

CITATION: Markovic v. Abbott, 2010 ONSC 26
COURT FILE NO.: 00-CV-193186
DATE HEARD: December 9, 2009
ENDORSEMENT RELEASED: January 4, 2010

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MILOS MARKOVIC, NATASA MARKOVIC and 1145959 ONTARIO LIMITED carrying on business as MAESTRO PIZZA PLUS v. MIKE ABBOTT, ROBERT CORREA, DANIEL ROSS, CHRIS HIGGINS, ANITA MANCUSO, DARREN COX, MARK DENTON, PEDRO DIAZ, JOHN MACIEK, TORONTO POLICE SERVICES BOARD, DAVIS BOOTHBY, CHIEF OF TORONTO POLICE SERVICE and THE TORONTO POLICE SERVICE

BEFORE: Master R. Dash

COUNSEL: Julian Falconer, Julian Roy and Jackie Esmonde, for the plaintiffs

Cheryl Woodin and David Elman, for the defendants Toronto Police Services Board and Boothby

L. Stuart, for the defendant police officers

REASONS FOR DECISION

[1] This is a motion by the plaintiffs to further amend their amended statement of claim by adding particulars of aggravated and punitive damages as against the Toronto Police Services Board ("Board"). The existing action is against police officers for theft and assault and against the Board for vicarious liability for the acts of those officers. The proposed amendments allege a negligent and deliberately incomplete investigation of those officers and suppression of investigative findings in order to cover up the original thefts. The motion is opposed by the Defendants Board and Chief of Police ("Chief"). The plaintiffs also seek to add particulars of negligent supervision by the Chief and that is not opposed.

BACKGROUND

[2] The plaintiffs allege that on October 28, 1999 the individual defendant police officers, members of the Toronto Police Service drug squad referred to as "Team 2" or the "Ross Team", unlawfully arrested and assaulted the plaintiffs and in the course of executing search warrants stole a large sum of money and valuables from their home, business and safety deposit boxes. This action was commenced on June 30, 2000 against the individual officers, the Chief and the

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Board for damages for conversion, fraud, negligence and assault. Damages included loss of monies converted, physical injury, emotional anguish and mental distress, loss of business, damages to reputation as well as "punitive, exemplary and aggravated damages." No particulars were provided of the claim for punitive and aggravated damages.

[3] In July 2001 a Special Task Force ("STF") was created to investigate allegations of corruption amongst members of the drug squad and was continued in April 2002 by Internal Affairs. The investigation was primarily concerned with another drug squad known as Team 3 or the Schertzer Team, but references were also made to Team 2. The investigation of Team 2 was ultimately closed without the laying of charges.¹ In the course of documentary production in this action, including productions made pursuant to orders of this court, the plaintiffs determined that the investigation into Team 2 officers was done negligently, was deliberately incomplete and that investigative findings, including an alleged finding that there were "thieves" on Team 2, were suppressed. Although the words are not used in the draft amended pleadings, counsel for the plaintiffs refers to the actions of the investigators and others for whom the Board is responsible as an intentional cover-up. There is a dispute as to when the plaintiffs first learned of problems with the investigation.

THE EXISTING PLEADING AND THE PROPOSED AMENDMENTS

[4] The existing statement of claim is concerned only with the initial assault, arrest and theft. The original statement of claim filed on July 27, 2000² was concerned with events that occurred between October 28 and November 2, 1999 and the discovery of the theft in February and March 2000. The statement of claim was amended on November 23, 2000 to add reference to a subsequent search, arrest and incarceration between September 25 and October 2, 2000. There are no facts pleaded subsequent to October 2, 2000. There were no particulars whatsoever supporting the pleas for aggravated and punitive damages, although such damages could have been awarded arising out of the intentional torts pleaded.

[5] In the existing statement of claim, it is pleaded that David Boothby is liable "in his capacity as Chief of Police at all material times, for the wrongful actions of the other individual defendants to the extent that such actions resulted from any failure to adequately train, supervise, oversee, monitor, instruct or discipline those individual defendants." The plaintiffs propose to add amendments in paragraphs 48 and 48A particularizing the negligence of Chief Boothby, including a plea that Boothby knew that these defendants had engaged in similar misconduct involving other persons under investigation and that another drug enforcement unit (Team 3) was engaged in theft and that there was a close relationship between them and these defendants. The defendants do not oppose these amendments.

[6] In the existing statement of claim, the Board is identified as "a civilian board that oversees and is responsible for the Toronto Police Services" and it "oversees the provisions of police services, including law enforcement in the City of Toronto." The only claim pled as

¹ There was a full investigation into Team 3 and charges were laid against members of the Team 3 squad.

² A notice of action had been issued on June 30, 2000

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against the Board is that it is "liable under statute and at law for the actions, omissions of and injuries and losses caused by the individual defendants." This is a plea of vicarious liability.

[7] The plaintiffs now wish to add paragraphs 45A, 45B, 45C and 45D respecting the liability of the Board for aggravated and punitive damages. These amendments are opposed by the Chief and the Board. The proposed amendments allege in paragraph 45A that the Board is liable for aggravated and punitive damages in respect of the manner in which its employees, agents and/or representatives (hereinafter "Board representatives") "responded to the individual defendants' misconduct" during an investigation into such misconduct between October 30, 2000 and February 22, 2006. It is alleged that the Board representatives assured the plaintiffs and the public that there would be a full investigation and the results would be accurately disclosed. The proposed pleading states the Board representatives "acted in bad faith in prematurely terminating" the work of the STF and "in suppressing the task force's investigative findings that there were 'thieves' on team 2". Paragraph 45A goes on to provide a non-exhaustive list of "deficiencies in the Board's responses" including then Chief Fantino prematurely terminating the STF's work, not interviewing certain witnesses, failing to allocate sufficient resources to the investigation, not considering similar allegations of misconduct against these defendants, the investigators issuing false reports suggesting that the investigation was terminated because of non-cooperation from the plaintiffs and that there was insufficient evidence to lay criminal charges when they honestly believed that the defendants had committed criminal misconduct. Paragraph 45A thus purports to hold the Board liable for aggravated and punitive damages for the actions of persons for whom the Board is vicariously responsible, including conducting a negligent investigation of the individual defendants, intentionally suppressing its findings and releasing false reports. There are also two proposed amendments alleging direct actions by the Board - that the Board "directly or" through its representatives conducted the impugned investigation and that the Board failed to allocate sufficient resources.

