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LITIGATION ROUNDUP: NEW DEVELOPMENTS AND STRATEGIES

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> *In Greek mythology, the Labyrinth was an elaborate structure designed and built for King Minos of Crete. Its function was to hold the Minotaur, a creature that was half man and half bull and was eventually killed by the Athenian hero Theseus. Daedalus had made the Labyrinth so cunningly that he himself could barely escape it after he built it. Theseus was aided by Ariadney, who provided him with a fateful thread, literally the "clew", or "clue", to wind his way back again.*[1]

Public Liability litigation is like a labyrinth. Many plaintiffs and defendants enter the labyrinth; some get lost in the facts; some get lost in the applicable principles. It is the task of the successful advocate to navigate the labyrinth to an appropriate exit, before being devoured by the Minotaur.

In Public Liability litigation the labyrinth is created by numerous factors: factual background, pleadings, limitation periods, insurance limits, statutory duties, private law duties, statutory immunities, foreseeability, causation, policy decisions, settlement potential, joint tortfeaser principles, etc. Unless you follow the thread that provides you with an appropriate exit strategy, you will get lost in the labyrinth and be devoured by the Minotuar.

This paper examines some key Public Liability decisions throughout Canada in 2008 and 2009 particularly with respect to the issues relating to duty of care, duty to warn, duty to enforce, causation and foreseeability. It also attempts to provide some practical advice with respect to defence strategies in public liability litigation.

DUTY OF CARE

Historically, the Courts confined claims of negligence to specific categories of relationships. That is, the Court would only find negligence for relationships in which a duty of care had previously been found to exist. Therefore, the plaintiff bore the onus of demonstrating that their claim fell within one of the recognized categories of relationships. As the categories of relationships were considered closed, if the plaintiff

[1] From Wikipedia

could not satisfy this onus, their claim would be dismissed irrespective of legitimate arguments pertaining to the proximity of the relationship or the reasonable foreseeability of harm.

Over time, the Courts recognized that duty of care should not be confined to a closed category of relationships. The current test for establishing a duty of care evidences the recognition that the categories of negligence should not be closed. In Canada, the test set out in *Anns v. Merton London Borough Council*[2] was adopted in *Kamloops v. Nielson*[3] and reformulated in *Cooper v. Hobart*[4]. The current test requires an initial consideration of whether the relationship at hand either falls into an established category of relationships in which the Court has found that a duty of care exists or is analogous to such a relationship. Where the relationship is not analogous to a previously identified relationship, the Court will consider it to be a novel relationship and must consider whether a duty of care exists. Identification of a duty of care for novel relationships requires the consideration of two stages:

1) Is there a prima facie duty of care? The Court will consider whether:
    a. the harm claimed by the plaintiff was a reasonably foreseeable consequence of the act or omission of the defendant
    b. there is a sufficiently proximate relationship, that is a "close and direct" relationship of proximity, between the parties and whether there are any policy reasons militating against this proximity.
2) Irrespective of the duty of care, are there any general policy reasons to reject finding a duty of care.

In this way, the Court has developed a methodology through which novel claims of negligence may be recognized. As a result, the duty of care has been extended to relationships where the parties were in a sufficiently close relationship, such that, in the reasonable contemplation of the defendant, harm would be caused to the plaintiff by the

[2] [1977] 2 All E.R. 492 (H.L.) ("*Anns*")
[3] [1984] 2 S.C.R. 2 ("*Kamloops*")
[4] [2001] 3 S.C.R. 537 ("*Cooper*")

defendant's act or omission. Unless there were sufficient policy considerations to militate against the finding of a duty of care, the Court could extend the duty of care to relationships in which such duty had not been recognized. The question is whether the application of the test has resulted in the expansion of the categories of relationships in which a duty of care exists. Examination of the case law demonstrates that recent decisions evidence that the Court has been hesitant to expand the categories of negligence. The current trend illustrates that the Courts have relied extensively on policy considerations in order to deny the existence of a duty of care for novel relationships.

Paxton v. Ramji[5]

In *Paxton*, the Court of Appeal examined the duty of care of physicians to a future child. Here the defendant, Dr. Shaffiq Ramji, prescribed Accutane to the plaintiff, Dawn Paxton, for her acne. As a teratogenic drug, Accutane was known to have adverse health effects for a fetus. For this reason, the manufacturer of Accutane developed a Pregnancy Protection Mainpro-C Program for doctors to follow before prescribing the drug. The program called for doctors to take precautionary measures, such as the performance of pregnancy testing, to ensure that patients were not pregnant when Accutane was prescribed.

Dr. Ramji was aware of the dangers of Accutane when he prescribed it to Paxton and took steps to comply with the manufacturer's program including warning Paxton of the danger and performing two pregnancy tests which came back negative. Further, he prescribed the drug on the understanding that Paxton's spouse had a vasectomy 4½ years earlier. Irrespective of the steps taken by Dr. Ramji, Paxton conceived a child when her spouse's vasectomy failed. The child, Jamie Paxton, was born with several severe deficiencies as a result of exposure to Accutane.

The principal question addressed by the Court of Appeal in *Paxton* was whether a doctor has a duty of care to a future child. Traditionally, the caselaw demonstrated that there were two potential negligence claims for a future child. First, there was the claim that but

[5] 92 O.R. (3d) 401 ("*Paxton*")

for the negligence of the doctor the future child would not have been born. The Courts have classified this type of claim as a claim for wrongful life and have found that there is no cause of action for wrongful life. On the other hand, the caselaw also demonstrates that a future child can bring a claim in negligence alleging that but for the negligence of the doctor the child would not have been born with abnormalities. In this light, the Court then considered whether a duty of care was owed to the future child under the *Coopers/Anns* test as indentified above.

Concerning the application of the *Coopers/Anns* test, Feldman J.A. stated at paragraph 29:

> *In my view, by asking whether or not the claim before the court should be characterized as one for wrongful life, Canadian courts have asked the wrong question. In Canada, the governing tort law analysis for determining whether a person will be held liable in negligence for harm done to another is that mandated by the Supreme Court of Canada in a line of cases following the decision of the House of Lords in Anns v. Merton London Borough Council, [1978] A.C. 728. This line of authority began with Kamloops v. Nielson, [1984] 2 S.C.R. 2 and includes Cooper v. Hobart, , [2001] 3 S.C.R. 537, Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, Odhavji Estate v. Woodhouse, , [2003] 3 S.C.R. 263, Childs v. Desormeaux, , [2006] 1 S.C.R. 643, Syl Apps Secure Treatment Centre v. B.D., , [2007] 3 S.C.R. 83, Design Services Ltd. v. Canada, , 2008 SCC 22 and Holland v. Saskatchewan, 2008 SCC 42.*
>
> *According to this authority, the first question a court must ask is whether there is a duty of care owed by the defendant to the plaintiff. This question is answered by determining whether the proposed cause of action fits within an established category of relationship giving rise to a duty of care. Where the relationship between the plaintiff and defendant is of a type that has already been judicially recognized as giving rise to a duty of care, or is analogous to a recognized category, "a court may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a prima facie duty of care will arise": Childs at para. 15; see also Cooper at para. 36, Design Services at para. 27, and Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, at para. 5.*
>
> *Where a duty of care is found to exist, the court will go on to determine the standard of care and whether the defendant met that standard. If the defendant's conduct fell below the standard of care, and if the plaintiff sustained damages as a result, which were caused in fact and in law by the*

