Court of Queen's Bench of Alberta

Citation: Rennalls v Tettey, 2021 ABQB 1

Date: 20210104
Docket: 1901 00374
Registry: Calgary

Between:

Teliesha Rennalls

Plaintiff

- and -

Korku Tettey, Rick Hanson, Roger Chaffin, and Paul Wagman

Defendants

Decision
of the
Honourable Mr. Justice N.E. Devlin

I. Overview

[1] Teliesha Rennalls has sued the Calgary Police Service for negligent handling of her sexual assault complaint. Despite determining that there were reasonable and probable grounds to charge the alleged perpetrator, Korku Tettey, the police failed to arrest him for almost four-and-a-half years after the assault, resulting in the ultimate demise of the prosecution.

[2] The learned Master in Chambers held that the facts of this case are sufficiently novel to permit the claim to proceed to trial, notwithstanding that police generally do not owe a personal duty of care in tort to the victims of crime. CPS appeals that decision and asks this Court to strike the claim on the basis that it has no reasonable prospect of success.

II. Facts

[3] On May 9, 2009, Ms. Rennalls ["Rennalls"] called the Calgary Police Service ["CPS"] and reported that Mr. Tettey ["Tettey"] had just sexually assaulted her at his home in Northeast Calgary. Rennalls told police that she had gone to Tettey's residence in the early hours after a house party, fallen asleep, and been awakened by him performing non-consensual intercourse. After the assault, Tettey remonstrated with her not to go to the police, but she did.

[4] Officers interviewed Rennalls and transported her to a hospital where they arranged for a sexual assault examination to be conducted by a physician.

[5] The case then fell into unexplained dormancy. CPS obtained a warrant for Tettey's arrest in December 2010, 18 months after the complaint. That warrant was not executed for another three years, despite Tettey continuing to live at the address where the crime is said to have occurred. During the intervening years, while the warrant was outstanding, CPS officers attended at Tettey's home in response to a call for service, but failed to arrest him.

[6] Tettey was finally arrested and brought before the court in January of 2014. His trial was scheduled in Provincial Court in May of 2015. That trial date was subsequently adjourned to December of 2015. Rennalls attended on that date and was told that a new trial date would be set sometime in February of 2016, as Tettey had re-elected to be tried in the Court of Queen's Bench. Rennalls heard nothing further from the CPS or the Crown regarding the trial.

[7] On January 20, 2017, the Crown stayed the charges against Tettey, citing the delay by the CPS in advancing the case as the reason for ending the prosecution.

III. The Civil Proceedings

[8] In January of 2019, Rennalls filed a Statement of Claim against Tettey for assault and against various CPS defendants for negligence. She also sued the CPS for assault and battery in respect of the sexual assault examination. This latter claim was based on the allegation that she was induced to undergo an intrusive medical procedure at the CPS' behest when it had no real intention of acting on the results.

[9] Tettey has filed a Statement of Defence denying the sexual assault. The CPS defendants have not filed a Statement of Defence. Rather, they brought an application to strike the Statement of Claim pursuant to *Rule* 3.68(2)(b) on the basis that it discloses no cause of action.

[10] In thoughtful reasons, reported at 2019 ABQB 927, Master Prowse permitted the claim for negligence to proceed. He considered the body of jurisprudence that has limited the right of victims and their families to sue police for investigation-related negligence and concluded that it did not govern in the circumstances. He distinguished this line of authority on the basis that Rennalls' claim involved injuries which took place after the alleged crime, including the invasive medical examination, and most importantly, that the claim did not involve negligence in the investigation but rather the failure to execute a warrant in a timely fashion.

[11] On the basis of these points of distinction, the Master concluded that Rennalls' claim was novel and should be permitted to proceed for the reasons articulated by the Supreme Court of Canada in ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at para 21 [***Imperial Tobacco***] and cited by this Court in ***Rudichuk v Genesis Land Development Corp***, 2019 ABQB 132 at para 9:

> [T]he Supreme Court of Canada has held that it is not determinative that the law has not yet recognized a particular claim and a court should be generous and err on the side of permitting a novel, but arguable claim to proceed to trial.

[12] The Master struck out the claim for assault and battery. Rennalls does not appeal that determination. CPS appeals the decision permitting the claim in negligence to proceed.

IV. The Law

Standard of review

[13] The appeal of a Master's decision is governed by *Rule* 6.14. The standard of review is correctness and the hearing before this Court is conducted *de novo*: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at paras 3, 17, 30. Effectively, I am asked to decide the substantive issue afresh.

Application to strike

[14] Applications to strike are brought under *Rule* 3.68(2)(b), which allows this Court to terminate a claim if the "commencement document or pleading discloses no reasonable claim or defence to a claim."

[15] Applications to strike are governed by the principles and test articulated by the Supreme Court in ***Imperial Tobacco*** at paragraphs 17–22; ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140 at para 16 [***O'Connor***]. A court must only strike an action if "it is plain and obvious that the plaintiff's claim cannot succeed", assuming the facts pled in the Statement of Claim are true: ***Pro-Sys Consultants Ltd v Microsoft Corporation***, 2013 SCC 57 at para 63.

[16] The power to terminate a claim at this very preliminary stage should be applied with care. As the Supreme Court instructs, "[a]ctions that yesterday were deemed hopeless may tomorrow succeed... [t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": ***Imperial Tobacco*** at para 21. Claims should not be dismissed simply because they are novel: ***Hunt v Carey Canada Inc***, [1990] 2 SCR 959 at 980 [***Hunt***]

[17] However, the mere presence of novelty does not dictate that a claim must be permitted to proceed to trial. As the Court of Appeal cautioned in ***O'Connor*** at paragraph 16:

> In determining whether a novel claim has a "reasonable prospect" of success, many factors must be examined. The clarity of the factual pleadings is important. The existence of case law discussing the same or similar causes of action is relevant. As noted in ***Imperial Tobacco***, the courts must be careful not to inhibit the development of the common law by applying too strict a test to novel claims. However, the courts must resist the temptation to send every case to trial, even if some legal analysis is needed to determine if a claim has any reasonable prospect of success: ***Kripps v Touche Ross & Co*** (1992), 1992 CanLII 923 (BCCA), 94 DLR (4th) 284 at 309, 69 BCLR (2d) 62 (CA).

[18] With these principles in mind, I turn to examining whether Rennalls' claim in negligence should be struck or permitted to proceed to trial.