[8] Paragraph 45B alleges that Chief Fantino or other Board representatives thereafter made public statements that the illegal drug squad actions were isolated to Team 3 when they knew there were thieves on Team 2. It is alleged that Board representatives solicited the cooperation of the plaintiffs in the investigation based on promises of a competent and unbiased investigation and the plaintiffs cooperated in the investigation based on that promise, however in proceeding as described they failed to reach objective or truthful conclusions and "deliberately misrepresented the truth" with respect to the defendants' misconduct. Paragraph 45C alleges that the Board "and" its representatives "knew or ought to have known" that the plaintiffs "were victimized" by the defendant officers "acting unlawfully by their resort to violence and theft" and by doing so they "breached the trust and confidence they sought to create with the public including the plaintiffs" as a result of their bad faith response to the plaintiffs' allegations. Paragraphs 45B and C thus purport to hold the Board vicariously liable for aggravated and punitive damages based on a deliberate suppression of the truth in breach of promises made to the plaintiffs and the public. Paragraph 45C also appears to be based on direct liability.

[9] Finally, paragraph 45D pleads that the conduct of the investigation by the Board's representatives "represents bad faith by members of the Toronto Police Service for which [the Board] is at law responsible." It pleads that the conduct of the Board representatives was "high

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handed, malicious, arbitrary and highly reprehensible” and “had the effect of increasing the plaintiffs’ mental distress” thus entitling the plaintiffs to both aggravated and punitive damages.

[10] The precise text of the proposed amendments is set out in Appendix A to these reasons.

THE MOTION

[11] The defendants oppose the amendments on three bases: (1) the amendments plead a new cause of action asserted after the expiry of the limitation period; (2) the amendments are not tenable since a victim has no cause of action based on negligent investigation of the alleged criminals; and (3) the claims as against the Board are not tenable to the extent that they are based on actions of the Board itself as opposed to vicarious liability for the actions of its representatives. The defendants do not allege prejudice as a result of the amendments, other than expiry of the limitation period.

[12] The plaintiffs argue: (1) the amendments do not purport to assert a new cause of action at all, they merely provide further particulars in support of an existing claim for aggravated and punitive damages, and as such there can be no limitation issue; (2) if a new cause of action has been raised then the limitation period has not expired based on when they first discovered the facts underlying the new cause of action; (3) the claims are based on both negligent investigation as well as deliberate acts of cover up and it cannot be said that the claims are impossible of success; and (4) although a claim could be advanced against the Board for its own actions, the plaintiffs will restrict their claims against the Board to those based on vicarious liability for acts of those for whom it is at law responsible and they will revise the proposed amendments to remove any assertions of direct liability.

[13] On October 29, 2009 I determined that the motion would be bifurcated into two hearings. The first hearing would determine two issues: whether a new cause of action was raised and if the claim was tenable. If I determined that a new cause of action was raised and that the amendments were tenable then a second hearing would be conducted to deal with the issues of discoverability on an evidentiary basis. If I determined that a new cause of action was not raised and the claims were tenable then I would allow the amendments and there would be no need for a second hearing concerned with discoverability. If I determined that the claims were not tenable then I would dismiss the motion (except as to those amendments related to negligent supervision which were not opposed) and there would be no need for a second hearing.

[14] For reasons set out hereafter I have determined that the amendments do raise a new cause of action thus requiring a determination as to discoverability and that the claims are tenable to the extent that I cannot conclude they are clearly impossible of success. As a result no order will be made today and a second hearing will be scheduled.

DO THE AMENDMENTS ASSERT A NEW CAUSE OF ACTION?

[15] Rule 26.01 provides that the court shall grant leave to amend a pleading at any stage unless prejudice would result that cannot be compensated for by costs or an adjournment. Rule 26.01 however “does not contemplate the addition of unrelated statute-barred claims by way of amendment to an exiting statement of claim” which “should be treated no differently than the

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issuance of a new and separate statement of claim that advances a statute barred claim.”³ If the new Limitations Act⁴ applies, that is if the new cause of action was discovered or reasonably ought to have been discovered after January 1, 2004, then the limitation period cannot be extended by the common law doctrine of special circumstances.⁵

[16] The plaintiffs argue that the amendments do not raise a new cause of action but merely provide further particulars of their existing claim for aggravated and punitive damages for which the Board is vicariously liable. As such, they argue there is no need to consider whether the amendments were made within the applicable limitation period.

[17] A cause of actions is defined as follows:

A “cause of action” has been defined as a “factual situation the existence of which entitles one person to obtain from the court a remedy against another person.” The key is whether substantially all of the material facts giving rise to the “new cause of action” have previously been pleaded or whether new facts are sought to be added that are relied upon to support a new cause of action. A new cause of action is not asserted if the amendments simply plead an alternative claim for relief arising out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.⁶

[18] The plaintiffs argue that aggravated and punitive damages are not a cause of action in themselves, but rather they are additional damages that may be awarded based on a cause of action. I accept that as a correct statement; however one still needs a factual situation that comprises a cause of action to support a claim for damages, whether it is special and general damages or aggravated and punitive damages.

[19] The plaintiffs refer to several cases that stand for the proposition that aggravated and punitive damages are not a cause of action in and of themselves. For example in *Atlantic International Trade Inc. v. Georgian College of Applied Arts and Technology*⁷ Boswell J. stated:

A claim to aggravated or punitive damages is not a cause of action in and of itself. The proposed amendment reflects a change in the damages alleged to have arisen as a result of the conduct complained of. The cause of action itself has not changed.

In that case however the plaintiffs wished to add claims for aggravated and punitive damages arising out of an alleged defamation. The facts supporting the defamation claim had already been pleaded. No new facts were alleged to support the claim for aggravated and punitive damages.

