

# **REGULATORY NEGLIGENCE: NEGLIGENCE WITH OR WITHOUT A DIFFERENCE?**

**By Charles M. K. Loopstra, Q.C. and Daron L. Earthy of LOOPSTRA NIXON LLP**



**LOOPSTRA NIXON** LLP

**BARRISTERS AND SOLICITORS**

Woodbine Place, 135 Queens Plate Drive, Suite 600

Toronto, Ontario, Canada M9W 6V7

[www.loopstranixon.com](http://www.loopstranixon.com)

Telephone: 416-746-4710 Fax: 416-746-8319

## REGULATORY NEGLIGENCE: NEGLIGENCE WITH OR WITHOUT A DIFFERENCE?

### Introduction

Historically, governments were virtually immune from tort liability. A government body performing a public duty authorized by statute would not be found liable in an action for negligence prior to 1866. This immunity was ended in England when the House of Lords held that the liability of a public body which was created by statute must be determined upon a true interpretation of the statute which created the body, and unless the statute specifically relieved the municipality from liability, then the legislature intended that the municipality be rendered subject to the same liabilities as would be imposed upon a private person doing the same thing.<sup>1</sup>

This line of reasoning made its way into the Ontario courts some 60 years later in the *Nickell* case,<sup>2</sup> where the Court of Appeal readily adopted the approach used by the House of Lords in the *Mersey* decision. The courts opened the floodgates ever so slightly, and a modest flow of tort litigation emerged on the basis of what became well-defined principles. It took another half a century for the floodgates to really open.

In the early days, after the *Nickell* decision, Canadian courts found against municipalities in only very limited and specific circumstances. Either a legal relationship had to exist, or some legal duty had to be expressly set out by statute. If a municipality failed to do something within its statutory powers, it was only considered nonfeasance, and therefore not actionable.<sup>3</sup> However, if a municipality negligently carried out a statutory power, it would be regarded as misfeasance, and thus open to an action for liability and damages. Most Canadian provinces enacted uniform Crown liability legislation in the early 1950's to the effect that the government is subject to liability in tort, as if it were a person of full age and capacity:

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<sup>1</sup> *Mersey Docks Trustees v. Gibbs*, (1866) L.R. 1 H.L. 93. ("*Mersey*")

<sup>2</sup> *Nickell v. The City of Windsor*, (1926) 59 O.L.R. 618 (C.A.) ("*Nickell*")

<sup>3</sup> *Sequein v. Hawkeberry*, [1955] O.W.N. 966

- (a) in respect of a tort committed by any of its officers and agents;
- (b) in respect of any breach of duty owed to a servant and agent as an employer;
- (c) in respect of any breach of duty attached to ownership, occupation, possession or control of property; and
- (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

Understanding the current legal relationship between statutory duties, statutory powers and the civil liability of government bodies is a complicated task. This paper is intended as a primer on suing the government for negligence, with a particular focus on recent cases involving the private law duties of care of government bodies.

### **Elements of Negligence**

Negligence, in the legal sense, is established when a court decides that a defendant ought to have acted more carefully because of what predictably could have, and actually did, happen to the plaintiff. This simple definition of negligence reveals all of the requirements of the tort of negligence:

- i) that the defendant had an obligation to the plaintiff to take care (i.e. he owed a duty of care to the plaintiff);
- ii) that the defendant should have observed a particular standard of care in order to fulfill or perform that duty;
- iii) that the defendant breached his duty of care by failing to fulfill or observe the relevant standard of care;
- iv) that the breach of duty caused harm to the plaintiff; and
- v) that such harm was not too remote or unforeseeable such that the defendant is not liable for its occurrence.<sup>4</sup>

Although the elements of negligence and applicable tests are the same for government defendants as for private party defendants, certain concerns arise only in the case of government defendants. The first concern is that in determining negligence claims against government authorities, the court is called on to make policy decisions about what the

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<sup>4</sup> Fridman, at 317

government authority should and should not have done in a particular case. Accordingly, the court must tread carefully to avoid overstepping its proper adjudicative function. In some cases, it is appropriate for the court to review and judge government conduct, while in others, the government must be given its arena of legislative and policy-making discretion without interference from the courts.

Secondly, all government actions, powers and duties arise from a statutory context, which is entirely foreign to private party negligence claims. In *R. v. Saskatchewan Wheat Pool*, the Supreme Court of Canada held that there is no tort for breach of statute, *per se*, however:

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*3. Proof of statutory breach, causative of damages, may be evidence of negligence; and*

*4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.<sup>5</sup>*

Accordingly, in negligence claims against government bodies, statutes and regulations are relevant to determining whether a private law duty of care exists and the scope of any private law duty of care, and they may be relevant to determining the standard of care that should be exercised. The role of statute is discussed in more detail below.

Thirdly, usually, the role and relationship of government vis-à-vis individuals is very different from the roles and relationships between individuals, as was recognized by the Federal Court of Canada:

*The relationship between the government and the governed is not one of individual proximity. Any, perhaps most, government actions are likely to cause harm to some members of the public. That is why government is not an easy matter. Of course, the government owes a duty to the public but it is a duty owed to the public collectively and not individually. The remedy for those who think that duty has not been fulfilled is at the polls and not before the Courts.<sup>6</sup>*

The courts must balance the unique role of government and the concept of duties owed to the public with the fact that government actors are still capable of being liable in negligence to

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<sup>5</sup> [1983] 1 S.C.R. 205. at 225-226.

<sup>6</sup> *A.O. Farms Inc. v. Canada (Minister of Agriculture)* (2000), 28 Admin. L. R. (3d) 315, [2000] F.C.J. No. 1771 (F.C.) at para. 11.

particular individuals in appropriate circumstances.

These three concerns are played out in the court's analysis of whether or not a government authority owes a duty of care to a particular individual, as opposed to owing only a public duty. Frequently, the analysis takes place on a motion to strike the plaintiff's claim on the grounds that the claim does not disclose a cause of action against a government defendant. The recent cases discussed below reiterate that it is not enough that a plaintiff plead the existence of a duty of care to get to trial of the full claim; the claimed duty of care may be tested by the defendant on a pre-trial motion. The test to be applied on a motion to strike pleadings is well settled:

*The court should not strike a pleading on the ground that it discloses no reasonable cause of action unless it is "plain and obvious" on the basis of the facts pleaded by the plaintiff that the existence of the cause of action could not be established at trial. For this purpose, it must be presumed that the plaintiff's allegations of fact will be proven unless they are manifestly incapable of proof. It has also been held consistently that, for the purpose of applying the test, the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies and that the novelty of a cause of action is not, in itself, a factor that would justify a decision to strike. In addition, it has been held in a number of cases that the decision to strike should not be made if it would require a resolution of difficult legal questions in an area where the law is unsettled.<sup>7</sup>*

## **I. Duty of Care**

At one time, the courts only recognized negligence in particular categories of relationships between plaintiffs and defendants. Gradually, the courts came to recognize that there were no necessary limits to situations where a party ought to be careful in his or her conduct for the benefit or protection of another – in other words, that the categories of negligence are never closed. Now, the starting point for establishing the existence of a duty of care is whether the relationship between the parties falls into a previously recognized category where a duty of care has been found to exist, or whether the relationship is analogous to such a relationship. If a duty of care cannot be established with reference to existing categories of

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<sup>7</sup> *Williams v. Canada (Attorney General)*, (2005), 76 O.R. (3d) 763, 257 D.L.R. (4th) 704 (S.C.J.), at para. 15; see also *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

relationships, the court must determine whether to impose a “new” duty of care in the circumstances of the case. To do so, the court must apply the test set out in *Anns v. Merton London Borough Council*<sup>8</sup> and adopted in Canada in *Kamloops v. Nielson*.<sup>9</sup> The *Anns* test has been reinterpreted and restated by the Supreme Court of Canada and other appellate courts repeatedly, but there is no single leading formulation of the test. Further, although the test is described as having “two parts”, the test, as it has been modified and applied, actually has many more parts and sub-parts. The important underlying point of the *Anns* test is that policy considerations relating both to the specific relationship or situation in the case and to broader, societal concerns are relevant to determining whether a duty of care should exist in a given situation. In order to establish the existence of a “new” duty of care, the plaintiffs must establish:

“Stage 1”

- a) that the harm complained of by the plaintiffs was a reasonably foreseeable consequence of the defendant’s alleged failure to take care;
- b) that there is a sufficiently “proximate” or “close and direct” relationship between the parties such that it would be fair, just and reasonable to impose a *prima facie* duty of care on the defendants; and

“Stage 2”

- c) that there are no “residual”, broad policy reasons to negate or limit this *prima facie* duty of care.

1. *Reasonable Foreseeability*

Almost no cases involving the application of the *Anns* test will turn on the foreseeability of the harm suffered by the plaintiff for several reasons. Firstly, most harms that a plaintiff will bother pursuing in court are significant enough that they could at least arguably be considered reasonably foreseeable. Secondly, the real issue in determining whether a duty of care exists is not what the defendants could have imagined potentially happening, but which possibilities should have caused the defendants to take care to prevent them from happening. Thirdly,

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<sup>8</sup> [1977] 2 All E.R. 492 (H.L.)

<sup>9</sup> [1984] 2 S.C.R. 2 (“*Kamloops*”).

reasonable foreseeability is a pure judgment call, which provides little or no opportunity for a reasoned analysis by the court. As a result, foreseeability is usually conceded by the defendant in a pre-trial motion to determine whether a duty of care exists.

