

Test for the Policy/Operational Distinction for Municipal Liability: *Nelson (City) v Marchi*

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Overview

- ▲ General case comments
- ▲ Policy/operational distinction
- ▲ Case history
- ▲ SCC decision
- ▲ Impact on Alberta cases
- ▲ Impact on MGA defences

General Case Comments

- ▲ Case deals with the policy/operational distinction for municipal liability
- ▲ Provides clarity on the distinction (helpful); but makes what is a policy decision narrower (not helpful)

General Case Comments (cont'd)

- ▲ Result **was not** holding the municipality liable – SCC directed the matter to a new trial
- ▲ But SCC **did** hold that a duty of care was owed to the Plaintiff, provided comments on the standard of care and causation
- ▲ New trial judge directed to take these comments into account

Policy/Operational Distinction

- ▲ Long-established liability principle
- ▲ The Crown (and municipalities) are exempt from liability for policy decisions because no duty of care is owed
- ▲ Cannot be negligent if no duty of care is owed; liability in negligence requires:
 - A duty of care
 - Breach of that duty
 - Damages
- ▲ The Crown (and municipalities) are **not** exempt from liability for operational decisions

Case History

- ▲ Trial decision: 2019 BCSC 308
- ▲ Facts: City of Nelson experienced heavy snowfall on January 4 and 5, 2015
 - Population: 10,664 in 2016 per Wikipedia
- ▲ It started plowing and sanding the streets simultaneously, focusing on the downtown core per a written document prescribing priorities

Case History (cont'd)

- ▲ City employees plowed snow in angled parking stalls to the top of the parking spaces, creating a snowbank along the curb that separated the parking stalls from the sidewalk
- ▲ City did not clear an access route to the sidewalk for drivers parking in the stalls
- ▲ Evening of January 6, 2015, Plaintiff parked in one of the angled parking stalls on Baker Street. While stepping over the snowbank, she fell through, hurting her leg
- ▲ Plaintiff was 28 on the date of injury

Case History (cont'd)

- ▲ Evidence was that the City's written document stipulated an order in which snow would be plowed
- ▲ It didn't specify how snow was to be plowed in angled parking stalls, when windrows would be removed, or whether access routes would be cleared through them
- ▲ Evidence was that the standard practice was to plow snow in stalls into windrows, haul them away once all City plowing was done
- ▲ Here: downtown core was completely cleared of snow, and all snowbanks were removed, by January 9, 2015

Case History (cont'd)

- ▲ Trial judge held that no duty of care was owed to the Plaintiff, because the City's snow removal procedures were written and unwritten policy decisions exempt from liability
- ▲ In the alternative, City didn't breach the standard of care
- ▲ In the further alternative, even if the City was negligent, the Plaintiff was the author of her own misfortune so claim dismissed on that basis anyhow
- ▲ Plaintiff appealed

Appeal Decision (2020 BCCA 1)

- ▲ Overturned trial judge's decision, directed a new trial
- ▲ Unanimous 3-judge panel
- ▲ Trial judge erred in:
 - Holding the City did not owe a duty of care
 - Analysis of standard of care, and
 - Analysis of Plaintiff's negligence
- ▲ City appealed

SCC Decision (2021 SCC 41)

- ▲ Dismissed City's appeal
- ▲ Agreed with the BCCA, ordered a new trial
- ▲ Unanimous 7-judge panel
- ▲ Also held trial judge erred in:
 - Holding the City did not owe a duty of care,
 - Analysis of standard of care, and
 - Analysis of Plaintiff's negligence (causation)

SCC: Duty of Care

- ▲ Bulk of the Court's decision
- ▲ Much is academic – goes through history of the policy/operational distinction, test for when a duty of care is owed generally

SCC: Duty of Care (cont'd)

- ▲ From *Just v British Columbia* (SCC): public authorities owe road users a duty to keep roads reasonably safe, unless there is a valid basis for its exclusion on one of two bases:
 - Statutory provisions exempting liability (e.g. the MGA), and
 - “True” policy decisions
- ▲ Facts of *Just*: boulder fell from a slope above the road onto Plaintiff’s car

