Wellington et al. v. Her Majesty the Queen in Right of Ontario et al.

[Indexed as: Wellington v. Ontario]

102 O.R. (3d) 714

2010 ONSC 2043

Ontario Superior Court of Justice,
Divisional Court,
McCombs, Molloy and Swinton JJ.
June 4, 2010

Torts -- Negligence -- Duty of care -- Family and estate of person killed by police officer bringing action for damages for alleged negligence on part of Special Investigations Unit in conducting investigation of fatal shooting -- Defendants bringing motion to strike statement of claim on ground that it disclosed no cause of action -- Motion judge not erring in determining that it was not plain and obvious that claim could not succeed and that action involved novel question of law that should be determined on full evidentiary record.

W's 15-year-old son was shot and killed in an encounter with two police officers. The incident was investigated by the Special Investigations Unit ("SIU"), which concluded that the police officers had acted lawfully and that no charges should be laid. W did not accept those findings. She, the deceased's estate and the deceased's half-sister brought an action for damages for the SIU's alleged negligence in carrying out the investigation. The defendants moved under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to strike the statement of claim on the ground that it disclosed no cause of

action. The motion was dismissed. The motion judge determined that it was not plain and obvious that the claim could not succeed. She held that because this was a novel question of law, it should be determined on the basis of a full evidentiary record. The defendants appealed.

Held, the appeal should be dismissed.

Per Molloy J. (McCombs J. concurring): The issue of whether a police investigation can give rise to a private law duty of care has not been definitively settled. The existence of a broad public duty on the part of the SIU to investigate a shooting by police officers does not necessarily negate an individual private law duty where the relationship is sufficiently proximate. The plaintiffs had a more direct and close interest in the investigation than did members of the general public. It was not plain and obvious that the relationship between the parties could not give rise to a prima facie duty of care in those circumstances. The motion judge properly did not make any conclusive findings on the question of whether there were any residual policy considerations which ought to negate or limit that duty of care. That question involved complex issues which would be better addressed on the basis of a full factual record. [page715]

Per Swinton J. (dissenting): The issue as to whether family members and the estate of a victim of crime are owed a private law duty of care by the SIU could be determined on the basis of the pleadings and the statutory framework. There was no need for an evidentiary background to determine the issue of whether there was sufficient proximity between the plaintiffs and the defendants such that a duty of care should be imposed. It was plain and obvious that the SIU owed no private law duty of care to the plaintiffs in the circumstances of this case. There was no allegation that the SIU failed to comply with established policy and nothing in the applicable statute that indicated a legislative intention to create a duty of care to family members or the estate of a victim. The relationship between the SIU and the family or estate of a victim of crime is not close and direct. The plaintiffs failed to satisfy the proximity requirement necessary to establish a private law duty of care.

Cases referred to

Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024, 75 L.G.R. 555, 141 J.P. 527, 5 Build. L.R. 1, 4 I.L.R. 21, 243 E.G. 523, [1977] E.G.D. 604 (H.L.); Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, 2001 SCC 79, 206 D.L.R. (4th) 193, 277 N.R. 113, [2002] 1 W.W.R. 221, J.E. 2001-2153, 160 B.C.A.C. 268, 96 B.C.L.R. (3d) 36, 8 C.C.L.T. (3d) 26, 110 A.C.W.S. (3d) 943, apld

Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, [2007] S.C.J. No. 41, 2007 SCC 41, 285 D.L.R. (4th) 620, 368 N.R. 1, J.E. 2007-1867, 230 O.A.C. 253, 64 Admin. L.R. (4th) 163, 50 C.C.L.T. (3d) 1, 50 C.R. (6th) 279, 40 M.P.L.R. (4th) 1, 160 A.C.W.S. (3d) 573, EYB 2007-124525, affg (2005), 76 O.R. (3d) 481, [2005] O.J. No. 4045, 259 D.L.R. (4th) 676, 202 O.A.C. 310, 36 C.C.L.T. (3d) 105, 33 C.R. (6th) 269, 142 A.C.W.S. (3d) 518 (C.A.); Norris v. Gatien (2001), 56 O.R. (3d) 441, [2001] O.J. No. 4415, 151 O.A.C. 394, 8 C.C.L.T. (3d) 220, 41 M.V.R. (4th) 260, 109 A.C.W.S. (3d) 401, 51 W.C.B. (2d) 525 (C.A.); Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74, 2003 SCC 69, 233 D.L.R. (4th) 193, 312 N.R. 305, J.E. 2004-47, 180 O.A.C. 201, 11 Admin. L.R. (4th) 45, 19 C.C.L.T. (3d) 163, 27 A.C.W.S. (3d) 178, consd