## 2. Proximity

“Proximity, above all, is a question of policy and a balancing of interests.”<sup>10</sup> Determining proximity involves a normative policy decision about which foreseeable potentiality should cause the defendant to change his conduct. To determine whether the relationship between the parties is “proximate” enough that a duty of care should be imposed, courts are instructed to examine factors such as the reasonable expectations of the parties, representations, reliance, and property or other interests affected by the defendant’s conduct.<sup>11</sup> Other important factors are the closeness of the causal connection between the parties, whether the plaintiffs were discretely or differentially affected by the relevant risk or the defendants’ conduct, and generally the appropriateness of a civil remedy (as opposed to an administrative or political remedy) in the circumstances. Courts tend to express this analysis as applying a test of proximity, as if proximity is something that can be discovered in the relationship between the parties or the governing statute.<sup>12</sup> For the sake of analytical clarity, it is important to remember that a finding of “proximity” expresses a policy-based conclusion reached upon examining the relevant factors mentioned above, just as a finding of “fiduciary” represents a conclusion about a relationship upon examining similar relevant factors. A “*prima facie* duty of care” exists where there is sufficient proximity between the parties.

## 3. Residual Policy Considerations

If the court finds that a *prima facie* duty of care exists, it must then consider whether there are other policy reasons outside the relationship between the parties to negate or limit the *prima facie* duty of care. These policy considerations include:

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<sup>10</sup> *R. v. Haj Khalil*, 2007 FC 923, at para. 193.

<sup>11</sup> *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (“*Cooper*”), at para. 34.

<sup>12</sup> *Williams*, *supra*, note 7.

- the effect of recognizing the duty of care on other legal obligations, the legal system, and society generally;
- the availability of other legal remedies, and the possibility of parallel proceedings and re-litigation of the same issues;
- the possibility of creating unlimited liability to an unlimited class;
- whether the duty of care would create an insurance scheme funded by taxpayers;
- conflict with other private or statutory duties;<sup>13</sup>
- the possibility of a chilling effect on a legislative or policy-making function, or on the fulfillment of other duties.

In addition to the policy considerations listed, the most important “residual policy consideration,” which has framed much of the jurisprudence regarding the negligence liability of government bodies, is the principle that it is inappropriate for the courts to adjudicate on or interfere with government’s true “policy” decisions, but there may be tort liability for the negligent implementation of a policy (i.e. for negligent “operational” activities). In *Brown v. B.C.*, the Supreme Court summarized the relevant factors to consider in determining whether government action should be categorized as “policy” or “operational”:

*True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.*

*The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.*<sup>14</sup>

The Supreme Court has held out this “policy/operational” distinction as a bright line test for determining whether governmental conduct is reviewable on negligence standards by the

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<sup>13</sup> Note: This factor was considered in the proximity analysis (stage 2) of the Anns test, in *Cooper*, *supra*, note 11 and *Edwards*, *infra*, note 18 and in *Syl Apps*, *infra*, note 32.

<sup>14</sup> *Brown v. British Columbia* (Minister of Transportation and Highways), [1994] 1 S.C.R. 420 (“*Brown*”)

court.<sup>15</sup> However, in applying the policy/operational test, the courts have demonstrated that the policy/operational distinction is not a workable or informative way of analyzing and addressing the underlying tension in the judicial adjudication of government actions. The problem is that any decision can easily be categorized as either policy or operational depending on how it is described. Despite the apparently simplicity of the distinction, the fact is that all government decisions and actions are a mix of policy and operations, involving the balancing of competing social and political interests and the allocation of resources. Some government decisions are matters of broad policy/operation, and some deal with policy/operation at a nitty-gritty level. To put the point another way, government decisions and actions do not declare themselves to be “policy” or “operational” upon examination, they are found to be one or the other by the courts as a *conclusion* about whether or not the decisions at issue are reviewable, not as a *reason* that the courts should or should not review the decision. The fact that courts must frame their reasons around the policy/operational distinction tends to obfuscate the real reasons why the court has decided one way or the other. For example, Professor Klar states:

*In **Swinamer**, for example, although the decision to have a survey apparently was not reviewable, the decision whether to hire experts or to specially train staff to conduct the survey was. What, however, is the essential difference between these types of decisions? They both involve "political" factors, they both involve planning. Similarly in **Just**, the planning decision not to climb slopes but rather to visually inspect them was reviewable. In **Brown**, the decision to be on a summer schedule was not reviewable, although the manner of the call-out system on the summer schedule was. These, however, are all resource allocation decisions, and it is difficult to distinguish between them.*<sup>16</sup>

Although the policy/operational distinction remains the law, the courts appear to be placing less emphasis on the policy/operational distinction, and instead focusing on whether the applicable statutes reveal private duties owed to the particular plaintiff, or only duties owed to the general public.

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<sup>15</sup> *Just v. The Queen in Right of British Columbia*, [1989] 2 S.C.R. 1228 (“*Just*”)

<sup>16</sup> L. Klar, “Falling Boulders, Falling Trees and Icy Highways: The Policy/Operational Test Revisited”, (1994) 33 Alta. L. Rev. 167

#### 4. The Role of Statute

In cases involving public authorities, the proximity analysis is complicated by the role of statutes and regulations in mediating or creating the relationship between the parties. In *Cooper*, the Supreme Court states:

*In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. The statute is the only source of his duties, private or public. Apart from that statute, he is no different position than the ordinary man or woman on the street. If a duty to investors...is to be found, it must be in the statute.*<sup>17</sup>

In *Edwards*:

*Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.*<sup>18</sup>

Despite these statements by the Supreme Court, it is clear that in certain circumstances, a relationship of proximity may be established on the specific factual relationship between a governmental body and a member of the public, even in the absence of a relationship of proximity arising from statute.<sup>19</sup> A more comprehensive statement of the relationship between private law duties of care owed by government bodies and their governing statutes was expressed by Cullity J. in *Williams*:

*[A]lthough the starting point in a case like this must be the statutes that impose duties, or confer powers, on the Crown, the issue of proximity is not dependent on finding a specific legislative intention to impose a private law duty of care owed to the plaintiffs. If, on the construction of the statute, such an intention appears, that will be the end of the inquiry but proximity will not be excluded by the fact that the statute is silent on the question. Similarly, a legislative intention to create duties owed to the public will not necessarily preclude a finding of proximity unless, as in *Cooper*, it appears that only such duties were intended to be imposed. Even where legislation imposes duties that are owed only to the public - or confers powers exercisable only in the public interest - a relationship of proximity may arise from the manner in which the duties or powers are exercised: *Pearson v. Inco Ltd*, [2001] O. J. No. 4990 (S.C.J.), at para 30. Statutory duties of Ministers to make policy decisions are quintessentially duties owed to the public and not to private individuals but, as the cases where liability is found in respect of operational decisions illustrate, an implementation of decisions made in the exercise of such powers or duties can create a relationship*

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<sup>17</sup> *Supra*, note 11.

<sup>18</sup> *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562.

<sup>19</sup> *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*, [1989] O.J. No. 471 (G.D.), (1990), 74 O.R. (2d) 225 (Div. Ct.)

*of proximity with persons affected. (emphasis added)*<sup>20</sup>

Cullity J.'s observation that, "statutory duties of Ministers to make policy decisions are quintessentially duties owed to the public and not to private individuals," leads to the conclusion that plaintiffs are unlikely to succeed in actions against the government if they rely solely on provisions of statutes with general applicability. Thus, while the policy/operational distinction tended to be used as a tool by judges to justify the expansion of government liability, the emerging public duty/private duty distinction suggests a reversal of that trend.

#### 5. *Recent Cases*

Recent cases involving the liability of governmental bodies demonstrate the following themes:

- Reaffirmation of the *Anns* test as the test for determining whether a duty of care exists;
- Reinforcement of using motions to strike pleadings as a pre-emptory strike against litigation against government bodies;
- Shifting emphasis from the policy/operational distinction as a bright line test of governmental negligence to other measures including reliance, causal connection and a distinction between public and private duties; and
- Consideration of as many relevant factors or arguments as possible without being concerned about following "tests" perfectly.

#### ***Williams v. Canada (Attorney General)***<sup>21</sup>

This case was a class action lawsuit launched against the City of Toronto, and the governments of Ontario and Canada on behalf of persons, and their families or estates, who contracted SARS during the outbreak of that disease in Toronto in 2003. The claim alleged that the City of Toronto was negligent in:

- failing to coordinate and integrate its response to the SARS outbreak with Ontario and Canada;

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<sup>20</sup> *Supra*, note 7.

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- failing to upgrade software appropriate for response to a public health emergency;
- issuing confusing or contradictory directives to hospitals; and
- prematurely declaring the outbreak to be at an end.

Ontario, through the Ministry of Health and Long-Term Care, was alleged to have been negligent in:

- failing to coordinate and integrate its response to the SARS outbreak with the City of Toronto and Canada;
- failing to maintain and upgrade equipment, software and laboratory facilities;
- terminating, in 2001, the employment of scientists who could have assisted with the analysis and testing of specimens;
- issuing confusing contradictory or otherwise inappropriate directives; and
- lifting the state of emergency and terminating other preventative measures prior to the total eradication of SARS from Toronto's hospitals.