> *defendant's breach, then the defendant has breached the duty of care and is responsible in law for the damage suffered: see Mustapha at para. 3.*
>
> *If, however, the proposed duty of care is a novel one not previously judicially recognized, then the court must conduct what the Supreme Court of Canada refers to as the Anns test, to determine whether the alleged wrongdoer owes a duty of care to the plaintiff. The test includes three components which are considered in a two-stage process: (1) reasonable foreseeability of harm; (2) proximity; (3) policy factors. The first stage determines whether there is a prima facie duty of care by analyzing reasonable foreseeability and whether there is a sufficiently close and direct relationship of proximity, including policy considerations that affect the relationship. The second stage considers whether, despite finding a prima facie duty of care, there are residual policy reasons to reject a duty of care.*

Stage One: Analogous Categories:

Therefore, the Court identified the starting point of the duty of care analysis was the identification of established categories of relationships in which the Court has identified that a duty of care exists. In this context however, the Court could not find a relationship which was truly analogous to the relationship between a doctor and a future child. The Court looked to three particular relationships and concluded that in each case there were unique policy considerations which militated against the relationship being viewed as analogous.

First, the Court looked to the relationship between a mother and her fetus. Here the Court noted the ruling in *Dobson (Litigation Guardian) v. Dobson*[6] where the Supreme Court of Canada held that a mother does not have a duty of care to her fetus. In view of the unique characteristics of the duty of care of a mother to her fetus, it was not possible to conclude that the relationship was analogous.

Second, the Court considered the relationship between the driver of a motor vehicle and a future child. In this context, the Court has found that a duty of care is owed to the future child as they are reasonably foreseeable plaintiffs. However, the Court noted that this relationship is not analogous to the relationship between the doctor and the future child due to the unique and conflicting duties owed by a doctor to the mother and child. That

[6] [1999] 2. S.C.R. 753

is, a doctor owes a duty to the mother, as their patient. If a duty were also owed to serve the best interests of the future child, there could potentially be conflicting duties for the doctor. Due to this unique policy consideration, this second relationship could not be considered analogous.

Finally, the Court considered whether the relationship between a doctor and a non-patient third party was analogous. Feldman J.A. did not consider this relationship at great length as she found that the foundational cases analyzing the duty of care in this relationship were not fully developed. Therefore, the relationship was not analogous.

Cooper/Anns Test

Stage One: Reasonable Foreseeability:

At the first stage of the *Cooper/Anns* test the Court will look to consider whether there is a sufficiently close and direct relationship of proximity between the parties. The initial consideration is whether the harm suffered by the plaintiff was reasonably foreseeable. With respect to the relationship between a doctor and a future child, the Court states that reasonable foreseeability of harm for prescribing a teratogenic drug is not a difficult issue. In this context, the question is not whether it was reasonably foreseeable that Paxton would conceive, but rather whether it was reasonably foreseeable that a future child would be harmed. Therefore, Feldman J.A. states at paragraph 63:

> *But as long as there is the potential for a future child to be born who may be affected by a teratogenic drug being prescribed to a woman who is of childbearing capacity, then at the first stage of the Anns test, the harm to that future child is reasonably foreseeable.*

Stage Two: Proximity

In considering proximity, the Court looks to determine whether the doctor and the future child were in a "close a direct" relationship. However, in addition to this consideration, the Court will also look to consider whether there are any policy considerations which militate against a finding of proximity at this stage of the analysis. As clarified in *Cooper*, policy considerations may be considered at the first stage of the *Cooper/Anns* test in

addition to the second stage. In *Paxton*, the Court finds two policy considerations which militate against the finding of proximity in this case:

1) As women are autonomous decision makers, they do not make decisions on behalf of the unborn child nor do they owe a duty to act in the best interests of the child. Therefore, if a doctor owed a duty of care to the future child, they could potentially be placed in an impossible conflict of interest between the best interests of the child and the best interests of the mother as their patient.

2) The relationship between the doctor and the future child is indirect as the doctor only has a direct relationship with the mother.

In application of the *Cooper/Anns* test, the Court finds that Dr. Ramji did not owe a duty of care to the future child. In reaching this conclusion, the Court states that the trial judge erred in finding that a duty of care did exist. In this way, *Paxton* serves as an illustration of the recent trend in the caselaw concerning claims for novel torts. Interestingly, the trial judge found that Dr. Ramji did owe a duty of care to Paxton but that the standard of care was met. Nevertheless, the decision of Feldman J.A. demonstrates the importance of policy considerations in the *Cooper/Anns* test as the policy considerations were sufficient to militate against finding a duty of care.

Breach of Statutory Duty

Holland v. Saskatchewan[7] was a class action suit involving 200 game farmers who had refused to register in a federal program due to objections to a broadly worded indemnification and release clause. As a result of their refusal, the farmers' herd status was downgraded to the lowest level, reducing the market price of their product and their ability to sell. The game farmers established on judicial review that the indemnification and release had been invalidly included in the registration form as it was overly broad in

[7] [2008] S.C.R. 551 ("*Holland*")

several respects. Irrespective of the result of the judicial review, Saskatchewan took no action to restore the farmers' certifications or to compensate them for lost income.

In light of Saskatchewan's failure to respond to the Court's ruling, the game farmers brought a civil action for, amongst other claims, negligence by Saskatchewan. In particular, the farmers alleged that Saskatchewan was negligent in requiring the farmers to sign the overly broad indemnities and in down grading the status for those who refused to sign. The Saskatchewan Court of Appeal struck out the negligence claim against Saskatchewan as it disclosed no cause of action. In commenting on the conclusions of the Court of Appeal, McLachlin C.J. states:

> *In my view, the Court of Appeal was correct in these conclusions. The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: The Queen in Right of Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant pursued this remedy before Gerein C.J.Q.B. and obtained a declaration that the government's action of reducing the herd certification status was unlawful and invalid. No parallel action lies in tort.*

However, while McLachlin C.J. states that the claim of negligence against Saskatchewan for acting outside the law, or in breach of statutory duty, must be struck, she continued to discuss the claim that Saskatchewan was negligent in failing to implement the ruling from the judicial review. At paragraph 14 of the decision McLachlin C.J. stated concerning this claim that:

> *Such a claim is not a claim for negligent breach of statute. It stands on a different footing. In Welbridge Holdings Ltd. v. Greater Winnipeg, [1971] S.C.R. 957, at p. 970, this Court noted the difference in terms that appear to recognize the possibility of an action for failure to implement a judicial decree:*
>
> > *. . . the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care. The situation is different where a claim for damages for negligence is based on acts*