[20] This is different from the matter before me where the facts as already pleaded were theft and assault by police officers in the Drug Squad that occurred between October 28, 1999 and

³ *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 (C.A.) at paragraph 24.

⁴ *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B

⁵ *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401 (C.A.) at paragraph 13.

⁶ *Ascent Inc. v. Fox 40 International Inc.*, 2009 O.J. No. 2964 at paragraph 3 [citations omitted]

⁷ *Atlantic International Trade Inc. v. Georgian College of Applied Arts and Technology*, [2008] O.J. No. 2385 (S.C.J.) at paragraph 43

October 2, 2000. The new facts sought to be pled arise out of a negligent police investigation into the alleged misconduct of those members of the Drug Squad and an alleged suppression by the investigators of their findings and issuance of false reports all of which took place between October 30, 2000 and February 22, 2006, subsequent to the thefts and assaults which are the only facts pleaded in the existing statement of claim.

[21] In *Hopwood Estate v. Young*⁸ the plaintiffs had advanced a claim for damages arising out of alleged mistreatment by ambulance attendants. After the plaintiffs received a copy of an investigative report they sought to add claims for punitive and aggravated damages. Lofchik J. denied the claim for punitive damages (on the basis of tenability) but permitted a claim for aggravated damages to be added, holding:

The claim for aggravated damages, in my view, is not seeking to add a new cause of action. Aggravated damages are not awarded in addition to general damages, but the general damages are to be assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded"...General non-pecuniary damage should be assessed after taking into account any aggravated features of the defendants' conduct".⁹

Again, what differentiates this from the matter before me is that in *Hopwood* the court was dealing with the same conduct by the same defendants in the same time frame, but seeking to increase the damages by including aggravating features. The matter before me concerns different and subsequent conduct by different persons who are not named as defendants (but for whom the Board is vicariously liable).

[22] As noted, although aggravated and punitive are not in themselves a cause of action, a cause of action must be pleaded that would support a claim for aggravated and punitive damages. As originally pleaded, the causes of action to support punitive and aggravated damages were the intentional torts of theft and assault. The amendments now seek to plead subsequent negligent and deliberate acts by investigators into the original misconduct as a new and additional basis for aggravated and punitive damages. Therefore, while no new cause of action is added for general and special damages the amendments add new and different facts to support a cause of action for punitive and aggravated damages.

[23] The plaintiffs also argue that post-tort conduct can form a basis for aggravated and punitive damages, including conduct that first arises after litigation is commenced, and that such claims may be pleaded by amendment of the existing claim. I accept that as correct, but if the post-tort conduct in support of aggravated and punitive damages amounts to a new cause of action, the amendments must be made within two years of the time that the subsequent conduct was discovered or ought with reasonable diligence to have been discovered.

[24] In my view the new facts sought to be pled deal with the negligent investigation and "cover-up" between October 30, 2000 and February 22, 2006 of the defendant officers' activities. These are very different facts from the facts of theft and assault committed by the

⁸ *Hopwood Estate v. Young*, [2009] O.J. No. 230 (S.C.J.)

⁹ *Hopwood*, supra at paragraphs 14 and 15

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defendant officers between October 1999 and October 2, 2000, which are the only facts pleaded in the existing claim. In the existing claim it is only theft and assault in 1999 and 2000 that are pled in support of punitive and aggravated damages. The proposed amendments seek to add new facts dealing with events subsequent to the original theft and assault and deal not with those original torts but with negligent and deliberate acts of others investigating the defendants' misconduct. The facts are new and the actors are different.

[25] Therefore in accordance with the definition of cause of action as set out in *Ascent v. Fox 40*, supra, the "factual situation the existence of which entitles one person to obtain from the court a remedy against another person" as pled in the existing statement of claim is theft and assault. The material facts giving rise to the new claims for aggravated and punitive damages are the subsequent negligent and deliberate acts of the investigators, material facts that have not been pled at all in the existing statement of claim. Similarly these subsequent acts are not simply an "alternative claim for relief arising out of the same facts previously pleaded" and instead consist of new facts that are relied upon. Similarly they are not simply "particulars of an allegation already pled" nor "additional facts upon which the original cause of action is based".

[26] The fact that the existing pleading includes a claim for aggravated and punitive damages does not alleviate the need for the plaintiffs to plead the material facts in support of such damages prior to the expiry of the applicable limitation period. I agree with the defendants that if it were otherwise, it "would allow a reference to punitive damages to act as a perpetual place holder for further claims."

[27] In the result, in my view, the impugned amendments seek to add a new cause of action to support the claims for aggravated and punitive damages. The amendments can therefore be made but only if made within the applicable limitation period, and provided of course that the claims are tenable.

TENABILITY OF THE CLAIMS

[28] I must next determine if it is tenable for a victim of crime to claim aggravated or punitive damages arising out of a negligent and deliberately incomplete investigation into that crime and deliberate misstatements about and suppression of its findings.

[29] Amended pleadings must be legally tenable. I accept the following statement of the law from *Plante v. Industrial Alliance Life Insurance Co* in determining if an amendment is tenable:

The amended pleading must be legally tenable. It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success. For this purpose amendments are to be read generously with allowance for deficiencies in drafting.¹⁰

¹⁰ *Plante v. Industrial Alliance Life Insurance Co.*, 2003 O.I. No. 3034, 66 O.R. (3d) 74 (S.C.J. – Master) at paragraph 21(b)

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[30] The plaintiffs tendered substantial evidence to support their allegations with respect to the impugned investigation as well as how the evidence of it came to their attention. As noted in *Plante*, such evidence is not necessary. The moving party need not prove the truth of the amendments it seeks to make nor should the court conduct an examination of the evidentiary merits of the amendments.¹¹ The court looks to the pleading itself to ascertain if it raises a tenable plea¹² or discloses a cause of action.¹³ I have therefore ignored the evidence submitted by the plaintiff as to the evidentiary foundation for the amendments and directed myself solely to the pleadings. Evidence of when and how the material facts came to the plaintiff's attention will be reviewed only if and when the issue of discoverability is examined during the second phase of this motion.¹⁴

