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HOW ARE THE COURTS APPROACHING THE DUTY OF CARE IN NEGLIGENCE CLAIMS AGAINST LOCAL GOVERNMENTS?

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I. INTRODUCTION

This paper will examine two major elements in the law of negligence as it affects claims against local governments: (1) the evolving duty of care analysis and potential narrowing of the range of claims faced by local governments and (2) the future of the policy/operational distinction in the defence of municipal claims. The cases that will be reviewed overlap somewhat in their treatment of these two issues. Accordingly, the discussion that follows will move back and forth between these two issues.

Negligence claims against local governments share common requirements with other negligence claims, in that to succeed a claimant must establish that the defendant (1) owed them a duty of care, (2) breached the standard of care, and (3) consequently, damage resulted from the breach. If a defendant does not owe a claimant a duty of care, there is no liability for negligence.

II. *KAMLOOPS V. NIELSEN* – WHERE IT ALL BEGAN

The seminal decision of the Supreme Court of Canada in *Kamloops v. Nielsen*, [1984] 2 SCR 2 ("*Kamloops"*) set out the framework for assessing negligence claims against municipalities. First, it affirmed the general test for establishing a duty of care set out by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] AC 728. In order to establish that a defendant owes a claimant a duty of care, there must be (1) proximity between the claimant and defendant, in that the harm caused by the defendant was reasonably foreseeable, and (2) no policy consideration that negates the duty of care. Secondly, the *Kamloops* case also set out the distinction between policy and operational decisions, the former being largely immune from liability.

In addressing these two questions, a court dealing with a claim against a local government must consider the governing legislation, noting that one class of statutes may confer powers but leave the scale as to which the power is exercised to the discretion of the local government. However, where the local government elects to act, as a matter of policy, under the enabling authority, it will have a duty to use due care at the operational level, and will be liable if its acts or omissions fall below the applicable standard of care. This was the situation in *Kamloops* in respect of the *Municipal Act* authority to regulate building construction and the City's enactment of a building bylaw.

In *Kamloops*, the City made a policy decision to regulate construction by bylaw and chose to have the City's building inspector enforce the bylaw. In this case, a contractor did not abide by the approved plans in the construction of a house. Upon several inspections, the City's building

inspection issued a "Stop Work Order". Nonetheless, the contractor continued with the construction of the house, and the City did not enforce the "Stop Work Order". Eventually, a subsequent purchaser of the house found significant issues with the foundation of the house and commenced an action against the vendor and the City.

The trial court's liability finding, apportioning the vendor with 75% of the liability and the City with the remaining 25%, was upheld at the Court of Appeal and Supreme Court of Canada. The Supreme Court said relatively little on the issue of the claimant and the City being in proximity. The Court appeared to be satisfied that if the City could reasonably foresee or contemplate that carelessness on its part could cause damage to the claimant then proximity was established. It was left for later cases to flesh out the proximity analysis more fully. The Court also left it to later decisions, in particular *Just v. B.C.* [1989] 2 SCR 1228, to outline the criteria for distinguishing between policy and operational decisions. For the majority, Justice Wilson provided the following short summary:

> Loss caused as a result of policy decisions made by the public authority in the *bona fide* exercise of discretion will not be compensable. Loss caused in the implementation of policy decisions will not be compensable if the operational decision includes a policy element. Loss caused in the implementation of policy decisions, i.e. operational negligence will be compensable. Loss will also be compensable if the implementation involves policy considerations and the discretion exercised by the public authority is not exercised in good faith. Finally, and perhaps this merits some emphasis, economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against.

A significant part of the Court's reasoning dealt with that very issue of whether the claim should be dismissed because the claimant's loss was pure economic loss, not physical damage to property. While the evident need to repair the house's foundation to avoid further subsidence could have been treated as a case of physical damage, the Court chose to characterize it as a case of economic loss, but a type of loss which the statute and bylaw were intended to provide protection from for a class of persons including subsequent purchasers.

The *Kamloops* decision is often referred to as a negligent inspection case, including by the Supreme Court of Canada in later cases. That is a misnomer though; the case is more aptly described as a case about "failure to enforce". That becomes clear from the dissenting judgment of Justice McIntyre. The majority had determined that the City made a policy decision when it provided in the building bylaw that the building inspector "shall enforce" the bylaw's provisions. The building inspector brought the issue of non-compliance with the Stop Work Order before Council which determined not to take further action; the majority of the Court accepting it did so on the basis of a plea from the then owner, a fellow council member, that it was his retirement home and any problems that might arise were his and his alone. Justice McIntyre noted that the building inspector had done all he could in discharging any duty

to enforce the bylaw by reporting the matter fully to Council. Whether to enforce the bylaw by commencing injunction proceedings was a decision within Council's discretion and which previous case law confirmed was not subject of any enforceable duty.

The contrary position of the majority glossed over the fact that the duty of enforcement under the bylaw rested with the building inspector and not Council. Justice Wilson was satisfied that could be imposed because there was a duty to act:

> In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion.