> *done in pursuance or in implementation of legislation or of adjudicative decrees. [Emphasis added.]*

> *More recent authorities describe the distinction in terms of "policy" versus "operational" decisions. Policy decisions about what acts to perform under a statute do not give rise to liability in negligence. On the other hand, once a decision to act has been made, the government may be liable in negligence for the manner in which it implements that decision: Kamloops (City of) v. Nielsen, , [1984] 2 S.C.R. 2; Just v. British Columbia, [1989] 2 S.C.R. 1228; Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705; Lewis (Guardian ad litem of) v. British Columbia, [1997] 3 S.C.R. 1145. Public authorities are expected to implement a judicial decision. Consequently, implementation of a judicial decision is an "operational" act. It is therefore not clear that an action in negligence cannot succeed on the breach of a duty to implement a judicial decree.*

Therefore, while McLachlin C.J. reiterated that public bodies would be immune from liability for policy decisions, she continued to state that public bodies can be liable for negligently performance of an "operational" act. In this way, it was possible that an action in negligence could be sustainable against a public body for negligent implementation of a judicial decision. The implications of the Supreme Court of Canada's decision in *Holland* could have an adverse effect for municipalities. Previously, defence counsel relied on the fact that there was no recognized cause of action against a municipality for breach of statutory duty. While *Holland* has not altered this finding, it has left uncertainty with regards to the liability of municipalities for the implementation of a judicial decree. As implementation of a judicial decree has been defined as an operational act, failure to implement the decrees may constitute negligence. However, the question remains as to what the requisite standard of care will be in this context.[8] Therefore, Holland has created uncertainty in the mind of municipal defence counsel regarding the duty of care owed by their clients.

[8] Basille Chiasson Q.C. *A Dramatic Revision in the Shape of the Law: Holland cv. Saskatchewan* (Sept 2008) 6 Mun. L. R. Mgt. at p. 88.

Williams v. Ontario[9]

Williams was an appeal of a motion to strike which concerned the liability of Ontario for damages suffered by the plaintiff, Andrea Williams, when she contracted SARS in 2003. The plaintiff alleged that she contracted SARS while she was a surgery patient at North York General Hospital in May of 2003. The initial outbreak of SARS in Toronto occurred late in February 2003. By the end of April, Ontario began to relax infection control procedures in its hospitals largely due to the negative travel advisory issued by the World Health Organization on April 23, 2003. Subsequently, on May 23, 2003, the Province was forced to reinstate infection control procedure due to a second outbreak of SARS. Williams alleged that Ontario was negligent in prematurely easing infection control procedures. In this way, she alleged that Ontario owed private law duty of care to her and that the motions judge has improperly struck portions of her claim. For its part, Ontario cross-appealed on the basis that it was "plain and obvious" that the claim as pleaded could not succeed as Ontario did not owe a private law duty of care.

In *Williams*, Sharpe J.A. held that Ontario did not owe a private law duty of care due to the statutory obligations of Ontario. In this context, the relevant legislation was the *Health Protection and Promotion Act*[10] which had been examined by the Court in *Eliopoulis et al. v. Ontario (Ministry of Health and Long Term Care).*[11] Like *Williams*, *Eliopoulis* involved a consideration of the duty of care of Ontario for a serious public health risk, in this case West Nile Virus. The court in *Eliopoulis* held that the discretionary powers to protect the public from the spread of public disease did not create a private law duty of care. Rather, Ontario was bound to act in the general public interest and was required to balance "a myriad of competing interests" in so doing. Similarly, in *Williams,* Sharpe J.A. identified the myriad of competing interests that Ontario was faced with during the SARS epidemic at paragraph 31. There Sharpe J.A. states:

> *When assessing how best to deal with the SARS outbreak, Ontario was required to address the interests of the public at large rather than focus on the particular interests of the plaintiff or other individuals in her situation.*

[9] [2009] O.J. No. 1819 (C.A.)("*Williams*")
[10] R.S.O. 1990 c.H.7 ("*HPPA"*)
[11] (2005), 82 O.R. (3d) 321 (Div. Ct.) ("*Eliopoulis*").

> *Decisions relating to the imposition, lifting or re-introduction of measures to combat SARS are clear examples of decisions that must be made on the basis of the general public interest rather than on the basis of the interests of a narrow class of individuals. Restrictions limiting access to hospitals or parts of hospitals may help combat the spread of disease, but such restrictions will also have an impact upon the interests of those who require access to the hospital for other heath care needs or those of relatives and friends. Similarly, a decision to lift restrictions may increase the risk of the disease spreading but may offer other advantages to the public at large including enhanced access to heath care facilities. The public officials charged with the responsibility for imposing and lifting such measures must weigh and balance the advantages and disadvantages and strive to act in a manner that best meets the overall interests of the public at large.*

In light of the statutory duty owed to the public, Ontario did not owe a private law duty of care to Williams. As a result, Ontario was completely successful on its cross appeal and the plaintiff's claim was struck in its entirety. What is evident from *Williams* is that the Court will continue to assess the duty of care of government bodies in the context of the applicable statutory authority. Where plaintiffs seek remedies for damages incurred in a public health epidemic, they must demonstrate a private law duty of care.

Heaslip Estate v. Mansfield Ski Club Inc.[12]

In this case the Crown brought a motion to strike out the plaintiffs' statement of claim as against the Crown. The allegations of negligence against the Crown pertained to its failure to provide an air ambulance in the circumstances when one was available. The court struck the claim on the basis that the Crown's actions were grounded in a policy rather than operational. The court stated:

> *In my view, any decision to assign or re-assign an air ambulance is a policy decision – a decision which involves balancing the interests of an individual against the public as a whole. On the facts pleaded, it would have also involved the balancing of the interests of one member of the public against another member of the public. There is a conflict between the interests of [the deceased plaintiff] an the other interested persons being transported in the air ambulances at the same time [the deceased plaintiff] needed to use the ambulance. The courts*

[12] (2008), Ontario S.C.J. released December 2, 2008

> *have stated that where there are such conflicting interests, there can be no private law duty of care.*[13]

Fullowka v. Royal Oak Ventures Inc.[14]

The decision in *Fullowka* illustrates the scope of the duty of care of government authorities. *Fullowka* involved a labour dispute at the Great Mine in Yellowknife. Nine workers were killed when a bomb was deliberately set off by a striking worker. The surviving family members, along with one witness who was injured in the blast, brought claims of negligence against Royal Oak Ventures Inc., the owner of the mine, Pinkerton's of Canada Limited, the provider of security during the strike, and a group of individual defendants. In addition, the Plaintiffs alleged that the government of the North West Territories ("Government") owed a statutory duty of care under the *Mining Safety Act*[15]. The trial judge found the Government did owe a duty of care and that the requisite standard of care was breached by allowing replacement workers and failing to shut down the mine to prevent the foreseeable violence.