SCC: Duty of Care (cont'd)

- ▲ Para 23: in *Just*: “the impugned system of inspection was operational in nature, meaning it could be reviewed by a court to determine whether the government breached the standard of care”
 - So operational decision = duty of care owed
 - BUT if this was Alberta: s. 530 precludes liability for a system of inspection and maintenance
 - This is the case **even if the municipality was negligent** (*Ellis v City of Lethbridge*, 2020 ABQB 783)

SCC: Duty of Care (cont'd)

- ▲ The duty of care of a public authority for roads and sidewalks exists where:

[29]... a public authority has undertaken to maintain a public road or sidewalk to which the public is invited, and the plaintiff alleges they suffered personal injury as a result of the public authority's failure to maintain the road or sidewalk in a reasonably safe condition.

- ▲ A duty of care exists in these circumstances, subject to statutory exemptions and the policy decisions exemption
- ▲ On these facts, the Plaintiff slipping on a snowbank fits this description (para 30)

Policy vs. Operational Decisions

- ▲ Court notes that this is difficult practically, tries to provide further clarity and examples

[51]... Core policy decisions, shielded from negligence liability, are “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith” (*Imperial Tobacco*, at para. 90). They are a “narrow subset of discretionary decisions” because discretion “can imbue even routine tasks” and protecting all discretionary government decisions would therefore cast “the net of immunity too broadly” (paras. 84 and 88).

Policy vs. Operational Decisions (cont'd)

- ▲ Court notes that this is difficult practically, tries to provide further clarity and examples

[52] Activities falling outside this protected sphere of core policy — that is, activities that open up a public authority to liability for negligence — have been defined as “the practical implementation of the formulated policies” or “the performance or carrying out of a policy” (*Brown*, at p. 441; see also *Laurentide Motels*, at p. 718). Such “operational” decisions are generally “made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness” (*Brown*, at p. 441).

Policy vs. Operational Decisions (cont'd)

Court distilled prior case law and its own analysis into four factors to assess whether a decision is policy or operational:

1. The level and responsibilities of the decision-maker
 - ▶ Decision maker at a high level or close to elected official = closer to policy
2. The process by which the decision was made
 - ▶ deliberative, required debate, involved input from different levels of authority, intended to have broad application and be prospective in nature = closer to policy

Policy vs. Operational Decisions (cont'd)

Court distilled prior case law and its own analysis into four factors to assess whether a decision is policy or operational:

3. The nature and extent of budgetary considerations
 - ▶ Decisions concerning budgetary allotments for departments or agencies = policy
4. The extent to which the decision was based on objective criteria
 - ▶ weighing competing interests and value judgments = closer to policy

Policy vs. Operational Decisions (cont'd)

Two clarifications:

1. mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy — most decisions involve some consideration of a department's budget or the scarcity of its resources
2. the fact that the word "policy" is found in a written document, or that a plan is labelled as "policy" is not determinative. Similarly, that a certain course of conduct is mandated by written government documents is of limited assistance

Application: Why City Decisions were Operational

- ▲ SCC noted several errors in trial judge's reasons:
 - described the decision or conduct at issue too broadly, focusing on the entire process of snow removal. At issue is the City's clearing of snow from the parking stalls in the 300 block of Baker Street by creating snowbanks along the sidewalks
 - ▶ "In a duty of care analysis, the decision or conduct at issue must be described with precision to ensure that immunity only attaches to core policy decisions" (para 76)

Application: Why City Decisions were Operational (cont'd)

- ▲ SCC noted several errors in trial judge's reasons:
 - placed too much weight on the label of "policy" on the document itself
 - improperly treated budgetary implications as determinative of the core policy question

Application: Why City Decisions were Operational (cont'd)

Court conclusions on why the City's decisions were operational (para 83):