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P.L.R. 21, 76 A.C.W.S. (3d) 429 (C.A.); Brownhall v. Canada (Ministry of National Defence) (2007), 87 O.R. (3d) 130, [2007] O.J. No. 3035, 228 O.A.C. 37, 50 C.C.L.T. (3d) 207, 159 A.C.W.S. (3d) 811 (Div. Ct.); Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, [2001] S.C.J. No. 77, 2001 SCC 80, 206 D.L.R. (4th) 211, 277 N.R. 145, J.E. 2001-2152, 153 O.A.C. 388, 34 Admin. L.R. (3d) 38, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, 110 A.C.W.S. (3d) 944; Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care) (2006), 82 O.R. (3d) 321, [2006] O.J. No. 4400, 276 D.L.R. (4th) 411, 217 O.A.C. 69, 43 C.C.L.T. (3d) 163, 35 C.P.C. (6th) 7, 152 A.C.W.S. (3d) 622 (C.A.), revg (2005), 76 O.R. (3d) 36, [2005] O.J. No. 2225, 198 O.A.C. 377, 139 A.C.W.S. (3d) 674 (Div. Ct.); Fockler v. Toronto (City), [2007] O.J. No. 11, 43 M.P.L.R. (4th) 141, 154 A.C.W.S. (3d) 65 (S.C.J.); Freeman-Maloy v. Marsden (2006), 79 O.R. (3d) 401, [2006] O.J. No. 1228, 267 D.L.R. (4th) 37, 208 O.A.C. 307, 146 A.C.W.S. (3d) 986 (C.A.); Heaslip Estate v. Mansfield Ski Club Inc. (2009), 96 O.R. (3d) 401, [2009] O.J. No. 3185, 2009 ONCA 594, 310 D.L.R. (4th) 506, 67 C.C.L.T. (3d) 1, 252 O.A.C. 1; [page716] Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, J.E. 2002-617, 219 Sask. R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 112 A.C.W.S. (3d) 991; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, J.E. 90-1436, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 23 A.C.W.S. (3d) 101; Jane Doe v. Toronto (Metropolitan) Commissioners of Police (1998), 39 O.R. (3d) 487, [1998] O.J. No. 2681, 160 D.L.R. (4th) 697, 60 O.T.C. 321, 126 C.C.C. (3d) 12, 43 C.C.L.T. (2d) 123, 80 A.C.W.S. (3d) 894 (Gen. Div.); Klein v. American Medical Systems, 2006 CanLII 42799 (Ont. Div. Ct.); Nash v. Ontario (1995), 27 O.R. (3d) 1, [1995] O.J. No. 4043, 59 A.C.W.S. (3d) 1083 (C.A.); Porter v. Brampton (City), [2002] O.J. No. 5132 (S.C.J.); Project 360 Investments Ltd. (Sound Emporium Nightclub) v. Toronto Police Services Board, 2009 CanLII 36380 (Ont. S.C.J.); Sauer v. Canada (Attorney General), [2007] O.J. No. 2443, 2007 ONCA 454, 225 O.A.C. 143, 31 B.L.R. (4th) 20, 49 C.C.L.T. (3d) 161, 159 A.C.W.S.

(3d) 306; Wellington v. Ontario, [2009] O.J. No. 4700 (Div. Ct.); Wellington v. Ontario, [2009] O.J. No. 2975 (S.C.J.); Williams v. Canada (Attorney General) (2009), 95 O.R. (3d) 401, [2009] O.J. No. 1819, 2009 ONCA 378, 310 D.L.R. (4th) 710, 70 C.P.C. (6th) 213, 249 O.A.C. 150, 57 M.P.L.R. (4th) 164, 66 C.C.L.T. (3d) 193

Statutes referred to

Canadian Charter of Rights and Freedoms

Coroners Act, R.S.O. 1990, c. C.37, s. 10(4.6)

Police Services Act, R.S.O. 1990, c. P.15, Part VII [as am.], ss. 1, 113, (1), (5), (7), (8)

Rules and Regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 21

APPEAL from a decision dismissing a motion to strike a statement of claim as disclosing no cause of action.

Peter Rosenthal, for respondents.

James Kendik and Lise Favreau, for appellants.

Kevin McGivney and David Elman, for intervenor Ontario Association of Chiefs of Police.

Julian Falconer and Jackie Esmonde, for intervenor Aboriginal Legal Services of Toronto Inc.

MOLLOY J. (MCCOMBS J. concurring): --

A. Introduction

[1] The issue in this appeal is whether the family of a person killed by the police can proceed with a lawsuit to recover damages from the Special Investigations Unit for alleged negligence in the investigation of the police responsible for the killing.

[2] Duane Christian ("Duane") was 15 years old at the time of his death on June 20, 2006. At about 5:00 that morning, two

Toronto police officers had pursued and stopped the vehicle Duane was driving. They were out of their police cruiser and had [page717] drawn their guns when Duane attempted to drive off. One of the officers was in front of the van. The other officer fired six shots, wounding and killing Duane.

[3] The Special Investigations Unit ("SIU") was notified. It is a civilian law enforcement agency with jurisdiction under the Police Services Act [See Note 1 below] to conduct investigations into the circumstances of serious injuries or deaths that may have resulted from criminal offences committed by police officers. The SIU assumed carriage of the investigation into Duane's death.

[4] Following that investigation, and based on the SIU report, the deputy director of the SIU concluded that the police officers had acted lawfully and that no charges should be laid.

[5] Duane's mother, Simone Wellington, does not accept the findings of the SIU. She alleges that the police officers who stopped her son had no legal authority to do so, acted unlawfully throughout and should have been charged with murder. In particular, she alleges that if the SIU had conducted a proper and competent investigation, evidence of this wrongdoing would have been obtained and charges would have been laid.

[6] Simone Wellington commenced this action alleging negligence by the SIU in the investigation of her son's death. The plaintiffs in the action are Duane's estate, Duane's half-sister Alexis and Ms. Wellington herself. The defendants in the action are the provincial government, which has responsibility for the SIU, and James Ramsay, who was the deputy director of the SIU at the time and directed the investigation into Duane's death.

[7] The defendants brought a motion under Rule 21 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] to strike out the statement of claim on the grounds that it discloses no cause of action. They argued that in these circumstances there was no private law duty of care owed by the SIU to Duane's

family.

[8] The motion was argued before Herman J. on June 30, 2009 and dismissed by her for reasons dated July 14, 2009 [[2009] O.J. No. 2975 (S.C.J.)]. The motion judge determined that it was not plain and obvious that the plaintiffs' claim could not succeed. She held that because this was a novel question of law, it should be determined on the basis of a full evidentiary record, rather than on a summary motion.

[9] Leave to appeal to the Divisional Court was granted by Karakatsanis J. on October 28, 2009 [[2009] O.J. No. 4700 (Div. Ct.)], essentially based on her finding that there are conflicting decisions from various levels of court as to whether police [page718] conducting a criminal investigation owe a private law duty of care to anyone other than a suspect.

[10] For the reasons set out below, this appeal is dismissed. I agree with the motion judge that a final determination as to the viability of this novel cause of action should be based on a full record that can only be obtained after trial.

