APPENDIX G: OTHER LEGAL TOOLS

1. *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC)

The plaintiff in this case, Jane Doe, successfully sued the Metropolitan Toronto Police Force (MTPF) for failure to warn her and other potential victims of a serial rapist from whom they were at risk of harm. Her claim was based on negligence and violations of ss. 7 and 15(1) of the *Charter*.

Jane Doe was sexually assaulted by a man named Paul Douglas Callow, who sexually assaulted at least four other women in the area in a similar manner. Mr. Callow's victims were all single, white women living in a certain area of Toronto who lived on the 2nd or 3rd floor of their apartment buildings and he entered through an unlocked balcony door. Jane Doe alleged that had she known a serial rapist was operating in the area, she would have taken measures to protect herself. She argued that "but for" the failure by the police to warn her, she would not have been attacked.

The trial of this matter took over 8 weeks and the Court heard from approximately 30 witnesses, including an expert who testified about sexual violence against women, police supervisors who testified about the way in which sexual assaults had historically been and were currently investigated, and individual police officers involved in the "balcony rapist" investigation. The evidence overwhelmingly established that prior to Jane Doe's sexual assault, the MTPF had a dismal record in terms of its police officers understanding sexual assaults, properly investigating complaints, and dealing with victims in a sensitive way. The evidence showed the investigation into the "balcony rapist" was put on the back-burner many times because it was not considered as urgent or serious as other sexual assaults occurring around the same time. The trial judge found as fact that the police officers involved deliberately chose not to warn potential victims of the balcony rapist because they "believed that women living in the area would become hysterical and panic and their investigation would thereby be jeopardized".

The trial judge held that "a meaningful warning could and should have been given to the women who were at particular risk". He accepted Jane Doe's evidence that had she been made aware of the "balcony rapist", "she would have taken steps to protect herself and most probably those steps would have prevented her from being raped".

With respect to Jane Doe's negligence claim, the trial judge found the police to be under both statutory and common law duties to prevent crime and protect the public. He found the harm to Jane Doe was foreseeable and a "special relationship of proximity existed" between her and the MTPF. The police were held to have breached their duty of care because they were aware of "a specific threat or risk to a specific group of women" but did nothing to warn them or take other measures to protect them. The trial judge ultimately concluded:

> In spite of the knowledge that police had about this sexual rapist and their decision not to warn, they took no steps to protect Ms. Doe or any other women from this known danger. In my view, in the circumstances of this case, the police failed utterly in the duty of care they owed Ms. Doe.
>
> Sergeants Cameron and Derry made a decision not to warn women in the neighbourhood and did not do so. They took no steps to protect the women they knew to be at risk from an almost certain attack in result, they failed to take the reasonable

> care the law requires and denied the plaintiff the opportunity to take steps to protect herself to eliminate the danger and ensure that she would not be attacked.
>
> In this respect they are liable to her in damages.

In addition to being negligent, the trial judge also found the MTPF had violated Jane Doe's ss. 7 and 15(1) *Charter* rights.

With respect to s. 15(1), Jane Doe alleged "systemic discrimination existed within the MTPF in 1986 which impacted adversely on all women and, specifically, those who were survivors of sexual assault who came into contact with the MTPF". She also alleged "the sexist stereotypical views held by the MTPF informed the investigation of this serial rapist and caused that investigation to be conducted incompetently" and in such a way that she was denied equal protection and benefit of the law.

The trial judge found as fact that even though all of the police officers testified they considered sexual assault to be a serious crime, this was "largely an effort in impression management rather than an indication of any genuine commitment for change". The evidence indicated that for more than 20 years the MTPF failed to address systemic deficiencies in sexual assault investigations, sexist and stereotypical attitudes by police officers and an adherence to "rape myths", for instance that women lie about being raped and unless there are signs of a violent struggle there could not have been forced sexual intercourse.