1. City supervisor did not have the authority to make a different decision with respect to the clearing of parking stalls (the first factor)
2. Method of plowing the parking stalls did not result from a deliberative decision involving balancing of competing objectives and policy goals. No evidence suggesting an assessment about the feasibility of clearing pathways in the snowbanks (the second factor)

Application: Why City Decisions were Operational (cont'd)

Court conclusions on why the City's decisions were operational (para 83):

3. Budgetary considerations were not high-level, but rather the day-to-day budgetary considerations of individual employees (the third factor)
4. City's chosen method of plowing the parking stalls can easily be assessed based on objective criteria. The safety of a road or sidewalk can be measured based on objective or commonly accepted standards as it is in the private sector. (the fourth factor)

Standard of Care

- ▲ Nothing new here from the SCC
- ▲ Noted the trial judge's standard of care analysis was flawed

[90]...While he acknowledged that the standard of care applicable to the City is reasonableness, he imported considerations relating to core policy immunity into standard of care and failed to engage with the practices of the neighbouring municipalities.

Standard of Care (cont'd)

- ▲ Noted the trial judge's standard of care analysis was flawed

[91] To avoid liability, a defendant must "exercise the standard of care expected that would be of an ordinary, reasonable and prudent person in the same circumstances"...Relevant factors in this assessment include whether the risk of injury was reasonably foreseeable, the likelihood of damage and the availability and cost of preventative measures...A reasonable person "takes precautions against risks which are reasonably likely to happen"

Causation

- ▲ Nothing new here from the SCC
- ▲ Noted the trial judge's causation analysis was flawed [96]... a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries...First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test. The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.

Causation (cont'd)

- ▲ Noted the trial judge's causation analysis was flawed
[97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote...The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct... Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury.

Takeaways

- ▲ Being able to argue a decision is a policy decision exempt from liability will now be assessed on the four criteria from *Marchi*
- ▲ That bar is now likely higher than before, although somewhat easier to determine

Takeaways (cont'd)

- ▲ Practically, cases involving slip and falls on municipal roads/sidewalks very likely result in a duty of care being owed, due to being an operational decision
 - To establish it's a policy decision, would need to have evidence that the decision was debated by council, based on department budget allotments, and that a Plaintiff's loss was directly based on that decision
 - Example: council, based on input from departments, after debate, decides not to plow residential streets at all because it's too expensive and they want to encourage people to walk more. Plaintiff then trips and falls on rutted street that hadn't been plowed

Takeaways (cont'd)

- ▲ Key part of the analysis is properly describing the decision at issue
- ▲ Here, the decision was not “snow removal policy generally”, it was how the City plowed snow in parking stalls at this particular location
- ▲ No evidence that **this** decision was core policy
- ▲ If the written document specified how that plowing was to occur, when the snowbanks would be hauled away, and that decision was made by council, result may have been different

Takeaways (cont'd)

- ▲ Limited Alberta consideration of *Marchi* to date
- ▲ No case goes through the detailed four factors
- ▲ Courts prefer to reach their conclusions on other grounds

Impact on MGA Defences

- ▲ Policy/operational distinction is a common law principle – not in any statute including the MGA
- ▲ So exists independent of the MGA
- ▲ Typically a weak argument, now weaker after *Marchi* case
- ▲ It's an arrow in the quiver, but it's rarely the best/only argument available
- ▲ *Marchi* based on BC municipality in the southern interior; not as much snow as Alberta

MGA Differences

- ▲ How would *Marchi* have been different in Alberta, given the MGA?
- ▲ Policy/operational distinction: same result, because this isn't part of the MGA
 - So a duty of care would have been owed by the municipality to the Plaintiff, assuming same evidence/documents

MGA Differences (cont'd)

- ▲ That's as far as the SCC went, but at trial, an Alberta municipality could have argued:
 - S. 529: exercise of discretion (probably not on these facts)
 - S. 530: inspections and maintenance (probably not on these facts)
 - S. 531: snow and ice on roads or sidewalks (gross negligence required, not the same in BC)

Questions?

THANK YOU



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