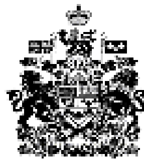

SUPREME COURT OF CANADA

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

DATE: 20071004
DOCKET: 31227

BETWEEN:

Jason George Hill
Appellant / Respondent on cross-appeal
and
Hamilton-Wentworth Regional Police Services Board, Jack Loft, Andrea McLaughlin, Joseph Stewart, Ian Matthews and Terry Hill
Respondents / Appellants on cross-appeal
\- and -
Attorney General of Canada, Attorney General of Ontario, Aboriginal Legal Services of Toronto Inc., Association in Defence of the Wrongly Convicted, Canadian Association of Chiefs of Police, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Canadian Police Association and Police Association of Ontario
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 106)	McLachlin C.J. (Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring)
DISSENTING REASONS ON CROSS-APPEAL: (paras. 107 to 188)	Charron J. (Bastarache and Rothstein JJ. concurring)

____

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

Jason George Hill *Appellant/Respondent on cross-appeal*

v.

Hamilton-Wentworth Regional Police Services Board, Jack Loft, Andrea McLaughlin, Joseph Stewart, Ian Matthews and Terry Hill *Respondents/Appellants on cross-appeal*

and

Attorney General of Canada, Attorney General of Ontario, Aboriginal Legal Services of Toronto Inc., Association in Defence of the Wrongly Convicted, Canadian Association of Chiefs of Police, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Canadian Police Association and Police Association of Ontario *Interveners*

Indexed as: Hill *v.* Hamilton-Wentworth Regional Police Services Board

Neutral citation: 2007 SCC 41.

File No.: 31227.

2006: November 10; 2007: October 4.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

Torts — Negligence — Duty of care — Police investigation — Whether police owe duty of care to suspects in criminal investigations — If so, standard of care required by police investigating a suspect — Whether police officers' conduct in investigating suspect was negligent.

Police — Investigation — Negligence — Whether Canadian law recognizes tort of negligent investigation.

H was investigated by the police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit. Police officers suspected that H had committed 10 robberies. The evidence against H included a tip, a police officer's photo identification of H, eyewitness identifications, a potential sighting of H near the site of one of the robberies, and witness statements that the robber was aboriginal. During their investigation, the police released H's photo to the media. They also asked witnesses to identify the robber from a photo lineup consisting of H, who is an aboriginal person, and 11 similar-looking Caucasian foils. The police, however, also had information that two Hispanic men, one of whom looks like H, were the robbers. Two similar robberies occurred while H was in custody. H was charged with 10 counts of robbery but 9 charges were withdrawn before trial. Trial proceeded on the remaining charge because two eyewitnesses remained steadfast in their identifications of H. H was found guilty of robbery. He appealed and a new trial was ordered. H was acquitted at the

second trial and brought a civil action that included a claim in negligence against the police based on the conduct of their investigation. The trial judge dismissed the claim in negligence and H appealed. The Court of Appeal unanimously recognized the tort of negligent investigation, however a majority of the court held that the police were not negligent in their investigation. In this Court, H appealed from the finding that the police were not negligent. The respondents cross-appealed from the finding that there is a tort of negligent investigation.

Held (Bastarache, Charron and Rothstein JJ. dissenting on the cross-appeal): The appeal and the cross-appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ.: The police are not immune from liability under the law of negligence and the tort of negligent investigation exists in Canada. Police officers owe a duty of care to suspects. Their conduct during an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. Police officers may be accountable for harm resulting to a suspect if they fail to meet this standard. In this case, the police officers' conduct, considered in light of police practices at the time, meets the standard of a reasonable officer in similar circumstances and H's claim in negligence is not made out. [3] [74] [77]

A person owes a duty of care to another person if the relationship between the two discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care. In the very particular relationship between the police and a suspect under investigation, reasonable foreseeability is clearly made out because a negligent investigation may cause harm to the suspect.

Establishing proximity generally involves examining factors such as the parties' expectations, representations, reliance and property or other interests. There is sufficient proximity between police officers and a particularized suspect under investigation to recognize a *prima facie* duty of care. The relationship is clearly personal, close and direct. A suspect has a critical personal interest in the conduct of an investigation. No other tort provides an adequate remedy for negligent police investigations. The tort is consistent with the values of the *Canadian Charter of Rights and Freedoms* and fosters the public's interest in responding to failures of the justice system. [21] [24-25] [31-39]

No compelling policy reasons negate the duty of care. Investigating suspects does not require police officers to make quasi-judicial decisions as to legal guilt or innocence or to evaluate evidence according to legal standards. The discretion inherent in police work is not relevant to whether a duty of care arises, although it is relevant to the standard of care owed to a suspect. Police officers are not unlike other professionals who exercise levels of discretion in their work but who are subject to a duty of care. Recognizing a duty of care will not raise the reasonable and probable grounds standard required for certain police conduct such as arrest, prosecution, search and seizure. The record does not establish that recognizing the tort will change the behaviour of the police, cause officers to become unduly defensive or lead to a flood of litigation. The burden of proof on a plaintiff and a defendant's right of appeal provide safeguards against any risk that a plaintiff acquitted of a crime, but in fact guilty of the crime, may recover against an officer for negligent investigation. [50-51] [53] [55] [61-65]

The standard of care of a reasonable police officer in similar circumstances should be

applied in a manner that gives due recognition to the discretion inherent in police investigation. Police officers may make minor errors or errors in judgment without breaching the standard. This standard is flexible, covers all aspects of investigatory police work, and is reinforced by the nature and importance of police investigations. [68-73]

To establish a cause of action for negligent police investigation, the plaintiff must show that he or she suffered compensable damage and a causal connection to a breach of the standard of care owed to him or her. Lawful pains and penalties imposed on a guilty person do not constitute compensable loss. The limitation period for negligent investigation begins to run when the cause of action is complete and the harmful consequences result. This occurs when it is clear that the suspect has suffered compensable harm. In this case, the limitation period did not start to run until H was acquitted of all charges of robbery. [90-98]

The respondents' conduct in relation to H, considered in light of police practices at the time, meets the standard of a reasonable officer in similar circumstances. The publication of H's photo, incomplete records of witness interviews, interviewing two witnesses together, and failing to blind-test photos are not good practices by today's standards but the evidence does not establish that a reasonable officer at the time would not have followed similar practices or that H would not have been charged and convicted if these incidents had not occurred. The trial judge accepted expert evidence that there were no rules governing photo lineups and a great deal of variation of practice at the time. It was established that the photo lineup's racial composition did not lead to unfairness. After H was arrested, credible evidence continued to support the charge against H and Crown prosecutors had assumed responsibility for the file. It has not been established that a reasonable

police officer in either a supporting or a lead investigator's role, in the circumstances, would have intervened to halt the case. [74] [78-81] [86] [88]

Per Bastarache, Charron and Rothstein JJ. (dissenting on the cross-appeal): The tort of negligent investigation should not be recognized in Canada. A private duty of care owed by the police to suspects would necessarily conflict with an officer's overarching public duty to investigate crime and apprehend offenders. This alone defeats the claim that there is a relationship of proximity between the parties sufficient to give rise to a *prima facie* duty of care. Even if a *prima facie* duty of care were found to exist, that duty should be negatived on residual policy grounds. The recognition of this tort would have significant consequences for other legal obligations and would detrimentally affect the legal system and society more generally. In light of the conclusion that the tort of negligent investigation is not available at common law, the action was properly dismissed by the courts below. [112-113] [187]

There is no question that the police owe a duty to the public to investigate crime. Determining whether this translates into a private duty owed to suspects under investigation requires examining reasonable foreseeability and proximity. The reasonable foreseeability requirement poses no barrier to finding a duty of care. A police investigator can readily foresee that a targeted suspect could be harmed as a result of the negligent conduct of an investigation. With respect to proximity, the analysis can usefully start with a search for analogous categories. This case does not fall directly or by analogy within any category of cases in which a duty of care has previously been recognized. The analogy made to victims of crime by the Court of Appeal does not hold. There is a crucial distinction between victims and suspects. Whereas a victim's interest is generally reconcilable with

a police officer's duty to investigate crime, a suspect will always suffer some harm from being targeted in an investigation, even if ultimately exonerated. A suspect's interest in being left alone by the state is at odds with the fulfilment of the police officer's public duty to investigate crime. Outside Ontario, no court of common law jurisdiction has found a private law duty of care owed by police to suspects under investigation and in cases where the issue has arisen, courts have declined to recognize such a duty. Cases based on the *Civil Code of Québec* provide little assistance in deciding the present appeal. [116-119] [131] [135] [186]

The question at the next stage of the inquiry on proximity is whether the relationship is such as to make the imposition of legal liability for negligence appropriate. Although the relationship between a police officer and a suspect is sufficiently close and direct, other factors engaged by the relationship do not give rise to proximity. The critical factor which militates against recognizing a duty of care is the conflicting interests engaged by the relationship. Enforcing the criminal law is one of the most important aspects of maintaining law and order in a free society. Fulfilling this function often requires police officers to make decisions that might adversely affect the rights and interests of citizens. The fulfilment of this public duty necessarily collides with the individual's interest to be left alone by the state. The imposition on the police of a private duty to take reasonable care not to harm the individual would therefore inevitably pull the police away from targeting that individual as a suspect. The overly cautious approach that may result from the imposition of conflicting duties would seriously undermine society's interest in having the police investigate crime and apprehend offenders. This opposition of interests has been recognized in other countries as a sufficient reason not to impose a duty of care. [136-140] [142] [147]

Residual policy considerations also militate against the recognition of such a duty. The potential imposition of civil liability gives rise to a significant concern about the improper exercise of the police discretionary power to not engage the criminal process despite the existence of reasonable and probable grounds. Police discretion must be exercised solely to advance the public interest, not out of a fear of civil liability. The proposed tort also raises difficult questions of public policy with respect to identifying the wrongfully convicted for the purpose of compensation. A verdict of not guilty is not a factual finding of innocence. A choice would have to be made whether compensation is available to all who are acquitted or reserved to those who are factually innocent. The issue is most pertinent where, as here, the alleged wrong is the conduct of a substandard police investigation. A person who committed an offence may benefit from a botched-up investigation because a negligent investigation will often be the effective cause of an acquittal. Whichever approach is adopted, there may be unforeseen and undesirable ramifications in the criminal context. These considerations provide reason to be cautious about imposing on police officers a novel duty of care towards suspects. [148] [151] [156] [160-161] [167]

Furthermore, the ordinary negligence standard, even if linked to the reasonable and probable grounds standard, cannot easily co-exist with governing criminal standards. If the civil standard for liability is to be tailored to complement governing criminal standards, the presence of reasonable and probable grounds for laying a charge must constitute a bar to any civil liability. It cannot be sufficient to show that investigative techniques used by the police were substandard. Rather, it must be established that the identification process was so flawed that it destroyed the reasonable and probable grounds for laying the charge. While the Court of Appeal agreed that the standard of care owed to suspects must be linked to the reasonable and probable grounds standard,

none of the judges considered whether the charges were nonetheless laid on the basis of reasonable and probable grounds in their negligence analysis. The private nature of the tort of negligent investigation narrows the focus to the individual rights of the parties and loses sight of the broader public interests at stake. By contrast to the proposed action in negligence, the existing torts of false arrest, false imprisonment, malicious prosecution and misfeasance in public office do not give rise to these policy concerns. The recognition that the civil tort system is not the appropriate vehicle to provide compensation for the wrongfully convicted should not, however, be viewed as undermining the importance of achieving that goal. [169] [174-175] [180-181] [187]

Cases Cited

By McLachlin C.J.

Applied: *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Donoghue v. Stevenson*, [1932] A.C. 562; **discussed:** *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18; **referred to**: *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 160 D.L.R. (4th) 697; *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474; *Brooks v. Commissioner of Police of the Metropolis*, [2005] 1 W.L.R. 1495, [2005] UKHL 24; *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Rufo v. Simpson*, 103 Cal.Rptr.2d 492 (2001); *Ryan v. Victoria (City)*,

[1999] 1 S.C.R. 201; *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Jauvin v. Procureur général du Québec*, [2004] R.R.A. 37; *Lacombe v. André*, [2003] R.J.Q. 720; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *Folland v. Reardon* (2005), 74 O.R. (3d) 688; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26.

By Charron J. (dissenting on cross-appeal)

Anns v. Merton London Borough Council, [1978] A.C. 728; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18; *Beckstead v. Ottawa (City) Chief of Police* (1997), 37 O.R. (3d) 62; *Reynen v. Canada* (1993), 70 F.T.R. 158; *McGillivary v. New Brunswick* (1994), 149 N.B.R. (2d) 311; *Al's Steak House & Tavern Inc. v. Deloitte & Touche* (1994), 20 O.R. (3d) 673; *Collie Woollen Mills Ltd. v. Canada* (1996), 107 F.T.R. 93; *Stevens v. Fredericton (City)* (1999), 212 N.B.R. (2d) 264; *Dix v. Canada (Attorney General)* (2002), 315 A.R. 1, 2002 ABQB 580; *Kleysen v. Canada (Attorney General)* (2001), 159 Man. R. (2d) 17, 2001 MBQB 205; *Avery v. Canada (Attorney General)*, [2004] N.B.J. No. 391 (QL), 2004 NBQB 372; *A.A.D. v. Tanner* (2004), 188 Man. R. (2d) 15, 2004 MBQB 213; *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238; *Alexandrou v. Oxford*, [1993] 4 All E.R. 328; *Osman v. Ferguson*, [1993] 4 All E.R. 344; *Cowan v. Chief Constable of the Avon and Somerset Constabulary*, [2001] E.W.J. No. 5088 (QL), [2001] EWCA Civ 1699; *Brooks v. Commissioner of Police of the Metropolis*, [2005] 1 W.L.R. 1495, [2005] UKHL 24; *Calveley v. Chief Constable of the Merseyside Police*, [1989] 1 All E.R. 1025; *Emanuele v. Hedley* (1997), 137 F.L.R. 339; *Courtney v. State of Tasmania*, [2000] TASSC 83;

Wilson v. State of New South Wales (2001), 53 N.S.W.L.R. 407, [2001] NSWSC 869; *Tame v. New South Wales* (2002), 191 A.L.R. 449, [2002] HCA 35; *Gruber v. Backhouse* (2003), 190 F.L.R. 122, [2003] ACTSC 18; *Duke v. State of New South Wales*, [2005] NSWSC 632; *Gregory v. Gollan*, [2006] NZHC 426; *Sullivan v. Moody* (2001), 183 A.L.R. 404, [2001] HCA 59; *Cran v. State of New South Wales* (2004), 62 N.S.W.L.R. 95, [2004] NSWCA 92, leave to appeal denied, [2005] HCA Trans 21; *Simpson v. Attorney General*, [1994] 3 N.Z.L.R. 667; *Gregoire v. Biddle*, 177 F.2d 579 (1949); *Thompson v. Olson*, 798 F.2d 552 (1986); *Kompare v. Stein*, 801 F.2d 883 (1986); *Kelly v. Curtis*, 21 F.3d 1544 (1994); *Orsatti v. New Jersey State Police*, 71 F.3d 480 (1995); *Schertz v. Waupaca County*, 875 F.2d 578 (1989); *Castle Rock v. Gonzales*, 125 S.Ct. 2796 (2005); *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 160 D.L.R. (4th) 697; *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 72 D.L.R. (4th) 580; *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Beaudry*, [2007] 1 S.C.R. 190, 2007 SCC 5; *R. v. Storrey*, [1990] 1 S.C.R. 241; *Lacombe v. André*, [2003] R.J.Q. 720; *Jauvin v. Procureur général du Québec*, [2004] R.R.A. 37.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.

Civil Code of Québec, S.Q. 1991, c. 64, art. 1457.

Criminal Code, R.S.C. 1985, c. C-46, ss. 504, 548(1)(*a*), 696.1 to 696.6.

Police Act, R.S.A. 2000, c. P-17, s. 38(1).

Police Act, R.S.B.C. 1996, c. 367, s. 34(2).