B. The Test to be Applied

[11] The appeal in this case involves a question of law: whether the plaintiffs' action should be dismissed under Rule 21 as disclosing no cause of action. [See Note 2 below] As such, the motion judge is required to be correct. [See Note 3 below]

[12] The test under Rule 21 is well established in the case law. For the purposes of such a motion, the allegations in the statement of claim are taken to be proven (unless they are patently ridiculous or incapable of proof, which is not the case here). An action should only be dismissed at this stage as disclosing no cause of action if it is "plain and obvious" that the plaintiff cannot succeed. In the words of the Supreme Court of Canada, "Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case." [See Note 4 below] Thus, claims should proceed to trial in the normal course and be tested on a full factual record, unless the action is

certain to fail. [See Note 5 below]

[13] The motion judge correctly identified the test to be applied. Accordingly, the issue to be determined is whether she correctly decided that the Rule 21 test had not been met in this case.

C. Cause of Action and Duty of Care

The test

[14] In order to ground a cause of action for negligent investigation, the plaintiffs must first establish that the defendants [page719] owed a duty of care to the plaintiffs. Over the course of the past decade or so, there has been considerable development in the law with respect to the circumstances in which a private law duty of care will be imposed. The test currently applied has its genesis in the House of Lords decision in Anns v. Merton London Borough Council, [See Note 6 below] as subsequently refined by the Supreme Court of Canada in Cooper v. Hobart [See Note 7 below] and Edwards v. Law Society of Upper Canada. [See Note 8 below]

[15] Essentially, the Anns/Cooper test involves two questions: (1) does the relationship between the plaintiff and 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 Note 9 below]

[16] However, before applying the Anns/Cooper test, the court should consider whether the law has already recognized a cause of action in the circumstances of the relationship at issue or, conversely, whether the law is settled that no duty of care can arise in that situation. [See Note 10 below]

Has the issue already been settled?

[17] There is no case in which a police officer/investigator has been found to owe a duty of care to a complainant or victim of an alleged crime such that a failure to conduct a reasonable and competent investigation would give rise to an action in

negligence against the police. Therefore, for the plaintiffs in this case to be successful, they would have to satisfy the Anns/Cooper test.

[18] The appellants/defendants submit that there are cases that have conclusively rejected the existence of a duty of care in this situation and that there is therefore no need to even embark [page720] on the Anns/Cooper analysis. They rely primarily on the 2001 Ontario Court of Appeal decision in Norris v. Gatien and on two Superior Court decisions, Porter v. Brampton from 2002 and Fockler v. Toronto from 2007. [See Note 11 below] Neither of the Superior Court decisions dealt in any depth with the duty of care and neither conducted an Anns/Cooper type of analysis. The Porter decision refers to no authorities at all; the Fockler decision cites only Norris v. Gatien. Accordingly, if the law can be taken to be settled, it can only be through the decision in Norris v. Gatien.

[19] In Norris v. Gatien, the family of a bicyclist killed in a motor vehicle accident brought an action in negligence against the police officer who investigated the accident, alleging that his investigation was deficient and if properly done would have resulted in the driver of the car being charged with impaired driving causing death. The plaintiffs alleged that the negligent investigation exacerbated the distress they suffered as a result of the death of their family member. On a Rule 21 motion, the action was dismissed as disclosing no cause of action. On appeal, the Court of Appeal held that the investigation and any resulting criminal prosecution were matters of public law and public duty and that there was no duty of care owed to the plaintiffs. In coming to that conclusion, the Court of Appeal distinguished its 1997 decision in Beckstead v. Ottawa (City) Chief of Police. [See Note 12 below] Although the court in that case recognized a tort of negligent investigation, this was found to be distinguishable because the plaintiff had been charged with an offence and the negligent investigation therefore had a direct and profound legal impact on him. [See Note 13 below] Likewise, the court distinguished the decision in the Jane Doe [See Note 14 below] case on the basis that the police negligence contributed to the claimant being sexually assaulted. [page721]

[20] Since the decision in Norris v. Gatien, there have been two decisions from the Supreme Court of Canada that touch closely, although not definitively, on this issue: Odhavji [See Note 15 below] in 2003 and Hill in 2007. In my view, those decisions are so significant in their impact it can no longer be said that Norris v. Gatien has conclusively shut the door on a duty of care being owed to a person whose death is the subject of a police investigation.

[21] In Hill, the Supreme Court of Canada applied the Anns/ Cooper test and concluded that police owe a private law duty of care to a particularized suspect in the course of an investigation. By extension, that would mean that the SIU owed a duty of care to the police officers involved in the shooting of Duane Christian. The Supreme Court expressly refrained from determining whether such a duty would extend to the relationship between the police and a victim or the family of a victim, but also refrained from ruling out that possibility. McLachlin C.J.C., writing for the majority, held, at para. 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[.]
(Emphasis added)

[22] The Supreme Court's decision in Odhavji is even more directly relevant. In that case, Mr. Odhavji was fatally shot by Toronto police officers and the SIU was called in to conduct the investigation. The SIU requested that the officers involved remain segregated, make themselves available for same-day [page722] interviews and turn over their shift notes, on-duty clothing and blood samples. The officers failed to co-operate as requested, notwithstanding a statutory obligation to do so. The family of Mr. Odhavji brought a civil action against the officers who had failed to co-operate in the investigation, the chief of police, the police board and the province based on misfeasance in public office and negligence, alleging that the lack of a thorough investigation caused them to suffer mental distress. A Rule 21 motion was brought to dismiss these claims as disclosing no cause of action. Of particular relevance for the case before the bar is the Supreme Court's ruling with respect to the viability of the negligence claim against the chief of police.

[23] The negligence claim against the chief of police was rooted in his alleged negligence in failing to properly supervise the Toronto police officers involved and to ensure they complied with their obligation to co-operate in the SIU investigation. It was alleged that the failure to properly supervise these officers resulted in an inadequate investigation and that this caused mental distress and psychological harm to Mr. Odhavji's family. The Supreme Court of Canada applied an Anns/Cooper analysis and concluded that if the plaintiffs could establish that the complained-of harm was a reasonably foreseeable consequence of the chief's failure to supervise, the chief was under a private law duty of care to take reasonable care to prevent the misconduct of the officers reporting to him.

