IN THE SUPREME COURT OF ONTARIO

PRE-TRIAL CONFERENCE MEMORANDUM

PRE-TRIAL DATE:

SHORT STYLE OF CAUSE: ROSEMARIE JOHNSON et al

and

HAROLD ADAMSON et al

Submitted by the: Plaintiff

Counsel for the Plaintiffs: Charles Campbell
Iler, Campbell & Assoc

Counsel for the Defendants: R.M. Parker
Metropolitan Toronto
Legal Department

THEORY OF THE PLAINTIFF'S CASE INCLUDING FACTUAL CONTENTIONS:

- Attached is an extended brief on the factual and legal issues.

  a. Liability

  b. Damages

THE LEGAL ISSUES RAISED IN THE PLEADINGS AND TO BE DETERMINED AT TRIAL:

1. Whether the Defendants are liable for tresspassing, false arrest, assault, battery use of undue force, and negligence for actions on May 12, 1979.

2. Whether the Defendants are liable for tresspassing, assault, battery and use of undue force, and negligence for actions on August 26, 1979.

3. If the answer to 1 and 2 is yes what are the special and general damages.

4. If the answer to 1 and 2 is yes should punitive damages be awarded.

PLEADINGS AND RELEVANT MATTERS:

1.	Are the pleadings in order or do they require amendments.	In order
2.	Are there any contemplated or outstanding motions?	Yes see below
3.	Are productions complete?	Yes
4.	Are all transcripts available?	Yes
5.	Other.	

MOTIONS:

Will there be any motions at trial? Yes

If so, what are they? On whether jury notice should be struck. Motion to compel that certain questions refused on discovery be answered.

ADMISSIONS: None

REPORTS:

1. Have reports been exchanged and has notice been given under The Evidence Act?

   Notice has not been given. Actuarial and other Income Loss Reports not yet prepared. Medical reports have been exchanged.

BUSINESS RECORDS:

1. Will any be tendered under The Evidence Act and has the appropriate notice been given?

   Business Records and Trial aids have been exchanged, but notices have not been given at this time.

EXPERT WITNESSES:

1. Will any be called? Yes

2. On what issues? Actuarial, Medical, Police Procedures, Race Relations

3. Identity of experts?

TRIAL DATE:

1. Are the parties ready for trial? Not at this time.

2. Are there any times the case cannot proceed because of witnesses or other matters?

3. How long will the trial last? 4 weeks

SETTLEMENT:

What are the prospects? Unlikely

DAMAGES:

Special Damages - Can any or all be agreed? Unknown at this time. This has not yet been canvassed by the parties.

Funeral Expenses (Toronto)	$ 2,133.80
Funeral Expenses (Jamaica)	$ 1,050.00

Travel Expenses to Jamaica for Buriel	$ 1,425.00
Repairs to House	$ 585.00
Hospital Expenses	$ 246.00
TOTAL	$ 5,439.80

General Damages - [see attached]

Punitive Damages - $50,000.00

IS THIS A CASE WHERE IT MAY BE ADVISABLE TO DIRECT A REFERENCE? No

WHAT PRE-TRIAL ORDERS ARE REQUESTED? None

FACTUAL AND LEGAL ISSUES

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B P.C. Inglis' Statement

C P.C. Cargnelli's Statement

D Mrs. Johnson - Direct Examination at Manslaughter Trial

E Bevolyn Williams - Direct Evidence at Manslaughter Trial

F Colsie Johnson - Direct Evidence at Manslaughter Trial

G Inspector Stroud Cross Examination at Manslaughter Trial

H Police Procedures re Mentally Ill Persons - Form 458 and revised Form 275 in use after Manslaughter Trial

I Adamson Discovery

J Police Regulation No. 51

K P.C. Inglis - Discovery

I-A) Events of August 26th, 1979

The events of August 26 have been subject to meticulous examination including a preliminary inquiry, a manslaughter trial and discovery in the civil action. The versions recounted by the adult participants have remained relatively consistent. For purposes of this report I enclosing the following:

a) P.C. Inglis' statement to investigating OPP officers; Tab <B>; (see also Discovery Answers sec. 11-c-i);
b) P.C. Cargnelli's statement to investigating OPP officers; Tab <C>;
c) Mrs. Johnson's direct evidence at the manslaughter trial; Tab <E>;
d) Beverley Williams' direct evidence from the manslaughter trial. Tab <E> It seems more appropriate to let the participants speak for themselves. My comments will follow. Please read those transcripts before proceeding further. In what follows I assume that the reader is familar with the basic facts outlined there.

There has been considerable controversy over the account of the facts by two of the Johnson children, Colsie and RoseMarie, particularly Colsie who has said that she witnessed the shooting. She is the only person other that the police officers who claims to have done so. I have enclosed her evidence from the manslaughter trial. (Tab <F>) By that account P.C. Inglis shot Albert Johnson while he was on his knees and after he surrendered to police. Colsie gave that account to the press shortly after the shooting and it was widely reported. She was nine years old at the time of the incident.

Colsie's version of the facts was immediately and publicly attacked by the Metro Police. OPP investigators who interviewed her several days later alleged it was a fabrication. I have enclosed the evidence of Inspector Stroud to this effect given at the manslaughter trial. (Tab <G>) His allegations are vehemently denied by the family and by Colsie.

Inspector Stroud interviewed Colsie at the time in the presence of Nancy Kasner then an articling student in the office of Pinkovsky, Lockyer and Martin. David Martin had been acting for Albert Johnson on various minor charges pending at the time of death. Stroud accused her of coaching Colsie during the interview. Ms. Kasner, now a Crown Attorney, denies the allegation.

At the time of the manslaughter trial Mr. W.J. Morrison Q.C. the Crown Prosecutor did not want to call Colsie to testify. He advised Mrs Johnson that Colsie's evidence was not credible. Mrs. Johnson insisted that all the evidence be presented to the jury. Colsie gave the evidence enclosed at Tab <F>. Then Mr. Morrison called Inspector Stroud who effectively destroyed Colsie's evidence by his allegations of coaching and fabrication. See Tab

<G>. Mr. Morrison did not call the reporters who heard that same story from Colsie the day of the shooting in order to rehabilitate her evidence.

