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SUPREME COURT OF CANADA CLARIFIES TORT LIABILITY EXPOSURE FOR PUBLIC AUTHORITIES

By: Ryan Shaw

In a recent landmark decision, the Supreme Court of Canada (“SCC”) clarified when public authorities will be exposed to tort liability in relation to decisions which result in injury to the public. The SCC unanimously ruled in *Nelson (City) v Marchi*, 2021 SCC 41 (*Marchi*) that municipalities will not be granted immunity when facing allegations of negligence unless the impugned act or failure to act was a core policy decision which falls within a new framework outlined by the SCC. The new framework for determining when core policy immunity arises will have a far-reaching impact for underwriters of public authorities and those in the industry who deal with claims involving public authorities.

THE FACTS

In response to heavy snowfall on January 4 - 5, 2015, the City of Nelson (the “City”) plowed and sanded the streets. One of the tasks completed was to clear snow in angled parking stalls in the downtown core by plowing the snow to the top of the parking spaces, creating a snowbank along the curb that separated the parking stalls from the sidewalk. Having created the snowbank, the City did not clear an access route to the sidewalk for drivers parking in the stalls. On the evening of January 6th, Ms. Marchi parked in one of the angled parking stalls. She decided to cross the snowbank to access a business and while doing so seriously injured her leg. She sued the City for negligence and the parties agreed that she suffered \$1 million in damages.

Since 2000, the City had relied on a written document called “Streets and Sidewalks Snow Clearing and Removal” (Policy). Broadly, the Policy stated that snow removal, sanding, and plowing would be carried out “on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines”. The Policy set out priorities for various types of routes and specific guidelines for the timing and manner of snow plowing. The Policy did not specifically mention clearing parking stalls or creating snowbanks. The City also had several unwritten practices concerning the timing and manner of snow plowing and clearing that did not specifically mention parking stalls or creating snowbanks. Throughout the snowfall in question, the City’s public works supervisor followed the Policy and made decisions about how many employees should be on snow removal shifts. Her evidence was that all streets in the City were first





cleared of snow, and snowbanks were only removed after all snow plowing was complete.

THE RULINGS

The trial judge held that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions and thus were immune to tort claims. Alternatively, the trial judge found that the City did not breach the standard of care because the snowbank did not pose an objectively unreasonable risk of harm — the City did what was reasonable in the circumstances.

The Court of Appeal unanimously allowed the appeal and ordered a new trial. On tort immunity, it held that the trial judge did not properly engage with the distinction between government policy and operation, simply accepting the City's submission that all snow removal decisions were core policy decisions. The Court of Appeal also found errors in the trial judge's analysis on standard of care and causation that required a new trial.

The SCC had to decide three issues: (a) whether the trial judge erred in concluding that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions immune from negligence liability; (b) whether the trial judge erred in his standard of care analysis; and (c) whether the trial judge erred in his causation analysis.

The SCC's ruling on the first issue was the most significant as it outlined four factors to assess in determining whether the nature of a government's decision is core policy or operational: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria.

Applying the four factors, the SCC determined that the City's decisions in how and when to plow its roads of snow bore none of the hallmarks of core policy. The extent to which the City supervisor was closely connected to a democratically-elected official was not clear, but the evidence showed she did not have the authority to make a different decision with respect to the clearing of parking stalls. In addition, there was no suggestion that the method of plowing the parking stalls resulted from a deliberative decision involving any prospective balancing of competing objectives and policy goals by the supervisor or her superiors. There was no evidence suggesting an assessment was ever made about the feasibility of clearing pathways in the snowbanks; the City's evidence was that this was a matter of custom. Although it was clear that budgetary considerations were involved, these were not high-level budgetary considerations but rather the day-to-day budgetary considerations of individual employees. Finally, the City's chosen method of plowing the parking stalls could easily be assessed based on objective criteria. In the result, the SCC determined that the City's impugned decision was not protected by policy immunity and thus a duty of care was imposed. The Court





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agreed with the Court of Appeal that errors in the trial judge's analysis of the standard of care and causation could only be resolved in a new trial.

PRACTICAL CONSIDERATIONS

Marchi will impact indemnitors, brokers and claims handlers that work with claims or potential claims involving public authorities.

In all such claims, the nature of the decision must be carefully scrutinized on a case-by-case basis to determine whether the decision qualifies as a core policy decision; the more involved elected or high-ranking officials are in creating the protocols and procedures that are implemented and followed within the authority, the more likely their decisions will attract core policy immunity. Insurers must carefully evaluate how much discretion and decision-making authority is up to individual employees implementing municipal policies and public authorities should attempt to narrow that discretion as much as possible to limit their liability exposure. As usual, evidence is key in evaluating whether a core policy immunity defence has a genuine likelihood of success based on the new factors and framework identified in *Marchi*.

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