CITATION: Wellington v. Ontario, 2011 ONCA 274
DATE: 20110408
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COURT OF APPEAL FOR ONTARIO

Moldaver, Sharpe and Armstrong JJ.A.

BETWEEN

Simone Wellington, Alexis Wellington-Watt (by her litigation guardian, Simone Wellington), and The Estate of Duane Michael Lenroy Christian

Plaintiffs (Respondents)

and

Her Majesty the Queen in Right of Ontario and James Ramsey

Defendants (Appellants)

Lise Favreau, James Kendik and Jeremy Glick, for the appellants

Peter Rosenthal, for the respondents

Kevin A. McGivney and David H. Elman, for the intervener Ontario Association of Chiefs of Police

Julian N. Falconer and Julian K. Roy, for the intervener Aboriginal Legal Services of Toronto Inc.

Heard: February 22, 2011

On appeal from the order of the Divisional Court (Justices J. David McCombs, Anne M. Molloy and Katherine E. Swinton) dated June 4, 2010, with reasons by Molloy J. and Swinton J. (dissenting) reported at (2010), 102 O.R. (3d) 714.

Sharpe J.A.:

[1] This appeal raises a single important legal issue: do victims of crime committed by police officers have the right to sue the Special Investigation Unit (SIU) for negligent investigation?

[2] On June 20, 2006, two police officers were involved in the pursuit of a van driven by 15-year-old Duane Christian. Pursuit led to confrontation and, when Duane attempted to drive away, he was fatally shot by one of the officers.

[3] The respondents, Duane's mother, sister and estate, bring this action against the appellants, Ontario and the deputy director of the SIU. The SIU is the statutory body responsible for investigating the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. The respondents allege that the SIU conducted a negligent investigation of the circumstances of Duane's death. The sole issue to be decided is whether the respondents' claim in negligence is one that is or should be recognized in law. In particular, the issue is whether the SIU owed the respondents a private law duty of care when it conducted the investigation of the two officers involved in Duane's death.

[4] The appellants moved to strike the statement of claim as disclosing no cause of action pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure*. The motion judge dismissed the motion, holding that it was not plain and obvious that the action could not succeed and that a full evidentiary record was required. That decision was upheld on appeal by a majority of the Divisional Court. The dissenting judge disagreed, holding

that any duty owed by the SIU was owed to the public as a whole and that nothing in the relevant legislation or the relationship between the parties was sufficient to establish a private law duty of care.

[5] The appellants were granted leave to appeal to this court. The Ontario Association of Chiefs of Police and Aboriginal Legal Services of Toronto Inc. were granted intervener status. For the following reasons, I would allow the appeal and dismiss the action.

FACTS

[6] This appeal arises from a Rule 21 motion and it is common ground that we must assume the truth of the facts pleaded in the statement of claim.

[7] The amended statement of claim alleges that the two officers pursued the van Duane was driving into a driveway without legal justification. When Duane attempted to drive away, one of the officers, again without legal justification, began shooting at Duane and fatally wounded him. It is alleged that the officers either intentionally killed Duane or were reckless in their use of force, and that there was a strong *prima facie* case that that they committed a number of serious offences, including forcible confinement, assault, manslaughter, criminal negligence causing death and murder.

[8] The respondents allege that the SIU was negligent in its investigation of Duane's death by failing to interview one of the officers and failing to ask the other officer certain key questions. It is further alleged that the SIU negligently allowed the officers to keep

their firearms for several hours after the shooting and that it closed the investigation before receiving the pathologist's report. The respondents plead that a proper investigation would have led to criminal charges being laid against the officers.

[9] The amended statement of claim seeks $2,000,000 in general and punitive damages on the grounds that the SIU's failure to conduct a competent investigation compounded the respondents' grief and distress, deprived them of their right to have a reasonable understanding of the circumstances of Duane's death, compromised their participation in the coroner's inquest and lessened their opportunity to recover damages in a civil action commenced against the two officers.