The parties' positions

[19] CPS argues that the law bars suits for negligent investigation by victims or their families and that shades of nuance on the facts underlying the action are insufficient to make such a claim "novel" or afford it a chance of success. Rennalls counters that her claim is materially distinct from those in which no cause of action has been found because she is not complaining about negligence in any facet of the investigation. Rather, she alleges that the police undid the results of their own investigation by failing to bring Tettey before the courts even after a judicial officer had ordered them to do so. She argues that the nature of the dilatory conduct, together with the evolving role of sexual assault complainants in the criminal justice system, make her claim novel and not obviously bound to fail.

Determining whether a claim is novel or bound to fail

[20] Many novel claims in tort have been brought against the police over the years. The correct approach to evaluating these claims was described by McLachlin CJC in ***Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board***, 2007 SCC 41 at paragraph 27 [***Hill***]:

> 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.

[21] The starting point to determine whether one individual owes another a private law duty of care such that they can be sued for negligent conduct is the *Cooper-Anns* test, derived from the well-known cases of ***Anns v Merton London Borough Council***, 1977 UKHL 4, and ***Cooper v Hobart***, 2001 SCC 79; ***Williams v. Canada (AG)*** (2009), 2009 ONCA 378, leave ref'd [2009] SCCA No 298, at para 13. The Supreme Court of Canada applied the *Cooper-Anns* test in the context of suits against the police in ***Odhavji Estate v Woodhouse***, 2003 SCC 69 ["***Odhavji***"], laying out the correct approach at para 46:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[22] The plaintiff has the ultimate legal burden of establishing the duty of care, but once a *prima facie* duty has been established, the evidentiary burden of considering the policy considerations shifts to the defendant: ***Childs v Desormeaux***, 2006 SCC 18 at para 13.

Does the state of the law make a *Cooper-Anns* analysis unnecessary?

[23] Under the *Cooper-Anns* test, the first question is whether the duty of care the plaintiff says has been breached has already been recognized by law: ***Wellington v. Ontario***, 2011 ONCA 274 ["***Wellington***"] at para 16. Rennalls acknowledges that it has not. CPS goes further and argues that the existing jurisprudence has categorically rejected the duty of care Rennalls advances. Therefore, it is necessary to begin by assessing the impact of the existing law on Rennalls' claim.

[24] There is no question that police officers are under a duty to do their jobs properly, both under statute and at common law. For instance, the *Police Act*, RSA 2000, c P-17 states at section 38(1): "[e]very police officer… has the authority, responsibility and duty (a) to perform all duties that are necessary to carry out the police officer's functions as a peace officer… and (b) to execute all warrants and perform all related duties and services."

[25] Further, the classic case of ***Dedman v The Queen***, [1985] 2 SCR 2 at para 14, outlines the common law duties of police. These include the preservation of the peace, the prevention of crime, and the protection of life and property. Other case law has required police officers to investigate the commission of crimes and apprehend offenders under their duty of "enforcement of laws": ***R v Custer***, [1984] SJ No 438 (CA) at para 26.

[26] Critically, however, those duties are owed to society at large, not to individual citizens. As the Ontario Court of Appeal stated in ***Wellington*** at para 20:

> While the police owe a duty of care to a particular suspect under investigation (see ***Hill*** and ***Beckstead***), and to warn a narrow and distinct group of potential victims of a specific threat (see ***Jane Doe***), 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.

[27] This list of decisions includes the leading case of ***Norris v Gatien*** (2001), 56 OR (3d) 441 (CA) ["***Norris***"], where an Ontario Provincial Police ["OPP"] officer struck and killed a cyclist while driving an OPP vehicle. The deceased cyclist's family sued the investigating officer of the local police service for negligent investigation into the OPP officer's conduct. On a motion to strike the plaintiff's claim against the investigating officer, the Ontario Court of Appeal laid out the governing legal principles at para 18:

> [T]he plaintiffs had no legal interest in the investigation or prosecution of [the OPP officer]; that investigation and prosecution were matters of public law and public interest. Nor had the plaintiffs any legal interest in the disciplinary proceedings taken against [the OPP officer]. Had [the OPP officer] been convicted on either or both charges, the plaintiffs, or some of them, may have derived some personal satisfaction from that conviction. That satisfaction, however, would have been a purely personal matter; it would have no reality in law. Nor did the failure to reach that verdict have any consequence for the appellants sounding in damages.

[28] The Court of Appeal accordingly held that the claim was correctly struck for disclosing no reasonable cause of action. In ***Wellington***, it re-stated and affirmed this general rule that police do not owe a duty of care to the victims of the crimes they investigate. There, a man was shot dead by a police officer, and the Special Investigation Unit of the Ontario Ministry of the

Attorney General ["SIU"] was called in to investigate. The deceased's family sued the SIU on the basis that their investigation into the shooting was negligent. In a unanimous decision authored by Sharpe JA, the Court held that the plaintiffs "had no legal interest in the investigation or prosecution of [the OPP officer]: that investigation and prosecution were matters of public law and public interest" (***Wellington*** at para 18).

[29] In ***Wellington***, the Court concluded that it could determine whether there is any possibility that a duty of care could be found to exist on the pleadings alone, citing ***Edwards v Law Society of Upper Canada***, 2001 SCC 80, ***Syl Apps Secure Treatment Centre v BD***, 2007 SCC 38, ***Williams v Ontario***, 2009 ONCA 378, ***Eliopoulos Estate v Ontario (Minister of Heath and Long Term Care)***, [2005] OJ No 2225 (SCJ (Div Ct), ***Attis v Canada (Health)***, 2008 ONCA 660.

[30] The ability of aggrieved complainants to sue police in negligence for the conduct of investigations was again brought before the Ontario Court of Appeal in ***Goldman v Weinberg***, 2019 ONCA 224. The motion judge's dismissal of the claim by way of summary judgment was itself summarily upheld on the authority of ***Norris*** and ***Wellington***. CPS contends that this line of cases closes the door to claims of negligent investigation in all forms.

[31] British Columbia also has a line of authority striking claims for negligent investigation by police officers. In ***Thompson v Webber***, 2010 BCCA 308, a father reported to the police that his daughters were being physically disciplined by their mother. He alleged that, due to a subsequent negligent investigation, the children became estranged from him and consequently suffered foreseeable psychological harm. The Court of Appeal upheld the striking of the claim on the basis that the plaintiff did not have a relationship of sufficient proximity with the police to create a private duty of care.

