Comment

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“DENYING JUSTICE”: DOES THE TORT OF NEGLIGENT INVESTIGATION GO FAR ENOUGH?

Jason George Hill, an Aboriginal man, was investigated, tried, convicted and imprisoned for 20 months for a burglary he did not commit. The investigation that was launched against him was fraught with errors, including questionable witness interview techniques, a problematic photo lineup that included Mr Hill and 11 Caucasian foils, and exculpatory evidence that was ignored. Should suspects like Mr Hill have recourse to the private law for losses suffered as a result of negligent investigation? If so, were the police in this particular case negligent?

Canadian law has been in a state of flux as to when a private law action in negligence can be brought against the police. Lower courts in Canada have been divided on the issue. In *Beckstead v Ottawa (City)* (1997) 37 OR (3d) 62 (*Beckstead*), the Ontario Court of Appeal affirmed that police owe to suspects a common law duty of care; however, this holding was challenged by the Hamilton-Wentworth Police in Mr Hill’s case. The Supreme Court of Canada resolved this dispute in *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620 holding that the tort of negligent investigation should be recognised.

Although this case should be heralded as an important victory for the protection of citizens against unreasonable actions of the state, the decision leaves much to be desired. First, given the prevalence of wrongful convictions resulting from substandard police practices, it is deeply disturbing that there was a dissenting judgment on the issue of whether a tort of negligent investigation should be established. Secondly, although the majority decision recognised that the police owe a duty of care to suspects, the analysis surrounding the standard of care essentially ensures that negligence will rarely be found. In determining that the police did not breach the standard of care expected of reasonable police officers in these particular circumstances, the court has set an impossibly high standard for plaintiffs to prove police negligence, and one that mirrors the requirements of pre-existing torts such as malicious prosecution and false arrest, torts generally considered inadequate. Moreover, an analysis of the role of systemic racism in the wrongful conviction of Mr Hill was noticeably absent. Ultimately, the Canadian justice system has distinguished itself in the common law world by recognising a tort of negligent investigation; however, the change may be more symbolic than real if the threshold for proving a breach of duty is set too high. This obstacle has particularly troubling implications for members of Aboriginal and racialised communities who are disproportionately targeted and harmed by the criminal justice system.

BACKGROUND

The sequence of events that led to the wrongful incarceration of Mr Hill was somewhat complicated. Mr Hill became a suspect in the course of an investigation of 10 robberies in Hamilton, Ontario, between 16 December 1994 and 23 January 1995, which became known as the “plastic bag” robberies. Given similarities in the modus operandi and eyewitness testimony, the police concluded early in the investigation that the same person had committed all of the robberies. Once the police focused their investigation on Mr Hill, they released his photo to the media. They also conducted a photo lineup that included Mr Hill as the only Aboriginal person among 11 Caucasian foils. On

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1 In the Canadian context, the term “Aboriginal” refers to peoples who are descended from the original inhabitants of North America, and includes the First Nations, Inuit and Métis.

2 The term “racialised” is used to reflect the social construction of race. The Commission on Systemic Racism in the Ontario Criminal Justice System defined “racialisation” as “the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life”. See *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen’s Printer for Ontario, Toronto, 1995) pp 40-41 (Commission on Systemic Racism Report).

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27 January 1995, the police arrested and charged Mr Hill with 10 counts of robbery based on various eyewitness identifications, a Crime Stoppers tip, identification by a police officer on the basis of a surveillance photo, and the possible sighting of Mr Hill near the location of one of the robberies.

The eyewitness identifications were inconsistent. Some witnesses described the robber as having facial hair; others did not. One noted that the robber could have been “North American Indian”, while another noted that the robber was dark-skinned and Asian. Another witness described the robber as Hispanic: see Hill v Hamilton-Wentworth Regional Police Services Board (2003) 66 OR (3d) 746 at [5]. In response to these descriptions, the police issued a press release on 20 December 1994, following the first two robberies, describing the suspect as “Hispanic or mulatto” (at [7]). On 2 January 1995, Detective Loft issued a composite of the descriptions he had gathered that described the suspect as having a “dark complexion” (at [11]). Although some of these variations in race identification were noted by Marshall J in the trial judgment, the Supreme Court noted only that there was eyewitness evidence that described the robber as Aboriginal: Hill v Hamilton-Wentworth Regional Police Services Board (2007) 285 DLR (4th) 620 (at [6]).