In defining the scope of the duty of the Government, the Court of Appeal notes that the duty of care must materialize within the ambit of the statute. Here the Court identified that the *Mining Safety Act* was not concerned with labour relations. More importantly, the Court stated that the duties owed by the Government were duties owed to the public at large. At para. 127 the Court states:

> *Even if it could be argued successfully that the GNWT owed the miners a prima facie duty of care in respect of the injuries Warren caused, the reasons previously outlined demonstrating why one person should not owe a duty in tort to prevent the intentional criminal acts of another person apply equally to regulators. There are also additional policy reasons why a regulator should not be held to owe a duty in tort to those participants in the regulated industry who might suffer damage. <u>First of all, the statutory duties of regulators are primarily public in nature, and generally no duty is owed to any private individual.</u> The legislators that create regulatory regimes usually do not intend that those regimes include compensation for participants, unless that is expressly provided for. When compensation is part of the scheme, premiums*

[13] *Syl Apps Security Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83
[14] [2008] NW.T.J. No. 27 ("*Fullowka*")
[15] R.S.N.W.T. 1988, c. M-13

> *or other fees are often charged to pay for it: see for example the workers' compensation systems. In this way the costs of regulation, and of accidents, are paid for by the regulated industry. (emphasis added)*

Further the Court continues at para. 131 to state:

> *Just because the government creates a regulator to promote safety in an industry does not mean that the government thereby becomes the insurer of any and all damage that the regulator fails to prevent in that industry. The statutory duty to ensure safety in the mines does not automatically translate into a duty in tort, that is a duty to answer in damages to anybody who is injured in a mine regardless of the source of the injury. The statute does not change the government from a regulator into an insurer just because with hindsight it appears that the inspectors could have ordered changes to the operations of the mine that might have prevented an intentional criminal act. Even if one assumes sufficient proximity between the Inspector of Mines and the miners to create a prima facie duty of care there is no basis in law to extend that duty to damage arising from intentional criminal acts.*(*emphasis added*)

The Court of Appeal reversed the findings of the trial judge pertaining to the liability of the Government. The conclusion was that the Government did not owe a private law duty of care to prevent the criminal conduct of a third party. The duties that arose under the statute could not be extended to prevention of criminal acts, nor to labour relations issues. Once again, the scope of the relevant legislation, properly interpreted, defined the scope of the duty of care of the public authority.

Street v. Ontario Racing Commission et al.[16]

In *Street*, the Plaintiff, Kenneth E. Street, was injured after being thrown from his horse during training at Woodbine Racetrack. Despite being injured while working, Street was denied workers compensation as his employer had failed to maintain his coverage. Street sought action against his employer for his negligence in allowing his coverage to lapse, and also brought an action against the Ontario Racing Commission (the "Commission") and the Ontario Jockey Club in negligence.

[16] [2008] O.J. No. 37 (C.A.) ("*Street*")

With respect to the Commission, the Plaintiff alleged that the Commission was negligent in enforcing its own rules. R. 29.09 of the *Rules of Thoroughbred Racing*, specified that "any person who places any licensee in a horse related occupation on their payroll" was to cover that person with worker's compensation insurance and to keep that person covered "throughout the time he/she is in their employ." Street alleged that the Commission owed a private law duty of care to ensure that it rules were followed. In particular, Street alleged that the Commission was negligent in not requiring trainers to provide clearance certificates evidencing compliance with the worker's compensation requirement. In contrast, the Commission's sole requirement was that trainers provide a worker's compensation number which, at any given time, may or may not be in good standing.

The Court states that the scope of the duty of care of the Commission in *Street* is set out in the applicable statute. Weiler J.A. states at paragraph 16 of the decision that:

> *One case-specific factor applicable in this situation is the existence of a statute regulating the activity in question. The statute does not specifically state that those who breach the statutory duty imposed on them should be liable to the individuals affected. More importantly, in regulatory cases involving pure economic loss, a legislative intent not to impose a private law duty of care has been inferred: Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562 and Cooper v. Hobart, supra.*

Here the Court indentified that the *Racing Commission Act*[17] was the only source of the Commission's powers and duties. Under the *Racing Act*, the Commission had a general mandate to serve the interests of "all Ontario in the public interest."[18] As part of this general mandate, the Commission allocated the obligation to compliance on the trainers. Street argued that the Commission was under a duty to ensure compliance with their own rules including the obligation to obtain a clearance certificate from trainers. In response, Weiler J.A. concluded at paragraph 18:

> *I would respectfully disagree with this conclusion. The statutory discretion given to the Commission by the Racing Commission Act permits, but does not require, enforcement. The Commission's decision respecting the extent of*

[17] R.S.O. 1990, c. R. 2. ("*Racing Act*")
[18] *Supra* note 12, at para. 17.

> *compliance required it to consider a "myriad of objectives consistent with public rather than private law duties" as stated in Edwards, supra, at para. 14. See also L.(A.) v. Ontario, (2006), 218 O.A.C. 150, Eliopoulos v. Ontario, (2006), 82 O.R. (3d) 321 (C.A.), and Granite Power Corp. v. Ontario, (2004), 72 O.R. (3d) 194 (C.A.), where this court also rejected the imposition of a private law duty of care on the public body in issue on the basis that the claims were at odds with the particular public body's statutory duty to the public as a whole and required a balancing of constituent interests.*

Street reinforces that the duty of care of statutory bodies will be defined by the relevant legislation. Where the legislation affords the public authority discretion, the public authority will not be liable for decisions exercising this discretion. The important point, as evident from the cases above, is that the Courts have consistently held that public authorities do not owe a private law duty of care in these circumstances.

Pembina (County) Water Resource District v. Manitoba[19]

Pembina was a motion to amend the plaintiff's statement of claim to plead the tort of economic interference and negligence for lost tax revenues. The plaintiffs represented various cities in North Dakota that were adversely impacted by flooding caused by a dike located just north of the 49th parallel. As a motion to amend the pleadings, the Court considered whether it was "plain and obvious" that the proposed amendments disclosed no reasonable cause of action.

With respect to the claim of negligence, the Court reiterated that the source of the duty of care of a public authority was set out in the relevant legislation. In this context, the plaintiffs substantially relied on the *International Boundary Waters Treaty Act*[20] which stated at ss. 4(1) and 12(1):

> *4. (1) Any interference with or diversion from their natural channel of any waters in Canada, which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters, as defined in the treaty, resulting in any injury on the United States side of the boundary, gives the same rights and entitles the injured parties to the same legal*

[19] [2008] F.C.J. No. 1809 ("*Pembina*")
[20] R.S. 1985, c. I-17 ("*IBWTA*")

> *remedies as if the injury took place in that part of Canada where the interference or diversion occurs.*
>
> *12. (1) Except in accordance with a licence, no person shall construct or maintain, either temporarily or permanently, any remedial or protective work or any dam or other obstruction in waters flowing from boundary waters, or in downstream waters of rivers flowing across the international boundary, the effect of which is or is likely to raise in any way the natural level of waters on the other side of the international boundary.*

Here the dike was constructed as a road allowance by several municipalities in Manitoba. The Plaintiffs alleged that the municipalities negligently, and in the face of the *IBTWA*, constructed the dike. Further, the Plaintiffs alleged that Manitoba was negligent for allowing the municipalities to build the dike without the requisite water licenses.