[31] Unless they arise directly out of the intentional torts that form the cause of action for general and special damages, punitive damages can only be awarded if the plaintiff can demonstrate a separate independently actionable wrong.¹⁵ It must be more than conduct of which the court disapproves, however strongly.¹⁶ Although the independently actionable wrong need not be an independent tort, it must be advertent wrongful acts that are so outrageous that they deserve punishment on their own.¹⁷ It is sometimes said that the acts that constitute the independent actionable wrong must be malicious, oppressive and high-handed misconduct that offends the court's sense of decency.¹⁸

[32] Although aggravated damages are compensatory and punitive damages constitute a punishment imposed by the court for certain types of behaviour, the plaintiff must demonstrate a separate actionable wrong for both aggravated and punitive damages.¹⁹

[33] An independent actionable wrong that is not an independent tort can be found in breach of a "separate contractual provision or other duty such as a fiduciary obligation."²⁰ Another example may be found in an action for first party insurance benefits. If the insurer has denied benefits that the court finds ought to have been paid, this may give rise to an order for payment of those benefits pursuant to the contract of insurance, but punitive damages will only be awarded if the insurer has in making its determination also breached the contractual duty of good faith that an insurer owes to its insured, which is an actionable wrong independent of and in

¹¹ *Plante*, supra at paragraphs 16 to 19.

¹² *Plante*, supra at paragraph 19.

¹³ *Plante*, supra at paragraphs 21(b).

¹⁴ The defendants do not allege prejudice (other than the expiry of the limitation period) or abuse of process for which evidence may have been necessary.

¹⁵ *Vorvis v. Insurance Corp. of British Columbia* [1989] 1 S.C.R. 1085, [1989] S.C.J. No. 46 at paragraph 25, *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362

¹⁶ *Vorvis*, supra at paragraph 25.

¹⁷ *Keays*, supra at paragraph 62

¹⁸ *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, [2002] 1 S.C.R. 595 at paragraph 36

¹⁹ *Beaird v. Westinghouse Canada Inc.*, [1999] O.J. No. 893, 43 O.R. (3d) 581 (C.A.) at paragraph 22. See also *Vorvis*, supra to the same effect at paragraph 22. In *Keays*, supra at paragraphs 54-55 the court held that damages could be awarded for mental distress without an independent actionable wrong based on breach of contract if such damages were reasonably foreseeable -- i.e. the damages flow from the original wrong.

²⁰ *Whiten*, supra at paragraph 79

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addition to the contractual duty to pay the loss.²¹ There is however no general independent tort of bad faith (such as exists in the unique relationship between insurer and insured).²² Punitive damages have also been awarded based on a finding of conspiracy that led to a breach of contract.²³

[34] The essence of the amendments is a plea that investigators conducted a flawed investigation by their negligent and deliberate acts and then suppressed the findings of the investigation and misled the plaintiff and the public. The claim for punitive damages against the Board is for the vicarious liability of the investigators and then Chief Julian Fantino.

[35] The defendants argue that although the plaintiffs characterize the amendments as further particulars of a claim for punitive damages arising out of post-incident conduct, they are really attempting to add a claim based on negligent investigation against the Board and that Ontario courts have rejected the tenability of such claims. In my view, it matters not whether the plaintiffs claim general and special damages based on a "tort" of negligent investigation or whether they claim that negligent (and deliberately deficient) investigation constitute an independent actionable wrong from which punitive damages may be awarded. In either case the plaintiffs must demonstrate an actionable wrong.

[36] In *Norris v. Gattien*²⁴ the Court of Appeal considered the tenability of a claim in relation to the investigation and prosecution of the conduct of a police officer who had driven his police car into the plaintiff's vehicle. In that case the plaintiffs claimed aggravated and punitive damages against the investigating officer who allegedly failed to properly investigate the accident, collect evidence or administer a breathalyser test and vicariously against the responsible Police Services Board. The Court of Appeal determined that no private law duty was owed by the investigating officer to the plaintiff victim. Rather, the duty owed by police officers to investigate crime is a public duty owed to the public at large and not to individuals privately. The court held that "the plaintiffs had no legal interest in the investigation or prosecution" of the police officer driving the car and that it was "plain and obvious" the claim could not succeed. The court held that while the plaintiffs may have derived satisfaction from a conviction, that satisfaction was a purely personal matter with "no reality in law."²⁵

[37] Similarly in *Fockler v. Toronto*²⁶, the plaintiff's claim included allegations against four police officers arising out of an investigation into complaints made by the plaintiff against other police officers, including, as in the matter before me, that they tried to cover up the misbehaviour of those other officers. The court also held, relying on *Norris*, that "the investigation and prosecution" of those officers "were matters of public law and public interest" and could not found a "private cause of action." It held that "trying to cover up a breach of duty might be a disciplinary offence but it cannot found a cause of action because the duty to discipline officers

²¹ *Whiten*, supra at paragraph 79.

²² *Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 533 (S.C.J.) at paragraphs 63 and 64.

²³ See reference in *Vorvis*, supra at paragraph 25.

²⁴ *Norris v. Gattien* (2001), 56 O.R. (3d) 441 (C.A.)

²⁵ *Norris*, supra at paragraphs 6 and 18

²⁶ *Fockler v. Toronto (City)*, [2007] O.J. No. 11 (S.C.J.)

for breach of duty is owed to the public and not to any one private individual.”²⁷ Similarly in *Porter v. Brampton* the court struck a claim against a city based on negligent investigation by police and the Fire Marshall into a failure to transmit to the Fire Department an emergency call that the plaintiff’s house was on fire since the investigators did not owe a “private law duty of care.”²⁸ In *Project 360 v. Toronto Police Services Board*, the court concluded in an action against the police for failure to warn (not a faulty investigation case) that “in the absence of circumstances giving rise to a special relationship of proximity, the relationship between police and individual members of the public does not give rise to a private law duty of care.”²⁹

[38] The defendants therefore argue that the plaintiffs are attempting to assert amendments that raise a new cause of action based on the quality of a police investigation that in Ontario is untenable at law since there is no private law duty of care owed by persons investigating a crime to the victim of the crime. If that were the final word in the jurisprudence I would have agreed with the defendants and decided that the claim advanced in the amendments is impossible of success.

