

# INNOCENCE COMPENSATION: THE SUCCESS RATE OF ACTIONS FOR NEGLIGENT INVESTIGATION

Myles Frederick McLellan\*

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*This research is a qualitative and quantitative analysis on the success rate for plaintiffs who bring actions for negligent investigation against police officers who have wrongly accused them of criminality. This research falls within the broader framework of the success rate of plaintiffs who also seek damages from both police services and crown counsel regarding actions seeking damages for malicious prosecutions, breaches of rights under the Canadian Charter of Rights and Freedoms, and findings of miscarriages of justice pursuant to section 696.1 of the Criminal Code of Canada. The data analysis shows that on a national basis, plaintiffs have a better than one in four chance to succeed in an action claiming damages for the tort of negligent investigation including its comparative remedy at civil law. The case law analysis shows that this tort has been proven when investigations have included relatively benign activity such as a simple mistake up to and including the characterization of police activity as reprehensible and high-handed.*

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*Cette recherche est une analyse qualitative et quantitative du taux de succès des demandeurs intentant une poursuite contre des agents de police qui les ont accusés à tort d'actes criminels au terme d'enquêtes menées de manière négligente. Cette recherche se situe dans le cadre plus vaste de l'étude du taux de succès des demandeurs réclamant par ailleurs des dommages-intérêts des services de police et du procureur de la Couronne en raison de poursuites malveillantes, de violation des droits protégés par la Charte canadienne des droits et libertés, et d'erreurs judiciaires suite aux demandes de révision formulées aux termes de l'article 696.1 du Code criminel du Canada. L'analyse des données indique que, sur une base nationale, les demandeurs ont un peu plus d'une chance sur quatre d'obtenir des dommages-intérêts dans une action en responsabilité délictuelle pour enquête négligente, y*

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\* The author is a Professor of Law and Justice in the Department of Law and Politics at Algoma University; a member of the Policy Review Committee for the Canadian Criminal Justice Association and the Founder and Director of the Innocence Compensation Project. With relevance to the subject matter of this paper, the author has been a Commissioner of a Police Service in Ontario. The author would also like to thank the following counsel for their gracious assistance in providing information on cases that were settled, are ongoing or were otherwise dealt with without being cited and/or reported: David Charney, Charney Law; Alison FitzGerald, Norton Rose Fulbright Canada; Nathan Ganapathi, Ganapathi Law Group; Charles M. Gibson, Vincent Dagenais Gibson; Robert J. Giddings, QC, Scharfstein Gibbings Walen, Fisher LLP; Luigi De Lisio, Barrister & Solicitor; Trevor W. Klassen, Bendig & Klassen; Peter I. Waldmann, Barrister & Solicitor.

*compris son recours équivalent en droit civil. L'analyse de la jurisprudence révèle que l'existence de ce délit a pu être établie allant d'enquêtes ayant porté sur des activités relativement bénignes comme une simple erreur, jusqu'aux activités policières décrites comme étant répréhensibles et arbitraires.*

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**Introduction**

In May 1991, Gwendolyn Wall was the victim of a theft of \$1,200 by means of the fraudulent use of her bank card at a Scotiabank ATM. Ms. Wall filed a complaint with the Ottawa Police Service<sup>1</sup> with her suspicion that an acquaintance, Roxanne Beckstead, was the culprit. The matter was assigned to an Officer Woodburn, an acknowledged experienced investigator. Before making his decision to charge Ms. Beckstead with fraud, the officer conducted little to no investigation, and he discounted the fact that photographs taken by the ATM showed that the person who had used the card bore little to no resemblance to the suspect. Ms. Beckstead was nonetheless charged. After a period of six months and a total of eight court appearances, the Crown attorney withdrew the charge because he thought the evidence was unsatisfactory.

Ms. Beckstead sued the officer and the Ottawa Chief of Police for false arrest, slander, and negligence. It was alleged that Woodburn failed to perform a careful investigation before charging her and was consequently negligent. The claims for false arrest and slander were dismissed. At trial, the judge awarded \$20,000 to the plaintiff for damages in negligence.<sup>2</sup> The Ottawa Police Service appealed.<sup>3</sup>

The appellant's first line of attack was that the police officer had immunity from a claim for negligence for work done in the course of his duties. The law relating to malfeasance by crown counsel and the tort of

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<sup>1</sup> The Ottawa Police Force at the time of the complaint.

<sup>2</sup> *Beckstead v Ottawa (City)*, [1995] OJ No 781 (QL), 37 OR (3d) 64 (Sup Ct [Beckstead 1]).

<sup>3</sup> *Beckstead v Ottawa (City)*, [1997] OJ No 5169 (QL), 37 OR (3d) 62 (CA [Beckstead 2]).

malicious prosecution was primarily relied upon.<sup>4</sup> The Court of Appeal for Ontario rejected this argument. The conduct of a police officer did not warrant the same protection of the qualified immunity granted to crown counsel and made clear that there was no established immunity for the tortious conduct of police “on any common law or statutory basis.”<sup>5</sup> On the premise that the officer owed a duty of care to a suspect he was investigating and that the standard of care relative to that duty was breached, the Court affirmed the decision at trial both as to liability and quantum. This was the first judgment of an appellate court that was not reversed on appeal in any common law jurisdiction that permitted a suspect who was able to prove that a negligent investigation by the police into her criminality could lead to an award of damages.

Ten years later, again with respect to an allegation of police negligence in Ontario, the Supreme Court of Canada<sup>6</sup> in *Hill v Hamilton-Wentworth*<sup>7</sup> similarly held that the tort of negligent investigation in Canada was alive and well. The work of police in investigating crime is not immune from civil action. No other common law jurisdiction has made this finding.<sup>8</sup> In this case, ten robberies had taken place in Hamilton, Ontario in 1994 and 1995. The way the robberies took place was similar and eyewitnesses essentially agreed on the description of the suspect as being likely Aboriginal. The police focused their investigation on Jason Hill, an Indigenous man. They released his photo to the media and conducted a photo lineup consisting of Hill together with eleven “similar-looking Caucasian foils.”<sup>9</sup> Hill was arrested for all ten robberies. At the time of arrest, the police were in possession of possible exculpatory evidence pointing to two potential Hispanic suspects. While Hill was in custody, two more similar robberies took place.

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<sup>4</sup> *German v Major*, 1985 ABCA 176 at 715–19; *Nelles v Ontario*, [1989] 2 SCR 170 at 199, 60 DLR (4th) 609 [Nelles]; *Munro v Canada* (1992), 98 DLR (4th) 662 at 665, [1992] OJ No 2453 (QL) (Sup Ct).

<sup>5</sup> *Beckstead 2*, *supra* note 3 at 2–3.

<sup>6</sup> Hereinafter referred to as the “Court” unless indicated otherwise.

<sup>7</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [Hill].

<sup>8</sup> There are definitive decisions in the United Kingdom, Australia and New Zealand that have ruled there is no duty of care by the police in their investigations of crime. See *Hill v Chief Constable of West Yorkshire*, [1989] AC 53 HL, [1988] 2 WLR 1049 (the leading case in the UK); See *Sullivan v Moody*, [2001] HCA 59; *Thompson v Connon*, [2001] 75 ALJR 1570 (following the English jurisprudence, Australia has denied the existence of a tort of negligent investigation). See *Gregory v Gollan*, [2006] NZHC 426 (New Zealand decision confirms that suspects in negligent investigations are owed no duty of care).

<sup>9</sup> *Hill*, *supra* note 7 at 6.

As a result of following up on this evidence, all but one count of robbery went to trial. Hill was found guilty, which was overturned on appeal. At a new trial, Hill was acquitted. Unfortunately, he had already spent more than twenty months in custody. As a result, Jason Hill brought an action against the Hamilton-Wentworth Regional Police Service Board on the basis of malicious prosecution, breach of his rights under the *Canadian Charter of Rights and Freedoms*<sup>10</sup> and negligence.<sup>11</sup> At trial, Justice Marshall of the Ontario Superior Court of Justice found that the police were not liable for negligence. He held that while there was a duty of care not to be negligent, in this particular case, the police had not fallen below the applicable standard of care. Hill appealed, and the Court of Appeal for Ontario<sup>12</sup> affirmed the existence of the tort of negligent investigation and reasoned that the appropriate standard of care is “the same as the standard respecting other professionals: what would a reasonable police officer in the same circumstances as the defendant do?”<sup>13</sup> Just as at trial, the appellate court found the standard of care had not been breached. Most significantly, the majority in the Court of Appeal was not prepared to find that the conduct on the use of what now appears to be a racialized photo lineup was negligent based upon the lack of uniform rules and procedures in place at the time. As such, it was not established that its use fell below that which a reasonable officer would have done in like circumstances in 1995.

Hill appealed and the Police Service cross-appealed to the Supreme Court of Canada, which rendered its decision on November 10th, 2007.<sup>14</sup> Chief Justice McLachlin, writing for the majority, spent a great deal of her decision establishing that the law of Canada now recognized the duty of care of police officers to suspects in an investigation. The rationale for this recognition was clear:

The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada. While the vast majority of police officers perform their duties carefully and reasonably, the

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<sup>10</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [Charter].

<sup>11</sup> *Hill v Hamilton-Wentworth Regional Police Services Board* (2003), 66 OR (3d) 746, [2003] OJ No 3487 (QL) (Sup Ct) [Hill Sup Ct].

<sup>12</sup> *Hill v Hamilton-Wentworth Regional Police Services Board* (2005), 76 OR (3d) 481, [2005] OJ No 4045 (QL) (CA) [Hill CA].

<sup>13</sup> *Ibid* at para 83.

<sup>14</sup> Intervenors included the Attorney General of Canada, Attorney General of Ontario, Aboriginal Legal Services of Toronto, Association in Defence of the Wrongly Convicted, Canadian Association of Chiefs of Police, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Canadian Police Association and Police Association of Ontario.

record shows that wrongful convictions traceable to faulty police investigations occur. Even one wrongful conviction is too many, and Canada has had more than one. Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions.<sup>15</sup>

Unlike in *Beckstead* 1, the reasoning of the Court in *Hill* included a thorough consideration on the policy implications relevant to this new common law tort remedy by virtue of the *Anns/Cooper* analysis.<sup>16</sup> Thereafter, the reasoning as to the appropriate standard of care echoed that of the courts below:

I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness.<sup>17</sup>

Chief Justice McLachlin found that the detective's conduct fell within the acceptable range of police discretion. She stressed that in 1995, "awareness of the danger of wrongful convictions was less acute than it is today."<sup>18</sup> Thus, the majority concluded that the detective met the standard of a reasonable officer in the circumstances. This has become a controversial

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<sup>15</sup> *Hill*, *supra* note 7 at para 36, relying upon the findings of public inquiries and reports such as Peter Cory, Commission of Inquiry Regarding Thomas Sophonow, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Manitoba: Attorney General, 2001) at 10 ["Cory Report"]; Antonio Lamer, *The Lamer Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons and Randy Druken: Report and Annexes* (St. Johns: Government of Newfoundland and Labrador, 2006) at 71; Federal/Provincial/Territorial Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (Ottawa: Department of Justice, 2004); The Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report* (Ontario: Ministry of the Attorney General, 1998) at 25–26, 30–31, 34–36, 1095–96, 1098–99, 1101, 1124 ["Kaufman Report"].

<sup>16</sup> In *Anns v Merton London Council*, [1977] UKHL 4, [1978] AC 728 (HL), the UK House of Lords laid down the test for the recognition of new torts as determined by answering two questions: 1) Does the relationship between the plaintiff and defendant disclose sufficient foreseeability and proximity to establish a duty of care?; and 2) Are there any residual policy considerations which ought to negate or limit the scope of the duty of care and the class of persons to whom the duty is owed? *Anns* was adopted by the Court in *Nielsen v Kamloops (City)*, [1984] 2 SCR 2, [1984] SCJ No 2 (QL) as further refined by the Court in *Cooper v Hobart*, 2001 SCC 79.

<sup>17</sup> *Hill*, *supra* note 7 at para 73.

<sup>18</sup> *Ibid* at para 88.

position with respect to informing the civil tort standard of care by means of the criminal requirement of reasonable and probable grounds to lay a charge and arrest. Unlike the rather vociferous dissent by Justice Charron who believed that “the usual negligence standard cannot easily co-exist with governing criminal standards,”<sup>19</sup> Chief Justice McLachlin saw no such conflict. She stated that the reasonable officer standard subsumes criminal standards “in the same way it incorporates an appropriate degree of judicial discretion, denies liability for minor errors or mistakes and rejects liability by hindsight.”<sup>20</sup> The majority noted that the standard of care to be applied is the one “generally appropriate in cases of negligent investigation”<sup>21</sup> but the discussion along these lines ended there. There was no discussion as to what is “generally appropriate.”<sup>22</sup> It is thought that guidelines by the Court as to how to “reconcile the criminal standard of reasonable and probable grounds with the civil standard of negligence would have been helpful.”<sup>23</sup> And so while the *Hill* decision stands as authority for what is seen as a singularly important ruling on a unique duty of care, the real-world outcome for Jason Hill in his role as plaintiff was a failure based upon the test established for the relevant standard of care.

It is the operation of this standard of care in negligent investigations that is at the heart of whether a suspect wrongly accused of a crime will be successful in a suit for negligent investigation. The success rate of these actions to a great degree is premised upon a plaintiff’s ability to prove a negative, that is, the absence of reasonable and probable grounds. As noted by one author:

The vast majority of claims that have been brought against police for negligence during an investigation have been dismissed, often in preliminary stages. For the most part, this has been due to a very generous application of the standard of care: even where the court concludes that an investigation was flawed, the police conduct has been characterized as within the range of reasonable discretion and

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<sup>19</sup> *Ibid* at para 169.

<sup>20</sup> *Ibid* at para 68.

<sup>21</sup> *Ibid* at para 67.

<sup>22</sup> *Ibid*.

