

MUNICIPAL LIABILITY: THE SUPREME COURT OF CANADA SEEKS TO CLARIFY THE FINE LINE BETWEEN POLICY AND OPERATIONAL DECISIONS

It is settled law that public authorities are not generally immune from claims in negligence. To establish a negligence claim, a plaintiff must prove that (1) the defendant owed the Plaintiff a duty of care; (2) the defendant breached a reasonable standard of care; (3) the plaintiff suffered a loss; and (4) the loss suffered was caused by the defendant's breach.

With respect to the first element, duty of care, the courts have recognized that public authorities have a special status in governing society in the public interest. Therefore, public authorities are entitled to immunity from liability in negligence to protect from court interference with public policy choices that are made by elected governments, who are answerable to the voters. The rationale for immunizing public bodies from private liability in relation to core policy decisions is to protect the separation of powers of the legislative, executive, and judicial branches of government. When making decisions that require the balancing of competing interests of the public, public entities should not be concerned with the risk of private lawsuits from individuals who are impacted by such decisions.

On the other hand, it is clear that public entities are subject to potential negligence claims for operational decisions, or those activities related to how they implement such policy decisions, or that are not based on true policy decisions. The courts, lawyers, and parties have struggled though in categorizing decisions as either core policy decisions or operational decisions.

On October 21, 2021, in *Nelson (City) v. Marchi*,¹ the

Supreme Court of Canada has lifted the fog in an attempt to provide clarity over the differences between the core policy decisions, which are immune from liability in negligence, and operational decisions, which are reviewable by the courts on a reasonableness standard.

BACKGROUND

To establish a negligence claim, plaintiffs must prove the following four elements: a duty of care; a standard of care; causation; and loss.

As part of their unique role, government bodies are required to make decisions based on competing social, political, or economic considerations and constraints, known as core policy decisions. Then, public employees are required to implement these policy decisions. This implementation is referred to as operational decisions.

Historically, all government decisions enjoyed complete and full immunity from negligence claims. Later on, it became clear that even though core policy decisions require special protection in the form of immunity, to guarantee the freedom of elected officials to make decisions in the public interest, operational decisions, should be treated in the same way as if made by private citizens. The policy vs. operational analysis was born.

Consider an extreme example: assuming the elected Council or Board of a local government makes a policy decision that it will remove snow from the downtown

(Continued on page 2)

streets within 24 hours based on social, political, or economic considerations, but staff does not clear the snow at all. In such an example, it seems fair to hold the local government liable for private losses caused by the staff's failure to properly implement the policy of the elected Council or Board.

A policy defence is part of the first element of negligence, duty of care. If a decision is one of core policy, the government making the decision does not owe a duty of care to the plaintiff. This defence is significant because then it cannot be attacked unless it was not *bona fide* or was so irrational that it could not constitute a proper exercise of discretion. Therefore, when responding to negligence claims, local governments and other public bodies focus much of their investigation on whether there is a policy defence.

It should be stressed though, that even when there is no policy defence, it will not automatically result in liability. The plaintiff must still prove all four elements of negligence, and the government may still have several other available defences.

FACTS

In 2000 the City of Nelson (the "**City**") established the "Streets and Sidewalks Snow Clearing and Removal" policy (the "**Policy**"). The Policy dictated that plowing will be conducted "on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines".² Emergency routes and the downtown core were to be plowed first. As for the timing, snow plowing was to occur early in the morning and snow removal, as necessary. The City also had the following unwritten practices (the "**Unwritten Practices**"), described by the court as follows:

"... it plows, sands, and removes snow from the designated sidewalk route and the various stairs located in the City. It focuses on Baker Street in the downtown core for snow removal, but to ensure safety, City workers begin to remove snow from other areas, including the civic centre and around schools, when the downtown

core starts to get busy (typically around 11:00 a.m.). They return to Baker Street as soon as possible. The City does not remove snow from the downtown core overnight due to noise complaints received in the past as well as the cost of overtime."³

Heavy snow accumulated in the City between January 4th and 5th, 2015. As a result, the City's crew plowed the snow downtown in the early morning of January 5, creating snowbanks along the sidewalks. During the relevant times, the City's supervisor decided how many employees to deploy and inspected the work through patrol to ensure the streets were safe, and the employees were working timely and efficiently. This was conducted in accordance with the Policy and the Unwritten Practices.