The plaintiff claimed that Canada, through Health Canada, was negligent in:

- failing to coordinate and integrate its response to the SARS outbreak with the City of Toronto and Ontario;
- failing to translate a Chinese language report regarding a flu outbreak in China;
- failing to take reasonable measures to limit the spread of the outbreak;
- failing to take steps to assist Ontario's officials;
- approving or acquiescing in the decision of Ontario and Toronto to prematurely reduce infection control measures;
- denying the renewal or continuation of the outbreak; and
- failing to warn Canadians that these measures were premature.

The plaintiff also claimed that all defendants had systemically breached a duty to develop and implement reasonable public health emergency plans in order to respond to communicable disease epidemics such as SARS.

On a motion by the defendants to strike the statement of claim on the ground that it disclosed no reasonable cause of action, Cullity J. dismissed the claim as against Canada and

the City of Toronto, and partially struck the claims against Ontario, holding that the claim should be decided with a full evidentiary record. In dismissing the claims against Canada, Cullity J. noted the absence of a close causal connection between the plaintiffs and the defendants in performance of their statutory duties. He found that the causal link between Health Canada and the plaintiff was even more indirect than that in *Odhavji*,<sup>22</sup> since Health Canada had no supervisory role over the steps that were taken in response to the SARS outbreak. He also noted that the statutory duties of Health Canada under the Department of Health Act, are duties owed “to the people of Canada”. He concluded that the statutes did not, by themselves, provide the “additional requisite element of proximity.”<sup>23</sup>

With respect to the claims against Ontario, the plaintiff alleged that the Premier and Minister of Health disregarded the interests of the plaintiff and prematurely relaxed infection control procedures in order to obtain the exclusion of Toronto from a travel advisory warning issued by the World Health Organization. Cullity J. held:

*In the face of these allegations, and the allegations of the motivation behind the decisions..., it is not plain and obvious to me that the plaintiff would be unable to establish proximity between the Provincial Crown and class members. Although, as the Divisional Court held in **Mitchell**, private law duties may not have arisen solely from the provisions of the statutes, it does not follow that proximity between the Provincial Crown and the class members could not arise from the manner in which policy decisions made pursuant to the statutory powers and duties were implemented. The Minister and other Provincial officials acted specifically to prevent the infection of persons who would otherwise have been at risk of contracting SARS. Arguably, their decision to do this, and their allegedly premature decision to reduce, or withdraw the preventative measures in place, were sufficient to create a relationship of proximity with such persons: cf., **Air India**, at pages 138-9; **Jane Doe**, at page 26 (S.C.J.) and 522 (Div.Ct.). The alleged causal connection between the conduct of the officials and the harm suffered by class members was significantly closer and more direct than that between the acts and omissions of the Federal Crown and such members. The facts are, I believe, nearer to those in **Eliopoulos** than those in **Mitchell**.*

Cullity J. dismissed the claims of “systemic” negligence against Ontario on the grounds that the decision about whether or not to develop a public health emergency plan was a non-reviewable

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<sup>22</sup> *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, in which the plaintiffs' claims were dismissed for want of proximity.

<sup>23</sup> At para. 82.

policy decision.

The claims against the City of Toronto were dismissed completely on the grounds that the plaintiff had failed to plead material facts sufficient to disclose a reasonable cause of action against the City of Toronto directly or vicariously. Cullity J. noted:

*The vagueness, generality and ambiguity of the pleading against the City mirrors that against each of the other defendants. In view of the trend of the most recent of authorities on Crown proceedings, I have found that the failure to plead vicarious liability or any breach of a duty of care by a Crown servant should not be considered on this motion to be fatal to the claims against the Crown. However, the same considerations do not apply to the claims against the City.*<sup>24</sup>

### *Conclusions*

The result of the *Williams* decision is that claims against government bodies should be struck out on a pre-trial motion where the relevant statutory duties are exercisable only in the public interest and the plaintiff does not plead sufficient material facts to establish proximity based on a differential risk or impact on the plaintiff. The claim against Ontario was not struck out because the plaintiff pleaded facts that indicated a differential risk or impact in the opinion of the motions judge. It should be noted that Cullity J. did not have the benefit of the Court of Appeal's decision in *Eliopoulos* when he wrote his decision; the outcome may have been different if he had. It is also interesting to note that Cullity J.'s proximity analysis relied on two factors that were not enumerated by the Supreme Court in *Cooper*: closeness of the causal connection between the plaintiff and defendant, and the availability of a political sanction. In the author's opinion, this latter, express factor is a more appropriate and to-the-point "test" than the policy/operational distinction in addressing the tension inherent in the adjudication of government actions.

### ***Burgess (Litigation Guardian of) v. Canadian National Railway Co.***<sup>25</sup>

The plaintiff was severely injured at the age of 13, when she was hit by a train while

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<sup>24</sup> At para. 103.

<sup>25</sup> (2005), 78 O.R. (3d) 209, aff'd in the result (2006), 85 O.R. (3d) 798 (C.A.), leave to appeal to Supreme Court of Canada dismissed with costs, Docket No. 31698

crossing a double set of railway tracks at the Glendale Avenue railway crossing in St. Catherines. The plaintiff and her family sued CNR, which operated the train that hit her, the municipalities, and the government of Canada, represented by Transport Canada. Canada brought a motion to strike the portions of the statement of claim relating to it on the grounds that the claim disclosed no reasonable cause of action against Canada. The plaintiffs did not plead that there had been any violation of the applicable safety and inspection regulations, but claimed that Canada was negligent because the railway crossing lacked appropriate pedestrian warning and safety devices. According to the motions judge, the issue before the court was whether a railway inspector had a duty, above and beyond his or her specific statutory duties, to identify and warn responsible parties to take corrective action with respect to any real or perceived hazardous condition.

*Motion decision*

The motions judge applied the *Anns* test to determine whether Canada and its railway inspectors owed a duty of care to the plaintiffs. After a lengthy review of *Cooper*, the motions judge concluded that Canada's railway inspectors owe a *prima facie* duty of care to a person such as the plaintiff in the exercise of their statutory duties. The judge also concluded that there were no residual policy reasons to negate the *prima facie* duty of care. He then examined the impact of the following provisions of the *Railway Safety Act* ("*RSA*"), which seem to negate the existence of a private law duty of care:

**27. (1)** *The Minister may designate any person whom the Minister considers qualified as a railway safety inspector or a screening officer for the purposes of this Act and, in the case of a railway safety inspector, the Minister shall designate the matters in respect of which the person may exercise the powers of a railway safety inspector.*

...

**(4)** *A railway safety inspector is not personally liable for anything done or omitted to be done by the inspector in good faith under the authority of this Act.*

The motions judge stated:

*[114] In this case, the Plaintiffs argue that they can sue Canada for the negligence of its inspectors and section 27(4) is no bar to that right. Counsel for the Plaintiffs states that the “immunity clause” is really not similar to the clauses found in **Edwards, Cooper, Rogers v. Faught** (supra at paragraph 101) or **Carlstrom v. Professional Engineers** (supra at paragraph 105). He submitted that it simply limits the personal liability of a railway inspector for anything done in good faith under the authority of the RSA but it does not mean that his/her can not be found negligent in the performance of his duties, which presumably would then render his employer Canada vicariously liable. I agree with that submission, but feel that there is clearly a limitation on that right.*

...

*[119] Section 27 (4) must be read literally and narrowly. If it was the intention of the legislature to deny any right of access of an aggrieved party to our Courts, our courts have, as noted above, made it clear it must do so in the clearest terms possible. That is not the case with respect to Section 27(4). Accordingly, I do not feel that this immunity clause exempts Canada from its private duty of care.*

Notwithstanding his finding that s.27(4) did not exempt Canada from civil liability, the motions judge dismissed the claims as against Canada on the basis of the following provisions of the RSA:

**31. (2)** *If a railway safety inspector is of the opinion that the standard of construction or maintenance of a crossing work threatens safe railway operations, the inspector, by notice sent to the person responsible for the maintenance of the crossing work and to the railway company concerned,*

*( a) shall inform them of that opinion and of the reasons for it; and*

*( b) may, if the inspector is satisfied that the threat is immediate, order either of them to ensure that the crossing work not be used, or not be used otherwise than under terms and conditions specified in the notice, until the threat is removed to the inspector's satisfaction.*

...

*(4) For the purposes of subsection... (2), a railway safety inspector shall not determine that the standard of construction or maintenance poses a threat to safe railway operations if that standard conforms to all applicable regulations, rules and emergency directives.*

The judge held that the duty of care of the railway inspectors was limited to the enforcement of the regulations, which were not alleged to have been violated in this case.

### *Court of Appeal decision*

The Court of Appeal's brief endorsement upheld the judge's decision, but apparently overruled his determination that Canada owed a duty of care to the plaintiffs. The court stated:

*In his comprehensive reasons, the motions judge essentially disposed of the respondent's motion on the basis that the appellants' pleadings do not assert that the railway inspectors were negligent with respect to any of the matters assigned to them under the Railway Safety Act, R.S.C. 1985, c. 32 (4th supp.). We agree with the motions judge's analysis and, in particular, with his application of Cooper v. Hobart, [2001] 3 S.C.R. 537 on this point: see paras. 121 – 123 of the motions judge's reasons.*

*More fundamentally, however, the respondent had no private law duty to regulate or to issue emergency directives beyond those regulations that were in effect at the relevant time. There is no suggestion here that there was a failure to comply with those regulations.*

...