[10] In an addendum headed "Additional facts that may be material", introduced on consent before the motion judge, the respondents set out certain further facts relating to the SIU and its investigation. They allege that Duane's mother, who witnessed some of the events leading up to her son's death, was interviewed by the SIU and assisted the SIU in its investigation, "in the expectation that it would be a thorough and competent investigation". The respondents further allege that the SIU has failed to earn the respect of the police and the public at large, and that it is reluctant to insist upon police cooperation as it suffers from "an internal culture overly influenced by a preponderance of ex-police officers among its staff". The addendum also asserts that allowing the families of victims of police shootings to sue the SIU for negligent investigation would lead to improved investigations, and that mistakes made during an initial investigation cannot be subsequently rectified.

[11] It was common ground before us that a coroner's inquest into Duane's death has been held and that the respondents have commenced an action for damages against the two police officers who were involved in the shooting.

LEGISLATION

[12] Section 113 of the *Police Services Act*, R.S.O. 1990, c. P-15, establishes a special investigations unit (the SIU) of the Ministry of the Solicitor General and gives it the mandate to investigate certain criminal offences committed by police officers. The key provisions in s. 113 relating to investigations and the powers of the director are as follows:

> Investigations
>
> (5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers.
>
> Restriction
>
> (6) An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member.
>
> Charges
>
> (7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution.
>
> Report
>
> (8) The director shall report the results of investigations to the Attorney General.

> Co-operation of police forces
>
> (9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.
>
> Co-operation of appointing officials
>
> (10) Appointing officials shall co-operate fully with the members of the unit in the conduct of investigations.

ISSUE

[13] Do the facts alleged in the amended statement of claim give rise to a private law duty of care and a claim in negligence against the SIU? To answer this question, we must determine the following:

1. Has this duty already been recognized by the law?

2. If the duty is novel, is it plain and obvious that the duty does not exist?

ANALYSIS

The Rule 21 test

[14] This appeal arises from a Rule 21 motion to strike the claim as disclosing no cause of action in law. It is common ground that:

- the allegations of fact pleaded in the respondents' claim must be accepted as proven;
- to succeed the appellants must show that it is plain and obvious that the respondents could not succeed if the matter were to proceed to trial;
- the claim should not be struck merely because it is novel; and
- the pleading must be read generously in favour of the respondents with allowances for drafting deficiencies.

See *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at pp. 978-80; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at p. 3.

1. **Has the duty of care alleged already been recognized by the law?**

[15] The test for determining whether a duty of care exists is the *Cooper-Anns* test, derived from the House of Lords decision in *Anns v. Merton London Borough Council*, [1978] AC 728, and refined by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537.

[16] The first consideration is whether the duty of care asserted by the plaintiff has already been recognized by the law. If it has, a duty of care is established and it is not necessary to engage in the *Cooper-Anns* analysis: See *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, at para. 15. Likewise, if it has been held that no duty of care exists on the facts pleaded, a full *Cooper-Anns* analysis is not required: *Attis v. Canada (Minister of Health*) (2008), 93 O.R. (3d) 35 (C.A.), at paras. 36-37.

<u>Cases excluding the alleged duty of care</u>

[17] The appellants submit that the duty of care alleged by the respondents has already been excluded by a decision of this court. In *Norris v. Gatien* (2001), 56 O.R. (3d) 441 (C.A.), leave to appeal to SCC dismissed, [2002] S.C.C.A. No. 54, a cyclist was struck and killed by a motor vehicle driven by an OPP officer. The cyclist's family sued the officer, the OPP and Mr. Gatien, the municipal police officer who had investigated the fatal accident. Against Gatien, the plaintiffs alleged that he negligently investigated the death, leading to the failure of the criminal prosecution against the OPP officer for

impaired driving causing death and driving "over 80". As in this case, the plaintiffs alleged that their emotional distress had been exacerbated by Gatien's failure to conduct a proper investigation. Gatien successfully moved under Rule 21 to strike the claim as disclosing no cause of action.