<sup>23</sup> Jennifer A Freund, “Police Civil Liability for Negligent Investigation: An Analysis of the Supreme Court of Canada Decision in *Hill v Hamilton-Wentworth Regional Police Services Board*” (2007) 53:4 Crim LQ 469 at 487. It has been acknowledged that “[r]easonable and probable grounds is the paradigm suspicion standard in Canadian law” but “precisely what the standard means is not clear”: Steven Penney “Standards of Suspicion” (2017) 65:1–2 Crim LQ 23 at 27–28.

judgment. As a result, those who hoped that Hill would usher in a new era of police accountability for wrongful charge and conviction can only be disappointed.<sup>24</sup>

In both a malicious prosecution or negligent investigation action, much judicial authority believes that the onus is so high to meet the standard of care that a plaintiff must demonstrate that the evidence collected by the police officer must point so overwhelmingly to the plaintiff's innocence such that no reasonable person could believe in the plaintiff's guilt.<sup>25</sup> To this, it was thought that:

This highly deferential standard, and wide latitude afforded police discretion, raise questions as to the ultimate utility of the tort of negligent investigation ... plaintiffs will only be successful in the most obvious cases of police negligence.<sup>26</sup>

By way of contrast, the civil law regime in Quebec has a much more developed jurisprudence with respect to negligent investigations due to the actions of police officers in that province. Indeed, the Supreme Court of Canada dealt with this issue almost thirty years before *Hill* in *Chartier v Québec (Attorney General)*.<sup>27</sup> In 1965, Benny Chartier was the victim of an erroneous identification by the Sûreté du Québec ("SQ"). He was arrested and detained for a charge of manslaughter which was withdrawn within a matter of days after the real assailant confessed to the crime. Chartier commenced an action against the provincial police force pursuant to the provisions of Article 1053 of the *Civil Code of Lower Canada*.<sup>28</sup> This article dealt with the liability for extra-contractual civil fault and provided that:

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<sup>24</sup> Erika Chamberlain, "Negligent Investigation: Faint Hope for the Wrongly Accused" (2011) 39:2 *Advocates' Q* 153 at 153.

<sup>25</sup> *Moak v Ontario (Provincial Police)*, [2008] OJ No 8 (QL), 2008 CarswellOnt (WL Can) (Ont Sup Ct) at para 46 [Moak]; *Wong v Kyriacou*, [2009] OJ No 5067 (QL), 2009 CarswellOnt 7412 (WL) (Sup Ct) at para 84–85 [Wong]; *George v Guelph (City) Police Services*, 2016 ONSC 4961 at paras 8, 21 [George]; *Kellman v Iverson*, 2012 ONSC 3244 at para 17 [Kellman].

<sup>26</sup> Erika Chamberlain and Jennifer A Freund, "Negligent Investigation: A New Remedy for the Wrongly Accused: *Hill v Hamilton-Wentworth Regional Police Services Board* Case Comment" (2008) 45:4 *Alta L Rev* 1089 at 1101. Also see *Wiche v Ontario*, [2001] OJ no 1850 (QL) at para 83, 38 Admin LR (3d) 194 [Wiche]: wherein "granting immunity to police officers and other investigators from liability for negligent investigation should prevail in all but the most egregious circumstances".

<sup>27</sup> *Chartier v Québec (Attorney General)*, [1979] 2 SCR 474, 104 DLR (3d) 32 [Chartier]. It can be argued that the Court firstly awarded damages for a negligent investigation with respect to police in Quebec in *Lamb v Benoit et al*, [1959] SCR 321, 17 DLR (2d) 369 [Lamb] (SQ).

<sup>28</sup> *Civil Code of Lower Canada*, 29 Vict, ch 41, (1865). The *Civil Code of Lower Canada* (*Code civil du Bas-Canada*) was enacted in Lower Canada (to become the Province of Quebec) on 1 August 1866 and remained in effect until repealed and replaced by the *Civil Code of Québec* (*Code civil du Québec*), SQ 1991, c 64 on 1 January 1994.

1053: every person capable of discerning good from evil is liable for the injury caused by his fault to others, either by his own act or by recklessness, negligence or incapacity.

While the action was dismissed at trial in the Quebec Superior Court<sup>29</sup> in 1974 and the appeal to the Quebec Court of Appeal<sup>30</sup> in 1975 was dismissed, the Court in 1979 allowed the appeal and found for the plaintiff. The conclusion made was that members of the SQ in the performance of their duties committed acts of fault. The police officers did not have reasonable grounds to believe that the accused had committed an indictable offence. Indeed:

It is sufficient to say that this was an unpardonable and unjustifiable error, which proved to be extremely prejudicial to the appellant since it is obvious that, had it not been for the reprehensible maneuvering and testifying of the officers, Chartier could never have been charged.<sup>31</sup>

As a result, the police were found not to have had reasonable and probable grounds for the arrest and moral damages were awarded in the order of \$50,000. It can be noted that the court in *Hill* makes reference to this earlier decision.<sup>32</sup> Judicial decisions in Quebec have relied upon *Chartier* as recently as 2018 in the Court of Appeal of Quebec decision of *Lupien c Aumont*,<sup>33</sup> although it is important to note that article 1053 was repealed on January 1, 1994 with the promulgation of the *Civil Code of Quebec* and in particular article 1457, which applies to all litigation after that date dealing with the issue of extra contractual civil liability:

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.<sup>34</sup>

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<sup>29</sup> *Chartier c Québec (Procureur général)* (1974), (Que Sup Ct) (Unreported).

<sup>30</sup> *Chartier c Québec (Procureur général)*, [1975] JQ no 108 (QL), [1976] CA 126 (Que CA).

<sup>31</sup> *Chartier*, *supra* note 27 at para 24.

<sup>32</sup> *Hill*, *supra* note 7 at 50.

<sup>33</sup> *Lupien c Aumont*, 2018 QCCA 168 [*Lupien* CA].

<sup>34</sup> *Civil Code of Québec*, CQLR c CCQ-1991, s 1457.



The decision most often judicially considered with respect to Article 1457 is *Lacombe c Andre*<sup>35</sup> in the Court of Appeal for Quebec.

This brings us to the purpose of this research, which is a qualitative and quantitative analysis on the success rate for plaintiffs who bring actions for negligent investigation against police officers who have wrongly accused them of criminality. This research falls within the broader framework on the success rate of plaintiffs who seek damages from both police services and crown counsel regarding actions seeking damages for malicious prosecutions, breaches of *Charter* rights, and findings of miscarriages of justice pursuant to section 691 of the *Criminal Code of Canada* (“Code”).<sup>36</sup> It can be noted that the pleadings in many, if not most, of the actions by suspects harmed by a wrongful accusation include claims collectively that encompass the pursuit of damages for negligent investigation, malicious prosecution and *Charter* violations. The test for succeeding in all of these causes of action are now well established in the Court’s decisions establishing the rules necessary to find liability. For negligent investigation the said decision is *Hill*, for malicious prosecution the decisions are *Nelles v Ontario*,<sup>37</sup> *Proulx v Québec*<sup>38</sup> and *Miazga v Kvello Estate*,<sup>39</sup> and for the *Charter* it is *Vancouver (City) v Ward*.<sup>40</sup> While negligent investigation involves the activities of police services, both malicious prosecution<sup>41</sup> and the *Charter* cases<sup>42</sup> involve police services and Crown counsel.

At the conclusion of the totality of this research there will be a comparative examination available to assess what actions provide the best prospect of success when the criminal justice process goes wrong. This first piece on negligent investigation will set the scene for a data analysis

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<sup>35</sup> *Lacombe c Andre*, [2003] JQ no 1376 (QL), [2003] RDF 899 (Sup Ct) [*Lacombe* Sup Ct], leave to appeal to SCC dismissed, *Lacombe c Andre*, [2003] CSC no 196 (SCC) [*Lacombe* SCC].

<sup>36</sup> *Criminal Code of Canada*, RSC 1985, c C-46 [Code].

<sup>37</sup> *Nelles*, *supra* note 4.

<sup>38</sup> *Proulx v Québec*, 2000 SCC 5 [*Proulx*].

<sup>39</sup> *Miazga v Kvello Estate*, 2009 SCC 51 [*Miazga*].

<sup>40</sup> *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].

<sup>41</sup> Police officers in addition to crown counsel can be held civilly liable for malicious prosecution when they are connected with the “carriage of the action once begun” per *Wiche*, *supra* note 26 at para 46. See also *Oniel v Toronto (Metropolitan) Police Force* (2001), 195 DLR (4th) 59, [2001] OJ No 90 (QL) at paras 49–51.

<sup>42</sup> Damages were awarded against the police for *Charter* breaches in *Ward*, *supra* note 40 and subsequently, for example, in *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074 and *Carr v Ottawa Police Services Board*, 2017 ONSC 4331, and against crown counsel recently by the Court in *Henry v British Columbia (Attorney General)*, [2015] 2 SCR 214, 383 DLR (4th) 383.

on the success rate followed by a case analysis on the reasons for both success and failure of these actions.

### 1. Data Analysis: The Success Rate

The starting point for data analysis is to discover the total number of criminal cases instituted in the latest year for which data has been published that have the potential recourse to a claim for compensation. In this regard, Statistics Canada provides data for the years 2016/17 as set out in Table One.

**Table One: Cases with potential recourse to a claim for compensation<sup>43</sup>**

|                     | 2016/2017               |
|---------------------|-------------------------|
| Total decisions     | 357,642                 |
| Guilty              | 226,231                 |
| Acquitted           | 14,539                  |
| Stayed or withdrawn | 113,297 / Total 127,836 |

A case includes one or more charges against an accused person processed by the courts at the same time and resulting in a final decision. Cases with motions, trial decisions and appeals are counted as one. As can be seen from this table, there were 14,539 acquittals of a total 357,642 decisions and cases with charges that were stayed or withdrawn came to 113,297 resulting in a total of 127,836 cases with the potential for actions by wrongly accused persons to seek compensation. It is from this total that actions for negligent investigation, malicious prosecution, and breaches of *Charter* rights derive. With respect to applications for ministerial review pursuant to section 696.1 of the *Code*, out of a total of 323 applications between 2003 and 2018 there are 17 cases as shown in Table Two wherein the Minister of Justice accepted that a miscarriage of justice had occurred and as such could also potentially give rise to a claim for compensation.

<sup>43</sup> Table 35-10-0027-01: Adult criminal courts, number of cases and charges by type of decision (formerly CANSIM 252-0054) Geography: Canada, Province or territory. This product is based on data from the adult component of the Integrated Criminal Court Survey (ICCS). The ICCS is administered by the Canadian Centre for Justice Statistics (Statistics Canada) in collaboration with provincial and territorial government departments responsible for criminal courts in Canada. The survey collects statistical information on adult and youth court cases involving Criminal Code and other federal statute offences. Data contained in this table represent the adult criminal court portion of the survey, namely, individuals who were 18 years of age or older at the time of the offence. Data are based on a fiscal year (April 1 through March 31).

**Table Two: Applications for Ministerial Review: s.696.1 Criminal Code<sup>44</sup>**

|            | 2003 | 04 | 05 | 06 | 07 | 08 | 09 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | Ttl |
|------------|------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----|
| <b>App</b> | 11   | 29 | 35 | 39 | 18 | 32 | 25 | 22 | 9  | 16 | 12 | 13 | 11 | 7  | 17 | 27 | 323 |
| <b>Dec</b> | 1    | 0  | 5  | 1  | 1  | 3  | 1  | 1  | 0  | 0  | 1  | 0  | 2  | 0  | 1  | 0  | 17  |

Next, the total number of cases must be filtered into the causes of action relevant to this research and then further refined to narrow them down to only those cases that pertain to claims by suspects wrongly charged. For this purpose, the commercial database of Lexis Advance Canada has been used. Firstly, the name of the cause of action was searched together with the words “tort” and “damages”. With particular regard to malicious prosecution, the search was further filtered with the case name for the Court’s seminal decisions of *Nelles*,<sup>45</sup> *Proulx*,<sup>46</sup> and *Miazga*.<sup>47</sup> With respect to narrowing the search for cases seeking damages for breaches of the *Charter*, the search was refined with the case name of the Court’s decision in *Ward*.<sup>48</sup> Lastly with respect to negligent investigation the search terms of “*Beckstead v Ottawa Police Service*” or “*Hill v Hamilton-Wentworth*” or “*Chartier v Québec (Attorney-General)*” or “*Lacombe c Andre*”, or “*Article 1053*” or “*Article 1457*” were used.

**Table Three: Number of relevant cases**

|   | Malicious Prosecution                | Charter Breach | Negligent Investigation  |
|---|--------------------------------------|----------------|--|
| <b>Word search: cause of action &amp; “tort” or “damages”</b> | 1,460                                | 940            | 663  |
| <b>Case specific</b>  | “Nelles” or “Proulx” or “Miazga”—458 | “Ward”—178     | See below—580<br>“ <i>Beckstead</i> ” or “ <i>Hill v Hamilton-Wentworth</i> ” or “ <i>Chartier</i> ” or “ <i>Lacombe</i> ” or “1053” or “1457” |
| <b>Suspect focused</b>  | 331                                  | 143            | 182  |

As can be seen from Table Three above, there are 580 cases that pertain to negligent investigation and refer to the relevant search terms as noted. The final filtering of the cases required reading each one to determine which

<sup>44</sup> This table is drawn from the Department of Justice, Ministerial Review, Miscarriages of Justice Annual Reports. The year 2003 is the earliest year that these data are provided to the public.

<sup>45</sup> *Nelles*, *supra* note 4.

<sup>46</sup> *Proulx*, *supra* note 38.

<sup>47</sup> *Miazga*, *supra* note 39.