So was the defining aspect of the City's negligence an operational decision, or did it still involve a decision within the realm of policy? The struggle seen in later cases with drawing the line between the two, despite the seemingly straightforward nature of the exercise suggested by the excerpt from Justice Wilson's reasons on the previous page, is foreshadowed in that judge's further comments:

> The making of inspections, the issuance of stop orders and the withholding of occupancy permits may be one thing; resort to litigation, if this becomes necessary, may be quite another. Must the City enforce infractions by legal proceedings or does there come a point at which economic considerations, for example, enter in? And if so, how do you measure the "operational" against the "policy" content of the decision in order to decide whether it is more "operational" than "policy" or vice versa? Clearly this is a matter of very fine distinctions.

From the foregoing, the reader might draw the conclusion that it is a toss up as to whether decisions if and how to enforce a building bylaw are policy or operational. Yet the excerpt just quoted above would suggest that the decision was a policy one, but not made bona fide, thus making the City liable. But even earlier the bylaw's imposition of a duty to enforce on the building inspector was said to be Lord Wilberforce's "operational' duty".

The duty of care a local government owed in connection with its building inspection function was extended to owner-builders in *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259. Vernon's building bylaw required that an owner give the building inspector 24 hours notice for a footings and forms inspection, prior to any concrete being poured. The owner's contractor failed to do so in respect of a retaining wall. The contractor's failure to call for the footings and forms inspection, responsibility for which was attributable to the owner under the bylaw, did not place the owner outside of the ambit of the duty of care owed by the City. The negligent breach of the bylaw by the owner did not disentitle them from relying on the municipality to ensure compliance with the building bylaw. After all, the court reasoned, municipalities employ building inspectors to deal with the fact that it can be expected, in the normal course of events, that contractors might fail to comply with certain aspects of a building bylaw.

The Supreme Court was split in *Rothfield*. The majority saw no reason for excluding a negligent owner-builder from being owed a duty of care as being within the group of persons that the building inspector ought to have in reasonable contemplation as likely to suffer harm if the building inspector did not take appropriate care. In *Kamloops* the duty was grounded in the inspector's obligation under the bylaw to enforce its provisions. The minority in *Rothfield* duly noted the significance of the statute (bylaw) in *Kamloops* establishing the inspector's duty of care and, by parity of reasoning, thought that the Vernon building inspector should not owe a duty of care to an owner that had failed to comply with the bylaw. While evincing a stark division in the reasoning of the majority and minority on how the bylaw shaped the scope of the duty of care, the *Rothfield* decision did little to clarify the proximity analysis.

III. *JUST V. BC* – GUIDANCE ON THE POLICY/OPERATIONAL DICHOTOMY

On the same day that *Rothfield* was decided, the Supreme Court released its decision in *Just v. British Columbia*, [1989] 2 SCR 1228. The action involved a claim that the provincial Department of Highways was negligent in failing to properly maintain a section of the Sea to Sky highway where a boulder from a rocky slope tumbled down onto the claimant's car. The primary issue was whether the decision of the Rockwork Section of the Department not to physically scale the slope in question was policy or operational in nature. The sole dissenting judge in the Supreme Court was attracted to the reasoning of the trial judge Justice McLachlin, who of course would later go on to become the Chief Justice of the Supreme Court and figure prominently in the more notable decisions involving public body negligence liability, some of which will be discussed later in this paper. Justice McLachlin succinctly stated her conclusion on the essential question as follows:

> … I conclude that the decisions here complained of fall within the area of policy and cannot be reviewed by this court. The number and quality of inspections as well as the frequency of scaling and other remedial measures were matters of planning and policy involving the utilization of scarce resources and the balancing of needs and priorities throughout the province. Decisions of this nature are for the governmental authorities, not the courts.

The majority of the Supreme Court however decided that the manner and quality of an inspection system, including the frequency or infrequency of inspections, were operational in nature. The case was remitted to trial to determine whether the Department's conduct met the appropriate standard of care.

The major contribution of the Court in *Just* was to provide some guidance to courts on how to determine whether a particular government decision lay in the realm of policy or operations. Justice Cory offered this:

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

This much criticized legacy set of guidelines for defining the ambit of the "policy" defence will be central to the appeal to be heard by the Supreme Court of Canada in *Marchi v. Nelson*, to be discussed later.

Apart from this formulation for determining what are policy decisions versus what are operational, the *Just* decision is notable for the adroit manner in which the majority construed a duty to maintain the highway in a reasonable manner, having confirmed there was no statutory duty of maintenance in a municipal case decided less than 10 years previously; *Barratt v. North Vancouver (District)*, 1980] 2 S.C.R. 418. There the Supreme Court acknowledged that the *Municipal Act* provided authority for municipalities to lay out, construct and maintain highways but did not mandate a duty to maintain or repair. The provincial *Highway Act* and *Ministry of Transportation and Highways Act*, referred to in *Just*, were to like effect. Despite the absence of a statutory duty to maintain, Cory J. crafted a duty of care in respect of maintenance from the Province's "invitation" to the driving public to use the Sea to Sky Highway to reach skiing facilities at Whistler, as well as other attractions. The duty of care of reasonable maintenance of the highway was said to exist in the absence of a specific statutory exemption. As for the apparent contrary finding in *Barratt* that no such duty existed, Justice Cory dismissed the statement as unnecessary to the earlier decision as the Court had already determined that North Vancouver's system of inspecting for potholes was eminently reasonable.