[24] At the first stage of the Anns/Cooper test, the court considered foreseeability and proximity. On the issue of foreseeability, the court noted that it was not immediately clear that an inadequate investigation could cause a degree of distress that would rise to the level of compensable psychiatric harm. However, since it was not "plain and obvious" that this could not be established, the plaintiffs should have the opportunity to prove their case at trial. The court concluded, at para. 54:

> It is reasonably foreseeable that the officers' failure to cooperate with the SIU investigation would harm the appellants. As the Chief was responsible for ensuring that the officers cooperated with the SIU investigation, it is reasonably foreseeable that the Chief's failure to do so would also harm the appellants.

[25] On the issue of proximity, the court found there was a "relatively direct causal link between the alleged misconduct and the complained of harm". [See Note 16 below] The court noted that the chief was under a statutory duty to ensure that police officers carried [page723] out their duty. This, it was held, strengthened the nexus between the parties. The court also held that the family could reasonably expect the chief of police to take reasonable care to ensure that his police officers did not act in a manner that would cause them harm. Accordingly, the court concluded that if foreseeability could be established, the relationship between the chief of police and the Odhavji family was such to give rise to a prima facie duty of care.

[26] Finally, on the second branch of the Anns/Cooper test, the court found that there were no broad public policy considerations to negative the prima facie duty of care imposed on the chief of police.

[27] The Odhavji family claimed damages arising from an inadequate investigation by the SIU. Their claim was not directly against the SIU (as is the case before this court), but rather against the chief of police for failing to ensure that his police officers co-operated with the SIU. Arguably, the plaintiffs' claim in this case is even more direct than was

the claim of the Odhavji family, although different policy concerns may arise at the second stage of the analysis. What is particularly important for present purposes is that the negligence claim in Odhavji was not dismissed on the basis that a duty of care is owed only to a suspect. Neither the Supreme Court of Canada nor the Court of Appeal (which also had upheld the cause of action in negligence against the chief of police) made any reference to Norris v. Gatien. However, in light of Odhavji it clearly cannot be said that cases like Beckstead and Hill are distinguishable solely on the basis that the plaintiff was a suspect in the investigation rather than a complainant or victim.

[28] I conclude, therefore, that in light of the Supreme Court's decision in Odhavji and its obiter comments in Hill, it can no longer be said that Norris v. Gatien is the definitive word on whether the family of a person killed by an allegedly criminal act has any cause of action against the police for negligence in the investigation of the circumstances of the death. Accordingly, the motion judge correctly held that this action could only be dismissed on a Rule 21 motion if it was "plain and obvious" that it could not meet the Anns/Cooper test.

[29] The first stage of the Anns/Cooper test involves a consideration of foreseeability and proximity. The appellants do not take serious issue with foreseeability. The real issue in this case is proximity. The proximity analysis requires an examination of the relationship between the parties and whether it can be said to be sufficiently close and direct to give rise to a duty of care. It is relevant to take into account "expectations, representations, [page724] reliance and property or other interests involved". However, the factors are diverse and change with the circumstances of every case. Central to the inquiry will be whether the relationship is sufficiently close and direct that the person alleged to be bound to take care would know that the person making the claim would be directly affected by his careless act. [See Note 17 below]

[30] Here, the plaintiffs are the close family members of a young man killed by the police. The SIU, once it becomes

involved, takes priority to all other investigations. SIU investigators are alleged to have dealt directly with the deceased's mother. Their relationship with the family is at least as proximate as, and arguably more proximate than, the relationship between the chief of police and the Odhavji family. The family in this case allege not only psychological harm as a result of the negligent investigation, but also that their financial claims against the officers involved in the shooting have been undermined as a result of the negligent investigation.

[31] The appellants argue that the duty of the SIU to investigate a shooting by police is owed to the public at large and that a private law duty of care cannot exist in those circumstances. Clearly, the SIU does perform its duties in the public interest and has a duty to the public at large, particularly given the reason for SIU involvement, which is to ensure that investigations of possible criminal acts by police are carried out independently of the police force involved. However, the existence of a broad public duty does not necessarily negate an individual private law duty where the relationship is sufficiently proximate. The chief of police has a broad public duty to ensure police officers follow their duties, but he was found nevertheless (in Odhavji) to have a private law duty to the family of persons injured by the police. The police have a broad public duty to investigate crime, but were found nevertheless (in Hill) to have a private law duty to a particularized suspect to conduct a competent investigation.

[32] Many of the cases relied upon by the appellants in support of this submission are situations in which the defendant had a broad supervisory function over a group (e.g., lawyers, mortgage brokers or the health care system) and the claimant is not distinguishable from any member of the general public injured by the alleged failure to supervise adequately. [See Note 18 below] In Hill, [page725] the Supreme Court of Canada distinguished those kinds of cases from a situation involving a particularized suspect identified for criminal investigation, noting that this was a close, personal and direct relationship, as opposed to a situation "concerned with the universe of all

potential suspects". [See Note 19 below] In my view, the situation in this case may also be distinguished in that the family of Duane Christian is not one of a universe of all potential complainants. They are clearly identifiable and have a more direct and close interest than the general members of the public.

[33] I agree with the motion judge's conclusion that it is not plain and obvious that the relationship between the parties cannot give rise to a prima facie duty of care in these circumstances.

[34] I am of the same view with respect to the second stage of the Anns/Cooper analysis. Policy issues arise in the first stage of the analysis, particularly with respect to the nature of the relationship, reliance and the reasonable expectations of the claimant. At the second stage, however, the court is concerned with broad issues of public policy rather than the issues relating to the relationship of proximity between these particular parties. There are significant issues of public policy raised in this case. For example, there is a "floodgates" concern. Would recognizing a private law duty of care to persons killed by the police also extend to every person who is the victim of a crime? Is there a policy concern in the allocation of police resources to particular criminal investigations? These are legitimate concerns, but are not necessarily raised by the particular circumstances of this case. More importantly, however, they involve issues of some complexity that are better dealt with on a full factual record, rather than being dismissed on a summary basis under Rule 21.

