

ONTARIO COURT OF APPEAL

ROBERT CORNELL

Plaintiff

– and –

THE PEEL REGIONAL POLICE FORCE

Defendant

**FACTUM OF THE APPELLANT,
ROBET CORNELL**

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PART I – THE FACTS

1. The plaintiff makes this appeal with respect to an appeal from a decision made by Justice Janice Philips of the Ontario S.C.J. on April 4, 2010 in Lindsay, Ontario.

2. Over several weeks, the police conducted an investigation of two known gang members and suspected drug traffickers, Henry Nguyen and Tuan Tran. The police, knowing that the two men believed to be dealing in illicit drugs were running an operation known as a “dial-a-dope” operation, believed they were selling the drug known as cocaine, an intoxicating drug that works harm to many innocents. The Peel Regional Police Force had those two under surveillance since December 4, 2009. This was justifiable, as the problem with respect to drugs was of severe and exigent concern in Canada, especially when considered with the numerous gang wars in regard to other criminal organizations like the one in this case, and when complicated by the problem in respect of gang violence. It is a problem that warrants equally severe and exigent action. But not action that is violative of the rights of the innocent, particularly those who suffer with mental handicaps. That is Robert, the plaintiff in the herein preceding.

3. The police thought, based on their surveillance and other evidence, that Cornell’s residence was being used in Nguyen and Tran’s operation as a “stash location,” that is, a place with respect to which Nguyen would reload his cocaine supply for the dial a dope business. However, from that surveillance and other investigation, the police had no reason to believe that the Cornell house was neither a gang house nor a drug house frequented by addicts or users. The police had reason to believe, based on their experience, that stash locations could contain drugs, money, weapons and score sheets. They generally knew that Nguyen entered the Cornell house four times: once “for approximately two minutes”; once “for approximately eight minutes”; next, for “a short visit”; and, finally, for “a short stop.” On the last visit, an unknown male accompanied Nguyen back to the vehicle for a short time and then returned to the Cornell house. This meant that the police had good reason to believe that Cornell was associated with at least one of the gang members and that that individual was welcome in the home. But they never saw one of the men, Nguyen, carrying anything into or out of the Cornell house and that Tran was never observed entering the Cornell house at all, but had been seen in the vicinity.

4. Generally the time of the search, the police did not know who resided there. In evidence though, they indicated that they did know the name of the owner of the premises and that it was rented to a Lorraine Cornell. Jason Cornell (the suspect) had given this address as his home after a car accident at the same address was shown as his residence on the records for the cell ‘phone found on Nguyen mentioned earlier. In fact, the residents of the Cornell house were Lorraine Cornell and her three children: Ashley, 17; Jason, 21; and Robert, 29, who has a mental disability. With respect to his condition, he is not able to speak in coherent sentences that convey meanings with respect to his general environment around him and things happening to him, nor can he really take care of himself, as is evidenced by his full-time caregiver who advised the trial judge in her testimony that she generally looked after everything according to the terms and conditions of his employment agreement.

5. Before the search was conducted with respect to the Cornell’s abode, Detective Barrow of the Peel Regional Police Service, the defendant, swore an Information to Obtain A Search Warrant relating to the Cornell house. That information, among other things, included details in regard to an informant who told police that Nguyen and Tran ran a cocaine dial-a-

dope operation, information that was substantiated by investigation which included surveillance of Tran and Nguyen, checks in various police and other databases and by the opinion of a police officer with long experience and expertise in the investigation of drug trafficking. Other information included the fact that activity at the Cornell house and another house was consistent with them being used as stash locations where Nguyen would reload his cocaine supply for the dial-a-dope business. In particular, the Information stated that Nguyen had made brief visits to Cornell's house on four occasions over a period of approximately two weeks. The search warrant also advised that the tactical team would have to enter through the front entry way of the residence at 247 Smith Street in Lindsay in order to avoid the destruction of evidence by potential occupants and for the safety of both the public and the police because of Nguyen and Tran's history of violence and association with the criminal gang and reasonable grounds to fear the destruction of evidence.

