EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

CHASING SUSPECTS AND PURSUING THE TORT OF NEGLIGENT INVESTIGATION

Eugene Mazzuca
Blaney McMurtry LLP
416.593.3946
emazzuca@blaney.com

June 23, 2006

PURSUITS OF SUSPECTS BY POLICE

1. Introduction

In all cases involving motor vehicle pursuits resulting in injuries or fatalities, the courts have had to balance between two normally complimentary but at times diametrically opposed duties imposed on the police. The police have common law and statutory duties to protect the public and to prevent crimes and apprehend criminals. [1] However, when the police become engaged in such activities as a motor vehicle chase or the discharge of a firearm in public, the two duties may conflict. In most cases, pursuits are conducted at high rates of speed and other rules of the road are not followed. In fact the *Highway Traffic Act* provides police vehicles with exemptions in certain circumstances from complying with speed limits and traffic controls.[2] As a result, pursuits can become quite dangerous not only to the drivers involved in the chase but also to other members of the public.

2. Historical Shift in Policy

Over the past 20 years there has been a significant shift in the manner in which police pursuits are conducted. This is as a result of a public outcry that arose following a number

---

[1] **See ss. 42(1)(b) and (d) of the *Police Services Act*, R.S.O. 1990, c. P. 15, as amended.**
[2] **See for example ss. 128(13) and 144(20) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8, as amended.**

of police pursuits that resulted in injuries and deaths of innocent bystanders. In 1984, the Solicitor General of Ontario established a special committee to examine police pursuits in Ontario. As a result of this committee, the Ministry of the Solicitor General introduced detailed guidelines regarding police pursuits. These guidelines provide direction on many aspects of pursuits including when and how pursuits are to be commenced and continued, the roles and duties of supervisors, as well as the manner in which pursuits are to be reported and investigated. Municipal police forces as well as the Ontario Provincial Police have established their own protocols for pursuits based largely on the provincial guidelines. The guidelines have been revised and updated over the years and have become much more stringent. The most recent amendments to the provincial guidelines have placed a much greater onus on police officers to determine whether there are any alternatives available before commencing and continuing a pursuit. On January 1, 2000, a regulation under the *Police Services Act* was brought into force dealing specifically with the pursuit of suspects.[3]

As a consequence, it is much rarer for police to engage in pursuits today than it used to be several years ago. Even when a pursuit is conducted now, it tends to be much shorter in duration than it used to be as police tend to abandon pursuits more readily. This means that the police are less likely to either commence or continue a pursuit even when they have reasonable and probable grounds to believe that the driver of the other vehicle has committed a criminal act.

[3] "**Suspect Apprehension Pursuits", O. Reg. 546/99 made under the *Police Services Act*.**

3. Treatment of Pursuits by the Courts

A. Generally

Historically, the courts had been reluctant to find liability on the part of police officers engaged in pursuits in the lawful execution of their duties. However, more recently the courts have appeared more willing to find liability on the part of officers. One would expect that a finding of liability on the police would occur mostly in cases where innocent third parties have been injured during the course of a pursuit. However, the courts have found liability in a number of cases where the driver of the vehicle being pursued has been injured. Having said that, there have not been many reported pursuit claims in which liability has been found against the police. I suspect that many cases involving injuries to innocent third parties are settled well before they go to trial.

B. Duty of Care

The courts have determined that the police owe a duty of care to members of the public when deciding to initiate and continue a pursuit. This duty of care has been found to extend not only to the public at large but also to the driver of the pursued vehicle.[4] Accordingly, the courts have clearly left open the possibility on the right facts to find an officer liable to the driver of the other vehicle.