In reliance on the seminal case of *R. v. Saskatchewan Wheat Pool*[21] Russell J. states at para. 38 that:

> *A statutory breach does not automatically give rise to a cause of action: R. v. Saskatchewan Wheat Pool, [1993] 1 S.C.R. 205. The Plaintiffs must show that the statute in question creates a private law duty to the Plaintiffs alongside the public law duty.*

In view of s. 4(2) of *IBTWA*, Russell J. states that a private law duty is not owed in this case. At para. 42 Russell J. states:

> *In my view, the references in the Statement of Claim to section 4 of the IBWTA and section of the Water Rights Act <u>do not impose a statutory obligation on Manitoba to institute effective measures to prevent the ongoing and continuing damage to the Plaintiffs</u>. Allowing for the same rights and remedies as exist in Canada does not impose a private duty, and the pleadings do not claim otherwise*. (*<u>emphasis added</u>*)

Under the *IBTWA*, Manitoba was not in breach as they had not interfered with or diverted water away from its natural channel nor had they had constructed or maintained any remedial or protective work. In this way, there was no private law duty for Manitoba. Moreover, the Court reached the same conclusion regarding the municipal defendants, stating at para. 44:

[21] [1993] 1 S.C.R. 205

> *As regards the municipal defendants, I cannot see how the provisions relied upon under the IBWTA impose the kinds of obligations that give rise to a duty of care for economic loss owed to the Plaintiffs. In the words of Justice Rothstein in Design Services, neither Manitoba nor the Municipal defendants in this case are "inspecting, granting, issuing or enforcing something mandated by law." (para. 32) Once again, there is no analogy with the Kamloops case. There is nothing in the present case to suggest that any of the Defendants owed a private law duty of care to the Plaintiffs or that the loss claimed by the Plaintiffs was the type of loss that the legislation in question was intended to guard against.*

Therefore, Russell J. held that it was plain and obvious that the amendments pertaining to negligence for pure economic loss were bound to fail. Therefore, the amendments could not be allowed and the motion was dismissed. *Pembina* is further corroboration that, in claims against public authorities, the plaintiff continues to bear the onus of demonstrating that a private law duty of care is owed.

Crawford v. Torbay[22]

This is a Newfoundland trial decision which found the municipality liable for failing to follow its own Development Regulations. The issue in this case was that had the Regulations been followed the plaintiff would have been able to assert certain rights and be afforded procedural fairness with respect to a development application that impacted the plaintiff. The trial judge awarded damages for diminution in value of his property, damages for loss of privacy and enjoyment, special damages for a privacy fence, and aggravated damages.

There is no reference in the case to the Supreme Court of Canada decision in *Welbridge*[23] which held that a municipality cannot be held liable for the negligent adoption of a zoning by-law since it is acting in a legislative capacity. This principle has also been extended to subdivision approvals.[24] There are however, some limits on this principle. The decisions preceded the policy/operational distinction applied by the Supreme Court

[22] (2008) 50 M.P.L.R. (4th) 297 (Nfld S.C.)
[23] [1971] S.C.R. 957
[24] *Bowen v. Edmonton (City)*, [1977] A.J. No. 540

of Canada in later decisions. As pointed out by Basile Chaison, Q.C. in an excellent article "Municipal Liability for Negligent Subdivision Approval"[25]:

> *In Wellbridge, the substance of the proposed zoning by-law and the decision to further it through the legislative process were policy decisions made by council since they were quintessential government functions. To execute these policy decisions, council had to comply with the procedural requirements imposed by law. Since the practical execution of a policy decision is a hallmark of an operational decision and is separate from decisions about the substance of policy, a failure to comply with procedural requirements should have been considered an operational decision that could have become the subject of a duty of care.*

DUTY TO WARN

McMillan v. Canada Mortgage and Housing Corporation[26]

McMillan is a British Columbia Court of Appeal case in which the appellants challenged the dismissal of their certification application. The appellants purchased a condominium unit in a condominium development built in 1994. In 2000, it was determined that the building was suffering from premature building envelope deterioration which would require a substantial sum to repair. The appellants argued that Canada Mortgage and Housing Corporation ("CMHC") was negligent for failing to disseminate its research on wall assembly construction and water ingress related envelope failures. The powers, duties and function of CMHC were set out in the *Canada Mortgage Housing and Corporation Act*[27] as well as the *National Housing Act*[28]. The Plaintiff sought to certify the application on behalf of "all persons who purchased a residential occupancy, or unit, or interest in a residential occupancy located on the west coast of Canada built between January 1, 1982 and December 1, 2005, the incorporated the alleged faulty envelope design" (the "Class"). Therefore, the issue of this appeal was whether, in light of the duties set out in the relevant statutes, CMHC owed a duty to the Class to disseminate its research and warn of the potential for envelope failure.

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[25] February 2009, The Canadian Institute's Annual Conference on Provincial/Municipal Government Liability
[26] [2008] B.C.J. No. 2574 (C.A.) ("*McMillan*")
[27] R.S.C. 1985 c. C-7
[28] R.S.C. 1985 c. N-11

The issue under section 4(1)(a) of the *Class Proceedings Act*[29] was whether it was plain and obvious that a claim could not succeed. The court examined whether CMHC owed a duty of care to the Class by applying the *Cooper/Anns* test as discussed above. The appellants argued that the duty of care owed by CMHC was analogous to the following categories of cases:

a) cases in which the defendant's conduct foreseeably causes physical harm to the plaintiff or the plaintiff's property;
b) cases of negligent misstatement by nondisclosure;
c) cases of failure to warn of the risk of danger to human health and safety;
d) cases of a building authority's duty to future owners of real estate; and
e) cases of a highway authority's duty to highway users.

However, the Court Saunders J.A. found that the categories presented were not analogous. At paragraph 17 Saunders J.A. stated that the claim was a novel one as:

> *With respect, I do not agree the case as pleaded is sufficiently analogous to cases that have recognized a duty of care as to obviate the need for individual and specific consideration of both of the Anns' questions. All of the cases to which we have been referred involve situations of a more direct relationship between the plaintiff and the defendant than the situation here pleaded. For example, in Nielsen the inspector had a duty in respect to property eventually owned by the plaintiff. In Rivtow the relationships were those of constructor and distributor of the cranes found to be faulty.*
>
> *In contrast, we were not pointed to any cases in which a researcher, with or without a statutory mandate, was found to owe a duty of care solely on the basis of a failure to disseminate knowledge learned, even assuming, for the purposes of this discussion, foreseeability. It seems to me that in order to come within a class of cases already recognized, given the criticism of CMHC's conduct said to amount to breach of a duty of care is failure to pass on knowledge, something of that nature would be required.*