Justice Cory's creation of a general duty of care to maintain highway in the face of permissive statutory language merited comment by Justice McLachlin (unable to comment at the SCC in *Just* because she had been the trial judge), as a member of the SCC that decided *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 SCR 445. Of Justice Cory's conclusion that a traditional

tort law duty of care would apply to government agency in the same way it would apply to an individual, Justice McLachlin noted in *Swinamer* that:

> This approach may be seen as a departure from the long-standing view that public authorities owe no private duty to individuals capable of founding a civil action, unless such duty can be found in the terms of the authority's enabling statute.

Additionally, the government agency must take a further step before there could be a basis for finding a duty of care:

> There is no private law duty on the public authority until it makes a policy decision to do something. Then, and only then, does a duty arise at the operational level to use due care in carrying out the policy. On this view, a policy decision is not an exception to a general duty, but a precondition to the finding of a duty at the operational level.

The difficulty of applying the *Just* criteria to distinguish between policy and operational decisions was commented on in *Brown v. British Columbia,* [1994] 1 S.C.R. 420, a case where the Province's decision as to when to transition from one summer day shift highway crew to three shifts per day for winter was held to be a bona fide policy decision. Justice Sopinka (the sole dissenting judge in *Just*) referred to the following academic critique:

> Whatever the criteria used, the cases show that characterizing the public authority's activity as a policy decision or operational activity is problematic and often unpredictable. In the *Just* case, of the 11 judges that gave judgments, six concluded that province's actions were operational and five that the actions were a policy decision.
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> In view of the above, the Court may wish to reconsider at some future time the continued usefulness of this test as an exclusive touchstone of liability.

IV. *COOPER V. HOBART* – PROXIMITY TO THE FOREFRONT

In *Cooper v. Hobart*, 2001 SCC 79, the Supreme Court revisited the duty of care analysis. The case was brought as a class action claim against the BC Registrar of Mortgage Brokers on behalf of 3000 investors who suffered substantial losses when Eron Mortgage Corporation failed. The claimants alleged that the Registrar was negligent in not acting quickly enough to suspend Eron's licence and failing to notify investors that Eron was under investigation by the Registrar's office. The Court explained that in the first stage of the *Anns* test to determine whether the defendant had a duty of care to the plaintiff, something more than the foreseeability of harm to the plaintiff from the defendant's acts or omissions was required; reasonable foreseeability must be supplemented by proximity.

The importance of *Anns* was said to lie in its recognition that policy considerations played an important part in determining whether proximity was present in new situations. The relevant policy considerations were said to be different from the types of policy considerations at play in the second stage of the *Anns* test, where the issue is whether policy reasons should negate a *prima facie* duty of care found to exist at the first stage. The second stage policy considerations "are not concerned with the relationship between parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally." Accordingly, there should be no duplication in addressing the different policy considerations.

"Proximity" was said to describing a "close and direct" relationship that gives rise to a duty of care. Further, sufficiently proximate relationships were to be identified through the use of categories. A duty of care is established if the relationship falls within the scope of an already recognized category, or one that is analogous, but the categories are not closed and the law will recognize novel categories where factors supporting proximity are present. The Court suggested the following factors be considered in the proximity analysis:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

In terms of established categories of proximity, the Court referred to building inspection, road maintenance, and negligent misstatement.

On the particular issue of whether the Registrar owed the claimant investors a duty of care, the Court reiterated that showing it was reasonably foreseeable that financial loss would result from negligence on the part of the Registrar in failing to suspend Eron or issue warnings was not sufficient to find a duty of care. The factors that could give rise to proximity must, in the Court's estimation, be found in the statute under which the Registrar was appointed. The Court observed that the statute did not impose a duty of care to individual investors. Rather, the Registrar's duty was owed to the public as a whole. Finding a duty in favour of individual investors could potentially conflict with the overall duty to the public. The object of the regulatory scheme governing mortgage brokers was to ensure the efficient operation of the mortgage marketplace. This required a delicate balancing of competing interests; while some of the statutory provisions served to protect interests of investors, the overall scheme did not mandate a duty to investors exclusive to the public as a whole. Therefore, the investors' claim failed under the first branch of the *Anns* test.