*In our opinion, the appellants' action against the respondent flounders on the first branch of the [Anns] test... that is, on the question of proximity.... Under the statutory scheme established by the Railway Safety Act, the respondent's statutory duties are owed to the public at large. We do not accept the appellants' argument that ss. 3 and 4(4) of the Railway Safety Act give rise to the necessary proximate relationship so as to ground a private law duty of care owed by the respondent to the appellants. (emphasis added)*

### *Conclusions*

This case is confusing for two reasons. Firstly, the Court of Appeal states that it agrees with the analysis of the motions judge, but then goes on, apparently, to overrule his finding that a duty of care exists in the circumstances. Secondly, the Court of Appeal summarizes the motions judge's lengthy decision into one holding, but says nothing about his questionable analysis of the statutory immunity provisions.

Notwithstanding these confusing aspects, this case is notable for two reasons. Firstly, the plaintiffs were essentially alleging that the railway safety regulations and requirements were inadequate, but were not alleging negligent inspection. Although this claim was arguably a very easy case to decide based on a policy/operational distinction, neither the motions judge nor the Court of Appeal framed their holdings that way. Secondly, the Court of Appeal used the public

duty/private duty distinction to negate a private law duty of care without an in-depth *Anns* test proximity analysis. Although this case is not a great example of well-reasoned analysis in either court, it further demonstrates some of the themes mentioned above, and perhaps further signals a retreat from expanding government liability.

***Eliopoulos v. Ontario (Minister of Health and Long-Term Care)***<sup>26</sup>

This case was one of 40 similar actions brought against the Ontario government by residents who contracted West Nile Virus in 2002. The claim alleged that Ontario should have done more to detect the presence of West Nile Virus in dead birds, and to prevent its spread through mosquitos. On a motion to strike the statement of claim, the motions judge held that there could be a duty of care in the circumstances, and refused to deal with Ontario's policy arguments for negating the duty of care. The Divisional Court upheld the motions judge's decision. The Court of Appeal overruled the Divisional Court and dismissed the claim against Ontario.

Having found that the relationship between the plaintiffs and the government did not fit within a recognized category giving rise to a duty of care, the Court of Appeal applied the *Anns* test to determine whether a new duty should be recognized. The plaintiffs relied solely on the provisions of the *Health Protection and Promotion Act* ("HPPA") to ground the claimed private law duty of care. Although the plaintiffs pointed to a long list of specific powers exercisable by the Minister to support their claim, the court found that:

*...these important and extensive statutory provisions create discretionary powers that are not capable of creating a private law duty. The discretionary powers created by the HPPA are to be exercised, if the Minister chooses to exercise them, in the general public interest. They are not aimed at or geared to the protection of the private interests of specific individuals. (emphasis added)*<sup>27</sup>

The court concluded that that although the Minister has a duty to prevent the spread of

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<sup>26</sup> (2006), 82 O.R. (3d) 321 (C.A.), leave to appeal to Supreme Court of Canada dismissed, Docket No. 31783

<sup>27</sup> At para. 17.

infectious diseases, a general public law duty of that nature does not give rise to a private law duty of care sufficient to ground an action in negligence. The court went on to comment:

*This case is concerned with a general risk faced by all members of the public and a public authority mandated to promote and protect the health of everyone located in its jurisdiction. The risk of contracting a disease that might have been prevented by public health authorities is a risk that is faced by the public at large. It is a much more generalized risk than the type faced by mortgage investors or clients of lawyers [as in **Cooper** and **Edwards**]. Moreover, the nexus or relationship between a member of the public who contracts WNV and the Minister is more attenuated than the nexus or relationship between a mortgage investor and the regulator of mortgage brokers or a client and the regulator of the legal profession. It was held to be plain and obvious in **Cooper** and **Edwards** that there could be no private law duty of care and I find it impossible to conclude otherwise in this case.*

The court also rejected the plaintiffs' argument that Ontario had made a policy decision to implement a West Nile Virus surveillance and prevention plan and was operationally negligent for three reasons:

- the plan was not the kind of decision that would engage Ontario at the operational level;
- any operational duties created by the plan resided with local authorities; and
- the statement of claim essentially alleges failure to adopt adequate policies, not failure to implement a plan in a non-negligent manner.

With respect to the first reason, the court concluded that the plan represented an attempt by Ontario to encourage and coordinate appropriate measures to reduce the risk of West Nile Virus by providing information to local authorities and the public. However, Ontario undertook to do very little beyond providing information, and the implementation of specific measures such as the elimination of standing water (i.e. mosquito breeding sites) was left to the discretion of members of the public and local authorities. The important underlying point is that Ontario's response to the threat of West Nile Virus did not create an expectation on which the plaintiffs could reasonably rely that Ontario would be responsible for preventing the disease's spread.

On the third issue, the court, citing *Brown*, concluded that the allegations in the statement of claim relate to issues of general public health policy, the establishment of

governmental priorities, and the allocation of scarce health care resources, which are policy decisions that are not reviewable by the court.

### *Conclusions*

The result in *Eliopoulos* is another example, following *Williams*, of the court striking out a claim against the government on a pre-trial motion where the plaintiffs have not pleaded any facts establishing a differential risk or impact on the plaintiff. The message is that government is not responsible for general risks faced by everyone, which are not created by the government, where the government takes no actions that would lead members of the public to believe that the government was taking responsibility for that risk.

### ***Klein v. American Medical Systems Inc.***<sup>28</sup>

This case involved a class action suit against the manufacturer and distributor in Canada of an allegedly defective medical device designed to alleviate or cure female incontinence. A claim was also brought against the Attorney General of Canada for the alleged negligence of Health Canada in allowing the device to be licensed for sale and use in Canada. Specifically, the plaintiff claimed that Health Canada:

- failed to take the necessary steps to approve the device;
- failed to test or adequately test the device when it approved it for sale, supply and use in Canada;
- relied on skewed tests submitted by the manufacturer;
- knew or ought to have known the device was unsafe, untested or inadequately tested;
- showed a reckless disregard for the lives and safety of Canadians into whose body the untested or inadequately tested device would be inserted, in particular the Plaintiff;
- misrepresented that the device had been tested or adequately tested and was safe for its purpose and use; and

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<sup>28</sup> (2006), 219 O.A.C. 49, 2006 CanLII 42799 (Ont. Div. Ct.)

- was complicit in supplying the device without warning and without knowledge as to whether the device was safe.

On a motion brought by Canada to strike the statement of claim, the motions judge determined that a full factual record was necessary to determine whether Health Canada negligently failed to enforce its own detailed licensing requirements. The Divisional Court found that the motions judge committed a reviewable error by failing to engage in an analysis of proximity under the *Anns* test, and failing to appropriately address the policy considerations relevant at stage two of the *Anns* test. The court commented that the motions judge appeared to have misconceived the nature of the issues before her on the motion. The Divisional Court characterized the plaintiff's claim as alleging that Health Canada has a duty to examine and test medical devices to be sold in Canada. The court went on to apply the *Anns* test, and determined that there was no private law duty of care owed by Canada in the circumstances.

#### *Motion decision*

The motions judge began her analysis under the *Anns* test with a review of the applicable legislation. The *Food and Drugs Act* (“*FDA*”) specifically prohibits the sale of medical devices that may cause injury to health (s. 19). All manufacturers must obtain licences from Health Canada before they are permitted to sell a particular medical device in Canada. The *Medical Devices Regulations* under the *FDA* set out the conditions of obtaining a licence. The Regulations:

- stipulate that medical devices shall not adversely affect health or safety (ss. 11 to 20);
- outline the license application process and the documents to be provided including (s. 32):
  - a summary of all studies on which the manufacturer relies to ensure that the device meets the safety and effectiveness requirements, and the conclusions drawn from those studies by the manufacturer (s.32(f)); and
  - a bibliography of all published reports dealing with the use, safety and effectiveness of the device (s.32(i));
- outline the conditions the Minister may attach when issuing a license including (s.

36):

- the tests to be performed on a device to ensure that it continues to meet the safety and effectiveness requirements (s.36(2)(a)); and
- the requirement to submit the results and protocols of any tests performed (s.36(2)(b)).
- provide that the Minister may refuse to issue a license if safety and effectiveness requirements are not met or if additional information or samples requested are insufficient to allow him/her to determine whether a device meets those requirements (ss. 26, 27, 32 and 33-38).

The motions judge noted that governments must exercise reasonable care in implementing their own directives. She stated:

*The Plaintiff here has alleged that Health Canada did not ensure that its own licensing requirements were met. At present there is much information as to Health Canada's enforcement of its own standards that is within the sole knowledge, power, possession and control of Health Canada. The Plaintiff needs to be able to seek further information at discovery as to the information Health Canada obtained about the Device before licensing it. For example, a representative of the Minister could be questioned about any manual, guide, memorandum, handbook, or checklist used by Health Canada to ensure its requirements had been met prior to licensing the Device.<sup>29</sup>*

The motions judge appears to have accepted the plaintiff's argument that imposing a duty of care would not expose Health Canada to indeterminate liability because the claim, as framed, is limited to Canadian women who have been physically injured by a particular defective device. The motions judge concluded:

*I accept the submission of counsel for the Plaintiff that a full factual record is necessary here to determine whether the AG negligently failed to enforce its own detailed requirements for licensing.*

*In my view, it is not plain and obvious that the AG/Health Canada, having made a decision to impose standards for the licensing of medical devices, and having created a detailed plan to protect against such devices causing physical harm to users, does not have a private law duty of care to the Plaintiff in implementing that plan.*

*Nor is it plain and obvious that to impose a private law duty of care in the circumstances here would unduly fetter Health Canada in protecting the safety of the Canadian public.<sup>30</sup>*

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<sup>29</sup> At para. 36

<sup>30</sup> At paras. 46-48.