<sup>48</sup> *Ward*, *supra* note 40.

cases were focused on actions seeking damages by suspects. This necessarily eliminated the cases for claims referencing negligent investigation by victims of crime, those seeking costs in criminal proceedings by way of damages due to a marked departure from the standard of care by the police investigation or, more widely, claims involving negligence but not relevant to this research. As such, the final number of cases that is contained in the data analysis is 182. Table Four sets out the case outcomes for the data set by year and jurisdiction. The numbers to the left in each column represent cases where the police were successful at trial or by way of motion to strike or for summary judgment. There are 130 such cases with Ontario and Quebec each having 57 followed by Alberta with 7, New Brunswick with 3, Nova Scotia with 2 and Prince Edward Island (PEI), Manitoba, British Columbia and Newfoundland and Labrador with 1 each. There are no cases recorded for Saskatchewan because its legislature has enacted legislation granting immunity to police services where officers have potentially been negligent but acted with good faith.<sup>49</sup> The provinces of British Columbia, PEI and New Brunswick have similar legislation<sup>50</sup> but since its provisions are not applicable to cases involving alleged negligence of the RCMP,<sup>51</sup> these jurisdictions have cases involving the federal police service. There are nine cases in total that were defeated with the defence of statutory immunity.<sup>52</sup> It can safely be assumed that there may well be other cases where negligent investigation can be proven but were not pursued considering the defendant's said immunity. The numbers to the right in each column represent cases that support the plaintiff's claim for negligent investigation including those with findings at trial and others where the actions are ongoing and have rulings in favour of the plaintiffs in motions

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<sup>49</sup> See Myles Frederick McLellan, "Innocence Compensation: The Obstacles of Fault and Crown Immunities to Financial Redress" (2018) 23:3 Can Crim L Rev 291. In Saskatchewan, there is *The Police Act*, 1990, SS 1990-91, c P-15.01, which states at section 10 that "no action lies against a member (e.g. police officer) acting pursuant to duties as set out in the Act or common law for any loss or damage suffered by reason of anything done in good faith".

<sup>50</sup> For British Columbia, see *The Police Act*, RSBC 1996, c 367, s 21; for PEI, see the *Police Act*, SPEI c P-11.1, s 14.4 (13), and for New Brunswick, see the *Protection of Persons Acting Under Statute Act*, RSNB 2011, c 210, s 1.

<sup>51</sup> See *Royal Canadian Mounted Police Act*, RSC 1985, c R-10.

<sup>52</sup> *Gillis v City of Bathurst et al*, 2019 NBQB 6 (Fredericton and Bathurst Police); *Jardine v Saskatoon Police*, 2017 SKQB 217 (Saskatoon Police); *Raghuraman v Macnab*, 2016 SKQB 385 (Saskatoon Police); *Stewart v Keating*, 2015 SKQB 108 (Saskatoon Police); *Wilson v Vancouver* (2011), (BC Sm Ct Ct) (Unreported) (Vancouver Police); *Wiese v Martin*, 2011 SKQB 296 (Saskatoon Police); *Harvey v Laidler*, 2010 BCPC 183 (North Vancouver Police); *Whatcott v Schluff*, 2009 SKQB 56 (Prince Albert Police); *Ward v City of Vancouver*, 2007 BCSC 3 (Vancouver).

brought by the police to strike the pleadings or for summary judgment.<sup>53</sup> These also include cases that have been settled in the plaintiff's favour.<sup>54</sup> There are 51 such cases with the majority won by the plaintiff in Quebec at 35<sup>55</sup> followed by Ontario with 13.<sup>56</sup> There are two cases in British

<sup>53</sup> The opportunity to pursue litigation and be awarded damages is only available to a plaintiff if she can turn back motions by the defendant police service to strike the pleadings or obtain summary judgment dismissing the action at the outset of a case. It has been noted by Justice Lamer (as he then was) of the Court in *Nelles*, *supra* note 4 at para 56 that dismissals by these means play a particularly significant role in actions brought against prosecutorial authorities. See also *Moak*, *supra* note 25 at paras 7–8; *Fragomeni v Sudbury Police Service*, 2015 ONSC 3985 at para 97 [*Fragomeni*]. The opportunity of summary judgment was opened more widely with the Court's decision in *Hyrniak v Mauldin*, [2014] 1 SCR 87, 366 DLR (4th) 641, wherein it held that summary judgment motions must be granted whenever there is no genuine issue requiring a trial. This has been transformative with respect to the utility of such motions as demonstrated by Brooke MacKenzie, "Effecting a Culture Shift: An Empirical Review of Ontario's Summary Judgment Reforms" (2017) 54:4 Osgoode Hall LJ 1275.

<sup>54</sup> These cases included in the win column for the plaintiff will be discussed in further detail in the sections on Case Analysis.

<sup>55</sup> *Paquette c Montréal (Ville de)*, 2019 QCCS 1796 [*Paquette*]; *McGowan v Montréal (Ville de)*, 2018 QCCS 174 (Montreal Police) [*McGowan*] (Montreal Police); *Manoukian c Procureur général du Canada*, 2018 QCCS 30 (RCMP); *Néron c Ville de Sherbrooke*, 2017 QCCQ 5058 [*Néron*] (Sherbrooke Police); *White c Ville de Montréal*, 2017 QCCQ 5542 [*White*] (Montreal Police); *Lupien c Aumont*, 2016 QCCS 5050 [*Lupien* Sup Ct] (St-Adele Police); 2018, appeal dismissed, *Lupien CA*, *supra* note 33; *Singh c Montréal (Ville de)*, 2015 QCCS 3853 (Montreal Police) [*Singh*]; *Grenier c Memphrémagog Police Board*, 2015 QCCQ 5136 (Memphrémagog Police) [*Grenier*]; *EP c MP*, 2011 QCCS 1796 [*EP c MP* Sup Ct] (SQ), appeal dismissed, *EP c MP*, 2013 QCCA 1137 [*EP c MP CA*]; *Mailloux c Durette*, 2010 QCCS 599 (RCMP) [*Mailloux*], appeal dismissed, *Durette c Grenier*, 2012 QCCA 1207 [*Durette CA*]; *Lévesque c Martel*, 2010 QCCS 5958 [*Martel*] (SQ); *Robertson v Mohawk Council of Kahnawake*, 2010 QCCS 355 [*Robertson* Sup Ct] (First Nation Peacekeepers), appeal dismissed, *Robertson v Mohawk Council of Kahnawake*, 2011 QCCA 2430 [*Robertson CA*]; *André c Montréal (Ville de)*, 2009 QCCQ 13407 [*André*] (Montreal Police); *Parasiris c Laval (Ville de)*, 2009 QCCS 3909 [*Parasiris*] (SQ); *Ruckenstein c Montréal (Ville de)*, 2009 QCCQ 7011 [*Ruckenstein*] (Montreal); *Lefebvre c Québec (Procureur général)*, 2008 QCCS 4336 [*Lefebvre* Sup Ct]; *Ramsay c Québec (Procureur général)*, 2008 QCCS 3509 [*Ramsay*] (SQ); *Morin c St-Martin*, 2007 QCCS 1367 [*Morin*] (SQ); *Lefebvre c Québec (Procureur général)*, 2007 QCCQ 4850 [*Lefebvre CQ*] (SQ); *Duval c Fredette*, 2006 QCCS 5064 [*Duval*] (SQ); *Mallet c Bernard*, [2004] JQ no 6860 (QL), EYB 2004-66026 (CQ) [*Mallet*] (SQ); *Pomerleau c Procureur général du Québec*, [2004] JQ no 4955 (QL), [2004] RRA 632 (Sup Ct) [*Pomerleau*] (SQ); *Khoury c Dupuis*, [2004] JQ no 17815 (QL), EYB 2004-127718 (CQ) [*Khoury*] (Montreal Police); *Michaelson c Régie intermunicipale de police des Seigneuries*, [2002] JQ no 5068, [2002] RRA 1261 (Sup Ct) [*Michaelson* Sup Ct] (Seigneuries Regional Police), appeal dismissed, *Régie intermunicipale de police des Seigneuries c Michaelson*, [2004] JQ no 13445, [2005] RRA 7 (Que CA) [*Michaelson CA*]; *Noisieux c Montréal (Ville de)*, [2002] JQ no 3572 (QL), [2002] RRA 1331 (CQ) [*Noisieux*] (Montreal Police); *Monette c Société Hôtelière Canadien Pacifique Ltée*, [2001] JQ no 322 (QL), [2001] RRA 369 (CS)

Columbia<sup>57</sup> that involve the RCMP and two cases in Manitoba,<sup>58</sup> both involving the Winnipeg Police Service. There are no cases of negligent investigation recorded for the territories.

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[*Monette*] (Montreal Police); *Corriveau c Vachon*, 2001 CanLII 24636, EYB 2001-22047 (Que Sup Ct) [*Corriveau Sup Ct*] (SQ); 2003: Appeal dismissed re negligent investigation and granted re malicious prosecution. *R c Corriveau*, [2003] JQ no 19211 (QL), JE 2004-242 (CA) [*Corriveau CA*]; *Quane c Lagrange*, [1999] JQ no 588 (QL), [1999] RRA 307 (Sup Ct) [*Quane Sup Ct*] (SQ), appeal dismissed, *Quane c Lagrange*, [2001] JQ no 6090, [2002] RRA 1 (CA) [*Quane CA*]; *André c Québec (Procureur général)*, [1999] JQ no 4213 (QL), [1999] RRA 886 (Sup Ct) [*André c Québec*] (Montreal Police). *Lacombe Sup Ct*, *supra* note 35, leave to appeal to SCC dismissed, *Lacombe SCC*, *supra* note 35; *Ostiguy c Québec (Procureur général)*, [1999] JQ no 544 (QL) (Sup Ct) [*Ostiguy*] (SQ); *Lacroix c Bilodeau*, [1998] JQ no 5040 (QL), [1998] RRA 1102 (CQ) [*Lacroix*] (SQ); *Mitchell c Québec (Procureur général)*, [1995] JQ no 3557 (QL), JE 95-1431 (Sup Ct) [*Mitchell*] (SQ); *Allard c Biron*, [1997] JQ no 5789 (QL), [1997] RRA 577 (CS) [*Allard Sup Ct*] (District of Roberval Police), appeal granted with respect to quantum, *Québec (Procureur général) c Allard*, [1999] JQ no 3059 (QL) (CA) [*Allard CA*]; *RD c DL*, [1992] JQ no 1460 (QL) (Sup Ct) [*RD c DL*] (Montreal Police); *Chartier*, *supra* note 27 (SQ); *Lamb*, *supra* note 27 (SQ).

<sup>56</sup> *Bagha v Toronto (City) Police Services Board*, 2018 ONSC 4748 [*Bagha*] (Toronto Police); *Winmill v Woodstock (City) Police Services Board*, 2017 ONSC 2528 [*Winmill Sup Ct*] (Woodstock Police), appeal allowed, *Winmill v Woodstock (City) Police Services Board*, 2017 ONCA 962 [*Winmill CA*]; *Carr v Ottawa Police Services Board*, 2017 ONSC 4331 (Ottawa Police) [*Carr*]; *Abboud v Ottawa (City) Police Services Board*, 2016 ONSC 1052 [*Abboud*] (Ottawa Police); *Adamson v Ontario*, 2014 ONSC 3787 [*Adamson*] (OPP); *Dixon v Hamilton (City) Police Services Board*, [2011] OJ No 3836 (QL) (Sup Ct) [*Dixon*] (Hamilton Police); *Tepper v Canada (Attorney General)*, 2014 FC 441 [*Tepper*] (RCMP); *Radovici v Toronto Police Services Board et al.*, [2007] OJ No 2663 (QL), 86 OR (3d) 691 (Sup Ct) [*Radovici*] (Toronto Police); *Al-Harazi v Niagara (Regional Municipality) Police Services Board*, [2005] OJ No 1859 (QL), [2005] OTC 360 (Sup Ct) [*Al-Harazi*] (Niagara Regional Police); *DJ v KC*, [2004] OJ No 1453 (QL), 238 DLR (4th) 126 (Sup Ct) [*DJ v KC*] (Anishinabek Police); *Johnson v Coppaway*, [2004] OJ 5665 (QL) (Sup Ct) (Anishinabek Police); *Simon v Toronto Police Services Board*, [2002] OJ No 5933 (QL) (Sup Ct) [*Simon*] (Toronto Police); *Beckstead 1*, *supra* note 2 (Ottawa Police), appeal dismissed, *Beckstead 2*, *supra* note 3.

<sup>57</sup> *Veeken v British Columbia (Minister of Public Safety and Solicitor General)*, 2018 BCPC 150 [*Veeken*] (RCMP); *Patrick Reilly v Paul Marcel Bissonnette (Claim for Malicious Prosecution)*, 2006 BCSC 1320 (RCMP) [*Patrick Reilly Sup Ct*], appeal dismissed, *Reilly v Canada (Attorney General)*, 2008 BCCA 167 [*Patrick Reilly CA*].

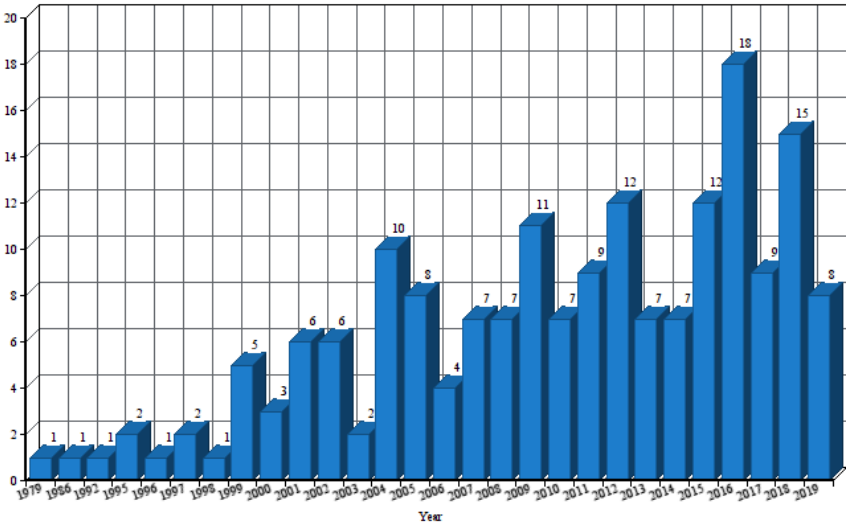
<sup>58</sup> *Shoaai v Canada (Attorney General)*, 2013 MBQB 110 [*Shoaai*] (RCMP); *Driskell v Dangerfield*, 2007 MBQB 142 [*Driskell QB*], appeal dismissed, *Driskell v Dangerfield*, 2008 MBCA 60 [*Driskell CA*] (Winnipeg Police).