The Court also found that if it was necessary to consider the second stage of the duty of care analysis, there were overriding policy reasons to negate any duty of care. The Court affirmed that the policy/operational distinction was to be considered at the second stage. In this case, the Registrar was a policy maker and did not just implement pre-determined government

policy. The Registrar was acting quasi-judicially in deciding whether to suspend a mortgage broker; a decision-making authority inconsistent with a duty of care to investors. A further, distinct policy reason, inconsistent with there being a duty of care, was found in the prospect of indeterminate liability to a large class of investor claimants. There were no limits under the statute which would give the Registrar the ability to control the number of investors or money amounts invested.

Claimants suing government bodies for negligence will be tempted from the reference in *Cooper* to "analogous categories" of proximate relationships to assert the relationship with the defendant bears sufficiently strong similarities to one of the recognized relationships that have been found to support the existence of a duty of care. For example, in *Kimpton v. Canada (A.G.)*, 2002 BCSC 1645, the representative plaintiff argued that her claim in respect of alleged deficiencies in the vapour barrier provisions of the BC Building Code and the National Building Code was analogous to a previously certified class action relating to radiant heating ceiling panels (RCHPs). However, the RCHP claim was that the Chief Electrical Inspector and individual municipalities failed to stop the use of the defective RCHPs. Kimpton's claim against the Province was that it had been negligent in not providing for more robust vapour barrier protections in the Building Code. This was found not to be analogous to the RCHP claim and was bound to fail because no duty of care existed to support a claim in negligence in respect of legislative decision-making.

The result was similar in *Los Angeles Salad Co. v. Canadian Food Inspection Agency*. 2013 BCCA. The plaintiff was the distributor of carrots to Costco for retail sale in Canada. The Canadian Food Inspection Agency had responsibility for inspecting and grading imported food products and warned the plaintiff and Costco that the plaintiff's carrots might be contaminated by a bacteria that could cause illness, and therefore, should not be consumed. The plaintiff claimed its carrots were not contaminated and it sustained economic loss as a result. The company relied on the building inspection line of cases as establishing a broad duty of care. The appeal court held that the proximity analysis was not focused on whether there was a recognized tort of "negligent inspection/investigation", but instead on whether the relationship alleged could give rise liability for negligent inspection/investigation. The Court held that the relationship was materially different from the relationships in the negligent inspection cases. As a food seller, the company had control over the very risk the inspection was intended to mitigate, as well as being prohibited from selling contaminated food.

By contrast, a duty of care was established in the case of the claims of the dependents of the miners killed in the deliberately set explosion at the Giant Mine in Yellowknife; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5. The analogous proximate relationship cited by the Court was that in the negligent building inspection negligence cases. Unlike *Cooper*, where the

regulator's duty was to the public generally, the mine inspector's statutory duties related directly to the conduct and safety of the miners. And similar to the building inspection cases, the statutory scheme dealt with the health and safety of the miners and not merely the protection of economic interests.[1]

V. *IMPERIAL TOBACCO* – ANOTHER ATTEMPT TO SORT OUT THE POLICY/OPERATIONAL DICHOTOMY

The proximity analysis as it relates to whether there is a duty of care and the proper understanding of what constitutes a policy decision immune from negligence were both under consideration in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42. The Supreme Court was dealing with a class action brought by consumers of "light" or "mild" cigarettes as well as the BC government's claim against the tobacco companies for recovery of health care costs related to smoking. The companies filed third party claims against the federal government in both cases seeking contribution and indemnity. In the consumer class action case, the third party claims were struck on the basis that the federal government did not owe a duty of care to individual smokers. A duty of care owed to the plaintiffs was a necessary condition of any third party claim against the federal government. In the costs recovery case, the third party pleadings alleged a series of specific interactions between the companies and Agriculture Canada whereby the latter provided advice and directions to the manufacturers regarding tobacco strains with lower nicotine content, as well as licensing strains for their use. Canada's alleged representations met the first stage of the *Anns/Cooper* test, but failed at the second stage, as any representations were seen as core matters of government policy.

The determination of whether Canada owed a duty of care to consumer required an examination of the relevant statutes as the relationship between them was not a direct one and was limited to Canada's statements to the public that low-tar cigarettes were less hazardous. The three statutes considered by the Court only established general duties to the public, and therefore, did not create a private relationship of proximity that could give rise to a private law duty of care to individual smokers.

Before stating, or re-stating, the test for distinguishing between policy and operational decisions, the Court acknowledged the problems with defining the concepts in the following comments:

- "The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled."

[1] While agreeing with the trial judge that the mine inspector owed the miners a duty of care, the Supreme Court found the trial judge had erred in assessing the conduct of the mine inspector as not meeting the standard of care by not intervening to close the mine in light of the various documented threats of violence and sabotage. The mine inspector was found to be wrong in considering he did not have the power to close the mine, but in relying on legal advice in reaching that view, he acted in good faith and with reasonable care in the circumstances.

- "To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably."

- "The main difficulty with the 'discretion' approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary."

- "The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion as to much money is in the budget or which of a range of tasks is most important at a particular time."

- "The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test."