I started the civil proceedings several months after the incident. Knowing the history of controversy over Colsie's story (which predated the manslaughter trial) I interviewed her in the presence of a child psychologist, Ester Cole. Her opinion about Colsie's truthfulness is not admissible. But in the circumstances I wanted some protection for myself and my staff, as well as the benefit of Ester's opinion about Colsie. That opinion was that Colsie was was not "making it up" and appeared to be telling what she recalled. But children's memories are even more fallible than most and her story was only the truthful best recollection of a nine year old.

The forensic evidence regarding the trajectory of the entry of the fatal bullet is consistent with either the evidence of the police officers or of Colsie.

The Johnson family suspects a cover-up to hide evidence that support Colsie's version of the facts. They point out that there are no photographs of the garden edger which was allegedly Mr. Johnson's weapon taken at the scene. The officers who allegedly took the item from the house give contrary evidence whether the tape on the handle was black or white. Mrs Johnson and her sister are emphatic that they cleaned the house the day before and that the edger was not upstairs. The forensic evidence disclosed no blood on the handle of the edger.But the forensic evidence was also that given the glossy nature of the tape on the handle there is no reason to expect that one might find traces of blood. The family believe that the police obtained the edger elsewhere after the incident took place and fabricated the story in order to exculpate the police officers involved. But it is clearly important in this regard that Mrs. Johnson has given evidence that as she was leaving the house and Albert Johnson was coming down the stairs she heard of the officers shout, "Look out, he's got an axe."

In the criminal proceedings there was one item of evidence excluded by the trial judge which is of obvious importance. It is the evidence of Bevolyn Williams that just prior to the shots she heard "the fat one" say: "I go kill that fucker!" "The fat one" was subsequently identified as P.C. Dicks who was not charged. That evidence was excluded because it was deemed not relevent to the actions of P.C. Inglis when he fired the shots. Dicks was present at the time but was not charged. In civil proceedings Dicks is a co-defendent, and presumably the evidence is admissible.

Colsie gave evidence at discovery as one of the plaintiffs. This evidence has significant discrepancies with her previous version of the incident. For example she has ten police officers entering the house before the actual shooting and says the officers followed Albert Johnson down the stairs. These are perhaps understandable confusions for a young witness, but also do provide significant ammunition for cross-examination.

I-B Events - May 12th, 1979
Certificate No. 46-294416

On May 12th, 1979 Mrs. Johnson called the police seeking their assistance regarding her husband's behaviour. In particular he was spraying the hose at the children and would not stop. She was concerned about him because he had recently been fired from his job and was upset about this turn of events. She expected the officers to be of friendly assistance dealing with a distraught person.

According to the evidence of several adult members of the Johnson family who were on the lawn outside the house at the time the police arrived the behaviour of the officers who arrived on the scene was outlandishly aggressive. According to them Albert Johnson ran to the front door of the house when the police approached. The police did not stop to speak to the adults on the sidewalk. One of the officers went to the front door and spoke to Albert Johnson through the closed door. They alleged that he punched Albert Johnson through the glass door then opened it and pursued him into the house. Needless to say, the officer's version of the incident was quite different. He alleges that Albert Johnson punched him through the glass door and he pursued him into the house presumably feeling it necessary to make an arrest. The physical evidence, according to a neighbour who claims to have cleaned up the broken glass, is that the glass was on the inside of the house which is consistent with Albert Johnson's version of the facts.

Albert Johnson strenuously resisted the arrest by the police officers. Eventually seven officers subdued and hand-cuffed Albert Johnson in his bedroom. He was cut and injured. According to the adult members of the Johnson family, no officers ever approached them to discuss an appropriate method of dealing with Mr. Johnson in the circumstances.

I-C Events Between May 12th, and August 26th, 1979.

Albert Johnson was involved in a number of incidents involving the police between May 12th, 1979 and August 26th, 1979. The following outline notes the relevant dates and important facts:

May 12th/79 - Mr. Johnson was detained in the Toronto Western Hospital - May 12th to May 14th, 1979. After a mental examination he was released because there were no grounds to hold him under the Mental Health Act. He was charged with assault police after his release from the hospital with respect to the May 12th incident. He was readmitted to the Toronto Western Hospital May 17th to May 24th for unrelated surgery.

May 27/79 - A complaint by neighbours that Mr. Johnson was causing a disturbance brought P.C. Inglis to he Johnson home. P.C. Inglis spoke with Mr. Johnson, calmed him down, and left without making an arrest. On returning to the station, P.C. Inglis looked up and read the Occurrence Report of the May 12 incident.

June 11/79 - Independent witnesses verify that Albert Johnson got into a fight with P.C. Bacon on this date and behaved in a provocative and dangerous manner with him. P.C. Bacon stopped Mr. Johnson in the street. Mr. Johnson was allegedly behaving in a strange fashion. Mr. Johnson became quite angry with P.C. Bacon and a fight ensued. It was feared by P.C. Bacon and the independent observers who intervened to assist the officer that Mr. Johnson was attempting to get the officer's gun. Mr. Johnson was charged as a result of this incident.

June 19/79 - Mr. Johnson was arrested and charged with cause disturbance regarding an incident in the street outside his home. No violence was reported Mrs. Johnson bailed out her husband. According to Mrs. Johnson she told the police officers on the occasion of her husband's release that her husband's behaviour at home was fine and caused no danger, but that he was "troubled" by his recent misfortunes.

July 11/79 - There is a tape recording from the police emergency switchboard of an alarmed call from Mrs. Johnson's sister Bevolyn William about Mr. Johnson. Mr. Johnson can be heard in the background shouting words that on the tape are unintelligable. Mrs. Johnson reports that on that occasion he was angry and pushed over the

television that she and Bevolyn Williams were watching. When the police arrived Mrs. Johnson sent them away telling them there was no problem. In their evidence of the manslaughter trial the officers thought from the flushed nature of Mrs. Johnson's cheek that she had been slapped. She denied this.

July 12/79 - Mr. Johnson was arrested on the street and charged with possession of a dangerous weapon being a stick. He was detained for a mental examination from July 12th to the 17th. He was found fit to stand trial. The trial took place July 31st, 1979, and he was acquitted.

Aug. 3rd/79 - Mr. Johnson was arrested for cause a disturbance in Christie Pitts where he was "preaching". Mr. Johnson was subsequently acquitted on this charge.

Aug.22nd/79 - Michele Rosemary Johnson called the police because Albert had locked her mother in the basement. When the police arrive at the house Mr. Johnson had released his wife. Mrs. Johnson sent them away. The officers alleged that Mrs. Johnson said that she wanted to separate from her husband. Mrs. Johnson says that she told the officers that she wanted to move away, but not from her husband, but rather from 14th Division which she alleged was making a great deal of trouble for her husband.