Unfortunately there is not a lot of meaningful analysis in this decision, possibly because the s. 15(1) jurisprudence was not very developed at the time. Based on a totality of the evidence, the trial judge simply concluded:

> The problems continued and because among adults, women are overwhelmingly the victims of sexual assault, they are and were disproportionately impacted by the resulting poor quality of investigation. The result is that women are discriminated against and their right to equal protection and benefit of the law is thereby compromised as the result.
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> In my view the conduct of this investigation and the failure to warn in particular, was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women and about women who are raped. The plaintiff therefore has been discriminated against by reason of her gender and as the result the plaintiff's rights to equal protection and equal benefit of the law were compromised.

With respect to s. 7, Jane Doe alleged her security of the person was violated by the failure to warn. Similar to her s. 15(1) claim, there is not a lot of legal analysis regarding s. 7 and the trial judge simply found that the MTPF:

> ... deprived the plaintiff of her right to security of the person by subjecting her to the very real risk of attack by a serial rapist -- a risk of which they were aware but about which they quite deliberately failed to inform the plaintiff or any women living in the Church/Wellesley area at the time save only S.G. and M.L. and where in the face of that knowledge and their belief that the rapist would certainly attack again, they

> additionally failed to take any steps to protect the plaintiff or other women like her. Clearly the rape of the plaintiff constituted a deprivation of her security of the person.
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> ...
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> As I have indicated, because the defendants exercised their discretion in the investigation of this case in a discriminatory and negligent way as I have detailed above, their exercise of discretion was thereby contrary to the principle of fundamental justice.

Equally lacking is a meaningful s. 1 analysis, although that is likely because the MTPF called little or no justification evidence. The trial judge's analysis is rather strange, in that he begins by stating that s. 1 does not apply because the issue was police conduct, not a challenge to legislation. He described the MTPF's s. 1 argument as basically being "policing is a complicated business and the courts should stay out of it", which he dismissed out of hand:

> In this respect their conduct was determined to have fallen short in part, because of their discriminatory treatment of women. Women were treated differently because some members of the force adhered to sexist notions that if warned, women would panic and scare off the attacker. The defendants do not suggest, even in argument, why such conduct in the circumstances of this case may be "justifiable". I suggest the answer is a simple one -- because it cannot.

At the end of the day the MTPF was ordered to pay Jane Doe over $220,000 in general and special damages. In addition, the trial judge issued declarations that her ss. 7 and 15(1) *Charter* rights had been violated.

2. *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263, 2003 SCC 69

This case is an appeal of a motion to strike actions against individual police officers, the Metropolitan Toronto Chief of Police, the Metropolitan Toronto Police Board and the Province of Ontario on the basis that they do not disclose a reasonable cause of action. The actions were brought by the family of Manish Odhavji, who was fatally shot by police after he ran from his vehicle. The family alleged the police officers involved in the shooting intentionally breached their obligations to cooperate with the investigation conducted by the Special Investigations Unit (SIU). The family also alleged the lack of a thorough investigation caused them to suffer mental distress, anger, depression and anxiety. The actions were based on the torts of misfeasance in public office and negligence. For the purposes of this memo, I am only focusing on the negligence claim.

At para 44, the Supreme Court of Canada (SCC) reiterated the three components of negligence, namely: "(i) that the defendant owed the plaintiff a duty of care; (ii) that the defendant breached that duty of care; and (iii) that damages resulted from that breach." The Court then applied the well established two-step analysis from *Anns v Merton London Borough Council*, [1978] AC 728, the first being that "harm is a reasonably foreseeable consequence of the conduct in question" and there is "a

sufficient degree of proximity between the parties". (para 48) The SCC noted that when determining proximity, courts are to "evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant". Relevant factors "include the expectations of the parties, representations, reliance and the nature of the property or interest involved". (para 50)

The second part of the *Anns* test is a consideration of any policy reasons that would negate or reduce the scope of the duty of care. This stage of the analysis:

> ... is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair. (para 51)

The SCC expressed concerns about whether the appellants would be able to prove their case and whether an inadequate investigation "would rise to the level of compensable psychiatric harm". Despite those concerns, it did not want to deprive the appellants of the opportunity to prove their case at a hearing. At para 54, the SCC noted it was "reasonably foreseeable that the officers' failure to cooperate with the SIU investigation would harm the appellants". Similarly, since the Chief of Police was responsible for ensuring that officers cooperated, it was reasonably foreseeable that his failure would also cause them harm.