- "The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts." [Followed by a review of the shifting and diverging views of courts and judges in the UK, Australia and the United States]

The Court next stated that a test simply based on discretion would be too broad as even routine tasks involve some element of discretion. However, it was suggested that most would generally view a matter as a policy decision if it involved a general rule, approach, or principle of action applied to a particular situation. The Court then pronounced its test for distinguishing between policy and operational decisions in the following terms:

> I conclude that "core policy" government decisions protected from suit 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. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

Although the objective of the Court was to provide a workable test where one had proved elusive thus far, the usefulness of what the Supreme Court of Canada produced has been questioned. A particularly blunt critique was offered by Stratas J.A. of the Federal Court of Appeal in *Paradis Honey Ltd. v. Canada*, 2015 FCA 89. After referring to the excerpt above from *Imperial Tobacco* in attempting to distinguish between policy from operational decisions, the judge commented:

> In the first sentence of this paragraph, we are told that "decisions ... based on public policy considerations" are immune. But most decisions are based on public policy considerations; indeed, all considerations to be taken into account by decision makers under legislation are public policy considerations.
>
> Also in the first sentence, we are told that examples - not exhaustive - of public policy considerations are "economic, social and political factors". But that covers just about everything on the legislative books in the area of regulation. Read literally, the first sentence immunizes a broad zone of bureaucratic activity quite contrary to fundamental principles of accountability in public law, and many decided cases too, including many from the Supreme Court: see the discussion in *Slansky v. Canada (Attorney General)*, 2013 FCA 199, at paragraphs 313-314.
>
> But the first sentence does not stand alone. Four follow. They whittle the definition down essentially to nothing, telling us immunity may or may not apply, and any certainty is "likely chimerical". What should be immunized from liability is said to be "readily identifiable", [at paragraph 90 of *Imperial Tobacco*] but no criteria for identification are supplied. Again, we are left to fend for ourselves.
>
> I conclude that *Imperial Tobacco* does not stand for any clear proposition that dooms the beekeepers' claim to failure. If anything, *Imperial Tobacco* leaves us more uncertain than ever as to when the policy bar will apply.

It is rare for a lower court to state so openly its dissatisfaction with the output of the Supreme Court, which lower courts are meant to follow. Justice Stratas' frank assessment may have been a factor in the Supreme Court's decision to potentially re-examine the policy/operational divide in the forthcoming appeal of our Court of Appeal's decision in *Marchi v. Nelson*.

VI. *WU V. VANCOUVER* – PUBLIC AND PRIVATE LAW DUTIES EXPLAINED

In 2011, the claimants bought a property located in the First Shaughnessy District (FSD) with the intention of demolishing the existing house and obtaining a development permit to build a new one. From the initial meeting with City planners, the owners' architect made it clear they had no interest in retaining the existing house. The City, on the other hand, encouraged retention.

The application for a development permit proceeded through Advisory Design Panel where the City presented a heritage evaluation recommending house be retained. Four months passed until the City communicated to the architect that the planning director had established

"confirmation of heritage merit" and that it wanted to see the house retained. Despite the City internally confirming the house had heritage merit, it required the owners to provide a "Statement of Significance" (SOS), prepared by a heritage consultant, providing further confirmation of the residence's heritage merit.

At this point the City's options were: (1) permit the demolition of the house and allow new development; (2) reach agreement with the owners to retain the house through incentives; or (3) designate the property as "protected heritage property", which would bring with it the requirement to pay compensation.

A City administrative bulletin indicated the timeline from filing a development permit application for a new house in the FSD to decision by the planning director should be 10 to 14 weeks. Once the SOS was completed, the City adhered to its position the house should be retained. However, the Owners reiterated they had no interest in retention. By this time about 9 months had passed since the formal application had been submitted and 18 months since the pre-application discussions had commenced.

The City had been reluctant to formally designate the property as heritage due to the compensation requirements and turned to a Heritage Conservation Area (HCA) as the new heritage protection mechanism. An initial 120-day temporary heritage protection order by Council was followed by a further heritage control period of up to a year. Ultimately, in September 2015 Council repealed the existing FSD zoning bylaw and enacted the HCA bylaws, with a new FSD district schedule and HCA ODP. The HCA prevented the demolition of any house in the FSD unless the planning director decided the house no longer had any heritage character or value. Placing the property within an HCA removed any requirement to pay compensation.

The owners brought a claim for an order compelling the issuance of a development permit, or alternatively for damages for abuse of public office, negligence, and expropriation. The trial judge rejected the abuse of office and expropriation claims, but found the City was negligent by reason of having engaged in a bad faith "circuitous course of delay" for the purpose of avoiding the compensation it would have required to pay if it had instead designated the property as having heritage status.

The Court of Appeal overturned the lower court's finding of liability on the basis that the requisite proximity between the owners and the City to establish a duty of care was not present. Justice Harris in the appeal court began with the trial judge's conclusion that the City owed the owners a duty of care to make a decision on their development permit application within a reasonable time in accordance with the statutory framework. The duty he found was not to actually issue a permit, but rather to make a decision on whether a development permit should be issued or not. That was a public law duty to make a decision in a reasonable time. If the decision was unduly delayed, the owners had a remedy in judicial review to obtain an order

that the decision-maker make a decision. The error of the trial judge was simply converting this public law duty into a private law duty of care in negligence. The law was settled though that there is no recognized tort of breach of statutory duty; that is "standing alone, a breach of a statutory duty is not a breach of a private law duty of care."

