SUPREME COURT OF YUKON

Citation: *McClements v. Pike*, 2012 YKSC 84

Date: 20121023
S.C. No. 11-A0127
Registry: Whitehorse

Between:

ISABELLE MCCLEMENTS

Plaintiff

And:

SHAUN PIKE, THE ROYAL CANADIAN MOUNTED POLICE AND THE ATTORNEY GENERAL OF CANADA

Defendants

Before: Mr. Justice L.F. Gower

Appearances:

Jonathan Gorton	Counsel for the Applicants (Defendants)
Kyle Carruthers	Counsel for the Respondent (Plaintiff)

REASONS FOR JUDGMENT

INTRODUCTION

[1] The defendants have applied to strike the plaintiff's amended amended statement of claim under Rule 20(26)(a) of the Yukon *Rules of Court* on the basis that the plaintiff's claim discloses no reasonable cause of action. The plaintiff has sued the defendant Shaun Pike, who was a Corporal with the Royal Canadian Mounted Police ("RCMP") at the material time, for negligence in the conduct of an investigation relating to two fires in the plaintiff's residence in Teslin, Yukon. The second of these fires destroyed her home

and her personal property within. The plaintiff claims that the RCMP and the Attorney General of Canada are vicariously liable for Corporal Pike's negligence.

[2] The defendants submit that there is no basis in law upon which a court could possibly find that Corporal Pike owed a private duty of care to the plaintiff. Accordingly, they say that it is plain and obvious that the plaintiff's claim cannot succeed and therefore should be struck.

[3] The plaintiff submits that the circumstances in which this claim arose created a special relationship of proximity between her and Corporal Pike, which in turn is the basis for alleging that a private duty of care was owed to her by him.

[4] On an application to strike pleadings on the basis that they disclose no reasonable claim, the court must assume that all the facts alleged in the statement of claim are true: *Dana Naye Ventures v. Canada (Attorney General)*, 2011 YKSC 20. The test for striking the claim is that it should only be done in plain and obvious cases where it is absolutely beyond doubt that the claim is doomed to fail. In *Dana Naye*, at para. 10, Veale J. summarized the law on an application to strike, as set out in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959:

> "1. it is only in plain and obvious cases where the case is absolutely beyond doubt that a claim should be struck out;
>
> 2. the mere fact that a case is weak or not likely to succeed are not grounds for striking it out;
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> 3. if the action involves serious questions of law or if facts are to be known before rights are definitely decided, the rule should not be applied;
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> 4. a statement of claim may be amended;

5. the allegations in the statement of claim are accepted as true for the purpose of the application;

6. the statement of claim should be struck out only if the action is certain to fail because it contains a radical defect;

7. if there is a chance that the plaintiff might succeed, the plaintiff "should not be driven from the judgment seat".”

[5] I would add two additional points to this list, taken from *Nash* v. *Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at p. 5:

- the court must read the statement of claim generously, with allowance for inadequacies due to deficient drafting; and
- the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence.

[6] Therefore, the issue on this application is whether it is beyond doubt that the circumstances of this particular case are incapable of giving rise to a private duty of care owing from Corporal Pike to the plaintiff. If so, the claim must be struck. However, if there is any chance that the plaintiff might succeed, then the application must be dismissed.

[7] The plaintiff has the ultimate legal burden of establishing the duty of care. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant: *Childs v. Desormeaux*, 2006 SCC 18, at para. 13.

[8] The plaintiff alleges the following facts support the imposition of a private duty of care:

a) She owned a house and improvements on land located at Mile 805.5 on the Alaska Highway (the "residence").

b) Corporal Pike is a member and employee of the RCMP.

c) The plaintiff called the RCMP because her daughter, Jenna McClements, had started a fire at the residence.

d) In response to the call, Corporal Pike attended the residence, along with the Teslin Fire Chief, and conducted an investigation into the fire.

e) During the course of the investigation, Jenna McClements, who was highly and visibly intoxicated, stated to the Fire Chief that she would burn down the residence when the authorities left. The Fire Chief apparently advised Corporal Pike of this statement.[1]

f) The plaintiff expressed concern to Corporal Pike about Jenna McClements being left alone in the residence and asked the Corporal what he intended to do about the situation.

g) Corporal Pike took no further steps with his investigation and did not remove Jenna McClements from the residence. Rather, he asked the plaintiff to leave the residence and transported her to another location for the night.

h) Later that night, Jenna McClements started a second fire which destroyed the structure of the residence and the plaintiff's personal property within.

LAW

[9] In my view, the evolving case law in this area, while diverse, is capable of supporting an argument in favour of the police owing a particular victim a duty of care. A

[1] Paragraph 8.1 of the amended amended statement of claim says that Pike was told only that “she would burn the residence down”, but a generous (and common sense) reading would suggest that the Fire Chief would have relayed the complete statement to Pike.

number of judgments, particularly in Ontario, hold that there can never be a private duty of care owed by a police officer to a victim, because that would directly conflict with the duty of the police to protect the public at large. I find that these cases are distinguishable. Further, other cases have found a private duty of care arises in particular relationships between police officers and persons suffering harm as a result of their actions, e.g. suspects in investigations. Also, while the Supreme Court of Canada has yet to recognize a private duty of care as between a police officer and a victim, it has repeatedly stated that the categories of relationships which may give rise to a duty of care are not closed and that new categories may be introduced as the law of negligence evolves. Unfortunately, in order to make my point in this regard, a rather lengthy review of the case law in this area is necessary.