One of the key factors supporting the finding of proximity was that the Chief of Police was statutorily obligated under the *Police Services Act* to ensure officers carried out their duties, including cooperating with the SIU investigation. (para 56) In addition:

> A second factor that strengthens the nexus between the Chief and the Odhavjis is the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions. 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. (para 57)

The SCC dismissed the appellants' claim against the Police Board and the Province because there was insufficient proximity in their relationship with the appellants. In particular, these parties were not involved in day to day conduct of police officers and were not under a similar statutory duty requiring them to ensure police officers cooperated with SIU investigators.

3. *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, 2007 SCC 41

This is a fairly recent SCC decision dealing with whether a duty of care exists on the part of police

officers when they are conducting criminal investigations. In this case, Mr. Hill was wrongfully convicted of robbery and spent approximately 20 months in prison before he was released. He alleged the investigating officers were negligent because their investigation was flawed, in particular because of how they interviewed some witnesses and administered a photo line up.

This case is significant because for the first time the SCC considered whether a duty of care exists between a police officer and a suspect. It began its analysis by applying the *Anns* test and held that "police are not immune from liability under the Canadian law of negligence". (para 3) Not only did the SCC find there was reasonable foreseeability of harm and proximity, it also found there were no "residual policy considerations" to justify negating the duty of care. As a result, the SCC held that "the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted". (para 3)

With respect to the appropriate standard of care, the SCC noted at paras 52 and 73:

> Police, like other professionals, exercise professional discretion. No compelling distinction lies between police and other professionals on this score. Discretion, hunch and intuition have their proper place in police investigation. However, to characterize police work as completely unpredictable and unbound by standards of reasonableness is to deny its professional nature. Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.
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> ...
>
> 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. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made - circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results (Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care.

With respect to causation, the SCC reiterated that "the starting point is the usual 'but for' test. If, on a balance of probabilities, the compensable damage would not have occurred but for the negligence on

the part of the police, then the causation requirement is met". (para 93) In addition, the SCC clarified that the limitation period for a negligence claim of this type "begins to run when the cause of action is complete", meaning it arises "when the harmful consequences of the negligence result". (para 96)

It is very important to note that the SCC made it clear that this case is limited to "the relationship between a police officer and a particularized suspect that he is investigating". Having said that, the door was left open to future cases where a duty of care might exist, as follows:

> ... It might well be that both the considerations informing the analysis of both proximity and policy would be different in the context of other relationships involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and 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. Such an approach will also ensure that the law of tort is developed in a manner that is sensitive to the benefits of recognizing liability in novel situations where appropriate, but at the same time, sufficiently incremental and gradual to maintain a reasonable degree of certainty in the law. Further, I cannot accept the suggestion that cases dealing with the relationship between the police and victims or between a police chief and the family of a victim are determinative here, although aspects of the analysis in those cases may be applicable and informative in the case at bar. (See *Odhavji* and *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 1998 CanLII 14826 (ON SC), 160 D.L.R. (4th) 697 (Ont. Ct. (Gen. Div.)).) I note that *Jane Doe* is a lower court decision and that debate continues over the content and scope of the ratio in that case. I do not purport to resolve these disputes on this appeal. In fact, and with great respect to the Court of Appeal who relied to some extent on this case, I find the *Jane Doe* decision of little assistance in the case at bar. (para 27)

Ultimately the SCC concluded that based on the facts, the police were not negligent in Mr. Hill's case. The Court agreed that the investigation was flawed, but it did not breach the standards of the day.