**Table Four: Case Outcomes by Year/Jurisdiction**

|       | BC       | AB      | SK | MB       | ON          | QB          | NB      | NS      | PEI     | Nfld    | Terr | Ttl           |
|-------|----------|---------|----|----------|-------------|-------------|---------|---------|---------|---------|------|---------------|
| 2019  |          |         |    |          | 3           | 4/1         |         |         |         |         |      | 8             |
| 2018  | /1       | 2/      |    |          | 5/1         | 3/2         |         |         |         | 1/      |      | 15            |
| 2017  |          |         |    |          | 2/2         | 3/2         |         |         |         |         |      | 9             |
| 2016  |          | 1/      |    |          | 8/1         | 7/1         |         |         |         |         |      | 18            |
| 2015  |          |         |    |          | 3/          | 6/2         |         |         | 1/      |         |      | 12            |
| 2014  |          |         |    |          | 3/2         |             | 1/      | 1/      |         |         |      | 7             |
| 2013  | 1/       | 1/      |    | /1       | 2/          | 1/          | 1/      |         |         |         |      | 7             |
| 2012  |          | 3/      |    | 1/       | 5/          | 1/          | 1/      | 1/      |         |         |      | 12            |
| 2011  |          |         |    |          | 2/1         | 5/1         |         |         |         |         |      | 9             |
| 2010  |          |         |    |          | 1/          | 3/3         |         |         |         |         |      | 7             |
| 2009  |          |         |    |          | 6/          | 2/3         |         |         |         |         |      | 11            |
| 2008  |          |         |    |          | 3/          | 2/2         |         |         |         |         |      | 7             |
| 2007  |          |         |    | /1       | 2/1         | 1/2         |         |         |         |         |      | 7             |
| 2006  | /1       |         |    |          | 1/          | 1/1         |         |         |         |         |      | 4             |
| 2005  |          |         |    |          | /1          | 7/          |         |         |         |         |      | 8             |
| 2004  |          |         |    |          | 3/2         | 2/3         |         |         |         |         |      | 10            |
| 2003  |          |         |    |          | 2/          |             |         |         |         |         |      | 2             |
| 2002  |          |         |    |          | 3/1         | /2          |         |         |         |         |      | 6             |
| 2001  |          |         |    |          | 2/          | 2/2         |         |         |         |         |      | 6             |
| 2000  |          |         |    |          |             | 3/          |         |         |         |         |      | 3             |
| 1999  |          |         |    |          |             | 2/3         |         |         |         |         |      | 5             |
| 1998  |          |         |    |          |             | /1          |         |         |         |         |      | 1             |
| 1997  |          |         |    |          |             | 1/1         |         |         |         |         |      | 2             |
| 1996  |          |         |    |          | 1/          |             |         |         |         |         |      | 1             |
| 1995  |          |         |    |          | /1          | /1          |         |         |         |         |      | 2             |
| 1992  |          |         |    |          |             | /1          |         |         |         |         |      | 1             |
| 1986  |          |         |    |          |             | 1/          |         |         |         |         |      | 1             |
| 1979  |          |         |    |          |             | /1          |         |         |         |         |      | 1             |
| Total | 1/2<br>3 | 7/<br>7 |    | 1/2<br>3 | 57/13<br>70 | 57/35<br>92 | 3/<br>3 | 2/<br>2 | 1/<br>1 | 1/<br>1 |      | 130/52<br>182 |

The incidence of cases from the Court decision in 1979 of *Chartier v Québec (Attorney General)*<sup>59</sup> up to May 7th, 2019 are displayed in Figure One showing the progression in the numbers of negligent investigation litigation.

Figure One: Number of Cases by Year



As can be seen, there is an overall increase in the incidence of cases from 1979 to 2019. It should be noted that from 1995 (being the first year with consecutive decisions up to and including 2007 with the release of *Hill v Hamilton-Wentworth*<sup>60</sup>) there is only one year with a cumulative total of cases in the double digits. The yearly average for these 13 years is 4.2 cases. For the remaining 12 years commencing in 2008 there are five cases in the double digits providing an average number of cases per year at 10.2.

Figure Two provides a contrast of the cases won and lost by the plaintiffs and police respectively.

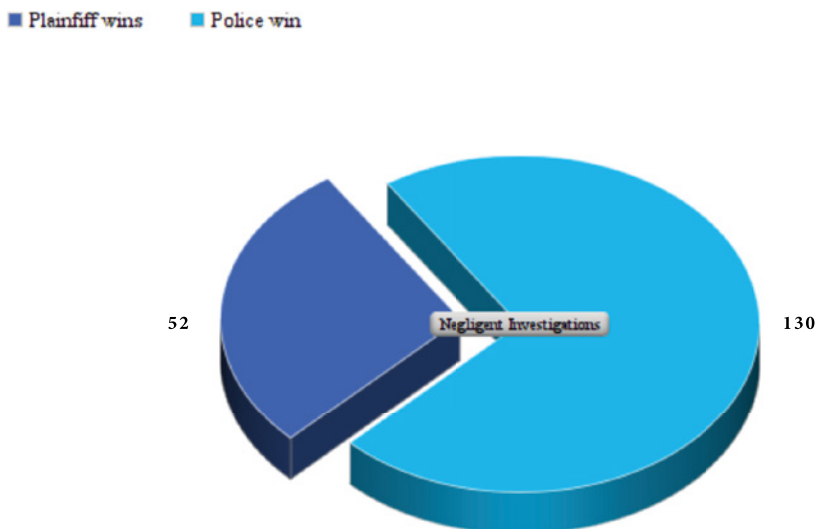
59

*Chartier*, *supra* note 27.

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Judgment released October 4, 2017.



**Figure Two: Cases Won/Lost by Plaintiffs and Police**

Numerically, the win/loss ratio in Table Two is 28.6% in favour of plaintiffs and 71.4% for the police services in actions for negligent investigation.

For comparative purposes, in Table Five demonstrating how the individual jurisdictions compare to each other, it is particularly interesting to see the difference in the incidence of success by plaintiffs between Quebec and Ontario. Clearly the courts applying the civil law are far more receptive to finding in favour of plaintiffs than those applying the common law. While it has often been said in the Quebec courts that “we in Québec have neither the need nor the right in the interpretation of our civil law to import foreign rules,”<sup>61</sup> some civil law jurisprudence considers and follows the common law decision of the Court in *Hill*.<sup>62</sup> The success rate in Quebec at 38% is twice that in Ontario at 18.6%. The success rate in the other provinces varies widely from a total lack of success in actions instituted in Alberta, New Brunswick, Nova Scotia, PEI and Newfoundland and Labrador to British Columbia and Manitoba where it is more likely than not to succeed with a 66.6% success rate.

<sup>61</sup> *Bertrand c Racicot*, [1984] JQ no 847 (QL) at para 6, JE 84-853—“foreign rules” meaning the common law. “Unlike the common law systems, civil law jurisdictions do not adopt a *stare decisis* principle in adjudication. In deciding any given legal issue, precedents serve a persuasive role” per Vincy Fon & Francesco Parisi, “Judicial Precedents in Civil Law Systems: A Dynamic Analysis” (2004) 26:4 Intl Rev Law & Econ 519; George Mason Law & Economics Research Paper No 04-15; Minnesota Legal Studies Research Paper No 07-19.

<sup>62</sup> See *Parasiris*, *supra* note 55 (SQ); *Robertson* Sup Ct, *supra* note 55.

**Table Five: The Success Rate by Jurisdiction**

|              | BC   | AB | SK | MB   | ON   | QB | NB | NS | PEI | Nfld | Terr |
|--------------|------|----|----|------|------|----|----|----|-----|------|------|
| Total cases  | 3    | 7  | 0  | 3    | 70   | 92 | 3  | 2  | 1   | 1    | 0    |
| Wins         | 2    |    |    | 2    | 13   | 35 |    |    |     |      |      |
| Losses       | 1    | 7  |    | 1    | 57   | 57 | 3  | 2  | 1   | 1    |      |
| Success Rate | 66.6 | 0  |    | 66.6 | 18.6 | 38 | 0  | 0  | 0   | 0    |      |

In the future, research on the success rate of actions for malicious prosecution, breaches of *Charter* rights and applications for ministerial review pursuant to section 696.1 of the *Code*, a comparative view across causes of action can be had in addition to this current research examining comparisons between jurisdictions over time. The numbers to replace the “TBD” data entry in Table Six will be inserted as the broader research evolves.

**Table Six: The Success Rate by Causes of Action**

|                             | Negligent Investigation | Charter Breach | Malicious Prosecution | Ministerial Review |
|-----------------------------|-------------------------|----------------|-----------------------|--------------------|
| Total Cases—suspect focused | 182                     | 143            | 331                   | 17                 |
| Wins/Losses                 | 52/130                  | TBD            | TBD                   | TBD                |
| Success Rate                | 28.6%                   | TBD            | TBD                   | TBD                |

2. Case analysis: Reasoning

Chief Justice McLachlin made clear that:

A plaintiff advancing a claim for negligent investigation has the burden of proving every element of his or her case, including a failure by police to meet the applicable standard of care, and that the relevant failure caused harm compensable at law.<sup>63</sup>

With respect to the applicable standard of care in an action for negligent investigation, the conduct of investigating officers is measured against a “flexible overarching standard”<sup>64</sup> of how a reasonable officer in like circumstances would have acted. Regard is had to all the prevailing circumstances at the time including the state of knowledge relevant to police investigations and the information available at the time of arrest.<sup>65</sup>

63

*Hill*, *supra* note 7 at para 64.

64

*Ibid* at para 68.

65

*Ibid* at paras 3, 67–68, 73, 77, 88; 495793 *Ontario Ltd v Barclay*, 2014 ONSC 3517 at para 47 [*Barclay*] (Thunder Bay Police).

The law does not demand a perfect police investigation; only one where the police conducting the investigation act reasonably.<sup>66</sup> Police are not required to evaluate evidence according to legal standards or make legal judgments. Investigating officers will not be held liable for failing to perform such evaluations or be held responsible for the conduct of other actors in the criminal justice process.<sup>67</sup> Investigating officers have significant discretion in how they conduct investigations, which are often carried out in difficult circumstances. The standard of care therefore is not breached simply because another officer would have acted differently or because a reviewing court deems their actions to be sub-optimal.<sup>68</sup>

The *Code* requires that an arresting officer must subjectively have reasonable and probable grounds for arrest and those grounds must be justifiable from an objective point of view. As Justice Cory stated in the Court's decision of *R v Storrey*:<sup>69</sup>

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.<sup>70</sup>

In establishing reasonable and probable grounds, police officers must take into account all information available to them and are allowed to disregard information which they believe is unreliable.<sup>71</sup> The finding by crown counsel that there is a reasonable prospect of conviction and a committal for trial after a preliminary inquiry supports a conclusion of the existence of reasonable and probable grounds at the time of arrest.<sup>72</sup> The dismissal

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<sup>66</sup> *Hill*, *supra* note 7 at paras 3, 73.

<sup>67</sup> *Ibid* at para 50.

<sup>68</sup> *Ibid* at paras 51-54, 58, 73; *MacPhee v Ottawa Police Services Board*, [2003] OJ No 3786 at para 27 (QL) (Sup Ct) (Ottawa Police); *Charlton v St. Thomas Police Services Board*, [2009] OJ No 2132 (QL) at para 42 (Sup Ct) [*Charlton*] (St. Thomas Police); and *Solomonvici v Toronto (City) Police Services Board*, [2009] OJ No 3144 at para 11 (QL) (Sup Ct) [*Solomonvici*] (Toronto Police).

<sup>69</sup> *R v Storrey*, [1990] 1 SCR 241, 17 DLR (2d) 369 [*Storrey* cited to SCR] with respect to the powers of arrest under ss 450 and 454 of the *Code*.

<sup>70</sup> *Ibid* at para 17.

<sup>71</sup> *Charlton*, *supra* note 68 at para 38.

<sup>72</sup> *Franklin v Toronto Police Services Board*, [2008] OJ No 5237 at para 40 (QL) (Sup Ct) [*Franklin*] (Toronto Police); *Wong*, *supra* note 25 at paras 60, 70; *Fragomeni*, *supra* note 53 at para 102; *George*, *supra* note 25 at para 8.

or withdrawal of charges or indeed an acquittal after trial does not lead inexorably to the conclusion that reasonable and probable grounds for an arrest or the laying of charges did not exist.<sup>73</sup>

All of this is not to say that every decision that rejects the plaintiffs' claim and finds in favour of the police is the result of the investigating officers having reasonable and probable grounds. There are eight cases where the standard of reasonable and probable grounds was referenced but was not relied upon for the purpose of the finding.<sup>74</sup> There are 26 cases that did not rely upon or make mention of reasonable and probable grounds yet still found in favour of the defendant police service.<sup>75</sup> In the

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<sup>73</sup> *Charlton*, *supra* note 68 at para 40; *Wong*, *supra* note 25 at paras 60, 72; *Grann v Thunder Bay (City) Police Services Board*, 2015 ONSC 438 at para 25 [*Grann*] (Thunder Bay Police); *Fragomeni*, *supra* note 53 at para 114; *Roda v Toronto (City) Police Services Board*, 2016 ONSC 743 at para 75 [*Roda*] (Toronto Police); *George*, *supra* note 25 at para 8.