The courts have recognized the necessity of balancing between officers' duties to apprehend criminals and the duty to ensure public safety.[5]

---

[4] **See Blaz v. Dickinson [1996] O.J. No. 3397 (Gen. Div.)**
[5] **Ibid. and Crew v. Nicholson [1987] O.J. No. 409 (H.C.J.).**

C. Standard of Care

The standard of care has been described as "that of a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case."[6] There is recognition by the courts that in many cases, officers have to make split second decisions with limited knowledge. Accordingly, the courts will not impose a standard of perfection and a mere error in judgment with the benefit of hindsight does not amount to negligence.[7]

D. Application of Standard of Care

In determining whether the standard of care has been met, the courts have generally placed a great deal of weight on the pursuit protocols for each police force. While a breach of the protocols is not necessarily a breach of the standard of care, the courts have viewed compliance with or a breach of the protocols as being an important consideration of whether the standard of care has been met. Generally, where the courts have found officers to have complied with the protocols, the courts have found no liability on the part of the officers. In both *Blaz v. Dickinson, supra,* and *Jones v. Denomme*[8], the pursuits were fairly lengthy and conducted at high speeds on city streets. Both pursuits were commenced and continued for fairly minor offences and ended as a result of accidents involving third party motorists. In each case, the courts found the pursuits to be in compliance with the protocols and accordingly found the officers not to have breached their duty of care.

---

[6] **See Doern v. Phillips Estate (1994), 2 B.C.L.R. (3d) 349 (S.C.) aff'd (1997), 43 B.C.L.R. (3d) 53 (C.A.).**
[7] **See Blaz v. Dickinson, supra, note 4**.
[8] **[1994] O.J. No. 611 (Gen. Div.).**

By contrast, the British Columbia Supreme Court in *Doern v. Phillips Estate, supra,* which was affirmed by the B.C. Court of Appeal, found the police to be negligent where they failed to follow their own policy. In that case, the Court found that the officer in lead of the pursuit failed to provide pertinent information to his dispatcher. Further, the Court found that the chief dispatcher and field supervisor failed to take command of the pursuit as required by policy. The officer was held to be 25% liable for the injuries sustained by a third party motorist who was struck by a vehicle fleeing police.

In the more recent British Columbia Supreme Court decision of *Radke v. M.S.*[9], the Court found the police 15% liable for injuries suffered by an innocent third party after his vehicle was struck by a stolen vehicle driven by a young offender. In finding liability, the court determined that the officer had failed to follow the pursuit policy both in commencing the pursuit and in continuing the pursuit. With respect to the former, the court found that prior to commencing the pursuit the stolen vehicle was not being driven in a manner that threatened public safety and that the offence being committed was not a serious one. With respect to the continuation of the pursuit, the court found that the stolen vehicle began to accelerate in a residential area and drive through stop signs after the officer commenced the pursuit. Also keep in mind that statistics show that motor vehicles that are stolen are more likely to flee when an officer attempts a traffic stop than other circumstances.

In addition to considering the nature of the offence, the courts have also considered other factors such as road conditions in determining liability. In one Ontario case, an officer was found liable after striking and killing a fellow police officer while pursuing a suspect. The court held that the liable officer took an unnecessary risk to the public when he drove at

[9] **[2005] B.C.J. No. 2077.**

high speeds on a hilly gravel road.[10] By contrast, the Federal Court recently found an officer not liable for injuries suffered by the driver of the vehicle being pursued after the officer rear ended the plaintiff's vehicle because he was unable to see that the plaintiff's vehicle had come to a stop after pursuing it down a gravel and dirt road which significantly reduced his visibility.[11]

4. Causation Issues

In dealing with pursuits there are some causation issues that should also be considered. First, even where an officer has been found not to have complied with the pursuit policy, there should be no finding of liability if the failure was not a direct cause of the accident. For example, the Manitoba Court of Appeal found the failure by a police officer to use the siren on the police car during the pursuit to be negligent but not an effective cause of the accident.[12] Further, generally where the vehicle being pursued by police is involved in a motor vehicle accident, the Courts have found the police to be the proximate cause of the accident provided that the pursuit was ongoing at the time of the accident. However, causation becomes a real issue when the pursuit has been abandoned by the police at some point prior to the accident.