4. Cases citing *Jane Doe, Odhavji* or *Hill*

I was not able to find any relevant Manitoba cases that followed or cited *Jane Doe, Odhavji* or *Hill*. I did look at some Court of Appeal and lower court decisions in other jurisdictions to see how they have been treated. As you will see, the Courts of Appeal appear reluctant to expand on *Odhavji* and *Hill*, possibly for fear of opening the door to indiscriminate litigation against police officers. However, the lower court decisions summarized below show a possible resurgence of *Jane Doe* and, depending on the judge, a willingness to find a duty of care if the facts are compelling.

(a) *Wellington v Ontario*, 2011 ONCA 274

This case is an appeal of a motion to strike a claim against two police officers who fatally shot 15-year old Duane Christian while pursuing him. The claim was filed by Duane's mother, sister and estate against the individual officers, the Province of Ontario and the Director of the Special Investigations

Unit. It alleged the individual officers "either intentionally killed Duane or were reckless in their use of force" (para 7) and that the Province and Director of the SIU conducted a negligent investigation into his death. The Ontario Court of Appeal had to decide "a single important legal issue: do victims of crime committed by police officers have the right to sue the Special Investigations Unit ("SIU") for negligent investigation?" (para 1)

The Ontario Court of Appeal applied the two-step *Anns* test to determine if the particular duty of care asserted in this case had already been recognized. At para 20, the Court referred to *Hill*, *Jane Doe* and other cases, noting that:

> 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 BCCA 308 (CanLII), [2010] B.C.J. No. 1239, 320 D.L.R. (4th) 496 (C.A.); Fockler v. Toronto (City), [2007] O.J. No. 11, 43 M.P.L.R. (4th) 141 (S.C.J.); Project 360 Investments Ltd. (c.o.b. Sound Emposium Nightclub v. Toronto Police Services Board, 2009 CanLII 36380 (ON SC), [2009] O.J. No. 2473 (S.C.J.); Spencer v. Canada (Attorney General), [2010] N.S.J. No. 640, 2010 NSSC 446 (CanLII); Petryshyn v. Alberta (Minister of Justice), [2003] A.J. No. 108,2003 ABQB 86.

The Court also referred to *Odhavji* but ultimately concluded that case was distinguishable on the facts. It also expressly stated that *Hill* did not apply because it was restricted to the relationship between a police officer and a suspect and at para 31 stated:

> 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 Canadian Charter of Rights and Freedoms 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), 2011 ONCA 55 (CanLII), 103 O.R. (3d) 401, [2011] O.J. No. 231 (C.A.); Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 (CanLII), [2008] 2 S.C.R. 114, [2008] S.C.J. No. 27.

At para 34, the Court stated: "At best, the combined effect of Odjhavi and Hill is to state that the duty alleged must be recognized under the Cooper-Anns test."

The Court ultimately followed its previous decision of *Norris v Gatien* (2001 CanLII 2486, ONCA), where it was held that "the relationship between police officers and victims or their families did not give rise to a private law duty of care". At paras 43 and 44, the Court concluded:

> 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.
>
> 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"...

(b) *Thompson v Webber*, 2010 BCCA 308

The plaintiff in this case "sued three members of the Saanich Police Department and the District of Saanich in negligence, alleging the officers caused him injury by failing to adequately investigate and by failing to recommend prosecution in regards to information he supplied them". (para 1) The claim arose after the plaintiff told the police that his former wife had physically abused their children and the respondents' failure to investigate "caused his estrangement from his children, thereby causing him certain relationship and psychological consequences which he advances as injury justifying an award of damages".

The evidence was that the police did interview Mr. Thompson's former wife and his children, but then closed the file and took no further action. Mr. Thompson alleged this was negligent because a reasonable police officer would have forwarded the information to the Crown and recommended assault charges be laid. The evidence also revealed a very acrimonious family law proceeding between Mr. Thompson and his former wife, including a restraining order being filed against him and requiring access to his children be supervised. My sense from the decision is that Mr. Thompson was not a particularly sympathetic plaintiff and that likely affected the outcome.