Aug. 24th/79 - Police officers pursued Albert Johnson to his house when they observed him riding the wrong way on a one way street on his bicycle. No arrest was made.

At the time of his death Mr. Johnson had not been convicted of any offence in Toronto. There was apparently no contact with the police prior to May 12th. Mr. Johnson was never found in need of involuntary commital on any of the mental examinations he underwent during this period.

I-D Manslaughter Trial

P.C. Inglis and Cargnelli were charged with manslaughter after the O.P.P. investigation. Mrs. Johnson was advised by her criminal counsel that the charge should have been murder. Mr. Clayton Ruby and David Martin advised her that a charge of constructive murder under sec. 123 of the Criminal Code would more likely lead to conviction. Their argument was that the entry to the house was unlawful and without excuse. Therefore the police entry technically constituted a break and enter. Self defense is not available to someone using force in the course of committing an indictable offense. Thus EVEN IF Mr Johnson had a garden edger when he came down the stairs the officers would be guilty. Mr. Ruby brought a motion before the Chief Judge of the High Court seeking a direct indictment for murder based on the evidence taken at the preliminary inquiry. The motion was opposed by the Crown and dismissed.

The Crown theory of manslaughter was also based on the entry to the house. Only the two officers who forcibly entered the house were charged. The Crown presented forensic evidence that there was no evidence of spittum on the side window screen of the Johnson house or on the officers' uniform. This directly contradicted the officers story that Johnson spit on them through the screen. There was considerable evidence whether there were women and children screaming inside the house as alleged by the officers as an excuse for entry. The evidence of those in the house strongly contradicted the police version. The evidence of neighbours outside is also strongly against the police version. The Crown also cross-examined the officers with some force on their bahavior once they entered the kitchen particularly on the use by P.C. Cargnelli of a large flashlight to beat Mr. Johnson. It caused a gash in his forehead with severe bleeding.

In my opinion the Crown case failed because the obviously and grossly negligent behavior of the officers - that is the entry to the house and the behavior in the kitchen - was not the "direct" cause of Mr. Johnson's death as the Criminal Code would define it. There was too much that happened between these events and the actual shooting several minutes later to prove manslaughter; thus, at the time of the shooting, the officers were acting in self-defense.

During the defendants' case evidence of every incident between Albert Johnson and the police between May 12 and Aug 26 was presented by every officer who ever had anything to do with Albert Johnson. In addition evidence was presented that he had been released from hospital after mental examinations on two ocassions between May 12 and August 26. Further there was evidence that he had been sentenced to jail in Jamaica in 1977 with a recomendation for psychiatric care. Every aspect of Albert Johnson's allegedly "strange" public behavior was recounted. Every police officer said that they thought Albert Johnson was an

"MI" (mentally ill). This evidence was allowed suposedly to show that the deceased had a propensity for violence. As noted in section I-C very few of the incidents had any elements of violence. The point was not argued vigourously by the Crown. The assumption seemed to be that a "crazy black man is violent".

The METFORS psychiatrist who examined Mr. Johnson in June of 1979 and determined "no major mental disorder" but he was most effectively cross-examined by the defense counsel who put to him as hypotheticals the many incidents recounted by the police and asked whether if he had known about these incidents might not have affected his opinion. Of course the answer was yes. There was virtually no effort by the Crown to rebutt this attack.

In the result the vast weight of the evidence at the trial focused on Albert Johnson and his emotional and mental health. Anyone listening would have been easily convinced that Mr Johnson was severely disturbed. Not only did the jury find the officers not guilty but they also made a recommendation that in the future decisions whether to release people from mental hospitals should be made in consultation with police officers.

Mrs. Johnson has always admitted that Albert was "troubled" after May 12 and up to the day of the shooting. She also consistently denied that he was ever dangerous. She was not given a chance at the manslaughter trial to defend her husband on this point. She testified first. She was not asked about the various incidents alleged nor was she recalled to rebutt or explain them.

I attended the manslaughter trial almost in its entirety. It was my conclusion after hearing the volume and intensity of the police evidence that there was no excuse for any police officers to approach Albert Johnson by August 26 without being fully informed about him and the dangers in dealing with him if any. The obvious advice about the "danger" was that Albert Johnson hated policemen, but that he was harmless to other persons, especially his family.

II--B NEGLIGENT ADMINISTRATION THEORY

i) Introduction

In this action we pleaded "negligence in the control, management and operation of a police force" as against the defendant Chief Adamson and the Board of Commissioners of Police. Particulars of this negligence were set out in the statement of claim and are quoted at Tab A in the Court of Appeal reasons. The general purpose of this strategy was give the jury an opportunity to blame the poor back-up available to the police officers, rather than the officers themselves. Juries do not like to find police officers liable given the difficult job they do. No doubt the Johnson case can be presented as one of those situations where a police officer has to intervene in a difficult "messy" domestic matter. By calling into question the training, back-up and administration of policing we allow the jury to say that even if the individual police officers are not responsible because they did the best they could there is nevertheless liability on the Chief and Board for sending the men out without proper training, misinformed, and without proper backup. Put very crudely there is better chance of establishing liability where we can attack "the management" rather than the Employee. Needless to say such a claim cannot be made in the abstract, and the particulars will be dealt with presently.

My conclusion after reviewing the evidence on discovery is that one of the particular allegations regarding procedures and record keeping for the mentally ill is most damning, II-B-(viii), possibly a winning argument and should proceed. the other allegations are noted below in II-B-(ii) to (vii).

ii) Common Law Vicarious Liability of Police Administrators

Until the Court of Appeal reasons in the Johnson case the law with respect to police liability was understood to be that there was no vicarious liability of police management for the torts of their officers while on duty. The reason for this, quite logical in the context of nineteenth century law enforcement, was that police officers had an absolute discretion who to arrest, and as to how to carry out their job on the street. The police chief was not able to tell individual officers who to arrest. Why should police administrators be responsible for their behavior in making those arrests? There is long line of cases denying the responsibility of municipalities for the torts of police officers on this basis. It was my submission that this old law is no longer appropriate in the modern era of highly managed police forces and the elaborate efforts of co-ordinated teams of police. Police officers are no longer independent.