<sup>74</sup> *Painter v Richardson*, 2017 ONSC 5603: Plaintiff's action dismissed. No breach of standard of care. Court mentions reasonable and probable grounds but makes no finding; *Lauer v Canada (Attorney General)*, 2015 PESC 15 [*Lauer*]: Defendant's motion granted. Plaintiff failed to raise reasonable cause of action of negligent investigation and police had limitation period defence; *Avery v Canada (Attorney General)*, 2013 NBQB 152: Defendant's motion granted. No evidence of negligence; *Bilich v Toronto (City) Police Services Board*, 2013 ONSC 1445: Defendant's motion granted. Proceedings did not terminate in Plaintiff's favour; *Barton v Nova Scotia (Attorney General)*, 2012 NSSC 405: Defendant's motion granted but Plaintiff given leave to amend Statement of Claim; 2013: *Barton v Nova Scotia (Attorney General)*, 2013 NSSC 121 (Defendant's motion dismissed). Action against RCMP can proceed. Court mentioned reasonable and probable grounds but made no finding. 2014: Plaintiff's action dismissed. No proof of negligence. Court mentioned reasonable and probable grounds but made no finding. *Barton v Nova Scotia (Attorney General)*, 2014 NSSC 192, appeal dismissed, *Barton v Nova Scotia (Attorney General)*, 2015 NSCA 34: No mention of reasonable and probable grounds. Notwithstanding finding by Court of Appeal that there was a miscarriage of justice, this does not necessarily lead to compensation; *EG c Carrier*, 2010 QCCS 2191 (Montreal Police). Plaintiff's action dismissed. No Article. Police assert reasonable and probable grounds but no finding by Court, appeal dismissed, *EG c Carrier*, 2010 QCCA 2153; *Sauve v Canada*, 2009 FC 1011 (RCMP): Defendant's motion dismissed as against RCMP; 2010: Defendant's motion granted. Plaintiff's claim was bald assertion; *Sauve v Canada*, 2010 FC 217, appeal dismissed, *Sauve v Canada*, 2011 FC 1074: No evidence of duty of care or breach of standard of care, appeal dismissed, [2012] FCJ No 1415 (CA); Appeal dismissed, *Sauve v Canada* [2015] FCJ No 882 (FCA) reasonable and probable grounds mentioned only; *Boucher c Québec (Procureur général)*, [1986] JQ no 1895 (Que Sup Ct) (SQ). Plaintiff's action dismissed. Court refers to requirement to prove lack of reasonable and probable grounds but did not find and held that "police had serious grounds to arrest"; Appeal dismissed, *Boucher c Québec (Procureur général)*, [1991] JQ no 225 (QL), [1991] RRA 312 (CA).

<sup>75</sup> *Bobel v Humecka and Patten*, 2019 ONSC 1876 [*Bobel*]: Defendant's motion granted. Plaintiff did not prove duty of care, breach of standard of care or cause of action in negligence; *MacNeil v Canadian Forces Military Police (Master Corporal Brown)*, 2018

ONSC 5760: Defendant's motion granted against one defendant as proceedings did not end in his favour, dismissed against other defendant due to limitation period defence; *Paraniuk v Pierce*, 2018 ABQB 1015: Defendant's motion granted. No proof of causation and plaintiff found to be vexatious litigant; *Kalemba c Sûreté du Québec*, 2018 QCCQ 1917 [*Kalemba*] (SQ): Plaintiff's action dismissed. Articles 1457/1053: Police conduct did not differ from "that of a police officer of the same cautiousness, diligence and skill under the same circumstances"; *Tremblay c Québec City*, 2018 QCCQ 10759 (Quebec City Police): Plaintiff's action dismissed. Articles 1457/1053. Plaintiff could not prove fault on part of police; *Figlarz c Ville de Montréal*, 2017 QCCQ 11811 [*Figlarz*] (Montreal Police): Plaintiff's action dismissed. Article 1457. Police had "valid reasons" for arrest; *Grenon v Canada Revenue Agency*, 2016 ABQB 260: Defendant's motion granted. The CRA does not have duty of care to those it investigates; *Ringuette c Québec (Procureure générale)*, 2016 QCCS 342 [*Ringuette*] (SQ): Plaintiff's action dismissed. No Article. Held that the court cannot conclude that the "investigation was so incomplete to unfairly accuse" the Plaintiff of the alleged crime. Further held that the investigation "was not botched"; *Chabot c Québec (Procureure générale)*, 2016 QCCS 4306 (SQ) [*Chabot*]: Plaintiff's action dismissed. No Article. Police had "reasonable and valid grounds" for arrest; *118143 Ontario Inc. (cob Canamex Promotions) v Mississauga (City)*, 2015 ONSC 3691: Plaintiff's action dismissed. No duty of care re: enforcement of municipal by-law; 2016: Appeal dismissed *118143 Ontario Inc. (cob Canamex Promotions) v Mississauga (City)*, 2016 ONCA 620; *Godin c Montréal (Ville de)*, 2015 QCCQ 5513 (Montreal Police) [*Godin*]: Plaintiff's action dismissed. Article 1457. Held there was "nothing unreasonable" in the arrest; Appeal dismissed re investigation but allowed re breach of *Québec Charter* re length of detention, *Godin c Montréal (Ville de)*, 2017 QCCA 1180 [*Godin CA*]; *Jean-Pierre c Benhachmi*, 2015 QCCS 5053 [*Benhachmi*]: Plaintiff's action dismissed. Article 1457. Officers acted "reasonably"; *Bodick v Ontario*, 2013 ONSC 2285 [*Bodick*] (Ont Sup Ct) (OPP): Defendant's motion granted. No genuine issue for trial. No breach of duty of care; *Ross v Canada (Attorney General)*, 2013 BCSC 1464 [*Ross*] (RCMP): Defendant's motion granted. No pleading establishing duty of care; *Adams c Dupuis*, 2013 QCCS 1912 [*Adams c Dupuis*] (SQ): Plaintiff's action dismissed. Article 1457. Police conducted investigation as a "normally prudent police officer ... and diligent investigation"; *Hyra v Winnipeg Police Service*, 2012 MBQB 275 (Winnipeg Police) [*Hyra*]: Defendant's motion granted. Cause of action not properly pleaded; *Leclair v McLellan*, 2011 ONSC 359 [*Leclair*] (Ottawa Police): Defendant's motion granted. Limitation period defence; *Binet c Société des casinos du Québec inc. (Casino du Lac-Leamy)*, 2011 QCCS 4634 [*Binet Sup Ct*] (SQ): Plaintiff's action dismissed. Article 1457. Police officer had "reasonable grounds" to arrest and acted "in light of the standard of the normally competent, prudent and diligent officer placed in the same circumstances"; *Savard c Québec (Procureur général)*, 2011 QCCQ 9371 (SQ): Plaintiff's action dismissed. Article 1457. Police acted "reasonably" re arrest; *Chimienti v Windsor (City)*, 2010 ONSC 1699 [*Chimienti*] (Windsor Police): Defendant's motion granted. Limitation period defence, appeal dismissed, *Chimienti v Windsor (City)*, 2011 ONCA 16; *Kavanaght c Montréal (Ville de)*, 2011 QCCS 4830 (Montreal Police) [*Kavanaght Sup Ct*]: Plaintiff's action dismissed with respect to negligence but granted with respect to arbitrary detention. Investigating officer met the standard of the normally-prudent police officer, placed in the same circumstances; 2013: Appeal dismissed *Kavanaght c Montréal (Ville de)*, 2013 QCCA 1987 [*Kavanaght CA*]; *Boies c Mirabel (Ville de)*, 2009 QCCQ 14355 [*Boies*] (Mirabel Police): Plaintiff's action dismissed. Article 1457. Plaintiff could not prove "fault"; *Moïse v Québec (City of)*, [2005] JQ no 18648 (QL), [2006] RRA 141 (Sup Ct) [*Moïse*] (SQ):

common law jurisdictions, the reasoning that gave rise to these results most often relied upon the failure of the plaintiffs to prove the essential elements of the tort. These included not proving a duty of care<sup>76</sup> or properly pleading said duty.<sup>77</sup> Some cases were found in favour of the police service due to the utility of a limitation period defence.<sup>78</sup> As for the application of the Quebec *Civil Code*, the courts found in favour of the police because their conduct did not differ from that of a police officer with one or more of the same cautiousness, diligence, prudence, and skill under similar circumstances;<sup>79</sup> or the police had valid reasons<sup>80</sup>; were normally competent and diligent<sup>81</sup>; conducted investigations in accordance with the standards taught to the police in such circumstances<sup>82</sup> or acted reasonably<sup>83</sup> in arresting the plaintiff. Likewise, the investigation was not so incomplete to unfairly accuse the plaintiff<sup>84</sup> or was not botched<sup>85</sup> and more broadly it was found that there simply was no fault<sup>86</sup> on the part of the investigating officers.

However most cases relied upon reasonable and probable grounds as the grounds to find in favour of the police. More particularly, the police were successful on a motion to strike or for summary judgment and as

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Plaintiff's action dismissed. No Article. Held no evidence of "fault"; *Noisieux c Montréal (Ville de)*, [2004] JQ no 11532 (QL) (CQ): Plaintiff's action dismissed. Held: no fault; *Loiseau c Saint-Hubert (Ville de)*, [2001] JQ no 5170 (QL), [2001] RRA 1084 (Sup Ct): Plaintiff's action dismissed. Article 1053. Plaintiff "unable to establish elements necessary to incur the non-contractual liability" of the police; *Perron c Québec (Procureur général)*, [2000] JQ no 4700 (QL), [2000] RRA 1021 (Sup Ct): Plaintiff's action dismissed. Article 1457. Held: no fault. See *Chartier*, *supra* note 27.

<sup>76</sup> *Bobel*, *supra* note 75 at para 37; *Bodick*, *supra* note 75 at para 71 (OPP).

<sup>77</sup> *Ross*, *supra* note 75 at para 22; *Hyra*, *supra* note 75 at para 18.

<sup>78</sup> *Leclair*, *supra* note 75 at para 9 (Ottawa Police); *Chimienti*, *supra* note 75 at para 18 (Windsor Police).

<sup>79</sup> *Kalemba*, *supra* note 75 at para 69 (SQ); *Adams c Dupuis*, *supra* note 75 at para 115; *Binet* Sup Ct, *supra* note 75 at para 47 (SQ), appeal dismissed, *Binet c Société des casinos du Québec inc. (Casino du Lac-Leamy)*, 2013 QCCA 2006; *Kavanaght* Sup Ct, *supra* note 75 at para 130 (Montreal Police), appeal dismissed, *Kavanaght CA*, *supra* note 75.

<sup>80</sup> *Figlarz*, *supra* note 75 at para 94 (Montreal Police).

<sup>81</sup> *Chabot*, *supra* note 75 at para 87 (SQ).

<sup>82</sup> *Godin*, *supra* note 75 at para 83 (Montreal Police), appeal dismissed with respect to arrest, granted with respect to arbitrary detention, *Godin CA*, *supra* note 75.

<sup>83</sup> *Benhachmi*, *supra* note 75 at para 32 (Laval Police), appeal dismissed, *Jean-Pierre c Benhachmi*, 2018 QCCA 348.

<sup>84</sup> *Ringuette*, *supra* note 75 at para 62 (SQ).

<sup>85</sup> *Ibid* at para 55.

<sup>86</sup> *Boies*, *supra* note 75 at para 38 (Mirabel Police); *Moïse*, *supra* note 75 at para 68 (Quebec City Police).

defendants were successful in adducing evidence that they had reasonable and probable cause 27 times.<sup>87</sup> At trial, where the burden was on the

<sup>87</sup> Note that all the cases that were resolved by way of motion were in the common law jurisdictions: *Obiorah v The Ottawa Police Services Board*, 2019 ONSC 194 (Ottawa Police): Defendant's motion granted. Police had reasonable and probable grounds; *Ens v Evans* (Royal Canadian Mounted Police), 2018 ABQB 139 (RCMP): Defendant's motion granted. Police had reasonable and probable grounds; *Greensides v Kawartha Lakes (City)*, 2018 ONCA 337 (Provincial Ministry of the Environment): Defendant's motion granted. Police had reasonable and probable grounds and no genuine issue for trial; *McCormick v Canada (Attorney General)*, 2018 NLSC 251 (RCMP): Defendant's motion granted. Police had reasonable and probable grounds and no evidence of breach of standard of care or causation; *Kolosov v Lowe's Companies Inc*, 2018 ONSC 7541 (Windsor Police): Defendant's motion granted. Police had reasonable and probable grounds; *JH v Windsor (City) Police Services Board*, 2017 ONSC 6507: Defendant's motion granted. Police had reasonable and probable grounds; *Kolosov v Lowe's Companies Inc*, 2016 ONSC 1661 (Belleville Police): Defendant's motion granted. Police had reasonable and probable grounds; 2016: Appeal dismissed, *Kolosov v Lowe's Companies Inc*, 2016 ONCA 973; *Farley v Ottawa (City) Police Services Board*, 2016 ONSC 7817: Defendant's motion granted. Police had reasonable and probable grounds and failure to prove investigation fell below standard of care, appeal dismissed, *Farley v Ottawa (City) Police Services Board*, 2017 ONCA 689; *George*, *supra* note 25 (Guelph Police): Defendant's motion granted. Police had reasonable and probable grounds. Plaintiff did not lead evidence as to standard of care; *Pitney v Toronto (City) Police Services Board*, 2016 ONSC 1013: Defendant's motion granted. Police had reasonable and probable grounds and limitation period defence, appeal dismissed, *Pitney v Toronto (City) Police Services Board*, 2017 ONCA 1005 (Toronto Police); *Roda*, *supra* note 73 (Toronto Police): Defendant's motion granted. Police had reasonable and probable grounds and failure to prove investigation fell below standard of care; *Rotondo v Ottawa (City) Police Services Board*, 2016 ONSC 8101 (Ottawa Police): Defendant's motion granted. Police had reasonable and probable grounds; *Fragomeni*, *supra* note 53: Defendant's motion granted. Plaintiff failed to prove lack of reasonable and probable grounds and no proof of negligence; *Grann*, *supra* note 73 (Thunder Bay Police): Defendant's motion granted. Police had reasonable and probable grounds and proceedings not commenced by police service; *Sheridan v Ontario*, 2014 ONSC 4970 (OPP): Defendant's motion granted. Plaintiff failed to prove lack of reasonable and probable grounds and Plaintiff entering into peace bond fatal to malicious prosecution, negligent investigation and *Charter* proceedings since did not terminate in his favour, appeal dismissed, *Sheridan v Ontario*, 2015 ONCA 303. No evidence of lack of reasonable and probable grounds and no breach of standard of care; *Maxwell v Wal-Mart Canada Corp.*, 2013 ABQB 625 (Edmonton Police): Defendant's motion granted. Plaintiff failed to prove lack of reasonable and probable grounds and police met standard of care, appeal dismissed, *Maxwell v Wal-Mart Canada Corp*, 2014 ABCA 383; *Can v Calgary Police Service*, 2012 ABQB 340: Defendant's motion granted. Police had reasonable and probable grounds; Appeal dismissed, *Can v Calgary Police Service*, 2013 ABQB 226, appeal dismissed, *Can v Calgary Police Service*, 2014 ABCA 322; *Gray v Canada (Attorney General)*, 2012 NBQB 375 (RCMP): Defendant's motion granted. Police had reasonable and probable grounds and no evidence that police failed to meet standard of care; *Raworth v Stratford (City) Police Services Board*, 2012 ONSC 300 (Stratford Police): Defendant's motion granted. Police had reasonable and probable grounds; *Romanic v Johnson*, 2012 ONSC 3449 (Niagara Regional Police): Defendant's

plaintiffs to prove an absence of reasonable and probable cause with respect to the actions of the police, that burden was not met 65 times.<sup>88</sup> As