[10] In *Cooper v. Hobart*, 2001 SCC 79, the Supreme Court of Canada held that, in assessing whether a duty of care should be imposed in a particular set of circumstances, the test from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), is still appropriate in the Canadian context. The majority's analysis of the law began with recognizing that *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), revolutionized the common law by replacing the old categories of tort recovery with the single comprehensive negligence principle (para. 22). From that time forward, liability would lie for negligence in circumstances where a reasonable person would have viewed the harm as foreseeable. However, foreseeability alone was not enough; there also had to be a close and direct relationship of proximity between the alleged tortfeasor and the person harmed (para. 22).

[11] The Supreme Court then went on to discuss the now familiar two-stage *Anns* analysis at para. 30:

> "In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? 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. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care…." (my emphasis)

[12] The Court next explained that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise, and that sufficiently proximate relationships may be categorized. However, the Court was careful to state: "The categories are not closed and new categories of negligence may be introduced." (para. 31). This, said the Court, permits the law of negligence "to evolve to meet the needs of new circumstances." (para. 31).

[13] As for the first stage of the *Anns* test, the Supreme Court noted that the factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case (para. 35). Evaluating the closeness of a relationship "may involve looking at expectations, representations, reliance, and the property or other interests involved…to determine whether it is just and fair having regard to that relationship to impose a duty of care …" (para. 34).

[14] As for the second stage of the *Anns* analysis, the Court said this, at para. 37:

> "…As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These 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. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?..." (my emphasis)

[15] In *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, McLachlin C.J., writing for the majority of the Court, held that police are not immune from liability under the Canadian law of negligence and that the tort of negligent investigation exists in Canada (para. 3). In that case, the plaintiff, Hill, was investigated by the police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for crimes he did not commit. The police officers involved suspected that he had committed 10 robberies. The evidence against Hill included eyewitness identifications and a photo line-up identification. The majority concluded that police officers owed a duty of care to suspects in police investigations.

[16] At para. 20, the Court again summarized the two-stage *Anns* analysis:

> "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? …"

[17] At para. 27, McLachlin C.J. was careful to emphasize that her judgment was concerned only with the relationship between a police officer and a particular suspect being investigated and that there were special considerations relevant to proximity and

policy applicable to that relationship which gave rise to the private duty of care. However, she did not foreclose the possibility of a duty of care arising with respect to other persons interacting with the police and echoed what was said in *Cooper* about permitting the law of negligence to evolve:

> "… 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…." (my emphasis)

[18] In her proximity analysis, McLachlin C.J. stated that the presence or absence of a "personal relationship" between the wrongdoer and the victim is an important factor to consider (para. 30), and in the context of a police officer and a suspect, she said this:

> "… 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…." (para. 33, with my emphasis)

[19] McLachlin C.J. noted that a final consideration bearing on the relationship is the interests it engages, and that a "critical personal interest in the conduct of an investigation" supports a finding that the relationship is sufficiently proximate to give rise to a duty of care (para. 34).

[20] As stated in *Cooper* above, there are policy considerations at both of the stages of the *Anns* test. However, those in the first stage are internal to the relationship between the parties and those in the second stage are external to the relationship (para. 30 of *Cooper*). In *Hill*, at paras. 40 and 43, McLachlin C.J. seems to be discussing the second stage external policy considerations in the context of the relationship between the police and suspects. First, she did not agree that a police officer's duty to the public to prevent crime is necessarily incompatible with recognizing a duty of care to suspects. Second, mere conflict or potential conflict between these duties is insufficient to negate a *prima facie* duty of care. McLachlin C.J. suggests that there must be a "real potential for negative policy consequences" going beyond mere "speculative grounds" for such a conflict:

> "[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.
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> …
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> [43] …[E]ven 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…." (my emphasis)

[21] At para. 48, McLachlin C.J. set out the arguments of the various police associations that the following policy considerations negate a duty of care to suspects:

- the "*quasi-judicial*" nature of police work;
- the potential for conflict between a duty of care in negligence and other duties owed by the police;
- the need to recognize a significant amount of discretion 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.

Before systematically debunking each of these arguments (at paras. 49 through 61), McLachlin C.J. repeated the need for a real potential for conflict going beyond mere speculation at para. 48:

> "… 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. (my emphasis)

[22] In specifically rejecting the notion that the discretion inherent in police work is a policy consideration sufficient to negate the proposed private duty of care, McLachlin C.J. suggested in the alternative that this discretion should be taken into account in formulating an appropriate standard of care:

> "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.
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> 52 Police, like other professionals, exercise professional discretion...
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> 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.
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> 54 … An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence…"

[23] In *Project 360 Investments Ltd. v. Toronto Police Services Board*, [2009] O.J. No. 2473 (S.C.), the claim arose from an incident at a nightclub operated by the plaintiffs in which one McCalla entered the nightclub with a concealed firearm on the evening of October 5, 2002. He shot a patron sometime after midnight in the early morning hours of October 6th. The plaintiffs alleged that the police knew McCalla was a gang member and a person with a history of violent criminal behaviour and that they also knew he intended to attend the club that night armed with a firearm. Accordingly, they argued that the police had a duty to prevent McCalla from entering the nightclub or to warn the plaintiffs of his intention to enter. The police applied to strike portions of the statement of claim alleging a private law duty of care on their part.

[24] It was alleged (and presumably assumed true for the purposes of the application by the police) that the police learned on October 5, 2002, that McCalla intended to go to the plaintiffs' nightclub armed with a firearm. However, no facts were pleaded that, prior to that date, the police knew of any connection - past, present or prospective - between McCalla and the plaintiffs (para. 9). Accordingly, the application by the police was to strike portions of the statement of claim alleging that they and the plaintiffs were in a relationship of proximity based upon information they acquired prior to October 5, 2002. The trial court allowed the application, but granted leave to the plaintiffs to amend their statement of claim.