[35] I do not agree with the submission that the duty of care should be negated because the plaintiffs have adequate remedies elsewhere. There was an inquest, and the family does have the option of suing the police officers for damages. However, the plaintiffs' claim is that their ability to get to the truth through [page726] any such avenues has been compromised by the inadequacy of the investigation. For example, of the two officers who were involved, the SIU failed to interview the officer who fired the shots (even though he agreed to be interviewed) and failed to ask a number of allegedly key

questions of the other officer. The ability to get that information at an early stage can be seen as critically important. Accepting the truth of the allegations at this stage, it cannot be said that other possible remedies would adequately compensate the interests of the plaintiffs raised here.

[36] I also reject the submission of the appellants that the cause of action should not be recognized because it would have a "chilling effect" on the SIU. There is no logic to the submission that SIU investigators would be reluctant to talk to family members if they owed them a duty of care; surely the opposite would be true. In any event, the SIU is already under a private law duty of care owed to the suspect officers to conduct a reasonable and competent investigation. If interviewing family members would be required to conduct a thorough investigation, then that would simply be done. An obligation to the family members to conduct a reasonable and competent investigation cannot be said to be in conflict with the duty owed to the suspects; it is the same standard of care. Neither party is entitled to a favourable investigation, but rather to a fair and competent one. Indeed, recognizing a corresponding duty of care to the family of the person killed may arguably provide a valuable balancing of interests, to ensure that the investigation is not tipped too favourably towards the interests of the suspects. This may be particularly so in situations involving SIU investigations because of the history of tensions between police and certain racial and ethnic minorities, which apparently was one of the impetuses for the formation of the SIU in the first place. Again, these are complex issues that are best decided on a full record, rather than on a motion such as this.

[37] The motion judge, quite properly, did not make any conclusive findings as to the existence of a duty of care in this situation. What she determined is that the possibility of a duty of care arising could not be ruled out and that the issue would be better addressed on the basis of a full factual record that can only be obtained at trial.

The importance of a trial

[38] In this regard, it is useful to again consider the words of the Supreme Court of Canada in Hill, at para. 27:

> This decision deals only with the relationship between the police and a suspect being investigated. If a new relationship is alleged to attract [page727] 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.

[39] There are certainly cases in which courts have dealt with issues of this nature on a Rule 21 motion. However, that does not mean it is always appropriate to do so. This is an emerging area of the law. There are important policy issues involved at both stages of the Anns/Cooper analysis. It is clear that in some cases a duty of care will be recognized in respect of persons who are the complainants or victims of crime. Odhavji is one example. Another obvious one may be where there is a specific duty to protect or warn where police are specifically aware of a criminal act about to be committed against a particular person. It is likely that as the case law develops, lines will be drawn. A person whose bicycle is stolen may not have the same cause of action against the police for negligent investigation as someone who is shot. However, as was urged by the Supreme Court, the law should be permitted to develop slowly and thoughtfully, on the basis of a full evidentiary record.

[40] This case is an example of the type of case that should be permitted to proceed to trial so that the important issues it raises can be carefully examined on the basis of a more thorough factual analysis than is possible at this stage. Such factual issues include the foreseeability of the particular types of harm alleged by the family; the causal connection

between the alleged inadequacies in the investigation and the harm to the plaintiffs; the expectations of the family in respect of the SIU and whether, in all the circumstances, those were reasonable; the extent and nature of the contact between the family and the SIU in the course of the investigation; the nature of SIU's duty to the various participants; the historical context surrounding the creation of the SIU and whether that enhances any policy concerns underlying a duty of care; the role, policies and practices of the SIU; the use and significance of SIU investigations in inquests and civil suits and whether that is sufficient to create an expectation interest; the extent to which SIU investigations may differ from and involve different policy concerns than regular criminal investigations by police forces; and the availability of other mechanisms for ensuring accountability of the SIU. [page728]

[41] Finally, the appellants, relying on Syl Apps Secure Treatment Centre v. D. (B.), [See Note 20 below] emphasize the desirability of determining this issue on a Rule 21 motion based solely on the pleadings in order to prevent a protracted and expensive trial. Firstly, that is an undoubtedly preferable procedure in appropriate cases. However, the Syl Apps case involved a very different situation from this case. At issue was whether the service providers to a child apprehended by the Children's Aid Society as a child in need of protection owed a duty of care to the family of the child in their care. The Supreme Court found that it was "plain and obvious" that the care providers had a statutory duty to act in the best interests of the child, to protect the child and to maintain confidentiality. This would put them in a conflict of interest if they also had a duty of care to the family from whom the child had been taken. The family had full rights to challenge the decision placing the child in care. That was not the kind of case that required a trial to deal with questions of fact. Secondly, counsel for the family in this case has offered a reasonable and cost effective alternative, to which the appellants have not responded. He proposes a bifurcated trial with the issue of the existence of a cause of action to be decided first, prior to any trial as to whether the investigation was in fact negligently conducted. I would urge

the parties to explore the efficacy of such an option.

D. Conclusion

[42] In the result, the appeal is dismissed. The intervenors neither sought, nor are they liable for, any costs. The quantum of costs for the leave motion was fixed by Karakatsanis J. at $2,500. Those costs are payable by the appellants to the respondents forthwith. If the parties are unable to agree upon the costs for this appeal, written submissions may be forwarded to the court. The respondents' submissions shall be due within 30 days of the release of these reasons, and the appellants' submissions 15 days thereafter.

