LERNERS

Police Liability: An Overview

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TOPICS

- Intentional torts
- Use of force claims
- Suspect apprehension pursuits
- Negligent investigation
- Interplay with the criminal justice system

Malicious prosecution

Miazga v. Kvello Estate, 2009 SCC 51

- "the elements of the four-part test for malicious prosecution are identical no matter the parties" (para. 44) – i.e., the prosecution was:
    1. initiated by the defendant
    2. terminated in favour of the plaintiff
    3. undertaken without reasonable and probable cause
    4. motivated by malice or a primary purpose other than that of carrying the law into effect

Malicious prosecution

- A negotiated resolution/settlement may preclude “termination in favour” of the plaintiff: *Romanic v. Michael Johnson*, 2012 ONSC 3449
- Malice requires more than proof of an absence of RPG. An improper purpose must be proven
  - *Miazga*, paras. 56, 86
- The alleged collateral/improper purpose must be pleaded: *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, para. 44

Misfeasance in public office

1. the defendant was a public official exercising public functions at the relevant time;
2. the public official deliberately engaged in an unlawful act in their public capacity
    (a) an act in excess of the public official's powers,
    (b) an exercise of a power for an improper purpose, or
    (c) a breach of a statutory duty

Misfeasance in public office

3. the public official was aware both that their conduct was unlawful and that it was likely to harm the plaintiff

    (a) actual knowledge

    (b) subjective recklessness, or

    (c) "conscious disregard"

4. the public official's tortious conduct was the legal cause of the plaintiff's injuries; and

5. the injuries suffered are compensable in tort law

    Meekis v. Ontario, 2021 ONCA 534, para. 73

Misfeasance in public office

- A bald pleading is insufficient
- There must be material facts about specific officials and their specific unlawful purpose in acting as they did
  - *Meekis*, para. 77

Use of force claims

- *Criminal Code*, s. 25: a police officer is justified in using force provided that he or she (a) acts on reasonable and probable grounds and (b) uses only as much force as is necessary in the circumstances
  - *R. v. Nasogaluak*, 2010 SCC 6, para. 34
- "Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances"
  - *Nasogaluak*, para. 35

Use of force claims

- Context and circumstances are key
- "Officers entering a residence where there are reasonable grounds to believe that a firearm may be available to the owner are faced with a heightened sense of danger. They must think and act quickly to deal with unpredictable factors beyond their control. In reviewing an arrest, *ex post facto*, a court cannot expect an officer to have precisely calculated the precise amount of force to be used in subduing a person"
  - *Du Carmur v. Cole*, 2016 ONSC 4930, para. 157
  - See also *Campbell v Turasz v Niagara Regional Police Service,* 2024 ONCS 4241 at para 50.

Use of force claims

- Arbitrary detention (contrary to s. 9 of the *Charter*) removes s. 25 protection
  - Unlawful forcible removal of individual from vehicle constitutes assault, even if the force used is reasonable: *Jeremiah v. Hamilton-Wentworth Police Services Board*, 2018 ONSC 5762

Suspect apprehension pursuits

- Vehicle Pursuits regulation, 397/23, under the *Community Safety and Policing Act, 2019* (in force April 1, 2024)
  - No pursuit shall be initiated or continued unless the police officer has reason to believe
    (a) a criminal offence has been committed or is about to be committed, and
    (b) Stopping the vehicle is necessary to apprehend an individual in connection with the offence, or to prevent the offence.
      - s. 2(1)

Suspect apprehension pursuits

- No pursuit shall be initiated unless the officer has determined:

(a) No alternatives can readily be implemented

(b) Risk to public safety is outweighed by the risk of the individual not being immediately apprehended, or the individual/fleeing vehicle not being identified

- Regulation, s. 2(2)

Suspect apprehension pursuits

- Every police services board shall establish policies consistent with the Regulation: s. 3
- Every chief of police shall establish procedures setting out alternatives to pursuit, and tactics for pursuing/stopping a vehicle: s. 4
- A firearm shall not be discharged for the sole purpose of attempting to stop a fleeing vehicle: s. 10

Negligent investigation

- Prior to 2007, there were conflicting court decisions on negligent police investigation
- Then: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41
  - 6 to 3 decision
  - The tort of negligent investigation exists
    - Dissent: “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?”