Police Act, R.S.P.E.I. 1988, c. P-11, s. 5(2).

Police Act, R.S.Q., c. P-13.1, s. 48.

Police Act, S.N.B. 1977, c. P-9.2, s. 12(1).

Police Act, S.N.S. 2004, c. 31, ss. 30(1), 31(1).

Police Act, 1990, S.S. 1990-91, c. P-15.01, ss. 18, 19(1).

Police Services Act, R.S.O. 1990, c. P.15, ss. 1, 42.

Provincial Police Act, R.S.M. 1987, c. P150, C.C.S.M. c. P150, s. 5.

Public Authorities Protection Act, R.S.O. 1990, c. P.38, s. 7(1).

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, s. 18.

Royal Newfoundland Constabulary Act, 1992, S.N.L. 1992, c. R-17, s. 8(1).

Authors Cited

Blackstone, Sir William. *Commentaries on the Laws of England*, Book IV, 1769.

Canada. Department of Justice. *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons*. Ottawa: Department of Justice, 1988.

Canada. Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Ottawa: The Commission, 1996.

Federal/Provincial/Territorial Heads of Prosecutions Committee Working Group. *Report on the Prevention of Miscarriages of Justice*. Ottawa: Department Justice, 2004.

Garrison, Arthur H. "Law Enforcement Civil Liability under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers" (1995), 18 *Police Stud.* 19.

Hall, Daniel E., et al., "Suing cops and corrections officers: Officer attitudes and experiences about civil liability" (2003), 26 *Policing: An International Journal of Police Strategies & Management* 529.

Hughes, Tom. "Police officers and civil liability: 'the ties that bind'?" (2001), 24 *Policing: An International Journal of Police Strategies & Management* 240.

Kaiser, H. Archibald. "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989), 9 *Windsor Y.B. Access Just.* 96.

Klar, Lewis N. *Tort Law*, 3rd ed. Toronto: Thomson Carswell, 2003.

Manitoba. *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*. Winnipeg: Department of Justice, 2007.

Manitoba. *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation*. Winnipeg: Manitoba Justice, 2001.

Mew, Graeme. *The Law of Limitations*, 2nd ed. Markham, Ont.: Lexis Nexis Butterworths, 2004.

Newfoundland and Labrador. *The Lamer Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons and Randy Druken: Report and Annexes*. St. John's: Government of Newfoundland and Labrador, 2006.

Nova Scotia. *Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations*. Halifax: The Commission, 1989.

Ontario. *Report of the Commission on Proceedings Involving Guy Paul Morin* (Kaufman Report). Toronto: Ministry of the Attorney General, 1998.

Saskatchewan. *Commission of Inquiry into the Wrongful Conviction of David Milgaard* (ongoing).

Vaughn, Michael S., Tab W. Cooper and Rolando V. del Carmen. "Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views" (2001), 47 *Crime & Delinquency* 3.

Weir, Tony. *Tort Law*. Oxford: Oxford University Press, 2002.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Goudge, Feldman, MacPherson, MacFarland and LaForme JJ.A.) (2005), 76 O.R. (3d) 481, 259 D.L.R. (4th) 676, 202 O.A.C. 310, 36 C.C.L.T. (3d) 105, 33 C.R. (6th) 269, [2005] O.J. No. 4045 (QL), affirming a decision of Marshall J. (2003), 66 O.R. (3d) 746, [2003] O.J. No. 3487 (QL). Appeal dismissed. Cross-appeal dismissed, Bastarache, Charron and Rothstein JJ. dissenting.

Sean Dewart, *Louis Sokolov* and *Charlene Wiseman*, for the appellant/respondent on

cross-appeal.

David G. Boghosian and *Courtney Raphael*, for the respondents/appellants on cross-appeal.

Anne M. Turley, for the intervener the Attorney General of Canada.

M. Michele Smith and *Heather C. Mackay*, for the intervener the Attorney General of Ontario.

Jonathan Rudin and *Kimberly R. Murray*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Julian N. Falconer and *Sunil S. Mathai*, for the intervener the Association in Defence of the Wrongly Convicted.

Leona K. Tesar and *Gregory R. Preston*, for the intervener the Canadian Association of Chiefs of Police.

Mark J. Sandler and *Joseph Di Luca*, for the intervener the Criminal Lawyers' Association (Ontario).

Bradley E. Berg and *Allison A. Thornton*, for the intervener the Canadian Civil Liberties

Association.

Ian Roland and *Emily Lawrence*, for the interveners the Canadian Police Association and the Police Association of Ontario.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 The police must investigate crime. That is their duty. In the vast majority of cases, they carry out this duty with diligence and care. Occasionally, however, mistakes are made. These mistakes may have drastic consequences. An innocent suspect may be investigated, arrested and imprisoned because of negligence in the course of a police investigation. This is what Jason George Hill, appellant in the case at bar, alleges happened to him.

2 Can the police be held liable if their conduct during the course of an investigation falls below an acceptable standard and harm to a suspect results? If so, what standard should be used to assess the conduct of the police? More generally, is police conduct during the course of an investigation or arrest subject to scrutiny under the law of negligence at all, or should police be immune on public policy grounds from liability under the law of negligence? These are the

questions at stake on this appeal.

3 I conclude that police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant's action on this basis. The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

II. Facts and Procedural History

4 This case arises out of an unfortunate series of events which resulted in an innocent person being investigated by the police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit.

5 Ten robberies occurred in Hamilton between December 16, 1994 and January 23, 1995. The *modus operandi* in all of the robberies seemed essentially the same. Eyewitnesses provided similar descriptions of the suspect. The police, relying on similarities in the *modus operandi* and eyewitness descriptions, concluded early on in the investigation that the same person had committed all the robberies, and labelled the perpetrator "the plastic bag robber".

6 The appellant, Jason George Hill, became a suspect in the course of the investigation of the "plastic bag" robberies. The police investigated. They released his photo to the media, and conducted a photo lineup consisting of the aboriginal suspect Hill and 11 similar-looking Caucasian foils. On January 27, 1995, the police arrested Hill and charged him with 10 counts of robbery. The evidence against him at that point included: a Crime Stoppers tip; identification by a police officer based on a surveillance photo; several eyewitness identifications (some tentative, others more solid); a potential sighting of Hill near the site of a robbery by a police officer; eyewitness evidence that the robber appeared to be aboriginal (which Hill was); and the belief of the police that a single person committed all 10 robberies.

7 At the time of the arrest, the police were in possession of potentially exculpatory evidence, namely, an anonymous Crime Stoppers tip received on January 25, 1995 suggesting that two Hispanic men ("Frank" and "Pedro") were the perpetrators. As time passed, other exculpatory evidence surfaced. Two similar robberies occurred while Hill was in custody. The descriptions of the robber and the *modus operandi* were similar to the original robberies, except for the presence of a threat of a gun in the last two robberies. The police received a second Crime Stoppers tip implicating "Frank", which indicated that "Frank" looked similar to Jason George Hill and that "Frank" was laughing because Hill was being held responsible for robberies that Frank had committed. The police detective investigating the last two robberies (Detective Millin) received information from another officer that a Frank Sotomayer could be the robber. He proceeded to gather evidence and information which tended to inculpate Sotomayer — that Sotomayer and Hill looked very much alike, that there was evidence tending to corroborate the credibility of the Crime Stoppers tip implicating "Frank", and that photos from the first robberies seemed to look more like

Sotomayer than Hill. Information from this investigation of the later robberies was conveyed to the detective supervising the investigation of the earlier robberies (Detective Loft).

8 Two of the charges against Hill were dropped in response to this new evidence, the police having concluded that Sotomayer, not Hill, had committed those robberies. However, the police did not drop all of the charges.

9 Legal proceedings against Hill in relation to the remaining eight charges began. Two more charges were withdrawn by the Crown during the preliminary inquiry because a witness testified that Hill was not the person who robbed her. Five more charges were withdrawn by the Assistant Crown Attorney assigned to prosecute at trial. A single charge remained, and the Crown decided to proceed based on this charge, largely because two eyewitnesses, the bank tellers, remained steadfast in their identifications of Hill.

10 Hill stood trial and was found guilty of robbery in March 1996. He successfully appealed the conviction based on errors of law made by the trial judge. On August 6, 1997, his appeal was allowed and a new trial was ordered. Hill was ultimately acquitted of all charges of robbery on December 20, 1999.

11 To summarize, Hill first became involved in the investigation as a suspect in January of 1995 and remained involved in various aspects of the justice system as a suspect, an accused, and a convicted person, until December of 1999. Within this period, he was imprisoned for various periods totalling more than 20 months, although not continuously.

12 Hill brought civil actions against the police (the Hamilton-Wentworth Regional Police Services Board and a number of individual officers) and the Crown prosecutors involved in his preliminary inquiry and trial. The actions against some of the individual officers and all of the Crown prosecutors were discontinued before trial. The action against the remaining defendants was brought on the basis of negligence, malicious prosecution, and breach of rights protected by the *Canadian Charter of Rights and Freedoms*. This appeal is concerned with the negligence claim.

13 Hill alleges that the police investigation was negligent in a number of ways. He attacks the identifications by the two bank tellers on the ground that they were interviewed together (not separately, as non-mandatory guidelines suggested), with a newspaper photo identifying Hill as the suspect on their desks, and particularly objects to the methods used to interview witnesses and administer a photo lineup. He also alleged that the police failed to adequately reinvestigate the robberies when new evidence emerged that cast doubt on his initial arrest.

14 At trial, Marshall J. of the Ontario Superior Court of Justice held that the police were not liable in negligence ((2003), 66 O.R. (3d) 746). In his view, the conduct of the police did not breach the standard of care of a reasonably competent professional in like circumstances; the police had acted in the frenzy of the moment, in circumstances where there was no recognized police procedure at the time, and it would be "facile hindsight" to conclude that they were negligent (para. 75). The trial judge expressed considerable sympathy for Hill and found frailties in the police evidence. Nevertheless, he concluded that the standard of care that would be expected of the reasonable officer at that time was met (paras. 75-76).

15 Hill appealed. The Court of Appeal unanimously held that there is a tort of negligent investigation and that the appropriate standard of care is the reasonable officer in like circumstances, subject to qualification at the point of arrest when the standard of care is tied to the standard of reasonable and probable grounds ((2005), 76 O.R. (3d) 481). However, the Court of Appeal split on the application of the tort of negligent investigation to the facts.

16 A majority of three (*per* MacPherson J.A. (Goudge and MacFarland JJ.A. concurring)) held that the standard of care was not breached and that the police should not be held liable in negligence. In the view of the majority, the impugned elements of the investigation pre-arrest complied with the standard of care. In particular, the majority was not prepared to find the photo lineup negligent. In light of the lack of uniform rules or procedures relating to photo lineups at the time, it was not clear that the police failed to do what the reasonable officer would have done in conducting the lineup as they did. Further, it was not established that the photo lineup was structurally biased. Nor was the failure to reinvestigate negligent. First, since "Hamilton is a fairly large city with many bank robberies", it was reasonable that the police's knowledge that later robberies were committed by Sotomayer did not cast doubt on the earlier arrest of the appellant (para. 112). Second, it was reasonable not to connect information relating to later robberies to the earlier robberies for which Hill was arrested because the later robberies involved a gun and the earlier ones did not. Third, police did take significant actions in response to new information, including dropping some of the charges against Hill. Fourth, some key evidence against Hill remained unchanged even after Sotomayer was arrested for some of the "plastic bag robberies", including some of the eyewitness identifications. Finally, the ultimate decision to proceed to trial

was made by the Crown prosecutor, not the police.

17 In dissent, Feldman and LaForme JJ.A. found aspects of the impugned police conduct constituted negligent failure to reinvestigate. They concluded that the trial judge had made errors of law and palpable and overriding errors of fact, in concluding that the photo lineup and failure to reinvestigate were not negligent. A photo lineup consisting of one aboriginal person and eleven Caucasians is "*prima facie* potentially structurally biased with obvious potential for unfairness" and thus "falls below the standard of care required of police" (para. 156). Feldman and LaForme JJ.A. also found that the police had not pursued a number of pieces of evidence which could potentially have exculpated Hill (paras. 144 ff.).

18 Hill appeals to this Court, contending that the majority of the Court of Appeal erred in finding that the police investigation leading to his arrest and prosecution was not negligent. The police cross-appeal, arguing that there is no tort of negligent investigation in Canadian law.

III. Analysis

The Tort of Negligent Investigation

1. Duty of Care

19 The issue at this stage is whether the law recognizes a duty of care on an investigating police officer to a suspect in the course of investigation. This matter is

not settled in Canada. Lower courts have divided and this Court has never considered the matter. We must therefore ask whether, as a matter of principle, a duty of care should be recognized in this situation.

20 The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80, at para. 9; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, at paras. 47-50; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18, at para. 47).)

(a) *Does the Relationship Establish a Prima Facie Duty of Care?*

21 The purpose of the inquiry at this stage is to determine if there was a relationship between the parties that gave rise to a legal duty of care.

22 The first element of such a relationship is foreseeability. In the foundational case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), Lord Atkin stated:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply.

> . . . Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. [Emphasis added; p. 580.]

Lord Atkin went on to state that each person "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (p. 580). Thus the first question in determining whether a duty in negligence is owed is whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim.

23 However, as acknowledged in *Donoghue* and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To impose a duty of care "there must also be a close and direct relationship of proximity or neighbourhood": *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate?

24 Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule, factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different

categories of cases involving different factors” (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151, cited in *Cooper*, at para. 35).

25 Proximity may be seen as providing an umbrella covering types of relationships where a duty of care has been found by the courts. The vast number of negligence cases proceed on the basis of a type of relationship previously recognized as giving rise to a duty of care. The duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client — these are but a few of the relationships where sufficient proximity to give rise to a *prima facie* duty of care is recognized, provided foreseeability is established. The categories of relationships characterized by sufficient proximity to attract legal liability are not closed, however. From time to time, claims are made that relationships hitherto unconsidered by courts support a duty of care giving rise to legal liability. When such cases arise, the courts must consider whether the claim for sufficient proximity is established. If it is, and the *prima facie* duty is not negated for policy reasons at the second stage of the *Anns* test, the new category will thereafter be recognized as capable of giving rise to a duty of care and legal liability. The result is a concept of liability for negligence which provides a large measure of certainty, through settled categories of liability — attracting relationships, while permitting expansion to meet new circumstances and evolving conceptions of justice.

26 In this case, we are faced with a claim in negligence against persons in a type of relationship not hitherto considered by the law — the relationship between an investigating police officer and his suspect. We must therefore ask whether, on principles applied in previous cases, this relationship is marked by sufficient proximity to make the imposition of legal liability for negligence

appropriate.

27 Before moving on to the analysis of proximity in depth, it is worth pausing to state explicitly that this judgment is concerned only with a very particular relationship — the relationship between a police officer and a particularized suspect that he is investigating. There are particular considerations relevant to proximity and policy applicable to this relationship, including: the reasonable expectations of a party being investigated by the police, the seriousness of the interests at stake for the suspect, the legal duties owed by police to suspects under their governing statutes and the *Charter* and the importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person. It might well be that both the considerations informing the analysis of both proximity and policy would be different in the context of other relationships involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and the family of a victim. This decision deals only with the relationship between the police and a suspect being investigated. If a new relationship is alleged to attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh *Anns* analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating. Such an approach will also ensure that the law of tort is developed in a manner that is sensitive to the benefits of recognizing liability in novel situations where appropriate, but at the same time, sufficiently incremental and gradual to maintain a reasonable degree of certainty in the law. Further, I cannot accept the suggestion that cases dealing with the relationship between the police and victims or between a police chief and the family of a victim are determinative here, although aspects of the analysis in those cases may be applicable and informative in the case at bar. (See *Odhavji* and

Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998), 160 D.L.R. (4th) 697 (Ont. Ct. (Gen. Div.)).) I note that *Jane Doe* is a lower court decision and that debate continues over the content and scope of the ratio in that case. I do not purport to resolve these disputes on this appeal. In fact, and with great respect to the Court of Appeal who relied to some extent on this case, I find the *Jane Doe* decision of little assistance in the case at bar.