On January 6 afternoon, the Plaintiff, Taryn Joy Marchi, parked her car in the "downtown core" in an angled spot and wished to get onto the sidewalk which was blocked by a snowbank. Finding no alternatives, she tried to cross the snowbank. While crossing, she got stuck in the snow and her leg was seriously injured.

Ms. Marchi brought an action against the City, alleging negligence and seeking damages. Ms. Marchi alleged that the City should have left paths through the snowbanks to ensure safe access onto the sidewalks. The City contended that it owed no duty of care to Ms. Marchi because the decisions with respect to the snow plowing were core policy decisions.

PREVIOUS DECISIONS

In *Marchi v. Nelson (City of)*,⁴ the trial judge dismissed the claim, concluding that the decision to clear the snow was a policy decision and therefore, the City was immune from a negligence claim. In other words, the City did not owe Ms. March a duty of care. However, in the alternative, the trial judge assessed the remaining elements of a negligence claim and found that a reasonable standard of care was not breached because

(Continued on page 3)

the snowbank did not pose an objectively unreasonable risk, and that, in any event, Ms. Marchi was responsible for her own injury.

On appeal, the B.C. Court of Appeal⁵ held that the trial judge erred on all conclusions and ordered a new trial. In particular, the Court of Appeal explained that the trial judge should have distinguished between core policy decisions, in which local governments are protected from judicial scrutiny, and operational decisions in which they are not, noting that such a distinction is a difficult one to make.

The City appealed to the Supreme Court of Canada, which dismissed the appeal, ordered a new trial, and took the opportunity to clarify where the line is drawn between core policy decisions and operational decisions.

THE SUPREME COURT OF CANADA ANALYSIS

As explained above, the first question in any negligence claim is whether a duty of care exists. Over the years, the Canadian courts recognized different categories where a duty of care is established.

In 1989, in *Just v. British Columbia*,⁶ the Supreme Court of Canada considered and established a novel category of duty of care by the Province of British Columbia toward road users. The Supreme Court of Canada held that public authorities owe a duty of care when responsible for maintaining roads or sidewalks which are available for the public's use, and a member of the public is allegedly injured by the authority's failure to keep these paths reasonably safe. Furthermore, the risk to users from a failure to maintain such roads is foreseeable.

In *Just*, the court further confirmed two exceptions to public authorities' duty of care. Public bodies will be shielded from negligence liability by a statutory provision to that effect, or if the decision made, is a "true" policy decision. The court explained that:

"... the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand,

complete Crown immunity should not be restored by having every government decision designated as one of policy. Thus, the dilemma giving rise to the continuing judicial struggle to differentiate between policy and operation..."⁷

The category established in *Just*, was extended in 1994 to injury to road users as a result of ice conditions.⁸

The Supreme Court of Canada previously defined core policy decisions as "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".⁹ On the other hand, operational decisions are normally "made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness".¹⁰

Despite these definitions, there has still been confusion over the years with drawing the line between policy and operational decisions. Therefore, the Supreme Court of Canada provided the following helpful guidance for such analysis.

THE FRAMEWORK OF ANALYSIS

In a duty of care analysis, the decision in question must be identified and described precisely, with a focus on the nature of the decision. The courts should consider the degree to which a decision was founded in core public policy considerations and to what extent did such considerations affect the justification for government immunity from private claims, i.e., maintaining the separation of powers. However, the court stated that the mere presence of budgetary, financial, or resource effects, in and of itself, is insufficient to determine whether a decision is core policy. Similarly, simply labelling a decision as "policy", or putting it in writing are not determinative.

In addition, the court identified the following four factors to be assessed, while keeping in mind the overarching principle that the core positions of the legislative and executive branches of government must

(Continued on page 4)

be shielded from judiciary's private law interference:

1. The level and responsibilities of the decision-maker – considering the separation of power principle, the closer the decision-maker is to an elected official, the decision would tend to be one of policy. This is also true when the decision-makers' responsibilities include the power to plan and determine the extent of government undertaking or decide regarding budgetary allotments for government departments;
2. The process by which the decision was made – the separation of powers principle is involved when decisions apply broadly, are prospective in nature, and require deliberation, possibly even in a public forum, and would lean toward policy. Conversely, operational decisions are usually at the discretion of employees, exercising judgement (without deliberation) on a case-by-case basis or in reaction to a specific situation;
3. The nature and extent of budgetary considerations – the court made a distinction between decisions regarding the allocation of budget among different government departments and everyday budgetary decisions. While the first will tend to be a policy decision, the latter will point to an operational decision, as it will have no effect on the balance between the three branches of government; and
4. The extent to which the decision was based on objective criteria – when competing interests are involved and the government uses its judgment to choose one over the other, the government would likely be entitled to a policy defence. The justification for immunity is that the court should not substitute the elected officials' judgment with its own. On the other hand, decisions which are founded on objective measures may be assessed by the judiciary.