[25] What is interesting about *Project 360* is that the police did not appear to dispute that the knowledge they acquired of McCalla on October 5th may have created a relationship that was sufficiently proximate to give rise to a private law duty of care. Indeed, the Court noted the position of the police as follows:

> "10. …For the purposes of this motion, the defendants do not dispute that as of the time the police acquired knowledge of McCalla's intention they were in a position of sufficient proximity to the plaintiffs to give rise to a private law duty of care. Accordingly, they do not seek to strike the claim in its entirety or to prevent the action from going forward…
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> …
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> 11. The defendants submit that the [impugned] portions of the Claim go beyond an allegation that the knowledge the police acquired on October 5 gave rise to a private law of duty of care…
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> …
>
> 15. With respect to the first stage of the test, the defendants do not argue that the harm alleged by the plaintiffs was not foreseeable. Their submissions have been focused on the question of whether the police and the plaintiffs were in a

> relationship of proximity prior to October 5, 2002." (my emphasis)

[26] In *Spencer v. Canada (Attorney General)*, 2010 NSSC 446, the plaintiff reported to the RCMP that her husband had assaulted her. The husband was arrested and held in custody overnight. The police told the plaintiff that when the husband was released from custody he would be escorted back to their home to retrieve his belongings and would not be left there unattended. The husband was released the following day and was driven to the family home by an RCMP officer who failed to remain on the scene. The husband set fire to the home and was subsequently convicted of arson. The plaintiff claimed damages based on the alleged negligence of the RCMP.

[27] The trial judge granted a summary judgment in favour of the Attorney General of Canada on the basis that it was not reasonably foreseeable that, as a result of the RCMP's actions, the husband would burn down the home upon his release. Therefore, on the first part of the *Anns* test, the judge was not satisfied that the plaintiff had a real chance of success in establishing that a private duty of care existed. However, in the event that he was wrong in that determination, he went on to deal with the proximity issue.

[28] The trial judge's proximity analysis focused on s. 18 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, although he also reviewed *Project 360* and *Hill v. Hamilton-Wentworth*. The trial judge concluded that the primary purpose of the *Act* is to protect the public as a whole, and he was not satisfied that the courts had previously recognized a relationship of proximity between the RCMP and victims of crime (para. 56). He also implicitly accepted the Attorney General's submission that there is a compelling policy reason to refuse to impose a private duty of care, i.e. that doing so would inhibit

the RCMP's ability to effectively discharge their statutory duties to the public, because the police are required to balance the liberty of the accused and the protection of public (para. 57).

[29] In *Thompson v. Saanich (District) Police Department*, 2010 BCCA 308, the plaintiff was estranged from his wife, with whom he had two daughters. He complained to the police in 1997 that his wife was beating the children with a kitchen spatula. The police investigated and found evidence confirming that allegation, but did not charge the wife with assault or proceed any further with the investigation. In family proceedings, the plaintiff was ultimately placed under a restraining order and an interim order changing his unrestricted access to supervised access. He claimed that the negligent investigation of the wife by the police interfered with his relationship with his children and caused them to become estranged. The trial judge dismissed the action because the plaintiff had failed to establish that the police owed him a duty of care. At para. 27, the British Columbia Court of Appeal agreed, concluding that the relationship of the plaintiff to the police officers was not sufficiently proximate to find a duty of care. The court held that the plaintiff was not the subject of the information provided to the police, either as one of the persons said to be wronged - his children - or the person thought to be the wrongdoer - his wife. Rather, the Court stated that, although the plaintiff was the father of the children, he was “one party removed from the complaint” and "not within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions."

[30] In *Wellington v. Ontario*, 2011 ONCA 274, two police officers pursued a vehicle driven by the plaintiff's 15-year-old son. The pursuit led to a confrontation and, when the

son attempted to evade capture, he was fatally shot by the police. The plaintiff alleged that the pursuit and shooting were without legal justification. The Special Investigation Unit (SIU) of the police force conducted an investigation and concluded that the officers had acted lawfully and that criminal charges were not warranted. The issue before the Ontario Court of Appeal was whether victims of crime committed by police officers have the right to sue the SIU for negligent investigation.

[31] In its analysis, the Court of Appeal relied heavily on its previous decision in *Norris v. Gatien* (2001), 56 O.R. (3d) 441(C.A.), leave to appeal to Supreme Court of Canada refused, [2002] S.C.C.A. No. 54. In that case, a cyclist was struck and killed by a motor vehicle driven by an Ontario Provincial Police ("OPP") officer. The cyclist's family sued, among others, the municipal police officer who investigated the fatal accident. They alleged that the negligent investigation led to the failure of the criminal prosecution against the OPP officer for impaired driving causing death and driving "over 80". The plaintiffs also claimed damages for emotional distress. The Court of Appeal concluded that the relationship between the parties did not give rise to a *prima facie* duty of care because the plaintiffs had "no legal interest" in the investigation or prosecution of the OPP officer, and that the investigation and prosecution were "matters of public law and public interest..." (at paras. 17-19, with my emphasis)

[32] The Court of Appeal in *Wellington* recognized that *Norris* preceded the Supreme Court's holding in *Hill v. Hamilton-Wentworth* that the police owe a duty of care to a particular suspect under investigation, but went on to note, at para. 20:

> "…there is now a long list of decisions rejecting the proposition that the police owe victims of crime and their families a private law duty of care in relation to the investigation of alleged crimes: *Thompson v. Saanich*