28 Having said this, I proceed to consider whether there is sufficient proximity between a police officer and a suspect that he or she is investigating to establish a *prima facie* duty of care.

29 The most basic factor upon which the proximity analysis fixes is whether there is a relationship between the alleged wrongdoer and the victim, usually described by the words "close and direct". This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed. A sufficiently close and direct connection between the actions of the wrongdoer and the victim may exist where there is a personal relationship between alleged wrongdoer and victim. However, it may also exist where there is no personal relationship between the victim and wrongdoer. In the words of Lord Atkin in *Donoghue*:

> [A] duty to take due care [arises] when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. <u>I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.</u> [Emphasis added; p. 581.]

30 While not necessarily determinative, the presence or absence of a personal relationship is an important factor to consider in the proximity analysis. However, depending on the case, it may be necessary to consider other factors which may bear on the question of whether the relationship between the defendant and plaintiff is capable in principle of supporting legal liability: *Cooper*, at para. 37.

31 In accordance with the usual rules governing proof of a cause of action, the plaintiff has the formal onus of establishing the duty of care: *Odhavji* and *Childs*, at para. 13, should not be read as changing this fundamental rule. Uncertainty may arise as to which factors fall to be considered at this part of the stage one analysis, and which should be reserved to the second stage "policy" portion of the analysis. The principle that animates the first stage of the *Anns* test — to determine whether the relationship is in principle sufficiently close or "proximate" to attract legal liability — governs the nature of considerations that arise at this stage. "The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant", for example expectations, representations, reliance and the nature of the interests engaged by that relationship: *Cooper*, at paras. 30 (emphasis deleted) and 34. By contrast, the final stage of *Anns* is concerned with "residual policy considerations" which "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper*, at para. 37. In practice, there may be overlap between stage one and stage two considerations. We should not forget that stage one and stage two of the *Anns* test are merely a means to facilitate considering what is at stake. The important thing is that in deciding whether a duty of care lies, all relevant concerns should be considered.

32 In this appeal, we are concerned with the relationship between an investigating police officer and a suspect. The requirement of reasonable foreseeability is clearly made out and poses no barrier to finding a duty of care; clearly negligent police investigation of a suspect may cause harm to the suspect.

33 Other factors relating to the relationship suggest sufficient proximity to support a cause of action. The relationship between the police and a suspect identified for investigation is personal, and is close and direct. We are not concerned with the universe of all potential suspects. The police had identified Hill as a particularized suspect at the relevant time and begun to investigate him. This created a close and direct relationship between the police and Hill. He was no longer merely one person in a pool of potential suspects. He had been singled out. The relationship is thus closer than in *Cooper* and *Edwards.* In those cases, the public officials were not acting in relation to the claimant (as the police did here) but in relation to a third party (i.e. persons being regulated) who, at a further remove, interacted with the claimants.

34 A final consideration bearing on the relationship is the interests it engages. In this case, personal representations and consequent reliance are absent. However, the targeted suspect has a critical personal interest in the conduct of the investigation. At stake are his freedom, his reputation and how he may spend a good portion of his life. These high interests support a finding of a proximate relationship giving rise to a duty of care.

35 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. Government compensation schemes possess their own limits, both in terms of eligibility and amount of compensation. 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" (paras. 77-78). To deny a remedy in tort is, quite literally, to deny justice. This supports recognition of the tort of negligent police investigation, in order to complete the arsenal of already existing common law and statutory remedies.

36 The personal interest of the suspect in the conduct of the investigation is enhanced by a public interest. Recognizing an action for negligent police investigation may assist in responding to failures of the justice system, such as wrongful convictions or institutional racism. The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada. While the vast majority of police officers perform their duties carefully and reasonably, the record shows that wrongful convictions traceable to faulty police investigations occur. Even one wrongful conviction is too many, and Canada has had more than one. 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. (See the Honourable Peter Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001), at p. 10 ("Cory Report"); the Right Honourable Antonio Lamer, *The Lamer Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton,*

Gregory Parsons and Randy Druken: Report and Annexes (2006), at p. 71; Federal/Provincial/Territorial Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (2004); the Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), at pp. 25-26, 30-31, 34-36, 1095-96, 1098-99, 1101 and 1124.)

37 As Peter Cory points out, at pp. 101 and 103:

> [I]f the State commits significant errors in the course of the investigation and prosecution, it should accept the responsibility for the sad consequences . . . .
>
> . . .
>
> [S]ociety needs protection from both the deliberate and the careless acts of omission and commission which lead to wrongful conviction and prison.

38 Finally, it is worth noting that a duty of care by police officers to suspects under investigation is consistent with the values and spirit underlying the *Charter*, with its emphasis on liberty and fair process. The tort duty asserted here would enhance those values, which supports the appropriateness of its recognition.

39 These considerations lead me to conclude that an investigating police officer and a particular suspect are close and proximate such that a *prima facie* duty should be recognized. Viewed from the broader societal perspective, suspects may reasonably be expected to rely on the police to conduct their investigation in a competent, non-negligent manner. (See *Odhavji*, at para. 57.)

40 It is argued that recognition of liability for negligent investigation would produce a conflict between the duty of care that a police officer owes to a suspect and the police's officer duty to the public to prevent crime, that negates the duty of care. I do not agree. First, it seems to me doubtful that recognizing a duty of care to suspects will place police officers under incompatible obligations. Second, on the test set forth in *Cooper* and subsequent cases, conflict or potential conflict does not in itself negate a *prima facie* duty of care; the conflict must be between the novel duty proposed and an "overarching public duty", and it must pose a real potential for negative policy consequences. Any potential conflict that could be established here would not meet these conditions.

41 First, the argument that a duty to take reasonable care toward suspects conflicts with an overarching duty to investigate crime is tenuous. The officer's duty to the public is not to investigate in an unconstrained manner. It is a duty to investigate in accordance with the law. That law includes many elements. It includes the restrictions imposed by the *Charter* and the *Criminal Code*, R.S.C. 1985, c. C-46. Equally, it may include tort law. The duty of investigation in accordance with the law does not conflict with the presumed duty to take reasonable care toward the suspect. Indeed, the suspect is a member of the public. As such, the suspect shares the public's interest in diligent investigation in accordance with the law.

42 My colleague Justice Charron suggests there is a conflict between the police officer's duty to investigate crime, on the one hand, and the officer's duty to leave people alone. It may be that a citizen has an interest in or preference for being left alone. But I know of no authority for the proposition that an investigating police officer is under a duty to leave people alone. The proposed

tort duty does not presuppose a duty to leave the citizen alone, but only a duty to investigate reasonably in accordance with the limits imposed by law.

43 Second, even if a potential conflict could be posited, that would not automatically negate the *prima facie* duty of care. The principle established in *Cooper* and its progeny is more limited. A *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences. This reflects the view that a duty of care in tort law should not be denied on speculative grounds. *Cooper* illustrates this point. The proposed duty was rejected on the basis, not of mere conflict, but a conflict that would "come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole" (para. 50). Not only was there a conflict, but a conflict that would engender serious negative policy consequences. In this case, the situation is otherwise. Requiring police officers to take reasonable care toward suspects in the investigation of crimes may have positive policy ramifications. Reasonable care will reduce the risk of wrongful convictions and increase the probability that the guilty will be charged and convicted. By contrast, the potential for negative repercussions is dubious. Acting with reasonable care to suspects has not been shown to inhibit police investigation, as discussed more fully in connection with the argument on chilling effect.

44 In a variant on this argument, it is submitted that in a world of limited resources, recognizing a duty of care on police investigating crimes to a suspect will require the police to choose between spending resources on investigating crime in the public interest and spending resources in a manner that an individual suspect might conceivably prefer. The answer to this

argument is that the standard of care is based on what a reasonable police officer would do in similar circumstances. The fact that funds are not unlimited is one of the circumstances that must be considered. Another circumstance that must be considered, however, is that the effective and responsible investigation of crime is one of the basic duties of the state, which cannot be abdicated. A standard of care that takes these two considerations into account will recognize what can reasonably be accomplished within a responsible and realistic financial framework.

45 I conclude that the relationship between a police officer and a particular suspect is close enough to support a *prima facie* duty of care.

(b) *Policy Considerations Negating the Prima Facie Duty of Care*

46 The second stage of the *Anns* test asks whether there are broader policy reasons for declining to recognize a duty of care owed by the defendant to the plaintiff. Even though there is sufficient foreseeability and proximity of relationship to establish a *prima facie* duty of care, are there policy considerations which negate or limit that duty of care?

47 In this case, negating conditions have not been established. No compelling reason has been advanced for negating a duty of care owed by police to particularized suspects being investigated. On the contrary, policy considerations support the recognition of a duty of care.

48 The respondents and interveners representing the Attorneys General of Ontario and Canada and various police associations argue that the following policy considerations negate a duty

of care: the “quasi-judicial” nature of police work; the potential for conflict between a duty of care in negligence and other duties owed by police; the need to recognize a significant amount of discretion present in police work; the need to maintain the standard of reasonable and probable grounds applicable to police conduct; the potential for a chilling effect on the investigation of crime; and the possibility of a flood of litigation against the police. In approaching these arguments, I proceed on the basis that policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent. Judged by this standard, none of these considerations provide a convincing reason for rejecting a duty of care on police to a suspect under investigation.

(i) The “Quasi-Judicial” Nature of Police Duties

49 It was argued that the decision of police to pursue the investigation of a suspect on the one hand, or close it on the other, is a quasi-judicial decision, similar to that taken by the state prosecutor. It is true that both police officers and prosecutors make decisions that relate to whether the suspect should stand trial. But the nature of the inquiry differs. Police are concerned primarily with gathering and evaluating evidence. Prosecutors are concerned mainly with whether the evidence the police have gathered will support a conviction at law. The fact-based investigative character of the police task distances it from a judicial or quasi-judicial role.

50 The possibility of holding police civilly liable for negligent investigation does not require them to make judgments as to legal guilt or innocence before proceeding against a suspect. Police are required to weigh evidence to some extent in the course of an investigation: *Chartier v.*

Attorney General of Quebec, [1979] 2 S.C.R. 474. But they are not required to evaluate evidence according to legal standards or to make legal judgments. That is the task of prosecutors, defence attorneys and judges. This distinction is properly reflected in the standard of care imposed, once a duty is recognized. The standard of care required to meet the duty is not that of a reasonable lawyer or judge, but that of a reasonable *police officer*. Where the police investigate a suspect reasonably, but lawyers, judges or prosecutors act unreasonably in the course of determining his legal guilt or innocence, then the police officer will have met the standard of care and cannot be held liable either for failing to perform the job of a lawyer, judge or prosecutor, or for the unreasonable conduct of other actors in the criminal justice system.

(ii) Discretion

51 The discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care. It is true that police investigation involves significant discretion and that police officers are professionals trained to exercise this discretion and investigate effectively. However, the discretion inherent in police work is taken into account in formulating the *standard* of care, not whether a duty of care arises. The discretionary nature of police work therefore provides no reason to deny the existence of a duty of care in negligence.

52 Police, like other professionals, exercise professional discretion. No compelling distinction lies between police and other professionals on this score. Discretion, hunch and intuition have their proper place in police investigation. However, to characterize police work as completely unpredictable and unbound by standards of reasonableness is to deny its professional nature. Police

exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.

53 Police are not unlike other professionals in this respect. Many professional practitioners exercise similar levels of discretion. The practices of law and medicine, for example, involve discretion, intuition and occasionally hunch. Professionals in these fields are subject to a duty of care in tort nonetheless, and the courts routinely review their actions in negligence actions without apparent difficulty.

54 Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.

(iii) Confusion with the Standard of Care for Arrest

55 Recognizing a duty of care in negligence by police to suspects does not raise the standard required of the police from reasonable and probable grounds to some higher standard, as alleged. The requirement of reasonable and probable grounds for arrest and prosecution informs the standard of care applicable to some aspects of police work, such as arrest and prosecution, search and seizure, and the stopping of a motor vehicle. A flexible standard of care appropriate to the circumstances, discussed more fully below, answers this concern.

(iv) <u>Chilling Effect</u>

56 It has not been established that recognizing a duty of care in tort would have a chilling effect on policing, by causing police officers to take an unduly defensive approach to investigation of criminal activity. In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other. Files must be closed, life must move on, but care must also be taken. All of this is taken into account, not at the stage of determining whether police owe a duty of care to a particular suspect, but in determining what the standard of that care should be.

57 The record does not support the conclusion that recognizing potential liability in tort significantly changes the behaviour of police. Indeed, some of the evidence suggests that tort liability has no adverse effect on the capacity of police to investigate crime. This supports the conclusion of the majority in the Court of Appeal below that the "'chilling effect' scenario" remains speculative and that concern about preventing a "chilling effect" on the investigation of crime is not (on the basis of present knowledge) a convincing policy rationale for negating a duty of care (para. 63). (For a sampling of the empirical evidence on point, see e.g.: A. H. Garrison, "Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers" (1995), 18 *Police Stud.* 19; T. Hughes, "Police officers and civil liability: 'the ties that bind'?" (2001), 24 *Policing: An International Journal of Police Strategies & Management* 240, at pp. 253-54, 256 and 257-58; M. S. Vaughn, T. W. Cooper and R.

V. del Carmen, "Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views" (2001), 47 *Crime & Delinquency* 3; D. E. Hall et al., "Suing cops and corrections officers: Officer attitudes and experiences about civil liability" (2003), 26 *Policing: An International Journal of Police Stategies & Management* 529, at pp. 544-45.) Whatever the situation may have been in the United Kingdom (see *Brooks v. Commissioner of Police of the Metropolis*, [2005] 1 W.L.R. 1495, [2005] UKHL 24; *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.)), the studies adduced in this case do not support the proposition that recognition of tort liability for negligent police investigation will impair it.

58 The lack of evidence of a chilling effect despite numerous studies is sufficient to dispose of the suggestion that recognition of a tort duty would motivate prudent officers not to proceed with investigations "except in cases where the evidence is overwhelming" (Charron J., at para. 152). This lack of evidence should not surprise us, given the nature of the tort. All the tort of negligent investigation requires is that the police act reasonably in the circumstances. It is reasonable for a police officer to investigate in the absence of overwhelming evidence — indeed evidence usually becomes overwhelming only by the process of investigation. Police officers can investigate on whatever basis and in whatever circumstances they choose, provided they act reasonably. The police need not let all but clearly impaired drivers go to avoid the risk of litigation, as my colleague suggests. They need only act reasonably. They may arrest or demand a breath sample if they have reasonable and probable grounds. And where such grounds are absent, they may have recourse to statutorily authorized roadside tests and screening.

59 It should also be noted that many police officers (like other professionals) are

indemnified from personal civil liability in the course of exercising their professional duties, reducing the prospect that their fear of civil liability will chill crime prevention.

(v) Flood of Litigation

60 Recognizing sufficient proximity in the relationship between police and suspect to ground a duty of care does not open the door to indeterminate liability. Particularized suspects represent a limited category of potential claimants. The class of potential claimants is further limited by the requirement that the plaintiff establish compensable injury caused by a negligent investigation. Treatment rightfully imposed by the law does not constitute compensable injury. These considerations undermine the spectre of a glut of jailhouse lawsuits for negligent police investigation.

61 The record provides no basis for concluding that there will be a flood of litigation against the police if a duty of care is recognized. As the Court of Appeal emphasized, the evidence from the Canadian experience seems to be to the contrary (majority reasons, at para. 64). Quebec and Ontario have both recognized police liability in negligence (or the civil law equivalent) for many years, and there is no evidence that the floodgates have opened and a large number of lawsuits against the police have resulted. (See the majority reasons in the Court of Appeal, at para. 64.) The best that can be said from the record is that recognizing a duty of care owed by police officers to particular suspects led to a relatively small number of lawsuits, the cost of which are unknown, with effects on the police that have not been measured. This is not enough to negate the *prima facie* duty of care established at the first stage of the *Anns* test.