### *Divisional Court decision*

In applying the *Anns* test, the Divisional Court framed its analysis of the *FDA* and the *Medical Devices Regulations*, in terms of determining a legislative intent to provide a private remedy to individuals. The court noted:

*It does not follow from a legislative decision to regulate an activity, product or industry that the legislative scheme created for this purpose is intended to protect individual users and consumers.*

The court concluded that any duties imposed by the legislation with respect to the regulation of medical devices by Health Canada are duties owed to the public at large and not to private individuals.

The court went on to indicate several reasons why a duty upon Health Canada to independently assess the safety of medical devices should not be found. Firstly, no such duty is prescribed by the *FDA*. Health Canada's role is limited to reviewing information brought to the Minister's attention or provided by the device's manufacturer regarding the safety and effectiveness of a medical device. Secondly, it is impossible for Health Canada to regulate on behalf of individuals directly. Further, Health Canada plays no direct role in the commercial transaction or the medical decision that leads to individual use. The court also considered several residual policy reasons negating a duty of care, namely that recognizing a duty of care would:

- create a spectrum of unlimited liability to an unlimited class;
- effectively create an insurance scheme for medical devices funded by taxpayers;
- negatively impact the government's ability to balance interests when making regulatory decisions;
- be inconsistent with the societal interest in promoting advances in medical science and technology; and
- potentially result in a flood of litigation against the government for similar claims.

The court commented, in conclusion:

*The nature of drug and device preapproval testing is such that it is not possible to*

*predict the emergence of long-term adverse events before such products come to market. If Health Canada were held liable for every adverse effect that became apparent during post-marketing surveillance, the courts would be inundated with lawsuits. The proper defendant in such cases is clearly the manufacturer who is responsible for the careful monitoring and long term safety of the drug or device. (emphasis added)*

### *Conclusions*

Arguably, the Divisional Court took liberties with its characterization of the plaintiff's claims, emphasizing the claim that Health Canada has a duty to examine and test products to be sold in Canada to the exclusion of the claim that Health Canada had not followed the applicable regulations in approving the device for sale. The Divisional Court also stated that "it was not possible for Health Canada to control [the] manufacture and sale [of the device]," when clearly, Health Canada could have prevented its sale by refusing to issue a licence.<sup>31</sup> However, even though this case was much more "proximate" and "operational" than either Williams or Eliopoulos, the message from the court is that motions judges must squarely address all of the relevant policy considerations on a motion to strike. The point is that "negligence" in respect of fulfilling regulations aimed at the health and safety of members of the public is only non-actionable "negligence in the air" if the government agency does not owe a private duty to particular members of the public for good policy reasons. The Divisional Court's decision was undoubtedly influenced by the fact that the plaintiff does not appear to have pleaded any material facts supporting her claim that the regulations had been violated. In such a case, it is appropriate for the court to decide the issue of the existence of a duty of care based only on the applicable statutes and regulations, having determined that the legislature intended that only a public duty is owed.

### ***Syl Apps Secure Treatment Centre v. B.D.***<sup>32</sup>

In this case, a 14-year-old girl was apprehended by the Halton Children's Aid Society

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<sup>31</sup> At para. 37.

<sup>32</sup> 2007 SCC 38, rev'g (2006), 79 O.R. (3d) 45 (C.A.)

("Halton CAS") after writing a story at school alleging that her parents had physically and sexually abused her. The parent denied the allegations and claimed that their daughter was delusional. No criminal charges were laid, but the girl was eventually made a permanent ward of the Crown by order of the court. The girl had attempted suicide three times while she was in foster care and in the care of mental health facilities as a temporary ward of the Crown. Over the objections of her parents, but with the girl's consent, she was eventually sent to the Syl Apps Secure Treatment Centre ("Syl Apps"), under the care of social worker, Douglas Baptiste ("Baptiste").

The parents of the girl appealed the permanent wardship order, but it was upheld. A few months later, the family of the girl, including her parents, grandmother and three siblings, issued a claim against the Halton CAS, several of the girl's doctors and social workers, Syl Apps, and Baptiste. The claim alleged that the girl had negligently been treated as if her parents had physically and sexually abused her, and that negligence caused the girl not to return to her family, thereby depriving the family of a relationship with her. Specifically, the family claimed that the defendants should have taken steps to question whether the alleged sexual abuse occurred, and to attempt to reintegrate the child into her family. The family sought damages for nervous shock, emotional distress and physical and mental illness, among others.

The defendants brought a motion to strike the statement of claim under Rule 21 of the Ontario Rules of Civil Procedure on the grounds that it disclosed no reasonable cause of action. The motions judge granted the motion, holding that the defendants, including Syl Apps and Baptiste, owed a duty of care only to their patient, the child, and not to her family. The family appealed the decision as it related to Syl Apps and Baptiste. The Ontario Court of Appeal (per Laskin J.A., Sharpe J.A. in dissent) overturned the motions judge's decision, holding that it may be possible that the respondents could owe duties to both the child and her family, and that the question should be decided with a full trial record. Syl Apps and Baptiste appealed the Court of Appeal decision, with the Attorney General intervening on the Supreme Court hearing. The

Supreme Court (per Abella J.) allowed the appeal and dismissed the family's action.

*Court of Appeal decision*

Applying the *Anns* test, Laskin J.A. determined that the harm complained of by the family was, at least arguably, a reasonably foreseeable consequence of failing to reintegrate the child in to the family. The court looked to the governing statute, the *Child and Family Services Act* ("CFSA"), as well as the various court orders affecting the child, to determine whether a proximate relationship existed between the parties. Laskin J.A. determined that the CFSA supported family's claim that Syl Apps and Baptiste owed them a duty of care because:

- The statutory purposes include supporting the integrity of the family unit;
- The express statutory duties include duties to parents of children under the care of "service providers"; and
- The CFSA excludes treatment centres such as Syl Apps from a section providing immunity from civil liability to officers and employees of a children's aid society carrying out statutory duties in good faith.

Laskin J.A. held that the court's wardship orders were relevant to determining proximity because of the CFSA's emphasis on judicial supervision of child protection proceedings, and the fact that a court order was required to admit the child to Syl Apps. He noted that the wardship orders were not made on the grounds that the child was in need of protection from sexual abuse, rather that she was at risk of suffering emotional harm. Further, the orders included terms that supported an obligation of Syl Apps and Baptiste to support family contact and reintegration. The court found that it was not plain and obvious that the respondents did not owe a duty of care to the plaintiffs in light of the statute and the court orders.

The respondents argued that two related policy considerations negated any *prima facie* duty of care. Firstly, that imposing a duty of care to the family of children in the care of the treatment centre would conflict with the established duty of care of a doctor to her patient. Although Laskin J.A. accepted that Syl Apps and Baptiste were in the equivalent position as a doctor, he did not accept that the duties were necessarily in conflict, noting that they were not

necessarily “equal” duties. Secondly, the respondents argued that the court should categorically exclude liability between a treatment centre and a patient’s family, rather than relying on a case-by-case analysis. Laskin J.A. rejected that argument, stating that it was inconsistent with the tailored and individualized approach of the *CFSA*.

#### *Supreme Court decision*

The Supreme Court’s reasons follow closely on the dissenting reasons of Sharpe J.A. in the Court of Appeal. Abella J. held that an examination of the *CFSA* contradicts the family’s assertion that a relationship of proximity exists because the *CFSA* and the court orders recognize the importance of the family and the integrity of the family unit. The Court states:

*The deciding factor for me, as in **Cooper** and **Edwards**, is the potential for conflicting duties: imposing a duty of care on the relationship between the family of a child in care and that child’s court-ordered service providers, creates a genuine potential for “serious and significant” conflict with the service providers’ transcendent statutory duty to promote the best interests, protection and well-being of the children in their care.*

The Court held that imposing a duty of care on secure treatment centres and their employees towards both children and parents would interfere with their ability to fulfill the paramount statutory duty to act in the best interests of children. Like Laskin J.A., Abella J. also noted that a treatment centre and social worker are in a similar position as a doctor with respect to a child/patient, but found that the potential conflict of interest between duties to parents and children precluded the existence of a duty to the parents. With respect to the relevant court orders, the Court commented:

*Nor can the family rely on the court orders to ground proximity. Their claim is based, at least in part, on the premise that, contrary to the court orders, R.D. was never reintegrated into her family. Reintegration is not what the court ordered. The order of September 26, 1995, for example, provided that “[t]here will be a monthly meeting arranged between the Society, service providers or their representatives and parents” and that “[a]ttempts will be made during the period of Society Wardship to reintegrate the family where possible”. This is not an uncommon term given the ostensibly temporary nature of such orders.*

*There is, in any event, no tort for breach of a court order, which is effectively what the members of R.D.’s family appear to be seeking. The parents were present at every court hearing, expressed their positions, and, at each stage, the*

*court, culminating in Crown Wardship, concluded that it was best for their adolescent daughter not to be returned to her parents. This did not represent a breach of anyone's duty to the family, it represented the fulfilment of the court's obligations, based on the evidence, to protect the child's best interests.*

The Court concluded that there were two further policy reasons for denying the existence of a relationship of proximity. Firstly, that the *CFSA* expressly provides a remedy, in addition to a right to appeal, for families seeking to challenge a wardship order. Secondly, that proximity was contradicted by the existence of statutory immunity provisions for acts done in good faith pursuant to the *CFSA*, and the *Ministry of Community and Social Services Act*, which was applicable to Syl Apps, and in respect of acts done pursuant to court order pursuant to the *Courts of Justice Act*. Finally, the Court noted that recognizing a duty to the family in this context would create the possibility of parallel proceedings and re-litigation of matters determining in child protection proceedings.