5. Insurance Issues

A finding of liability, even as low as 10% can be significant as in many cases the vehicle being pursued is not covered by a policy of insurance and the driver has no assets. In these

[10] **See Crew v. Nicholson, supra, note 5.**

[11] **See Watson v. Royal Canadian Mounted Police, [2003] F.C.J. no. 1834.**

[12] **See O'Reilly v. Clinch, (1979), 99 D.L.R. (3d) 45.**

cases, even a finding of 1% liability results in the police force being potentially fully responsible for the plaintiff's damages.

While there may be some odd factual circumstances that may lead a court to find otherwise, the police officers involved in the pursuit and the entities that are statutorily vicariously liable for their acts and omissions under the *Police Services Act* are normally found to be protected defendants under Bill 198, the current no fault auto regime. An issue remains outstanding with claims arising under Bill 59 prior to October 1, 2003 with respect to the status of an entity that is vicariously liable by statute for the acts or omissions of a police officer given the Ontario Court of Appeal decision in *Vollick v. Sheard*.[13]

Given the nature of any police pursuit issues arise with respect to whether the CGL policy or Auto policy should be responding to the claim. This is a topic that is beyond the parameters of this paper and could be the subject of a paper on its own. Suffice it to say that each case would have to be determined on its particular facts. I can comment that in almost all the pursuit claims I have personally been involved in over the years, both policies have generally responded to the claim.

6. Conclusion

While pursuits have become less common as a result of changes in the policies which significantly limit when officers can engage in same, we expect that those same policies will

[13] **(2005), 75 O.R. (3d) 621**.

give the courts more opportunity to find liability on officers who do choose to pursue suspects.

NEGLIGENT INVESTIGATION: MYTH OR TORT

1. Introduction

One of the most hotly debated topics in police liability today is the tort of negligent investigation.

The tort 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.*[14] which was affirmed in 1997 by the Ontario Court of Appeal.[15]

Since the affirmation of the tort by the Court of Appeal, the lower courts have struggled with the concept of negligent investigation and tried to limit its application for public policy reasons.

However, the issue was once again put squarely before the Ontario Court of Appeal last year in *Hill v. Hamilton-Wentworth Regional Police Services Board*.[16] The Court was expressly asked to

[14] **(1995) 37 O.R. (3d) 64 (Gen. Div.).**
[15] **(1997) 37 O.R. (3d) 62 (C.A.).**
[16] **[2005] O.J.No. 4045 (C.A.) aff'g [2003] O.J. No. 3487 (S.C.).**

determine whether the tort of negligent investigation should continue to exist as part of the law in Ontario. As the Court was being asked to overrule its own previous decision, the court had five justices hear the appeal instead of the customary three. The Court unanimously found that negligent investigation continues to be a tort in Ontario. Leave to appeal this decision was recently granted by the Supreme Court of Canada.

2. History of the Tort in Ontario

This new tort enjoyed its genesis in Ontario with very little legal analysis by either the trial judge or for that matter the Court of Appeal.

The Beckstead[17] case involved a plaintiff who had been charged with the fraudulent use of a complainant's bank card. The charges were ultimately withdrawn once the Crown prosecutor had the opportunity to review the evidence. There appear to have been some significant problems with the investigation. Perhaps the most significant concern related to the fact that the plaintiff did not resemble the actual culprit whose photograph had been captured on a security camera. In addition, the investigating officer had not met the complainant face to face and had only ever spoken to her over the telephone which brought into question whether he was in a proper position to assess her credibility. More importantly, the investigating officer gave evidence that he had already made up his mind to charge the plaintiff with the offence before having interviewed the plaintiff. Further, the investigating officer did not follow up on information provided to him by the plaintiff that may have given the plaintiff an alibi.