(vi) <u>The Risk that Guilty Persons Who Are Acquitted May Unjustly Recover in Tort</u>

62 My colleague Charron J. (at paras. 156 ff.) states that recognizing tort liability for negligent police investigation raises the possibility that persons who have been acquitted of the crime investigated and charged, but who are in fact guilty, may recover against an officer for negligent investigation. This, she suggests, would be unjust.

63 This possibility of "injustice" — if indeed that is what it is — is present in any tort action. A person who recovers against her doctor for medical malpractice may, despite having proved illness in court, have in fact been malingering. Or, despite having convinced the judge on a balance of probabilities that the doctor's act caused her illness, it may be that the true source of the problem lay elsewhere. The legal system is not perfect. It does its best to arrive at the truth. But it cannot discount the possibility that a plaintiff who has established a cause of action may "factually", if we had means to find out, not have been entitled to recover. The possibility of error may be greater in some circumstances than others. However, I know of no case where this possibility has led to the conclusion that tort recovery for negligence should be denied.

64 The answer to the ever-present possibility of erroneous awards of damages lies elsewhere, it seems to me. The first safeguard is the requirement that the plaintiff prove every element of his or her case. Any suspect suing the police bears the burden of showing that police negligence in the course of an investigation caused harm compensable at law. This means that the suspect must establish through evidence that the damage incurred, be it a conviction, imprisonment,

prosecution or other compensable harm, would not have been suffered but for the police's negligent investigation. Evidence going to the factual guilt or innocence of the suspect, including the results of any criminal proceedings that may have occurred, may be relevant to this causation inquiry. It is not necessary to decide here whether an acquittal should be treated as conclusive proof of innocence in a subsequent civil trial. Existing authority is equivocal: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63. (I note that in the United States, victims may recover damages against a defendant who has been acquitted in criminal proceedings: *Rufo v. Simpson*, 103 Cal.Rptr.2d 492 (Ct. App. 2001).) The second safeguard is the right of appeal. These safeguards, not the categorical denial of the right to sue in tort, are the law's response to the ever-present possibility of error in the legal process.

65 I conclude that no compelling policy reason has been shown to negate the *prima facie* duty of care.

2. Standard of Care

66 Two issues arise: What is the appropriate standard of care? and Was that standard met on the facts of this case?

(a) *The Appropriate Standard of Care for the Tort of Negligent Investigation*

67 Both the trial judge and the Court of Appeal adopted the standard of the reasonable police officer in like circumstances as the standard that is generally appropriate in cases of alleged

negligent investigation. I agree that this is the correct standard.

68 A number of considerations support the conclusion that the standard of care is that of a reasonable police officer in all the circumstances. First, the standard of a reasonable police officer in all the circumstances provides a flexible overarching standard that covers all aspects of investigatory police work and appropriately reflects its realities. The particular conduct required is informed by the stage of the investigation and applicable legal considerations. At the outset of an investigation, the police may have little more than hearsay, suspicion and a hunch. What is required is that they act as a reasonable investigating officer would in those circumstances. Later, in laying charges, the standard is informed by the legal requirement of reasonable and probable grounds to believe the suspect is guilty; since the law requires such grounds, a police officer acting reasonably in the circumstances would insist on them. The reasonable officer standard entails no conflict between criminal standards (Charron J., at para. 175). Rather, it incorporates them, in the same way it incorporates an appropriate degree of judicial discretion, denies liability for minor errors or mistakes and rejects liability by hindsight. In all these ways, it reflects the realities of police work.

69 Second, as mentioned, the general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances. In cases of professional negligence, this rule is qualified by an additional principle: where the defendant has special skills and experience, the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling". (See L. N. Klar, *Tort Law* (3rd ed. 2003), at p. 306.) These principles suggest the standard of the reasonable officer in like circumstances.

70 Third, the common law factors relevant to determining the standard of care confirm the reasonable officer standard. These factors include: the likelihood of known or foreseeable harm, the gravity of harm, the burden or cost which would be incurred to prevent the injury, external indicators of reasonable conduct (including professional standards) and statutory standards. (See *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at p. 227.) These factors suggest a standard of reasonableness, not something less onerous. There is a significant likelihood that police officers may cause harm to suspects if they investigate negligently. The gravity of the potential harm caused is serious. Suspects may be arrested or imprisoned, their livelihoods affected and their reputations irreparably damaged. The cost of preventing the injury, in comparison, is not undue. Police meet a standard of reasonableness by merely doing what a reasonable police officer would do in the same circumstances — by living up to accepted standards of professional conduct to the extent that it is reasonable to expect in given circumstances. This seems neither unduly onerous nor overly costly. It must be supposed that professional standards require police to act professionally and carefully, not just to avoid gross negligence. The statutory standards imposed by the *Police Services Act*, R.S.O. 1990, c. P.15, although not definitive of the standard of care, are instructive (s. 1).

71 Fourth, the nature and importance of police work reinforce a standard of the reasonable officer in similar circumstances. Police conduct has the capacity to seriously affect individuals by subjecting them to the full coercive power of the state and impacting on their repute and standing in the community. It follows that police officers should perform their duties reasonably. It has thus been recognized that police work demands that society (including the courts) impose and enforce high standards on police conduct (Cory Report, at p. 10). This supports a reasonableness standard,

judged in the context of a similarly situated officer. A more lenient standard is inconsistent with the standards that society and the law rightfully demand of police in the performance of their crucially important work.

72 Finally, authority supports the standard of the reasonable police officer similarly placed. The preponderance of case law dealing with professionals has applied the standard of the reasonably competent professional in like circumstances. (See Klar, at p. 349; see also the reasons of the trial judge at para. 63.) The Quebec Court of Appeal has twice stated that the standard is the ordinarily competent officer in like circumstances. (*Jauvin v. Procureur général du Québec*, [2004] R.R.A. 37, at para. 59, and *Lacombe v. André*, [2003] R.J.Q. 720, at para. 41).

73 I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. 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

(Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care. (See *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.); Klar, at p. 359.)

(b) *Application of the Standard of Care to the Facts — Was the Police Conduct in this Case Negligent?*

74 The defendant police officers owed a duty of care to Mr. Hill. That required them to meet the standard of a reasonable officer in similar circumstances. While the investigation that led to Mr. Hill's arrest and conviction was flawed, I conclude that it did not breach this standard, judged by the standards of the day.

75 Hill alleges that Detective Loft, who was in charge of the investigation of the plastic bag robberies, conducted the investigation negligently, and that Officers McLaughlin, Stewart, Matthews and Hill acted negligently in aspects of the investigation assigned to them. On this basis, he argues that the Police Services Board is vicariously liable for the individual acts and omissions of its officers.

76 The arrest itself is not impugned as negligent. Although there were problems in the case against Hill, it is accepted that the investigation, as it stood at the time the arrest was made, disclosed reasonable and probable grounds. It is the conduct of the police prior to and following the arrest that

Hill criticizes. At the pre-arrest stage, Mr. Hill alleges: witness contamination as the result of publishing his photo (McLaughlin); failure to make proper records of events and interviews with witnesses (McLaughlin and Stewart); interviewing two witnesses together and with a photo of Hill on the desk (McLaughlin); and structural bias in the photo lineup in which Hill was identified (Hill and Loft). At the post-arrest stage, Hill charges that Detective Loft failed to reinvestigate after evidence came to light that suggested the robber was not Hill, but a different man, Sotomayer. (It is also alleged that Detective Loft failed to communicate relevant facts to defence counsel. This has more to do with trial conduct than investigation, and I consider it no further.)

77 We must consider the conduct of the investigating officers in the year 1995 in all of the circumstances, including the state of knowledge then prevailing. Police practices, like practices in other professions, advance as time passes and experience and understanding accumulate. Better practices that developed in the years after Hill's investigation are therefore not conclusive. By extension, the conclusion that certain police actions did not violate the standard of care in 1995 does not necessarily mean that the same or similar actions would meet the standard of care today or in the future. We must also avoid the counsel of perfection; the reasonable officer standard allows for minor mistakes and misjudgments. Finally, proper scope must be accorded to the discretion police officers properly exercise in conducting an investigation.

78 Considered in this light, the first four complaints, while questionable, were not sufficiently serious on the record viewed as a whole to constitute a departure from the standard of a reasonable police officer in the circumstances. The publication of Hill's photo, the somewhat incomplete record of witness interviews, the fact that two witnesses were interviewed together and

the failure to blind-test the photos put to witnesses are not good police practices, judged by today's standards. But the evidence does not establish that a reasonable officer in 1995 would not have followed similar practices in similar circumstances. Nor is it clear that if these incidents had not occurred, Hill would not have been charged and convicted. It follows that the individual officers involved in these incidents cannot be held liable to Hill in negligence.

79 This brings us to the photo lineup. The photo array consisted of one aboriginal suspect, Hill, and eleven Caucasian foils. However, a number of the subjects had similar features and colouring, so that Hill did not in fact stand out as the only aboriginal.

80 The first question is whether this photo lineup met the standard of a reasonable officer investigating an offence in 1995. The trial judge accepted expert evidence that there were "no rules" and "a great deal of variance in practice right up to the present time" in relation to photo lineups (paras. 66 and 70). These findings of fact have not been challenged. It follows that on the evidence adduced, it cannot be concluded that the photo lineup was unreasonable, judged by 1995 standards. This said, the practice followed was not ideal. A reasonable officer today might be expected to avoid lineups using foils of a different race than the suspect, to avoid both the perception of injustice and the real possibility of unfairness to suspects who are members of minority groups — concerns underlined by growing awareness of persisting problems with institutional bias against minorities in the criminal justice system, including aboriginal persons like Mr. Hill. (See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996).)

81 In any event, it was established that the lineup's racial composition did not lead to unfairness. A racially skewed lineup is structurally biased only "if you can tell that the one person is non-Caucasian" and "assuming the suspect is the one that's standing out" (majority reasons in the Court of Appeal, at para. 105). Although the suspects were classified as being of a different race by the police's computer system, at least some of them appeared to have similar skin tones and similar facial features to Hill. On this evidence, the trial judge concluded that the lineup was not in fact structurally biased. Any risk that Hill might have been unfairly chosen over the 11 foils in the photo lineup did not arise from structural bias relating to the racial makeup of the lineup but rather from the fact that Hill happened to look like the individual who actually perpetrated the robberies, Frank Sotomayer.

82 It remains to consider Mr. Hill's complaint that the police negligently failed to reinvestigate when new information suggesting he was not the robber came to light after his arrest and incarceration. This complaint must be considered in the context of the investigation as a whole. The police took the view from the beginning that the 10 robberies were the work of a single person, branded the plastic bag robber. They maintained this view and arrested Hill despite a series of tips implicating two men, "Pedro" and "Frank". Other weaknesses in the pre-charge case against Hill were the failure of a search of Hill's home to turn up evidence, and the fact that at the time of his arrest Hill had a long goatee of several weeks' growth, while the eyewitnesses to the crime described the robber as a clean-shaven man. While the police may have had reasonable and probable grounds for charging Hill, there were problems with their case.

83 After Hill was charged and taken into custody, the robberies continued. Another officer,

Detective Millin, was put in charge of the investigation of these charges. Sotomayer emerged as a suspect. Millin went into Hill's file and became concerned that Sotomayer, not Hill, may have committed at least some of the earlier robberies. He met with Detective Loft and discussed with him the fact that in the photographic record, the perpetrator of the December 16 robbery resembled Sotomayer more than Hill. As a result, on March 7 the charges against Hill relating to that robbery were withdrawn and Sotomayer was charged instead. Detective Millin met with Detective Loft again on April 4 and 6 to express concerns that Sotomayer and not Hill was the plastic bag bandit on the other charges. Detective Loft told Detective Millin that he would attempt to have the trial of the charges against Hill put over to permit further investigation. He never did so. The matter remained in the hands of the Crown prosecutors and no further investigation was done. Eventually, the Crown withdrew all the charges, except one, on which Hill was convicted. Detective Loft did not intervene to prevent that charge going forward. Nor did he check the alibi that Hill supplied. Had Detective Loft conducted further investigation, it is likely the case against Hill would have collapsed. Had he re-interviewed the eyewitnesses, for example, and shown them Sotomayer's photo, it is probable that matters would have turned out otherwise; when the witnesses were eventually shown the photo of Sotomayer, they recanted their identification of Hill as the robber.

84 When new information emerges that could be relevant to the suspect's innocence, reasonable police conduct may require the file to be reopened and the matter reinvestigated. Depending on the nature of the evidence which later emerges, the requirements imposed by the duty to reinvestigate on the police may vary. In some cases, merely examining the evidence and determining that it is not worth acting on may be enough. In others, it may be reasonable to expect the police to do more in response to newly emerging evidence. Reasonable prudence may require

them to re-examine their prior theories of the case, to test the credibility of new evidence and to engage in further investigation provoked by the new evidence. At the same time, police investigations are not never-ending processes extending indefinitely past the point of arrest. Police officers acting reasonably may at some point close their case against a suspect and move on to other matters. The question is always what the reasonable officer in like circumstances would have done to fulfil the duty to reinvestigate and to respond to the new evidence that emerged.

85 It is argued that by failing to raise the matter with the Crown and ask that they halt the case for purposes of reinvestigation, and instead allowing it to proceed to trial, Detective Loft failed to act as a reasonable officer similarly situated. It is also argued that the other defendant officers also acted unreasonably in not intervening before the case came to trial.

86 The liability of the officers who assisted in the investigation is readily disposed of. It has not been established that a reasonable police officer in the position of McLaughlin, Stewart, Matthews and Hill would have intervened to halt the case. They were not in charge of the case and had only partial responsibility.

87 The case of Detective Loft presents more difficulty. He was in charge of the case and could have asked the Crown to postpone the case to permit reinvestigation, as favoured by Detective Millin. He considered doing so, but in the end did not intervene, with the result that the matter went to trial. Explaining his decision, he referred to the evidence of two eyewitnesses identifying Hill as the robber on the final charge.

88 This was not a case of tunnel-vision or blinding oneself to the facts. It falls rather in the difficult area of the exercise of discretion. Deciding whether to ask for a trial to be postponed to permit further investigation when the case is in the hands of Crown prosecutors and there appears to be credible evidence supporting the charge is not an easy matter. In hindsight, it turned out that Detective Loft made the wrong decision. But his conduct must be considered in the circumstances prevailing and with the information available at the time the decision was made. At that time, awareness of the danger of wrongful convictions was less acute than it is today. There was credible evidence supporting the charge. The matter was in the hands of the Crown prosecutors, who had assumed responsibility for the file. Notwithstanding that Detective Millin favoured asking the prosecutors to delay the trial, I cannot conclude that Detective Loft's exercise of discretion in deciding not to intervene at this late stage breached the standard of a reasonable police officer similarly situated.

89 I therefore conclude that although Detective Loft's decision not to reinvestigate can be faulted, judged in hindsight and through the lens of today's awareness of the danger of wrongful convictions, it has not been established that Detective Loft breached the standard of a reasonable police officer similarly placed.

3. Loss or Damage

90 To establish a cause of action in negligence, the plaintiff must show that he or she suffered compensable damage. Not all damage will justify recovery in negligence. Recovery is generally available for damage to person and property. On the other hand, debates have arisen, for

example, about when an action in negligence may be brought for purely economic loss and psychological harm. (See Klar, at pp. 201-4, and T. Weir, *Tort Law* (2002), at pp. 44-51.)

91 It is not disputed that imprisonment resulting from a wrongful conviction constitutes personal injury to the person imprisoned. Indeed, other forms of compensable damage without imprisonment may suffice; a claimant's life could be ruined by an incompetent investigation that never results in imprisonment or an unreasonable investigation that does not lead to criminal proceedings. Wrongful deprivation of liberty has been recognized as actionable for centuries and is clearly one of the possible forms of compensable damage that may arise from a negligent investigation. There may be others.