The BC Court of Appeal applied the *Anns* test to determine if there was reasonable foreseeability of harm and proximity between the parties. In support of his case, Mr. Thompson relied on the *Odhavji, Hill* and *Jane Doe* cases but the Court did not follow them. The Court held there was no duty of care owed to Mr. Thompson by the police for the following reasons:

- there was insufficient proximity because "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"; and

- the *Odhavji* case is distinguishable because in that case there was a failure to meet the requirements of specific legislation and the Chief of Police was responsible for ensuring the

officers cooperated with the investigation.

(c) *Patrong v Wayne Banks and Others*, 2013 CanLII 60852 (ON SC)

This case was a motion to strike negligence and *Charter* claims against the Toronto Police Services Board, the former Chief of Police and two individual police officers. The plaintiff, Kofi Patrong, was a young African-American man who was the victim of a drive-by shooting in the Malvern area of Scarborough. Mr. Patrong was standing outside his townhouse complex when he was shot by Tyshan Riley, a total stranger. He alleged the police knew Mr. Riley was dangerous and "his intention to drive into Malvern to shoot at young black males whom he perceived to be Malvern Crew members". Mr. Patrong alleged the defendants were negligent because they failed "to take reasonable care to guard against foreseeable harm" and they also violated his s. 7 rights. He alleged he was "part of a narrow and identifiable group of Riley's potential victims" and the "defendants knew or ought to have known that Riley posed a great threat to young black men's safety in Malvern", including him. (para 5)

The Court accepted that *Jane Doe* "establishes that the police may owe a duty of care to a crime victim if the facts as pleaded establish a special relationship of proximity between the police and the victim". (para 24) However, the Court found that the facts as alleged did not support Mr. Patrong's allegation that the police knew he was the target of foreseeable harm. The Court distinguished *Jane Doe* because the facts as alleged did not disclose that the police knew Mr. Riley had a pattern of prior similar criminal offences, that Mr. Patrong "was a member of a limited number of obvious victims and used him as 'bait' for Riley's apprehension, as the police did in *Doe*". (para 32) The Court said that Mr. Patrong had no "greater claim to police protection from Riley than any other Malvern resident or member of the public". (para 46) The police might have known that Mr. Riley would commit another violent offence, "but what crime and against whom was entirely unknown". (para 46) For that reason, the Court struck out Mr. Patrong's claim in its entirety.

(d) *Patrong v Banks et al.*, 2015 ONSC 3078 (CanLII)

After his claim was dismissed in 2013, Mr. Patrong filed another claim against the same defendants. This time his claim survived a motion to strike.

It is evident from the following opening paragraphs of the decision that this judge took a very different view of Mr. Patrong's claim and allowed it to proceed:

> Kofi Patrong was shot in a drive-by shooting in the Malvern area of Scarborough, Toronto on April 19, 2004. He was only 19 years old and a high school graduate. Mr. Patrong's goal of going to college was replaced by six surgeries, permanent disability, and a need for social assistance.
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> The shooter was a violent criminal named Tyshan Riley.
>
> Riley was known to the police. In fact, the police were watching Riley that very day. The defendants Comeau and Banks were the police officers leading an investigation into Riley in connection with previous drive-by shootings in Malvern.
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> Riley was known to be a dangerous member of a criminal gang called the Galloway