SWINTON J. (dissenting): --

Overview

[43] I agree with Molloy J.'s statement of the legal principles respecting Rule 21 [of the Rules of Civil Procedure, R.R.O. 1990, [page729] Reg. 194] motions and the requirements of the Anns/Cooper test. As well, I agree that it is necessary to do an Anns/Cooper analysis in this case, despite Norris v. Gatien (2001), 56 O.R. (3d) 441, [2001] O.J. No. 4415 (C.A.), given the more recent decision of the Supreme Court of Canada in Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, [2007] S.C.J. No. 41. However, the analysis leads me to the conclusion that it is plain and obvious the Special Investigations Unit ("SIU") owes no private law duty of care to the plaintiffs in the circumstances of this case. Therefore, I would allow the appeal and grant the motion to dismiss the action.

[44] There is an advantage to making a determination about the existence of a private law duty of care at the early stage of a Rule 21 motion, as has been observed in a number of cases (see, for example, Syl Apps Secure Treatment Centre v. D. (B.), [2007] 3 S.C.R. 83, [2007] S.C.J. No. 38, 2007 SCC 38, at para. 19; Williams v. Canada (Attorney General) (2009), 95 O.R. (3d) 401, [2009] O.J. No. 1819 (C.A.), at para. 39). In the present case, the issue as to whether family members and the estate of a victim of crime are owed a private law duty of care by the SIU can be determined on the basis of the pleadings

and the statutory framework. There is no need for an evidentiary background to determine the issue of whether there is sufficient proximity between the plaintiffs and the defendants such that a duty of care should be imposed.

The Legal Principles

[45] At the first stage of the Anns/Cooper test, the question to be determined is whether the harm that occurred is the reasonably foreseeable consequence of the defendant's act. To determine that question, one focuses on factors arising from the relationship between the plaintiff and the defendant, including questions of policy in the broad sense of that word (Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, at para. 30). The plaintiff must show both foreseeability and proximity, the latter requiring the plaintiff to show 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" (Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, [2001] S.C.J. No. 77, at para. 9).

[46] Where a private law duty of care is asserted against a public authority, the starting point for analysis is the statutory context. However, beyond the statutory context, it is necessary to inquire into the relationship between the plaintiffs and the defendant to determine whether, in the circumstances, they are [page730] in such a close and direct relationship that it is fair and just to impose a private law duty of care (Cooper, supra, at para. 42; Williams, supra, at paras. 32-33).

The Statutory Context

[47] In order to find that a public authority owes a private law duty of care, one must conclude that the purpose of the statutory scheme at issue is to benefit individual members of an identifiable group and the loss at issue is the type of loss the statute was meant to guard against (Klein v. American Medical Systems, 2006 CanLII 42799 (Ont. Div. Ct.), at para. 24). In my view, the provisions of the Police Services Act, R.S.O. 1990, c. P.15 (the "Act") do not reveal a legislative intention, either expressly or impliedly, to impose on the SIU a private law duty of care to families of victims and the

estate of the victim.

[48] The SIU derives its existence and powers of investigation from s. 113 of the Act, found in Part VII. Subsection 113(1) establishes a special investigations unit in the Ministry of the Solicitor General (now in the Ministry of the Attorney General).

[49] When a serious injury or death has occurred that may have resulted from criminal offences committed by police officers, the SIU may undertake an investigation pursuant to s. 113(5). The director, on his own initiative, may initiate an investigation, and he or she must do so at the request of the Solicitor General or the Attorney General.

[50] The SIU has two further functions. Pursuant to s. 113(7), the director shall cause informations to be laid against police officers if, in his or her opinion, there are reasonable grounds to do so. The informations are to be referred to the Crown Attorney for prosecution. Finally, the director must report the result of an investigation to the Attorney General (s. 113(8)).

[51] There is nothing in the wording of s. 113 of the Act that either explicitly or implicitly creates a private law duty of care to any individual. The director has a discretion to choose whether to investigate, unless required to do so by one of the two named ministers. The purpose of the investigation is clearly to carry out a public function: to determine whether criminal charges should be laid against police officers who have seriously injured or killed someone. The public nature of that function is evidenced, in particular, by the facts that an investigation can be required by one of two ministers of the Crown, and the result of the investigation must be reported to the Attorney General.

[52] Historically, police officers have been recognized to owe duties to the public as a whole in the conduct of investigations and decisions to lay criminal charges. For example, the Declaration of [page731] Principles in s. 1 of the Act provides that police services shall be guided by "the need

to ensure the safety and security of all persons and property in Ontario".

[53] The SIU, through its investigation of possible criminal activity by police officers, similarly carries out a duty to the public as a whole, ensuring that investigations of such activity are carried out by an independent body rather than the police force itself.

[54] In two significant cases, the Supreme Court of Canada refused to impose a private law duty of care on regulators to individuals protected by a regulatory regime. For example, in Cooper, supra, an investor brought an action against the registrar of mortgage brokers, alleging negligence in failing to suspend a mortgage broker's licence and failing to alert investors that he was under investigation. The Supreme Court held there was insufficient proximity between the registrar and individual investors, as the registrar owed a duty to the investing public collectively and not to individual investors (at paras. 44 and 49).

[55] In Edwards, supra, the court found that the Law Society of Upper Canada did not owe a private law duty of care to an individual who claimed damages for the Law Society's alleged failure to properly monitor a solicitor's trust account. Again, the Law Society's duty was to protect clients and thereby the general public (at paras. 13 and 14).

[56] The Ontario Court of Appeal has also refused to find a private law duty of care on the part of regulators in a number of cases, finding that the regulators' duties were owed to the public as a whole and not to individual members of the public (Attis v. Canada (Minister of Health) (2008), 93 O.R. (3d) 35, [2008] O.J. No. 3766 (C.A.), at para. 59; Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care) (2006), 82 O.R. (3d) 321, [2006] O.J. No. 4400 (C.A.), at para. 20; Williams, supra, at para. 31).

[57] Admittedly, the defendants in those cases exercised a broad policy and regulatory role, unlike the SIU, which has an investigatory role. However, the Court of Appeal also held in

Norris, supra, that there was no private law duty of care owed by a police officer investigating a crime to the family members of the victim. Police officers owe a duty to the public at large when investigating a crime or determining whether to lay charges (at para. 18).