Presumably in response to public outcry that there was no person of substance to pay the damages awarded against officers in the few successful actions the legislature provided in section 24 of the Police Act that the Chief of Police was responsible to pay damages awarded against a police officer with

respect to torts committed in the course of his duties. I note in passing that there is no such indemnification for the members of the Board of Commissioners of Police.

It is generally accepted that the provisions of section 26 do not create vicarious liability for police management, although a careful reading of that section suggests the contrary.

In the original pleading in this action we alleged a number of failings in police administration that appeared to us to have contributed to the death of Albert Johnson. They were at that time vague. This infuriated the defendants, but it was a case where the plaintiffs "knew nothing" and the defendants have control of all the relevant information. Thus we proceeded through discoveries on all.

iii) Allegation: Racism

In paragraph 36 we alleged the failure to deal with racism in 14 Division contributed to the death of Albert Johnson. I was advised by various municipal politicians active in the police issue that the apparently racist behavior of officers from 14 Division had been directly articulated to senior police officials, and in particular the attitude of the Division Commander, Schultz was strongly criticized. Indeed that individual was removed from his position at 14 Division a few months after the Johnson shooting although we had no direct evidence of the reasons. Second, I had, and still have, extremely reliable evidence of direct complaints to then Deputy Chief Ackroyd regarding racism attitudes in 14 Division at approximately the time of the Johnson incident. My informant reports taking the Deputy Chief to the locker room at 14 Division to show him a sign there that said: Bust a Paki - two days off; bust a nigger - four days off. Albert Johnson had complained of police harassment based on race in many conversations reported to us. Even his daughters complained that after the shooting and before the manslaughter trial that while they were sitting on the front steps of their house two police officers in cruiser stopped in front of their house and made derogatory remarks about the little "nigger" girls. Allegations such as these are difficult to deal with in the best of times let alone the deteriorating race relations in the City of Toronto. Invariable each side accuses the other of lying. As the action progressed I determined that the there was not sufficient direct evidence of racism causing Albert Johnson's death. I do not propose to proceed with it, although the issue will pervade the trial.

iv) Allegations: Re Complaints

We also alleged that the defendant bureaucrats failed to take reasonable steps to investigate the complaints of Albert Johnson about police harassment. As you may recall Mr Johnson had complained to the Human Rights Commission about his various run-ins with the police. Those statements by Mr Johnson include his fear that police wouls break into his house and kill him. It

seemed to me that a proper investigation of those complaints would invariably have lead to the obvious assessment of the situation and appropriate instructions to police officers about dealing with Albert Johnson. I have concluded based on the evidence at discovery, however, that the delivery of these complaints to the police ocurred so close in time to the shooting itself that the defendants would successfully be able to argue that they had insufficent time to take any action.

v) Allegations: Training½Non-violent Arrest

Further we alleged that there was inadequate training of constables in the techniques of non-violent arrest. This is the classic allegation in American cases of this sort. It arises at two points in the facts. At the time Albert Johnson came down the stairs, presuming he had the garden edger as alleged, it is suggested by some persons, including consulting police expert I have talked to that Mr. Johnson could have been subdued by less force than the officers' guns. I have concluded that if the officers are believed when they say that Johnson had a weapon that the jury would be persuaded that the situation was a real emergency, that the lives of the officers were in danger, and that the officers were justified in using their weapons. There was no opportunity at that point to use other methods of non-violent arrest.

The other point where the issues arises is at the point of entry, the kitchen door. When the officers entered to house as they say to make an arrest under the Mental Health Act why did they not behave in a non-threatening fashion with the suspect. They knew, or ought to have known once they entered the house that no persons were in danger. It appears that the officers were totally inept in making the arrest in an appropriate fashion. However on discovery I learned that the basic training of all police officers contains clear instruction that when dealing with suspected mentally ill people officers should behave in non-threatening fashion. Indeed these instructions seem so clear that the main argument for the plaintiffs will be that the defendant officers failed to follow their own training instructions. See section II-C below.

In any event I have concluded that we should not pursue this branch of alleged negligence against the defendant bureaucrats.

vi) Allegations: Selection/Personnel

We further alleged that the Chief and Board had failed to ensure that their constables were fit for duty. It would appear from evidence obtained on discovery that none of the individual defendant officers have a record of complaints of violence against citizens prior to this incident. I note that my police expert was highly critical of the Toronto police department for the inadequacy of its in-service training for officers in dealing with domestic problems. However this seems

too remote to be of any use.

vii) Allegations: Campaign to Incarcerate

The last allegation in paragraph 36 provides that there was "a campaign to incarcerate" Albert Johnson and that campaign should not have been allowed by the senior officers. The defendants' lawyers interpret this as an "allegation of conspiracy". It fact we seek to expose what was "really" happening. In this view we are advised by certain "street-wise" social workers and lawyers. Crudely put, the theory is this: Albert Johnson was perceived by the police to be "crazy" and they believed he should have been locked up in a mental institution for his own good. This view is evident in many police accounts of the incident. After the May 12 incident the police attempted to have Mr. Johnson committed rather than arrest him. He was released, much to their distress. They then charged him. At one point in June Mr. Johnson was remanded in custody for a mental examination. The result of that examination was also a release. Indeed the police have long complained that the mental hospitals are too lax in releasing people that they take in. The police would rather the doctor give them "help" than arrest. This point was quite explicit in the manslaughter trial where the opinion of the doctor who released Mr. Johnson was attacked because he didn't know all the facts known to the police about Mr. Johnson "weird" street behaviour.

Because the police were frustrated in their attempts to put Mr. Johnson in a mental hospital they determined to "keep the heat on him" until they managed to have him jailed for whatever reason so that he would finally be off the street, but more important so that he would get "help". This collective decision was probably not articulated as such. It was simply the way such problems were handled - without much thought. It suggests not that Mr. Johnson's arrests were illegal, but rather that the discretion that every police officer exercises about whether to arrest would be exercised against Mr. Johnson. It was my contention that this kind of "campaign" is a common aspect of police work. Some may argue it is a necessary and proper feature. It certainly is well known and as such it should be properly managed because there are substantial dangers that such campaigns will be provocative to the victim especially if they are not successful.