92 On the other hand, lawful pains and penalties imposed on a guilty person do not constitute compensable loss. It is important as a matter of policy that recovery under the tort of negligent investigation should only be allowed for pains and penalties that are wrongfully imposed. The police must be allowed to investigate and apprehend suspects and should not be penalized for doing so under the tort of negligent investigation unless the treatment imposed on a suspect results from a negligent investigation and causes compensable damage that would not have occurred but for the police's negligent conduct. The claimant bears the burden of proving that the consequences of the police conduct relied upon as damages are wrongful in this sense if they are to recover. Otherwise, punishment may be no more than a criminal's just deserts — in a word, justice.

4. Causal Connection

93 Recovery for negligence requires a causal connection between the breach of the standard of care and the compensable damage suffered. Negligent police investigation may cause or contribute to wrongful conviction and imprisonment, fulfilling the legal requirement of causal connection on a balance of probabilities. The starting point is the usual "but for" test. If, on a balance of probabilities, the compensable damage would not have occurred but for the negligence on the part of the police, then the causation requirement is met.

94 Cases of negligent investigation often will involve multiple causes. Where the injury would not have been suffered "but for" the negligent police investigation the causation requirement will be met even if other causes contributed to the injury as well. On the other hand, if the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established. It follows that the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, lawyer or judge, may have contributed to a wrongful conviction causing compensable damage.

5. Limitation Period

95 The respondents claim that Hill's action is statute-barred. The relevant limitation period is set out in the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 7(1) (now repealed):

> **7.**—(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six

months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

96 The limitation period for negligent investigation begins to run when the cause of action is complete. This requires proof of a duty of care, breach of the standard of care, compensable damage, and causation. A cause of action in negligence arises not when the negligent act is committed, but rather when the harmful consequences of the negligence result. (See G. Mew, *The Law of Limitations* (2nd ed. 2004), at p. 148, citing L. N. Klar et al., *Remedies in Tort* (loose-leaf), ed. by L. D. Rainaldi, vol. 4 (release 5), c. 27, at para. 217, n. 23.)

97 As discussed above, the loss or injury as a result of alleged police negligence is not established until it is clear that the suspect has been imprisoned as a result of a wrongful conviction or has suffered some other form of compensable harm as a result of negligent police conduct. The wrongfulness of the conviction is essential to establishing compensable injury in an action where the compensable damage to the plaintiff is imprisonment resulting from a wrongful conviction. In such a case, the cause of action is not complete until the plaintiff can establish that the conviction was in fact wrongful. So long as a valid conviction is in place, the plaintiff cannot do so.

98 It follows that the limitation period in this case did not start to run until December 20, 1999 when Mr. Hill, after a new trial, was acquitted of all charges of robbery. The action was commenced by notice of action on June 19, 2000, within the six-month limitation period set out in the *Public Authorities Protection Act*. Therefore, the relevant limitation period was met.

6. Adequacy of Reasons

99 The appellant Hill argues that this appeal should be allowed on the basis that the reasons of the trial judge were inadequate. With respect, I disagree.

100 The question is whether the reasons are sufficient to allow for meaningful appellate review and whether the parties' "functional need to know" why the trial judge's decision has been made has been met. The test is a functional one: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 55.

101 In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important when "a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue", as was the case in the decision below: *Sheppard*, at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": *Sheppard*, at para. 26.

102 It might have been preferable for the trial judge to provide a more comprehensive treatment of the allegations of negligence and the dismissal of the action. As the Court of Appeal noted, the trial judge's choice not to address some of the specific allegations of negligence might have made appellate review more "difficult" (para. 165).

103 This said, the reasons were in fact sufficient to allow for meaningful appellate review, when considered in light of the extensive trial record, and Hill's functional need to know why the case was decided against him was met. As the Court of Appeal concluded, it was "clear from the reasons for judgment why the trial judge reached the decision he did — he found the evidence of police officers Loft, Matthews and Stewart and Crown prosecutor Nadel to be credible and, based on their evidence, he concluded that the respondents' conduct did not constitute either malicious prosecution or negligent investigation. The trial judge also reviewed the evidence of the appellant's expert witness, Professor Lindsay, and concluded that it did not undermine the quality of the police investigation in this case. The appellant simply did not demonstrate a standard of care breached by this investigation" (majority reasons, at para. 124).

104 I agree with this assessment. The claim that the reasons were inadequate therefore fails.

IV. Conclusion

105 I would dismiss Hill's appeal with costs. The Court of Appeal was correct to conclude that the police conduct impugned on this appeal met the standard of care and, therefore, was not negligent.

106 I would also dismiss the cross-appeal. The Court of Appeal rightly concluded that the tort of negligent investigation is available in Canadian law.

The reasons of Bastarache, Charron and Rothstein JJ. were delivered by

CHARRON J. (dissenting on the cross-appeal) —

1. Overview

107 The dictum that it is better for ten guilty persons to escape than for one innocent person to go to jail has long been a cornerstone of our criminal justice system (W. Blackstone, *Commentaries on the Laws of England* (1769), Book IV, c. 27, at p. 352). Consequently, many safeguards have been created within that system to protect against wrongful convictions. Despite the presence of such safeguards, however, miscarriages of justice do occur. When an innocent person is convicted of a crime that he or she did not commit, it is undeniable that justice has failed in the most fundamental sense.

108 Mr. Hill submits that he is one such victim of the criminal justice system. Of the 10 robbery charges laid against him, 9 were withdrawn by the Crown. Mr. Hill was convicted on the remaining charge but, following a successful appeal, was retried and ultimately acquitted of the offence. Mr. Hill claims that he has sustained significant damages because of substandard policing during the course of the criminal investigation leading to and following the charges laid against him. He therefore brings this action in negligence.

109 While Mr. Hill acknowledges that his cause of action is novel, he nonetheless submits that the tort system can act as an effective deterrent against, and fairly allocate the costs arising from, negligent investigative practices. Consequently, he urges this Court to bring "[t]he law of negligence . . . to bear on the problem of wrongful convictions" by recognizing a new tort of

negligent investigation designed to compensate the wrongfully convicted who have suffered damages as a result of a substandard police investigation (appellant's factum, at para. 71).

110 The Crown takes the position that this mischaracterizes the issue. In its view, this is not a case about providing a remedy for the wrongfully convicted since, if this Court accepts Mr. Hill's argument, *any* person charged with a criminal offence in respect of whom the charge does not ultimately result in a conviction would be a potential plaintiff. The Crown submits that the "wrongfully convicted" consist, rather, of those persons who are not only presumed innocent or found not guilty, but who are also determined to be factually innocent after a review or an inquiry under ss. 696.1 to 696.6 of the *Criminal Code*, R.S.C. 1985, c. C-46.

111 The Crown argues further that, for important public policy reasons, tort liability should be limited to instances where the police seriously abuse or misuse their public powers, not where they are merely negligent in the discharge of their duties. According to the Crown, the imposition of a duty of care in negligence would not only subsume existing torts such as false arrest, false imprisonment, malicious prosecution, and misfeasance in public office, but would upset the careful balance between society's need for effective law enforcement and an individual's right to liberty.

112 The novel question before this Court is therefore whether the new tort of negligent investigation should be recognized by Canadian law. I have concluded that it should not. A private duty of care owed by the police to suspects would necessarily conflict with the investigating officer's overarching public duty to investigate crime and apprehend offenders. The ramifications from this factor alone defeat the claim that there is a relationship of proximity between the parties

sufficient to give rise to a *prima facie* duty of care. In addition, because the recognition of this new tort would have significant consequences for other legal obligations, and would detrimentally affect the legal system, and society more generally, it is my view that even if a *prima facie* duty of care were found to exist, that duty should be negatived on residual policy grounds.

113 Therefore, for the reasons that follow, I would allow the Crown's cross-appeal and find that the tort of negligent investigation is not a remedy available at common law. In light of this conclusion, I find that the action was properly dismissed by the courts below and I would therefore dismiss Mr. Hill's appeal.

2. Analysis

2.1 *Elements of the Tort Action*

114 Mr. Hill claims that the defendants — who for simplicity I will refer to collectively as "investigating officers" — committed the tort of negligent investigation and that he is entitled to damages. In order to succeed in his claim, Mr. Hill must establish the following elements: (1) that the investigating officers owed him a duty of care; (2) that the investigating officers failed to meet the standard of care appropriate in the circumstances; (3) that he suffered a compensable loss or injury; and (4) that the loss or injury was caused by the investigating officers' negligent act or omission. While the most contentious elements of the proposed tort of negligent investigation are the duty and standard of care, the proposed new tort gives rise to difficult issues in respect of all four elements of the action. I will touch on each element in what follows, focussing principally on the

duty of care.

2.2 *The Anns Test*

115 Police officers have multiple duties. There is no question that one of them is the duty to investigate crime. This duty exists at common law and, in Ontario, is embodied in s. 42 of the *Police Services Act*, R.S.O. 1990, c. P.15, which describes the general duties of a police officer. Although "investigating crime" is not specifically listed, several of the listed duties are related to, or form part of, the police investigation into crime. Section 42(1) reads as follows:

> **42.**—(1) The duties of a police officer include,
>
> (a) preserving the peace;
>
> (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
>
> (c) assisting victims of crime;
>
> (d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
>
> (e) laying charges and participating in prosecutions;
>
> (f) executing warrants that are to be executed by police officers and performing related duties;
>
> (g) performing the lawful duties that the chief of police assigns;
>
> (h) in the case of a municipal police force and in the case of an agreement under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;
>
> (i) completing the prescribed training.

See also *Police Act*, R.S.B.C. 1996, c. 367, s. 34(2); *Police Act*, R.S.A. 2000, c. P-17, s. 38(1); *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, ss. 18 and 19(1); *Provincial Police Act*, R.S.M. 1987, c. P150, C.C.S.M., c. P150, s. 5; *Police Act*, S.N.S. 2004, c. 31, ss. 30(1) and 31(1); *Police Act*, S.N.B. 1977, c. P-9.2, s. 12(1); *Police Act*, R.S.P.E.I. 1988, c. P-11, s. 5(2); *Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17, s. 8(1); *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 18; *Police Act*, R.S.Q., c. P-13.1, s. 48.

116 There is no dispute that a police officer owes an overarching duty to the public to investigate crime. The question that occupies us here is whether this overarching public duty translates into a private duty owed to individual members of that public who fall in a particular class, namely suspects under investigation. This question calls for the application of what is commonly called the *Anns* test (in reference to the House of Lords decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728), as refined by this Court in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, and *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18.

117 The Chief Justice has set out in some detail the analytical framework that must be followed in applying the *Anns* test. For the purpose of my analysis, I need only summarize that test briefly. For convenience, I reproduce here the succinct summary of the *Anns* test articulated by McLachlin C.J. and Major J. in *Edwards* (at paras. 9-10):

> At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie*

duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

2.3 *Foreseeability*

118 The requirement of reasonable foreseeability poses no barrier to finding a duty of care in this case. A police investigator can readily foresee that a targeted suspect is among those persons who could be harmed as a result of the negligent conduct of the investigation. To be sure, when a targeted suspect is in fact the perpetrator of the offence under investigation, the public rather than the suspect may be the actual victim of a substandard investigation. Nonetheless, on the strict question of foreseeability, it is clear that this part of the test is made out.

2.4 *Proximity*

2.4.1 The Search For Analogous Categories

119 It is when we turn to the question of proximity that problems arise. As stated in the above-noted summary of the *Anns* test, the proximity analysis can usefully be started by inquiring whether the case falls, either directly or by analogy, within a category of cases in which a duty of care has previously been recognized. If the case does fall within such a category of cases, the court can generally be satisfied that there are no residual policy considerations that might negative the imposition of a duty of care, and a duty of care will be found to exist. In this case, Mr. Hill does not dispute that, prior to the Ontario trial judgment in *Beckstead v. Ottawa (City) Chief of Police* (1995), 37 O.R. (3d) 62 (p. 64), no court of common law jurisdiction in Canada, across the Commonwealth or in any state in the U.S. had found a private law duty of care owed by police to suspects in respect of the investigation of crime. Indeed, in jurisdictions outside Ontario, and in Ontario prior to *Beckstead*, courts have declined to recognize such a duty in cases where the issue has arisen. For authorities to this effect, see *Reynen v. Canada* (1993), 70 F.T.R. 158, at para. 5; *McGillivary v. New Brunswick* (1994), 149 N.B.R. (2d) 311 (C.A.), at para. 10; *Al's Steak House & Tavern Inc. v. Deloitte & Touche* (1994), 20 O.R. (3d) 673 (Gen. Div.); *Collie Woollen Mills Ltd. v. Canada* (1996), 107 F.T.R. 93, at para. 34; *Stevens v. Fredericton (City)* (1999), 212 N.B.R. (2d) 264 (Q.B.); *Dix v. Canada (Attorney General)* (2002), 315 A.R. 1, 2002 ABQB 580, at para. 557; *Kleysen v. Canada (Attorney General)* (2001), 159 Man. R. (2d) 17, 2001 MBQB 205; and *Avery v. Canada (Attorney General)*, [2004] N.B.J. No. 391 (QL), 2004 NBQB 372, at para. 11. See also *A.A.D. v. Tanner* (2004), 188 Man. R. (2d) 15, 2004 MBQB 213, where at para. 148, Duval J. explicitly declined to recognize the separate tort of negligent investigation while nonetheless considering whether a claim for negligence was made out on the particular facts of that case.

120 U.K. authorities holding that no duty of care is owed by the police to individual members of the public in the context of the investigation of crime are: *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.), at pp. 243-44; *Alexandrou v. Oxford*, [1993] 4 All E.R. 328 (C.A.); *Osman v. Ferguson*, [1993] 4 All E.R. 344 (C.A.); *Cowan v. Chief Constable of the Avon and Somerset Constabulary*, [2001] E.W.J. No. 5088 (QL), [2001] EWCA Civ 1699; and *Brooks v. Commissioner of Police of the Metropolis*, [2005] 1 W.L.R. 1495, [2005] UKHL 24, at paras. 19-23 and 33. See also *Calveley v. Chief Constable of the Merseyside Police*, [1989] 1 All E.R. 1025 (H.L.), at pp. 1030-32, in support of the proposition that the police do not owe a duty of care in the context of an internal police investigation and disciplinary proceeding against police officers.

121 Australian authorities holding that no duty of care is owed to suspects in the context of a police investigation are *Emanuele v. Hedley* (1997), 137 F.L.R. 339 (A.C.T.S.C.), at p. 359; *Courtney v. State of Tasmania*, [2000] TASSC 83; *Wilson v. State of New South Wales* (2001), 53 N.S.W.L.R. 407, [2001] NSWSC 869, at para. 63; *Tame v. New South Wales* (2002), 191 A.L.R. 449, [2002] HCA 35, at para. 231; *Gruber v. Backhouse* (2003), 190 F.L.R. 122, [2003] ACTSC 18, at para. 41; *Duke v. State of New South Wales*, [2005] NSWSC 632, at para. 23; and in New Zealand, *Gregory v. Gollan*, [2006] NZHC 426, at paras. 16-17. See also the discussion in *Sullivan v. Moody* (2001), 183 A.L.R. 404, [2001] HCA 59, at para. 60. Cases holding that no duty of care is owed to individual members of the public in the broader investigatory context are *Cran v. State of New South Wales* (2004), 62 N.S.W.L.R. 95, [2004] NSWCA 92, at para. 50 (leave to appeal to HCA denied, [2005] HCA Trans 21); and in New Zealand, *Simpson v. Attorney General*, [1994] 3 N.Z.L.R. 667 (C.A.).

122 For American authorities supporting the proposition that police do not owe a duty of care to suspects, see *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), at p. 581; *Thompson v. Olson*, 798 F.2d 552 (1st Cir. 1986), at p. 556; *Kompare v. Stein*, 801 F.2d 883 (7th Cir. 1986), at p. 890; *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994), at p. 1551; *Orsatti v. New Jersey State Police*, 71 F.3d 480 (3d Cir. 1995), at p. 484; *Schertz v. Waupaca County*, 875 F.2d 578 (7th Cir. 1989), at p. 583. Also relevant are the remarks of Scalia J. in *Castle Rock v. Gonzales*, 125 S.Ct. 2796 (2005), at p. 2810.