> *(District) Police Department* (2010), 320 D.L.R. (4th) 496 (B.C.C.A.); *Fockler v. Toronto (City)* (2007), 43 M.P.L.R. (4th) 141 (Ont. S.C.); *Project 360 Investments Ltd. v. Toronto Police Services Board*, [2009] O.J. No. 2473 (S.C.); *Spencer v. Canada (A.G.)*, 2010 NSSC 446; *Petryshyn v. Alberta (Minister of Justice)*, 2003 ABQB 86." (my emphasis)

[33] The Court also stated that the situation of a suspect is distinguishable from that of a victim or his or her family:

> "…A suspect faces the risk of the stigma of being charged and convicted, as well as the potential loss of liberty and *Charter* rights. The interests of victims and their families in a proper investigation are simply not comparable in nature. While no doubt deeply felt on a subjective level, the interests for which these individuals seek compensation do not ordinarily attract legal protection. Claims for added grief and mental distress are compensable only in exceptional cases: see *Healey v. Lakeridge Health Corp.* (2011), 103 O.R. (3d) 401 (C.A.); *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114." (para. 31)

[34] The Court of Appeal in *Wellington* commented briefly (at para. 32) that the British Columbia Court of Appeal in *Thompson* failed to find a duty of care to victims because the relationship between the plaintiff and the police was insufficiently proximate, as discussed above. However, in the result, the Ontario Court of Appeal considered that it was bound by its previous decision in *Norris* which it described as holding that it was "plain and obvious that the relationship between police officers and victims or their families did not give rise to a private law duty of care" (para. 34). And further, "As a three-judge panel, it is not open to us to reconsider our prior decision…". In other words, the *Wellington* Court seems to have concluded, in a general sense, that a duty of care cannot arise between the police and victims regardless of the degree of proximity.

[35] In *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402, the plaintiff was in an abusive relationship with R.K., who had a criminal record for violence and had been

sent to prison four times. R.K. pled guilty to an assault on the plaintiff in November 1995. The plaintiff and R.K. subsequently separated, however they met on March 11, 1996. During the meeting a dispute erupted. The plaintiff went to the police, but the officer she spoke to, one Constable Andrichuk, did not investigate her complaint. The provincial Attorney General had a policy requiring officers to be proactive in investigating complaints of domestic violence. On April 29, 1996, R.K. telephoned the plaintiff and an argument ensued. That night, R.K. broke into the plaintiff's house, shot and killed the plaintiff's friend, wounded one of her daughters, set the house on fire and shot himself. The plaintiff claimed that Constable Andrichuk was negligent in failing to take steps to adequately investigate her complaint.

[36] The trial judge in *B.M.* found that a duty of care arose from the special relationship resulting from the plaintiff's complaint to Constable Andrichuk on March 11th. However, he concluded that there was no causal connection between what occurred on that date and the violence at the plaintiff's residence on April 29th.

[37] The issues before the British Columbia Court of Appeal included whether there was a private duty of care and, if so, whether there was causation. Donald J.A. found for the plaintiff on both issues. Hall J.A. seems to have gone directly to the causation issue, without addressing the duty of care (para. 138), and agreed with the trial judge that there was no causality to be found on the evidence (para. 141). Smith J.A. said this:

> "I have had the privilege of reading the reasons for judgment of each of my colleagues in draft form. I agree with Mr. Justice Hall that this appeal must be dismissed on the basis that no causal link was established between Constable Andrichuk's inaction and the appellants' harm. In my view, the trial judge applied correct principles and made no error that would justify our intervention either in his findings of fact

> or in his application of legal principle to those facts." (at para. 146, with my emphasis)

[38] Implicitly then, if not explicitly, Smith J.A. agreed with the trial judge's conclusion that a private duty of care existed, as did Donald J.A. It is therefore noteworthy that, although the dispositive issue on the appeal was causation, two of the three judges on the panel seem to have agreed that there was a duty of care arising from the circumstances.

[39] Donald J.A.'s analysis on the duty of care issue focused on the provincial Attorney General's policy regarding violence against women, which included a requirement that attending officer's conduct a complete investigation in every case, as well as a "proactive charge policy" (paras. 50 and 51.). Donald J.A. concluded that it was just and fair to impose a duty on the police because of the policy, and continued:

> "In summary on the question of the duty of care, having made herself known to the police as a person in fear of a violent abuser, B.M. established a special relationship of proximity with the police thereby creating a private duty of care. The duty on the police was to act on the complaint promptly. I am in substantial agreement with the trial judge's ruling on this issue." (at para. 57, with my emphasis)

[40] Earlier in his reasons, Donald J.A. described the plaintiff's circumstances as follows:

> "…B.M. sought police assistance and had a direct engagement with an officer when she presented her complaint. She had a pressing need for protection as a potential victim of R.K.'s violence and the police should have recognized that. She cannot be said to fall into a large indeterminate class; to the contrary she was a person… with a "special distinctive risk"." (at para. 46, with my emphasis)

[41] In *Haggerty Estate v. Rogers*, 2011 ONSC 5312, the Hamilton Police Service received a 911 call from a wanted violent offender named Rogers indicating where he

was and that he wanted to turn himself in. The officers who took the call told Rogers to come to the police station. When Rogers failed to appear, the officers went to the residence from which the 911 call was placed, but Rogers was not present. A few days later, Haggerty was stabbed to death by Rogers in a bar. Haggerty's estate sued the Hamilton Police Services Board (“HPSB”), the Hamilton Police Service (“HPS”) and several of its officers and employees. The defendants applied to strike of the statement of claim for failure to disclose a cause of action. The plaintiff was entitled to proceed with the claims against the Police Service and the Police Services Board, but not as against the individual police officers.