A strong argument can be made that the Johnson case illustrates this phenomenon. But I have concluded that it should not be advanced at trial as a branch of the negligence claim against the bureaucratic defendants. At the point of arrest it is difficult to argue about the" real" meaning of numerous earlier incidents. Either there are reasonable grounds or there are not. Indeed our strongest argument is that those grounds do not exist. It seems unproductive to take on the difficult remoteness issues implicit in the argument. Furthermore the

argument is closely related to the remaining branch of the negligence claim regarding mental health records which puts approximately the same issue in a more coherent fashion.

viii) Allegations: Re Mental Health Records

a) General

Discoveries on this topic have borne out my worst suspicions and I have concluded that this issue should be pursued vigorously at trial. The facts are very damning of the police administration and will serve the purpose noted above of shifting the focus of attack to the police administration for failing to properly back up the men in the street. In all likelihood the defendants will get in voluminous evidence about the history of Albert Johnson's mental health derived from numerous contacts with him by some sixteen different officers. This was the bulk of the evidence at the manslaughter trial. They KNEW, or OUGHT TO HAVE KNOWN how to handle Albert Johnson before they opened the kitchen door.

In discovery we learned that there was in existence at the time of Albert Johnson's death (as there is now the "green card system) a system for dealing with persons suspected of being mentally ill. I would argue that that system was inoperative due to negligent administration and that caused, or contributed to the death of Albert Johnson.

b) Forms

Form 458 was identified by P. C. Inglis as a form in use in 1979 that officers were suppose to complete when dealing with chronic domestic disputes, mentally disturbed persons and neighbourhood disputes. It is included in the documents at Tab C. It was to be forwarded to the Community Relations Officer.

Thereafter P.C. Inglis was unable to tell us what should be done with the form. Nor could former Chief Adamson even after inquiring of his research department. Eventually in his discovery he refused to answer any further questions on the subject. (See Tab I,Q-77) I may want to bring a motion to compel this answer before proceeding to trial. At this point I reasonably certain there were no standing orders to officers regarding these forms, and no standing orders to the Community Relations staff what to do with them once they got them.

No forms 458 were ever filed with the Community Relations Office on Albert Johnson. At the manslaughter trial every police officer testified that he believed that Mr Johnson was an "MI". At the civil trial each of them will have to answer questions from me why he did not report his concerns on the subject to the appropriate authorities.

Ironically the only officer who did report problems was P.C. Inglis. He did so by writing a memo on his occurence report on the occasion he visited the Johnson home in June '79 that the case should referred to Community Relations. Apparently this was not followed up.

In my opinion if the police record of contacts with Albert Johnson and his family had been gathered and analyzed properly, including the interview with Mrs Johnson the conclusion would have been available that Mr. Johnson was not dangerous to his family, but that he was extremely hostile to the police. This information should have been available to officers in 14 Division, or available to them by radio. Had the officers on the scene known this their behaviour would have been different.

c) Tort Liability of Government Officials

The claim against the Chief and the Board of Commissioners for negligence in the "control management and operation of the police force" raises the thorny issue of the tort liability of government officials. The failing identified above regarding mental health records poses several difficult versions of this problem.

The first line of defence to this claim was that advanced by the defendants in their ;motion to strike thi;s branch of the claim. They argued that senior police officials are not vicariously liable and therefore they cannot be sued. Our argument that they were nevertheless liable for negligence in the exercise of their own duties was upheld in the Court of Appeal. I note that the Supreme Court of Canada did not decide the issue, only that they would not hear it on a motion regarding pleadings. Therefore at the highest level the issue is still open.

Section 16 of the Police Act creates their statutory powers. It says:

> "A board may by by-law make regulations not inconsistent with the regulations under section 72 for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties."

In 1984, the Supreme Court of Canada clarified the law with respect to the negligence of government agencies. In Kamloops vs. Nielsen, Hughes and Hughes, the Supreme Court essentially threw out the old distinction between misfeasance and nonfeasance substituting analysis based on a characterization of conduct by such an agencies as being either a policy nature or administrative nature.

I believe a good argument can be made based on the most conservative view of the law, that is that both the Board and the Chief were guilty of " negligence" in their duties in this area. It appears from what we have learned on discovery that they did not even consider the problems raised by improper and inadequate mental health records.

The Board passed O.P. 50 a directive regarding the apprehension of mentally ill persons. We were told they never considered problems arising from other contacts with mentally ill persons. No other directives were given. If they seek to rely on Form 458 it appears that there were no operational directions how to use, or even whether to use it, let alone directions from the Board on the point.

If the Board's powers are unlimited and its duties vague those of the Chief are invisible. The defendants argue that the Act neither confers powers nor creates duties for the Chief. On the ~~fact~~ face of it this is true. But it is also true that

the regulations create a hierarchy in which the Chief's orders must be obeyed in every respect except who to arrest and charge. (This, in my opinion, is the last bastion of the independent constabulary.) Thus we have the dissent of Jessup J. that there can be no claim against the Chief.

We will argue that the Chief by implication has the responsibility to insure good policing. If the system for utilizing Form 458; broke down it was his responsibility to "fix" it. Probably the Chief can construct an argument that he delegated the job to somebody, but so far he doesn't know who. The point is worth pursuing.

d) Causation and Remoteness

One key question in this area is whether the failure of the police administration described "caused" the injures to Mr. Johnson. This obviously a difficult legal problem. Ultimately we may lose on the issue of remoteness. However I believe an excellent argument can be made. The police administration obviously felt some system was necessary, hence form 458. But, it seems, no steps were taken to implement it. And the officers on the scene clearly relied in part on their beliefs about Albert Johnson obtained from their isolated contacts and "stories" they heard around the station.

Liablity with respect to inadequate safety precautions against parties who are not the direct cause of the accident is established in law. I note the recent case of Beutler v Union Gas (unreported) where liability to the gas company on a fifty percent basis was awarded because of the inadequacy of the gas company safety precautions in an emergency.

Assuming a duty to establish a system record keeping regarding mentally ill people is found to be a duty of either the Chief of the Board or both will the breach of that duty be found to be a cause, or a contributory cause, to the death of Albert Johnson?

The leading case on cause-in-fact is Millette et al v. Cote et al [1972] 3 O.R. 224, aff'd. (1974) 51 D.L.R. (3d) 244. In that case, the Court held that there was a duty on the O.P.P. to take precautionary steps regarding icy road conditions. However, on appeal the 25% apportionment of liability against the police was overruled on the ground that causation had not been established between the precautions that ought to have been taken and the accident itself. In our case, P.C. Inglis admits he was influenced by his scanty information about Albert Johnson.

Remoteness is also an important issue in the claim against the Chief and the Board. Precisely what duty is imputed to the Chief and the Board and did the breach of that duty cause, or contribute, to the death of Albert Johnson.