123 I will mention some of these decisions later in my judgment, but first, a word about *Beckstead* and the decision of the Court of Appeal for Ontario in this case ((2005), 76 O.R. (3d) 481).

124 In *Beckstead*, the Court of Appeal for Ontario confirmed a trial decision holding that a duty of care was owed by the investigating officer to the suspect under investigation ((1997), 37 O.R. (3d) 62 (p. 63)). Notably, however, neither the trial judge nor the panel of the Court of Appeal in that case carried out the *Anns* analysis to determine whether a duty of care in respect of this new category should be found to exist. This lack of any prior authority to support such a holding and the lack of any principled analysis in *Beckstead* prompted the Chief Justice of Ontario to create a five-judge panel for the hearing of this case to determine whether *Beckstead* was correctly decided (Court of Appeal judgment, at para. 2).

125 In support of his conclusion that *Beckstead* was correctly decided, MacPherson J.A.,

writing for a unanimous court on this issue, relied in part on the existence of a duty of care in an analogous category, stating that "the duty of care exists in Ontario with respect to both suspects (*Beckstead*) and victims (*Jane Doe*)" (para. 65 (emphasis added)). He then concluded that he could "see no principled basis for distinguishing the two categories" (para. 65).

126 The question whether the relationship between the investigating officer and the victim or potential victim of crime can give rise to a private duty of care has never been considered by this Court and we are not deciding this issue on this appeal. However, given the reliance placed by the Court of Appeal on *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 160 D.L.R. (4th) 697 (Ont. Ct. (Gen. Div.)), it is necessary to examine the import of the finding in that case to determine whether the Court of Appeal was correct in concluding that a general duty of care exists with respect to victims and that the categories of victim and suspect are indistinguishable.

127 First, it is important to properly circumscribe the decision in *Jane Doe*. In order to do so, it may be helpful to briefly review the facts and the findings of the court in that case. From December 1985 to August 1986, a series of sexual assaults took place in Toronto. The sexual assaults shared certain characteristics: each took place in the same downtown Toronto neighbourhood; all the female victims lived in second or third floor apartments; each apartment contained an exterior balcony; and entry to the women's apartments had been effected via the balconies.

128 After the fourth incident, but prior to the sexual assault of Jane Doe, the Metropolitan

Toronto Police Force ("MTPF") had grounds to believe that a single individual was responsible for the sexual assaults. However, while anticipating that additional assaults were likely to occur, the MTPF deliberately refrained from informing potential victims of the specific risk to them on the grounds that doing so would cause the offender to flee. The trial judge, MacFarland J. (as she then was), found that the circumstances of the case suggested that "the women were being used — without their knowledge or consent — as 'bait' to attract a predator whose specific identity then was unknown to the police, but whose general and characteristic identity most certainly was" (p. 725).

129 According to MacFarland J., the MTPF's decision not to inform members of the public who had been identified as being at risk was grossly negligent. Importantly, however, MacFarland J. took care to delineate the scope of the duty thus breached. She was "satisfied on the evidence that a meaningful warning could and should have been given to the women who were at particular risk" (p. 730 (emphasis added)). MacFarland J. went on to find that "the police failed utterly in their duty to protect these women and the plaintiff in particular from the serial rapist the police knew to be in their midst by failing to warn so that they may have had the opportunity to take steps to protect themselves" (p. 732 (emphasis added)). MacFarland J. concluded that "[h]ere police were aware of a specific threat or risk to a specific group of women and they did nothing to warn those women of the danger they were in, nor did they take any measures to protect them" (p. 732 (emphasis added)).

130 Hence, the trial judge in *Jane Doe* held that where the police are aware of a *specific* threat to a *specific* group of individuals, the police have a duty to inform those individuals of the specific threat in question so that they may take steps to protect themselves from harm. As

Moldaver J. (as he then was) said, speaking for the Divisional Court in confirming that the action could proceed to trial, "[w]hile the police owe certain duties to the public at large, they cannot be expected to owe a private law duty of care to every member of society who might be at risk": *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 72 D.L.R. (4th) 580, at p. 584. Hence, *Jane Doe* cannot be read to stand for the wide proposition that the police owe a *general* duty of care to *all potential* victims of crime. Such an interpretation would ignore the fact that there must be more than mere foreseeability of harm before a duty of care will arise; there must also be sufficient proximity between the parties and the absence of policy considerations negating the existence of any *prima facie* duty of care.

131 Without further qualification, therefore, I find myself unable to endorse MacPherson J.A.'s broad conclusion in this case that "the duty of care exists in Ontario with respect to . . . victims" (para. 65). I also respectfully disagree with his assertion that there is no principled basis on which to distinguish between the two categories. To the contrary, there is crucial distinction between victim and suspect. The distinction resides in the fact that the public interest in having police officers investigate crime for the purpose of apprehending offenders and a potential victim's interest in being protected from the offenders are generally reconcilable. In contrast, the police officer's duty to investigate crime and apprehend offenders is diametrically opposed to the interests of the person under investigation. This is because the suspect's interest, regardless of whether that suspect is the actual perpetrator of the crime, is *always* to be left alone by the state. In other words, the suspect's interest is *always* at odds with the public interest in the context of a criminal investigation. I will explain.

132 That a perpetrator's interest is at odds with the public interest in having him investigated and apprehended is too obvious to require explanation. It is important in this context to appreciate, however, that the interests of the suspect who is factually innocent of any criminal involvement is also at odds with the fulfilment of the officer's public duty to investigate crime. In my respectful view, it would be naive to simply assume that the innocent suspect's interest is not at odds on the ground that such a person will always be exonerated as a result of the investigation, if the police perform their duty in a competent manner. There is a significant gap between the "reasonable and probable grounds" standard upon which the initiation of the criminal process is based and the ultimate standard of proof beyond a reasonable doubt upon which a conviction is grounded. There is, moreover, a significant public interest in maintaining the long-established lower standard for the initiation of process. The result of this is that a criminal investigation, even of the most stellar quality, may well result in the targeting of the factually innocent. Further, even in those cases where the innocent suspect is exonerated as a result of the investigation, he or she will inevitably have suffered some harm as a result of the process that led to his exoneration: her reputation may be tarnished, or she may have suffered economic loss. This is why I say that *all* suspects, whether they have in fact committed the offence or not, stand to lose from being targeted by the police. It is *always* in the suspect's personal interest to be left alone by the state.

133 Therefore, victims and suspects are not analogous categories.

134 The Court of Appeal also placed some reliance on this Court's decision in *Odhavji* in support of the approach it adopted (para. 71). In my view, however, *Odhavji* provides little assistance in determining the question that occupies us on this appeal. *Odhavji* involved a suit

brought against the Metropolitan Toronto Chief of Police by the family of an individual who had been fatally shot by the police. The plaintiffs alleged that the Chief owed them a duty of care to ensure that officers co-operated with the Special Investigations Unit, and that the Chief had breached that duty, resulting in harm to the family. This Court refused to strike the plaintiff's statement of claim as disclosing no cause of action, noting in particular that s. 41(1)(b) of the *Police Services Act* imposed on the Chief a "freestanding statutory obligation to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* and the needs of the community" (*Odhavji*, at para. 58). This Court took this to support the finding of a relationship of proximity. By way of contrast, no similar specific statutory duty can be pointed to in the present case. Consequently, *Odhavji* does not provide us with an analogous category in which a duty of care has previously been found to exist either.

135 Because this case does not fall either directly or by analogy within a category of cases in which a duty of care has previously been recognized, it is necessary to turn to the proximity inquiry under the *Anns* test to determine whether the relationship between an investigating officer and a suspect under investigation is sufficiently close to give rise to a *prima facie* duty of care.

2.4.2 <u>The Interests Engaged by the Relationship Between the Investigator and the Investigated</u>

136 As explained by my colleague (at paras. 26-30), the question at this stage of the inquiry is whether the relationship between the investigating officer and the suspect is such as "to make the imposition of legal liability for negligence appropriate". Proximity is closely connected to the

notion of foreseeability: the relationship must be sufficiently close and direct that the defendant *ought* to have had the plaintiff in mind as a person who could potentially be harmed by his or her conduct. But proximity is not exhausted by foreseeability. In addition, other factors that may bear on the question of whether the relationship between the defendant and the plaintiff is capable of supporting legal liability must be considered (*Cooper*, at para. 37). Such factors may include expectations, representations, reliance and the nature of the interests that characterize the relationship (*Cooper*, at para. 34). However, no definitive list of factors is possible and the list will vary depending on the circumstances of the case (*Cooper*, at para. 35).

137 There is no question that the relationship between police officer and suspect is sufficiently close and direct that the investigating officer ought to have the targeted suspect in mind as a person potentially harmed by his actions. As I have noted, however, other factors engaged by the relationship must also be considered in order to reach a conclusion regarding proximity. In my view, none of these further factors, either jointly or severally, is sufficient to give rise to the required proximate relationship.

138 McLachlin C.J. identifies the expectations of the parties and the interests engaged by the relationship as relevant factors giving rise to a relationship of proximity. In respect of the first factor, my colleague states: "Viewed from the broader societal perspective, suspects may reasonably be expected to rely on the police to conduct their investigation in a competent, non-negligent manner" (para. 39). From a logical standpoint, I take no issue with this proposition. Since society undoubtedly relies on police officers to perform their public duty to investigate crime and apprehend criminals in a competent, non-negligent manner, the suspect, as a member of that society, may

reasonably be said to share that expectation. The critical factor, however, and one which, in my view, strongly militates *against* the recognition of a duty of care is the second one, the interests engaged by the relationship.

139 McLachlin C.J. describes the high interests at stake for the targeted suspect. As she states, the suspect "has a critical personal interest in the conduct of the investigation. At stake are his freedom, his reputation and how he may spend a good portion of his life" (para. 34). In addition, as the Statement of Claim in this case reveals, the targeted suspect's financial interests are also engaged. Mr. Hill claims loss of wages, decreased future income earning ability and numerous out-of-pocket expenses. My colleague concludes that "[t]hese high interests support a finding of a proximate relationship giving rise to a duty of care" (para. 34). With respect, however, the suspect's interests are not the only interests engaged by the relationship. As aptly stated in *Childs v. Desormeaux*:

> The law of negligence not only considers the plaintiff's loss, but explains why it is just and fair to impose the cost of that loss on the particular defendant before the court. The proximity requirement captures this two-sided face of negligence. [para. 25]

In other words, in assessing the proximity of the relationship between plaintiff and defendant, we must pay attention not only to the plaintiff's interests; we must also pay attention to those of the defendant, in this case the investigating officers. This requires us to consider their role in the enforcement of the criminal law.

140 The enforcement of the criminal law is one of the most important aspects of the

maintenance of law and order in a free society. Police officers are the main actors who have been entrusted to fulfill this important function. Often, this requires police officers to make decisions that might adversely affect the rights and interests of citizens. As the Canadian Association of Chiefs of Police notes in its factum:

> While there is a superficial similarity between liability in negligence for police officers and liability in negligence for other professionals, there is also a fundamental distinction. Other professionals have a private law duty to act in the best interests of their clients. Police officers however are public office holders, and have a public duty to act in the best interests of society as a whole. This public interest is not synonymous with the interests of private citizens in a police investigation. As stated in *Odhavji Estate* [at para. 28], "[i]n a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens". [para. 22]

The importance of maintaining the police officer's authority to make decisions in the public interest that are adverse to certain citizens is underscored in the case of suspects. As I explained earlier, because society's interest in having the police investigate crime and apprehend criminals inevitably collides with the suspect's interest to be left alone by the state, the imposition of a private duty of care would of necessity give rise to conflicting duties. I am not suggesting, as stated by the Chief Justice (at para. 42), that the police have "a duty to leave people alone". I am saying that it is always in the *interest* of individual members of society to be left alone rather than to be investigated by the police. This is because the individual, whether innocent or not, always stands to lose from being targeted by the police. Therefore, the imposition on the police of a legal duty to take reasonable care not to harm the individual inevitably pulls the police away from targeting that individual as a suspect. In such circumstances, it is neither just nor fair to the individual police officers, nor in the interest of society generally, to impose on police officers a duty that brings in its wake a set of

conflicting duties.

141 By way of example, we need only consider the — unfortunately not uncommon — occurrence of the suspected impaired driver. If in acting to combat impaired driving the police were duty-bound to take into account not only the public interest but also the suspect's interests, in all but the most obvious cases of impairment, the officer might well be advised to simply let the suspect go rather than risk harming the suspect by initiating a criminal law process that may not result in a conviction. By letting the suspect go, the officer would also avoid the risk of time-consuming legal entanglements and potential civil liability. This cautionary approach may seem even more advisable to the officer if the suspect in question is a person of stature and means who may personally stand to lose more from being "wrongfully" dragged into the criminal justice system.

142 I do not mean to suggest that if a duty of care towards suspects is recognized, police officers will become "so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims" that they will be incapable of carrying out their assigned duties (*Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 (H.L.), at p. 1033, *per* Lord Reid). Like Lord Reid, in my view, the police are made of sterner stuff. Rather, my point is that the overly cautious approach that may result from the imposition of conflicting duties would seriously undermine *society's interest* in having the police investigate crime and apprehend offenders. Mr. Hill purports to answer this argument by denying that the police officer would be faced with such concerns because, he argues, the officer could always safely stand behind the reasonable and probable grounds standard. I will have more to say about the reasonable and probable grounds standard below. For the moment, however, let me simply say that I am dubious that a police officer,

who has spent time in impaired driving court and who has witnessed countless legal debates about whether the arresting officer had the requisite reasonable and probable grounds to believe the suspect had been driving while impaired, would regard this standard as a sufficient safety net. Therefore, I am not persuaded that the potential ramifications of imposing on police these conflicting duties can be so easily answered by an appeal to the reasonable and probable grounds standard.

143 If authority is needed in support of the proposition that the imposition of conflicting duties is to be avoided, we need to look no further than the decisions of this Court in *Cooper* and *Edwards*. In both cases, the defendants were found to owe duties to the public at large, and private claims against them were dismissed at the pleadings stage for failure to disclose a reasonable cause of action.

144 In *Cooper*, the Registrar of Mortgage Brokers was sued for alleged negligence in failing to exercise his statutory powers with appropriate care to avoid or minimize a loss suffered by the plaintiff resulting from the improper actions of a mortgage broker. This Court found that there was no private duty of care in part because "a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public" (para. 44).

145 *Edwards* involved a similar claim against the Law Society of Upper Canada for its alleged negligence in failing to protect a class of fraud victims from improper conduct on the part of a solicitor. This Court refused to impose a private duty of care because imposing liability for negligence on the Law Society would be inconsistent with the Society's "public interest" role. The Court agreed with the following excerpt from Finlayson J.A.'s judgment in the Court of Appeal for

Ontario, at para. 6:

> The public is well-served by refusing to fetter the investigative powers of the Law Society with the fear of civil liability. The invocation by the plaintiffs of the "public interest" role of the Law Society seems to be misconceived as it actually works to undermine their argument. . . . [T]he Law Society cannot meet this obligation if it is required to act according to a private law duty of care to specific individuals such as the appellants. The private law duty of care cannot stand alongside the Law Society's statutory mandate and hence cannot be given effect to.

146 It might be objected that in each of *Cooper* and *Edwards* a particular statutory scheme brought the parties together and that that statutory scheme was what stood in the way of a finding of proximity. However, this provides no basis for declining to apply the same principle to this case. Although the police officer's duty to investigate crime and apprehend suspects is rooted in common law, it is also recognized, expressly or impliedly, by statute. Furthermore, the relationship between the investigating officer and the suspect arises in the context of the criminal law and regulatory law, both of which are governed almost entirely by statute. In fact, in my view, the conflicting duties that would arise in this case are far more acute than those in *Cooper* or *Edwards* where, at least in some instances, the interest of the potential victim can be reconciled with the interest of the public. After all, both the investing public and the private investor might have as an interest the shutting down of unscrupulous mortgage brokers. By contrast, as I have explained earlier, it is *never* in the interest of the targeted suspect that the police investigate him or her. This suggests again that the interests of the public in having police officers investigate crime and the interests of suspects are inherently and diametrically opposed.

