

TORT OF NEGLIGENT INVESTIGATION
-- APPEARANCE OF FAIRNESS IN JUSTICE SYSTEM

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Ontario law recognizes that tort of negligent investigation by peace officers: *Beckstead v Ottawa* (1997), 37 O.R. (3d) 62. The tort, which recognizes peace officers owe a duty of care to suspects is matched by a duty of care to victims of crime: *Doe v Toronto* (1998), 39 O.R. (3d) 487. English courts, in *Brooks v Commissioner* [2005] UKHL 24 have strongly denied a duty of care on police in the context of their investigative duties.

The recent decision of the Court of Appeal (an unusual five member bench) in *Hill v Hamilton* (unrep. September 26, 2005) upholds the continued viability of the tort of negligent investigation. All members of the panel agreed there was no public policy reason to exclude a duty of care for police investigations. The concerns raised by the House of Lords in *Brooks* (chilling effect on investigations and similar concerns) were discounted.

The application of the cause of action was more problematic. The majority of the Court found the trial judge's decision that there was a duty of care, but such duty was met, was reasonable and fact based. As a result, there being no "palpable and overriding error," the decision stands: *Housen v Nikolaisen* [2002] 2 SCR 235. The minority, in a strongly argued reasons for judgment disagreed. The basis of the disagreement is interesting but requires some facts of the case.

Mr. Hill was arrested following a series of bank robberies in Hamilton. Prior to his arrest, his picture was released to the media by the police. Curiously, the robberies seemed to continue after Mr. Hill's arrest and while he was in custody; of course, copycat crimes could be taking place, but the seeming continuation of the crime spree after Mr. Hill's arrest might have given the police pause.

Additionally, Mr. Hill, who is aboriginal, was identified in a photo lineup in which everyone, except Mr. Hill, was white. In any event, after nearly two years in custody Mr. Hill was exonerated. The real robber, who was not aboriginal, was arrested after Mr. Hill.

The majority view focussed on the specific facts of the case and concluded, in effect, that policy standards were met. The aboriginal status of Mr. Hill was relevant merely insofar as it made the photo line-up questionable. The case would have been the same if Mr. Hill were, say, South Asian.

The minority decision looked more broadly at justice and how the wrongful detention of an aboriginal man impacts society more generally especially where the detention, though a wrong, is without a remedy. The minority writes:

[154] The second problem involves the perception of fairness, which is so basic in the administration of justice, and which has become particularly important in this country where Aboriginal justice is concerned. In *R. v Gladue*, [1999] 1 S.C.R. 688, the Supreme Court discussed the problem in very frank terms. At paras. 61, 62, 63 and 64 the Court said:

Not surprisingly, the excess imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are over-represented in virtually all aspects of the system. As this Court recently noted in *R v Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t] here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".

Statements regarding the extent and severity of this problem are disturbingly common. In *Bridging the Cultural Divide*, *supra*, at p. 309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following striking yet representative statement:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada - - First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural - - in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

To the same effect, the Aboriginal Justice Inquiry of Manitoba described the justice system in Manitoba as having failed aboriginal people on a "massive scale", referring particularly to the substantially different cultural values and experiences of aboriginal people: *The Justice System and Aboriginal People*, *supra*, at pp. 1 and 86.

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it

[155] In that context, a photo line-up where the target suspect is the only Aboriginal person among a group of Caucasians, even where the people can be viewed generally as similar in appearance, perpetuates the appearance of unfairness.

It may be that this important decision will be considered further. Certainly, the issues raised are of national importance.

**This article is intended to provide general information and is not specific legal advice. If you have a legal problem, you should not rely on this article alone but should speak to a lawyer. James Morton is certified as a specialist in civil litigation by the Law Society of Upper Canada and is a partner with Steinberg Morton Frymer LLP, a full service law firm in Toronto. You can reach James by telephone at 416-225-2777.*