[18] This court dismissed the appeal and upheld the order striking out the claim against Gatien. Writing for the court, Austin J.A. applied the test set out in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, which corresponds closely to the current *Cooper-Anns* test. Austin J.A. concluded, at paras. 17-19, that the relationship between the parties did not give rise to a *prima facie* duty of care:

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

[19] While *Norris* preceded the Supreme Court's holding in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, that the police owe a duty of care to targeted suspects (discussed below), that duty had already been recognized by this court in *Beckstead v. Ottawa (City) Chief of Police* (1997), 37 O.R. (3d) 62 (C.A.). In *Norris*, at paras. 19-20, Austin J.A. held that neither *Beckstead*, nor *Jane Doe*

v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), 74 O.R. (2d) 225 (Div. Ct.), supported the family's claim. In *Beckstead*, the careless investigation resulted directly in the plaintiff being charged with fraud. In *Jane Doe*, the police negligence contributed to the plaintiff being sexually assaulted by a known suspect. The alleged negligence in both *Beckstead* and *Jane Doe* had a direct, profound and damaging legal impact on the plaintiffs. In *Norris*, the family's claim for added grief or mental distress did not implicate rights or interests of a like nature.

[20] While the police owe a duty of care to a particular suspect under investigation (see *Hill* and *Beckstead*), and to warn a narrow and distinct group of potential victims of a specific threat (see *Jane Doe*), there is now a long list of decisions rejecting the proposition that the police owe victims of crime and their families a private law duty of care in relation to the investigation of alleged crimes: *Thompson v. Saanich (District) Police Department* (2010), 320 D.L.R. (4th) 496 (B.C. C.A.); *Fockler v. Toronto (City)* (2007), 43 M.P.L.R. (4th) 141 (Ont. S.C.); *Project 360 Investments Ltd. v. Toronto Police Services Board*, [2009] O.J. No. 2473 (S.C.); *Spencer v. Canada (A.G.)*, 2010 NSSC 446; *Petryshyn v. Alberta (Minister of Justice)*, 2003 ABQB 86.

[21] While *Norris* did not involve a claim against the SIU, it did involve the tort of negligent investigation alleged against a police officer, in relation to an investigation into a crime allegedly committed by another police officer. As I will explain in greater detail below, I see no basis to distinguish *Norris* from the case at bar on the basis of the statutory mandate of the SIU.

The effect of *Odhavji v. Woodhouse* and *Hill v. Hamilton-Wentworth*

[22] The Supreme Court in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, like this case, dealt with an SIU investigation into a fatal police shooting. The victim's family sued the police officers involved in the shooting for misfeasance in public office, alleging that they had failed in several respects to comply with their statutory duty to cooperate with SIU investigations, imposed by s. 113(9) of the *Police Services Act*. The family also sued the Chief of Police for negligently performing his duty under s. 41(1) of the *Police Services Act* to ensure that the members of his force carry out their duties in accordance with the Act. The family also asserted claims against the Police Services Board and Ontario, but those claims (which were ultimately struck) are not pertinent to the present case.

[23] The defendant police officers and the Chief of Police moved to strike the plaintiffs' claims at the pleading stage as disclosing no cause of action. The Supreme Court held that it was not plain and obvious that the claims could not succeed and allowed the matter to proceed to trial.

[24] The intervener, Aboriginal Legal Services of Toronto Inc., in a submission adopted by the respondents, argues that *Odhavji* requires us to come to the same conclusion in this case and dismiss the appeal.

[25] It is my view that *Odhavji* is distinguishable from the case at bar and that, indeed, passages in *Odhavji* support the position of the appellants.