This list is not exhaustive as more factors may be developed in the future, and no factor is determinative on its own. Every case should be decided on its own facts.

APPLICATION

Turning to the facts of this case, the *Just* category of duty of care was found to extend to injuries from snowbanks created by public authorities on roads and sidewalks.

Therefore, the duty of care will be imposed on the City unless it proves that it is immune from negligence due to the decision being a core policy.

The City argued that the Policy involved allocating limited resources while balancing competing interests and required that the removal of snow be conducted within budget constraints. Furthermore, the public works supervisor made budgetary decisions. For example, the supervisor made the decision not to spend over 20% of the yearly snow removal budget in January.

Ms. Marchi submitted that the creation of snowbanks and parking stalls clearing was not addressed in the Policy. The decisions made by the City's supervisor were merely an implementation of the Policy.

The Supreme Court of Canada agreed with Ms. Marchi. The alleged duty of care must be considered in connection with the allegedly negligent decision. Here, the decisions in question were the way the City cleared the angled parking stalls and created snowbanks which blocked access to the sidewalk. The decisions made by the City's supervisor related to the number of employees to deploy and the inspection of the work through patrol to ensure the streets were safe, and employees were working timely and efficiently. The court made it clear that evidence of daily budgetary considerations in the decision are not determinative.

As part of her evidence, the City's supervisor explained that: "her job was simply to follow "[the] normal protocol" and "follow direction from above me" (trial transcript, A.R., vol. IV, at p. 75). She also testified that changing the way the City plowed the streets would have required some "planning ahead" and she would not have had the authority to change the plowing

method but would have had to ask her director (p. 79).¹¹

Applying the framework above to the facts, the court found that none of the factors pointed to the supervisor's decision being a core policy decision. The supervisor had no authority to make a different decision, which suggested that the decision-maker in this case was not closely connected with democratically elected officials. The City provided no evidence that the decision regarding the way the snow was cleared from the parking stalls resulted from deliberation or balancing of competing interests by the supervisor or her superiors, or that any assessment was made about the feasibility of clearing pathways in the snowbanks. The City's process was based on custom and was performed routinely. The court further found that the budgetary considerations were day-to-day considerations and were not high-level. Finally, the court held that the plowing process can be reviewed by the court using objective standards.

In summary, the Supreme Court of Canada did not purport to change the law regarding the policy defence. The court's analysis repeated the principles that have already been established in the case law. However, this case provides guidance on how to apply the legal principles on the facts of each case.

In Ms. Marchi's case, the Supreme Court of Canada agreed with the B.C. Court of Appeal that the City owed Ms. Marchi a duty of care and cannot be shielded from her negligence claim by a policy defence on the evidence, because the decision in question was operational in nature. Therefore, the court ordered a new trial for determining the remaining elements of a negligence claim. It should be noted though, that despite the City not having a policy defence in this case, it may still succeed in its defence that it acted reasonably.

KEY TAKEAWAYS

Based on the Supreme Court of Canada's analysis, it is recommended that, when decisions are being made regarding the allocation of budgets to different departments and for different functions, these decisions

be adequately documented to show the deliberation process including the different options considered, any competing interests involved, economic, social, or political elements affecting the decision, and any risk assessment conducted. This will assist legal counsel later to defend a decision by arguing that it was one of core policy, and that immunity should be available.

Having written policies approved by Council/Board may strengthen a policy defence. However, this must be weighed against efficiency, as all future revisions and updates will then also need to be approved by Council/Board.

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¹ *Nelson (City) v. Marchi*, 2021 SCC 41 [Marchi].

² *Ibid*, at para 8.

³ *Marchi*, supra note 1, at para 9.

⁴ *Marchi v. Nelson (City of)*, 2019 BCSC 308.

⁵ *Marchi v. Nelson (City of)*, 2020 BCCA 1.

⁶ *Just v. British Columbia*, 1989 CarswellBC 234 [Just].

⁷ *Ibid*, at para 16.

⁸ *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 [Brown].

⁹ *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para 90.

¹⁰ *Brown*, supra note 8, at p. 441.

¹¹ *Marchi*, supra note 1, at para 82.



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