

# The Best Defence is a Good Offence: Lessons from Recent Police Negligence Cases

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Prior to the Supreme Court of Canada decision in *Hill v. Hamilton Wentworth Regional Police*<sup>1</sup>, the focus in tort litigation cases involving police officers was whether malicious prosecution and wrongful confinement or imprisonment could be made out. The court's analysis generally revolved around the issue of whether an officer had reasonable grounds for arrest. Since *Hill*, Courts have expanded their inquiry into police officers' conduct to include a determination of whether their conduct met the standard of care of a reasonable police officer in similar circumstances. This article looks at a recent decision involving the campus police at the University Western Ontario and the impact of the *Hill* decision on the outcome of that case, as well as practices and procedures that should be carefully considered in light of the evolving trends in this area of the law.

A recent decision in the area of police negligence is *Small v. Stec*<sup>2</sup>. Mr. Small sought damages against the University of Western Ontario for the actions of its campus police, for negligence, false arrest, wrongful imprisonment, assault and battery, malicious prosecution, and breach of Charter Rights and Freedoms. Mr. Small had had a physical altercation with his long-term girlfriend in her apartment, which resulted in her phoning the campus police. Mr. Small's girlfriend had a red welt on her arm, which was observed by the campus police officer. This, along with other facts, led the campus police officer to have reasonable grounds to believe that an assault had been committed. After a few days, the Plaintiff (a P.h.D. student) was arrested while he was conducting some research in a lab near campus. The Plaintiff was handcuffed, arrested and charged with assault. He spent one evening in jail. The charges were eventually withdrawn by the Crown Attorney.

In alleging that the campus police were negligent, the Plaintiff was critical of the lead officer's investigation, as he failed to interview his girlfriend's roommate, neighbours, or the Plaintiff himself. There were also allegations relating to a failure to follow-up personally with the Plaintiff's girlfriend, a delay of a few days prior to the arrest, faulty CPIC information, inadequate notes, racial bias, and the place of arrest.

Justice Jenkins found that the lead officer was justified in concluding that a domestic assault had occurred. As a result, the officer was also justified in continuing his investigation, and eventually arresting and charging the Plaintiff with assault. Justice Jenkins commented that the Plaintiff had to share blame for the events that unfolded

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<sup>1</sup> *Hill v. Hamilton Wentworth Regional Police*, [2007] S.C.C. 41 ("*Hill*")

<sup>2</sup> *Small v. Stec*, [2009] O.J. No. 426 ("*Small*")

after the police became involved. Although the Plaintiff was aware that the campus police had interviewed his girlfriend, he made no effort to speak with them. The Plaintiff had a full opportunity to provide his version of the events to the campus police, but elected not to do so. Justice Jenkins also agreed with the Defence position that there was little to be gained (at least from the Plaintiff's perspective) from interviewing the Plaintiff's girlfriend's roommate or neighbours since they were not witnesses to the assault.

In addition, it was found that the delay in arrest could be explained by the fact that the lead officer was off duty for a few days. Further, Justice Jenkins held that the mistaken CPIC information was not material to the arrest because there were reasonable grounds to believe that an assault had occurred, regardless of the CPIC information. Although Justice Jenkins agreed that the officer's notes were inadequate, the adequacy of notes did not effect the outcome of the analysis of whether there were reasonable and probable grounds to arrest the Plaintiff, and whether the standard of a reasonable officer in similar circumstances was met.

The focus of the Plaintiff's case was not whether the officer acted with malice (which is one of the requirements to establish the tort of malicious prosecution)<sup>3</sup>, as may have been argued if this case preceded *Hill*. Instead, the *Small* decision reflects that there will now be a broad inquiry into police conduct to determine whether the conduct of police during an investigation meets the standard of a reasonable police officer in similar circumstances. This conduct will be examined in addition to whether there were reasonable and probable grounds for the arrest. While the Plaintiff in *Small* was unsuccessful, it is apparent that the Court's inquiry into the campus police conduct in this case went well beyond a consideration of whether reasonable grounds existed.

Justice Jenkins also dismissed the Plaintiff's arguments of racial bias largely based on his assessment of the credibility of the parties. In addition, it was significant that the University of Western Ontario maintained a discrimination and harassment policy, and that the lead investigating officer had been trained in these areas. Evidence was also led that established that the University had in place a procedure for students who wished to pursue discrimination complaints relating to University personnel, including campus police. The fact that the Plaintiff had not pursued this internal complaint procedure was noted by Justice Jenkins in his decision.

Accordingly, the following practices should be considered by police officers, but could certainly be extended to other professional environments as well:

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<sup>3</sup> See *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9

- (a) Ensure that there are adequate anti-discrimination policies in place and that the policies specifically address bias and profiling issues;
- (b) Ensure that there are adequate procedures in place to train officers on anti- discrimination and racial profiling issues;
- (c) Post the anti-discrimination policies and procedures and a definition of racial profiling, in conspicuous areas, so as to promote awareness;
- (d) Ensure racial profiling literature is available and offer ongoing education to officers; and
- (e) Ensure that a procedure is in place for persons who wish to pursue discrimination complaints, and ensure that the procedure is accessible to the population being served.

In addition, although the adequacy of the officer's notes was not seen to be a determinative factor in the context of the *Small* decision, a best practice would include the keeping of detailed notes, and ensuring that the notes have an objective tone.

In conclusion, as a result of the Supreme Court's decision in *Hill*, and the ongoing importance of anti-discrimination policies and procedures, it is important for police officers and other professionals to be aware of the expanded inquiry of Courts into these areas in a litigation context. While the Defendant in the *Small* decision acted in accordance with the standard of a reasonable police officer in similar circumstances, the analysis in this case shows the expanded nature of the inquiry that will be undertaken following *Hill*. It is important that law enforcement personnel be aware of the current trends in the case law as the best defence is always a good offence.