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motion granted. Police had reasonable and probable grounds and proceedings ended due to plea bargain and not in Plaintiff's favour. Reference to same test as for malicious prosecution; *Charlton*, *supra* note 68: Defendant's motion granted. Police had reasonable and probable grounds; *Solomonvici*, *supra* note 68: Defendant's motion granted. Plaintiff failed to prove lack of reasonable and probable grounds and the plea deal did not result in termination in favour of Plaintiff, appeal dismissed, *Solomonvici v Toronto (City) Police Services Board*, 2010 ONCA 85: Police did not breach standard of care; *Wong*, *supra* note 25 (Toronto Police): Defendant's motion granted. Police had reasonable and probable grounds and arrest did not fall below standard of care; *Moak*, *supra* note 25: Defendant's motion granted. Police had reasonable and probable grounds and did not breach standard of care; *Matton v Yarlasky*, [2007] OJ No 5014 (QL), 2007 CanLII 56507 (Sup Ct) (OPP): Defendant's motion granted. Police had reasonable and probable grounds and no breach of standard of care notwithstanding failure to interview co-accused prior to laying of charges and failure to interview witnesses; *Miguna v Toronto (City) Police Services Board*, [2007] OJ No 512 (QL), 2007 CanLII 3674 (Sup Ct) (Toronto Police): Defendant's motion granted. Police had reasonable and probable grounds; 2008: Appeal allowed *Miguna v Toronto (City) Police Services Board*, 2008 ONCA 799: Claims for malicious prosecution, negligent investigation and *Charter* breach to proceed to trial. Action abandoned by Plaintiff; *Osborne v Ontario (Attorney General)*, [1996] OJ No 2678 (Sup Ct) (Toronto Police): Defendant's motion granted. Police had reasonable and probable grounds and crown and police have immunity to actions in negligence, appeal dismissed, *Osborne v Ontario (Attorney General)*, [1998] OJ No 4457 (QL), 1998 CanLII 5920: Police had reasonable and probable grounds which is fatal to claim for negligence.

<sup>88</sup> There were 28 cases decided in the common law jurisdictions and 34 cases decided in Quebec: *Scala v Toronto Police Services Board*, 2019 ONSC 2239 (Toronto Police): Plaintiff's action dismissed. Police had reasonable and probable grounds; *Bélanger-Lachapelle c Lake of Two Mountains Police Board*, 2019 QCCQ 1590 (Lake of Two Mountains Police): Plaintiff's action dismissed. Police had reasonable and probable grounds Article 1467; *Gauthier c Procureure générale du Québec*, 2019 QCCS 535 (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Geres c Regional Municipality of the Outaouais Hills*, 2019 QCCQ 916 (Outaouais Hills Regional Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Gounis c Ville de Laval*, 2019 QCCS 479 (Laval Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Street v Toronto (City) Police Services Board*, 2018 ONSC 4290 (Toronto Police): Plaintiff's action dismissed. Police had reasonable and probable grounds, no evidence as to standard of care, finding of no negligence; *Pyle v Niagara (Regional Municipality) Police Services Board*, 2018 ONSC 4774: Plaintiff's action dismissed. Police had reasonable and probable grounds and while negligence found, not below standard of care; *Bérubé c City of Longueuil*, 2018 QCCQ 6951 (Longueuil Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Côté c Ville de Saguenay*, 2017 QCCS 1834 (Saguenay Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Gratton c Ville de Laval*, 2017 QCCQ 10482 (Laval Police): Plaintiff's action dismissed. Article 1457. Plaintiff could not prove lack of reasonable and probable grounds; *McCullough v Hamilton-Wentworth (Regional) Police Services Board*, 2016 ONSC 2638: Plaintiff's action dismissed. Police had reasonable and probable grounds; *Tremblay v Ottawa (City)*



*Police Services Board*, 2016 ONSC 4185 (Ottawa police): Plaintiff's action granted. Police did not have reasonable and probable grounds. Damages awarded \$10,000, appeal allowed; *Tremblay v Ottawa (Police Services Board)*, 2018 ONCA 497: Trial judge erred in absence of expert evidence as to standard of care and police had reasonable and probable grounds; *Taylor v Tassé*, 2016 QCCS 1129 (Montreal Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. No Article; *Duperré c Durette*, 2016 QCCS 1653 (RCMP). Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Leblanc c Laval (Ville de)*, 2016 QCCQ 872 (Laval Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *JT c Bourassa*, 2016 QCCS 4228 (Montreal Police) (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; 2018: Appeal dismissed *JT c Bourassa*, 2018 QCCA 652; *Zitouni c Montréal (City of)*, *Police Service*, 2016 QCCQ 4003: Plaintiff's action dismissed. Police had reasonable and probable grounds. Articles 1457 and 1053; *Lafleur c Fortin*, 2015 QCCS 4461 (Montreal Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. No Article; Appeal dismissed, *Lafleur c Fortin*, 2016 QCCA 342; *Kosoian c Laval (Ville de)*, 2015 QCCQ 7948 (Laval Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; Appeal dismissed, *Kosoian c Société de transport de Montréal*, 2017 QCCA 1919; *Karman c Gatineau (Ville de)*, 2015 QCCQ 3262 (Gatineau Police). Plaintiff's action dismissed. Police complied with the "requirements of the jurisprudence" with respect to reasonable and probable grounds. No Article; *Croteau c Régie intermunicipale de police Richelieu-St-Laurent*, 2015 QCCS 2399: Plaintiff's action dismissed. Plaintiff could not prove absence of reasonable and probable grounds. No Article; *Barclay*, *supra* note 65: Plaintiff's action granted. Police fell below standard of care. Damages of \$1,042,179 for lost profits, \$200,000 for non-pecuniary damages (pain and suffering); 2016: Appeal allowed *495793 Ontario Ltd (c.o.b. Central Auto Parts) v Barclay*, 2016 ONCA 656: Trial judge erred in not allowing expert evidence as to standard of care which would have gone to establishing reasonable and probable grounds for arrest; *Gilbert v Canada (Attorney General)*, 2014 NBQB 194 (RCMP): Plaintiff's action dismissed. Plaintiff failed to prove lack of reasonable and probable grounds and police met standard of care; *Jarrett v Halifax (Regional Municipality)*, 2014 NSSC 116 (Halifax Regional Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and met standard of care; *Livert v South Simcoe (County) Police Service*, [2014] OJ No 875 (QL) (Sup Ct (Small Claims)) (South Simcoe Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and no breach of standard of care; *Payne v Mak*, 2012 ONSC 6541 (Windsor Police): Defendant's motion dismissed. Negligence claim required multiple factual findings suitable for trial; *Payne v Mak*, 2017 ONSC 243: Plaintiff's action dismissed. Police had reasonable and probable grounds and met standard of care; 2018: Appeal dismissed *Payne v Mak*, 2018 ONCA 622; *AM v Matthews*, 2012 ABQB 185 (Edmonton Police): Plaintiff's action dismissed. Plaintiff failed to prove lack of reasonable and probable grounds and no proof investigation was negligent; *Gioris v Toronto (City) Police Services Board*, 2012 ONSC 6396 (Toronto Police Service): Plaintiff's action failed. Police had reasonable and probable grounds and no proof of negligence or that investigation fell below standard of care; *Green v Diack*, 2012 ABQB 45 (Edmonton Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and while police were negligent, no evidence of damages caused; *Kellman*, *supra* note 25: Plaintiff's action dismissed. Police had reasonable and probable grounds; *Millette c Laval (Ville de)*, 2012 QCCS 5976 (Laval Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; Appeal dismissed, *Millette c Laval (Ville de)*, [2013] JQ no 4308; *Russell v York*

(*Regional Municipality*) *Police Services Board*, 2011 ONSC 4619 (York Regional Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and met standard of care; *Dumais c Québec (Procureur général)*, 2011 QCCS 4609 (Longueuil Police): Plaintiff's action dismissed and Plaintiff could not prove absence of reasonable and probable grounds. Article 1457; *Sicotte-Gagné c Montréal (Ville de) (Service de police)*, [2011] JQ no 7684 (QL) (Que CQ) (Montreal Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Sayers c Québec (Procureur général)*, 2010 QCCS 1883 (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds and "acted reasonably". No Article; *Bourassa c Québec (Attorney General)*, 2010 QCCQ 1529: Plaintiff's action dismissed. Police had reasonable and probable grounds. No Article; *Small v Stec*, [2009] OJ No 426 (QL), 2009 CanLII 3565 (Sup Ct) (London Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and met the standard of care notwithstanding failure to obtain signed statement from victim; failure to take photographs of victim's injuries; failure to take adequate notes; failure to properly attribute CPIC report to accused; *Lawrence v Peel (Regional Municipality) Police Force*, [2009] OJ No 1684 (QL), 2009 CanLII 19934 (Sup Ct): Plaintiff's action dismissed. Police had reasonable and probable grounds and did not breach standard of care; *Side c Longueuil (City of)*, 2009 QCCS 2587 (Longueuil Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Ontario (Attorney General) v Greater Sudbury Police Service (Fazekas)*, [2008] OJ No 5047 (QL) (Sup Ct) (Sudbury Police): Defendant's motion granted. No negligence by Police. Plaintiff's action dismissed, *Fazekas v Greater Sudbury (City) Police Services Board*, 2015 ONSC 4316: Police had reasonable and probable grounds; *Franklin, supra* note 72 (Toronto Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and no evidence of malice; *Abeille c Montréal (Ville de) (Service de police)*, 2008 QCCQ 5525 (Montreal Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Djourovitch c Québec (Procureur général)*, 2008 QCCQ 10170: Plaintiff's action dismissed. Police had reasonable and probable grounds; *Whiston c Maedler*, 2007 QCCS 2161 (RCMP) (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Zareian v Durham Regional Police Services Board*, [2006] OJ No 1296 (QL) (Sup Ct) (Durham Regional Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and no proof of negligence; *Johnson-Richard c Montréal (Ville de)*, [2006] JQ no 3779 (QL), EYB 2006-104234 (Sup Ct) (Montreal Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1053; *Dufour c Québec (Procureur général)*: [2005] JQ no 8597 (QL), EYB 2005-92156 (CQ) (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Kabbabe c Québec (Procureure générale)*, [2005] JQ no 14493, [2005] RRA 1258 (Sup Ct) (Montreal Police): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; 2007: Appeal dismissed, *Kabbabe c Québec (Procureur général)*, 2007 QCCA 1471; *Baillargeon c Dufour*, [2005] JQ no 12400 (QL), [2005] RRA 1243 (Sup Ct): Plaintiff's action dismissed. Plaintiff could not prove lack of reasonable and probable grounds; *Desjardins c Québec (Procureur général)*, [2005] JQ no 19542 (QL), EYB 2005-99998 (Sup Ct) (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds and held circumstances do not "reveal misconduct on part of police"; 2006: Appeal dismissed, *Desjardins c Québec (Procureur général)*, 2006 QCCA 1154; *Dubeau c Québec (Procureur général)*, [2005] JQ no 11592 (QL), [2005] RRA 1232 (Que Sup Ct) (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds and police acted as would a "prudent and diligent officer." No Article; Appeal dismissed, *Dubeau c Régie intermunicipale de*

such, the standard of care was not breached by the investigating officers relying upon the criminal standard of reasonable and probable cause in 92 of the 130 actions, representing 71% of the cases that found in their favour. A few cases are outliers with respect to the fatality of reasonable