[17] **supra, at notes 14 and 15.**

Traditionally, the courts would take the above facts and determine whether the torts of false arrest and/or malicious prosecution had been committed. However, in this case, Mr. Justice Binks could not find any authority to support a claim for false arrest where the plaintiff was charged by way of summons. Further, the plaintiff had abandoned her claim for malicious prosecution prior to trial. As detailed above this was also a case in which a poor investigation resulted in the plaintiff being improperly charged. The plaintiff had pleaded negligence arising out of the charges against her.

It appears that the focus of the defence to the claim in negligence was not whether a tort of negligent investigation existed in law and ought to be introduced but rather whether the immunity from negligence claims generally which is enjoyed by Crown prosecutors[18] ought to be extended to the police. After concluding that the immunity does not extend to the police, Mr. Justice Binks immediately thereafter found that the officer owed a duty of care to the plaintiff to perform a careful investigation before charging her; had failed to do so and therefore was negligent. There is no traditional tort analysis made to determine whether liability ought to be extended in this new area. In particular, the two-part test in Anns[19] is not applied to determine whether a duty of care is owed by a police officer to a suspect and whether there may be policy reasons not to impose such a duty. Further, the trial judge does not set out the basic elements that are required to prove this new tort.

The Court of Appeal dismissed the appeal of the trial judge's decision without adding anything to the trial judge's analysis. The Court simply accepted the trial judge's conclusions

[18] **Nelles v. Ontario [1989] 2 S.C.R. 170.**
[19] **Anns v. London Borough of Merton, [1977] 2 All E.R. 492 (H.L.)**

that the general negligence immunity does not extend to the police and that the officer was negligent in failing to take the necessary steps to establish reasonable and probable grounds in support of charges against the plaintiff.

3. Treatment of the Tort in other Jurisdictions

Ontario appears to be one of the few common law jurisdictions in which the tort of negligent investigation has been accepted.

In Quebec, a civil law jurisdiction, a duty of care on police officers with respect to how they conduct criminal investigations is set out in their Civil Code[20] and has been widely recognized by the Quebec Court of Appeal in a number of recent cases.[21]

On the other hand, some other common law jurisdictions in Canada have strongly rejected the tort. The New Brunswick Court of Appeal dismissed a claim for negligent investigation and ruled that a criminal investigation that is done within jurisdiction and without bad faith is not actionable.[22] In Alberta, the Court of Queen's Bench has recently ruled that negligent investigation is not a valid cause of action.[23] The reasoning in this decision is worth repeating:

> It is well established that there is no discrete tort founded in negligently performing a criminal investigation. Only malicious prosecution and its related torts as claimed by the Plaintiff, are available against defendants carrying out a criminal investigation. To find otherwise would lower the

---

[20] **Civil Code of Quebec, Art. 1457.**
[21] **Lacombe v. André, [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.**
[22] **McGillivary v. New Brunswick (1994), 116 D.L.R. (4th) 104.**
[23] **Dix v. Canada (Attorney General), [2003] 1 W.W.R. 436.**

> standard of recovery to the point which would eliminate the tort of malicious prosecution completely, as malicious prosecution requires both the absence of reasonable and probable cause and malice, whereas negligent prosecution would require only the absence of reasonable and probable cause…
>
> There is good reason for requiring a standard of care higher than that of simple negligence. There are pressing public policy reasons to keep the standard high. It allows police to function effectively in society without fear of being sued in every case for alleged deficiencies in the investigation. There is, accordingly, no duty of care in negligence owed by police investigators toward a suspect…

In the United Kingdom, the House of Lords has unanimously rejected the tort of negligent investigation for public policy reasons on two separate occasions including a decision made this past year.[24] Essentially, while the highest court in Great Britain accepts that a police officer can be liable in negligence in certain limited circumstances, it concludes that in the course of a criminal investigation it would not be appropriate to require the police to be concerned about owing a duty of care to suspects. In particular, the Court in both cases expressed concern that such a standard would require police to devote substantial time and resources to each investigation to avoid the risk of causing harm and would lead to an unduly defensive approach in combating crime. In the most recent decision Lord Steyn stated that such "legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with dispatch, would be impeded."