At different stages of the investigation, the police had in their possession potentially exculpatory evidence. Before Mr Hill was arrested, the police had received a Crime Stoppers tip that two Hispanic men (“a Cuban named ‘Pedro’” and “a Spaniard named ‘Frank’”) were the perpetrators: Hill v Hamilton-Wentworth Regional Police Services Board (2005) 76 OR (3d) 481 at [11]. After two similar robberies occurred while Mr Hill was in custody, the police received another tip that implicated “Frank” and claimed that “Frank” was laughing because Mr Hill was being blamed for the robberies. Additional information was gathered by the officer investigating the last two robberies that implicated Frank Sotomayer, a man who looked like Mr Hill. Furthermore, the photos from the first robberies looked more like Sotomayer than Mr Hill. This information was conveyed to Detective Loft, the detective supervising the investigation of the earlier robberies, and two charges against Mr Hill were dropped.

All charges except one were eventually dropped by the Crown. The Crown proceeded with the remaining charge based largely on the questionable eyewitness evidence of two bank tellers who remained convinced that the robber was Mr Hill. After the robbery at the bank where they worked, both tellers, with the photo of Mr Hill issued to the media on their desks, were interviewed together, contrary to the usual practice of separating witnesses. Mr Hill was found guilty of robbery in March 1996, but successfully appealed the decision. He was ultimately acquitted at a new trial in December 1999, after having been imprisoned intermittently for more than 20 months in total.

Mr Hill brought, among others, an action against the police in malicious prosecution and negligence. At trial, Marshall J found there was no malicious prosecution because the proceedings had been instituted with reasonable and probable grounds and without malice. He also found that the police had not breached the standard of care on the basis that there was no standard methodology for police investigations. Furthermore, in his view, the photo lineup was not negligent in that the Caucasian foils looked similar to Mr Hill. While he was sympathetic to the “unfortunate result” for Mr Hill, including his wrongful conviction and the time spent in prison, Marshall J pointed out that “it is not every wrong that the civil law can right”: see (2003) 66 OR (3d) 746 at [75].

Mr Hill appealed the finding that the conduct of the Hamilton police officers did not constitute either malicious prosecution or negligent investigation. In response to a cross-appeal by the police, the Ontario Court of Appeal created a special five-judge panel to consider whether its decision in Beckstead, which held that there was a tort of negligent police investigation, should remain the law in Ontario. The Court of Appeal unanimously agreed that the tort of negligent investigation should continue to exist. Furthermore, the court held that, in the case at Bar, the tort of malicious prosecution had not been established. However, the majority and dissenting opinions divided on whether, in these particular circumstances, the police had breached the standard of care. Unlike the dissenting opinion, the majority believed that the photo lineup was not presumptively structurally biased, and that the trial judge’s reasons were sufficient to allow appellate review. The dissent found that the trial judge had made palpable and overriding errors of fact in his analysis of negligence by the police. The dissent would have held the police liable for negligent investigation.
SUPREME COURT OF CANADA

Duty of care

In Hill v Hamilton-Wentworth Regional Police Services Board (2007) 285 DLR (4th) 620 McLachlin CJ, writing for the majority, stated that the tort of negligent investigation in relation to police practices should be recognised in Canada. Applying the first stage of the Anns test, the majority held that a prima facie duty of care was established. It is reasonably foreseeable that a negligent investigation of a suspect may cause harm to the suspect. Moreover, the relationship between a police officer and suspect is personal, and close and direct, thereby satisfying the requirement of sufficient proximity. The majority noted that recognising a duty of care owed by police to suspects under investigation is consistent with the values and spirit underlying the Canadian Charter of Rights and Freedoms. Furthermore, conditions were not established that would negate or limit the prima facie duty of care under the second stage of Anns.

On behalf of three dissenting justices, Charron J agreed that reasonable foreseeability was easily established. However, she found no prima facie duty of care given that policy reasons, in her view, barred the finding of proximity. According to the dissent, a duty of care owed by police officers to suspects would be incompatible with the police’s “overarching public duty”. She was also concerned that recognising a duty of care would have a chilling effect on policing, causing police officers to be more cautious in their investigations. Because no duty of care was recognised by the dissent, there was no determination of whether the standard had been breached in this case.

