those parties adverse in interest to the lawyer’s client, parties to whom the lawyer owes no duty at law.

Conversely, the relationship between an investigating officer and a suspect under investigation does not bear any of the hallmarks that define the lawyer-client relationship and for that matter any other relationship between a professional and their client or patient. Such distinction gives rise to a markedly different looking spectrum of duty for investigating officers. For example, from the outset of a criminal investigation the investigating officer is essentially in an adverse relationship vis-à-vis the suspect under investigation. Police have a general public duty to investigate crime and apprehend offenders.⁴⁷ As Justice Charron’s dissent in *Hill* recognized

⁴⁵ [2002] O.J. No. 1629 at para. 43 (S.C.J.) [*de Jung*].

⁴⁶ For example, when a lawyer acts for a testator of an estate he is expected to “keep in mind” the impact any transactions may have on the beneficiaries to that estate.

⁴⁷ *Hill*, *supra* note 38, para. 112.

“the police officer’s duty to investigate crime and apprehend offenders is diametrically opposed to the interests of the person under investigation.”⁴⁸ The suspect has an interest in not being the subject of a police investigation. In fact, suspects have the legal right not to speak to officers which is one of many fail safes in our legal system to protect the liberty of those who may be wrongly accused. In order to obtain a conviction, the Crown must prove the guilt of the accused beyond a reasonable doubt. The Crown and police have significant disclosure obligations which have recently been substantially expanded by the Supreme Court of Canada in *R. v. McNeil*.⁴⁹ On the other hand, the accused has no obligation to disclose any information about his/her defence to the Crown or police with the exception of alibi information. Accordingly, it is not unusual for the Crown and the investigating officer to hear about a witness or potentially important evidence for the first time at trial. In most cases, the investigating officers only have a limited picture of the circumstances surrounding a particular criminal investigation.

Add to this the fact that officers have limited resources to investigate every criminal complaint. Priority will be given to the investigation of the most serious criminal offences and even there officers will experience limitations in resources available to them.

To complicate matters even further, police officers are faced with conflicting duties.

Officers have been found to owe a duty of care to a complainant in the course of carrying out an investigation. In *B.M. v. British Columbia (Attorney General)*⁵⁰ the British Columbia Court of Appeal upheld the trial judge’s finding that police owed a duty of care to the plaintiff (a victim of crime) to investigate her complaint of domestic abuse.⁵¹ In *B.M.* the plaintiff was involved in an abusive relationship with her estranged husband. Following a dispute, the plaintiff went to police who failed to investigate her complaint. Over a month later, the estranged husband attended the plaintiff’s property, shot and killed the plaintiff’s friend and wounded the plaintiff’s

⁴⁸ *Ibid.*, at para. 131.

⁴⁹ [2009] 1 S.C.R. 66.

⁵⁰ [2001] B.C.J. No. 1160 (S.C.); aff’d [2004] B.C.J. No. 1506 (C.A.); leave to appeal refused [2004] S.C.C.A. 428.

⁵¹ In this respect, the court relied on earlier case law where courts had imposed on police a duty to warn potential victims of crime. See: *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*, *infra* note 53.

daughter before killing himself. The plaintiff brought a claim for negligent investigation against the police. At trial, while the existence of a duty of care was recognized, the claim was dismissed because of the failure of the plaintiff to prove causation between police inaction and the harm that materialized. The decision was upheld on appeal.

In Ontario, courts do not yet appear as willing to extend the scope of the private law duty of care owed by police investigating a crime to include a duty owed to complainants or victims of negligent investigations.⁵² Nevertheless, Ontario courts have recognized that police owe a duty of care to victims of crime in certain situations other than negligent investigations.⁵³ A finding in Ontario similar to the one reached by the British Columbia Court of Appeal in *B.M.*, that police owe a duty to victims of crime as a result of negligent investigations is not outside the realm of possibility, especially when considering that recognition of a duty of care in *Hill* was premised on the majority's desire to "complete the arsenal" of remedies available to "a victim of negligent police investigation [left] without legal recourse".⁵⁴