In order to find a duty of care, it was necessary to undertake the analysis under the *Anns/Cooper* test. As that test had evolved, Justice Harris noted that increased emphasis was placed on the concept of proximity at the expense of reasonable foreseeability in determining where there was a *prima facie* duty of care. Further, the operational and policy decision distinction was said to have been overshadowed, as the law had developed, by the need for a "more rigorous" proximity analysis. As there was no analogous category of duty of care to cover the case, the court considered any duty in the circumstances of the case would be novel.

The role that a statutory scheme of regulation plays in the proximity analysis is a challenge. Although *Imperial Tobacco* instructs that a private law duty of care may arise explicitly or by necessary implication, none of the significant decisions in this area point to a situation where the statute explicitly creates a duty of care or cause of action in favour of a person upon whom responsibilities are imposed through regulation in the event of carelessness on the part of the regulator that causes loss. Thus, it is invariably a question of discerning the inference or implication that a private law duty of care exists.

The appeal court's reasons in *Wu* (together with decisions from the Supreme Court of Canada since 2010 cited by the appeal court) make it clear that the law has come a long way from Justice Cory's finding in *Just* that despite permissive, and not mandatory statutory language, a duty of care to reasonably maintain highways existed in the absence of a specific statutory exemption. Now, although the scheme of statutory regulation is relevant to whether there is proximity, "generally the existence of such a scheme is insufficient to support a finding a proximity."

Statutory schemes creating public law duties do not, on their own, create proximity because their objective is to "promote the public good." Even if a potential claimant is seen as benefiting from the regulatory scheme, that is not sufficient to create proximity. A public authority's duty to the public under such a scheme might also be in conflict with a private law duty to an individual claimant. Therefore, a private law duty of care must be founded on "specific interactions" between the authority and individual creating proximity.

Following these comments on the framework, the Court concluded that the protection of heritage character in FSD addressed the character and ambience of the area; in other words, a concept of the public interest or public good. The Court could not discern any legislative intent to create a private law duty of care in favour of property owners.

The appeal court also took issue with the trial judge's finding that the relationship between the owners and the City was "direct and transactional", as such a relationship was an inherent and necessary part of almost any regulatory framework that included a licensing or permitting

process. There had also been no representations to the owners that could ground any reliance on their part that the City would look out for their private interests. The administrative bulletins on expected timelines cited by the trial judge amounted to general statements about process, not representations that any official was assuming a duty in favour of the owners.

While the appeal court's central finding was that the claim failed due to the lack of a duty of care owed by the City, the court also considered whether there were policy reasons that would negate a *prima facie* duty of care at the second state of the *Anns/Cooper* analysis. Any duty of care would be open-ended, which might be applied indiscriminately against any public authority charged with granting or withholding a permission. The Court also identified a concern for indeterminate liability based on the range of circumstances in which particular permits may be sought. The fact the regulator would know who they were dealing with, as referenced by the trial judge, was not sufficient to allay the concern regarding indeterminate liability. Finally, as the court had already noted in connection with the existing public law duty, enforceable through the remedy of *mandamus*, the law provided an alternative remedy to a claim for damages under negligence law.

VII. FOOTNOTES TO *WU*

The analytical approach adopted in *Wu* was followed in the recent decision of the Supreme Court of BC in *Goy v. Sechelt (District)*, 2020 BCSC 1242. The claimants in Goy were owners in a residential subdivision that had become uninhabitable as a result of the land subsiding. The approving officer, one of the defendants in the lawsuit, applied to have the owners' claim dismissed on the basis that he did not owe them a duty of care. The approving officer relied, in part, on a 1989 BC Supreme Court decision, *Grande v. Nelson*, that held an approving officer's responsibilities in respect of approving a subdivision fell within the legislative or policy category, not within the operational realm. Justice Macintosh accepted the caution from a recent Supreme Court of Canada decision about drawing conclusions finding proximity based on precedent. *Grande* had been decided when proximity played a smaller role in the duty of care analysis. Accordingly, he considered it necessary to undertake the full analysis under the *Anns/Cooper* principles in which proximity has a more prominent part.

The Court readily concluded that it was reasonably foreseeable that a negligent approval of a subdivision on land unfit due to geotechnical problems could lead to property damage or physical harm to occupants. The power given to an approving officer in s. 86(1(d)(i) of the *Land Title Act* to require a report from a geotechnical engineer where the approving officer considers the land could be subject to various hazards, including land slip, supported the view that dangerous or disruptive geotechnical events should be within the contemplation of an approving officer when approving a subdivision.