[58] In the most recent Ontario case on the private law duties of police officers, Project 360 Investments Ltd. (Sound Emporium Nightclub) v. Toronto Police Services Board, 2009 CanLII 36380 (Ont. S.C.J.), Macdonnell J. stated (at para. 19):

> To paraphrase language used by the Supreme Court of Canada in Edwards v. Law Society of Upper Canada, supra, and borrowed by the Court of [page732] Appeal in Williams, supra, in fulfilling their duties the police are required to act in the general public interest and to balance "a myriad of competing interests the nature of which are inconsistent with the imposition of a private law duty of care".

[59] It is not surprising that family members wish to have a competent investigation and to be apprised of its results, but that does not create a private law duty of care. This is not a situation like the one in Heaslip Estate v. Mansfield Ski Club Inc. (2009), 96 O.R. (3d) 401, [2009] O.J. No. 3185, 2009 ONCA 594, a case relied on by them. In that case, the plaintiffs alleged that the Province of Ontario was negligent because it failed to prioritize the medical needs of a young man seriously injured in an accident and failed to send or divert an air ambulance to transport him to a hospital capable of treating his injuries. The statement of claim contained allegations that focused on the specific interaction between the young man and Ontario when a request for an air ambulance was made -- in particular, that the province was responding to a specific request for medical services and failed to comply with an established government policy. As the Court of Appeal stated (at para. 21):

> The duty of care alleged here belongs within the established category of a public authority's negligent failure to act in accordance with an established policy where it is reasonably foreseeable that failure to do so will cause physical harm to

the plaintiff: see, e.g., Just v. British Columbia, [1989] 2 S.C.R. 1228 ("Just").

[60] Here, there is no allegation that the SIU failed to comply with established policy. It was carrying out an investigation of alleged police misconduct in the general public interest. While the SIU has a duty of care to suspect officers in doing so, given Hill, there is nothing in the Act which indicates a legislative intention to create a duty of care to family members or the estate of the victim.

Is there a direct relationship between the plaintiffs and the SIU?

[61] Beyond the statutory context, it is still necessary to ask whether, in the circumstances, the parties are in such a close and direct relationship that it is fair and just to impose a private law duty of care on the defendants (Cooper, supra, at para. 42). Factors that may be considered to determine the proximity analysis include the parties' expectations, representations and reliance (Cooper, at para. 34). As the Court of Appeal stated in Attis, supra (at para. 66):

> However, once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk.

[page733]

[62] The Supreme Court of Canada in Hill, supra, found a duty of care by police officers to individual suspects under investigation. The majority emphasized that there was a close and direct relationship between police and particularized suspects because the relationship is "personal, and is close and direct" (at para. 33). Clearly, the court was influenced by the significant consequences of a deficient investigation for the suspect who is criminally accused.

[63] The majority in Hill distinguished the cases of Cooper, supra, and Edwards, supra, because the public officials whom the plaintiffs sought to sue in those cases were not acting in

relation to the plaintiffs, but were acting in relation to a third party (those regulated) who then interacted with the plaintiff (at para. 33). In contrast, the police officer conducting an investigation of a particular suspect is in a direct relationship with him or her.

[64] The court in Hill took into account, as well, the interests engaged by the relationship. The suspect has a "critical personal interest in the conduct of the investigation", as his or her freedom and reputation are at stake (at para. 34). As well, the existing remedies for wrongful prosecution and conviction are described as incomplete (at para. 35).

[65] The court also took into account that the public interest is served by a private law duty of care, as it may assist in responses to failures of the justice system, such as wrongful convictions and institutional racism (at para. 36). As well, a duty of care by police officers to suspects is consistent with Canadian Charter of Rights and Freedoms values (at para. 38).

[66] Given Hill, the SIU would owe a duty of care to the officers under investigation by it. However, in the present case, the relationship between the SIU and the family of a victim of crime or the estate of a victim of crime is not close and direct in the way that the relationship of police officer and targeted suspect is close and direct. While the family understandably wants information about the death of their loved one, the consequences for them of an inadequate investigation are not comparable to the consequences for a particularized suspect, who is at risk of a wrongful prosecution or conviction and a limitation of liberty and constitutionally protected rights.

[67] Moreover, this is not a case where the pleadings disclose a direct interaction by the defendants with the plaintiffs in the operation of or implementation of a policy that creates a relationship of proximity, as described above in Attis. The plaintiffs plead that the SIU has a policy of informing family members of victims of police killings of

"much" of the information obtained in the SIU investigation (statement of claim, at para. 51), that the family [page734] members expected the SIU would conduct a competent investigation and that they relied on that expectation. These facts are not sufficient to found the kind of direct relationship that in other cases has given rise to a private law duty of care. This is not a case, for example, where the plaintiffs allege that the SIU made any representations on which they relied, as in Sauer v. Canada (Attorney General), [2007] O.J. No. 2443, 2007 ONCA 454.

[68] The interests at stake here are not like those in Hill, where the Supreme Court emphasized the potential harm to the targeted suspect from a negligent investigation because of the impact on the suspect's liberty and reputation and the incomplete remedies available in tort. Here, the alleged losses from a negligent investigation are said to be grief caused by the deprivation of a reasonable understanding of the death of Duane, a "compromised" coroner's inquest and a lessened opportunity to recover damages in a civil action for wrongful death.

[69] The family members' interest in knowing the circumstances of Duane's death is understandable. However, the public at large also shares an interest in knowing the circumstances of the death of a person killed in circumstances where there is police involvement. Indeed, evidence of that public interest is demonstrated by the provision in the Coroners Act, R.S.O. 1990, c. C.37 making an inquest mandatory when an individual is killed in the custody of police (s. 10(4.6)). However, that interest does not give rise to a private law duty of care by the SIU to the family.

[70] Nor does the potential deprivation of information to be used in a civil action against the police officers create a relationship of proximity with the SIU. The plaintiffs will still have access to the discovery process to gather information in the civil action.