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*police de Roussillon*, 2007 QCCA 1278; *Chmielewski v Niagara (Regional Municipality) Police Services Board*, [2004] OJ No 3073 (QL) (Sup Ct) (Niagara Regional Police): Defendant's motion dismissed. Negligence is a triable issue. Action dismissed, *Chmielewski v Niagara (Regional Municipality) Police Services Board*, [2007] OJ No 3052 (QL), 2007 CanLII 31778 (Sup Ct): Police had reasonable and probable grounds notwithstanding failure to investigate alibi; failure to investigate background of confidential informant; failure to comply with standard operating procedures of SIU; *Collis v Toronto (City) Police Services Board*, [2004] OJ No 4037 (QL) (Sm Cl Ct) (Toronto Police): Plaintiff's action granted. Police lacked reasonable and probable grounds; Appeal allowed, *Collis v Toronto (City) Police Services Board*, [2007] OJ No 3301: Police had reasonable and probable grounds and met standard of care; *Khoury*, *supra* note 55: Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board* (1993), 64 OR (3d) 28, [2003] OJ No 1208 (QL) (Sup Ct): Defendant's motion dismissed. Matter should proceed to trial. Plaintiff's action dismissed, *Hill* Sup Ct, *supra* note 11: Police had reasonable and probable grounds; Appeal dismissed, *Hill* CA, *supra* note 12: Court recognized tort of negligent investigation, but police had reasonable and probable grounds and did not breach standard of care; Appeal to SCC dismissed, *Hill*, *supra* note 7; *Magas v Monette*, [2002] OJ No 3872 (QL) (Sup Ct) (Ottawa Police): Defendant's motion granted. Police had reasonable and probable grounds. Appeal allowed, *Magas v Monette*, [2003] OJ No 2388 (QL): There are triable issues. Plaintiff's action dismissed *Magas v Pasanen* (2008) (Ont Sup Ct) (Unreported); Appeal dismissed, *Magas v Monette*, 2009 ONCA 302; *Bainard v Toronto Police Services Board*, [2002] OJ No 2765 (QL) (Sup Ct): Plaintiff's action dismissed. Claim against one officer did not fall below standard of care. Claim against other officer failed due to reasonable and probable grounds; *de Jong v Midland (Town) Police Services Board*, [2002] OJ No 1629 (QL) (Sup Ct): Plaintiff's action dismissed. Police had reasonable and probable grounds and no proof of negligence; *Lloyd v Toronto (City) Police Services Board*, [2001] OJ no 1603 (QL) (Sup Ct): Defendant's motion dismissed. Police had reasonable and probable grounds and not plain and obvious that duty of care cannot be established. Plaintiff's action dismissed; *Lloyd v Toronto (City) Police Services Board*, [2003] OJ no 83: No proof of negligence; *Wiche*, *supra* note 26 (York Regional Police): Plaintiff's action dismissed. Police had reasonable and probable grounds and no proof of negligence; investigation did not fall below standard of care; 2003: Appeal dismissed, *Wiche v Ontario*, [2003] OJ No 221 (QL); *Larocque c Ville de Montréal (Service de police de la Ville de Montréal)*, [2001] JQ no 2428 (QL) (Sup Ct): Plaintiff's action dismissed. Police had reasonable and probable grounds; 2003: Appeal dismissed, *Monette c Société Hôtelière Canadien Pacifique Ltée*, [2003] JQ no 9381: No Article; *Nabhan c Hénault*, [2000] JQ no 5470, EYB 2000-21578 (Sup Ct): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1053; *Jauvin c Québec (Procureur général)*, [2000] JQ no 4035 (QL) (Sup Ct) (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1457; 2003: Appeal dismissed, *Jauvin c Procureur général du Québec*, [2003] JQ no 17601, [2004] RRA 37; *Etcheverry c Sûreté du Québec*, [1997] JQ no 3295 (QL) (Sup Ct) (SQ): Plaintiff's action dismissed. Police had reasonable and probable grounds. Article 1053.

and probable grounds. In *Emery c Canada (Gendarmerie royale)*<sup>89</sup> at trial, the Plaintiff's action was granted with reference to Article 1053. The Plaintiff was arrested for trafficking in narcotics. The charge was dismissed at the preliminary inquiry. It was held that there was no material evidence to support the charge and no reasonable and probable grounds by the investigating officers. Moral damages of \$150,000 were awarded together with special damages. The appeal to the Court of Appeal for Quebec<sup>90</sup> was granted where it was found that the absence of malice on the part of the police is a defence to liability for extracontractual fault notwithstanding the absence of reasonable and probable grounds. Conversely, in *Robertson v Mohawk Council of Kahnawake*<sup>91</sup> the Plaintiff's action was granted with reference to article 1457. The plaintiff was arrested for possession of stolen goods and counterfeit money. The court held that the police had reasonable and probable grounds yet found civil fault in the investigation.<sup>92</sup>

When it comes to the success rate for Plaintiffs in actions for negligent investigation, while the courts most often find in favour of the police, it is not as bad as one jurist posits:

Since the 2007 decision in *Hill v Hamilton-Wentworth*, I gather findings of negligent investigation have been non-existent, or nearly so, and courts have held the standard of proof for a finding of negligent investigation by a public police force is one of gross negligence, which brings this newly created tort very close to the tort of malicious prosecution.<sup>93</sup>

As noted in the section on data analysis, on a national basis plaintiffs have a better than one in four chance to succeed in an action claiming damages for the tort of negligent investigation, including its comparative remedy at civil law. The case law shows that the tort has been proven when investigations have included relatively benign activity such as a simple mistake<sup>94</sup> up to and including the characterization of police activity as “arbitrary, highly reprehensible and high-handed.”<sup>95</sup> On the whole however, a good many cases with a finding of negligence are a function

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<sup>89</sup> *Emery c Canada (Gendarmerie royale)*, [1999] JQ no 1572 (QL), [1999] RRA 729 (Sup Ct) (RCMP).

<sup>90</sup> *Richer c Emery*, [2003] JQ no 9568 (QL), [1999] RRA 729 (CA).

<sup>91</sup> *Robertson* Sup Ct, *supra* note 55.

<sup>92</sup> Moral damages of \$8,000 and exemplary damages \$5,000 were awarded. Appeal dismissed, *Robertson* CA, *supra* note 55.

<sup>93</sup> *Lauer*, *supra* note 74.

<sup>94</sup> *Lupien* Sup Ct, *supra* note 55, appeal dismissed, *Lupien* CA, *supra* note 33; *Paquette*, *supra* note 55.

<sup>95</sup> *Dixon*, *supra* note 56 at para 115.

of “tunnel vision.”<sup>96</sup> This can be seen in the following synopses starting with the first common law decision and the Court’s first civil law decision establishing the subject tort:

Police officer never met complainant face to face, acknowledged suspect did not resemble video footage taken at location of crime and made up his mind before talking to suspect.<sup>97</sup>

Police only interested in inculpatory evidence disregarding exculpatory evidence. Court considered actions of police scandalous.<sup>98</sup>

The investigating officer purposefully ignored evidence.<sup>99</sup>

Police ignored exculpatory evidence.<sup>100</sup>

Police failed to conduct proper investigation, ignored exculpatory evidence.<sup>101</sup>

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<sup>96</sup> In Canada, the concept of tunnel vision was discussed for the first time in the public inquiry into the wrongful conviction of Guy Paul Morin. See Kaufman Commission, *The Morin Inquiry* (Ontario: Ministry of the Attorney General, 1998) at 1134, where Commissioner Kaufman defined tunnel vision as “the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one’s conduct in response to that information.” Tunnel vision is now acknowledged as a fundamental systemic cause of wrongful convictions. See Bruce Macfarlane, “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31:3 Man LJ 403.

<sup>97</sup> *Beckstead 1*, *supra* note 2: Plaintiff’s action granted. No immunity for police. Proof of negligence. Appeal dismissed, *Beckstead 2*, *supra* note 3. No immunity. Proof of negligence. Held: no reasonable and probable grounds for arrest. General damages for negligent investigation \$20,000.

<sup>98</sup> *Chartier*, *supra* note 27 (SQ): Plaintiff’s action granted. Article 1053. Plaintiff charged with manslaughter. Withdrawn by Crown. Police did not have reasonable and probable grounds. Moral damages \$50,000.

<sup>99</sup> *Veeken*, *supra* note 57 (RCMP). Defendant’s motion to strike dismissed. Plaintiff was charged with breach of recognizance to bail conditions that he not be in the presence of children under the age of sixteen unless other adults were present who were aware of bail conditions. Held: there was a breach of the standard of care and proof of causation. Charges were stayed. Judge referenced standard of care as being informed by the legal requirement of reasonable and probable grounds for arrest but made no finding. Trial ongoing. Written submissions due spring 2019.

<sup>100</sup> *Mallet*, *supra* note 55 (SQ): Plaintiff’s action granted. Article 1457. Plaintiff charged with disobeying police officer plus traffic offences. Acquitted. Moral damages \$3,500.

<sup>101</sup> *RD c DL*, *supra* note 55 (Montreal Police): Plaintiff’s action granted. Article 1053. Plaintiff charges with various offences relating to child abuse. Withdrawn by Crown. Police did not have reasonable and probable grounds. Damages \$21,000.

Police ignored exculpatory evidence that was readily available and ignored faulty evidence of complainant.<sup>102</sup>

Ignored exculpatory evidence. A proper investigation would have revealed evidence was insufficient and based upon non-credible information.<sup>103</sup>

Arresting officer knew the Plaintiff paid rent but refused to look at her written agreement regarding tenancy and proceeded to evict Plaintiff from her home. Plaintiff was arrested without warrant. Judge preferred evidence of Plaintiff over that of officer.<sup>104</sup>

Investigation by the RCMP was cursory, lasted only a few minutes and relied extensively on investigation by employee of the Manitoba Public Insurance Corporation.<sup>105</sup>

Officer ignored exculpatory evidence and didn't test credibility of complainant.<sup>106</sup>

Police only looked for inculpatory evidence and ignored exculpatory evidence.<sup>107</sup>

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<sup>102</sup> *Corriveau* Sup Ct, *supra* note 55 (SQ): Plaintiff's action granted. Articles 1053 and 1457. Plaintiff charged with sexual assault. Acquitted. Moral damages of \$35,000; Appeal dismissed (re negligent investigation and granted re malicious prosecution), *Corriveau* CA, *supra* note 55.

<sup>103</sup> *Manoukian c Procureur général du Canada*, 2018 QCCS 239 (RCMP): Plaintiff's action granted. Article 1457. Plaintiff charged with human trafficking. Withdrawn by Crown. Police and Crown did not have reasonable and probable grounds. Moral damages of \$150,000 to Manoukian and special damages of \$146,000; moral damages of \$50,000 to Saryboyajan and moral damages of \$20,000 to each of their four children.

<sup>104</sup> *Carr*, *supra* note 56: Plaintiff's action granted. Plaintiff was charged with assault, assaulting a police officer, resisting arrest and mischief relating to eviction of Plaintiff from her home. Held: no reasonable and probable grounds for arrest. Damages for negligent investigation (plus false arrest, false imprisonment, excessive force) \$90,000 plus special damages of \$120,000 for loss or earnings and out of pocket of \$37,226.84.

<sup>105</sup> *Shoaa*, *supra* note 58: Defendant's motion dismissed. Plaintiff charged with fraud relating to insurance claim with respect to motor vehicle accident. Charge was withdrawn after settlement of civil claim between Plaintiff and Manitoba Public Insurance Corporation. Issue estoppel not available. Reference to reasonable and probable grounds for arrest but no finding. Settled. Plaintiff received \$25,000 damages.

<sup>106</sup> *EP c MP* Sup Ct, *supra* note 55 (SQ): Plaintiff's action granted. 2013: Appeal granted, *EP c MP* CA, *supra* note 55 (with respect to quantum). Moral damages reduced to \$50,000.

<sup>107</sup> *Mailloux*, *supra* note 55: Plaintiff's action granted. Article 1457. Plaintiff arrested for fraud, obtaining credit by false pretenses and forgery. Charges dismissed at prelim. Police did not have reasonable and probable grounds. Moral damages \$45,000 to each plaintiff plus special damages. 2012: Appeal dismissed, *Durette* CA, *supra* note 55.

During investigation Plaintiff had asked the investigating officer to conduct a number of forensic analyses with respect to blood and pattern of spatter but refused to do so. An internal RCMP review found that the investigation was flawed and incomplete.<sup>108</sup>

At time of arrest Plaintiff advised investigating officer that a change in the bail conditions would obviate the arrest. The officer ignored information and did nothing to confirm or deny the amendment or the veracity of the bail conditions.<sup>109</sup>

The following decisions involved police investigations that were fundamentally indolent:

Virtually no investigation was undertaken.<sup>110</sup>

Police did not have objective grounds for arrest and made “simple mistake”.<sup>111</sup>

Police made no efforts to verify payment of fines at time of arrest.<sup>112</sup>

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<sup>108</sup> *Patrick Reilly* Sup Ct, *supra* note 57. Plaintiff’s action granted. Plaintiff charged with assault with a weapon in alleged domestic knife fight. Plaintiff and wife were RCMP officers. Plaintiff was acquitted at trial. Became apparent that the wounds suffered by the Plaintiff’s wife were self-inflicted post domestic conflict. Summary trial for negligent investigation and malicious prosecution to proceed; 2008: Appeal dismissed, *Patrick Reilly CA*, *supra* note 57. Police failed to get written report from forensic pathologist notwithstanding oral report that indicated wife’s wounds were likely self-inflicted. Held: insufficient evidence to determine if there was lack of reasonable and probable grounds for arrest for purpose of motion. Settled in favour of Plaintiff.

<sup>109</sup> *Al-Harazi*, *supra* note 56. Plaintiff’s action granted. Plaintiff was arrested for breach of recognizance to bail conditions which had been recently amended. Charges were withdrawn. Police did not have reasonable and probable grounds for arrest and were negligent in not following up evidence. Damages of \$20,000 for wrongful arrest, unlawful detention and negligence.

<sup>110</sup> *Winnmill* Sup Ct, *supra* note 56: Defendant’s motion to dismiss abandoned with respect to negligent investigation. Plaintiff was charged with assault against son. Motion granted as to claim of battery against police. Limitation period defence; 2017: Appeal allowed, *Winnmill CA*, *supra* note 56. Limitation defence not available. No mention of reasonable and probable grounds for arrest. Application by Police Service seeking leave to SCC denied. Matter to proceed to trial on merits. Ongoing.