For the proximity analysis, the statutory scheme under which approving officer's function was critical to the Court concluding that there was no duty of care. First, there was an acknowledgement from the *Wu* decision that the Court of Appeal had indicated that only rarely would the discharge of public law duties give rise to a private law duty of care. Second, the

authority under s. 85(3) of the *Land Title Act* to refuse to approve a subdivision where it would be considered against the public interest was a clear indication that the approving officer must look beyond the immediate interests of owners and occupants of subdivided land. The subdivision approval context was not analogous to *Kamloops* where the enabling legislation and bylaws regulated construction for health, safety, and the protection of property. An approving officer did not have duties corresponding to those of a building inspector. Finally, there were no specific interactions between the plaintiff owners and the approving officer to create proximity.

While the absence of proximity was sufficient to foreclose any finding of duty of care, the Court also concluded there were residual policy concerns that would have precluded a duty of care. Drawing on the *Imperial Tobacco and Cooper* decisions, as well as *Grande*, the Court concluded that the approving officer was engaged in "core policy" decision-making. Concerns of indeterminate liability that the class of potential claimants could extend beyond prospective purchasers to adjacent/adjoining landowners also worked against imposing a duty of care. Accordingly, the claim against the approving officer was struck.

The nature of the loss claimed by the owners in *Wu* was economic loss; the loss in value and expense arising from the City's delays, distinguishable from the kind of damage sustained by the claimants in *Kamloops* and *Just*. The result in *Wu*, while the product of much more thorough reasoning that is up to date in accordance with Supreme Court decision such as *Cooper* and *Imperial Tobacco*, is in line with earlier, ambitious attempts by plaintiffs to claim recovery for economic loss, coincidentally involving the City of Vancouver. In *Wirth v. Vancouver*, [1990] BCJ No. 1616, the Court of Appeal affirmed the dismissal of a claim for diminution of property value of an owner who asserted the City negligently approved an accessory building on an adjacent property that exceeded the size permitted under the zoning bylaw. The claimant relied on *Anns*, *Kamloops,* and *Rothfield*, all of which the court found were inapplicable as the relevant building bylaws in those cases were concerned with safety of persons and property. The zoning bylaw breach at issue in *Wirth* did not deal with similar concerns. The Court held there was simply no tort theory of liability that would permit an adjoining owner to sue for something built on the adjoining land, absent nuisance or some safety element.

In *Cambridge Plumbing Systems Ltd. v. Vancouver (City)*, 2002 BCSC 530, the plaintiff plumbing contractor claimed loss of business revenue resulting from the City's approval of epoxy pipe coating, a method employed by a competitor of the plaintiff to its alleged detriment. The plaintiff asserted the epoxy coating was not permitted by the City's Building Code and the City was under a duty to enforce its building bylaw. The judge accepted that the foreseeability of economic loss from the City's failure to properly regulate epoxy coating use, but concluded that would not be sufficient to impose of a duty of care. Following *Wirth*, the judge concluded the plaintiff could not recover for the claimed economic loss.

On the one hand *Cambridge Plumbing* can be seen as a case affirming that claimants hoping to recover pure economic loss face an uphill battle. It can also be seen as a negligent enforcement or "failure to enforce" case. Negligent enforcement cases can be regarded as a somewhat distinct genre. Some cases do not address the preliminary issue of whether a duty of care is owed to the plaintiff. For example, *Butterman v. Richmond*, 2013 BCSC 423 involved a claim that Richmond had been negligent in its enforcement of its animal control bylaw and the *Community Charter* dangerous dog provisions, allowing a dog to remain free and injure the plaintiff. The Court relied on a 1993 B.C decision, *Froese v. Hik,* for the proposition that as enforcement of a bylaw is discretionary, local governments are obliged to act in good faith and reasonably in respect of any enforcement steps. In *Butterman,* the Court also relied on a 2008 Ontario Court of Appeal decision that a municipality could be liable for negligent enforcement of its bylaws, based on a duty to enforce in favour of property owners, although a municipality retained a discretion as to how it went about enforcement. Two more recent trial level decisions and an appellate decision from Ontario suggest, however, that this path of analysis cannot be squared with the *Anns/Cooper* analysis.

In *Vlanich v. Typhair,* 2016 ONCA 517, an auto insurer brought a third party claim against the township for failing to ensure that a taxi operator had $1 million third party insurance coverage in effect. The township had only one bylaw enforcement officer who was occupied with other duties and was not able to follow up on a notice the township received that the defendant tax company's insurance had expired. The Ontario Court of Appeal applied the *Anns/Cooper* test and determined that the township did not owe a duty of care as there was no proximity between it and the third party claimant insurer. The bylaw did not adopt a standard of avoiding a risk of physical damage or harm, and thus, any analogy to the building inspection regime was inapt. The bylaw was said to have established a standard to benefit the public as a whole, not any particular individual.