#### *Conclusions*

This case reaffirms that it is not necessary to have a full trial record in order to determine whether a duty of care exists. It also demonstrates that the court need not be overly concerned with getting the two stages of the *Anns* test right, as long as all the relevant considerations are considered at some point. The court cites *Cooper* (at paragraph 27) in support of its approach.

#### ***Holland v. Saskatchewan (Minister of Saskatchewan Agriculture, Food and Rural Revitalization)***<sup>33</sup>

This case involves a class action suit initiated by a game farmer who sued the Saskatchewan government for its alleged negligence in assigning the health status of his elk herd. On an application to strike the claim, the Chambers judge dismissed the application stating that the statement of claim alleged all the necessary elements to establish the tort of negligence. The Chambers judge did not analyze whether the defendant owed a duty of care to the plaintiff. The Saskatchewan Court of Appeal dismissed the negligence claims, holding that

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<sup>33</sup> 2007 SKCA 18 (Sask. C.A.), leave to appeal to Supreme Court of Canada granted Feb 15, 2007, Docket No: 31979.

the government did not owe a duty of care to the plaintiff. The Supreme Court of Canada granted leave to appeal, and will likely attempt to clarify the law with respect to negligence for breach of statute.

### **Conclusions re: Duty of Care**

The cases discussed above should signal to lower courts that they must give a hard look at novel claims against government, where the existence of a private law duty of care has been brought into question on a motion to strike the pleadings. Neither the courts, nor the advocates should get bogged down in the details of any of the tests – the important point is to address all of the relevant reasons for and against imposing a private law duty of care in the particular circumstances. The following questions may be helpful in thinking and developing arguments about private law duties of care:

- How close is the causal connection between the individual's harm and the government's conduct?
- Is the individual in a different position than the rest of the public?
- Has the government undertaken to do something in particular upon which the individual can rely?
- Is the individual's claim outside the scope of a duty of care?
- Would finding a duty of care open the floodgates? Would it create an insurance scheme funded by taxpayers?
- Is a political or administrative remedy available or more appropriate than a civil remedy?
- Would it be impossible or inappropriate for a court to say what the government should have done?
- Would civil liability have a chilling effect on government activities?
- Should the government be concerned about the particular individual in its allegedly negligent activities?

## **II. Standard of Care**

A defendant's conduct is small-"n" negligent if it creates an objectively unreasonable risk

of harm.<sup>34</sup> In determining the reasonability of the risk and the appropriate standard of care, the court must balance the social utility of the defendant's conduct against the risk or danger created by that conduct. More specifically, the court must weigh the likelihood or probability of the harm occurring and the gravity of the risk against the purpose of the defendant's conduct and the cost or burden on the defendant of eliminating the risk. The applicable standard of care is usually determined by asking what a "reasonable person" would have done in similar circumstances. Where the defendant is a professional or has special skills, knowledge or experience, the defendant is required to "live up to the standards possessed by persons of reasonable skill and experience in that calling."<sup>35</sup> The standard of care depends on the facts of each case, and may be informed by external standards such as custom, industry practice, professional standards and statutory or regulatory standards.

The area of greatest liability for governmental authorities of all levels is that of negligent safety inspections. The issue is whether or not the fact that safety standards have been breached and therefore were not fully enforced by government inspectors is conclusive of a breach of care on the part of the inspectors. The Supreme Court of Canada has clearly stated that statutory or regulatory standards are not co-extensive with the common law standard of care.<sup>36</sup> Thus, in certain circumstances a defendant may not have discharged his or her common law duty of care even though all statutory requirements have been fulfilled, and on the other hand, a breach of statute may not be conclusive of a breach of reasonable care. However, the court has also clearly stated that a breach of statute may be "evidence" of negligence.

With respect to government safety inspectors, the applicable standard of care is the standard of a reasonably competent inspector in similar circumstances. In *Swanson Estate v. Canada*, the Federal Court of Appeal described the standard of care in relation to aviation

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<sup>34</sup> Negligent, in the limited sense of falling below the standard of care, as opposed to meeting all the definitive elements of the tort of negligence.

<sup>35</sup> Lewis Klar, *Tort Law*, 3<sup>rd</sup> ed., 2003 at p. 306, cited in *Hill v. Hamilton-Wentworth Regional Polices Services Board*, infra note 44 at para. 69.

<sup>36</sup> See *Saskatchewan Wheat Pool*, supra note 5, and *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29.

inspections:

*The government is not an insurer; it is not strictly liable for all air crashes, only for those caused by the negligence of its servants. The standard of care required of these inspectors, like every other individual engaged in activity, is that of a reasonable person in their position. What is required of them is that they perform their duties in a reasonably competent way, to behave as would reasonably competent inspectors in similar circumstances, no more and no less. In evaluating their conduct, courts will consider custom and practice, any legislative provisions and any other guidelines that are relevant. The risk of harm and its severity will be balanced against the object and the cost of the remedial measures. In the end, the court must determine whether the employees of the defendant lived up to or departed from the standard of care demanded of them, in the same way as in other negligence cases: see, generally, Fleming, *The Law of Torts*, 7th ed. (Sydney: Law Book Co. Ltd., 1987), at p. 96.*

*In accordance with the directions of the Supreme Court of Canada in **Just**, it is necessary to consider, in assessing the conduct of the defendant, matters such as resources available. Surgeons who stop at the side of the road to help injured motorists, cannot, of course, be expected to perform at the same level as they could in an operating theatre of a major hospital. Similarly, an inspection staff of a few cannot be expected to deliver the same quality of service that a larger team could. What is expected of both is reasonable care in the circumstances, including the resources available to them. An underfunded government inspection staff is no different than a surgeon operating on an accident victim at the side of a road. Neither is responsible for circumstances beyond [page753] their control, but each must use his resources as would fellow professionals of reasonable competence in the same circumstances. (emphasis added)<sup>37</sup>*

This standard was also applied in *Ingles v. Tutkakuk Construction Ltd.*, a case involving

negligent municipal building inspections:

*As I have stated above, to avoid liability the city must show that its inspectors exercised the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances. The measure of what constitutes a reasonable inspection will vary depending on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury; see, for example, **Ryan v. Victoria**, *supra*, at para. 28. For example, a more thorough inspection may be required once an inspector is put on notice of the possibility that a construction project may be defective. In addition, a municipal inspector may be required to exercise greater care when the work being inspected is integral to the structure of the house and could result in serious harm if it is defective. While in some circumstances a more thorough inspection will be required to meet the standard of care, municipalities will not be held to a standard where they are required to act as insurers for the renovation work. The city was not required to discover every latent defect in the renovations at the appellant's home. It was, however, required to conduct a reasonable inspection*

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<sup>37</sup> (1991), 80 D.L.R. (4th) 741 (F.C.A.) at pp. 752-753 ("Swanson").

*in light of all of the circumstances; see, for example, Rothfield v. Manolakos, supra, at pp. 1268-69. (emphasis added)*<sup>38</sup>

Despite the instruction that the same considerations apply to determining the standard of care of government professionals as to private professionals, the courts repeatedly apply the “reasonable person” standard in a different way in cases involving governmental authorities than private defendants. In *Swanson*, the court determined that Transport Canada was negligent for failing to take decisive steps against an airline that the agency knew had repeatedly seriously violated safety standards. The court held:

*"Transport Canada was aware of serious deficiencies in the carrier's flight operations and maintenance practices and knew that Wapiti Aviation Ltd. had been repeatedly violating safety standards for at least a year and one-half prior to the accident dates. Although Transport Canada had reasonable grounds to believe that Wapiti's operations were unsafe and that vigorous enforcement action was warranted, no effective action was initiated until after the accident..."*

*Transport Canada's failure to take any meaningful steps to correct the explosive situation which it knew existed at Wapiti amounted to a breach of the duty of care it owed the passengers. Transport Canada officials negligently performed the job they were hired to do; they did not achieve the reasonable standard of safety inspection, and enforcement which the law requires of professional persons similarly situated. It was not reasonable to accept empty promises to improve where no improvement was forthcoming. It is [page757] incomprehensible that a professional inspector of reasonable competence and skill would choose not to intervene in a situation which one of his own senior staff predicted was virtually certain to produce a fatal accident. (emphasis added)<sup>39</sup>*

In *Ingles*, the plaintiff home owners hired a contractor to renovate their basement including lowering the basement floor, which required the installation of underpinnings under the existing foundation. The contractor convinced the home owners to begin construction without a building permit to avoid delays. By the time the permit was issued, the underpinnings had been completed and were concealed by subsequent work. The municipal building code inspector relied on the contractor's assurances that it had been built in accordance with the Building Code in permitting construction to continue. The underpinnings were later discovered to have been

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<sup>38</sup> [2000] 1 S.C.R. 298 at para. 40 (“*Ingles*”).