<sup>111</sup> *Lupien* Sup Ct, *supra* note 55. No Article. Plaintiff arrested for obstruction of justice. Withdrawn by Crown. Moral damages of \$6,000 by police and \$6,000 by the town. 2018: Appeal dismissed, *Lupien CA*, *supra* note 33.

<sup>112</sup> *Lefebvre CQ*, *supra* note 55 (SQ): Plaintiff’s action granted. No Article. Plaintiff arrested for outstanding fines. Police withdrew charges after verifying no fines owing. Moral damages \$6,800.

Police did not act as “a normally prudent and diligent officer”.<sup>113</sup>

Police made arrest “without reasonable cause”.<sup>114</sup>

Investigating officer prepared erroneous synopsis for trial and did very little investigation. Judge had significant questions about detective’s honest belief and reasonable and probable grounds to arrest.<sup>115</sup>

Police failed to undertake serious investigation especially in light of the psychological issues and age of the complainant.<sup>116</sup>

There were reasonable and probable grounds for arrest but absence of evidence as to reasonable standard of care and novelty of issue as to who bore onus as to whether Plaintiff committed the offence and as such created genuine issue for trial.<sup>117</sup>

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<sup>113</sup> *Duval, supra* note 55 (SQ): Plaintiff’s action granted. No Article. Plaintiff charged with pimping, drug trafficking and assault. Charges withdrawn by Crown. Held: there were no objective grounds for arrest. Moral damages \$59,000, exemplary damages \$3,000.

<sup>114</sup> *Monette, supra* note 55 (Montreal Police): Plaintiff’s action granted. Article 1053. Plaintiff arrested for disturbing police. Acquitted. Moral damages \$20,000.

<sup>115</sup> *Bagha, supra* note 56: Defendant’s motion dismissed. Plaintiff was charged with extortion with respect to payments sought to settle assaults on Plaintiff’s son. Plaintiff entered into peace bond and charges were withdrawn. Judge held that there were genuine issues for trial of peace bond ending matter in Plaintiff’s favour and whether there were reasonable and probable grounds to arrest. Appeal by Toronto Police Service to Divisional Court dismissed. Ongoing.

<sup>116</sup> *André c Québec, supra* note 55 (Montreal Police): Plaintiff’s action granted. Article 1053 & 1457. Plaintiff arrested for assault/sexual assault. Withdrawn by Crown. Reasonable and probable grounds mentioned but not relied upon. Article 1457 applies to police officers. Plaintiff must prove negligence and establish causal link between negligence and damage done. Plaintiffs do not have to prove gross negligence, just simple negligence. General damages \$326,100; 2003: Appeal dismissed, *Lacombe Sup Ct, supra* note 35. Police, like every citizen, are civilly responsible for simple faults committed in performance of duties. The test is that of a normally prudent and diligent officer in the same circumstances. Police officer simply believed the complainant’s claims and went no further to verify their accuracy or credibility. Police did not have reasonable and probable grounds; 2003: Leave to appeal dismissed. See *Lacombe SCC, supra* note 35.

<sup>117</sup> *Abboud, supra* note 56: Defendant’s motion dismissed. Plaintiff was arrested in his home as a result of an improperly conducted search under warrant with respect to the alleged delivery of guns. Cocaine was found in home incidental to search which provided reasonable and probable grounds for arrest. Due to breach of section 8 of *Charter*, evidence found in home excluded and all charges were dismissed. Due to reasonable and probable grounds for arrest, claims under *Charter* and for false arrest and detention dismissed. Claim for negligence settled in Plaintiff’s favour. Dismissed on consent.



Police abandoned investigation, nothing done after arrest and no charges pursued.<sup>118</sup>

Police ignored exculpatory evidence with no real investigation<sup>119</sup>

Other cases made findings that the police acted with elements of *mala fides* in their investigations:

The investigating officer was not truthful in his testimony as to actions of Plaintiff.<sup>120</sup>

Investigating officers took “guilty until proven innocent” approach and delayed the investigation which would have led to the early finding of an alibi. Police did not interview witnesses and had blinders on as to exculpatory evidence. Held that the defendant’s conduct was arbitrary, highly reprehensible and high-handed. Police manufactured evidence to fit their theories of the Plaintiff’s guilt.<sup>121</sup>

Police “imposed their power upon innocent bystanders” who were later arrested.<sup>122</sup>

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<sup>118</sup> *Robertson* Sup Ct, *supra* note 55 (First Nation Peacekeepers): Plaintiff’s action granted. Article 1457. Plaintiff arrested for possession of stolen goods and counterfeit money. Police had reasonable and probable grounds yet found civil fault in investigation. Moral damages \$8,000, exemplary damages \$5,000; Appeal dismissed, *Robertson CA*, *supra* note 55.

<sup>119</sup> *Johnson v Coppaway*, [2004] OJ No 5665 (QL) (Sup Ct) (Anishinabek Police): Plaintiff’s action granted. Plaintiff charged with sexual assault. Acquitted. No reasonable and probable grounds for arrest. Damages \$50,000.

<sup>120</sup> *Radovici*, *supra* note 56: Plaintiff’s action granted. Plaintiff was arrested for public intoxication by plain clothed police officer. Plaintiff had been drinking heavily but did not endanger the safety of others. The Crown withdrew the charge. Held: No reasonable and probable grounds for arrest. Damages of \$7,500 for false arrest and imprisonment sufficient for negligent investigation claim.

<sup>121</sup> *Dixon*, *supra* note 56: Plaintiff’s action granted. Plaintiff was arrested for breaking and entering. Charges were withdrawn after proof of alibi evidence came to light. Plaintiff was on public transit at time of offence and bore no resemblance to suspect (suspect was described as white; Plaintiff was black). Held: no reasonable and probable grounds for arrest. Damages awarded for negligent investigation claim. General damages of \$25,000 and punitive damages of \$10,000 plus special damages. Also damages for *Charter* breach, false arrest and imprisonment.

<sup>122</sup> *White*, *supra* note 55: Plaintiff’s action granted. Article 1457. Plaintiffs were soldiers who witnessed police dispersing crowd. They interacted with police who refused to identify themselves and pushed the Plaintiff. Court referred to test of reasonable and probable grounds but did not make finding. Moral damages of \$9,500 (also breach of the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12).

The charges were pursued at the instance of the Detachment Commander who had a very real conflict of interest with the complainant his niece and was therefore improperly motivated in the continuance of the investigation. Held that the investigating officer also failed to provide his notes containing exculpatory evidence to the Crown due to his desire not to be put in a difficult position with the Detachment Commander.<sup>123</sup>

RCMP provided information in the investigation that led to the arrest including notice to Algeria that the Plaintiff was uncooperative in the investigation because he requested the assistance of counsel.<sup>124</sup>

The officer had “immense doubt that the plaintiff may have committed the offence” and did not have a “real and honest belief there were RPG to believe an offence had been committed” thus making “an arbitrary and unnecessary arrest.”<sup>125</sup>

Police discovered problems with the investigation, including perjured testimony of witnesses in return for immunity from prosecution, two years after trial but did not disclose said evidence for another ten years. Failure by police to disclose evidence in murder investigation substandard.<sup>126</sup>

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<sup>123</sup> *DJ v KC*, *supra* note 56 (Anishinabek Police): Plaintiff’s action granted. Plaintiff was charged with sexual assault with a weapon and use of firearm. Crown withdrew charges after receiving a letter from investigating officer that complainant was not a valid or credible witness. Held: no reasonable and probable grounds for arrest and police were negligent and acted with malice. Damages of \$50,000.

<sup>124</sup> *Tepper*, *supra* note 56: Defendant’s motion dismissed. Plaintiff was a farmer who was arrested in Lebanon for exporting potatoes allegedly unfit for consumption. Plaintiff spent one year in prison. The judge held that the relationship between the RCMP and the Plaintiff was analogous to police and suspect and thus possibly gave rise to duty of care. Held that it was not plain and obvious that the Plaintiffs’ claims could not succeed. Question of duty of care deserves to go to trial. No mention of reasonable and probable grounds for arrest. Ongoing.

<sup>125</sup> *Lefebvre* Sup Ct, *supra* note 55 (SQ): Plaintiff’s action granted. Article 1457. Plaintiff arrested for conducting illegal wiretap. Withdrawn by police. Police did not have reasonable and probable grounds. Moral damages of \$10,000.

<sup>126</sup> *Driskell* QB, *supra* note 58 (Winnipeg Police): Defendant’s motion dismissed. Plaintiff was convicted of murder and spent 15 years in prison until conviction was quashed by Ministerial Review pursuant to section 696.1 the *Code*. Held it was negligent not to continuously provide disclosure from police to Crown until all appeals exhausted. Held that it was not plain and obvious that obligation for disclosure does not continue post-conviction. Negligence against Crown and police open question; 2008: Appeal dismissed *Driskell* CA, *supra* note 58. Police have duty to disclose to Crown and not directly to accused. There was no appeal by Crown. Failure by police to disclose evidence that murder investigation was substandard. No mention of reasonable and probable grounds for arrest. Settled. City of Winnipeg agreed to pay 1.4 million and the Province of Manitoba agreed to pay 2.6 million.

With respect to the first charge, the judge found that all three officers connected to the investigation had credibility issues and some testimony was demonstrably untrue. As to the second charge, investigating officers ignored evidence that the same circumstance that led to withdrawal of the first offence would necessarily lead to the withdrawal of the second offence.<sup>127</sup>

Police knew accusation against Plaintiff was false.<sup>128</sup>

Police had no right to come onto Plaintiff's property and acted aggressively and violently towards Plaintiff. Police "departed from the standard of care, diligence and skill required of a peace officer."<sup>129</sup>

Investigation was "sketchy".<sup>130</sup>

The evidence for an arrest was non-existent. One of the officers acted out of personal hostility to the Plaintiff.<sup>131</sup>

Police acted aggressively and unnecessarily.<sup>132</sup>

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<sup>127</sup> *Simon*, *supra* note 56 (Toronto Police): Plaintiff's action granted. Plaintiff was charged twice with respect to a breach of recognizance to bail conditions. Both charges were withdrawn by Crown. Held: no reasonable and probable grounds for arrest. Police met all four conditions for malicious prosecution re: first arrest and as such were liable for negligent investigation. For general damages of \$20,000 plus \$5,000 punitive damages for malice. Also allowed damages of \$5,000 for *Charter* breach. For second arrest police met first three conditions of MP but no malice. Damages for negligent investigation of \$7,500.

<sup>128</sup> *Pomerleau*, *supra* note 55 (SQ): Plaintiff's action granted. No Article. Plaintiff arrested for attempted murder, possession of prohibited weapon, possession of narcotics and possession of explosive weapon. Acquitted. Moral damages of \$67,500 and exemplary damages of \$30,000.

<sup>129</sup> *Michaelson* Sup Ct, *supra* note 55: Plaintiff's action granted. Article 1457. Plaintiff charged with obstructing police in performance of duty and assault. Acquitted. Moral damages of \$45,150, plus special damages and exemplary damages of \$5,000; Appeal dismissed, *Michaelson* CA, *supra* note 55.

<sup>130</sup> *Noiseux*, *supra* note 55 (Montreal Police): Plaintiff's action granted. Article 1053. Plaintiff arrested for possession of stolen property. Acquitted. \$17,000 plus special damages.

<sup>131</sup> *Quane* Sup Ct, *supra* note 55 (SQ): Plaintiff's action granted. No Article. Plaintiff arrested for drug trafficking. Withdrawn by Crown. Special damages plus moral damages \$3,000 and exemplary damages \$6,000; Appeal dismissed: *Quane* CA, *supra* note 55 (except as to quantum, exemplary damages reduced to \$3,000).

<sup>132</sup> *Allard* Sup Ct, *supra* note 55 (District of Roberval Police): Plaintiff's action granted. Article 1053. Plaintiff charged with mischief regarding boundary dispute with neighbour. Acquitted. Police did not have reasonable and probable grounds. Crown also liable. Special damages \$44,588.63; Moral damages \$35,000. Police responsible for 25%; Plaintiff for 25%; Crown and Province 50%; 1999: Appeal granted with respect to quantum, *Allard* CA, *supra* note 55: Quantum increased to moral damages \$60,000; special damages \$69,588.63 and exemplary damages of \$10,000 against Crown and Province.

The remaining cases held in the plaintiff's favour rely upon a particularized finding of fault by the police in their investigation of crime.<sup>133</sup>

## Conclusion

While many jurists and academics opine that the prospects of success for Plaintiffs seeking damages as result of a negligent investigation by a police service are anywhere from disappointing to abysmal, the quantitative data prove otherwise. The success rate stands at 28.6% on a nationwide basis. Notwithstanding the generous operation of the standard of care that favours the police in many judicial decisions, the qualitative analysis shows that this tort can be proven with evidence that shows a simple mistake. While this is far from a guarantee that recompense will flow to victims of substandard investigations, it is far more heartening than opinions previously rendered. It should prove instructive as this research further evolves with a broader comparative analysis on success rates for actions for malicious prosecution, breaches of *Charter* rights and applications for ministerial review pursuant to section 696.1 of the *Criminal Code*.

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<sup>133</sup> *Paquette*, *supra* note 55; *McGowan*, *supra* note 55; *Néron*, *supra* note 55; *Singh*, *supra* note 55; *Grenier*, *supra* note 55; *Adamson*, *supra* note 56 (OPP); *Martel*, *supra* note 55 (SQ); *André*, *supra* note 55; *Parasiris*, *supra* note 55 (SQ); *Ruckenstein*, *supra* note 55, appeal dismissed, *Montréal (Ville de) c Ruckenstein*, 2011 QCCA 1666; *Ramsay*, *supra* note 55 (SQ); *Morin*, *supra* note 55 (SQ); *Khoury*, *supra* note 55 (Montreal Police); *Ostiguy*, *supra* note 55; *Lacroix*, *supra* note 55 (SQ); *Mitchell*, *supra* note 55 (SQ); *Lamb*, *supra* note 27 (SQ).