[71] The plaintiffs argue that their grief will be compounded if the investigation is not proper and there is not proper

consideration of appropriate criminal punishment for his killers. The Court of Appeal in Norris, supra, concluded that family members have no legal interest in the investigation of a police officer and criminal proceedings taken against the person investigated, as those are matters of public law and public interest (at para. 18).

[72] Nor is this case analogous in any way to Jane Doe v. Toronto (Metropolitan) Commissioners of Police (1998), 39 O.R. (3d) 487, [1998] O.J. No. 2681 (Gen. Div.), where the Metropolitan Toronto Police Service was found to have a duty to warn potential victims living in a defined neighbourhood of the activities of a serial rapist. In that case, MacFarland J. found that police were aware of a specific threat or risk to a specific group of women. [page735]

[73] Here, assuming that a crime has been committed by the suspect officers, there is no risk of further harm to the plaintiffs from their activities, giving rise to a duty to act to prevent harm. The role of the SIU is to determine whether there are grounds for criminal charges because of the officers' past conduct.

[74] I would also distinguish Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74, which is relied on by the majority in the present appeal. In that case, the Supreme Court of Canada refused to strike a claim of negligent supervision against the Toronto chief of police. The court held that the chief had a statutory duty to ensure that members of the police force carried out their duties in accordance with the Police Services Act. The plaintiffs in that case had pleaded that the police officers intentionally and deliberately failed to co-operate with the SIU, in violation of a direct statutory obligation to co-operate with an SIU investigation. As a result, the court stated (at para. 58):

> The fact that the Chief already is under a duty to ensure compliance with an SIU investigation adds substantial weight to the position that it is neither unjust nor unfair to conclude that the Chief owed to the plaintiffs a duty of care to ensure that the defendant officers, did in fact, cooperate

with the SIU investigation.

In contrast, in the present case, the SIU does not have a statutory duty to conduct an investigation, unless one is requested by the Solicitor General or the Attorney General. Otherwise, the director has discretion to decide whether to hold an investigation.

Conclusion

[75] For these reasons, the plaintiffs have not satisfied the proximity requirement necessary to establish a private law duty of care. Given my conclusions on step one of the Anns/Cooper analysis, it is not necessary to proceed with step two and policy reasons for not imposing a duty of care. I would allow the appeal, set aside the order of the motion judge and dismiss the action.

Appeal dismissed.

Notes

Note 1: Police Services Act, R.S.O. 1990, c. P.15, Part VII.

Note 2: Brownhall v. Canada (Ministry of National Defence) (2007), 87 O.R. (3d) 130, [2007] O.J. No. 3035 (Div. Ct.).

Note 3: Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31.

Note 4: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 74 D.L.R. (4th) 321, at p. 980 S.C.R., p. 335 D.L.R.

Note 5: See, also, Nash v. Ontario (1995), 27 O.R. (3d) 1, [1995] O.J. No. 4043 (C.A.); Freeman-Maloy v. Marsden (2006), 79 O.R. (3d) 401, [2006] O.J. No. 1228 (C.A.), at para. 18.

Note 6: Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

Note 7: Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, 2001 SCC 79.

Note 8: Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, [2001] S.C.J. No. 77, 2001 SCC 80.

Note 9: Cooper v. Hobart; Edwards; Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, [2007] S.C.J. No. 41, 2007 SCC 41, 285 D.L.R. (4th) 620, at para. 20.

Note 10: Hill, at paras. 25-27; Attis v. Canada (Minister of Health) (2008), 93 O.R. (3d) 35, [2008] O.J. No. 3766 (C.A.), at paras. 36-37.

Note 11: Norris v. Gatien (2001), 56 O.R. (3d) 441, [2001] O.J. No. 4415 (C.A.); Porter v. Brampton (City), [2002] O.J. No. 5132 (S.C.J.); Fockler v. Toronto (City), [2007] O.J. No. 11, 43 M.P.L.R. (4th) 141 (S.C.J.).

Note 12: Beckstead v. Ottawa (City) Chief of Police (1997), 37 O.R. (3d) 62, [1997] O.J. No. 5169 (C.A.).

Note 13: Subsequently, in Hill (2005), 76 O.R. (3d) 481, [2005] O.J. No. 4045, 259 D.L.R. (4th) 676, 33 C.R. (6th) 269, 202 O.A.C. 310 (C.A.), the Court of Appeal affirmed its earlier ruling in Beckstead that police owed a duty of care to a particular suspect under investigation, which decision was ultimately upheld by the Supreme Court of Canada.

Note 14: Jane Doe v. Toronto (Metropolitan) Commissioners of Police (1998), 39 O.R. (3d) 487, [1998] O.J. No. 2681, 160 D.L.R. (4th) 697, 126 C.C.C. (3d) 12 (Gen. Div.).

Note 15: Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74, 2003 SCC 69.

Note 16: Odhavji, at para. 56.

Note 17: Hill, at paras. 23, 24 and 29.

Note 18: E.g., Edwards (the Law Society of Upper Canada does

not owe a duty to a member of the public who deposits money into a solicitor s trust fund); Cooper (registrar of mortgage brokers does not owe a duty to investors with a regulated mortgage broker); Williams v. Canada (Attorney General) (2009), 95 O.R. (3d) 401, [2009] O.J. No. 1819, 2009 ONCA 378 (the government does not owe a duty of care to members of the public who contracted SARS); Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care) (2005), 76 O.R. (3d) 36, [2005] O.J. No. 2225 (Div. Ct.) (the government does not owe a duty of care to individuals who contracted West Nile virus); Attis v. Canada (Minister of Health) (2008), 93 O.R. (3d) 35, [2008] O.J. No. 3766, 2008 ONCA 660 (Health Canada, in regulating medical devices, did not owe a private law duty to persons injured by the use of silicone breast implants).

Note 19: Hill, at para. 33.

Note 20: Syl Apps Secure Treatment Centre v. D. (B.), [2007] 3 S.C.R. 83, [2007] S.C.J. No. 38, 2007 SCC 38, 284 D.L.R. (4th) 682.