Standard of care

According to the majority, any legitimate policy concerns in recognising a duty of care can be addressed through a carefully articulated standard of care. The standard of care is that of a reasonable police officer in all the circumstances, and the particular conduct required is informed by the stage of the investigation and applicable legal considerations (at [68]). As such, the conduct of a reasonable police officer is informed by criminal law standards. The standard is not perfection and is not to be judged from the vantage of hindsight. Instead, it is judged in the circumstances that prevailed at the time the decision was made (at [73]).

In light of this standard, the court found that the conduct of the investigating officers did not breach the standard of care in 1995. The investigation, including the photo lineup, did not constitute a departure from the standard of a reasonable officer in the circumstances. As a result, there was no negligent investigation on these facts.

ANALYSIS

Although this decision is being celebrated as a groundbreaking decision in the law of torts, it is disconcerting that, in this day and age, there would be any debate as to whether the police should be granted immunity from civil liability in negligence. As the majority remarked (at [36]):

The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada … Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions.

Given this knowledge, it is even more worrisome that a dissenting opinion was written in this case at all. Knowing what we do about the serious and harmful consequences of poor police practice, it is difficult to see how immunity could be reasonably supported, particularly on the basis of policy, as the dissenting opinion suggested. The dissenting justices essentially rejected the notion that police must act reasonably in their investigations and instead pointed to existing remedies as the solution. However, as the majority noted (at [35], footnotes omitted, emphasis added):

5 Binne, LeBel, Deschamps, Fish and Abella JJ concurred with McLachlin CJ.
7 Bastarache and Rothstein JJ concurred with Charron J.
On this point, I note that the existing remedies for wrongful prosecution and conviction are incomplete and may leave a victim of negligent police investigation without legal recourse. The torts of false arrest, false imprisonment and malicious prosecution do not provide an adequate remedy for negligent acts … As the Court of Appeal pointed out, an important category of police conduct with the potential to seriously affect the lives of suspects will go unremedied if a duty of care is not recognized. This category includes “very poor performance of important police duties” and other “non-malicious category of police misconduct”. To deny a remedy in tort is, quite literally, to deny justice.

Despite this important recognition by the majority of the Supreme Court, and a very thoughtful and persuasive analysis of why a duty of care is owed by police to suspects, the discussion surrounding the application of the standard of care is, at closer inspection, disheartening. The majority was very forgiving in judging the reasonableness of police conduct in 1995. Although the majority treated the events leading to Mr Hill’s wrongful conviction as if they had occurred in another era, in reality 1995 was not that long ago.

Ultimately, the court believed that the publication of Mr Hill’s photo, the interviewing of two witnesses together, and the incomplete record of witness interviews were not good police practices evaluated by today’s standards, but were not unreasonable, judged against the practices of reasonable police officers in similar circumstances in 1995 (at [78]). Similarly, the majority determined that the photo lineup was not unreasonable judged by 1995 standards. It is difficult to evaluate on what basis the majority formed these conclusions; however, what is clear is that little was expected of police officers in 1995.

Wrongful convictions

Interestingly, the majority suggests that in 1995, “awareness of the danger of wrongful convictions was less acute than it is today” (at [88]). This observation leads to the conclusion that police practices were not as sensitive to the issues of wrongful convictions and institutional bias as they are today. However, numerous cases of wrongful convictions had already been well publicised by the time the events leading to Mr Hill’s conviction had taken place. Of particular relevance to this case is the role of faulty eyewitness evidence. Faulty eyewitness evidence led to the initial convictions of David Milgaard, Thomas Sophonow and Guy Paul Morin, cases that received extensive attention as wrongful convictions in the 1990s.

These warnings were not limited to academic commentary. The Association in Defence of the Wrongfully Convicted (AIDWYCY) was founded in 1993 in response to the wrongful conviction of Guy Paul Morin in 1992, and raised public awareness about this issue. The public was further educated by the CTV and CBC television networks, which exposed the issue of wrongful convictions beginning in the late 1980s. The Globe and Mail newspaper published an article on 21 January 1995, which outlined the problems generated by eyewitness reporting and cited an American study that found that half of the wrongful conviction cases reviewed were due to eyewitness errors. Ironically, this article appeared in the Globe and Mail during the same period in which Mr Hill was being investigated.