[42] Turnbull J., of the Ontario Superior Court of Justice, commenced his *Anns* analysis of the duty of care issue by examining the governing legislation and stated:

> "It is clear from the legislative provisions creating them that the HPS and the HPSB are regulatory authorities responsible for providing for the security and safety of citizens in their jurisdiction and providing adequate and effective police services in the geographic area under their jurisdiction. However, whether the duty of a Police Service to the public at large narrows to a private duty to an individual is at issue here.” (para. 49)

Thus, notwithstanding that the legislation clearly imposed a public duty upon the police to ensure the safety and security of all persons and property in Ontario (para. 47), Turnbull J. nevertheless continued with his duty of care analysis.

[43] At para. 68, Turnbull J. quoted the passage from *Wellington* where Sharpe J.A. referred to the "long list of decisions rejecting the proposition that the police owe victims of crime…a private duty of care…” (see para. 32 of these reasons). He then said that he reviewed each of the cases listed by Sharpe J.A. and found that they contained significantly different facts from the case before him:

> "…In *Thompson v. Webber*, the plaintiff sued the police for damages he alleged he suffered because of their failure to charge his wife with assault of their children, which he alleged resulted in their alienation from him. In *Fockler*, Marrocco J. of this court dealt with a plaintiff's unusual claim for negligence of the police in investigating his allegations that police officers were influenced to act in a given way because of food and other benefits given to them by a tavern owner who was seeking a liquor licence in the plaintiff's neighbourhood. In *Project 360*, the owner of a night club was not permitted to proceed against the police with his action for damages for interruption of his business allegedly caused by the police allowing a man they were actively investigating and following to enter the plaintiff's night club where he discharged a gun. As in *Wellington*, the plaintiffs were indirectly affected by the alleged negligence of the police. In *Spencer v. Canada (Attorney General)*, the Plaintiff alleged negligence against the RCMP arising from the destruction of her residence by her husband's arson. The Plaintiff had reported to the RCMP that her husband had assaulted her. The Plaintiff's husband was arrested and held overnight. After his release, the Plaintiff's husband returned to the Plaintiff's home and burned it down. In dismissing the Plaintiff's claim against the RCMP on a preliminary motion, the court held that the act of arson was not reasonably foreseeable as all the evidence that the RCMP has on the date of Mr. Spencer's release related to domestic assault allegations and not concerns re property damage." (para. 69)

[44] Turnbull J. determined that all of the cases cited by Sharpe J.A. were distinguishable, because in Mr. Haggerty's case, he was "directly affected" by the alleged negligence of the police (para. 70).

[45] The only case not specifically distinguished by Turnbull J. was *Petryshyn v. Alberta (Minister of Justice)*, 2003 ABQB 86. In that case the plaintiff and her then landlord had an altercation of some kind, resulting in a complaint by the plaintiff to the police. Two officers went to investigate the complaint. Officer Olmstead spoke to the plaintiff and the landlord and concluded that charges were not warranted. The plaintiff wanted the landlord charged with assault. The police reconsidered the matter, but chose

to charge the landlord with forcible entry and possession of a weapon. The landlord went to trial on those charges and they were both dismissed. The following day the plaintiff sued the police alleging a negligent investigation. Master Funduk heard the application by the police for a summary dismissal of the lawsuit against them. He agreed with the Ontario Court of Appeal in *Norris*, cited above, that the plaintiff had "no legal interest in the investigation or prosecution" of the landlord (para. 11). Master Funduk succinctly described the problem with the plaintiff's claim as follows:

> "The Plaintiff's ultimate dissatisfaction is that her landlord was not charged with assault and the outcome of the charges that were laid. But she was not victimized by that. Complainants do not decide whether charges should be laid and if so what they should be. Second, complainants do not run the prosecution of a criminal proceeding. That is Crown counsel's responsibility and there was a provincial Crown prosecutor. Third, complainants do not decide if an accused is guilty. That is solely a function for the court." (para. 10)

[46] In the result, Turnbull J. concluded that it was not plain and obvious that the claim against the HPSB and the HPS could not succeed. He reasoned that the duty of care alleged in the case fell:

> "…within the recognized class of cases involving a public authority's negligent failure to act within established policies when it was foreseeable that failure to do so may result in physical harm to a member of the community who is alleged to have had a pre-existing relationship with Mr. Rogers or who arguably was in geographic proximity with Rogers." (para. 72).

[47] With respect to the individual police officers, Turnbull J. cited *Project 360* in support of the proposition that the statutory and common-law duties of police officers are owed to the public at large and not to particular individuals (para. 75). However, he did not read *Project 360* as going so far as to say that there is an "immunity" of police officers

from claims for tortious actions (para. 76). Rather, Turnbull J. held that, on the facts as pled, a finding that the individual police officers owed a duty of care could not be supported. Further, he remarked that counsel was unable to provide him with any authority for the proposition that police officers owe a private duty of care "to an individual with whom they have had absolutely no direct or indirect contact."

[48] Before turning to my analysis, I note the case of *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, which was cited but distinguished by the Ontario Court of Appeal in *Wellington*. *Fullowka* is a civil case arising from the intentionally set explosion at the Giant Mine near Yellowknife, Northwest Territories in 1992, that resulted in the deaths of nine miners. The explosion occurred during a strike at the mine. The miners' survivors sued the mine owner, the security company retained by the owner and the territorial government for negligently failing to prevent the murders. The Supreme Court of Canada held that the trial judge was correct in finding that both the security company and the territorial government owed the murdered miners a duty of care. However, the Court concluded that the trial judge erred in finding that these defendants did not meet the requisite standard of care. The duty of care attributed to the government arose from the allegation of negligence against its mining inspectors. The legislative context in that case was the *Mining Safety Act,* R.S.N.W.T. 1998, c.M-13 and the *Mining Safety Regulations,* R.R.N.W.T. 1990, c.M-16. The government argued that the legislation imposed duties in relation to the prevention of accidents, but not to the prevention of intentional criminal acts. However, Cromwell J., speaking for the Supreme Court, upheld the trial judge's finding that there was a *prima facie* duty of care, and noted in particular the "direct and personal dealings" that the mining inspectors had with the deceased miners. For

example, visits by the inspectors to the mine during the strike were said to have occurred almost daily. At para. 44, Cromwell J. commented: "As pointed out in *Hill,* in considering whether the relationship in question is close and direct, the existence, or absence, of personal contact is significant." At para. 52, he concluded that, while the inspectors' statutory duties did not extend to the detection and prevention of crime, that "does not seem to me to be an answer to the question of whether there is sufficient proximity between the inspectors and the miners in relation to mine safety issues, whatever the cause."

