

The Top Five 2008

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, 2007 SCC 41

<http://scc.lexum.org/en/2007/2007scc41/2007scc41.html>

In this case, the Supreme Court of Canada decided that the tort of negligent investigation exists in Canada. Prior to this decision an individual could sue the police only for malicious prosecution. Malicious prosecution is much more difficult to establish.

Date released: October 4, 2007

The Facts

There were 10 robberies of banks, trust companies and credit unions in Hamilton. The police suspected Hill, an Aboriginal man. The police had a Crime Stoppers tip, a police officer's photo identification of him, eyewitness identifications, a potential sighting of him near the site of one of the robberies, and witness statements that the robber was Aboriginal. During their investigation, the police released Hill's photo to the media. They also asked witnesses to identify the robber from a photo lineup of 12 persons. Of these 12, Hill was the only Aboriginal person. The police, however, also had information that two Hispanic men, one of whom looked like Hill, were the robbers. Two similar robberies occurred while Hill was in custody. Hill was charged with 10 counts of robbery but 9 charges were withdrawn before trial. Trial proceeded on the remaining charge because two bank tellers remained steadfast in their identifications of Hill. Both tellers had a photo of Hill that had been published in a newspaper on their desks, and had been interviewed together, instead of individually. Hill was convicted at trial and sentenced to three years in prison, but that decision was overturned on appeal and a new trial ordered. At the new trial Hill was found not guilty. He had spent more than 20 months in jail.

Hill then brought a civil action against the Police Service Board for a number of torts, including malicious prosecution and negligent investigation.

Hill's action for *malicious prosecution* could not succeed as the tort of malicious prosecution requires:

1. proof that the impugned prosecution was initiated by the defendant;
2. that it was terminated in favour of the plaintiff;
3. that it was instituted without reasonable and probable grounds;

4. and that the defendant acted out of malice or for a primary purpose other than that of carrying the law into effect.

Hill could not establish the third and fourth criteria.

The Court of Appeal unanimously confirmed the existence of the tort of negligent investigation. However, it divided 3-2 on the facts. The majority held that Hill had established that the police investigators had failed to meet the standard of care of a reasonable police officer in the circumstances. The dissenting two judges found that the police had conducted their investigation with tunnel vision and their use of a photo lineup in which Hill was the only aboriginal person.

Hill's appeal to the Supreme Court was limited to the finding that the police had not been negligent. The police cross-appealed to argue there was no tort of negligent investigation. By a 6-3 majority, the Supreme Court recognized the tort of negligent investigation but dismissed Hill's appeal on the facts.

The Decision

Chief Justice McLachlin (Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring) held that the police are not immune from liability under the law of negligence. They owe a duty of care to suspects. The conduct of police officers during an investigation should be measured against the standard of how a reasonable officer would have acted in the circumstances. When police officers fail to meet this standard of reasonableness, they may be accountable for harm resulting to a suspect. McLachlin J. held that no other tort provides an adequate remedy for negligent police investigations. The tort is consistent with the values of the *Charter* and fosters the public's interest in responding to failures of the justice system.

However on the facts, the Chief Justice held that the police conduct in relation to Hill, considered in light of police practices in 1995, met the standard of a reasonable officer in similar circumstances. The trial judge had found that the photo lineup's racial composition was not structurally biased and did not lead to unfairness. Hill had not established that the police, in this instance, had acted with tunnel vision.

Charron J. (Bastarache and Rothstein JJ. concurring), were of the view that the tort of negligent investigation should not be recognized in Canada. The imposition on the police of a private duty to take reasonable care not to harm the individual would inevitably pull the police away from targeting that individual as a suspect. They said that that police discretion must be exercised solely to advance the public interest, not out of a fear of civil liability.

Discussion Issues

1. Do you think it was fair that Hill was the only Aboriginal person in the photo lineup? If so would you require photo lineups to be composed only of persons of the same ethnic origin as the suspect? Can you answer this question without seeing the photo lineup?
2. Do you think that fear of being sued might affect what police officers assess as reasonable and probable grounds, and influence them to refrain from carrying out their duty to the public? The majority did not attach importance to this concern because there was no proof that it was well founded. If you think the concern is real, how would you go about establishing it?