> Boyz. In 2004, the Galloway Boyz were in a gang war with a rival criminal gang called the Malvern Crew.
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> Two court orders already prohibited Riley from entering Scarborough. Riley was the prime suspect in a series of drive-by shootings that had recently occurred in the Malvern area. The police knew that if Riley went to Malvern, he would likely be armed and would pose a real threat. A Joint Management Team composed of senior officers of the Toronto Police Service had therefore ordered that if Riley entered Scarborough he was to be arrested; in a high risk take down if necessary. Such was the known danger presented by Tyshan Riley.
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> On April 19, 2004, surveillance officers watched Riley in a car heading toward Malvern traveling at high speed. The surveillance officers did not arrest him however. Riley drove to the heart of Malvern as expected. There he shot Kofi Patrong.
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> The surveillance officers did not arrest Riley because they were not told about the senior officers' arrest order. The defendant Banks disagreed with the senior officers' order to arrest Riley if he entered Scarborough and had declined to pass on the order. So despite two court orders and orders from their superiors, the surveillance officers just let Riley drive into Malvern.
>
> Riley and the Toronto Police Service changed the course of Mr. Patrong's life that day.

In addition, it is also very evident from the decision that the judge was extremely frustrated by courts that take a rigid and narrow interpretation of the law regarding duties of care:

> Judges do not always discuss how defining justice can involve personal moral judgments. In *Jacobellis v. Ohio*, 378 U.S. 184, U.S. Supreme Court Justice Potter Stewart famously wrote that while certain concepts may be difficult to define, "I know it when I see it." In cases like this one, the Supreme Court of Canada has said that the law of negligence is supposed to apply if it is "just and fair" to require the defendant to pay the plaintiff for the injuries caused by the defendant's negligence. *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263 at para. 50. Although the question asks for an opinion of what is "just and fair," the law tries to supply other tests to make the decision seem less personal and more predictable. In doing so however, as discussed below, the law has strayed into areas where decisions can be made without regard to the underlying justice of the case. Irrelevant and arbitrary factors can be considered and important factors can be ignored. The vital, quintessentially common law judgment call of whether it is reasonable to hold the defendants to account for their neglect can get lost in the twists and turns of the path down which the common law has strayed. (para 10)

In a plain language, "tell-it-like-it-is" decision that I would encourage you to read in its entirety, the judge discusses *Jane Doe* and criticizes how it has been interpreted:

There are two problems intersecting in this case. First, *Jane Doe* is being read too narrowly. It is not a statute that limits lawsuits against the police by victims to only cases where a very small number of known potential victims is in play. That happened to be the facts in that case. There was an unknown assailant and a small group of known likely victims. Here we have the opposite; a known assailant and larger group of potentially unknown victims. Moldaver J. did not say that the common law duty to warn and the parallel duty to protect apply only in the former case and not in any other. To the contrary, he said that there even where a duty to warn would be ruled out a duty to protect citizens would still apply. Here, it is doubtful that the police could have warned all possible victims of Riley's approach or even the Malvern Crew for that matter. Doing so may well have made matters much more dangerous. As found by Moldaver J., that does not need to negate a duty to protect the victims by arresting the assailant. Given that Riley was known and that the order had already been made to arrest him, this case is much stronger for a pure operational negligence claim for failure to arrest than *Jane Doe* where Moldaver J. had to suggest the existence of a public policy duty to spend more money to identify the assailant before he could be arrested.

Moreover, reading *Jane Doe* as a statute requiring a fixed, known number of named plaintiffs, ignores the decisions quoted above that say expressly that proximity is a broad concept guided by factors rather than a fixed test. Mr. Patrong had a vital physical safety interest in the actions of the police. He and others in the neighbourhood had a right to expect the police to arrest Riley before he committed another drive-by shooting. There was a court order prohibiting him from entering Scarborough. The senior police officers had ordered his arrest. The police knew that a drive-by shooting was imminent. They knew it was likely to occur in a very defined area. (One stops to wonder whether Detective Banks would have made the same decision he is alleged to have made in this case if Riley had been headed into Rosedale or Forest Hill rather than into Malvern. But that is for another day.) There are good reasons to find a duty of care on the facts alleged. But they are largely obscured by an overly-narrow reading of *Jane Doe.*

Negligence involving a government defendant requires a broader assessment of proximity.