147 This opposition of interests has been recognized by courts in other countries as a

sufficient reason not to impose a duty of care. The imposition of a duty of care in negligence owed to suspects has been held to be inconsistent with a police officer's duty to fully investigate the conduct in question. For example, Australian courts have reasoned that to impose a duty of care in negligence to a person whose conduct is under investigation would conflict with and constrain the proper performance of the police officers' duty to fully investigate the conduct in question: see *Tame v. New South Wales*, at paras. 231 and 298-99; *Gruber v. Backhouse*, at paras. 29-30 and 35-39. Similarly, in England, the House of Lords has refused to extend the duty of care on the basis of a conflict with the "fearless and efficient discharge by police officers of their vitally important public duty of investigating crime": *Calveley v. Chief Constable of the Merseyside Police*, at p. 1030; see also *Hill v. Chief Constable of West Yorkshire*, at pp. 240-41; *Brooks v. Commissioner of Police of the Metropolis*, at para. 30.

148 To sum up: in my view, although in the present case there is foreseeability of harm, there remains a lack of proximity. Consequently, I would conclude on the ground of lack of proximity alone that the relationship between the investigating officer and the suspect does not give rise to a *prima facie* duty of care. However, even if some degree of proximity were found, and even if this degree of proximity were held to be sufficient to give rise to a *prima facie* duty of care, it is my position that a consideration of additional policy considerations would militate against the recognition of such a duty. This takes us to the second stage of the *Anns* test.

2.5 *Residual Policy Considerations*

2.5.1 Potential Impact on the Exercise of Police Discretion

149 It is at the second stage of the *Anns* test that so-called residual policy considerations fall to be considered. At this stage we are "not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper*, at para. 37; see also *Edwards*, at para. 10). I begin my analysis of the residual policy considerations with the question of police discretion since discussion of this factor is more closely related to the issue of conflicting duties we have just discussed. McLachlin C.J. finds that the discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care because, in her view, it is a factor to be "taken into account in formulating the *standard* of care, not whether a duty of care arises" (para. 51 (emphasis in original)). I disagree. The concern about police discretion in this context is not whether courts will be able to properly distinguish between mere errors of judgment and negligent acts. Police discretion is a significant factor because the police have the discretionary power not to investigate further or engage the criminal process despite the existence of reasonable and probable grounds to believe that an offence has been committed. A concern therefore arises from the fact that, should this Court recognize a private duty of care owed to the suspect under investigation, this power could be exercised, not to advance the public interest as it should be, but out of a fear of civil liability.

150 The police discretionary power has been recognized by this Court as "an essential feature of the criminal justice system": *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 410. As stated by La Forest J. in that case: "A system that attempted to eliminate discretion would be unworkably complex and rigid." Equally important, however, is the need to properly circumscribe this power so that it be exercised solely in the *public interest*. This issue arose recently in *R. v. Beaudry*, [2007]

1 S.C.R. 190, 2007 SCC 5. This Court recognized that the police officer's duty to enforce the law and investigate crimes is not absolute and is subject to the exercise of discretion. "Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process" (para. 37). The Court was quick to add, however, that the discretionary power itself is not absolute and stated that "[f]ar from having *carte blanche*, police officers must justify their decisions rationally." The exercise of the discretion must first be justified subjectively: it must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds. In addition, the exercise of discretion must also be justified on the basis of objective factors.

151 At first blush, it may be thought that the imposition of a private duty of care to the suspect and the consequent potential for civil liability should give rise to no concern about the improper exercise of police discretion. Just as a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion, so would a police officer be precluded from deciding not to engage the criminal law process simply to avoid potential civil liability. Again, however, I am not persuaded that we can so easily disregard the potential legal and societal ramifications of imposing on police such a duty.

152 If this Court accepts Mr. Hill's argument, the investigating officer will be *legally bound*, not only to fulfill his or her public duty to enforce the law, but also to take care not to harm the suspect by conduct that may ultimately be found to fall below the relevant standard of care. The law should not impose a duty unless it expects that it will be fulfilled. Of course, the surest way of

avoiding harm to the suspect is for the officer to decide to not issue process and not engage the criminal law; in other words, in order to reconcile the conflicting duties imposed by law, the police officer may well choose to avoid any risk of harm to the suspect by the exercise of "police discretion". Since there is a significant gap between the "reasonable and probable grounds" standard to issue process and the "beyond a reasonable doubt" standard to convict, the prudent officer who tries to reconcile his public duty to enforce the law and his private duty not to harm the innocent suspect may be well advised not to issue process except in cases where the evidence is overwhelming. How then would we distinguish between a proper exercise of discretion based on a police officer's desire to fulfill his legal duty of care to the suspect and an improper one based on the selfish desire to avoid potential civil liability?

153 There is significant public interest in maintaining the long-standing reasonable and probable grounds standard so as to ensure a robust and efficient enforcement of the law. Once this standard is met, it is left to others within the criminal justice system, namely the Crown prosecutor, the preliminary hearing justice, and the ultimate finder of fact, to delve more deeply into the legal and factual merits of a case. As this Court has recognized in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-50, the reasonable and probable grounds standard achieves a reasonable balance between the individual's right to liberty and the need for society to be protected from crime. In my view, because the imposition of a private duty of care as suggested in this case could only impede the police officers' ability to perform their public duties fearlessly and with despatch, it would detrimentally upset this delicate balance.

2.5.2 <u>Identifying the Wrongfully Convicted for the Purpose of Compensation</u>

154 As stated earlier, Mr. Hill urges this Court to bring "[t]he law of negligence . . . to bear on the problem of wrongful convictions" by recognizing a new tort of negligent investigation. McLachlin C.J. accepts his plea and, in fact, relies on the need to compensate the wrongfully convicted as an important factor in support of finding a duty of care (paras. 36-37). It is noteworthy that the proposed tort would also provide recourse to targeted suspects who, short of being convicted, suffer a loss or injury as a result of a negligent investigation. Indeed, from the plaintiff's viewpoint, it makes little sense to limit the right of action to cases of wrongful conviction. In the context of an action for negligent investigation, the difference between a negligent investigative process that results in a conviction and one that is terminated at an earlier point would seem to go only to the question of the quantum of damages.

155 Mr. Hill relies on his ultimate acquittal in support of his claim that the losses he suffered as a result of being subjected to the criminal justice system should be compensable at law. The Crown disputes the notion that this is a case about providing a remedy for the wrongfully convicted, and states the following (factum, at para. 6):

> This case is not about preventing wrongful convictions. Wrongfully convicted persons would constitute only a tiny sub-set of the class who would be in a position to sue for negligent investigation (the largest sub-set being those who are acquitted at trial or against whom charges are dropped before trial). Even amongst the wrongfully convicted, few would be able to establish that negligent police investigation caused their conviction.

156 No one is disputing the validity of Mr. Hill's acquittal. However, the distinction between an acquittal and a finding of innocence must be considered in assessing the potential

ramifications of recognizing a tort of negligent investigation. The difficulty arises from the fact that our criminal justice system is not focussed on identifying the innocent. The verdict in a criminal case is guilty or not guilty. A verdict of not guilty is not a factual finding of innocence; neither is an order on appeal overturning a conviction. A verdict of not guilty encompasses a broad range of circumstances, from factual innocence to proof just short of beyond a reasonable doubt. That reality about our criminal justice system raises difficult questions of public policy when it comes time to consider the issue of compensation. Should compensation be reserved to those accused who are factually innocent of the crime with which they were charged or convicted? If so, how should factual innocence be determined? The question whether *any* inquiry should be made into the "true" status of the acquitted person is itself rather controversial. The controversy, in a nutshell, can be described as follows.

157 On the one hand, a compelling argument can be made that a not guilty verdict should be considered as a determination of innocence for all purposes, including compensation. Under this first approach, all persons charged with a criminal offence who are ultimately found not guilty could fall in the category of potential plaintiffs. The most powerful argument in support of this approach is that any qualification of the verdict of acquittal would in effect introduce the third verdict of "not proven" which has not been accepted in our criminal justice system. The introduction of such a "Scotch verdict" would create a lingering cloud over those persons who have been found not guilty or in respect of whom the criminal process was terminated but whose innocence has not been conclusively ascertained. Professor H. A. Kaiser, in the context of discussing possible statutory compensation schemes, explains the rationale for having a more inclusive compensatory approach in his article "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory

Obstacle Course" (1989), 9 *Windsor Y.B. Access Just.* 96, as follows (at p. 139):

> It is argued that persons who have been wrongfully convicted and imprisoned are *ipso facto* victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under the guise of a compensatory scheme, supposedly requiring higher threshold standards than are necessary for a mere acquittal. As Professor MacKinnon forcefully maintains [in his article "Costs and Compensation for the Innocent Accused" (1988), 67 *Can. Bar Rev.* 489, at pp. 497-98]:
>
> > . . . one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower. . . . There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted.

158 On the other hand, an equally compelling argument can be made that any compensation regime that is not limited to the "factually innocent" is unacceptable because it would provide the persons who have in fact committed the offence, but whose guilt could not be proven, with a possible means of profiting from the commission of their crime. Under the federal-provincial *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons* (agreed to and adopted by federal and provincial justice ministers in March 1988), a clear distinction is made between a finding of not guilty and a finding of innocence for the purpose of compensation. The following was added to the listed prerequisites for eligibility for compensation:

> As compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) a further criteria would require:
>
> a) If a pardon is granted under Section 683 [of the *Criminal Code*], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or
>
> b) If a reference is made by the Minister of Justice under Section 617(b), a statement

> by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c), to the effect that the person did not commit the offence. [Emphasis added.]

159 The Chief Justice alludes to this concern when she stresses, at para. 64, that any suspect suing the police "bears the burden of showing that police negligence in the course of an investigation caused harm compensable at law" and that "[e]vidence going to the factual guilt or innocence of the suspect, including the results of any criminal proceedings that may have occurred, may be relevant to this causation inquiry." My colleague takes the position, however, that "[i]t is not necessary to decide here whether an acquittal should be treated as conclusive proof of innocence in a subsequent civil trial" (para. 64). While it is perhaps not necessary in order to dispose of this appeal to decide whether an acquittal should be treated as conclusive proof of innocence, it will certainly be necessary to do so in the next tort action where the plaintiff succeeds in proving negligence in the conduct of a police investigation. These are precisely the sorts of ramifications that must be considered at the second stage of the *Anns* test. The question I ask, therefore, is the following: how are we to distinguish between treatment that is "rightfully imposed by the law" and treatment that is "wrongful" for the purpose of compensation? If we adopt the first approach described earlier, namely that an acquittal should be regarded as the equivalent of a finding of innocence for the purpose of compensation, this could have wide-ranging ramifications. For example, every suspect, who is charged with an offence but who is not convicted because the criminal justice system has worked the way it should, would become a potential plaintiff if he can show that the police conducted a substandard investigation. This result would follow regardless of whether the suspect has in fact committed the crime or not.

160 The issue is most pertinent in the context of a proposed right of action where, as here, the alleged wrong is the conduct of a substandard police investigation. On the one hand, there is no question that negligent police investigation may contribute to the wrongful conviction of a person who did not commit the crime. Negligent mishandling of physical evidence may lead to erroneous forensic results. Careless or incomplete investigations may fail to yield evidence that would have exonerated the accused or raised a reasonable doubt about his guilt. On the other hand, a negligent investigation will often be the effective cause of an acquittal — as indeed it should be in the criminal context. Numerous evidentiary and procedural safeguards are built in the criminal trial process to guard against wrongful convictions. Hence, evidence may be excluded or disregarded because improper investigative techniques were used in obtaining it. Or, a substandard investigation may yield insufficient evidence to support a conviction, even though the evidence may have been out there to be found.

161 It is a principle of fundamental justice that the accused in a criminal trial be given the benefit of any reasonable doubt. Therefore, from a criminal law perspective, there is no question that an acquittal must be regarded as tantamount to a finding of innocence. However, in the context of a tort action, we must come to terms with the reality that the person who committed the offence may well stand to *benefit* rather than lose from a botched-up investigation. The true victim in such cases is not the suspect but the public at large. Should the successful accused who actually committed the offence be entitled to use the acquittal brought about by the negligent conduct of police investigators as a basis to claim compensation? A simple example may assist in understanding how this difficulty may easily arise and why it cannot simply be resolved by a careful tailoring of the appropriate standard of care.

162 Let us assume that a complainant is the victim of a brutal sexual assault. The perpetrator is unknown to her. However, she provides a detailed description to the police which leads them to pick from police files a photo of a suspect matching her description. The complainant is shown the single photo and she positively identifies the person in the photo as her assailant. Fearing the assailant may strike again, the police quickly apprehend the suspect. The police later arrange for a physical lineup comprised of several persons, including the suspect in the photo. The other persons in the lineup bear questionable resemblance to the suspect. The complainant views the lineup, and again identifies the suspect as her assailant. The suspect is charged. As it turns out at trial, there is little else connecting the suspect to the crime, and the case for the prosecution essentially turns on the complainant's eyewitness identification. The complainant is firm in her identification of the accused at trial. However, because of the inherent frailties of eyewitness identification and the risk that the identification made by the complainant may have been tainted by the improper police techniques adopted in this case, the trial judge concludes that he cannot be satisfied beyond a reasonable doubt of the guilt of the accused. The accused is acquitted.

163 The accused commences a civil action in negligence against the police alleging that the improper identification techniques caused the complainant to wrongfully identify him as the perpetrator which, in turn, led to his wrongful arrest and prosecution. He claims damages for loss of reputation, nervous shock, and the legal expenses he incurred in defending himself against the charge.

164 In defence of the claim, the defendant proposes to call the complainant to identify the

plaintiff as her assailant. The defendant argues that any negligent conduct on his part did not cause the harm. Rather, the plaintiff's own conduct in committing the sexual assault occasioned his loss. The defendant argues further that, even if causation is proven, none of the damages should be compensable at law unless the plaintiff proves that he did not in fact commit the offence.

165 How is the civil claim to be adjudicated? Is the acquittal to be considered as the legal equivalent of factual innocence in the civil trial thereby precluding the defendant from advancing this line of defence? If that approach is adopted, the action in negligence is easily made out. The duty of care would exist as a matter of law. The breach of standard is proven because, quite clearly, the identification techniques fell below acceptable standards. The causal link is inevitably made out because, if the plaintiff must be regarded as innocent of the crime, one can only conclude that it is the negligent conduct of the police that caused the complainant to wrongfully identify him as her assailant, which identification in turn caused him to be subjected to the entire criminal process. Upon proof of his loss, the plaintiff is assured of compensation. This result appears entirely just, if the plaintiff in fact is not the person who assaulted the complainant. On the other hand, if he is in fact the assailant, many would view it as unthinkable that his loss should be regarded as compensable at law, given that the true victim who was harmed as a result of the police officer's substandard conduct was society, not the plaintiff.

166 Adopting the second approach, according to which a finding of not guilty is distinguished from factual innocence, could also bring about undesirable results if the plaintiff did not in fact commit the crime with which he was charged. If the acquittal is not conclusive of factual innocence, the plaintiff, who bears the burden of proving his claim on a balance of probabilities,

would have to prove that he is not the assailant in order to succeed in his civil action. Meeting this burden may prove impossible to do. It also seems unjust that, having already been acquitted, he should be put through this additional hurdle. It would also necessitate a retrial of the case which may well lead to conflicting findings and put an aura of suspicion on his acquittal.