It is therefore clear that unlike lawyers who owe a duty to their clients, the investigating officer is potentially beholden to several different duties of care throughout the course of conducting a criminal investigation. At one end of the 'investigating officer's duty spectrum' is the suspect, an individual to whom an investigating officer owes a duty to carry out a careful and reasonable investigation. Somewhere along this spectrum police may also owe a duty of care to victims or complainants when the investigation falls below acceptable standards. At the other end of this spectrum is the general duty police owe to the public at large. Given the adversarial nature of the police-suspect relationship, the competing duties owed by police to suspects, victims/complainants and the general public and the complex and fluid nature that often characterizes many criminal investigations, it becomes much less clear that police can be so

⁵² In *Norris v. Gatién* (2001), 56 O.R. (3d) 441 (C.A.) the Ontario Court of Appeal held that the surviving family members of a deceased cyclist had no legal interest in the investigation or prosecution of the motorist responsible for his death and that the survivors could not sue the police for alleged negligence in the investigation and unsuccessful prosecution of the motorist; see also *Lloyd*, *supra* note 35, at para. 204 where the court denied extending liability for negligent investigation to circumstances that would allow a complainant to seek redress from the police for failure to conduct a sufficiently thorough investigation of a complaint.

⁵³ *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*, [1989] O.J. No. 471 [*Jane Doe*].

⁵⁴ *Hill*, *supra* note 38, at para. 35.

readily compared to ‘other professionals’ without first pausing to consider the implications of this comparison. Unfortunately, the majority of the Supreme Court of Canada’s analysis in *Hill* failed to address these particular concerns.

A good example of just how the adversarial nature of the police-suspect relationship may impact the court’s assessment of the standard of care in criminal investigations is Justice Kelly’s recent decision in *Lawrence v. Peel Regional Police Force*.⁵⁵ In *Lawrence*, the plaintiff brought a claim against police for negligent investigation after he was acquitted of 8 of the 9 charges against him following allegations of domestic abuse from the plaintiff’s estranged wife. In holding that the investigating officers did not breach the standard of care in the circumstances, Justice Kelly considered it significant that the plaintiff had been given an opportunity to provide statements to the police to refute the allegations against him but that he declined to do so.⁵⁶ This case therefore may stand for the proposition that, while a suspect under investigation has no obligation to speak to police during the course of a criminal investigation, where the suspect refuses to provide police with information that may assist in exonerating him, the police will not be held civilly liable in light of the plaintiff’s silence. Put another way, the accused’s right to silence may serve as a shield in the criminal context, but his silence cannot be used as a sword against the police in a civil action for negligent investigation.

(iv) *Evaluating the Reasonable Officer Standard of Care in Negligent Investigation*

Another issue left untouched by the majority’s analysis in *Hill* was how a court ought to assess the reasonableness standard, and in particular, what role expert evidence plays in determining whether investigating officers have met the requisite standard of care. As the analysis in *Hill* makes clear, police officers are professionals and their conduct should be assessed in the same way that other professional negligence claims are evaluated. Generally speaking, the general practice in professional negligence cases is to require expert opinion on the general standards and

⁵⁵ [2009] O.J. No. 1684 (S.C.J.).

⁵⁶ *Ibid.*, at para. 20.

practices of the profession in order to allow the court to gauge whether those standards were met in the circumstances.⁵⁷

Prior to *Hill*, the role of expert opinion in assessing police conduct in negligence claims remained unclear in the case law. For example, in *Charlene Walsh v. Brigitte et al.*⁵⁸ Justice Lane held that expert evidence as to applicable police standards and practices was necessary for a jury's consideration of officer's conduct in a claim for negligent investigation. It was specifically noted:

In my view, on the facts of this case there is no basis on which a jury can determine whether the officer was negligent because there is no evidence to establish the standard of the profession. Juries try medical malpractice cases these days but they do it with the help of experienced people who appear as expert witnesses. Policing is also a profession and criminal investigation is an important and complex part of it. It is no disrespect to this or any other jury to hold that they should not be asked to make a judgment call when they have no evidence to base it on.⁵⁹