In continuing the application of the *Cooper/Anns* test, Saunders J.A. relied on the decision of the Supreme Court of Canada in *Cooper* to state that, as a statutory entity, the relationship of CMHC with any member of the public is defined by the legislation. In this respect, the appellants argued that the legislation placed a duty on CMHC to investigate housing issues and to disseminate the information to purchasers. However, the Court

[29] R.S.B.C. c. 50

recognized that the legislation relied on by the applicants was drafted in a discretionary manner. While the appellants asserted that CMHC had failed to carry out its **duty** under the legislation, the Court noted that the discretionary language of the Act meant that the responsibilities were not synonymous with duties. Further, Saunders, J.A. continued to state:

> *Last, I would adopt the statement of Madam Justice Sulyma in **Holtslag v. Alberta**, 2006 ABCA:*
>
> > *Further, as was the case in **Cooper**, the Director's duty is to the public as a whole and a duty to individual home builders or consumers would potentially conflict with that overarching duty to the public. Such a private duty would no doubt come at the expense of other important public interests. As discussed in paragraph 29 above, the Director in legislating is balancing different objectives and policies, and public interests, and the interests of a particular homeowner may well conflict with those.*
> >
> > *Notwithstanding the able submissions on behalf of the appellants, I respectfully conclude that their claim the relationship between themselves and CMHC is sufficiently proximate as to support a duty of care is bound to fail. Without a duty of care, the claim cannot succeed*

The result in *McMillian* is further evidence that the duty of care of government bodies, including the duty to warn, is defined by the relevant statutory authorities. Where the legislation provides that the government body owes a duty an overarching duty to the public, the Court will continue to deny the existence of a private law duty of care.

Zsoldos v. CPR[30]

In this case the court found CPR liable for it failure to warn motorists of an unsafe crossing, even though the railway was found to have complied with the regulatory framework and industry standards. In this case it was found that the advance warning sign would not have allowed the plaintiff to stop in time to avoid the collision. The trial

[30] (2009), 93 O.R. (3rd) 321 (C.A.)

judge concluded that, given the amount of discretion CPR had in determining what safety measures should be established at level crossings, mere compliance with the regulatory framework did not necessarily relieve CPR of liability.

The Court of Appeal upheld the decision in finding CPR 75% at fault and the plaintiff 25% contributorily negligent. In its liability analysis, the court made reference to the Supreme Court of Canada decision, *Ryan v. Victoria (City)*[31]. In that case Major, J. stated that "where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more than likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required". However, he also held that where the statutory framework is general or permits discretion, mere compliance "is unlikely to exhaust the standard of care".

The court then went on to consider the decision of the Supreme Court of Canada decision, *ter Neuzen v. Korn*[32] which held that "conformity with general practice…usually dispels a charge of negligence" but that "even a common practice may itself be condemned as negligent if fraught with obvious risk". Since the trial judge found that had CPR met the standard of care and carried out the necessary inspections it would have realized additional safety measures were required. The appellate court concluded that the next step in the analysis was to determine whether the failure to take additional measures was negligent. The normal test is to weigh the 3 factors set out in *Ryan:* the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost to prevent the injury. However, *Ryan* also states that the courts may look to external indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standards. Ultimately, in the case at bar, the court held that the failure to illuminate the crossing was negligent because "a motorist travelling at the expected speed would not have been able to stop in time".

[31] [1999] 1 S.C.R. 201
[32] [1995], 3 S.C.R. 674

The case is a reminder that even in obvious cases of regulatory compliance, a detailed negligence analysis may expose the public authority to liability. What may be of concern to Ontario municipalities is how that analysis plays out over against section 44 of the *Municipal Act, 2001:*

Maintenance

44. (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge. 2001, c. 25, s. 44 (1).

Liability

(2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default. 2001, c. 25, s. 44 (2).

Defence

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising; or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met. 2001, c. 25, s. 44 (3).

The *Minimum Maintenance Standards for Municipal Highways ("MMS")*[33] don't prescribe all of the safety requirements in all situations. Often the *Manual of Uniform Traffic Control Devices* is used as the industry standard. Does *Zsoldos* hold that even if the *Manual* is complied with along with the maintenance requirements for such signage in the *MMS*, there is still a potential for negligence if the signage is inadequate for an obvious risk? What about the common law policy defence in these circumstances as codified by section 450 of the *Municipal Act, 2001?* It would appear that the courts are drawing a distinction between a policy decision concerning warning signage and the failure to impose a proper inspection system to identify the need for additional warning signage where there is an obvious risk of danger. Clearly this is an area of concern, and requires a more comprehensive *MMS* standard to protect the municipality from liability.

DUTY TO ENFORCE

It has been generally accepted that where enforcement is discretionary, there is no private law duty to enforce, and enforcement can be done on a selective basis.[34] This is not

[33] Ontario Regulation 239/02

[34] *Toronto v. Polai* [1970] 1 O.R. 483 (C.A.) aff'd [1973] S.C.R. 38

necessarily the case with the enforcement of building codes for new construction. As stated by the Supreme Court of Canada in *Ingles v. Tutkaluk Construction Ltd.*[35]

> *The purpose of the building inspection scheme is…to protect health and safety of the public by enforcing safety standards for all construction projects. The province has made the policy decision that the municipalities appoint inspectors who will inspect construction projects and enforce the provisions of the [Building Code] Act. Therefore, municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers.*

Negligent Building Inspections

Most provinces have adopted a mandatory duty to inspect buildings. The current *Building Code Act* in Ontario imposes a host of mandatory statutory duties which include:

- the establishment of operational policies for enforcement
- co-ordinate and oversee enforcement
- review plans and inspect construction to determine compliance with the OBC
- ensure compliance with "applicable law"

Failure to Enforce By-Laws and Building Codes

Where the municipality has discretion to enforce or not enforce its by-laws, a decision not to do so is a policy decision and immune from civil action. This principle must be qualified in the following circumstances:

- A decision not to enforce does not avoid a private law duty of care. For example, the failure to prosecute a building code offence may be a discretionary policy decision, but the failure to inspect and note the defect may be a breach of a private law duty of care resulting in negligence;[36]

[35] [2000] 1 S.C.R. 298

[36] *Kamloops v. Nielsen* [1984] 2 S.C.R. 2

- Where there has been a failure to even consider enforcement, there has not been a bona fide policy decision, which may give rise to a claim for negligent enforcement.[37]
- Identifying a problem and issuing orders, and then failing to do anything about it, may give rise to a breach of private law duty of care if the failure affects innocent third parties.[38]

Foley v. Shamess[39]

This was a trial decision by the Ontario Superior Court of Justice that held the Town of Parry Sound 40% liable for the damages sustained by Foley, the owner of one of three connected row units in a 100 year old building as a result of an unsafe building order issued by the Town against Foley and Shamess, (Shamess being the owner of the other two units), that ultimately led to the demolition of all three units. The Town's negligence was found on the following basis:

> *By October of 1996, the Town must have known that [Shamess] would not be providing the engineering assurances requested in the Town's letter of September 9, 1996. Its failure to enforce its [Property Standards] by-law in the ensuing 12 months coupled with the ongoing deterioration of the entire building, leading to the decision ultimately made to demolish the entire building, contributed…to the damages sustained by the plaintiffs through the loss of their building.*

In his legal analysis, the trial judge determined that the Town owed a duty of care to Foley in its enforcement of the Property Standards By-law, and that it was reasonably foreseeable that the Town's failure to enforce the by-law against Shamess would cause harm to Foley. In coming to this conclusion the judgment finds a breach of a private law duty of care for the Town's failure to carry through with the enforcement process started earlier. Even though the enforcement process was discretionary, the Town's failure to make a *bona fide* policy decision not to proceed with enforcement, effectively meant it could not rely on the policy decision defence. The trial judge stated:

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[37] *Oosthoek v. Thunder Bay* (1995), 30 O.R. (3d) 323 (C.A.)