How far will the court go in spellling out the particulars of a mental health records system? The plaintiffs must show that the duty extended to a system the operation of which would likely have altered the course of events on August 26. This means in practice the following:

1. that someone in the police department receive and collate information on mentally persons; this is now done (the green card system);

2. that this information be conveyed or be available to officers; and

3. that the information on Albert Johnson would have shown he was not a danger to his family.

II-C TRESPASS/FALSE ARREST/ASSAULT - INTENTIONAL TORT

In my opinion there is a winning argument that the actions of Inglis, Cargnelli and Dicks constituted trespass, false arrest and assault which caused the death of Albert Johnson.

i) Entry to the Kitchen

The first stage of the events of August 26 is the entry into the house. The officers had no warrant and must show "reasonable and probable grounds" to believe that an offence was being committed and that they make a proper announcement.

Eccles v. Bourque (1974) 19 CCC (2d) 129

I believe that the entry cannot be justified under the Mental Health Act section 11 powers to arrest and detain those thought to be "behaving violently toward another person". There are no cases on point. However, a very strong argument can be made based on R. v. Colet [1981] 1 SCR 2. In that case, the Court dismissed attempt murder charges against the accused who fired on police who entered his house to arrest him. They had a warrant to seize illegal firearms, but not to search his house. His defence of self and property against illegal arrest was justified. The Court gave a strict and narrow reading to the powers under the warrant. Similarly the Court will narrowly construe the powers of pursuit and/or entry under section 11 of the Mental Health Act. I believe this to be so especially in light of the alternate existing powers in section 12 to obtain a warrant to enter and apprehend, and under the Criminal Code.

The reasons for entry given by P.C. Inglis are as follows:

A) See statement (Tab B)

B) See questions 124 to 152 (Tab K)

There was strong if not decisive evidence at the manslaughter trial that there was no spittum on the screen. There was strong independent evidence from neighbours at the manslaughter trial that there were no screamings from inside the house until after the entry by the police. There is a straight forward credibility issue on this between the police officers and the balance of the witnesses. But let us assume nevertheless that the officers are believed that there were screams coming from inside the house. (Mere subjective belief does not justify entry.) Would that belief be sufficient to justify entry?

ii) Actions in the Kitchen

Once the officers entered the kitchen they proceeded straight away to "arrest" Mr. Johnson. They did not stop to examine the circumstances and assess whether their suspicions that Mr. Johnson was causing danger to persons in the house were in fact true. They did not ask any questions to other people in the house. (See questions 191 - 195 - Tab K) Either the officers were "arresting" him under the Criminal Code or the Mental Health Act.

(a) Arrest Under the Criminal Code
(aa) Sufficient grounds

It will be argued that the officers were obliged in the circumstances to verify the facts upon which they based the arrest. In fact, P.C. Inglis admits on discovery he did not do so. He will have to try to justify the arrest on the basis of screams heard (allegedly) before he entered the kitchen. The relevance of his prior knowledge of Mr. Johnson ought not assist in justifying the arrest in face of visual proof that no one was in danger. (Indeed, in P.C. Inglis' prior encounter with Mr. Johnson, he successfully "talked him down".)

The case law that will be used by the defendants is to the effect that a peace officer need not exhaust all possible defences before concluding there is reasonable and probable cause to arrest. But that line of authorities is to be distinguished from the facts of this case. Here the officers had scant evidence to justify their suspicions of a possible offence, part of which was gossip of much earlier incidents, and every opportunity when they entered the kitchen to observe directly whether the offence they feared might be committed was in fact being committed.

My conclusion is that an "arrest" by the officers when they entered the kitchen would be unlawful because reasonable and probable grounds are not shown. This means section 25 of the Criminal Code is inapplicable to protect the defendants.

(bb) Necessary Force

Section 25 of the Criminal Code has been held to limit the civil liability of peace officers. The plaintiffs will argue in addition that just as section 25 limits the exposure of defendant officers, section 35, 41 and 213 limit and define the discretion of peace officers to use force and claim self-defence. Section 25 provides as follows:

(1) Every one who is required or authorized by law to do

anything in the administration or enforcement of the law

(a) as a private person,
(b) as a peace officer or public officer,
(c) in aid of a peace officer or public officer, or
(b) by virtue of his office,

is, if he acts on reasonable and probably grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not jusitified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. 1953-54, c.51, s.25.

This section has been held to immunize peace officers in negligence actions in a number of cases, e.g. Priestmann v. Colangelo [1959] SCR 615. Its protection has also been denied in other cases e.g. Beim v. Goyer [1965] SCr 638, Woodward v. Begbie [1962] OR 60 and R. v. Berrie 1975 24 CCC (2d) 66. The plaintiffs will rely on the latter authorities. In my opinion, an arrest or a detention in the kitchen are demonstrably without justification and section 25 will not protect the defendant officers.

The burden of proof regarding "necessary" force lies on the defendant officers. See Prior v McNab 78 DLR (3d) 319. Thus it is arguable even if there were probable grounds to believe Mr. Johnson might commit an offence thus justifying arrest, the defendants may still be deprived of the protection of section 25 because they used unnecessary force. The plaintiffs would argue that something less than an attack on Mr. Johnson immediately upon entering the kitchen was called for even if the arrest was on justifiable grounds.

b) "Detention" under the Mental Health Act

Section 11 of the Mental Health Act defines the powers of detention:

> "Where a constable or other police officer observes a person who acts in a manner that in a normal person would be disorderly and has reasonable cause to believe that the person,
>
> a) has threatened, or attempted, or is threatening, or attempting to cause bodily harm to himself;
> b) has behaved, or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him; or
>
> c) has shown, or is showing a lack of competence to care for himself,
>
> and in addition the constable or other police officer is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in
> d) serious bodily harm to the person;
> e) serious bodily harm to another person; or
> f) imminent and serious physical impairment of the person,
>
> and that it would be dangerous to proceed under Section 10, the constable or other police officer may take the person in custody to an appropriate place for assessment by a physician".

The difficulty that the police will have in using this section as an authorization for their entry to the land, prior to the screams, is that there is no evidence that they formed the opinion required under Section 11(d), (e) or (f).

The evidence of P.C. Inglis as noted above would indicate that he did not form an "opinion" after he entered the kitchen that Albert Johnson might cause harm to himself, per 11(d), or other; per 11(e). He proceeded immediately to take Mr. Johnson into custody without observation or inquiry of the facts before him. His "opinion", such as it was, was based on his perception of screams formed outside the house and some scanty data of Albert Johnson's earlier behaviour (none of which indicated that Mr. Johnson was any threat to members of his family).