4. Problems in Defining the Tort since Beckstead

[24] **Hill v. Chief Constable of West Yorkshire, [1988] 2 All E.R. 238; and Brooks v. Commissioner of Police for the Metropolis, [2005] UKHL 24.**

As a result of the limited analysis for the new tort at both levels of court in the *Beckstead* decisions, the courts in Ontario have subsequently struggled in their efforts to define the test for the tort. The difficulty appears to have arisen in an effort to try to differentiate this tort from both the pre-existing torts of false arrest/imprisonment and malicious prosecution. While it appears that the tort is meant to occupy the liability range somewhere between a false arrest at the low range and a malicious prosecution at the high range, the lower courts have had difficulties applying a mere negligence standard following the Beckstead decision. For example, Mr. Justice Ground in **Wiche v. Ontario**[25] acknowledged that while the Court of Appeal had recognized the tort of negligent investigation, he states "the overriding public policy considerations, such as the effective functioning of the criminal justice system, granting immunity to police officers and other investigators from liability for negligent investigation should prevail in all but the most egregious circumstances." This would suggest that the standard should be more akin to gross negligence. This standard has been accepted and subsequently applied.[26] Along the same vein, other cases have suggested that the standard not be a low one and have expressed views that the investigation that is being reviewed need not be a model of perfection.[27]

Efforts to distinguish between the new tort and malicious prosecution have been further complicated by the decision of the Ontario Court of Appeal in *Oniel v. Toronto (Metropolitan)*

---

[25] **[2001] O.J. No. 1850.**
[26] **de Jong v. Midland Police Services Board, [2002] O.J. No. 1629 (S.C.J.); and Simon v. Toronto Police Services Board, Ont. S.C., 27 December 2002.**
[27] **Thornton v. Hamilton-Wentworth (Regional Municipality) Police Force, [1999] O.J. No. 1250; and Bainard v. Toronto Police Services Board, [2002] O.J. No. 2765.**

Police Force[28] which has further blurred the distinction between these two torts in this province. In that case, the Court suggested that the element of malice required to prove malicious prosecution could be inferred if there has been a negligent investigation. This decision has caused a great deal of debate between police liability experts as to how the elements of the two torts are expected to be distinguished given this finding. It is likely that this finding would not be accepted by the Supreme Court of Canada which has reiterated its previous high test for finding malice in its most recent decision on the issue.[29]

Further the facts found in the *Beckstead* decision could just as easily be used to prove a false arrest as the police clearly did not have reasonable grounds on an objective basis to arrest the plaintiff. This difficulty distinguishing a false arrest from a negligent investigation is seen in the *Simon v. Toronto Police Service Board* case in which the court concludes that the plaintiff was both falsely arrested and negligently investigated but also finds that there is such factual overlap in finding both those torts to have been committed that the court only awards damages for one tort.

5. Discussion of the Recent Ontario Court of Appeal Decision in Hill

The Court of Appeal in the recent *Hill*[30] decision has addressed some of the concerns raised following its decision in *Beckstead*. The court has considered the case law particularly in Great Britain and has applied the Anns test. The Court has now expressly decided to take a

---

[28] **[2001] O.J. No. 90.**
[29] **Proulx v. Quebec (Attorney General) (2001), 206 D.L.R. (4th) 1.**
[30] **Supra, at note 16.**

different course than that taken by the United Kingdom. The Court has confirmed that a duty of care exists and is owed by an officer to a suspect in the course of a criminal investigation. The Court has also determined that the policy reasons that have been raised by the House of Lords are not sufficient to deny the existence of a duty of care.

It is noteworthy that the Court places a fair amount of emphasis on the need to ensure that the duty of care owed by police to suspects be the same as the duty of care owed to victims. This was taken from the decision of the House of Lords in *Brooks*. The Court points to the lower court trial decision in *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*[31] in which the police were found to owe a duty of care to warn potential victims of crime.