[38] *Foley v. Shamess* (2005) 22 M.P.L.R. (4th) 50 (Ont. S.C.J.), rev'd (2008), 297 D.L.R. (4th) 287

[39] *ibid*

> *No evidence was called by the Town to explain why during the 11 month period from September of 1996 to October of 1997, it did not enforce its [Property Standards] by-law. Evidence was not put forward to suggest that for various policy reasons, the Town determined that enforcement should not proceed. A process that had been started by the Town in 1994 was still underway, but not complete, some three years later in 1997.*

The Ontario Court of Appeal in a decision released on August 18, 2008, dealing with an appeal by the Town as well as cross appeals by both Foley and Shamess, allowed the Town's appeal and dismissed the cross appeals.

In dealing with the Town's appeal, the Court of Appeal held that the trial judge had erred by finding that the Town was negligent for failing to demolish the two Shamess units by October, 1997 thereby allowing the Foley unit to be spared from ultimate demolition due to ongoing deterioration of the building. The trial judge had stated that "no policy reason was put forward by the Town to explain why it did not move to demolish [the two Shamess units], and to recover the cost of such work as against the owners.

In allowing the Town's appeal, Justice Laskin of the Court of Appeal stated:

> *In my view, finding the Town negligent for failing to undertake a partial demolition of the building was unreasonable. Although the Town owed a duty to the Foley's to enforce its property standards by-law, it owed no duty to them to undertake a partial demolition. For it is one thing to say a municipality has a duty to enforce its by-laws. The way it enforces them is quite another thing. As I read the case law, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners. See Frouse v. Hik, 1993 CanLII 2815 (B.C.S.C.) and Nesbitt Aggregate Ltd. v. Smiths Construction Co. (Arnprior), [2000] O.J. No. 1233 (Ont. S.C.J.).…In effect, the trial judge forced the Town to solve the very problem the owners of the building could not solve on their own. Both the Shamesses and the Foleys were well aware of the option of a partial demolition and well aware of its expense and risks. They would not agree to undertake it. Why, I ask rhetorically, should the Town be required to do it for them?*

The thrust of the decision in absolving the Town of any liability is the finding that the Town had acted in a reasonable manner in the circumstances. The decision also

reinforces the principle that enforcement procedures are discretionary, and the method of enforcement chosen amounts to a policy decision that is not subject to liability. What is not clear from the decision is if there is potential liability from the exercise of the municipality's discretion not to enforce at all in certain circumstances, assuming the legislation does not impose mandatory enforcement. Applying the rationale of the decision, that a municipality is not liable for its enforcement decisions if it acts reasonably and in good faith would suggest no liability for lack of enforcement if it was a bona fide policy decision made in good faith.

On the other hand, the court stated that "the Town owed a duty to the Foleys to enforce its property standards by-law". This implies a mandatory obligation to act. Failing to act, even in the context of a policy decision to not enforce, may constitute a breach of a private law duty. This is a troublesome conclusion, given the fact that the underlying legislation at the time did not include a mandatory obligation to enforce.

I suspect that the court did not address this issue with clarity because it was more concerned about absolving the Town on the basis of it acting in a reasonable manner. It is suggested that counsel acting for municipalities be aware that this decision not be strictly read to conclude that in all circumstances failure to enforce will result in a breach of a private law duty. If however, a decision is made to enforce, and is then carried out in a negligent manner, the enforcement may be subject to liability.

CAUSATION

As a result of the decision of the Supreme Court of Canada in *Resurfice Corp. v. Hanke*[40], there is little doubt that the "but for" test is the general test for negligence actions involving multi-cause injuries. This was clarified by McLachlin C.J. at paragraph 21 of the decision where the Chief Justice states concerning the "but for" test that:

[40] [2007] 1 S.C.R. 333 ("*Hanke*")

> *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.*
>
> *This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in Athey v. Leonati, at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in Blackwater v. Plint, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."*
>
> *The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": Snell v. Farrell, at p. 327, per Sopinka J.*

However, while *Hanke* stands for the proposition that the "but for" test is the relevant test for causation in negligence actions, the decision did not supplant the analysis on causation set out in the foundational cases of *Athey v. Leonati*[41] and *Snell v. Farrell*[42]. Rather, the ratio in *Hanke* supplements the findings of the Supreme Court of Canada in *Athey* and *Snell*. This point has been further clarified by the Ontario Superior Court of Justice in the recent case *Cartner v. The City of Burlington*.[43]

Cartner v. The City of Burlington

In *Cartner,* Quigley J. provides a comprehensive overview of the law of causation in negligence actions. *Cartner* was a personal injury action involving claims of negligence against the City of Burlington and Feng Feng Wang, a local store owner. The plaintiff severely broke her leg after slipping on a "concrete slurry" substance that was on the sidewalk. The substance had drained onto the sidewalk after Mr. Wang had made repairs to his front step without properly cleaning up.

[41] [1996] 3 S.C.R. 458 ("*Athey*")
[42] [1990] 2 SCR 647 ("*Snell*")
[43] [2008] O.J. No. 2986 (S.C.J.) ("*Cartner*")

In addition to Mr. Wang's negligence in cleaning up the concrete slurry, the Court held that the sidewalk was in a state of non-repair and that the City was negligent in maintaining the sidewalk. In particular, the Court held that there were three separate flaws which could be classified as being in a state of non-repair. First, the slabs of sidewalk were improperly sloped away from the street preventing the proper drainage of the concrete slurry. Second, the concrete slabs were improperly designed. Finally, the Court held that the repairs performed by the City's workers were inadequate. The workers had performed grinding work on the slabs which created both a trip hazard and a slope on the slabs. In consideration of the state of non-repair, the Court emphasized the fact that the slurry could not properly drain off the sidewalk. Therefore, the Court concluded that the negligence of the City was a cause of the plaintiff's damages.