[32] A claim of negligent investigation was similarly struck out in ***Callan v Cooke***, 2012 BCSC 1589. There, the plaintiff alleged that the Royal Canadian Mounted Police had been negligent in investigating assaults by one of its members in his capacity as a hockey coach. In striking out those portions of the claim relating to negligent investigation, the British Columbia Supreme Court held at para 68:

> absent limited exceptions, the police… do not generally owe a private duty of care to victims or potential victims with regards to their investigations. They owe a duty to the public to carry out proper criminal investigations.

[33] In the same vein, a claim that police had negligently investigated allegations of *Charter* infringements during their handling of a domestic dispute was held to disclose no cause of action in ***Allen v New Westminster (City)***, 2017 BCSC 1329. In coming to this conclusion, Ehrcke J cited para 48 of ***John v Peel Regional Police***, 2016 ONSC 2016: "the relationship between the investigator and victims is not sufficiently proximate to give rise to a duty of care to the individual. The duty is to the public in general."

[34] Further appellate authority that no private law duties are owed by police to the victims of crimes they are investigating is found in ***Jones v The Attorney General of Canada (Royal Canadian Mounted Police) et al***, 2018 NBCA 86. There, the New Brunswick Court of Appeal upheld the decision to strike pleadings alleging that the police were negligent in investigating a complaint of a sexual assault. The Court followed the jurisprudence in Ontario and British

Columbia, and agreed with the motion judge's conclusions that the complainant-police relationship lacked the legal proximity to impose a duty of care.

[35] The litany of cases in which individuals affected by alleged crimes have failed in their attempts to establish an individual duty of care by allegedly negligent police also include:

- ***Connelly v Toronto Police Services Board***, 2017 ONSC 3408. Parents claimed that the police were negligent in investigating their son's death and ruling it a suicide after he fell from a ten-story apartment building. Relying on ***Norris*** and ***Wellington***, the Ontario Superior Court of Justice held that the claim of negligent investigation was not novel and should be struck.

- ***Project 360 Investments Limited (Sound Emporium Nightclub) v Toronto Police Services Board***, [2009] OJ No 2473 (SCJ). The owners of a nightclub attempted to sue police for failing to prevent (or warn of) a shooting at their premises by a known criminal, which caused them significant commercial harm. The Ontario Superior Court of Justice struck out the claim on the basis that there was insufficient proximity to ground a duty of care because police were not aware of any link between the gunman and the businesses prior to the night of the shooting.

- ***Albatal v Canada (Royal Mounted Police)***, 2016 FC 371. The Federal Court dismissed an application for *mandamus* compelling the police to investigate a complaint of corruption in the Canadian embassy in Berlin, Germany. The police concluded that no crimes had been committed and exercised their discretion in not opening an investigation. The Court held that police owe no private duties in regards to their decision to investigate or whether reasonable and probable grounds exist that a crime has occurred: see also ***Clemens v Canada***, [1995] OJ No 1094 (Gen Div).

- ***Burnett v Moir***, 2011 BCSC 1469 [***Burnett***]. A man brutally assaulted in a bar claimed that officers failed to properly police the location or preserve and gather evidence of his assault. The Court found that there was an insufficient relationship of proximity between the victim and the police to support a finding of negligence, highlighting that criminal investigations do not serve private interests: ***Burnett*** at 443.

Alberta authority finding no private law duties to complainants

[36] In ***Leung v Kilgour***, 2004 ABQB 408, a self-represented plaintiff sued a variety of parties, including the police. She specifically alleged that the law enforcement defendants were negligent in failing to lay charges after she complained of being assaulted at a political candidate's campaign office. The claim was struck by Rowbotham J (as she then was) on the basis that police are afforded wide discretion in fulfilling their investigative duties and did not

owe the plaintiff any private duties in how they did this part of their work. Moreover, the Court held, at para 11, that the police do not owe a duty "not to be apathetic".[1]

[37] ***Kilgour*** applied the earlier decision of Master Funduk in ***Petryshyn v Alberta (Minister of Justice and Attorney General)***, 2003 ABQB 86 ["***Petryshyn***"]. In that case, the Master adopted and applied ***Norris*** and held that police discretion is not limited to whether charges are laid, but also includes what charges are laid, and that no cause of action in tort arises from such decisions:

> 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. (at para 10)

[38] Alberta authority is thus consistent with decisions across the country rejecting negligent investigation claims brought by complainants.

Conclusion on the existing state of the law

[39] It is well settled that police officers generally do not owe a duty of care to complainants or people impacted by the alleged crimes they are called upon to investigate. The public duty of officers to conduct themselves conscientiously does not translate into personal duties of care to the individuals most directly touched by any particular crime. As the Nova Scotia Court of Appeal stated in ***Walsh Estate v Coady Estate***, 2016 NSCA 60, at para 60 ["***Walsh***"]:

> Unlike private citizens, police have statutory and common law duties that require them to take positive steps. But to found a private duty of care, the circumstances must transcend a police officer's obligations to the general public. Something more is needed to establish a private duty of care. [emphasis added]

[40] The claim Rennalls advances does not, therefore, fall into any established category of relationship where a duty of care has been found to exist. If her claim has a reasonable prospect of success, this must be found in a fresh application of the *Cooper-Anns* test.

[41] Before turning to the analysis for a novel duty of care, I must consider whether the existing jurisprudence so thoroughly forecloses her claim as to make a fresh duty of care analysis unnecessary. I find that it does not. The delict of the police in this case does not align squarely with any of the negligent investigation claims that have been categorically rejected. As the learned Master rightly noted, a common theme that runs through those cases is that the alleged negligence occurred in the exercise of discretionary powers. In the present case, however, the decision to investigate, the investigative steps themselves, the assessment as to whether reasonable and probable grounds to charge existed, and the determination that a charge was in the public interest were all complete before the alleged negligence occurred. It was only *after* the charge was sworn, and a warrant issued directing police to bring Tettey before the courts for the prosecutorial process to begin, that the police are said to have acted negligently.

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[1] This outcome was unsurprising as the suit had vexatious undertones.

[42] This factual landscape is sufficiently distinct from the existing jurisprudence to warrant a full *Cooper-Anns* analysis.