The Court also suggests that the common law of negligence should be consistent with the right to liberty and security of the person enshrined in section 7 of the *Charter of Rights and Freedoms*.

It is also noteworthy that the Court does state that the policy concerns can be addressed by "a carefully tailored standard of care." However, after stating this, the court goes on to suggest that the standard for negligent investigation generally be that of a reasonable police officer in the same circumstances as the defendant. This is simply the standard of mere negligence and is much lower than the standard that has been suggested by the lower courts since *Beckstead* and does nothing to address the policy concerns. The Court also suggests that the standard when dealing with an arrest or prosecution be a different one. In particular, it suggests that the standard be whether the police have reasonable and probable

[31] **(1998), 39 O.R. (3d) 487 (Gen. Div.).**

grounds to believe that the plaintiff had committed a crime. This is the same standard that is applied for determining the tort of false arrest and imprisonment and will only continue the problems the courts are having distinguishing the two torts. It also does not properly address any of the policy concerns.

It should also be noted that the courts have over the years generally accepted that the standard of care for alleged breaches of *Charter* rights where damages are sought under s. 24(1) of the *Charter* requires more than mere negligence.[32] Further, the trial judge in finding liability against the police in the *Jane Doe* decision found that the inaction of the police in failing to warn constituted gross negligence.

6. Anticipated Difficulties in the Application of the Tests in Hill

By applying a relatively low standard as has been suggested in *Hill*, the entire police investigation will become open for review by the courts. The courts will be asked to review intricate details of each investigation and there will be different interpretations given to how evidence gathered during an investigation ought to have been interpreted. The courts will then have to determine with the benefit of hindsight whether the standard of care has been met. In the *Hill* case itself, while all five members of the panel agreed on the standard to be applied, the Court was significantly divided on the application of that standard on the facts before them.

---

[32] **McGillivary v. New Brunswick, supra, at Note 20; and Pinnock v. Ontario, [2001] O.J. No. 2921 (S.C.J.).**

The *Hill* case was a relatively simple criminal investigation in comparison to most murder and fraud investigations that the police conduct. Defending such claims from negligent investigation allegations will be very costly and will ultimately require significant court resources should they proceed to trial.

An issue that has not been canvassed by the courts to date when determining the standard to be applied is the fact that our criminal justice system is created with many failsafes to protect the liberty of those who may be wrongly accused. The concept that it is better for one hundred guilty men to go free than to have one innocent man go to jail has long been a cornerstone of our criminal justice system. We have the high burden of proof placed on the Crown Attorney to prove the case against the accused beyond a reasonable doubt. We have significant disclosure obligations placed on the state. We have specific *Charter* rights to protect the accused from improper conduct by public authorities. Among those rights is the right of accuseds not to be forced to speak to police. It is also well accepted that suspects have no legal obligation to provide the police with any information regarding the crime being investigated. More often than not, police officers are investigating crimes without having the complete picture. In fact, unlike civil proceedings the accused is under no obligation to disclose his or her defence to the Crown and can still engage in trial by ambush. Further, once an investigating officer arrests an accused and provides the Crown with the disclosure package it is fairly rare for the police to continue with an investigation into the charges unless a specific issue is raised by either the Crown or the accused's solicitors. These facts place a police officer investigating a crime at a significant disadvantage when trying to piece together who was responsible for a criminal act. Setting the standard of

care on officers as low as the Court of Appeal has done in *Hill* will make it very costly and difficult to defend many claims brought for negligent investigation.

7. Conclusion

While we expect that the Supreme Court of Canada will also likely uphold the existence of the tort of negligent investigation, we are hopeful that the Court will reconsider the standard of care to be applied to this tort as the current standard suggested by the Ontario Court of Appeal is much too low and difficult to distinguish from the existing tort of false arrest and false imprisonment.