6. The defendant police did not do any investigation or research about the character or background of those in the house and this would include Robert. There was no evidence to suggest that it would have been difficult to do that, or that there was urgency. On the other hand, the police did not necessarily know for sure that Robert was in the house at the time, though it is important to note that through surveillance, they could have kept track of who was in the house at all times, by seeing who was coming and going from the house. Further, using a visual aid, such as binoculars, it could have been clearly seen by them that Robert's condition and physical state was severely and most obviously impaired, walking in an uncoordinated way and saying things that were hard to understand. Importantly, it could be seen by them that he was most significantly challenged, accompanied always by his caregiver.

7. So the police searched and felt that it was important to execute the three warrants for entry as closely in time as possible. As Constable Smolinski indicated in his trial testimony, the police were concerned that if a person inside one residence was able to make a phone call, it might lead to loss of valuable evidence at the other home. A tactical team was to be used at both residences and in the stop of the vehicle, and they were made use of. Its job was to secure the site and then turn it over to the investigators who would conduct the search.

8. Shortly before executing their warrant to search the Cornell house, the police observed two people, later identified as Lorraine (Jason's mother) and Ashley Cornell (his sister) leave and drive away. The other search warrants relating to this operation had already been executed, and Nguyen, the only suspected drug dealer or gang member ever observed entering the dwelling, was already in police custody. The police made no effort to intercept the departing women in order to secure — or at least attempt to secure — a nonviolent, peaceful means of entering the residence to search within. Instead, some 15 minutes later, the tactical team made it's unannounced and violent "dynamic entry" into the Cornell house. There were nine police officers with weapons drawn and wearing balaclavas and body armour in the "dynamic entry" which involved, while yelling "Police, search warrant," battering the front door with a battering ram, and entering the house while yelling, alarming everyone inside. The police dented the front door with their battering ram and broke the door frame, destroyed some of the interior doors, pried locks off a garage door and rendered the garage door itself inoperable.

9. It turned out that the only person in the home at the time was Mr. Cornell, who was 29 years old and mentally challenged. Robert was forcibly "taken down", pushed to the floor, "proned out", and handcuffed with his arms behind his back. Robert's emotional distress

became quickly apparent and the officer dealing with him removed the handcuffs, took off his balaclava, and called the accompanying paramedic to assist. The police contacted his mother to ask that she return home to care for her “distraught” and “very scared” son. According to the evidence, from the time of entry to the time that Robert was out of the handcuffs and seated on a couch being comforted by one of the officers was about four minutes. Robert’s mother came back home. She testified that, upon her arrival, she was initially prevented from seeing Robert. When she was let back into the Cornell house, she found that her house was a mess. But she also indicated at trial that she was able to repair much of the damage with material she had around the house without incurring any expense.

10. The tactical team did not have the search warrant with them when they entered the house. The Crown led no evidence that it was not feasible in this case to have a search warrant in possession. Detective Bent, who was in charge of the investigation and of the search that started as soon as the house was secured by the tactical team, had a copy of the warrant. He entered the residence approximately four minutes after the tactical team went in. The lone occupant present in the house at the time of entry, which would be the handicapped Robert, did not ask to see the warrant and neither did Ms. Cornell, although she was shown a copy when she came back to the house not long after Detective Bent’s arrival.

11. The investigating officers discovered 99.4 grams of cocaine in the corner of the basement bedroom of Jason Cornell, in a box marked “Jason’s stuff”. Cornell was later arrested at his place of employment. He formally admitted that he possessed this cocaine for the purposes of trafficking. At his criminal trial, the Supreme Court said that he should be convicted because the evidence of the search should be admitted because the search was reasonable under section 8 of the Charter of Rights.

12. The trial judge at the criminal trial dismissed the s. 8 challenge. He found as a fact that the police had no means of knowing before executing the warrant who, if anybody, was in the residence or whether there was anyone in the residence who might destroy the cocaine, if there was any, upon learning of the police presence at the door. The trial judge also found that the police had done what could reasonably be expected in formulating their decision to use a forced entry. Finally, the trial judge found that the forced entry and corresponding deviation from the standard practice of “knock and announce” when executing a search warrant were justified in the circumstances. In his opinion, the police had reasonable grounds to anticipate either the use of violence by the residents of the Cornell home or the destruction of evidence. The Supreme Court basically agreed with the trial judge without saying much more.

13. Robert was very upset and needed \$21,500 worth of counselling with respect to impairment of his mental condition as a result of the egregious trauma caused by the sudden break and entry into the home and his take down. So he sued the police force for negligence in that they caused him harm by not taking steps before the search to find out who was in the search, and they conducted the search in a careless harmful way without thinking about Robert and his condition. He also sued for damages based on violation of the section 8 search and seizure right in the Charter.