The existence of cases reading of *Jane Doe* too narrowly and others that tried to apply it where it probably did not fit, is only one manifestation of the problem. Those cases hint at the larger issue however. The real issue is that the questions being asked in all of these cases do not make much sense. The circular reasoning of *Nielsen* and *Anns* works very well in private law cases. The categories of negligence are never closed and we can trust common law judges to "know it when they see it." But it does not make sense to try to discern a hidden private law duty of care in statutory or regulatory schemes that establish public bodies with public duties. The statutory schemes are not drafted to deal with common law damages remedies in the main. It is the height of fiction to romp through these statutes to try to find hints at a non-existent legislative intent concerning the existence or non-existence of a private law duty of care. (para 67-69)

This decision has been cited in one other case, that being *Walsh v. Coady Estate*, 2015 NSSC 175 (CanLII) from the Supreme Court of Nova Scotia. Without going into the specific facts, in *Walsh* the Court dismissed a motion to strike a claim against the RCMP for failing to stop a driver they knew had been driving "erratic and risky" who then struck and killed two people, including Mr. Walsh. I am mentioning this case because the Court dismissed the motion to strike on the basis of *Patrong* and other cases that found the police owe a duty of care to individual members of the public if it is reasonably foreseeable they could be harmed by the actions of another person. I do not know if this is a new trend and courts in the future may be more willing to find a duty of care exists based on *Jane Doe*.

5. My comments on the case law

Based on the above cases, I have the following comments:

- *Jane Doe* is significant because:
  - the Court found that police owe a duty of care to members of a group at risk of harm by a particular offender. That duty takes the form of a warning or other measures to protect potential victims;
  - the Court found the police violated Jane Doe's ss. 7 and 15(1) rights based on their dismal record of such things as investigating sexual assaults, their stereotypical assumptions about women and how rape victims are supposed to act. Originally I thought a *Charter* claim would have little merit but I think we should revisit this issue and walk our way through a potential claim given a similar dismal history of investigating murders and disappearances of Indigenous women; and
  - based on the 2015 *Patrong* and *Walsh* cases, *Jane Doe* may be making a resurgence and courts may be open to finding a duty of care if the facts are compelling, ie. sympathetic plaintiff and police conduct is particularly egregious. In an interesting twist, Moldaver, J. was the judge who dismissed the motion to strike the claim in *Jane Doe* in 1990. I am not sure, but he may be the same judge who is now on the Supreme Court of Canada.

- *Oldhavji* is significant because:
  - the SCC allowed a claim to be brought by the family of a deceased person;
  - a key factor in the decision was that the police officers and Police Chief breached their statutory obligations. I briefly skimmed *The Police Services Act* and the *Royal Canadian Mounted Police Act* and would draw to your attention the following sections:
    - *The Police Services Act:*
      - s. 22(1) - The police chief is responsible for "the enforcement of law, the prevention of crime and the preservation of the public peace in the municipality";
      - s. 25 - A police officer's duties include: "preserving the public peace", "preventing crime and offences against the laws in force in the municipality", "assisting victims of crime" and "apprehending criminals and others who may

lawfully be taken into custody".

- *Royal Canadian Mounted Police Act*:
  - s. 18 - a RCMP officer's duties include performing "all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody";
- the SCC confirmed the standard of care is that of a reasonable police officer;
- the SCC confirmed the test for causation and when the limitation period begins to run; and
- Courts of Appeal in Ontario and BC in *Wellington* and *Thompson* respectively have distinguished this case and appear to be less inclined to find a duty of care exists.

- *Hill* is significant because:
  - the SCC recognized the tort of "negligent investigation" by police officers;
  - the SCC made it clear that the case is limited to the relationship between police officers and a particular suspect, however it left the door open to future duties of care being recognized, including between the police and a victim or the police and families; and
  - in the right case, ie. if the facts support it, a claim in negligence against the Winnipeg Police or the RCMP might be possible provided the *Anns* test can be met, ie. there is reasonable foreseeability of harm, there is a special relationship of proximity and there are no policy considerations that would negate or limit the duty of care.