ANALYSIS

[49] The first question is whether the duty of care asserted by the plaintiff falls within one of the categories of cases in which proximity has been previously recognized by the courts: *Cooper*, at para. 23; *Wellington*, at para. 16. As I have already suggested, given that the law in this area is currently diverse and unsettled, the answer to this question must be "no".

[50] Similarly, it is important to note that the plaintiff is not alleging that she is a member of a class of victims to which a duty of care is owed. Notwithstanding a typo in paragraph 13 of the amended amended statement of claim, it seems clear that the plaintiff is alleging that Corporal Pike and the RCMP owed a duty of care to her personally; and that this duty was in the specific context of taking reasonable steps to protect her person, her residence and her personal property from foreseeable harm.

[51] To recap, the *Anns* test for determining whether a person owes a duty of care involves two questions (as framed in *Hill v. Hamilton-Wentworth)*:

1. Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care?
2. If so, are there any residual policy considerations which ought to negate or limit that duty of care?

[52] On the issue of foreseeability, the plaintiff's counsel submitted that it should have been "patently obvious" to Corporal Pike that, when Jenna McClements threatened to set a second fire, having allegedly set the first, it was reasonably foreseeable that she would carry out that act. Curiously, counsel for the defendants submitted that it was "unnecessary to undertake a full foreseeability analysis", but that Ms. McClements conduct in starting the second fire was nevertheless "not foreseeable". No reasons were given for that proposition. I agree with the plaintiff's counsel here. Firstly, as I will discuss below, the plaintiff made an arguable case on proximity. Therefore, it was necessary for the defendants to respond to the foreseeability issue. Secondly, the circumstances would seem to make it reasonably foreseeable that there was a risk of Jenna McClements setting the subsequent fire, which allegedly caused the plaintiff's loss.

[53] The starting point for determining the sufficiency of the proximity between the parties is to acknowledge that the plaintiff's relationship with Corporal Pike and the RCMP occurred in the context of a statutory scheme, i.e. the *Royal Canadian Mounted Police Act*: *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 (para. 45); and *Wellington*, at para. 39.

[54] Section 18 of the *Act* provides as follows:

> "18. It is the duty of members who are peace officers, subject to the orders of the Commissioner,

> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
>
> (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
>
> (c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and
>
> (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner."

[55] As the trial judge recognized in *Spencer* (para. 48), this legislation creates a duty on a police officer to protect the public as a whole, and does not specifically contemplate a duty to protect an individual's property or a duty to a specific individual. Indeed, this is the principle argument put forward by the defendants in support of their proposition that it is plain and obvious they do not owe the plaintiff a duty of care.

[56] The case authorities principally relied upon by the defendants are: *Project 360*; *Spencer*; *Thompson*; *Wellington*; and *B.M.*, all cited above. As Turnbull J. did in *Haggerty Estate*, at paras. 69 and 70, I find I can distinguish these authorities on the basis that the plaintiff in the case at bar was "directly affected" by the alleged negligence of Corporal Pike.

[57] In *Project 360*, the claim was by a nightclub owner for damages for interruption of his business as a result of the shooting by McCalla. Therefore, the claimant was one step removed from the patron who was shot. In any event, the case turned on what the police did or didn't know prior to the evening of the shooting. However, as for the knowledge acquired by the police on that particular evening, the police did not argue that the harm was not foreseeable and did not dispute that they were in a position of sufficient proximity to the plaintiff to give rise to a private law duty of care (paras. 10 and 15).

[58] In *Spencer*, the first question addressed by the trial court was foreseeability. Not surprisingly, the court held that all of the evidence acquired by the RCMP, as of the day of the husband's release from custody, related to domestic assault allegations. They had no evidence to suggest that the husband would inflict property damage. Consequently, the court was not satisfied that it would be reasonably foreseeable that the husband would burn down the family home on his release. Therefore, the *ratio* of the case turned on foreseeability and in that regard the court concluded that the plaintiff had no real chance of success in establishing that a duty of care existed.

[59] While the trial judge in *Spencer* went on to consider proximity, he did so only in the event he was wrong on foreseeability. Thus, his determinations with respect proximity were *obiter dicta*. In any event, he relied heavily upon *Project 360*, which I have already found to be distinguishable, in concluding that the legislation governing the RCMP created a duty to the public as a whole and not to specific individuals (para. 53). Further, he found that *Hill v. Hamilton-Wentworth* was restricted to "suspects" and did not determine a duty of care in the case of other relationships (para. 55). I have not found *Hill* to be so restrictive and indeed I suggest there is much language in the case capable

of supporting a duty of care *vis-à-vis* specific victims. Finally, the trial judge in *Spencer* seemed to accept the RCMP's arguments that there were compelling policy reasons to refuse to find proximity where an alleged private duty of care would conflict with the discharge of a statutory or public duty (para. 57). Counsel for the defendants made similar arguments in the case at bar, which I will return to shortly.