[26] Unlike the present case, in *Odhavji* the victim's family did not sue the SIU officers or anyone else for negligent investigation of the shooting. The claim against the police officers was for misfeasance in public office, a tort that requires an element of deliberate unlawful conduct as well as awareness that the conduct is unlawful and likely to harm the plaintiff. In finding that the claim for misfeasance in public office should proceed, Iacobucci J., writing for the court, made clear that he was *not* deciding that the family could sue for negligent investigation, at para. 40:

> In the defendant officers' submission, the essence of the plaintiffs' claim is that they were deprived of a thorough, competent and credible investigation. And owing to the fact that no individual has a private right to a thorough, competent and credible criminal investigation, the plaintiffs have suffered no compensable damages. If this were an accurate assessment of the plaintiffs' claim, I would agree. *Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize*. This, however, is not an accurate assessment of the plaintiffs' submission. [Emphasis added.]

[27] The negligence claim pleaded against the Chief of Police was directly tied to the misfeasance in public office claim asserted against the individual police officers under his supervision. The "essence" of the claim was that the Chief "breached a duty to take reasonable care to ensure that the defendant officers complied with their legal obligation to cooperate with the SIU investigation", at para. 52. That claim was considered under the *Cooper-Anns* test. The court held, at para. 54, that while the plaintiffs might well have difficulty in establishing that their distress and anger rose "to the level of

compensable psychiatric harm", it was not "plain and obvious" that the claim would fail and hence the pleading should not be struck out. Iacobucci J. repeatedly linked the negligence claim against the Chief to the alleged "misconduct" or "improper conduct" of the officers, for example, at paras. 57-58:

> It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions.
>
> …
>
> The fact that the Chief already is under a duty to ensure compliance with an SIU investigation adds substantial weight to the position that it is neither unjust nor unfair to conclude that the Chief owed to the plaintiffs a duty of care to ensure that the defendant officers did, in fact, cooperate with the SIU investigation.

[28] When the judgment is read as a whole, I cannot accept the submission that by allowing the action in negligence to proceed against the Chief, Iacobucci J. intended to reverse the proposition asserted a few paragraphs earlier that individual citizens are not entitled to damages where there is a failure to conduct a thorough investigation.

[29] The Supreme Court in *Hill v. Hamilton-Wentworth* made it clear that *Odhavji* did not establish a private law duty of care owed by police officers to victims or their families. In *Hill*, the court held that there is a tort of negligent investigation and that the police owe a private law duty of care to a suspect. However, McLachlin C.J., writing for the majority at para. 27, stated that her analysis of the issue of proximity and duty was

concerned only with "[the] very particular relationship…between a police officer and a particularized suspect that he is investigating". Finding that a duty of care was owed by the police to a suspect did not mean that a duty would be owed to a victim or the family of a victim*:*

> This decision deals only with the relationship between the police and a suspect being investigated. If a new relationship is alleged to attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh *Anns* analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating.

[30] McLachlin C.J. added that the decisions in *Odhavji* and *Jane Doe* "dealing with the relationship between the police and victims or between a police chief and the family of a victim" were not determinative.

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

[32] In *Thompson v. Saanich (District) Police Department*, the British Columbia Court of Appeal rejected the proposition that *Odhavji* and *Hill* opened the door to claims of negligent investigation against the police by victims or families of victims. The plaintiff in *Thompson* alleged that the police negligently investigated his complaints that his wife was assaulting their children. He claimed that the officers' negligence had caused him to suffer damage in his relationship with his children. The Court of Appeal, applying *Odhavji* and *Hill*, upheld an order striking out the statement of claim on the ground that that the claim disclosed no cause of action, at paras. 27-28:

> In my view, the relationship of Mr. Thompson to the police officers, even on his full pleadings, is not sufficiently proximate to find a duty of care. Mr. Thompson was not the subject of the information provided to the police, either as a person said to be wronged - who were his children, or the person thought to be the wrongdoer - Ms. Thompson. He was, although the father of the children, one party removed from the complaint. I consider it is plain and obvious, on the pleadings, that Mr. Thompson was not within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions.
>
> ...
>
> *Odhavji*, on my view, is a very different case. The wrong said to support the claim in negligence was failure to meet the requirements of specific legislation, in the context of investigation of police conduct leading to the death of the family member; the duty of care discussed by the court arose related to the Chief of Police's supervisory responsibilities to ensure appropriate police behaviour in investigating police conduct. This is not that case.