In *Roy v. British Columbia (Attorney General)*⁶⁰ the British Columbia Court of Appeal also commented on the important role expert evidence plays in evaluating police conduct. In this case, the plaintiff (deceased) was initially found by a police officer lying on the ground conscious but incoherent due to extreme intoxication caused by alcohol. He was taken into custody and placed in the "drunk tank" where he later died of extreme intoxication. The police had a policy stating that if a person was of questionable consciousness, medical attention was needed. The trial judge found for the plaintiffs holding that the police should have further assessed the plaintiff in order to determine his state of consciousness. On appeal the British Columbia Court of appeal reversed the trial decision on the basis that the trial judge could not properly have found that the police failed in their duty to the plaintiff to take reasonable care. Of significance, no evidence was adduced that police in Canada were trained to know the difference

⁵⁷ Lewis Klar, *Tort Law*, 4th ed. (Toronto: Thomson Carswell, 2008), pgs. 382-383.

⁵⁸ (May 28, 2006), Toronto, Court File No. 00-CV-199959CM.

⁵⁹ As cited in *Franklin v. Toronto Police Services Board*, *infra* note 63, as *Charlene Walsh v. Brigitte et al.*, (May 28, 2006), Toronto, Court File No. 00-CV-199959CM (S.C.J.) at para. 3.

⁶⁰ [2005] B.C.J. No. 293 (C.A.) [*Roy*].

between an intoxicated person who had passed out and a person who was on the verge of central nervous system failure.⁶¹

The British Columbia Court of Appeal was of a different view in *Burbank v. R.T.B.* Although this case did not involve a claim in negligent investigation, the analysis regarding expert opinion on the requisite standard of care for police conduct is nevertheless insightful. In this case the driver of a stolen vehicle sped through a stop sign and collided with an automobile, killing a child and seriously injuring others. The driver of the stolen vehicle was being pursued by an RCMP officer. At trial, the trial judge found that both the officer and the driver had breached the standard of care and had caused the collision.

On appeal, the Attorney General argued that since no expert evidence was adduced at trial as to what a reasonably competent police officer would have done differently in the circumstances the judge was not able to determine the standard of care in the circumstances. In upholding the trial judge's decision, the Court of Appeal held that expert opinion as to the standard of care was not required in this case because the nature of the inquiry into the police officer's conduct in pursuing the driver was not beyond common understanding. It was only where the subject matter of the inquiry was beyond the common understanding of the judge and jury that expert evidence would be necessary to assist the court in determining the appropriate standard of care.⁶²

Post-*Hill*, the issue of whether and when expert opinion will be required in order to properly assess police conduct in carrying out criminal investigation remains an open question. In *Franklin v. Toronto Police Services Board*⁶³ the plaintiffs alleged the police were negligent in investigating and charging the plaintiffs with fraud, forgery and other related charges. The charges were dropped more than one year later. In the course of their investigation, the police came into possession of a letter from the doctor of a witness whose testimony was central to substantiating the charges against the plaintiffs. The letter called into question both the witness' version of events as well as the witness' mental health. The failure of police to further

⁶¹ *Ibid.*, at para. 39

⁶² *Burbank v. R.T.B.*, *supra*, at paras. 56-57.

⁶³ [2008] O.J. No. 5237 [*Franklin*].

investigate the contents of that letter was deemed to be a breach of the standard of care in the circumstances. At trial however, the plaintiffs had failed to lead any direct or expert evidence about what a reasonable officer ought to have done in the circumstances.⁶⁴ Justice Gans recognized that while expert testimony may be appropriate in certain situations involving the conduct of police investigations, where as in this case, the police had admitted to failing to follow up on an important piece of evidence, such an admission made expert opinion unnecessary since judicial assessment of the officer's conduct would not have been assisted by "hearing from another experienced investigator".⁶⁵

CONCLUSION

It can be anticipated that there will be an ongoing debate about how to apply the general professional standard of care to the very unusual relationship between officers and suspects. It would not be surprising if the standard of care applied to officers is once again reviewed by our highest court in the near future. In any event, in assessing whether the standard of care has been breached, it will be necessary for the courts to review the nature of the relationship between the accused and by extension his/her lawyer and the officer and by extension the Crown in many cases.

⁶⁴ *Ibid.*, at para. 48

⁶⁵ *Ibid.*, at para. 52