[60] In *Thompson*, the case once again turned on the fact that the plaintiff was one step removed from the complaint, unlike the case at bar where the plaintiff was directly affected. As the British Columbia Court of Appeal noted at para. 27:

> "In my view, the relationship of Mr. Thompson to the police officers, even on his full pleadings, is not sufficiently proximate to find a duty of care. Mr. Thompson was not the subject of the information provided to the police, either as a person said to be wronged - who were his children, or the person thought to be the wrongdoer - Ms. Thompson. He was, although the father of the children, one party removed from the complaint. I consider it is plain and obvious, on the pleadings, that Mr. Thompson was not within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions." (my emphasis)

In the case at bar, I find that the plaintiff was within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions.

[61] In *Wellington*, the Ontario Court of Appeal relied heavily on its own previous decision in *Norris*, where the deceased's family suing the police was found to have "no legal interest in the investigation". In the case at bar, it would appear that the plaintiff did have a significant legal interest in the investigation, as the safety of her real and personal property were directly at stake. As the Supreme Court stated in *Cooper*, at para. 34:

> "Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship

> between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant." (my emphasis)

[62] In *Wellington,* Sharpe J.A., speaking for the Court of Appeal, concluded that a duty of care had been "excluded" by prior decisions of that Court, the British Columbia Court of Appeal and "numerous trial courts" (para. 52). While indeed some of the prior decisions of the Ontario Court of Appeal have failed to find a duty of care vis-à-vis victims, most notably *Norris,* the Court's decisions in that regard have not been entirely consistent - a topic I will return to shortly.

[63] Further, I respectfully disagree that *Norris* is determinative in excluding the imposition of a duty of care upon police officers. In *Norris*, the Court of Appeal held that the plaintiff had “no legal interest” in the investigation. In the case at bar, I find the plaintiff did have a legal interest in Corporal Pike’s investigation, i.e. the protection of her property interest.

[64] In addition, the British Columbia Court of Appeal decision referred to by Sharpe J.A. appears to be *Thompson*, which I have already distinguished, as it dealt with a plaintiff who was one step removed from the negligence complained of, unlike the plaintiff in the case at bar.

[65] As well, the "numerous trial courts" mentioned by Sharpe J.A. would seem to be those cited by him at para. 20 of his reasons, all of which I have found to be distinguishable.

[66] As well, there are two examples of contrary decisions from Ontario: *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (C.A.) and *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1997), 74 O.R. (2d) 225 (Div. Ct.). In

Attis, the plaintiffs alleged that their breast implants leaked or ruptured, causing catastrophic medical consequences. They further alleged that the *Food and Drugs Act,* R.S.C. 1985, c.F-27 imposed a duty on Health Canada to ensure that individual members of the Canadian public are protected from devices that might cause them harm. The Court of Appeal agreed that the legislation signalled an intention that the government's duty was owed to the public as a whole and not to the individual consumer. However, the Court allowed that once a government actor has direct communication or interaction with an individual in the operation or implementation of a government policy, a duty of care may arise, particularly where the individual's safety is at risk. The Court commented as follows:

> "[65] When the government interacts with an individual in the context of an ordinary accident, the relationship is obviously both close and direct. In contrast, when government decides what laws to enact or how to allocate limited resources for the general good, it has neither a close nor direct relationship with the individual. The job of the government is to govern and, in the course of doing so, to make broad-based policy decisions for the benefit of the public collectively, even if those decisions may not have positive implications for all individuals….
>
> [66] However, <u>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</u>….
>
> [67]….Accordingly, a duty of care can be assumed and evidenced by the interaction between the parties, depending on the closeness of the relationship." (my emphasis)

[67] In *Jane Doe*, Moldaver J., speaking for the Divisional Court of the Ontario High Court of Justice, agreed that the police owed a duty of care to the plaintiff, who was the victim of a serial rapist. In particular, the Court held that the plaintiff was "part of a narrow

and distinct group of potential victims sufficient to support a special relationship proximity" (para. 19). The proximity arose from the alleged prior knowledge of the police that:

- the rapist confined his attacks to a specific area of Toronto;
- the victims all lived in second or third floor apartments;
- the entry in each case was gained through her balcony door; and
- the victims were all white single females.

[68] As Sharpe J. observed in *Wellington,* the alleged negligence in *Jane Doe* "had a direct, profound and damaging legal impact on the plaintiffs" (para. 19). I suggest the same can be said of the plaintiff in the case at bar.

[69] As noted, in *B.M.*, two of the three justices of the British Columbia Court of Appeal agreed that there was a private duty of care arising, because of the provincial Attorney General's domestic violence policy. Counsel for the defendants submits that this is reason enough to distinguish *B.M.*, since no such policy is involved in the case at bar. However, the language used by Donald J.A. at para. 46 of the judgment nevertheless seems particularly applicable to the plaintiff's circumstances:

> "…B.M. sought police assistance and had a direct engagement with an officer when she presented her complaint. She had a pressing need for protection as a potential victim of R.K.'s violence and the police should have recognized that. She cannot be said to fall into a large indeterminate class; to the contrary she was a person, in Lord Keith's words at 243 of *[Hill v. Chief Constable of West Yorkshire*, [1988]2 All E.R. 294] with a "special distinctive risk"." (my emphasis)

In the case at bar, the plaintiff similarly sought police assistance and had a direct engagement with an officer in presenting her complaint. She likewise had a pressing need for action as a potential victim of her daughter's arson. Arguably, the police should

have recognized that. Finally, as I noted at the outset, the plaintiff did not fall into a large indeterminate class of victims, but rather was a person with a special distinctive risk.