[33] I agree with this analysis. Mr. Thompson, like the respondents in this case, was no doubt keenly interested in the outcome of the police investigation concerning allegations

of criminal harm perpetrated against his children. But a parent's desire for a thorough police investigation does not give rise to a relationship of proximity sufficient to ground an action for damages in tort.

[34] At best, the combined effect of *Odjhavi* and *Hill* is to state that the duty alleged must be recognized under the *Cooper-Anns* test. As I have already noted, this court considered that very issue in *Norris v. Gatien*. Applying the earlier, but for all practical purposes identical, version of the *Cooper-Anns* test that then governed, the court held that it was plain and obvious that the relationship between police officers and victims or their families did not give rise to a private law duty of care. As a three judge panel, it is not open to us to reconsider our prior decision: see *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), at para. 5.

[35] However, as the claim in this case is made against the statutory body charged with the responsibility of investigating allegations of criminal misconduct against police officers, I propose to consider whether there is anything in the statutory mandate of the SIU that gives rise to a duty of care.

2. Is it plain and obvious that there is no duty of care under the *Cooper-Anns* test?

[36] The two-stage *Cooper-Anns* test is used to determine whether a novel duty should receive legal recognition:

1. Is there foreseeability of harm and is there proximity between the parties?

2. If a prima facie duty of care is established, are there residual policy considerations that negate the duty of care?

[37] The first stage involves considering both foreseeability of the harm and proximity between the parties. Proximity is used "to characterize the type of relationship in which a duty of care may arise": *Cooper*, at para. 31. Two parties are proximate if their relationship is sufficiently close and direct that it is fair to require the defendant to be mindful of the plaintiff's legitimate interests: *Cooper*, at paras. 32-34. Factors such as the parties' expectations, representations, reliance, and the property or other interests involved, allow the court to evaluate the closeness and directness of the parties' relationship: *Cooper*, at para. 34. Proximity is not defined by any "single unifying characteristic", nor is there a clear test to be applied to determine whether proximity exists in any given case: *Cooper*, at para. 35.

[38] Policy reasons are relevant at both stages of the test. At the first stage, the policy reasons must arise from the nature of the relationship between the parties, rather than any external concerns. At the second stage, the court is entitled to consider "residual policy considerations" that militate against recognizing a novel duty of care: *Cooper*, at para. 30. These are policy considerations that "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper*, at para. 37. One such residual policy concern is the need to immunize policy decisions of the government from tort liability: *Cooper*, at para. 38.

1. Forseeability of harm and proximity between the parties

[39] It is common ground that the alleged harm was foreseeable and that the crucial issue is that of proximity. I agree with the appellants and with Swinton J., dissenting in the Divisional Court, that the starting point for the duty of care analysis is the statute creating and conferring powers on the SIU: See *Cooper*, at para. 43; *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, at para. 27; *Williams v. Canada (A.G.)* (2009), 95 O.R. (3d) 401 (C.A.), at para. 24.

[40] Section 113 of the *Police Services Act* aims to ensure public confidence in the investigation of crime against police officers. The SIU is a statutory body, independent of the police, charged with the responsibility of investigating circumstances of serious injury and death that may have resulted from criminal offences committed by police officers (s. 113(5)), and laying informations against the police officers investigated and referring the matter to the Crown Attorney for prosecution (s. 113(7)). The director is someone who is not a police officer or former police officer, and investigations are conducted by individuals who are not police officers (s. 113(3)). While the Solicitor General or Attorney General can direct the SIU to conduct an investigation (s.113(5)), in other cases, the powers of the SIU are discretionary.