V. Application of the *Cooper-Anns* Analysis

[43] Before embarking on the *Cooper-Anns* analysis, it bears repeating that, on a motion to strike, the Court is not determining whether a duty of care has been proven on the facts as pled, but whether it is plain and obvious that the plaintiff will be unable to establish one at trial: ***Jane Doe v Toronto (Metropolitan) Commissioners of Police***, [1990] OJ No 1584 (Div Ct) at para 76 [***Jane Doe***], per Moldaver J (as he then was).

[44] The first stage of the *Cooper-Anns* test examines two interrelated questions: (i) was the harm that occurred a reasonably foreseeable consequence of the defendant's actions, and (ii) do the parties have a sufficiently proximate relationship for a duty of care to arise? The concept of proximity, in turn, refers to the nature of the relationship between the people in question: ***Odhavji*** at paras 48-49. The practical impact of these requirements was described in ***Odhavji*** at paragraph 50:

> ...the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case.... Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

[45] The Court must therefore consider whether the police ought reasonably to have foreseen that failing to execute the warrant would harm Rennalls, as the complainant in the case they were neglecting, and examine the broader nature of the relationship between a sexual assault complainant and the police.

[46] First, however, it is necessary to define with greater precision the exact type and scope of "harm" that is at issue.

Defining the "harm" in question

[47] If Rennalls establishes everything she has pled, there is no question she has suffered a great deal of harm. By far, the worst of this would be the sexual assault Tettey is said to have committed against her. But that harm is not attributable to the subsequent lackadaisical approach of the police. Equally, Rennalls may be aggrieved and distressed that Tettey will never face criminal conviction or sanctions for his alleged crime. This frustration also does not translate into a legal interest in a specific criminal outcome: ***Petryshyn*** at para 10.

[48] Not 'getting justice' is not a form of harm compensable in tort. That is not to underestimate the importance of a sense of justice being done. Our collective experience in the criminal justice system confirms that societal recognition of wrongs can play a significant role in the psychological and emotional healing following traumatic events. Individuals victimized by crime undoubtedly have a profound *human interest* in the outcome of the criminal process: ***R v Jordan***, 2016 SCC 27 at paras 2 and 23.

[49] The criminal law is not, however, a device of individual vindication or retribution. It exists to uphold the law for the common good, not to settle individual scores: see ***R v M(CA)***, [1996] 1 SCR 500 at 557–558. Consequently, victims and their families do not have a special *legal* interest in the investigation, prosecution, or punishment of the crimes that have impacted them: ***Norris*** at para 18. As the Supreme Court held in ***Odhavji***, at para 40:

> Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize.

[50] Therefore, Rennalls' understandable aggrievement that her criminal complaint will never get its day in Court does not constitute a compensable loss, and thus cannot be the "harm" that police must have foreseen to owe her a duty of care.

[51] The foreseeable harm must lie in the *direct* impact on Rennalls' mental health of the wanton disregard the CPS displayed towards her claim of having been sexually assaulted, not in the consequential failure of the criminal justice process to reach her desired result on the merits of the case. I am satisfied that, while this would be a narrow and discrete type of injury, this sort of harm could be found at trial on the facts as pled. This harm may, as the Master held, include any trauma resulting from the sexual assault examination conducted at CPS' behest, which their subsequent inactions rendered unnecessary.

[52] I am guided in this conclusion by the findings of the Supreme Court in ***Odhavji***. In that case, the family of a man fatally shot by police in the aftermath of a robbery sued the involved officers. Those defendants had obstructed the SIU's investigation of the shooting by failing to remain segregated, refusing to attend interviews on the same day as the shooting, and refusing to provide shift notes, on-duty clothing, and blood samples in a timely manner. All of the things the subject-officers failed or refused to do were mandated upon them by the relevant regulations and standing orders of their force.

[53] In addition to a claim for misfeasance in public office, the plaintiffs in ***Odhavji*** sought to hold the Chief of Police liable in negligence for failing to prevent his officers' misfeasance. This led the Supreme Court to conduct a *Cooper-Anns* analysis, including a consideration of whether there had been compensable harm. The Court's treatment of this issue at paras 40-41 is apposite here:

> ...the plaintiffs also allege that they have suffered physically, psychologically and emotionally, in the form of mental distress, anger, depression and anxiety as a direct result of the defendant officers' failure to cooperate with the SIU.
>
> Although courts have been cautious in protecting an individual's right to psychiatric well-being, compensation for damages of this kind is not foreign to tort law. As the law currently stands, that the appellant has suffered grief or emotional distress is insufficient. Nevertheless, it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm": see for example *Guay v. Sun Publishing Co.*, 1953 CanLII 39 (SCC), [1953] 2 S.C.R. 216, and *Frame v.* Smith, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99. Consequently, even if the plaintiffs could prove that

> they had suffered psychiatric damage, in the form of anxiety or depression, they still would have to prove both that it was caused by the alleged misconduct and that it was of sufficient magnitude to warrant compensation. But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct. [emphasis added]

[54] It may be challenging for the plaintiff to quantify the harm she has suffered because of the failure to act of her case after reasonable and probable grounds were confirmed and disaggregate it from the harm caused by the sexual assault and her general sense of injustice. Those harms may commingle, but they are not co-extensive. The proof and quantification of harm, however, is a task for trial. It is neither plain nor obvious that the plaintiff will be unsuccessful in showing that what the police were obligated, but failed to do caused her direct mental injury. Therefore, I find that the pleadings disclose compensable harm, sufficient to support a cause of action if the other elements of a duty of care are established.

Foreseeability of harm

[55] The issue of foreseeability is easily dealt with. Where the aftermath of serious crimes is the operative milieu, it is foreseeable that those affected will suffer psychological distress if the criminal justice process goes awry. The words of Moldaver J in ***R v KJM***, 2019 SCC 55 at para 38, poignantly summarize the psychological stakes for justice system participants, and definitively answer the question of foreseeability in this case:

> Police officers ought to know that delays in the criminal justice process cause psychological and emotional harm to victims of crime. Further, police officers are aware that excessive delays in executing an arrest warrant is often fatal for the prosecution of those offences. It should be within the reasonable contemplation of police officers that the resulting inability to participate in the judicial process as a result of the failure to execute an arrest warrant would cause psychological and emotional harm to victims of crime. [emphasis added]

[56] To be clear, frustration, offense, grief, or any other form of general dissatisfaction with police investigative conduct is not actionable, and foresight of such unhappiness with their work does not vest the police with a duty of care. The level of mental harm needed to establish an action in tort for negligence is high. The foreseeability of psychological distress does not equate to a plaintiff proving "true 'damage' qualifying as mental injury, which is 'serious and prolonged' and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society": ***Saadati v Moorhead***, 2017 SCC 28 at para 19.