14. On April 4, 2010, in Lindsay, the judge in the Superior Court, however, found as a fact that only \$5,000 of damage was caused because of the receipts that were tendered by Robert at trial added up only to \$4,569 and at best only \$450 of damage was pain and

suffering damage. But in any event, putting the damages issue aside, the biggest concern of Robert in this appeal is that the trial judge made a ruling that the police could not be found to be liable with respect to the decisions they had made with respect to the search of the abode, and the action was barred by the fact that the Supreme Court dismissed the Charter claim, finding it reasonable under section 8 of the Charter. This was because in her view the police did not owe a duty of care in regard to the people in the residence. The search was found valid and reasonable by the Supreme Court, she said. So in her opinion that meant that to the extent there was a duty of care, which there was not because there was no precedents for such a duty, the police did not breach that duty, and Charter damages were not available because the Supreme Court said there was no violation in regard to the search.

15. Robert appeals and makes and asserts a powerful challenge against each and every aspect of the rulings that the trial judge made in her judgment and reasons for judgment.

PART II - POINTS IN ISSUE

16. Was the police force negligent and should it pay Robert \$21,500 in damages?

PART III – THE LAW

17. The police owed a duty of care. The facts above show this. They should have known that Robert was in the house and that if they broke into the residence, Robert might be alarmed and suffer damage. This case is consistent with other cases where bad police investigation has resulted in negligence by the police and damages liability.

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

Anns v. Merton London Borough Council, [1978] A.C. 728

Cooper v. Hobart, [2001] 3 S.C.R. 537

Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562

Hill v. Chief Constable of West Yorkshire, [1988] 2 All E.R. 238

18. In *Hill v. Hamilton-Wentworth*, McLachlin C.J. said:

In accordance with the usual rules governing proof of a cause of action, the plaintiff has the formal onus of establishing the duty of care: *Odhavji* and *Childs*, at para. 13, should not be read as changing this fundamental rule. Uncertainty may arise as to which factors fall to be considered at this part of the stage one analysis, and which should be reserved to the second stage “policy” portion of the analysis. The principle that animates the first stage of the *Anns* test — to determine whether the relationship is in principle sufficiently close or “proximate” to attract legal liability — governs the nature of considerations that arise at this stage. “The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant”, for example expectations, representations, reliance and the nature of the interests engaged by that relationship: *Cooper*, at paras. 30 (emphasis deleted) and 34. By contrast, the final stage of *Anns* is concerned with “residual policy

considerations” which “are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally”: *Cooper*, at para. 37. In practice, there may be overlap between stage one and stage two considerations. We should not forget that stage one and stage two of the *Anns* test are merely a means to facilitate considering what is at stake. The important thing is that in deciding whether a duty of care lies, all relevant concerns should be considered. [our emphasis]

19. The trial judge did not consider all relevant concerns.
20. The damage calculation of the trial judge was factually wrong. Justice requires that Robert receive the full amount of his claim. As the evidence above shows, his pain and suffering was extreme and warrants redress.
21. It is true that the Supreme Court dismissed the Charter arguments, and found the search to be generally satisfactory. But the police conduct was severely criticized by the Court. The Charter ruling should not be regarded as determinative and, because it was with respect to a different issue, there can be no *res judicata* or issue estoppel.
22. It is respectfully submitted that because a search is reasonable for the purposes of the law of the Charter does not mean that it is not negligent. A reasonable search of a home under section 8 might still be considered to be violative of common law duties of care owed to innocent persons in the home. A reasonable search for section 8 purposes, as a matter of logic, could still be a careless search. After all the police have duties and obligations under the *Police Act* to protect the public and provisions such as that can define the content of a standard of care. Persons in a house, who did nothing wrong at all except being in the wrong place at the wrong time, should be able to be compensated for damages caused by a violation of duty. Breaches of duties should be met with the payment of a money award.

References: *Holland v. Saskatchewan*, [2008] 2 S.C.R. 551
 Smith v. Jones (2004) 24 O.R. (2d) 349.

PART IV – RELIEF SOUGHT

23. Robert asks for the relief sought in his Statement of Claim.