[39] The plaintiffs argue that *Norris*, a 2001 decision of the Court of Appeal, was decided before two decisions of the Supreme Court of Canada which leave the door open for a court to conclude that a private law duty of care might exist between police investigating a crime and the victim of the crime. In *Odhavji*³⁰, following a fatal shooting by police, the individual officers failed to co-operate with a Special Investigation Unit investigation, as they were required to do under the *Police Services Act*. The Chief of Police is required to ensure that police officers comply with their duties under the Act. The plaintiffs claimed the failure of the officers to co-operate caused them mental distress. The Court held that if such harm were foreseeable, it would also be reasonably foreseeable that the Chief’s failure to enforce co-operation would also harm the plaintiffs³¹. The Supreme Court held: “if it is reasonably foreseeable that the defendant officers’ decision not to cooperate with the SIU would injure the plaintiffs, a private law obligation to ensure that the officers cooperate with the SIU is rightly imposed on the Chief”³². The court summarizes their decision as follows:

In short, I believe that it would be inappropriate to strike the action for negligent supervision against the Chief on the basis that he did not owe the plaintiffs a duty of care. If the plaintiffs can establish that the complained of harm is a reasonably foreseeable consequence of the Chief’s failure to ensure that the defendant officers cooperated with the SIU, the Chief was under a private law duty of care to take reasonable care to prevent such misconduct.³³

[40] *Odhavji* established that a private law duty in favour of the family of a victim of crime could be imposed on the Chief to take reasonable care to prevent police misconduct. Although

²⁷ *Fockler*, supra at paragraph 70.

²⁸ *Porter v. Brampton*, [2002] O.J. No. 5132 at paragraph 7.

²⁹ *Project 360 Investments Ltd. (c.o.b. as Sound Emporium Nightclub) v. Toronto Police Services Board*, 2009 O.J. No. 2473 (S.C.J.) at paragraph 3

³⁰ *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263

³¹ *Odhavji*, supra at paragraph 54

³² *Odhavji*, supra at paragraph 59

³³ *Odhavji*, supra at paragraph 61

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The Supreme Court founded this private law duty of care based on negligent supervision, the plaintiffs argue that it is not for me to conclude that a private law duty could not be imposed based on negligent investigation, for which the Board would be vicariously liable.

[41] In *Hill*³⁴, the plaintiff was wrongfully convicted, and later acquitted, of a crime he did not commit. His claim against the police included a claim in negligence based on negligent investigation. The Supreme Court stated that the issue “is whether the law recognizes a duty of care on an investigating police officer to a suspect in the course of investigation. This matter is not settled in Canada.”³⁵ The court engaged in the two-part *Anns*³⁶ analysis and considered both whether the relationship between the suspect and police disclosed a sufficient foreseeability and proximity to establish a prima facie duty of care and whether there were residual policy considerations that ought to negate or limit that duty of care.³⁷ The court also considered the standard of care.

[42] The court determined that the tort of negligent investigation exists and that a duty of care, at least to suspects, is owed. The court stated that “an investigating officer and a particular suspect are close and proximate such that a prima facie duty of care should be recognized.”³⁸ The essence of the decision is summarized in the headnote as follows:

The police are not immune from liability under the law of negligence and the tort of negligent investigation exists in Canada. Police officers owe a duty of care to suspects. Their conduct during an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. Police officers may be accountable for harm resulting to a suspect if they fail to meet this standard.

[43] The court was careful to note that their decision was restricted to a duty of care to suspects for negligent investigation, and that the decision does not determine that a duty of care to victims exists with respect to negligent investigation. They did however leave that door open for determination in a future case. In particular the court stated with respect to a possible duty of care to victims:

[T]his judgment is concerned only with a very particular relationship - the relationship between a police officer and a particularized suspect that he is investigating. There are particular considerations relevant to proximity and policy applicable to this relationship... 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

³⁴ *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129

³⁵ *Hill*, supra at paragraph 19

³⁶ *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)

³⁷ *Hill*, supra at paragraph 20

³⁸ *Hill*, supra at paragraph 39

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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.³⁹

[44] A recent decision of the Ontario Superior Court and then by the Divisional Court on a leave to appeal motion has considered the possible conflict between the *Norris* line of cases and *Hill*. In *Wellington v. Ontario*⁴⁰ a 15 year old boy was fatally shot by a police officer and following an investigation by the Special Investigations Unit ("SIU") no charges were laid. The family of the boy brought an action against the Crown on behalf of the SIU and against the deputy director of the SIU for negligent investigation by the SIU. Some of the complaints are similar to the matter before me, including failure to interview certain witnesses, failure to thoroughly investigate and prematurely closing the investigation. Damages included deprivation of the right to understand the circumstances of their son's death, compounding their grief and lessening their opportunity to participate in an inquest and to recover damages for the wrongful killing.

[45] The defendants moved to strike the claim because the SIU did not owe a private law duty of care to the family of the victim and thus the claim disclosed no reasonable cause of action. The motion to strike was heard by Herman J. As in the matter before me, the defendants relied on the *Norris*, *Fockler* and *Porter* line of cases to indicate that a police investigator owes no private law duty of care to victims or their families for negligent investigation and the plaintiffs relied on *Odhavji* and *Hill* to indicate that a private law of duty of care for negligent investigation may exist but a full *Anns* analysis considering proximity and policy on an evidentiary record would be necessary. Herman J. noted that the *Norris*, *Fockler* and *Porter* cases were decided before the Supreme Court of Canada decision in *Hill*. She also noted that in those cases the harm was restricted to emotional distress and loss of satisfaction in having someone prosecuted whereas in *Wellington* there was a claim that rights at an inquest and to recover civil damages was compromised.

[46] Herman J. stated as follows:

The next question is whether there was sufficient proximity between the plaintiffs and the defendants (the SIU and Mr. Ramsay) such that a duty of care should be imposed. The factors that may be relevant include whether there is a causal connection between the inadequate investigation and the harm to the plaintiffs, as well as the plaintiffs' reasonable expectations.