[57] Proof of an injury meeting the threshold for compensability is, however, an issue for trial. The Supreme Court's decision in ***Odhavji***, at para 54, is again dispositive of this issue:

> Although it is to be expected that an inadequate investigation would distress or anger the close relatives of Mr. Odhavji, it is less obvious that this distress or anger would rise to the level of compensable psychiatric harm. Nevertheless, I do not think it "plain and obvious" that such harm is an unforeseeable consequence of the defendant officers' failure to cooperate with the investigation. The task might be a difficult one, but the appellants should not be deprived of the

> opportunity to prove that the complained of harm is a reasonably foreseeable consequence of a truncated or otherwise inadequate investigation into the shooting incident. 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. [emphasis added]

[58] The disregard of sexual assault claims, and the impact of police nullification of the experience of women who report these crimes, is equally capable of generating a compensable psychological injury. It is too late in the day for police or any other actor in the criminal justice system to say otherwise.

[59] For all of these reasons, I conclude that the relationship between Rennalls and the CPS described in the Statement of Claim could permit her to establish foreseeable harm arising from CPS' inexplicably protracted failure to execute the warrant for Tettey's arrest.

Proximity

[60] The real nub of the issue is proximity. Canadian courts have unanimously held that the relationship between complainants and the police is incompatible with the imposition of a duty of care. The police must remain objective and unfettered in their discretion when investigating crime, making it unjust at a broad societal level to impose a duty of care in the circumstances: ***Edwards v Law Society of Upper Canada***, 2001 SCC 80 at para 9. The question in this case, therefore, is whether there is anything different about the present case that would justify a different result on the question of proximity.

[61] The plaintiff posits that two features of her case establish the requisite proximity to police that victims in general do not have. The first is that the police default in this case was a failure to take a mandatory, non-discretionary step. The dilatory conduct occurred after the investigation was complete, reasonable and probable grounds to believe a crime was committed had been determined, and a decision to charge in the public interest had been made. At this stage the police's discretionary charging decision was transformed into a judicial command to arrest when the warrant was issued. The second factor she points to as justifying a fresh look at the bounds of private law duties in this context is the evolving status of victims in the criminal justice system, exemplified by the emerging provision of specific legal rights for sexual assault complainants.

[62] Whether these factors could give rise to a relationship of proximity is informed by the instances in which Courts have identified private duties of care between police and the public. The common law in Canada has recognized three discrete scenarios in which the police may be held liable in tort to individuals who their investigations impact. These are: (i) negligence harming the suspect; (ii) failure to prevent crime against specifically foreseeable victims (or group of potential victims); and (iii) misfeasance in public office during investigations. Each of these realms are instructive as to whether a relationship of proximity could be established on the facts in this case.

Negligent investigation of suspects

[63] The most prominent exception to the general rule of police immunity to private suits for negligent investigation has emerged in favour of the suspects being investigated. In ***Hill***, the plaintiff sued police for negligent investigation of the crimes they had charged him with, leading to his initial conviction and ultimate exoneration after an appeal and re-trial. The Supreme Court of Canada found that police owe a duty of care to suspects and that a tort for negligent investigation exists in Canada. In arriving at this conclusion, the Supreme Court of Canada focussed on the critical personal interests at stake, namely physical liberty and reputation: ***Hill*** at paras 33-34.

[64] The suspect-investigator relationship is not analogous to that between victims and investigators. Police scrutinize, question, surveil, and accuse a suspect in a direct and personal manner distinct from even the most intrusive examination of a complainant. The potential consequences of that intense attention – namely a charge and potential conviction – have no equal in the relationship between police and complainants or their families.

[65] Moreover, the existence of a duty of care to suspects militates against finding a countervailing duty to complainants. Imposing dual private duties of care, in favour of both sides of a criminal investigation, would burden police with constant concern over which private liability they should attend to. This situation is analogous to that of child welfare authorities, who owe duties of care to the children they may apprehend but not the parents they may be taken from: ***CHS v Alberta (Director of Child Welfare)***, 2010 ABCA 15 at paras 27-28; ***LC v Alberta***, 2010 ABCA 14 at para 13. In this respect, the principles underlying the Supreme Court's finding of a proximate relationship and duty of care in ***Hill*** does not assist the plaintiff.

[66] Rather, ***Hill*** is useful to the limited extent that the Supreme Court rejected a blanket immunity from private duties of care in the execution of core policing functions. Also, subsequent experience with ***Hill*** demonstrates that fears of a floodgates effect were overstated. The standard of care towards suspects incorporates the significant investigative discretion police must be afforded: ***McCullough v Hamilton Police Services Board***, 2016 ONSC 2638. As a result, there have been few reported cases advancing this tort.

Failure to protect specifically foreseeable victims

[67] A second line of authority has opened the possibility of police owing a duty of care to victims whose vulnerability is sufficiently specific and known to police to distinguish them from the public at large. This body of jurisprudence has developed from the watershed ***Jane Doe*** litigation before the Ontario Courts: ***Jane Doe v Toronto (Metropolitan) Commissioners of Police***, [1989] OJ No 471 (SCJ); affm'd [1990] OJ No 1584 (Div Ct); leave ref'd [1991] OJ No 3673 (CA); [1998] OJ No 2681 (SCJ) ["***Jane Doe***"].

[68] ***Jane Doe*** arose from the police response to a serial sexual offender operating in Toronto in the 1980s. Jane Doe was one of his victims. At the time she was assaulted, police already knew that the offender was active in a specific geographic area, attacking women who lived in second and third floor apartments. They also knew that he would most likely attack again around the 24th or 25th of the month. Despite this specific foresight, the investigators decided not to issue any warning to the circle of likely victims, professing a need to avoid alerting the perpetrator to their level of knowledge about his *modus operandi*.

[69] Jane Doe sued the police in tort, alleging that they failed in their duty to protect her and other potential victims from this known criminal. She further claimed that the reason the officers did not want to warn the public was because they believed that women living in the area would become hysterical and scare off the offender. As such, Jane Doe also advanced a claim for an infringement of her rights under ss 7 and 15 of the *Charter*.