167 Quite clearly, this Court would have to choose one approach or the other on the question of compensability of harm. Whichever approach is adopted, there may be unforeseen and undesirable ramifications in the criminal context. If the first approach is adopted, would triers of fact be less inclined to arrive at a verdict of not guilty on the basis of deficiencies in the police investigation, knowing that this result could give the accused the right to claim damages? Conversely, if the second approach is adopted and one branch of the law draws a distinction between a finding of not guilty and a finding of innocence, would this undermine the overall meaning of an acquittal? These are the sorts of residual policy considerations to which the tort of negligent investigation gives rise. In my view, they provide us with reasons to be cautious about imposing on police officers a novel duty of care towards suspects.

2.5.3 Competing Policy Concerns not Resolved by Defining the Standard of Care

168 The Court of Appeal was of the opinion that the policy concerns weighing against imposing a duty of care could be addressed by a "carefully tailored" standard of care (para. 70). The court went on however to simply adopt the standard of "the reasonable police officer in like circumstances" as the appropriate standard, adding: "In an arrest and prosecution context, the standard becomes more specific and is directly linked to statutory and common law duties, namely

did the police have reasonable and probable grounds to believe that the plaintiff had committed a crime?" (para. 83). McLachlin C.J. agrees that this is the correct standard (para. 67).

169 With respect, I fail to see how the ordinary negligence standard, even if linked to the reasonable and probable grounds standard, can reconcile the conflicting standards at play. In my view, the usual negligence standard cannot easily co-exist with governing criminal standards. By way of illustration, I will refer, first, to the hypothetical fact situation I have just discussed and, second, to the analysis in the courts below in this case.

170 In the hypothetical example I have discussed earlier, the plaintiff's action in negligence against the police is based on the allegation that the improper identification techniques caused the complainant to wrongfully identify him as the perpetrator which, in turn, led to his wrongful arrest and prosecution. As I have stated earlier, I believe there is no question in this hypothetical example that the identification techniques used by the police fell below acceptable standards. By showing the complainant a single photo of a suspect and by constructing a lineup with stand-ins who bore questionable resemblance with the suspect, the police investigator clearly did not meet the standard of the reasonable police officer in like circumstances. Therefore, under the usual negligence paradigm, this breach of standard of care could well result in civil liability, presumably — if one accepts the plaintiff's argument on causation — for all the damages that flowed from the initiation of criminal proceedings and the process that followed.

171 The problem that arises, however, is that in focussing on the investigating officer's conduct and the civil standard of negligence, we easily lose sight of both the complainant's role and

the criminal standard for initiating process. In this hypothetical example, it could not seriously be disputed, from a criminal law standpoint, that the complainant's detailed description of her assailant as a person matching the suspect's appearance, together with her positive identification of the suspect as her assailant, amply meet the reasonable grounds standard for laying a criminal charge under s. 504 of the *Criminal Code*. Under s. 504, "[a]ny one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information" before a justice and where territorial jurisdiction is established, "the justice shall receive the information". Even if the police chose not to lay a charge, the complainant would be entitled to lay the information herself. It is further noteworthy that the complainant's identification evidence, potentially flawed as it may be (a matter to be determined at trial), would not only meet the standard to *lay* a charge, but would also meet the standard for *committal* at the preliminary hearing under s. 548(1)(*a*) of the *Criminal Code*.

172 Similarly, it is instructive to consider how the negligence analysis played out in the courts below in this case. While all five members of the panel in the Court of Appeal for Ontario agreed on the standard to be applied, the court was divided on the application of that standard on the facts before them. Of particular relevance to the point I am making is how the criminal standard for initiating process all but gets lost in the negligence analysis. I will explain.

173 Much as in my hypothetical example, Mr. Hill's claim is based on alleged deficiencies in police identification techniques. In turn, he submits that these deficiencies led to his misidentification by witnesses, his wrongful arrest, and his conviction for the January 23, 1995 robbery. In particular, he alleges that the police failed to follow their own internal guidelines with

respect to the presentation of photo lineups to witnesses and that the photo lineup of eleven Caucasians and one aboriginal person was structurally biased against him. In determining whether there was a breach of standard in this case, it therefore became incumbent upon the court to inquire whether the police, in using these identification techniques, met the "reasonable police officer in the same circumstances" standard. While all justices below proceeded with that analysis, they were divided on the result. The trial judge found that there was no breach of the standard ((2003), 66 O.R. (3d) 746), and this finding was upheld by three of the five justices in the Court of Appeal. The two dissenting justices were of the opinion that the identification techniques used by the police fell below this standard.

174 However, despite the Court of Appeal expressly acknowledging that, in an arrest and prosecution context, the ordinary negligence standard must be linked to the reasonable and probable grounds standard, none of the judges below considered the criminal standard for initiating process in their analysis. In other words, beyond inquiring into the identification techniques used by the police, none of the judges asked themselves whether the charges were nonetheless laid on the basis of reasonable and probable grounds. The latter standard, of course, is the one by which the police are governed in the conduct of their criminal investigation and, it is important to stress, it is in the public interest that it be maintained as the operative standard. As this Court has observed in *Storrey*, at pp. 249-50:

> The importance of this requirement [that police have reasonable grounds in order to affect an arrest] to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest.

175 Therefore, if the civil standard for liability is to be "carefully tailored" so as to complement and not conflict with governing criminal standards, the presence of reasonable and probable grounds for laying the charge must constitute a bar to any civil liability. It cannot be sufficient for the plaintiff to show that identification techniques used by the police were substandard. Rather, it must be established that the identification process was so flawed that it *destroyed* the reasonable and probable grounds for laying the charge. It is only when this standard is met that the plaintiff can be said to have suffered, as McLachlin C.J. puts it "compensable damage that would not have occurred but for the police's negligent conduct" (para. 92).

176 MacPherson J.A. alluded to this notion that process would have issued in any event, not in his discussion on standard of care, but in considering the question of causation. He stated as follows (at para. 97):

> There is a complete answer, on the facts, to this submission [that the unfair line-up tainted the entire identification procedure]. The appellant was originally charged with ten robberies, one of which took place on January 23, 1995. Ultimately, he faced a trial in relation to only this robbery. The photo line-up that the appellant attacks was *not* part of the evidence concerning this robbery. Rather, the identification evidence about the January 23 robbery was the sighting by P.C. Stewart and the positive identification of the appellant by two bank tellers based on a newspaper photograph on their desks. It follows that there is no causal link between the photo line-up and the appellant's arrest, detention and trial on the charge relating to the January 23 robbery. He would have been arrested on January 27, detained and tried regardless of any negligence in preparing the photo line-up. However, because the trial judge addressed the photo line-up issue, I will also consider it on the merits. [Emphasis in original.]

177 The Chief Justice, it seems, also alludes to the fact that a charge may have been laid regardless of any substandard conduct when she observes (at para. 78): "Nor is it clear that if these incidents [i.e., the alleged negligent conduct] had not occurred, Hill would not have been charged

and convicted." The question of reasonable and probable grounds obviously goes to causation, in the sense that the claim in negligence is not made out if the criminal proceedings would have issued regardless of the negligent conduct in question. Indeed, the law would be rather incoherent if the investigating officer could be civilly liable for any harm to the suspect flowing from the initiation and continuation of criminal proceedings, even when such proceedings are not merely authorized but are in fact *desirable* under the standards set by the criminal law. In my view, however, it is not sufficient to consider the governing criminal standard simply on the issue of causation. To the contrary, the criminal standard for initiating process must also inform the standard of care itself. In other words, *even if* the impugned lineup had in fact been used with respect to the January 23, 1995 robbery, it would not be sufficient for the purposes of the tort action to show that the identification techniques used by the police fell below the standard of the reasonable police officer. Such an approach would ignore the significant public interest in having criminal process issue on the basis of reasonable grounds to believe that an offence has been committed. Again, the determinative question would therefore have to be whether the identification process was so flawed as to *destroy* the reasonable and probable grounds provided by the witnesses' positive identification of Mr. Hill as the robber.

178 The two dissenting justices not only failed to incorporate the reasonable and probable grounds standard in their analysis; they adopted a very expansive view of causation. Even though the impugned photo lineups did not even form part of the evidence on the charge in respect of which Mr. Hill was convicted, the two justices were nonetheless satisfied that a sufficient causal link could be established between the lineups and the conviction for the following reasons, at para. 158:

> First, as noted by the trial judge in his reasons, on January 17, 1995, Detective Loft showed this photo line-up to a number of witnesses to the robberies. Most identified Mr. Hill as the robber, although they thought he did not have a goatee. It is apparent that these witnesses' misidentification of Mr. Hill as the robber materially contributed to Detective Loft's fixation on Mr. Hill as the perpetrator of the plastic bag robberies, and therefore to his initial arrest of Mr. Hill. It was because he was convinced that the witnesses had identified the right person that Detective Loft neglected to do any reinvestigation of the robberies in the face of the emerging exculpatory evidence. The misidentification from the photo line-up contributed to Detective Loft's tunnel vision on the issue of Mr. Hill, which resulted in Mr. Hill's arrest, detention, wrongful prosecution and the ensuing miscarriage of justice. Accordingly, we believe there is a clear causal link between the photo line-up and Mr. Hill's wrongful conviction.

179 The dissenting justices further relied on the fact that the trial judge also appeared to find that causation was made out. Although the trial judge did not provide any analysis on the question of causation, he expressed the view that the only element of the tort action which was in issue in this case was whether the standard of care had been met.

180 As evidenced by the above, the private nature of the tort action necessarily narrows the focus of the criminal investigation to the individual rights of the parties and, in the process, it is almost inevitable that courts lose sight of the broader public interests at stake. In short, tort law simply does not fit. In his article, Professor Kaiser aptly notes the following at p. 112:

> . . . as Professor[s] Cohen and Smith have argued [in their article "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 *Can. Bar Rev.* 1], private law in general and torts in particular are singularly ill-suited to deal with issues which fundamentally concern the nature of the state and the relationship of the individual to the state and the law:
>
>> . . . the legislatures and courts, in developing rules of public conduct and responsibility premised on private law tort concepts, have failed to consider a wide range of factors which should be recognized in articulating the relationship of the private individual and the state. . . . [p. 5]

> . . . rights against the state are qualitatively different from rights against individuals. [p. 12]

2.5.4 Other Existing Remedies

181 By contrast to the proposed action in negligence, the existing torts of false arrest, false imprisonment, malicious prosecution and misfeasance in public office do not give rise to the policy concerns we have just discussed. With respect to each of these torts, where a police officer is acting within the scope of his or her powers, there can be no tort liability for simple negligence in the performance of his duty. The torts of false arrest and false imprisonment are properly circumscribed in recognition of the limited role of the police officer in the overall criminal process, and any interposition of judicial discretion effectively ends any civil liability. By contrast, how does the proposed tort action account for the fact that, once a criminal charge has been laid, the *Crown* controls the proceedings, not the police? (Indeed, in some jurisdictions, the Crown takes control earlier in the process — all charges are vetted by the Crown before they are laid.) How is the intervening verdict of a neutral third party to be considered in the negligence action? Is it a *novus actus interveniens* that breaks the chain of causation between the act of negligence and the injury? Does the answer depend on the strength of the evidence which was not tainted by the negligent conduct in question? Since the ultimate issue on the question of duty of care is whether it is fair and just to impose it, 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, including witnesses, scientists, Crown attorneys, judges and juries, none of whom is exposed to liability, with the exception of Crown Attorneys, for the tort of malicious prosecution?

182 The torts of malicious prosecution and misfeasance in public office concern allegations of *misuse* and *abuse* of the criminal process and of the police officer's position. These torts do not invite a second-guessing of the police officer's judgment in the investigation of a case but deal rather with the deliberate and malicious use of the police officer's position for ends that are improper and inconsistent with the public duty entrusted upon him or her. In short, there is no conflict between the duties imposed by the existing torts and the police officer's public duty to investigate crime and apprehend offenders. The creation of the new tort of negligent investigation would effectively subsume all the existing torts and risk upsetting the necessary balance between the competing interests at play.

2.5.5 Civil Law in Quebec

183 Finally, a word must be said about the existing state of the civil law in Quebec. MacPherson J.A. found support for his conclusion that there was a common law duty of care in two decisions of the Quebec Court of Appeal: *Lacombe v. André*, [2003] R.J.Q. 720, and *Jauvin v. Procureur général du Québec*, [2004] R.R.A. 37, stating that he was "impressed by the reasoning and the balanced results" achieved in those two cases (para. 66). In both cases, the court recognized a duty of care on police towards suspects based on the general provision found in art. 1457 of the *Civil Code of Québec*, S.Q. 1991, c. 64. Article 1457 provides:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

184 I will briefly review the facts and findings in these two cases. In *Lacombe*, Alain André was charged with sexually assaulting his adopted daughter. Eight months later, after the charges were withdrawn prior to the commencement of a preliminary inquiry, Mr. André brought a suit against the police, claiming that they did not have reasonable and probable grounds for his arrest. At trial, damages in the amount of $326,100 were awarded and a further appeal was dismissed, the Quebec Court of Appeal holding that the police did not have reasonable and probable grounds when they arrested Mr. André.

185 In *Jauvin*, the accused John Jauvin was charged with conspiracy to commit fraud but, eventually, all the charges against him were dropped. Mr. Jauvin brought a suit against the police, claiming that the police inquiry and investigation had caused him great harm and seeking damages exceeding $4 million. Jauvin's suit was dismissed at trial, as was his appeal to the Quebec Court of Appeal. However, while the court held that there was no fault on the part of the respondent Attorney General of Quebec, the court did hold, that simple negligence on the part of the police could engage art. 1457 of the *Civil Code of Québec*, which concerns extra-contractual civil liability. In determining the standard of care, the court referred to its decision in *Lacombe* and stated that the conduct of a police officer was to be that of the normally competent, prudent and diligent officer in the same situation.

186 Both cases, in my view, provide little assistance in deciding the present appeal. There is no question that *Lacombe* and *Jauvin* provide some support for the proposition that police officers

owe suspects a duty of care. However, three things are worth noting in this regard. First, in both *Jauvin* and *Lacombe* the duty owed arises primarily out of the codified provision in art. 1457 of the *Civil Code of Québec*. Thus, while interesting, neither case directly supports the proposition that police should owe suspects a common law duty of care. Second, *Lacombe* turned on whether the police had reasonable and probable grounds to arrest Mr. André; in the view of the courts, they did not. This is by no means a novel legal principle. Third, no liability was found in *Jauvin* and, while the Court of Appeal reiterated its finding in *Lacombe* that civil liability in negligence can be imposed, none of the policy considerations raised in this case were considered or discussed.

3. Conclusion

187 For these reasons, I conclude, as have other courts of common law jurisdictions, that the common law tort of negligent investigation should not be recognized in Canada. The recognition that the civil tort system is not the appropriate vehicle to provide compensation for the wrongfully convicted should not be viewed as undermining the importance of achieving that important goal. However, how this goal is to be achieved is a complex issue that has been discussed in the context of a number of inquiries and governmental studies: see for example *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001) (the Sophonow Inquiry); *Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations* (1989) (the Marshall Inquiry); *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) (the Morin Inquiry); *Commission of Inquiry into the Wrongful Conviction of David Milgaard* (ongoing) (the Milgaard Inquiry); *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (2007)

(the Driskell Inquiry); *The Lamer Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons and Randy Druken: Report and Annexes* (2006) (the Lamer Inquiry). It may be that compensation for the wrongfully convicted is a matter better left for the legislators in the context of a comprehensive statutory scheme. It is certainly not a matter that should be left to the vagaries of the proposed tort action.

188 I would allow the Crown's cross-appeal and dismiss Mr. Hill's appeal.

Appeal dismissed with costs. Cross-appeal dismissed, BASTARACHE, CHARRON *and* ROTHSTEIN JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Boghosian & Associates, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Falconer Charney, Toronto.

Solicitor for the intervener the Canadian Association of Chiefs of Police: Edmonton Police Service, Legal Advisors' Section, Edmonton.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Cooper, Sandler & West, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

Solicitors for the interveners the Canadian Police Association and the Police Association of Ontario: Paliare, Roland, Rosenberg, Rothstein, Toronto.