In my opinion, a full factual record is needed to make the determination. Such a record could include evidence on: the role, policies and practices of the SIU; the use and significance of SIU investigations in inquests and civil suits; and the nature of the contacts between the SIU and the family members during the course of the investigation.⁴¹

³⁹ *Hill*, supra at paragraph 27

⁴⁰ *Wellington v. Ontario*, [2009] O.J. No. 2975 (S.C.J. per Herman J.), leave to appeal granted [2009] O.J. No. 4700 (Div. Ct. per Karakatsanis J.)

⁴¹ *Wellington* (SCJ), supra at paragraphs 43 and 44.

She concluded as follows:

I conclude that it is not plain and obvious that the plaintiffs' claim could not succeed. In particular, it is not plain and obvious that there is no duty of care in the circumstances. This is a novel claim that should be determined with the benefit of a full evidentiary record. The motion is therefore dismissed.⁴²

[47] Although Herman J. partly based her decision on the claims made by the plaintiffs in that action that rights at an inquest and to recover civil damages was compromised by the negligent investigation, in my view that is not determinative given that proximity between the police and the particular plaintiffs must be explored on a full evidentiary record. I am of the view that the decision does not purport to close off the categories where proximity and a private law duty of care may be established on the evidence.

[48] Leave to appeal was granted by Karakatsanis J. She stated that the *Norris, Fockler* and *Porter* line of cases and *Hill* are "conflicting in principle."⁴³ She noted that "The Supreme Court of Canada decision in *Hill* relates to the suspect of a criminal investigation and specifically states that a fresh *Anns* analysis...both of proximity and policy would be necessary for the relationship between the police and a victim or victim's family."⁴⁴ She concludes as follows:

Appellate review to resolve conflicting jurisprudence is desirable in these circumstances. The proposed appeal is important because the issue of whether the SIU and other investigative bodies owe a duty of care to victims and family members has ramifications that go far beyond this case.⁴⁵

As a result Karakatsanis J. granted leave to appeal because of conflicting decisions and the general importance of the issue to the development of the law "beyond the interest of the parties."⁴⁶ It does not appear that the appeal before a full panel of the Divisional court has yet been determined.

[49] The issue before me is whether the claim for punitive damages for vicarious liability of the Board for a negligent and deliberately flawed police investigation and a subsequent cover-up and misrepresentation as to the nature and then the results of the investigation is tenable. As stated in *Plante*: "Amendments are to be granted unless the claim is clearly impossible of success." I am bound by the findings in *Wellington* that there is a conflict in the law that must be determined by appellate review, possibly on a full evidentiary record, and by the determination of the Supreme Court in *Hill* that a full *Anns* analysis may be required to determine whether a private law duty of care exists between police and victim for negligent investigation. The matter before me may be even more compelling than the facts before the court in *Wellington* since the plaintiffs' claims herein involve much more than simply negligent investigation and include

⁴² *Wellington* (SCJ), supra at paragraph 49.

⁴³ *Wellington* (Div. Ct.), supra at paragraph 5.

⁴⁴ *Wellington* (Div. Ct.), supra at paragraph 6.

⁴⁵ *Wellington* (Div. Ct.), supra at paragraph 8.

⁴⁶ *Wellington* (Div. Ct.), supra at paragraph 10.

deliberate acts such as suppression of evidence and greater proximity to these specific plaintiffs may be considered because of alleged misrepresentations to them to solicit their cooperation.

[50] I therefore cannot say that the amendments are clearly impossible of success. They are therefore legally tenable and the existence of a duty of care will have to be determined on a full evidentiary record or by a higher court resolving the conflict in the jurisprudence. The amendments will be allowed subject to a few specific changes with respect to direct liability of the Board as discussed below and subject to a determination as to whether the claims are time barred.

ALLEGATIONS AGAINST THE BOARD

[51] In addition to various allegations in the proposed amendments against the investigators, Chief Fantino and other "Board representatives" for which the Board is said to be vicariously liable, the plaintiffs have also pled various direct claims against the Board. For example in paragraph 45A the plea is that the Board "directly or" through its representatives conducted investigations, paragraph 45A(e) is a plea that the Board failed to allocate sufficient resources and in paragraph 45C it is pled that "the Board and" its representatives had certain knowledge.

[52] An employer who is vicariously liable for damages flowing from the acts of its employee may also be directly liable for damages arising from its own conduct, including aggravated and punitive damages for an inadequate response to wrongdoing by its employee.⁴⁷ The jurisprudence however has treated the statutory liability of a Police Services Board for its own actions differently, and in particular with respect to investigations of a police officer's conduct.

[53] Pursuant to section 50 of the *Police Services Act*⁴⁸ the Board is liable for the torts committed by police officers in the course of their employment. It is clear that the Board is vicariously liable for all damages, including aggravated and punitive damages, flowing from the tortious acts of police officers and of the Chief. In my view this could include liability for aggravated and punitive damages for the negligent investigation and concealment of findings by persons for whom the Board is responsible (if the jurisprudence is ultimately resolved in favour of recognizing a private law duty of care to victims of crime by those investigating the crime).

[54] The Board however is not *directly* responsible for operational issues or supervision or direction of police officers. For example, as stated in *Deciantis*:

The Board is not responsible for supervision and training. That is the responsibility of the Chief. Similarly, the Board is not responsible for practices, standing and routine orders, directives, training programs and operational practices and structures. Those again are the responsibility of the Chief.⁴⁹

⁴⁷ *P.D. v. Allen*, [2004] O.J. No. 3042 (S.C.J.) at paragraph 326-327. Damages were not awarded against the diocese because the court was not satisfied the diocese knew of the priest's conduct.