In *118143 Ontario Inc. (c.o.b. Canamex Promotions) v. Mississauga (City)*, 2015 ONSC 3691, the City was held to be in a relationship of proximity with one corporate plaintiff as a result of a series of personal interactions. However, the duty of care was negated at the second step of the analysis on the basis that the City's "blitz" to remove apparently offending mobile signs and its publicity campaign in advance of a new bylaw were an exercise of policy implementation.

A prospective class action by taxi licence holders for the City's negligence in not enforcing, or insufficiently enforcing, its vehicle licensing bylaw against Uber was dismissed on a preliminary application to strike the claim as not disclosing a valid cause of action; *Eisenberg v. Toronto (City)*, 2019 ONSC 7312. The plaintiffs' claim was for pure economic loss, and thus, the Court distinguished it from the negligent building inspection cases on which the plaintiffs sought to rely. Notably, the Court relied on the BC Court of Appeal decision in *Wu* and also found that factually the taxi licensees' case was closer to *Vlanich*, but lacked even that case's underlying element of physical injury to the plaintiffs.

While the notion that local governments have a duty to enforce their bylaws and can be found negligent for failing to do so is unlikely to disappear entirely, the case law provides little encouragement for potential claimants.

VIII. *MARCHI V. NELSON* – A CHANCE FOR A NEW APPROACH TO THE POLICY/OPERATIONAL QUANDRY?

The Supreme Court of Canada granted the City of Nelson leave to appeal the BC Court of Appeal's decision in *Marchi v. Nelson*, 2020 BCCA 1. The appeal provides the Supreme Court with a fresh opportunity to address the problematic test for distinguishing between policy/operational decisions, restated last by Chief Justice McLachlin in *Imperial Tobacco*, and roundly criticized by Stratas JA.

The *Marchi* case came out of an attempt by Ms. Marchi to cross a snowbank between the space where she parked her vehicle in downtown Nelson and the adjacent sidewalk. There had been a substantial snowfall over the previous two days. Pursuant to the City's snow removal policy, streets and sidewalks in the downtown had been cleared, but the removal of snowbanks or windrows was not prioritized ahead of plowing and sanding of secondary roads in the City. Areas such as the civic centre, fire hall, police station, and around schools are given priority in snow removal over the area where the plaintiff parked. The trial judge found that the City had followed its snow removal policy and accepted the City's argument that it had made *bona fide* policy decisions based on budgetary, social and economic factors, which included the availability of manpower and equipment. The trial judge rejected as "not very useful" evidence comparing Nelson's snow clearing practices with those of three other municipalities. The trial judge concluded that Nelson's policy was not unreasonable and did not suffer from any lack of appreciation of the risks involved. The trial judge concluded the City did not owe a duty of care in the circumstances, although the more correct statement, following the *Anns/Cooper* test, would have been that the City's *bona fide* policy decisions with respect to snow clearing negated any *prima facie* duty owed to the plaintiff.

The Court of Appeal allowed Ms. Marchi's appeal of the dismissal of her claim and ordered a new trial. The appeal court stated that the City's snow removal decisions may have been more properly characterized as operational in nature, not policy. Certain of Nelson's decisions, such as whether to extend the hours of snow clearing and to not move snow into particular parking spots or leave access to sidewalks open in some areas, were described as "arguably operational". However, the appeal court did not state these decisions were operational, only asserting that the trial judge erred by simply accepting the City's submissions without engaging in the full analysis required in *Just*.

In addition to arguing that the Court of Appeal was wrong to overturn the trial judge's decision to accept the City's policy defence, Nelson's counsel are arguing in their factum that the criticism of the policy/operational dichotomy, and in particular the test articulated in *Imperial Tobacco*, demonstrate the Courts have failed to provide clarity as to its meaning. While noting some commentators have argued for the abandonment of the policy/operational distinction,

the City's counsel are arguing that the policy defence is still an effective way to immunize public bodies from liability for their policy-making decisions. The City argues that its decisions, as set out in its snow removal policy and by supervisory staff in deciding whether or not to engage additional resources, were classic policy decisions involving the allocation of scarce resources with the goal of adhering to budgetary guidelines.

While not suggesting a fundamental overhaul of the policy/operational test, Nelson's counsel suggest additional guidance can be found in the U.S. Supreme Court's decision in *United States v. Gaubert*, 499 US 315 (1991), a decision mentioned by Chief Justice McLachlin in *Imperial Tobacco*. In considering the decisions of Nelson in the written policy and by staff in respect of whether to have workers stay overtime or to engage on-call workers, the following comments by Justice White in *Gaubert* were highlighted:

> "if a regulation [policy] mandates particular conduct, and the employee obeys the direction, the Government will be protected."
>
> "if a regulation [policy] allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."

Perhaps with Christmas 2021 in mind we can hope for two things from the Supreme Court of Canada in its eventual decision in the *Marchi* case: first, and on the broader front, that any re-articulation of the test to distinguish policy/operational decisions does not lead to greater confusion in the quest for greater clarity and, second, and more modestly, that the Court will affirm that policy decisions can be made at lower levels of an organization in respect of discretionary calls and specific resource allocation matters.

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