Cartner indicates that, while it is neither legally necessary nor justified to apply the "material contribution" test, the concepts underlying the test remain relevant. That is, the ratio in *Hanke* did not reverse the concepts set out by the Court in *Athey* and *Snell.* At para 19 of *Cartner,* Quigley J. states:

> *The very notion of a "contribution to injury" was at the heart of the decision in Snell. As Major J. noted on the authority of Snell, at paragraph 13 of Athey, "[c]ausation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury." Further, he observed at paragraph 14 that the causation test is not to be applied too rigidly and that causation need not be determined with scientific precision. Referencing Sopinka J.'s adoption in Snell of Lord Salmon's caution in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475 at p. 490 that causation is "essentially a practical question of fact which can best be answered by ordinary common sense"*

Therefore, applying the analysis in *Snell* and *Athey*, Quigley states at paragraphs 22 and 23 that a plaintiff in a negligent action need only demonstrate that the negligence of the defendant was ***a*** cause, and not ***the*** cause, of their damages. The Court must then apply ordinary common sense to determine whether the negligence of the defendants was "a cause" of the Plaintiff's damages but for which, on a balance of probabilities, it would not have occurred. In result, the Court in *Cartner* apportioned 20% of the liability to the

Town on the basis that its negligence was a cause of the Plaintiff's injuries but for which the Plaintiff would not have suffered damages.

Cartner provides a comprehensive overview of the law of causation in multi-cause incidents. Quigley J. clarifies that the decision of McLachlin C.J. in *Hanke* does not supplant the prior jurisprudence, rather it supplements it. The 'but for' test is the relevant test for causation in negligence actions. However this does not imply that there can no longer be multiple causes for a plaintiff's injury. So long as the actions of the defendant are a cause but for which the plaintiff would not have suffered damages, a defendant can be liable for the plaintiff's damages. This is an important distinction which municipal defence counsel should be alive too.

Mustapha v. Culligan of Canada Ltd.[44]

In *Mustapha*, the Supreme Court of Canada has confirmed that the reasonably foreseeability test for causation is an objective test. Here the plaintiff, Waddah Mustapha, claimed damages for psychological trauma experience after seeing a dead fly and part of another fly in an unopened bottle of water supplied by Culligan. The Court found that the incident was debilitating for Mr. Mustapha and had a significant impact of his life as Mr. Mustapha developed a major depressive disorder accompanied with phobia and anxiety. At trial Mr. Mustapha was granted general and special damages as well as damages for loss of business. The Court of Appeal overturned the trial judgment, stating that the damages were not reasonably foreseeable and that Mr. Mustapha had no cause of action against Culligan.

The central issue for the Supreme Court of Canada in *Mustapha* was whether the damages claimed were too remote. That is, the Court questioned whether the harm to Mr. Mustapha was a reasonably foreseeable consequence of Culligan's negligence. On this point, McLachlin C.J. clarified that there is an important distinction to be made between

[44] [2008] 2 S.C.R. 114 ("*Mustapha*")

probable outcome of the defendant's conduct and possible outcomes. At para. 13 of the decision McLachlin states:

> *Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in The Wagon Mound (No. 2) as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" (Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty., [1967] A.C. 617, at p. 643).*
>
> *The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see White v. Chief Constable of South Yorkshire Police, [1998] 3 W.L.R. 1509 (H.L.); Devji v. Burnaby (District), (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; Vanek. As stated in White, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."* (*emphasis added*)

Chief Justice McLachlin continued to clarify that an objective assessment of reasonable foreseeability should not be confused with the "thin skull" doctrine. Traditionally, under the "thin skull" doctrine Courts have held that defendants will take their plaintiffs as they find them. That is, if the plaintiff has a peculiar predisposition to a specific injury that causes their actual damages to be more excessive than what would normally occur, the defendant will still be liable for the plaintiff's actual damages. In contrast to the "thin skull" doctrine, McLachlin C.J. states that reasonable foreseeability is an objective assessment of whether it was reasonably foreseeable to the defendant that a person of

ordinary fortitude would suffer damages as a result of the defendant's negligence. In this context, the Court found that Mr. Mustapha's injuries were categorized by medical experts as "highly unusual." In this way, the Court found that his damages were too remote and that his claim must be dismissed.

PRACTICAL CONSIDERATIONS

Going back to the metaphor in comparing Public Liability litigation to a labyrinth, I have suggested that it is the task of the successful advocate to navigate the labyrinth to an appropriate exit, before being devoured by the Minotaur. Theseus cleverly used a thread to guide him to the appropriate exit. Lawyers always need an exit strategy. Getting lost in the facts, confusing the applicable principles, or being unable to identify the appropriate issues, will inevitably result in being devoured by the proverbial Minotaur.

We have reviewed some of the applicable principles. There is no simple guide to navigating the facts and identifying the issues. However, I will share with you some techniques that I have used in this regard.

Chronology

All facts tell a story. Stories are best understood if you start at the beginning and finish at the end. As a result, the first thing I do in any case is prepare a chronology of all of the relevant facts. It allows me to understand the facts in the sequence in which they occurred. It also allows the advocate to determine liability issues in context. For example, in a negligent misrepresentation case, the element of reliance is one of the essential factors that lead to liability. If the plaintiff acted (to his detriment) before the alleged misrepresentation, there was no reliance on it.

Document Management

Documents are a crucial evidentiary tool. They are more reliable than oral evidence, since the documents are not subject to recall or faulty memory. They also tell a crucial story in chronological order. Again to understand your case in context, you should first organize all of your crucial documents in chronological order.

Identify the Issues

Identifying the issues will help you lead to conclusions on liability and damages. They also help you to take a complex case and organize it into discreet issues. Once you have determined the relevant issues, you need to know the applicable legal principles and available defences.

Indemnification

Frequently, municipal defendants seek indemnification from co-defendants or third party defendants pursuant to indemnification clauses that exist, such as development agreements, construction contracts, conditions of permit, insurance certificates, etc. Often these agreements allow the municipality to not only recover damages, but also defence costs.

In a recent Ontario Superior Court of Justice decision[45] the court held that the contractual obligation "to save harmless" is broader than that of indemnification. The terms of an indemnity agreement using the words "indemnify and save harmless" may require the indemnifier to fund, on an ongoing basis, the reasonable defence costs of the action.

Another recent Ontario decision should make municipalities diligent about accepting insurance certificates purporting to add them as additional insured.[46] In that case the Certificate of Insurance stated that Huron and the Ministry had insurance pursuant to a liability policy issued by Canadian Surety and that "this certificate is subject to the Declarations, Insuring Agreements, Terms, Conditions, and Exclusions of the policy". It was held that since the policy defined "insured" as Huron, and did not name the Ministry, coverage only extended to the acts and omissions of Huron and not for any independent acts of negligence of the Ministry. The Certificate could not create any duties or responsibilities on its own. It is for this reason that municipalities should ensure that they are added as named insured under the policy if they want full protection. This is of

[45] *Stewart Title Guarantee Company v. Zeppieri et al*., (2009), 94 O.R. (3rd) 196
[46] *Ontario (Minister of Transportation) v. Canadian Surety Co*., (2008), 93 O.R. (3d) 708

particular importance for facilities managed by the municipality but occupied by a party providing the insurance coverage.