The *Hill Decision*

KEY TAKEAWAYS

- Police, like other professionals, exercise professional discretion
- Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals
- A legal duty is owed to suspects being investigated
- The standard of care is that of “a reasonable police officer in all the circumstances”

“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”

The *Hill* Decision

- Investigation “flawed” but not in breach of the applicable standard judged by the standards of the day
  - 2 witnesses interviewed together
  - Failure to blind-test the photos put to witnesses
    - “Not good police practices, judged by today’s standards”, but “the evidence does not establish that a reasonable police officer in 1995 would not have followed similar practices in similar circumstances”

The *Hill* Decision

A criminal acquittal does not automatically translate to civil liability

Hill Refined

***495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656**

- Police "are not required to establish a *prima facie case* for conviction before making an arrest"
  - "Nor is a police officer required to exhaust all possible routes of investigation or inquiry, interview all potential witnesses prior to arrest, or to obtain the suspect's version of events or otherwise establish there is no valid defence before being able to form reasonable and probable grounds"

Hill Refined

***495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656**

- A civil court must "accord proper weight to the fact that there had been a committal to trial on all charges after a preliminary hearing, [and] to the role of the Crown and the criminal justice system as the prosecution proceeded"
  - "It is up to Crown Counsel to make the determination of whether or not there are sufficient grounds upon which to proceed to trial in any particular case"

Hill comes full circle

Farley v. Ottawa Police, 2017 ONCA 689

- Accused convicted by jury of first degree murder
- On appeal, Court of Appeal orders new trial because of erroneous jury instruction and mishandling of certain evidence
- By second trial, key witness will no longer cooperate
- Crown still runs the trial but this time accused is acquitted
    - Lawsuit follows

Hill comes full circle

Farley v. Ottawa Police, 2017 ONCA 689

- Summary judgment motion, prior to discoveries
  - No affidavits, no cross-examinations
- Judgment granted
  - Order for new trial, like committal for trial, meant Court of Appeal was satisfied there was evidence on which a reasonable jury could convict
  - Therefore impossible to say the police lacked reasonable grounds to arrest

Hill comes full circle

Farley v. Ottawa Police, 2017 ONCA 689

- Existence of reasonable grounds is fatal to claims for:
  - Negligent investigation
  - Malicious prosecution
  - Breach of *Charter* rights
- Summary judgment affirmed
  - Leave to appeal to SCC refused

Criminal vs. civil

***Abboud v. Ottawa Police Serices Board*, 2016 ONSC 1052**

- CBSA intercepted a package of stun guns (prohibited weapons) that were shipped to the plaintiff
- Police obtained a search warrant on grounds including that plaintiff would accept delivery
- Undercover officer attended to deliver the package; plaintiff refused to take delivery
- Police still proceeded with search

Criminal vs. civil

***Abboud v. Ottawa Police Serices Board*, 2016 ONSC 1052**

- Police seized computer containing evidence of the purchase
- Also found cocaine
- Plaintiff charged with attempting to import prohibited weapons, possession of illegal drugs
- At trial, all evidence from search excluded under s. 8 of the *Charter*

Criminal vs. civil

***Abboud v. Ottawa Police Serices Board*, 2016 ONSC 1052**

- Plaintiff then sued for breach of *Charter* rights, false arrest and detention, and negligent investigation
- Police motion for summary judgment: granted
- Section 8 right was breached, but exclusion of evidence was a “sufficient benefit”

Criminal vs. civil

***Rotondo v. Ottawa Police Services Board*, 2016 ONSC 8101**

- Massage parlour investigation
- Charges stayed after ruling at criminal trial that search violated accused's s. 8 *Charter* rights
- Lawsuit followed, and police summary judgment motion

Criminal vs. civil

***Rotondo v. Ottawa Police Services Board*, 2016 ONSC 8101**

- Judgment granted
- Existence of RPG fatal to claims for false arrest/imprisonment, negligent investigation, and breaches of the *Charter*
- No entitlement to damages for *Charter* breach, because exclusion of evidence in criminal proceedings already a “significant remedy”

17 years post-*Hill*

- Successfully suing the police for negligence is no easy task
- Expert evidence almost is generally required
- A civil action is not a “blank slate”
- Compensation will be rare where guilt is likely

Recent case in point

McCormack v. Evans, 2023 ONSC 4340

- Former Toronto Police officer charged with 22 criminal offences
- Preliminary inquiry, committed to trial on corruption charges
- All charges ultimately stayed or withdrawn without trial
- Claims: malicious prosecution, misfeasance in public office, negligent investigation

Recent case in point

McCormack v. Evans, 2023 ONSC 4340

- All claims dismissed at trial
- “I am not the trial judge making any findings of guilt or acquittal on these charges”; “I am satisfied that, objectively viewed, there were reasonable and probable grounds for the firearms charges to have been laid” (paras. 151-152)
- No improper collateral purpose proven (para. 200)

Recent case in point

McCormack v. Evans, 2023 ONSC 4340

- Causation also not proven
- "Mr. McCormack's own conduct and statements that the police intercepted and overheard provided reasonable and probable grounds for the charges and caused them to be laid" (para. 217)

Additional causation issue

- If the Crown, with disclosure of all relevant information, independently concludes there is RPC – does that not break the chain of causation, at least as of that point in the prosecution?

Questions?

Thank you!