I note that P. C. Inglis explicitly bases his reason for detention on the Mental Health Act.

The officers were clearly acting in contravention of their training at the police college. They were taught to approach suspected mentally ill persons in a non-threatening fashion. (See discovery of P.C. Inglis).

The defendants will obviously argue that the opinion formed outside the house was sufficient. There are no cases on point under the Mental Health Act. We will argue, based on Colet

and Dumbell that the powers of detention under the Mental Health Act must be read narrowly.

My conclusion is that a "detention" of Albert Johnson under the Mental Health Act would be just as "unlawful" as an "arrest", and the protection of section 25 of the Criminal Code would again be denied.

iii) Events after "Arrest" in the Kitchen

Once it has been established that Albert Johnson was being unlawfully arrested it can be argued that he was entitled to take steps to defend himself. The evaluation of the relevant facts and after the initial arrest in the kitchen is extremely difficult.

The officers continued their attempt to arrest/detain Mr. Johnson by trying to grab hold of him and drag him from the kitchen. They allege Mr. Johnson threw a pot of peas then cooking on the stove at them and it messed up their uniforms. P.C. Cargnelli hit Mr. Johnson on his forehead with a large flashlight opening a gash that started to bleed. Mrs. Johnson physically tried to stop the officers. The arrest attempt continued in the middle room of the house with the officers trying to grab and subdue Mr. Johnson who backed away. Then Mr. Johnson retreated once again this time up the stairs. The officers started to pursue him. At one point, Mr. Johnson had his daughter Colsie in his arms at the upstairs bannister and the officers downstairs thought he might throw her over. He released her and she came down the stairs meeting her mother half-way. Mr. Johnson came down the stairs very shortly thereafter. Let us assume he had the garden edger in his hand when he did so. The officers did not draw their guns until this point. They say they feared he would swing at them, which indeed could have caused a grevious injury.

Conventional wisdom has it that "reasonable force" is justifiable in defence of self or property:

> "It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force .... Force is not reasonable if it is either (I) unnecessary - i.e. greater than is requisite for the purpose - or (II) disproportionate to the evil being prevented. In order that it may be deemed reasonable within the meaning of this rule it is not enough that the force was not more than was necessary for the purpose at hand. For even though not more than necessary it may be unreasonably disproportionate to the nature of the evil sought to be avoided".
>
> See also: Bruce v. Dyer [1966] 2 O.R. 705; aff'd 1970 10 O.R. 482, Salomn Torts (18ed) p.120 and Linden, A., Canadian Tort Law (3d) pp 66-70.

Once the plaintiff proves an assault has been committed the onus is on the defendant who relies upon self-defence to prove the counterforce was justified and not of unreasonable force. See Mann v Balaban (1969) 8 DLR (3d) 548 at 558.

Using a "bald" test of "reasonableness" it is difficult to evaluate the facts. The plaintiffs will stress that Johnson was being attacked by armed trespassers in his own home who were trying to abduct him. This argument is powerful especially if there are no probable grounds for arrest. The defendants will argue that whatever they may have done wrong in the kitchen at the last moment Mr. Johnson's apparent attack on them was unjustifiable and they acted in self-defence. They will say their "attack" on Mr. Johnson in the kitchen does not justify the violence he threatened against them. They might rely on Bigcharles v Merkel, 1973 1 WWR 324. or the ancient authority of Bird v Holbrook 1828 4 Bing 628, 130 ER 911. The plaintiffs will argue that Albert Johnson was entitled to use any necessary force to prevent an unlawful arrest and that the law ought not judge the niceties of his response under extreme provocation. See R v Taylor (1970) 73 WWR 636 R v Ogal 50 CCC 71, R v Colet, supra.

There are two additional arguments that might be raised to assist their respective positions.

The defendants may argue that a citizen has no right to resist a false arrest. Rather he must submit and sue in tort for false arrest and imprisonment. There is dicta to this effect in the reasons of DuParque J. in Christie v Leachinsky [1974] AC 573 at 599. But I do not believe this is a correct comment on the law. Christie is a case on the necessity of disclosure of reasons for arrest not assault. DuParque J. relies on very ancient authority MacKalley (1611) 9 Co. Rep. 656, 77 ER 824. This case is a murder trial. It has been held repeatedly in modern times that resistance to an unlawful arrrest is a defence to criminal charges, eg. R v Hastings [1974] 4 DLR 749, Kenlin v Gardiner [1967] 2 QB 510. In the leading Ontario civil case Koechlin v Waugh and Hamilton [1957] OWN 245 Laidlaw J. says specifically that the plaintiffs were entitled to resist an arrest where the officers had no reasonable and probable grounds and did not give a reason for the arrest. Their resistance could not be considered as evidence of guilt. Damages were given for false arrest.

Furthermore there are numerous cases where damages are awarded because of unnecessary and excessive force under section 25 and 26, eg. Priestman & Beim supra. Those cases are argued and decided on an analysis of the force used. If the Christie dicta is correct no action by the plaintiffs in those cases would be permitted. In my opinion if and when the issue is directly addressed the Court will rule that the Criminal Code provisions determine the rights of citizens and police officers, not the ancient common law.

In addition the plaintiffs will argue that the bare

test of "reasonableness" ought not be applied, rather it should be modified by section 35 on self defence which includes a duty to retreat. Just as section 25 of the Code has been applied to save police officers from civil liability when acting in the course of their duties so also should section 35 be applied to define the limits of their self defence argument. Section 35 defines self defence by an accused where he started the fight. It provides:

> (a) he uses the force
>
> (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
>
> (ii) in the belief, on reasonable and probable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
>
> (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
>
> (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose. 1953-54, c.51, s.35.

It is arguable that the blows struck to Mr. Johnson in the kitchen, especially by P.C. Cargnelli with his oversize flashlight (contrary to regulations) are evidence of intent to cause "grievous bodily harm" within the meaning of section 35(b). Under section 35(c), we will argue the officers failed to make a "feasible retreat" on many occasions prior to the events at the foot of the stairs. This subsection in effect creates an obligation to retreat. If this is so, section 25 would not apply and the defence of self defence would not be available.

Section 35 and the "duty to retreat" was not to my best recollection argued at the manslaughter trial although I do not have a transcript of the judge's charge to confirm the point.