Systemic racism

It is impossible to have a meaningful discussion of the risk of wrongful convictions without recognising the role that systemic racism plays in targeting and prosecuting Aboriginal and racialised peoples. As the Royal Commission on the Donald Marshall, Jr, Prosecution noted:10

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6 These cases included the wrongful convictions of Donald Marshall, Jr, Thomas Sophonow, David Milgaard and Guy Paul Morin.


8 Anderson and Anderson, n 7, p 124.

9 Cited in Anderson and Anderson, n 7, p 11.

Donald Marshall, Jr’s status as a Native contributed to the miscarriage of justice that has plagued him since 1971. We believe that certain persons within the system would have been more rigorous in their duties, more careful, or more conscious of fairness if Marshall had been white.

The majority opinion of the Supreme Court remarked that a reasonable officer today might be expected to avoid lineups using foils of a different race than the suspect, to avoid unfairness to suspects who are members of minority groups as well as the perception of injustice (at [80]). The majority further noted (at [80]) that these concerns were “underlined by growing awareness of persisting problems with institutional bias against minorities in the criminal justice system, including aboriginal persons like Mr Hill”. To support this claim of the “growing awareness” of such problems, the majority (ironically) cited the Royal Commission on Aboriginal Peoples’ report from 1996.

Even more information was known in the mid-1990s that the Supreme Court did not acknowledge. In 1989, the Royal Commission on the Donald Marshall, Jr, Prosecution published its report which explored in significant detail the impact of systemic racism on Blacks and Aboriginals in the Nova Scotia criminal justice system.11 The monumental study by the Commission on Systemic Racism in the Ontario Criminal Justice System was published in 1995, the same year the incidents in question occurred. The report exposed the insidious and systemic nature of racism in the criminal justice system. This Commission was established in 1992 in response to an already “growing awareness” of the extent and impact of racism at all levels of the criminal justice process. A large portion of the report was devoted to policing.12 Similarly, in 1991, the Report of the Aboriginal Justice Inquiry of Manitoba emphasised the importance of clear and consistent police practices to address systemic racism.13

Ultimately, a discussion of systemic discrimination was woefully absent in the Supreme Court’s decisions. The only mention of racism was in the abstract, when the majority opinion acknowledged that the tort of negligent investigation would be one way in which to address the problem of “institutional racism” (at [36]). There was no recognition of the role that systemic racism played in this investigation and how it tainted the entire process. Systemic racism, however, was at the core of the negligent investigation alleged. Mr Hill was targeted as a suspect because he was Aboriginal. Although many eyewitnesses described the robber in other ways, the police became convinced that the suspect was Aboriginal, and that the Aboriginal person in question was Mr Hill. The reasons for fixating on an Aboriginal suspect are not entirely clear from the decision; however, police officers are not immune from stereotypes that associate Aboriginality with crime.

In any event, cross-race eyewitness identification has been challenged as unreliable, given the dangers of misidentification documented over the past decades. As Tanovich noted, “[c]ross-racial identifications are now recognized as a leading cause of wrongful convictions”.14 The Manitoba Aboriginal Justice Inquiry questioned the value in describing suspects by race at all, when a description of the suspect’s skin colouring would suffice.15 As the Inquiry noted, “[t]o advise police officers that a suspect in an offence is a native is a licence to commit racism. That should not be

11 See n 10.
12 Commission on Systemic Racism Report, n 2.
15 Tanovich, n 14, p 167, warns that caution must be exercised in using descriptions of skin colouring as well. Even more racialised individuals could become entangled in the criminal justice system if the suspect is described as having, eg, a dark complexion. But see Walker who argues that these concerns could be addressed through the development of a universal complexion chart that would allow officers to gather any information necessary for accurate suspect descriptions, while minimising discriminatory impact: see Walker BA, “The Color of Crime: The Case Against Race-Based Suspect Descriptions” (2003) 103 Colum L Rev 662.
condoned.”16 Understood as a social construct rather than a biological one, race makes little sense as a physical descriptor.17 Although the majority believed that the police were not guilty of “tunnel vision” in their investigation of Mr Hill, it is difficult to explain for what other reason the police did not explore potentially exculpatory evidence.