[70] An unsuccessful motion to strike the claim was appealed as far as the Ontario Court of Appeal. The matter was permitted to proceed. In the Divisional Court, Moldaver J (as he then was) emphasized that the police are generally immune from suit from victims of crime (at para 14), but have a duty to warn of foreseeable risks (para 21).

[71] At trial, Jane Doe proved her case. The trial judge found that a private law duty of care had been established and that the police "failed utterly" in fulfilling this duty. She was also satisfied that the police had acted on discriminatory grounds in choosing their negligent course of action.

[72] The result in ***Jane Doe*** is not uncontroversial. In ***Hill***, the Supreme Court commented in *obiter*, at para 27: "***Jane Doe*** is a lower court decision and that debate continues over the content and scope of the ratio in that case." This has led the Ontario Divisional Court to note: "there is considerable debate about the 'content and scope' of ***Jane Doe*** such that the law surrounding the duty of care owed by police to potential victims of crime is by no means settled": ***Patrong v Banks***, 2016 ONSC 4200 at para 35.

[73] Nevertheless, a limited class of attempts to hold police liable for breaching their duty to protect have proceeded. The Courts have, insisted that plaintiffs establish a unique relationship with the police vis-à-vis the criminal activity in question: ***Burnett v Moir***, 2011 BCSC 1469 at para 405. Plaintiffs have met this bar in a few instances.

[74] In ***Gilchrist v Levin***, 2016 ABQB 474 [***Gilchrist***], two complainants approached CPS claiming that Dr. Levin had sexually assaulted them in the course of his psychiatric practice. CPS investigated the complaints but determined that no charges should be laid. Gilchrist was subsequently sexually assaulted by Dr. Levin and sued him. On a motion to add CPS as a defendant, Master Prowse permitted CPS to be brought into the suit on the basis that Gilchrist's claim that they had failed to protect him through their earlier, allegedly negligent investigation, was not bound to fail.

[75] In another case arising from the same series of events, however, Langston J granted summary judgment in favour of the police. He held that the two complaints CPS had determined to be "unfounded" did not create a basis to identify or warn a "largely undefined" group of potential victims: ***RVB v Levin***, 2018 ABQB 887 at para 28. Respectfully, I would not follow this result, as it is premised on the assumption that the earlier police investigations were sound in their conclusion that the initial complaints about Dr. Levin were unfounded. That investigative conclusion is one of the very acts of negligence the plaintiffs alleged, making the resulting dismissal of the claim circular. Moreover, I respectfully disagree that the pool of an abusive doctor's patients is either too large or undefined for police to take prophylactic steps in an appropriate case.

[76] A more helpful application of the ***Jane Doe*** exception is found in ***McClements v Pike***, 2012 YKSC 84 [***McClements***]. In that case, the plaintiff called the police because her daughter had started a fire at the plaintiff's residence and told the fire chief that she would burn down the

residence when the authorities left. They left without arresting the plaintiff's daughter and she burned the house down, as she said she would. The plaintiff in ***McClements*** argued that a duty of care could be found to exist in cases where a potential victim brings themselves to the attention of police by raising fears of victimization.

[77] On a motion to strike, Gower J found that a novel duty of care could potentially arise on the facts, concluding: "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": ***McClements*** at para 80. While the Court arguably overstated the threshold to be met by the defendants, the result is intuitively correct.

[78] Suits by victims of crime against the police have also been permitted to proceed in cases where the offender had been identified in the midst of recently ongoing criminal activity. In ***Castle et al v Her Majesty The Queen in Right of Ontario***, 2014 ONSC 3610 [***Castle***], one Jesse-James Low was stabbed by his friend Raymond Reid, who had a history of violent behaviour and was on probation. Reid had already assaulted Low twice before. On the day in question, Reid became intoxicated and assaulted a group of youths while at a fair. The police arrested him and observed his intoxication. Instead of keeping him in custody, however, police took Reid back to his father's house, where Low also lived. A dispute ensued and Reid fatally stabbed Low. Low's family brought a claim against the police on the basis that they had breached their duty of care to protect Low when they released Reid from custody.

[79] In the context of a motion to strike, Lederman J found that it was not plain and obvious that foreseeability and proximity could not be established. Further, he found that the floodgates argument advanced by the defendants was not sufficiently compelling, as the class of persons with claims could be restricted by their special relationship of proximity. In the end, Lederman J found that the defendant did not meet its burden to establish that the claim should be struck, and permitted the matter to proceed to trial: ***Castle*** at paras 45 and 51.

[80] Even more recently, the Nova Scotia Court of Appeal permitted the family of a deceased motorist to sue police who failed to apprehend the impaired driver (Coady) who killed the deceased in what they alleged was a preventable crash: ***Walsh***. RCMP had been alerted to Coady's dangerous driving, had investigated him in his vehicle, and permitted him to drive on. On appeal from a failed summary judgment motion, the Court of Appeal found it necessary to conduct a fresh *Cooper-Anns* analysis and concluded that it was not plain and obvious that the police did not owe a duty to the other motorists Coady endangered after their encounter with him. The matter was permitted to proceed to trial.

[81] Two key features emerge from the 'failure to protect' line of cases. First, these decisions demonstrate that proximity is more likely to be found as the impugned action/inaction of the police moves away from investigative discretion and towards protective obligation. Second, in each of these cases, the police had reasonable and probable grounds to believe crimes had been committed and responded with inaction. Once these elements are present, victims whose injuries were foreseeable have been able to establish arguable causes of action.

Misfeasance in public office

[82] Moving outside the realm of negligence, the Supreme Court has recognized the intentional tort of misfeasance in public office as a pathway for those aggrieved with police

conduct of investigations to seek redress. In ***Odhavji***, the family of a man shot by police in the aftermath of a robbery sued involved officers who obstructed the SIU's work.

[83] As the defendants' defaults constituted breaches of lawful directions given to them in their role as police officers, the family framed their claim as one of intentional wrongdoing. The defendants' motion to strike the claim was appealed to the Supreme Court of Canada. The high Court found that the action for misfeasance against the police officers, as well as an action in negligence against the Chief of Police for permitting this misfeasance, should be allowed to proceed.