⁴⁸ *Police Services Act*, R.S.O. 1990 c. P. 15

⁴⁹ *Deciantis v. Toronto Police Service*, 2001 O.J. No. 2615 (S.C.J.) at paragraph 6

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In particular, the Board “is precluded from giving directions to the Chief with respect to specific operational decisions or with respect to the day-to-day operation of the police force.”⁵⁰

[55] The Board has responsibility under section 31(1) of the *Police Services Act* to provide “adequate and effective police services” which includes responsibility for policy, such as under section 31(1)(c) to “establish policies for the effective management of the police force”. The Act however “not only limits the Board to policy decisions, it precludes the Board from making operational decisions. Thus...any potential duty of care which the Board may owe to the plaintiffs is negated.”⁵¹ “There is a clear separation in the Act between the policy-making function of the Board and the day-to-day operational function, which is the preserve of the chief of police.”⁵²

[56] The Supreme Court in *Odhavje* stated with respect to the Board’s liability for policy decisions:

Unlike the Chief, the Board does not directly involve itself in the day-to-day conduct of police officers, but, rather, implements general policy and monitors the performance of the various chiefs of police. The Board does not supervise members of the force, but, rather, supervises the Chief (who, in turn, supervises members of the force). This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct.⁵³

[T]he Board is responsible for the provision of adequate and effective police services, but is not under an express obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act*. The absence of such an obligation is consistent with the general tenor of s. 31(1), which provides the Board with a broad degree of discretion to determine the policies and procedures that are necessary to provide adequate and effective police services. A few enumerated exceptions aside, the Board is free to determine what objectives to pursue, and what policies to enact in pursuit of those objectives.⁵⁴

[57] As a general rule therefore, although the Board is vicariously responsible for acts of police officers and the Chief, it is not directly liable for operational decisions or for failing to instruct the Chief to deal with specific operational issues. Further, although it is responsible for policy decisions it will not normally be liable for creating or not creating specific policies. “Insofar as the setting of general policy is concerned, at present the Act does not require the Board to promulgate policies and procedures on any particular matter...Rather, the responsibility is expressed in broad general terms, namely, the Board ‘may, by by-law, make rules for the effective management of the police force.’”⁵⁵

⁵⁰ *Miguna v. Ontario (Attorney General)*, [2008] O.J. No. 4784 at paragraph 89.

⁵¹ *Odhavji Estate v. Woodhouse* (2000) 52 O.R. (3d) 181 (C.A.) at paragraph 52, affirmed on this issue 2003 SCC 69, [2003] 3 S.C.R. 263

⁵² *Odhavji*, supra (C.A.) at paragraph 53

⁵³ *Odhavji*, supra (S.C.C.) at paragraph 64

⁵⁴ *Odhavji*, supra (S.C.C.) at paragraph 65

⁵⁵ *Heritage Custom Jewellers v. Metropolitan Toronto (Municipality) Police Services Board* (2000), 46 O.R. (3d) 593 (S.C.J.) at paragraph 14.

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[58] The plaintiffs point to statements made in the "Junger Inquiry"⁵⁶ by the governing body for policing in Ontario that the Board may have a public interest duty to take positive steps, as the civilian overseer of the police on behalf of the community, to ensure that policing services meet community standards. Those statements however were made prior to various court decisions, including the Supreme Court decision in *Odhavji*, which determined that the Board does not have a mandate to make operational decisions or to implement specific policies.

[59] The Supreme Court in *Odhavji* however left the door open for an argument that the Board may have a positive obligation in certain circumstances to deal with systemic problems:

It is possible, I concede, that circumstances might arise in which the Board is required to address a particular problem in order to discharge its statutory obligation to provide adequate and effective police services. If there was evidence, for example, of a widespread problem in respect of the excessive use of force in the detention of visible minorities, the Board arguably is under a positive obligation to combat racism and the resultant use of excessive force. But as a general matter, courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue, or what policies to enact in pursuit of those objectives. Suffice it to say, the Board's decision not to enact additional policies or training procedures...does not constitute a breach of its obligation to provide "adequate and effective" police services.⁵⁷

[60] Although Mr. Falconer suggests in argument that problems of theft in the drug squad could be considered a systemic or widespread problem for which the Board has a positive obligation to act, he is prepared for purposes of this motion to revise his proposed amendments to delete any references to the direct liability of the Board and restrict his claim to vicarious liability. In any event it is not self-evident that the direct claims against the Board set out in the proposed amendments would meet the test suggested in *Odhavje*.

[61] The plaintiffs will resubmit their proposed amendments for review by the defendants to ascertain that it complies with this requirement. I will resolve any dispute with respect to that issue.

THE LIMITATIONS ISSUE

[62] As noted earlier in these reasons, even though the amendments may be legally tenable, they cannot be asserted at this time if the limitation period for advancing this new cause of action has passed. That will not be decided until phase two of the hearing of this motion is conducted unless the parties can agree on a resolution. The limitation period does not start to run until the plaintiffs knew or ought with due diligence to have known of the material facts constituting the cause of action. It appears there is a dispute whether the facts as known to the plaintiffs' prior counsel, Mr. Biro, as early as August 2002 were sufficient to bring home to the plaintiffs that they had a cause of action for aggravated and punitive damages related to the manner in which the investigation of the theft was conducted or whether the plaintiffs could not, even with due

⁵⁶ Ontario Civilian Commission on Police Services, *Report of an Inquiry into administration of internal investigations by the Metropolitan Toronto Police Force* (August 1992)

⁵⁷ *Odhavji*, supra (S.C.C.) at paragraph 66.

diligence, have reasonably discovered the essential facts that make up the cause of action until productions were made in 2009 during the course of this litigation.

[63] If the plaintiffs provide a reasonable explanation on proper evidence as to why the essential facts were not known or obtainable with due diligence within two years of moving to amend the statement of claim, such that the court determines there is a triable issue of fact or credibility on the discoverability allegations, the court will normally permit the amendments with leave to plead a limitations defence. It is only if the court is convinced on the evidence before it that the essential facts were actually known at the earlier date or that there is no issue of fact or credibility on discoverability that the amendments would be denied.⁵⁸

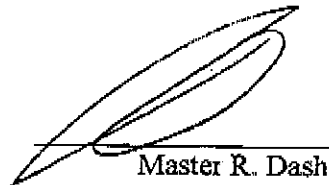
FURTHER PROCEEDINGS

[64] I have determined that the impugned amendments plead a new cause of action and that the amendments, subject to revisions eliminating reference to direct liability of the Board, are tenable. It must be determined if the amendments are barred by passage of the applicable limitation period. Defendants' counsel must determine whether to concede that there is at least a triable issue on discoverability. In that case I would, if on consent, permit the amendments (subject to variation respecting direct liability of the Board) with leave to plead a limitations defence. If discoverability must be argued then I will at a case conference convened for that purpose set a timetable for the exchange of further material, any cross-examinations, any refusals or production motions that now become relevant on the discoverability issue and finally a hearing date for the continuation of this motion.