<sup>39</sup> *Supra*, note 37 at pp. 756-757.

inadequately constructed in breach of the Building Code, and the home owners sued the City of Toronto for negligent inspection. The court determined that the trial judge had correctly determined the applicable standard of care in the circumstances, which included that the inspector could have ordered the home owner to hire an engineer to saw through the underpinning to determine its width, and the inspector could have returned later to dig beside the foundation to determine the depth of the underpinnings. The trial judge held that the inspector should have been wary of the contractor because the contractor began construction without a permit, and failed to display the permit as required. The court states:

*The trial judge applied the correct principles in determining that the inspector failed to conduct a reasonable inspection in the circumstances. He recognized that in the circumstances, especially in light of the importance of the underpinning to the structural safety of the home, a more vigilant inspection was required. The Act granted the power to the inspector to conduct such an inspection. By failing to exercise those powers to ensure that the underpinning met the specifications in the plan, the inspector failed to meet the standard of care that would have been expected of an ordinary, reasonable and prudent inspector in the circumstances. I therefore agree with Conant J. that the municipality was negligent in conducting the inspection of the renovations on the appellant's home. (emphasis added)*

In a similar case, *Rothfield v. Manolakos*,<sup>40</sup> the home owners contracted with two contractors for the construction of a retaining wall in their backyard. The home owners contacted the City of Vernon regarding obtaining a building permit. The contractors then met with an engineer and the city's chief building inspector to apply for a permit. The engineer was presented with a rough sketch of the proposed wall, and exercised his discretion under the city's property standards by-law not to require a professional engineer's plan for the wall. A building permit was issued on the basis that the adequacy of the wall's design and construction could be evaluated during prescribed on-site inspections. However, the city was not notified at the appropriate stage of construction that an inspection should take place. A crack later appeared in the wall, at which time a city inspector was called by the home owners to check the wall. However, the concrete had been poured and a large part of the backfilling had already taken

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<sup>40</sup> [1989] 2 S.C.R. 1259 ("*Manolakos*").

place, so the inspector was not able to evaluate the wall's foundations, siting, reinforcing or drainage. Later, the city's engineer also inspected the wall, and advised the home owners and contractors that they monitor the wall for 20 days for further cracking or movement before continuing with backfilling. When the wall later failed, the plaintiff's engineer determined that it had not been built adequately. The city's engineer testified that the project would not have been permitted to continue if it had been inspected at the appropriate time.

In a plurality judgment, the Supreme Court held that the city was negligent for failing to cause a remedy to the poorly designed wall when it was notified of the crack in the wall. LaForest J. held:

*The key question, it seems to me, is whether it is reasonable to conclude that despite the negligence of the owners, the inspector was still in a position to acquit himself of the responsibility that the by-law placed on him, i.e., to take reasonable care to ensure that all building was done in accordance with the applicable standards of the by-law. In other words, is it reasonable, in the circumstances to conclude that a due exercise by the inspector of his powers, even though he was summoned late, could have avoided the danger? ...*

*When the question is framed in this way, I think that the answer must be in the affirmative. The inspector could not and did not rely on the plan submitted to him; it was inadequate. He chose instead to rely solely on the on-site inspection. And when he attended at the site, he was confronted with a situation which, if left unremedied, manifestly stood to pose a threat to the health and safety of the public, including the neighbours and the owner builder. Of course, the cause of the problem would have been evident if the inspector had been asked to come at the proper time. But this does not absolve the inspector of his duties. It must be remembered that the inspector was, at the time, armed with all the powers necessary to remedy the situation. As I see the matter, it was incumbent on the building inspector, in view of the responsibility that rested on him, to order the cessation of the work, and the taking of whatever corrective measures were necessary to enable him to ensure that the structure was up to standard.*

*Instead, the inspector stipulated that the situation be monitored for a certain time and that construction proceed if no further damage occurred. In my view, this was negligence. When a building inspector authorizes a given project to proceed this must be taken as an indication that the inspector has satisfied himself that the project conforms to applicable standards. On what other basis could the building inspector, acting prudently, authorize construction to proceed? Here, on the facts, I do not see how the building inspector, using reasonable care, could have satisfied himself that this was the case. Even leaving aside the fact that the project was already showing signs of damage, the inspector, never having inspected the structure, simply did not have at his disposal any information on*

*which to base a conclusion that the project was up to standard. Indeed, had the inspector simply turned to the city's records or enquired about the manner in which the structure was built or about the materials used in the construction, he would have discovered from the specifications what he ought to be taken to know in any event, that the structure was deficient in a number of important aspects. (emphasis added)*<sup>41</sup>

In each of these cases, the inspector was found negligent for failing to exercise his or her discretionary remedial powers to perform a more thorough inspection or to prevent the sub-standard operation from continuing. In an important sense, the fact that the applicable safety standards were breached by the co-defendant is conclusive of the negligence of the safety inspector, under a duty to enforce the safety standards. There is no discussion in any of these cases of any evidence regarding what other similarly situated inspectors would have done pursuant to established practice or policy in place at the relevant government authority or other similar bodies. There is no discussion, for example, of whether a privately-hired home inspector would recommend a more thorough inspection to his or her clients in the circumstances. The court merely takes a common sense view of what it thinks a reasonable inspector would do, or to be more exact, what the court thinks the municipality, as a whole, should have done.

The approach taken by the court in *Swanson*, *Ingles* and *Manolakos*, follows the approach taken in the seminal *Kamloops* case.<sup>42</sup> In *Kamloops*, an owner builder failed to build a foundation in accordance with approved building plans. The city's building inspector made three inspections in accordance with municipal by-laws and then issued a stop work order against the property. The house was later sold to the plaintiff who had no knowledge of the state of its foundations. The plaintiff's own contractor inspected the house but did not inspect the foundations, and was not a defendant in the action. The plaintiff sued the City of Kamloops and the vendors, one of whom was an alderman with the City, when he discovered that the foundations had subsided. In its reasons, the Supreme Court's consideration of the standard of care is not explicitly distinguished from its consideration of the duty of care and the

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Supra* note 9.

policy/operational distinction:

*[T]he building inspector was under a public law duty to prevent the continuation of the construction of the building on structurally unsound foundations once he became aware that the foundations were structurally unsound. He was also under a public law duty to prevent the occupancy of the building by the Hughes or the plaintiff. He failed to discharge either of those public law duties....*

*It seems to me that Lambert J.A. was correct in concluding that the courses of conduct open to the building inspector called for "operational" decisions. The essential question was what steps to take to enforce the provisions of the by-law in the circumstances that had arisen. He had a duty to enforce its provisions. He did not have a discretion whether to enforce them or not. He did, however, have a discretion as to how to go about it....*

*[T]he City could have [page 24] made a policy decision either to prosecute or to seek an injunction. If it had taken either of those steps, it could not be faulted. Moreover, if it had considered taking either of those steps and decided against them, it could likewise not be faulted. But not to consider taking them at all was not open to it. In other words, as I read [Mr. Justice Lambert's] reasons, his view was that the City at the very least had to give serious consideration to taking the steps toward enforcement that were open to it....*

*There is no evidence to support the proposition that the City gave serious consideration to legal proceedings and decided against them on policy grounds. Rather the evidence gives rise to a strong inference that the City, with full knowledge that the work was progressing in violation of the by-law and that the house was being occupied without a permit, dropped the matter because one of its aldermen was involved.... 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. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care. I conclude therefore that the [page 25] conditions for liability of the City to the plaintiff have been met. (emphasis added)<sup>43</sup>*

The reasoning in *Kamloops* and the other building inspection cases appears to follow the following steps, which are more or less express in the respective decisions:

1. Home owners reasonably rely on municipal building inspectors as a safeguard against inevitable mistakes made by building contractors;
2. Building inspectors have sufficient discretionary power to remedy reasonably apprehended potentially significant flaws in design and construction, which could or will cause loss for home owners;
3. Therefore, inspectors *should* have remedied those reasonably apprehended potentially significant flaws in design and construction;

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<sup>43</sup> *Supra* note 9, at pp. 22-25.

4. In the case before the court, the inspector could have prevented the plaintiff's loss and is therefore a "but for" cause;
5. Therefore, the municipality should be responsible for its inspector's failure to remedy reasonably apprehended potentially significant flaws in design and construction;
6. Therefore, "There is a duty on the municipality or municipal building inspectors to:
  - a. *Kamloops*: give serious consideration to take steps to enforce the stop work orders, and to take those steps if there were no good faith policy reasons for not doing so.
  - b. *Manolakos*: take whatever corrective measures were necessary to enable the inspector to satisfy himself or ensure that the building was up to standard.
  - c. *Ingles*: exercise his discretionary powers to ensure that the construction met the specifications in the plan and the standards of the Building Code."
7. "Therefore, the municipality is liable in negligence because the inspector/municipality breached its duty."

Following regular negligence principles, the appropriate steps of reasoning in these cases would be:

1. Home owners reasonably rely on municipal building inspectors as a safeguard against mistakes made by building contractors with respect to health and safety issues;
2. "There is a private law duty on the municipality and municipal building inspectors to inspect with reasonable care."
3. Other inspectors do X in the circumstances based on industry practice and policy, etc.;
4. "A reasonable building inspector would do X in the circumstances."
5. "In this case, the building inspector did Y, therefore he breached the standard of care required."
6. But for the building inspector's breach of duty, the plaintiff would not have suffered his or her loss;
7. "The building inspector's breach of duty was a cause of the plaintiff's loss."
8. "Therefore, the municipality is vicariously liable for the building inspector's negligence."