[41] The statute imposes no explicit duties on the SIU in relation to victims or their families. I agree with and adopt Swinton J.'s assessment of the statute's effect, at para. 51:

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

[42] In my view, the situation of the SIU vis-à-vis victims and their families is analogous to the relationship between the Registrar of Mortgage Brokers and mortgage investors considered in *Cooper*, and that between the Law Society of Upper Canada and the clients of an errant lawyer considered in *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562. In both cases, a public authority was charged with the duty to regulate an activity in the public interest. Just as the SIU is charged with the responsibility of ensuring that allegations of crime by the police are properly investigated, the regulators were plainly charged with the responsibility of protecting mortgage investors and clients of lawyers. However, the Supreme Court of Canada held that those duties were owed to the public at large, not to individual investors or clients who had suffered losses at the hands of mortgage brokers and lawyers regulated by the defendant public authorities. As McLachlin C.J. and Major J. explained in *Edwards*, at para. 14:

> The *Law Society Act* is geared for the protection of clients and thereby the public as a whole, it does not mean that the Law Society owes a private law duty of care to a member of the

> public who deposits money into a solicitor's trust account. Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

[43] When the SIU investigates allegations of criminal misconduct by the police, its duties are overwhelmingly public in nature. Every member of society has an interest in the thorough and effective investigation of police misconduct and in the apprehension and prosecution of any police officer who commits a crime. While victims of crime and their families understandably may feel that they have a specific and particular interest, in the end, their interest in knowing and understanding the circumstances of an alleged crime by certain police officers is shared with all members of the public.

[44] There is now a well-established line of cases standing for the general proposition that public authorities, charged with making decisions in the general public interest, ought to be free to make those decisions without being subjected to a private law duty of care to specific members of the general public. Discretionary public duties of this nature are "not aimed at or geared to the protection of the private interests of specific individuals" and do "not give rise to a private law duty sufficient to ground an action in negligence": *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), at para. 17; *Williams*, at paras. 29-30; *Attis*, at paras. 59-60; *River Valley Poultry Farm v. Canada (A.G.)* (2009), 95 O.R. (3d) 1 (C.A.), at paras. 41-42.

[45] In my view, the SIU does not and should not conduct criminal investigations to advance the private interest of any individual citizen. I agree with the submission of the Ontario Association of Chiefs of Police that there is an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of that same investigation, which includes seeking to ground a viable civil action against the alleged perpetrators. To impose a private law duty of care would, in my view, introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest.

[46] In *Cooper*, at para. 44, the Supreme Court held that the Registrar's duty was not to individual mortgage investors but rather to the public as a whole and that recognizing "a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public".

[47] Likewise, in *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, at para. 50, the Supreme Court held that a child treatment centre owed no private law duty of care to the parents of a child in its care, on the ground that recognizing such a duty would conflict with the centre's primary duty to the child:

> If a corresponding duty is also imposed with respect to the parents, service providers will be torn between the child's interests on the one hand, and parental expectations which may be unrealistic, unreasonable or unrealizable on the other. This tension creates the potential for a chilling effect on social workers, who may hesitate to act in pursuit of the child's best interests for fear that their approach could attract criticism — and litigation — from the family. They should

> not have to weigh what is best for the child on the scale with what would make the family happiest, finding themselves choosing between aggressive protection of the child and a lawsuit from the family.

[48] In my view, recognizing a duty of care in favour of victims and their families could interfere with the SIU heeding its primary duty to the public at large.

[49] This case is distinguishable from *Fullowka v. Pinkerton's of Canada Ltd.*, [2010] 1 S.C.R. 132, where the court found, at paras. 42-45, that the government regulator owed a duty of care flowing from its statutory duties to inspect a mining operation in favour of fatally injured miners. The miners were held to be a narrow and clearly-defined group relating directly to the statutory duties of the mining inspectors. This was held, at paras. 46-47, to be analogous to the duties of building inspectors towards property owners and purchasers recognized in *Kamloops*. The duties of the SIU in investigating crimes committed by police officers stand in sharp contrast. Those duties are not focussed on the protection or promotion of victims' interests but instead relate to protecting the public at large.