[84] The Supreme Court held that the tort of misfeasance in office was not limited to the positive misuse of power, but could also encompass a failure to carry out tasks and perform actions required of the office holder, so long as the tort feasor knew his or her conduct was likely to harm others: ***Odhavji*** at paras 26-27. Iacobucci J summed up the scope of the tort in these terms at para 30:

> ...there is no principled reason, in my view, why a public officer who wilfully injures a member of the public through intentional abuse of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. [original emphasis]

[85] More importantly for Rennalls, the Supreme Court also permitted the Odhavji family to sue the Chief of Police in negligence for failing to ensure that his officers complied with their statutory duties. In applying the *Cooper-Anns* test, the Supreme Court found that there was sufficient proximity between the Chief and the deceased's family, making the following observations at para 58:

> Under s. 41(1)(b), the Chief is under a freestanding statutory obligation to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* and the needs of the community. This includes an obligation to ensure that members of the police force do not injure members of the public through misconduct in the exercise of police functions. [emphasis added]

[86] While ***Odhavji*** insisted on wilful wrongdoing before liability of any sort will be imposed, it establishes that police *inaction* in the face of a *defined obligation* is capable of attracting private law liability, including negligence, relating to that default. These principles assist the plaintiff's claim, as inaction in the fact face of a determined investigative outcome and judicial direction to arrest are at the heart of her claim.

The legal interest of complainants in the judicial process

[87] Criminal prosecution in the common law came into being as a private form of litigation between the complainant and the accused: see generally James Fitzjames Stephen, *A History of the Criminal Law of England*, Vol 1 (London, MacMillan and Co, 1883) at 245; Peter Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" [1975] 21 McGill LJ 269

at 271*ff*. However, as the criminal law evolved into a codified form of state enforcement, victims of crime came to be hermetically isolated from the legal right to prosecute: ***SNC-Lavalin Group Inc v Canada (Public Prosecution Service)***, 2019 FC 282 at para 84. Their interests in criminal outcomes are now generally seen as purely personal: ***Norris*** at paras 17-19.

[88] This trend, however, has reversed slightly in recent years, most notably in the case of sexual assault. Owing to increasing social awareness of the severity, prevalence, and highly gendered nature of this crime, Parliament has enacted a series of *Criminal Code* provisions providing sexual assault complainants with special legal rights and protections: see ***R v Arcand***, 2010 ABCA 363; ***R v Freisen***, 2020 SCC 9; ***R v Goldfinch***, 2019 SCC 38 at para 37; Canada, Library of Parliament, "Legislative Summary of Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act", by Lyne Casavant et al, Publication No 42-1-C51-E (Ottawa: Library of Parliament, 1 October 2018), s 2.2.3.2.

[89] These developments were driven by a broad societal concern that sexual assault complainants were not being accorded full and equal protection of the law at any stage in the criminal justice system: ***R v Kapustinsky***, 2020 ABQB 611 at para 27. For example, L'Heureux-Dubé J observed in ***R v Osolin***, 1993 CanLII 54 (SCC), [1993] 4 SCR 595 at 628:

> One of the most powerful disincentives to reporting sexual assaults is women's fear of further victimization at the hands of the criminal justice system; as I discussed in Seaboyer, supra, at p. 650, almost half of unreported incidents may be traced to this perception on the part of sexual assault victims. With good reason, women have come to believe that their reports will not be taken seriously by police and that the trial process itself will be yet another experience of trauma. [emphasis added]

[90] Indeed, as MacFarland J noted in ***Jane Doe***: "although the [police] say they took the crime of sexual assault seriously in 1985–86, I must conclude, on the evidence before me, that they did not." Parliament's repeated legislative interventions in the law of sexual assault has been designed to answer these concerns and ensure that complainants are respected and their rights and interests given regard in the criminal process.

[91] Most significantly, with the enactment of Bill C-51 in 2018, complainants' statutory rights crossed the rubicon into legal participation at trial. Specifically, sexual assault complainants now have the right to appear through counsel and make submissions on admissibility hearings regarding prior sexual activity, in addition to hearings on the production of personal records: *Criminal Code* ss 276(2), 278.94(3). These provisions represent the only instance in Canadian criminal law where the complainant is a full legal participant in argument on a substantive issue at trial.

[92] While the wisdom and utility of involving alleged victims of crime in the prosecutorial process as legal parties is a subject for fruitful academic research and debate, it is clear that the law is evolving in that direction, by the dictate of Parliament. It is entirely conceivable that this trend will find a reflection in the development of private law obligations of justice system participants as well.

[93] On a parallel track, the increasing awareness that the criminal justice system must better address the impact of crimes on victims resulted in the enactment of the *Canadian Victims Bill of*

Rights, SC 2015, c 15, s 2 [*Victims Bill of Rights*]. The preamble to this legislation stated that it was being enacted in response to the following concerns:

> Whereas crime has a harmful impact on victims and on society;
>
> Whereas victims of crime and their families deserve to be treated with courtesy, compassion and respect, including respect for their dignity;
>
> Whereas it is important that victims' rights be considered throughout the criminal justice system.

[94] The *Victims Bill of Rights* provides rights for victims before, during, and after the prosecutorial process, including:

- the right to information about: the criminal justice system and the role of victims in it, the services and programs available to them, and their right to file a complaint for an infringement or denial of any of their rights under the statute; the investigation into the crime and the location of the criminal proceedings and their outcome; and the offender or accused, including in relation to their release;
- the right to protection, including protection of their privacy and identity and the right to request testimonial aids;
- the right to participation, including to have their views heard and to provide a victim impact statement;
- the right to seek restitution and enforcement of such an order; and
- the right to make complaints about their treatment in the process.

[95] Notably. the *Victims Bill of Rights* expressly includes the investigative phase in its definition of the criminal justice system: s 5.

[96] While none of these legislative developments define or expand the private law rights of complainants in tort, they nonetheless reflect a growing recognition that complainants are important stakeholders whose interests must be respected. The law of tort, in turn, expressly contemplates that our society's understanding and conception of public and private relationships evolve over time and that the legal recourses available at common law should evolve in tandem with the changing needs of society: ***Hunt*** at 990-91; ***Jones v Tsige***, 2012 ONCA 32 at para 65.

[97] Therefore, to the extent that broad trends in the law are relevant to defining the proximity of a relationship in tort, the law has moved to recognize that failures of the criminal justice system can both impact and injure complainants to a significant degree.

The principles of proximity applied

[98] By the time CPS is alleged to have dropped the ball on Rennalls' case, they had: (i) subjected her to a physically invasive evidence-gathering procedure; (ii) determined that her complaint of being sexually assaulted was well-founded – at least to the level of reasonable and probable grounds; (iii) decided that a charge was in the public interest; (iv) had their grounds judicially confirmed; and (v) been directed by that same judicial officer to arrest Tettey and bring

him before the Court. The discretionary investigative and charging steps had been completed. The requirement for investigative objectivity had been served.