Particularly troubling is the analysis of the photo lineup. The majority of the Supreme Court held that a photo lineup comprised of the suspect as the sole Aboriginal man among 11 white foils, though “not ideal”, was not unreasonable in 1995. Moreover, in this case, the lineup did not lead to unfairness. Citing the majority reasons of the Ontario Court of Appeal, McLachlin CJ noted that a racially skewed lineup is structurally biased only “if you can tell that one person is non-Caucasian” and “assuming the suspect is the one that’s standing out” (at [81]). In her view, Mr Hill did not stand out because a number of the subjects had similar features and colouring (at [79]).

This reasoning is problematic for a number of reasons. First of all, who assesses whether the suspect and the foils have “similar features and colouring”? Should white police officers be entrusted with the determination of who looks alike? Should the (primarily) white judiciary? The majority of the Supreme Court essentially articulated the standard of care from the dominant white perspective. In other words, did the white people in the lineup look, through white eyes, sufficiently like Mr Hill? Given that racialised people are often interchangeable through the dominant white gaze – hence the varying descriptions of the robber as Hispanic, “North American Indian”, Asian and Aboriginal – it is not sufficient to articulate the standard of care in terms of whether “you” can tell that one person stands out in a lineup based on her or his race. Imagine the opposite situation. If a suspect was the sole white man in a lineup of light-skinned racialised and Aboriginal people, this practice would likely be seen as outrageous and clearly unfair. It is too risky to defer to the police and judiciary for these types of assessments.

Secondly, the majority opinion paid little attention to the perception of injustice that arises from a racially skewed lineup, which was a disservice to the carefully articulated reasons of the dissenting opinion of the Court of Appeal. Although the majority noted that a reasonable officer today “might be” expected to avoid lineups using foils of a different race than the suspect for this reason, it did not go far enough in setting the standard for even today’s officers. The majority decision left open the possibility that under certain circumstances, this practice could be acceptable. Under no circumstances should this practice be condoned. As Feldman and LaForme JJA observed in the dissenting opinion of the Court of Appeal (Hill v Hamilton-Wentworth Regional Police Services Board (2005) 76 OR (3d) 481 at [154]), the perception of fairness is particularly important in Canada where Aboriginal justice is concerned. As the Supreme Court of Canada has itself noted in other cases, widespread bias against Aboriginal peoples has translated into systemic discrimination in the criminal justice system.18 The dissenting opinion of the Court of Appeal held (at [156]) that a lineup such as the one used in Mr Hill’s case was “prima facie potentially structurally biased with obvious potential for unfairness”.

At a minimum, the Supreme Court should have recognised, unequivocally, that this lineup was unacceptable by today’s standards. However, the court should have also found that this lineup was unreasonable by the standards of 1995. The descriptions of the suspect were wide-ranging in terms of race, but most witnesses identified the suspect as someone who was not Caucasian. Detective Loft, the detective in charge of the investigation, released a composite that identified the suspect as having a “dark complexion” based on the descriptions he had gathered. And yet, Mr Hill was placed in a lineup with the determination of who looks alike? Should the (primarily) white judiciary? The majority of the Supreme Court suggested that regardless of whether the photo lineup had fallen below the standard of care in these circumstances, it

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16 Aboriginal Justice Inquiry, n 13, pp 94-95.
17 As Walker argues, the use of race in suspect descriptions serves to further the perception that racialised communities are disproportionately criminal. It allows police officers and witnesses to claim, and likely believe, that they are not acting out of racist motives, but are instead responding to increased criminality in racialised communities: see Walker, n 15 at 678. Moreover, Walker warns (at 672) that race may become the sole descriptor relied upon by law enforcement officials, rather than one of many of a suspect’s characteristics. This risk was likely actualised in Mr Hill’s case.
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was not connected to the charge for which Mr Hill was eventually convicted, but rather to one of the charges that had been dropped.\(^\text{19}\) In other words, there was no causal relationship between the lineup in question and Mr Hill’s wrongful conviction. As the dissenting opinion of the Court of Appeal pointed out, however, this lineup was also shown to a number of other witnesses to the robberies and contributed to Detective Loft’s fixation on Mr Hill as the “plastic bag robber”. This fixation also played a role in Detective Loft’s decision not to explore potentially exculpatory evidence.