[50] Nor do I agree with the submission that *Heaslip Estate v. Mansfield Ski Club Inc.* (2009), 96 O.R. (3d) 401 (C.A.), supports the argument that because the SIU interviewed one of the respondents, Duane Christian's mother, it engaged the respondents in a relationship giving rise to a duty of care. In *Heaslip*, the plaintiffs alleged that the government entity, when requested to transport a seriously injured man for emergency medical care, failed to follow its own policy for air ambulances giving priority to those

with life-threatening injuries. At para. 21, this court held that the case fell within an established category of negligence, namely, a public authority's negligent failure to act in accordance with an established policy where it is foreseeable that the failure to do so will cause physical harm to the plaintiff. I cannot agree that by interviewing Duane Christian's mother, the SIU engaged with her in a comparable fashion. She had witnessed some of the events leading to her son's death. By interviewing her, the SIU was simply carrying out a routine step in the investigation. She was not thereby brought within the circle of the SIU's care and there is no comparable allegation that the SIU failed to comply with an established policy from which she could expect to benefit.

2. Residual policy considerations

[51] As I find that the respondents fail to establish a *prima facie* duty of care under the first branch of the *Cooper-Anns* test, it is not necessary for me to consider whether any *prima facie* duty would be negated for policy reasons.

Conclusion regarding the alleged duty of care

[52] In my view, this is not a case where a trial is required to resolve the duty of care issue. A duty of care has been excluded by prior decisions of this court, the British Columbia Court of Appeal and numerous trial courts. As stated in *Williams*, at para. 39,

it has been repeatedly held "that it is appropriate to analyze claims alleging negligence against public authorities based on the exercise of discretionary statutory duties at the pleading stage to determine whether there is any possibility that a duty of care could be found to exist": Citing, *inter alia*, *Cooper*; *Edwards*; *Syl Apps*; *Eliopoulos*; and *Attis*.

[53] I wish to add that nothing in these reasons should be read as minimizing the legitimate concern of victims and their families for a thorough and effective investigation, or as excluding the participation of victims and their families in the legal process where appropriate and where provided for by law. Legislation and case law recognizes that victims are entitled to be heard in the process and that victims do have certain rights. The *Victims Bill of Rights, 1995*, S.O. 1995, c. 6, s. 2(1), states that victims of crime "should be treated with courtesy, compassion and respect". But the statute also expressly provides in s. 2(5) that the principles it establishes do not give rise to any new cause of action. Victims of crime may apply for compensation from a publicly-funded scheme under the *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24. The families of victims are ordinarily given standing in Coroner's inquests in homicide cases and may apply for reimbursement of their legal costs: See the *Coroner's Act*, R.S.O. 1990, c. C.37, s. 41. *Odhavji* recognizes the right of victims and their families to sue where the police wilfully fail to comply with their statutory duties in relation to investigations. After conviction, the *Criminal Code* gives victims a voice in sentencing through victim impact statements (s. 722) and allows for victim-centred sanctions and remedies in certain cases (see, e.g., ss. 738-741.2). And of course, victims

and their families are entitled to sue the perpetrators of crime. Refusing to recognize the existence of a private law duty of care in relation to police investigations does not leave the families of victims or these respondents without appropriate and viable legal recourse.

DISPOSITION

[54] For these reasons, I would allow the appeal and dismiss the action. As the appellants do not seek costs of the appeal, I would make no order as to costs.

"Robert J. Sharpe J.A."
"I agree M.J. Moldaver J.A."
"I agree R.P. Armstrong J.A."

RELEASED: April 8, 2011