[99] These factors militate in favour of finding proximity. Indeed, if Tettey had threatened or re-assaulted Rennalls before being arrested and put under conditions of release, she would find herself similarly situated to the plaintiffs in ***McClements***, ***Walsh***, and ***Gilchrist***. The only distinction in this case is that the police are alleged to have caused the harm directly themselves. That can hardly place them in a better position in regards to a duty of care.

[100] The police are afforded considerable operational latitude to decide when and how to execute warrants and what resources to devote in the pursuit of wanted individuals whose whereabouts is unknown. However, the idea that the police may indefinitely and unjustifiably avoid carrying out Court Orders – which is what warrants are – without attracting any liability for harm proximate to their failure to do so, is unappealing. For instance, this Court routinely directs the police to serve Emergency Protection Orders, and similar devices of urgent restraint, issued in favour of victims of domestic violence and others at immediate risk. I cannot accept that such Orders are incapable of giving rise to a duty of care between the police and the individuals the Court has directed them to assist in protecting.

[101] I am mindful that in ***Gustavsen v Calgary (City)*** (1996), 43 Alta LR (3d) 13 (QB), a case predating most of the relevant developments in the law of police negligence, the learned Master appears to have rejected the idea that the beneficiary of a restraining order can sue the police for failure to enforce that order. That case was narrowly decided on the basis that it was unclear whether the conditions requisite to arrest had been met. It is thus distinguishable from the present case as it appears to have involved an element of enforcement discretion, which is absent from the execution of an arrest warrant. Were ***Gustavsen*** to be read more broadly as precluding a duty of care arising from the obligation to serve or enforce a Court Order, I would find it to be wrongly decided and decline to follow it.

[102] Rather, I find that the facts pled by Rennalls more closely resemble the situation in ***Odhavji***. In both instances, the police were under defined and explicit legal obligations to do certain things as requirements of their office. In both they failed to do so, and in both the Chief of Police failed to adequately sueprvise compliance with these obligations. Rennalls has not pled that CPS officers advertently chose not to execute the warrant in her case. However, the crass obviousness of the police default, and the near total absence of a conceivable explanation for that default, bring her case much closer to a situation of intentional misfeasance than to a discretionary error in investigative judgement. To be clear, I am not finding that the police acted intentionally in this case. The foregoing is simply to observe that the facts before the Court bear greater similarity to those in ***Odhavji***, where a duty of care in negligence was found to be arguable, than those in which a duty to investigate carefully has been rejected.

[103] The Ontario Court of Appeal went to some pain in ***Wellington*** to emphasize that ***Odhavji*** did not permit a suit for negligent investigation, but only for negligence in relation to intentional misfeasance in office: ***Wellington*** at paras 22-28. There is no doubt that ***Odhavji*** was not intended to create liability where no willful wrongdoing is found. However, where the allegedly wrongful police conduct moves away from mistakes in discretionary investigative steps and more towards the failure to execute defined obligations, the Supreme Court's decision to permit a suit against the Chief of Police for negligent supervision of his officers takes on greater significance. That very much describes the facts pled in this case.

[104] For these reasons, I agree with the learned Master that it is not plain and obvious that Rennalls' claim will fail for lack of sufficient proximity.

Policy considerations

[105] The second stage of the *Cooper-Anns* test examines public policy concerns that may arise from recognizing a duty of care. Even where foreseeability and proximity are made out, a proposed duty of care may be rejected in law on policy grounds: ***Walsh*** at paras 75-77. In this case, there is a strong policy component to the rule that unsatisfied victims cannot complain about negligent police investigations. The police and Crown prosecutors need to be able to do their jobs independently. This is essential to the proper functioning of the justice system: ***Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council***, [2006] OJ No 4790 (CA) at paras 113-114.

[106] The counterpoint to the imperative that police take sexual assault complaints seriously is the requirement that they investigate those allegations objectively. Police must not be incentivized to 'charge and let the courts sort it out' for fear of criticism or civil consequence if they do their work diligently and conclude that a charge should not be laid. Sound policy dictates that the criminal complaints of those with the resources to sue police civilly, or credibly threaten to do so, not receive different or preferential treatment. This is true for every alleged crime.

[107] Moreover, there is a real and justified concern that permitting aggrieved complainants to sue police and prosecutors for failed investigations and charges would create a large duplication of litigation and consume scarce and valuable law enforcement resources. I do not doubt the validity of these concerns, which have found expression in the strong rule against general liability for negligent investigations.

[108] I am satisfied, however, that none of these pressing policy concerns manifest in this case. First, no complaint about any discretionary decision or investigative step is advanced. Second, it is a rare case indeed where the police do not follow though on their own investigative outcomes and charge-decisions. For the same reason, I am satisfied that the duty of care Rennalls proposes will not obviously fail on floodgates concerns. Judicial experience following ***Hill***, ***Jane Doe***, and ***Odhavji*** suggests that none of these incremental expansions of police liability in tort have occasioned waves of litigation. Indeed, claims under these heads of liability remain rare, and cases successfully prosecuted at trial even rarer. Therefore, I am not satisfied that Rennalls' claim is bound to fail on policy considerations.

VI. Conclusion

[109] The principles protecting police investigative discretion from private law obligations to complainants do not preclude finding a duty of care in this case. This is not a claim of negligent investigative in the normal sense. On the facts as pled, CPS sabotaged its own, judicially confirmed investigative outcome, in a straightforward but serious criminal case, through a baffling level of negligence. As such, the facts pled have more in common with the ***Jane Doe*** and ***Odhavji*** lines of authority than the classic investigative negligence claims brought in cases like ***Wellington*** and ***Kilgour***.

[110] It is not plain and obvious that this claim will fail at trial. The appeal is dismissed and the learned Master's denial of the CPS defendants' motion to strike is affirmed.

[111] Finally, I would be remiss if I did not acknowledge the outstanding advocacy of counsel on this matter – Mr. Milczarek for thoughtfully seeking to advance the law and Ms. Gallo for her exemplary defence of a factually unattractive brief.

Heard on the 18th day of August, 2020.

Dated at the City of Calgary, Alberta this 4th day of January 2021.

N.E. Devlin
J.C.Q.B.A.

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