Individual stages of the investigation cannot be distinguished in the way attempted by the majority opinions. Separating the individual events in the investigation against Mr Hill facilitates a non-racist interpretation of each event and each exercise of discretion; however, when the investigation is viewed as a whole, it is difficult to discount the role that systemic racism played in the course of events, including the use of a structurally biased photo lineup and Detective Loft’s tunnel vision in pursuing Mr Hill as the sole suspect. As Anderson and Anderson note, “[i]t is no longer acceptable to suggest that wrongful conviction resulting from police activities is simply the result of numerous bizarre elements coincidently coming together.”\(^\text{20}\)

Ultimately, with the exception of the dissenting opinion of the Court of Appeal, the trial and appellate courts reflected a discomfort with recognising the role of race and racism in this case. The trial judge seemed uncomfortable even identifying the foils as Caucasian.\(^\text{21}\) The analysis by the courts was decontextualised, and minimised the consideration of race, even though it was an issue that clearly warranted discussion. The courts lost sight of the fact that (yet another) Aboriginal man was wrongfully imprisoned due to a shoddy police investigation that was fuelled by racist practices. Rather than focusing on the injustice of the investigation, which produced a result that could have been prevented with simple precautionary measures, the Supreme Court minimised the gravity of the negligence by referring to the events leading to the wrongful incarceration as “unfortunate” (at [4]) and “questionable” (at [78]). The photo lineup was “not ideal” (at [80]) and the investigation was “flawed” (at [74]). Though “unfortunate”, “questionable”, “not ideal” and “flawed” enough to lead to the wrongful conviction of Mr Hill, the conduct of the police met the standard of a reasonable police officer in like circumstances. The majority opinion of the Supreme Court attempted to sanitise the events leading to the wrongful conviction of Mr Hill in order to avoid an uncomfortable recognition of race. If there had been an explicit recognition of systemic racism in this analysis, perhaps it would have been more difficult to maintain that the investigation had been reasonably conducted.

Even in the context of 1995 police practices, it is troubling to label the conduct of the police officers as reasonable. First, as discussed above, it is not fair to suggest that little was known about the danger of wrongful convictions at that time. Even if this were an accurate evaluation of the state of knowledge in the mid-1990s, it is problematic to defer to a standard of racist police practices. Such practices should be viewed as inherently unreasonable. Otherwise, we risk the perverse outcome of recognising reasonableness in institutional racism because that in fact is the standard practice. The reasonable police officer in like circumstances does not engage in racist police practices. When the majority of the Supreme Court determined that a photo lineup with the suspect as the only racialised man was reasonable in 1995, but speculated that it might not be the case anymore, was the court implying there was a time when racism was reasonable? Given the grave consequences of systemic racism in the criminal justice system, recognised both in 1995 and today, the courts should assume a more proactive role in articulating the appropriate standard of care expected of police officers, rather than deferring to practices that have been widely criticised as harmful to racialised peoples.

The majority’s deference to police practice was also evident in its response to the concern that the new tort will have a chilling effect on policing. The majority emphasised that it was not the role of the

\(^{20}\) Anderson and Anderson, n 7, p 22.

\(^{21}\) He stated in Hill v Hamilton-Wentworth Regional Police Services Board (2003) 66 OR (3d) 746 at [72]: “In the case at bar the pictures chosen, by the Officer, on the facts, if you will, were all Caucasian.” His addition of “if you will” appears to express a certain awkwardness.