[65] Even if the amendments now proceed on consent, a case conference may be required to deal with the wording of the amendments with direct Board liability removed, productions or refusals that become relevant based on the amended pleadings and costs of the motion.

[66] Whether or not paragraphs 45A, 45B, 45C and 45D are ultimately allowed to proceed on consent or following the Phase 2 hearing, the amendments to paragraph 48 and new paragraph 48A, dealing with the negligent supervision by the Chief, will be permitted on consent. The timing of that amendment will depend on determination of the balance of the motion.

[67] No order is therefore made today. The plaintiffs will resubmit their proposed amendments to the defendants for review to confirm that they comply with these reasons. Either party may request a case conference to deal with the outstanding matters outlined in these reasons.



Master R. Dash

DATE: January 4, 2010

⁵⁸ *Pepper v. Zellers* (2006), 83 O.R. (3d) 648 (C.A.) at paragraph 18.

Appendix A

Proposed Amendments to Amended Statement of Claim

45A. The Defendant, the Toronto Police Services Board, is liable for aggravated and punitive damages in respect of the manner in which its employees, agents and/or representatives (hereinafter "Board representatives") responded to the individual Defendants' misconduct after October 2000. Between October 2000 and 2006, the Toronto Police Services Board either directly or through Board representatives conducted a number of investigations of the individual Defendants' misconduct in relation to the Plaintiffs. In undertaking these responses to the drug squad allegations, Board representatives gave assurances to the public, including these Plaintiffs, that the allegations against the CFC drug squads (including the Schertzer Team 3 and the Ross Team 2) were being independently and fully investigated by an RCMP-led task force (the "Special Task Force" or "STF"); and further that the results of those investigations would be honestly and accurately disclosed. Board representatives acted in bad faith in prematurely terminating the work of the Special Task Force as it pertained to the Plaintiffs' allegations and in suppressing the Task Force's investigative findings that there were "thieves" on Team 2 as led by the Defendant Ross. Without limiting the generality of the foregoing, deficiencies in the Board responses include the following:

- (a) Then Toronto Police Chief Julian Fantino and/or those acting on his instructions improperly interfered in the work of the Special Task Force by prematurely terminating STF's investigation of Ross Team 2 and transforming the investigation of Ross Team 2 into a purely internal exercise by Toronto Police Service Internal Affairs;
- (b) Civilian witnesses to the individual Defendants' misconduct were not interviewed promptly, or at all;
- (c) Employees of the defendant Toronto Police Services Board who were witness officers were not interviewed promptly, or at all;
- (d) There was a lack of continuity with respect to the investigators assigned to investigation of the individual Defendants;
- (e) The defendant Toronto Police Services Board failed to allocate sufficient resources to fully and competently investigate the individual Defendants;
- (f) The financial background and affairs of the individual Defendants were not investigated;
- (g) Strikingly similar allegations of misconduct on the part of the individual Defendants against other members of the public were not adequately investigated;
- (h) The investigators failed to consider the impact of the pattern of misconduct on the part of the individual Defendants in determining whether there were adequate grounds to substantiate the Plaintiffs' allegations;
- (i) The investigators failed to offer adequate protections to the Plaintiffs and other members of the public to facilitate their cooperation in the investigations.

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- (j) The investigators issued false and misleading reports suggesting, *inter alia*, that the investigations were terminated because of a lack of cooperation from the Plaintiffs; and,
- (k) The investigators issued false and misleading reports suggesting, *inter alia*, that there was insufficient evidence to commence criminal proceedings against the individual Defendants, in circumstances in which they honestly believed on reasonable grounds that the individual Defendants had committed criminal misconduct in relation to the Plaintiffs.

45B. Having intentionally responded to the allegations against the Ross Team 2, as described above, Chief Fantino and/or other Board representatives, as a means of damage control, deliberately conveyed a distorted picture to the public in stating in January 2004 and on other occasions that the illegal actions of drug squad members were "isolated" to one team (the Schertzer Team 3) when they knew that STF investigators were of the opinion that there were thieves on the Ross Team 2. The Toronto Police Services Board, through its employees and/or agents, solicited the cooperation of the Plaintiffs in the investigations based on the promise, express or implied, that the investigations would be conducted in a competent and unbiased fashion, regardless of how the results of the investigation would portray the Toronto Police Service. The Plaintiffs cooperated in these investigation based on this implied or express promise. In proceeding in the fashion as described above, this Defendant's employees and/or agents failed to reach truthful and objective conclusions regarding the misconduct of the individual Defendants, and indeed deliberately misrepresented the truth with respect to their misconduct.

45C. The Toronto Police Services Board and its employees and/or agents involved in the investigations knew or ought to have known that all of the Plaintiffs herein were victimized by the defendant police officers acting unlawfully by their resort to violence and theft. In proceeding as outlined above, this Defendant and Board representatives completely breached the trust and confidence they sought to create with the public including the Plaintiffs as a result of the bad faith exhibited in how they responded to the Plaintiffs' allegations.

45D. Without limiting the generality of the foregoing, the Plaintiffs state that conduct of the investigations of the individual Defendants by the employees and agents of the Toronto Police Services Board, as plead aforesaid, represents bad faith by members of the Toronto Police Service for which this Defendant is at law responsible. The Plaintiffs state that the conduct of the employees and agents of the Toronto Police Services Board was high-handed, malicious, arbitrary and highly reprehensible and departed to a marked degree from ordinary standards of decent behaviour, which had the effect of increasing the Plaintiffs' mental distress. The Plaintiffs are thus entitled to aggravated and punitive damages.