The Supreme Court's reasoning in the building inspection cases can be contrasted with its reasoning in the case of *Hill v. Hamilton Wentworth Police Services Board*.<sup>44</sup> Hill was arrested (with reasonable and probable grounds), tried, wrongfully convicted and ultimately acquitted of robbery. Hill brought a claim against the police for negligent investigation, alleging the following particulars:

- that witnesses were contaminated by the publishing of his photo;
- that the investigating officers failed to make proper records of events and interviews with witnesses;
- that two witnesses were contaminated by being interviewed together and with a photo of Hill on the desk;
- that the photo lineup in which Hill was identified was structurally biased because all of the foils were Caucasian and Hill is Native; and
- that the lead detective failed to reinvestigate after evidence came to light that suggested the robber was not Hill, but a different man.

Although the Supreme Court found that the police owed Hill a duty of care as a suspect under criminal investigation, Hill's claim failed because the police procedures, although flawed in retrospect, were not negligent judged against standard police practices at the time. In determining the appropriate standard of care, the court concluded:

*[T]he appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results (Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results,*

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<sup>44</sup> 2007 SCC 41.

*without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere “errors in judgment” which any reasonable professional might have made and therefore, which do not breach the standard of care (Lapointe v. Hôpital Le Gardeur, [1992] 1 S.C.R. 351; Folland v. Reardon (2005), 74 O.R. (3d) 688 (C.A.); Klar, at p. 359.)<sup>45</sup>*

In applying the standard of a reasonable police officer to the facts of the case, the court concluded that the issues raised by Hill did not constitute a departure from the standard of a reasonable police officer in the circumstances. The court states:

*[T]he evidence does not establish that a reasonable officer in 1995 would not have followed similar practices in similar circumstances. Nor is it clear that if these incidents had not occurred, Hill would not have been charged and convicted. It follows that the individual officers involved in these incidents cannot be held liable to Hill in negligence. (emphasis added)<sup>46</sup>*

### **Conclusions re: Standard of Care**

The approach of the courts in *Kamloops*, *Manolakos* and *Ingles* is problematic for a number of reasons. Firstly, in *Kamloops*, the reasons were framed in terms of whether the City had made a policy decision that would be exempt from civil liability, and the court never distinguishes the issue of whether a duty of care exists from the issue of the content of that duty of care. The court manipulates the “scope” of the *duty* of care in its *Anns* test analysis such that its finding that the *standard* of care was breached is an implicit, foregone conclusion. In dissent in *Kamloops*, McIntyre J. characterized the scope of the duty differently and came to different conclusion regarding the policy/operational distinction than the majority:

*The building inspector in his response to the problems he discovered faced no alternative courses of action. His duty was to report, and he did so, and any alternative courses of conduct in response to public duties were for the Council, the City itself, and I am wholly unable to characterize them as operational in character. (emphasis added)<sup>47</sup>*

This point is further indication of the weakness of the policy/operational distinction as a tool in the second stage of the *Anns* test, and demonstrates that the various elements of negligence are interrelated and can be manipulated to the detriment of government authorities

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<sup>45</sup> *Ibid.*, at para. 73.

<sup>46</sup> *Ibid.*, at para. 78.

<sup>47</sup> *Supra*, note 9 at p. 57.

by the courts.

Secondly, in each of the cases, because of the way the scope of the duty of care was treated and defined, the court's analysis focuses on the municipality as a whole, rather than on the conduct or alleged negligence of a particular municipal inspector. This point is made by McIntyre J.:

*No complaint has been made of the manner of inspection and no allegation of negligence in that respect has been made. The building inspectors have fully and adequately performed their duties in the case at bar and no vicarious liability can be visited upon the City because of any failure on their part. The only complaint seriously advanced in this Court has been non-enforcement by proceedings in court.*

In cases against government bodies, the courts generally have taken a very liberal and conceptual approach to the plaintiff's theory of the government authority's liability. The courts are rarely concerned with distinctions between direct and vicarious liability or liability founded on agency, or with pointing to the negligence of any particular official or group of officials. By doing so, the court is able to manipulate the nature and scope of the duty owed by the municipality as a whole, even though it may not be appropriate to say that any particular municipal agent has such a duty.

Thirdly, because of the way the court manipulates the scope of the duty of care and focuses on the municipality as a whole, in these cases, the reliance by the plaintiffs, the nature of the risk and close causal relationship between the parties becomes conclusive of liability in negligence without a careful analysis of the evidence regarding the appropriate standard of care. In other words, the plaintiff is able to prove negligence on the part of the government authority without expressly proving each of the "individual" elements of negligence.

The lesson for advocates is that although each of the elements of negligence is meant to be analyzed distinctly and must be proved for liability to arise, negligence is inherently multi-faceted, and the elements of negligence are not truly distinct. This means that there are

opportunities to influence the court's finding with respect to one element using considerations more appropriately addressed under another element. For example, the lack of a causal connection may be relevant as to whether or not a duty of care exists, even though strictly speaking, causation should not be determinative of that issue. When the scope of the duty of care is appropriately characterized, the court may be convinced that no duty of care exists, where it may be objectively more appropriate to say that there was no breach of the standard of care. In cases where certain elements of the plaintiff's case are strong, the government's advocate must make sure that the court does not allow those strong points to substitute for full consideration of all of the elements of negligence.

### III. Causation, Remoteness and Foreseeability

With respect to causation, remoteness and foreseeability, there are no rules unique to government bodies. In *Resurface Corp. v. Hanke*,<sup>48</sup> the Supreme Court of Canada reaffirmed that following basic principles are applicable to determining causation:

21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

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24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice

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<sup>48</sup> [2007] 1 S.C.R. 33 ("*Resurface*")

*to deny liability by applying a “but for” approach. (emphasis added)*

For example, the “material contribution” has been correctly applied where two shots were carelessly fired at the victim, but it was impossible to say which shot injured him,<sup>49</sup> where it was medically impossible to determine the exact cause of an illness or injury, or where it is impossible to say what someone would have done if the defendant had been non-negligent.<sup>50</sup>

The plaintiff has the onus of proving causation by proving that the injury would not have occurred had the defendant been non-negligent. In other words, the plaintiff must provide evidence of what would have likely happened had the defendant been non-negligent from which an inference or finding of causation can be drawn. The plaintiff’s claim must fail where the required evidence is absent from the record because the appropriate questions were not asked of the expert witnesses.<sup>51</sup> The court must not draw an inference of causation applying the material contribution test unless the plaintiff has provided evidence that the cause of the plaintiff’s injury is impossible to determine, and that the defendant’s conduct materially contributed to the injury. Although in some sense, it is always impossible to say what someone would have done had the defendant been non-negligent, if character evidence is available or could have been led by the plaintiff, the courts may draw inferences from such evidence to determine causation.<sup>52</sup>

In *Resurice*, the court also made the following statement regarding reasonable foreseeability:

*The Court of Appeal’s second criticism of the trial judge’s rejection of reasonable foreseeability was that the trial judge failed to consider policy matters, namely the seriousness of the injury and the relative financial positions of the parties. The Court of Appeal erred in suggesting that these matters are relevant to foreseeability. Foreseeability depends on what a reasonable person would anticipate, not on the seriousness of the plaintiff’s injuries (as in this case) or the depth of the defendant’s pockets: Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 55.*

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<sup>49</sup> *Cook v. Lewis*, [1951] S.C.R. 830

<sup>50</sup> *Resurice*, *supra* note 48 at para. 28.

<sup>51</sup> See *Jackson v. Kelowna General Hospital*, 2007 BCCA 129 (B.C.C.A.) (CanLII) at para. 23; *Barker v. Montfort Hospital*, 2007 ONCA 282 (O.C.A.) (CanLII)

<sup>52</sup> *B.S.A. Investors Ltd. v. DSB*, 2007 BCCA 94 (B.C.C.A.) (CanLII) at para. 45.

## Conclusion

Regulatory negligence has become more complex because of a shifting emphasis on how the courts determine whether a private law duty of care exists. Even though a number of successful motions to strike an alleged cause of action against a government authority in high profile cases have been brought, the majority of advocates practicing in the field of public liability litigation are dealing with cases that don't justify the expense of bringing a pre-emptive strike at an early stage of the proceeding. In addition, if it involves an allegation of negligence in an area where the private law duty of care is well settled, the issue is not whether a cause of action exists, but rather whether the facts of the case justify a finding of liability in the circumstances. This requires the advocate to concentrate on defining the particular standard of care that applies, whether the standard of care was breached, whether the breach caused the damages and whether the damages were foreseeable in the circumstances. Although this may sound like basic Torts 101, too many cases are decided or settled on the basis that where there is any evidence of damages involving a government authority, liability is assumed. As the Supreme Court of Canada stated in *Hill* in determining the appropriate standard of care: *The law distinguishes between unreasonable mistakes breaching the standard of care and "mere errors in judgment" which any reasonable professional might have made and therefore which do not breach the standard of care.* Liability should never be assumed, and advocates need to diligently review the facts of each case and analyze it in the context of all of the requisite requirements of the tort of negligence. Even judges need to be reminded of this.