\(^{19}\) Hill v Hamilton-Wentworth Regional Police Services Board (2005) 76 OR (3d) 481 at [97]; Hill v Hamilton-Wentworth Regional Police Services Board (2007) 285 DLR (4th) 620 at [78].
courts to second-guess the difficult decisions that police officers are required to make, as long as their discretion is exercised reasonably. Overall, the court permitted the police officers in this case a wide scope of discretion. The majority opinion encountered more difficulty in evaluating the allegations against Detective Loft, the detective in charge of the investigation, who did not ask the Crown to postpone the case to permit reinvestigation when potentially exculpatory evidence was made known to him. Nonetheless, the majority claimed (at [88]) that it was not a case of tunnel vision or blinding oneself to the facts, and excused the detective’s exclusive focus on Mr Hill as falling into the “difficult area of the exercise of discretion”. Once again, the court was able to interpret the troubling actions of the police in a way that evaded the acknowledgment of racism.

Of course, police officers, like other actors in the criminal justice system, require adequate discretion to do their work effectively. However, in a system that is tainted by systemic racism at every level, courts need to curtail some of this discretion, not defer to it when it is exercised in discriminatory ways. The majority opinion noted that “hearsay, suspicion and a hunch” might be enough of a basis from which to proceed at the outset of an investigation, as long as the police officer acts as a reasonable investigating officer would in those circumstances (at [68]). How courts will assess the reasonableness of “hunches” and “suspicions” in determining whether the standard of care was breached remains to be seen. Police officers’ “hunches” are informed by their personal attitudes and prejudices, and have often resulted in the targeting of Aboriginal and racialised peoples as suspects. In R v Simpson (1993) 79 CCC (3d) 482 at 502 (Ont CA), Doherty JA warned against relying on “hunches”:

Such subjective based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee’s sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a “hunch”.

There have been strong warnings against giving the police too much discretion, which, consciously or unconsciously, has often been exercised to the disadvantage of Aboriginal and racialised communities.22

CONCLUSION

The Supreme Court of Canada made history on 4 October 2007, when it recognised the tort of negligent investigation. In principle, this recognition was an important step. However, the court’s venture into this new territory was hesitant. The court set the standard for police conduct so low that it will likely be only in rare cases that a breach will be found. Even the lawyer for the Hamilton-Wentworth Police stated that although it was disappointing that police could be sued for simple negligence, the Supreme Court set such a high standard that it will be difficult for plaintiffs to prove their case.23

Most significantly, the court lost an important opportunity to show how tort of negligent investigation can be used to combat systemic racism against Aboriginal people like Mr Hill and members of other racialised communities. Despite the fact that the majority acknowledged the potential of this tort to address institutional bias, the Supreme Court demonstrated that application to particular cases will pose an obstacle for plaintiffs who fall victim to negligent policing. Justice was denied to Mr Hill. If the court seeks to fill in the gap left by torts such as false imprisonment and malicious prosecution,24 the threshold for finding a breach of the standard of care will need to be relaxed in future cases to ensure that a remedy is available for non-malicious categories of poor police investigation.


23 MacCharles T, “Court Lets Suspects Sue Police for Negligence; 6-3 Decision Called ‘Groundbreaking’ but Some Fear it could have ‘Chilling Effect’ on Law Enforcement”, Toronto Star (5 October 2007) p A01.

24 The majority opinions of both the Court of Appeal and the Supreme Court agreed that malicious prosecution was not an adequate remedy for cases involving poor police conduct that is not malicious or deliberate. The majority of the Ontario Court of Appeal cited The Inquiry Regarding Thomas Sophonow: The Investigation. Prosecution and Consideration of Entitlement to Compensation, which warned that the tort of malicious prosecution sets the bar too high because of both the malice and the...
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If the criminal justice system, and the police in particular, are to earn the trust of Aboriginal and racialised communities, the police must be held responsible for their conduct. As LaForme JA, the first Aboriginal person to be appointed to an appellate court in Canadian history and co-author of the insightful dissenting opinion of the Ontario Court of Appeal in this case, observed extrajudicially:

Police, perhaps even more than others, must accept the accuracy and depth of the attitudes and views Aboriginal people have with respect to the discrimination they experience, and demonstrate to them that they no longer need to be distrustful of the police.25

If the police are truly held accountable for their actions, not only in theory, public confidence in the system will be advanced.

reasonable and probable grounds requirements: Hill v Hamilton-Wentworth Regional Police Services Board (2005) 76 OR (3d) 481 at [75]. It is important to note that the tort of negligent investigation also incorporates the reasonable and probable grounds requirement in its standard of care.