[70] In any event, returning to the *Royal Canadian Mounted Police Act*, while the legislative context is a relevant factor in the *Anns* analysis, it is not determinative. While I accept that the legislation does not specifically contemplate a duty to protect an individual's property or a duty to a specific individual, it is still incumbent on me to examine whether there are other circumstances capable of giving rise to a special relationship of proximity. To borrow from the language used by Turnbull J. in *Haggerty Estate*, I must still decide whether the duty of the police to the public at large “narrows to a private duty to an individual” in these particular circumstances.

[71] As noted in *Hill v. Hamilton-Wentworth*, the proximity analysis involves a determination of whether the relationship between the alleged wrongdoer and the victim was "close and direct". The words used by McLachlin C.J. at paras. 29 and 33 bear repeating here:

> "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…. (emphasis already added)
>
> …
>
> 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…." (my emphasis)

[72] In my view, the facts pled in the case at bar suggest a sufficient proximity between the plaintiff and Corporal Pike to support a cause of action. The plaintiff called the RCMP for assistance on March 26, 2010 when her daughter, Jenna McClements, had started a fire at the plaintiff's residence. When Corporal Pike and the Fire Chief attended the residence, Corporal Pike commenced his investigation. Jenna McClements was highly and visibly intoxicated and made a statement to the Fire Chief that she would burn down the residence when the authorities left. This statement was apparently relayed to Corporal Pike. The plaintiff expressed concern about her daughter being left alone at the residence and she asked Corporal Pike what he intended to do about the situation.

[73] By calling the RCMP with her complaint about the first fire, the plaintiff had singled herself out as a particular potential victim. She was no longer merely one person in a pool of potential victims. Also, Corporal Pike had begun an investigation into the first fire. It is reasonable to infer that Jenna McClements had been identified as a potential suspect relating to the first fire. Further, her state of intoxication and her threat to the Fire Chief were capable of both corroborating the plaintiff's complaint about the first fire and justifying the plaintiff's concern about her being left alone in the residence. In my view, these circumstances created a close and direct relationship between Corporal Pike and the plaintiff such that the Corporal ought to have had the plaintiff in mind as a person who might have been potentially harmed.

[74] The next question asks whether there are any internal policy considerations relating to the relationship between the plaintiff and Corporal Pike which would make it unjust or unfair to impose a duty of care. I did not understand counsel for the defendants to make such an argument. Rather, his policy arguments related to the external residual policy considerations to be considered in the second stage of the *Anns* test, which I will turn to next.

[75] Before I do so, I repeat that, although the plaintiff bears the ultimate legal onus of proving that she has a valid cause of action, once she establishes a *prima facie* duty of care, the evidentiary burden shifts to the defendant to prove any countervailing policy considerations.

[76] Counsel for the defendants submitted that the imposition of a private duty of care on the RCMP to conduct a proper investigation in order to protect an individual complainant's property would conflict with the ability of the police to effectively discharge their statutory duties to the public. In particular, counsel submitted that the imposition of such a duty would:

> "a) curtail the proper exercise of the police officer's discretion in the exercise of his duties;
>
> b) inhibit the ability of police to balance the liberty of the accused and the protection of the public;
>
> c) limit the discretion of police departments, and officers, in setting priorities, and the scope of investigation;
>
> d) lead to officers carrying out their duties in a more defensive frame of mind; and
>
> e) lead to more arrests of suspects as officers avoid any potential civil liability to the detriment of rights of potential suspects."

[77] Similar arguments were made in *Hill v. Hamilton-Wentworth.* However, as I noted earlier in these reasons at para. 21, McLachlin C.J. systematically rejected all of them. While she made it clear that her decision dealt only with the relationship between the police and the suspect being investigated, once again, much of the language and reasoning she employed in her response to those arguments seem equally applicable to the context of a specific victim. Firstly, at para. 40, McLachlin C.J. did not agree 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 officer's duty to the public to prevent crime. In particular, she did not accept that recognition of such a duty would place police officers under "incompatible obligations" (para. 40). Secondly, McLachlin C.J. held that conflict or potential conflict does not in itself negate a *prima facie* duty of care, but rather the conflict must pose "a real potential for negative policy consequences", reflecting the view that a duty of care in tort law "should not be denied on speculative grounds" (paras. 40 and 43). Indeed, she recognized that a suspect is a member of the public and, as such, "shares the public's interest in diligent investigation in accordance with the law" (para. 41). Logically, the very same could be said about a particular victim.

[78] Indeed, Charron J., dissenting on the cross-appeal, opined that a police officer's duty to diligently investigate crime is generally reconcilable with a potential victim's interest in being protected from crime. While she argued that a police officer's duty to investigate crime is "diametrically opposed" to the interests of the person under investigation:

> "…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…" (my emphasis)

[79] The similarities between the residual policy considerations in *Hill*, and the ones raised by counsel for the defendants in the case at bar are several, with the most obvious being the concern about an adverse impact on police discretion. However, that concern was clearly put to rest by McLachlin C.J. with her conclusion that an appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence (para. 54).

CONCLUSION

[80] Based on my review of the case law, I am not satisfied that it is absolutely beyond doubt that the plaintiff will not be able to establish that the defendants owed her a private duty of care to conduct a diligent investigation into her initial arson complaint. While the authorities are divergent, the principles enunciated by the Supreme Court in *Hill v. Hamilton-Wentworth* may well be capable of supporting a conclusion that such a duty existed in these particular circumstances. Any doubt in that regard should be resolved in favour of the plaintiff. Therefore, the application to strike is dismissed.

[81] Costs were not specifically spoken to at the hearing. If counsel are unable to agree on the issue, I will remain seized for the purpose of hearing further submissions.

Gower J.