Without Prejudice
Vol 64., No. 9 May 2000

ONTARIO COURT OF APPEAL BROADENS SCOPE OF GOVERNMENTAL LIABILITY

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In a recent decision the Ontario Court of Appeal reconsidered the policy exemption available to governmental authorities in the civil context.

In ***Kennedy v Waterloo County Board of Education*** 45 O.R. (3d) 1 the Plaintiff was involved in a motorcycle accident as he left a Waterloo school parking lot. As a result of this accident he struck his head on a bollard situated on school property. His impact with the bollard caused catastrophic injuries.

The Trial Judge found no liability on the part of the Defendant Board. He found the decision by the Board not to remove the bollards was a policy decision and further found that decision was a proper one in that it caused no reasonable apprehension of danger.

The Court of Appeal allowed the appeal and held the Defendant Board 25% liable.

In his judgment, Justice Feldman reviewed the trilogy of Supreme Court of Canada cases starting with ***Just v British Columbia*** [1989] 2 S.C.R. 1228, then ***Brown v British Columbia*** [1994] 1 S.C.R. 420 and ***Swinamer v Nova Scotia*** [1994] 1 S.C.R. 445 in which the Court articulated the basis on which governmental bodies could be found liable in negligence. The Court had held that a governmental authority which did owe a duty of care may be exempted from that duty of care and liability flowing therefrom where it could be demonstrated that that authority had made a bona fida "policy decision" as to the devotion of resources as opposed to an "operational decision" implementing the policy decision. To quote Justice Corey in the ***Just*** case "True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors".

In essence, the Supreme Court of Canada established in these trilogy of cases that governments were not liable in tort for deciding where and how much money they were going to spend but could be liable for the manner in which the money was spent, if they decided to spend it. Alternatively, if they legitimately decided to do nothing, they could not be criticized for it but if they decided to do something, that something had to be reasonable.

Justice Feldman was of the view that the Supreme Court of Canada did not address whether or not the policy/operational analysis had any application when the duty of care was imposed by a statute as opposed to common law. Although in ***Just*** and ***Swinamer*** Justice Corey commented on statutory obligations imposed on the Province, he felt on a

close reading of the decisions such an "obligation" did not equate to a duty.

Justice Corey had examined the statutes to see whether or not they contained a specific exemption from the common law duty of care owed. The statutes contained no such exemption and by inference placed an obligation. That inferential obligation did not translate to a specific duty or specific standard.

Justice Feldman noted, in fact, that Justice Sopinka in his dissenting Judgement in ***Just*** commented that that case dealt with liability for negligence of a public body in the absence of a breach of a statutory duty of care and concluded at page 9, "In my view, therefore, there is nothing in the majority decision which derogates from Sopinka, J.'s statement in his opening sentence in ***Just*** that that case did not involve a statutory duty but only a statutory power. Therefore, the policy/operational dichotomy and the exempting effect of a policy decision, are not applicable where a duty of care is imposed by statute rather than arising at common law."

He then proceeded to consider the statutory duty set out in Section 3 of *The Occupiers' Liability Act*. The duty prescribed under Section 3 (1) of that Act was to take such care as in "all of the circumstances" is reasonable. In the case of a governmental body, such circumstances could include it's financial resources. In this case, despite finances, the Board had failed to demonstrate reasonable care.

In ***Restoule v. Strong (Township)*** [1999] OJ 2979, the statutory duty considered by the court was the Defendant's duty of road repair under section 284 of the *Municipal Act.* In this case, the Plaintiff slipped and fell on an icy road within the jurisdiction of the Defendant, Strong Township. At trial, the issue was whether or not the Defendant had failed to comply with it's statutory duty of repair. At trial, evidence was lead that due to a lack of resources, the township did not sand nor inspect its roadways on weekends, except in emergencies. The accident occurred on a weekend.

Applying a policy/operational analysis, the Trial Judge dismissed the Plaintiff's claims.

Justice Borins, for the court, allowed the Appeal and ordered a new trial.

He held that the Trial Judge had failed to apply correct legal principles. The policy/operational dichotomy, and the exempting effect of the policy decision are not applicable where duty of care is imposed by statute.

In this case, the duty was imposed by statute and the duty was to keep highways "in repair". The only issue was whether or not the Defendant breached that duty.

In the specific facts of this case, the Defendant township could not make a policy

decision which would allow it to avoid compliance with it's statutory duty under the *Municipal Act*. It's "policy decision" to only inspect and sand on weekdays breached it's statutory duty.

CONCLUSION

These two decisions, rendered within months of each other, were unanimous decisions by two separate benches of six different Judges.

Further, although the ratio of ***Kennedy*** was limited to the statutory duty imposed by the *Occupiers' Liability Act*, the ratio of ***Restoule*** considered the statutory duty imposed by the *Municipal Act*.

There is no reason to believe that any Ontario court would avail a governmental body of a policy exemption with respect to any other statutory duty. Practically, therefore, all governmental bodies are now exposed to statutory duties in the absence of a specific statutory exemption. Further, in the absence of such an exemption, a court can not only scrutinize the manner in which governmental dollars are spent, but can to an extent tell such bodies where and how they should be spending such monies.

While our elected officials digest this latest intrusion in their autonomy, discussions are ongoing in Insurer boardrooms. Insurers insure risk. Premiums are calculated and collected based upon perceived risk. The risks of insuring governmental authorities has unexpectedly, and therefore without premium dollar, have increased.

Whether or not the governmental response to such perceived judicial interference is a plethora of legislative amendments adding express statutory exemptions remains to be seen.