Whether section 35 would be applied in the manner indicated is uncertain. We have found no cases that would deny the possibility and given the extensive use of sections 25 and 26 to govern tortious liability there would seem to be good reason to look to other Code sections especially those of general application like section 35. Linden comments at p.73 (2nd) that the Code provisions are being incorporated in the tort law by "most judges" but the subjects remains "shrouded in mist".

e) Remoteness

Where intentional tort has been shown "any and all damages are recoverable if it results from the wrongful act, whether it is foreseeable or not. The limitation devices of foresight and remoteness are not applicable as they are in negligence." Linden J. in Allan v New Mount Sinai Hospital, 28 OR (2d) 356, and see Bettel v Yim, 20 OR (2d) 617.

Did Albert Johnson obtain a garden edger as a "result" of the defendants assaults in the kitchen, or does that constitute a novus actus? The plaintiffs will argue that the defendants' actions drove Mr. Johnson to his desperate act. Perhaps this argument will be successful and the difficulties of analysing reasonable force and self defence will be avoided.

II-D NEGLIGENCE BY THE ARRESTING OFFICERS

The same facts give rise to argument based on negligence. Both intentional false arrest, assault, etc. and unintentional negligence are pleaded. There will be an argument that both cannot succeed but I believe both can proceed. In order to escape intentional tortious liability the defendants have to show they were not negligent.

The application of section 25, 26 and 35 of the Criminal Code to a negligence claim is difficult to assess. Some authorities suggesst section 25 and 26 apply only to intentional torts. Even if they do apply in principle they ought to save the defendants. A finding of negligence is virtully the same as "unnecesary force" or "excessive force" within the meaning of those sections. See Priestman v Colangelo [1959] SCR 615 and Beim v Goyer SCR 638.

I believe the duty owed by the officers to take care in dealing with the mental ill is easy to establish.. Further their breach of that duty by their behaviour in the kitchen is also relatively easy to prove.

The difficult issue is the relationship between that negligence and the shooting death at the foot of the stairs a few minutes later. The principles of remoteness in negligence law are different than direct cause as might apply to intentional torts and perhaps they are better from the plaintiffs point of view.

The general principle applicable is that even if subsequent events or causes "intervened" to contribute to the damages suffered if they were of a type that was foreseeable, even if the particulars are not foreseeable, then all consequent damages are payable. This is so whether the subsequent cause proves to be a special suseptibility of the plaintiff (eg. the thin skulled plainitff) or intervening criminal activity with the plaintiff as victim (eg. a negligent locksmith and a subsequent burglary). See Hughes v Lord Advocate 1963 AC 837, Smith v Leech Brain [1962] 2 QB 405, Thiele and Wesman v Rod Service (Ottawa) Ltd., [1964] 2 OR 347, Canphoto Ltd v Aetna Roofing (1965) Ltd., 1971 3 WWR 116. See also Linden Torts (1st) pp. 347-49.

That Albert Johnson would become hostile and a fight would develop between him and the police was easy to foresee. Indeed, on discovery, the defendant officers virtually admitted as much. The officers conferred on the street after Mr. Johnson had gone into his house and decided not to arrest him and that they should leave so the situation would calm down. Their specific knowledge of Albert Johnson warned them of a possible fight. There was no danger to the Johnson family as was obvious once they entered the house, or if they thought there might be they took no steps to address that by removing the family. Perhaps the precise events at the stairs could not be foreseen but the law does not require that such precision.

II-G CONCLUSIONS

a) Sympathy

The legal amd factual arguments raised in this case are close enough that the sympathy of the judge and/or jury may be an important factor in the result of this case. The "sympathy" of the judge/jury will be important, for example in determining the reasonableness of Mr. Johnson's behaviour in "self defence" in the remoteness issue. Generally speaking we must anticipate that basic sympathies will favour the police. However in this case there is good reason to believe that this can be subplanted. Shifting the "blame" to the police bureaucrats is one strategy. A man's right to defend his own home is another potent emotional message.

A third factor will be the impression made by the Johnson family. I believe it will be altogether favourable. Mrs. Johnson is a quiet spoken, firm, impressive woman who has borne her troubles with great nobility. She is widely admired by many people Whether we do or do not present Colsie's story in-chief I believe Mrs. Johnson's evidence on whether or not Colsie was "coached" would be eloquent and impressive. The only danger spots I perceive lie in the issues of domestic violence. The defendants will try to turn the two minor episodes where their version of the facts appear to indicate some violence by Mr. Johnson towards his family into evidence of serious danger which would justify police entry on August 26th. Those incidents are noted in section I-C. Mrs. Johnson has never claimed her husband was perfectly well. She describes him as "troubled'. And she insists he was not a danger to the family at any time. This is an important area of evidence at trial. I believe Mrs. Johnson will be persuasive.

c) Burden

In trespass, false arrest and assault, the defendants have the evidentiary burden of justifying the entry and the arrest on reasonable and probable grounds and that the force used was no more than necessary. See Prior v McNab 78 DLR (3d) 319. The jury should determine the facts and the judge the law. In this case the facts are relatively clear (save the presence of the garden edger) and the nature of the conduct in the kitchen falls within the purview of the judge. This is a great advantage to the plaintiffs particulary in assessing the event in the kitchen where it appears the police have no evidence to adduce in addition to the facts known by the defendants outside the house.

In the negligence arguments the plaintiff has the burden of proof. The most difficult aspect of this is remoteness as discussed earlier.

d) Issues

In my opinion the key issue in this case is the evaluation of the defendants' behaviour once they entered the kitchen. I believe we will be successful in showing that it was both a false arrest and an arrest by unnecessary force. Dumbell v Roberts, supra, is directly applicable.

The second obvious task is to demonstrate that damages for Mr. Johnson's death follow from the tortious conduct in the kitchen. Several arguments are available and I believe at least one will succeed. If damages for intentional tort cases are apportionable between plaintiff and defendant there should be at least partial recovery (and in the circumstances total recovery of costs). If section 35 of the Criminal Code can be used to define the ambit of self defence available to the defendants then there is an excellent argument on the facts that the defendants will be denied the benefits of self defence because they failed to retreat when they had the opportunity to do so. If the level of force used in the kitchen was "unnecessary" then the defendants will also be deprived of the protection of section 25 of the Code. The evidentiary burden lies on the defendant. That being so, the issue will be the 'reasonableness" of Mr. Johnson's conduct in defence of himself and his home.