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Supreme Court of Canada revisits the law of government liability in negligence

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Nelson (City) v. Marchi (*Marchi*), 2021 SCC 41, is the Supreme Court of Canada's latest update on the law of government liability in negligence. The Court held that municipalities can be sued for negligent snow-clearing. And in doing so, the Court created a new legal test to determine when government agents are immune from suit in negligence.

Key take-aways from the decision are:

- *Marchi* did not radically change the law of government liability in negligence.
- Following *Marchi,* lower courts will look at four factors to determine if government conduct is immune from liability:
  - the level and responsibility of the decision maker(s)
  - the process by which the decision was made
  - the nature and extent of budgetary considerations
  - the extent to which the decision was based on objective criteria
- It is unclear if *Marchi* has clarified the law in this area or will lead to further uncertainty and unpredictability. This post outlines aspects of the decision that could foment uncertainty.
- The scope of *Marchi* is limited, and significant issues pertaining to government liability in negligence were not addressed. These unaddressed issues include
  - the effect of statutes like the *Crown Liability and Proceedings Act, 2019*,[1] which govern the boundaries of government immunity
  - how the analysis may be different for claims of pure economic loss, rather than personal injury. Typically, courts have been reluctant to find a duty of care for claims of pure economic loss.

Generally, to make out a claim in negligence a plaintiff must show that the defendant owed them a duty of care, the defendant breached the standard of care expected of a reasonable person in their position, the defendant's breach of the standard of care caused the plaintiff injury and the plaintiff suffered damages as a result of that injury.

Marchi deals primarily with the first element, whether a government agent owes a private citizen a duty of care or whether the government agent is immune from liability. The law has long recognized that government agencies do not owe private citizens a duty of care for "core policy" decisions as this would cause improper judicial interference in the affairs of other branches of government.[2]

In the abstract, this proposition is unassailable. But in practice, courts have noted for decades that the line between immune policy decisions and actionable operational decisions is notoriously difficult to draw.[3] One leading text has even called it the most "uncertain and contentious" area of negligence law.[4]

In *Marchi,* the Supreme Court provides some instruction on how to draw that line.

Background

At issue in *Marchi* was whether the City of Nelson's snow-clearing practices were "core policy" such that they were immune from liability, or if the snow-clearing practices were an actionable operational matter.

The plaintiff, Ms. Marchi, badly injured her leg while attempting to scale a snowbank created by the City. This happened while the City was still in the midst of plowing and sanding streets and sidewalks following a snow storm. The City had temporarily left the snowbank in place so that it could prioritize plowing other areas.[5]

Ms. Marchi sued the City in negligence for creating the snowbank with no pedestrian passages. The city argued that it was immune from negligence liability because decisions of how to plow the snow and which snow-removal tasks to prioritize were "core policy" matters.

The Supreme Court of British Columbia found in favour of the City and dismissed the action. The Court of Appeal for British Columbia disagreed. The Court of Appeal found serious issues with the trial judge's analysis and sent the matter back for re-trial.

Supreme Court of Canada decision

The Supreme Court of Canada agreed with the Court of Appeal but went a step further. While the Court of Appeal sent the entire case back to trial, the Supreme Court decided part of the negligence analysis — that the city owed Ms. Marchi a duty of care and its actions were not immune policy decisions — on its own, and sent only the other issues back for redetermination in accordance with its reasons.

As discussed above, the Supreme Court in *Marchi* purports to clarify the proper analysis for determining if government action is an immune "core policy." It does not purport to make a sea change to the law in this area. Instead, it builds on earlier jurisprudence, most notably *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45.

The new analysis in *Marchi* requires a Court to weigh four factors in order to determine whether challenged conduct is immune "core policy" or an actionable operational matter:

- the level and responsibility of the decision maker(s)
- the process by which the decision was made
- the nature and extent of budgetary considerations
- the extent to which the decision was based on objective criteria[6]

The Court also explained how these factors should operate.

- On the first factor — the level and responsibility of the decision maker(s) — the closer the

decision-maker is to a democratically accountable official, the more likely the decision will be immune. If the decision-maker's job includes the assessment and balancing of public policy considerations, this also leans in favour of immunity.

- On the second factor — the process by which the decision was made — the following will push the needle toward immunity: internal deliberation; the requirement of debate, especially if in a public forum; an intent for the decision to have broad application; and an intent for the decision to be prospective in nature.
- On the third factor — the nature and extent of budgetary considerations — the Court explained that decisions regarding budgetary allocations for government departments or agencies are more likely to constitute "core policy" than day-to-day budgetary decisions.
- On the fourth factor — the extent to which the decision was based on objective criteria — the Court said that the more a decision requires weighing competing interests and making value judgments, the more likely it is that the decision will be immune. Conversely, the more a decision is based on technical standards or general standards of reasonableness, the more likely it is to be actionable.[7]

Litigants and lower courts alike will appreciate the roadmap the Supreme Court has provided in *Marchi*. The new analytical structure may help add certainty and predictability to the fraught area of government liability in negligence. However, certainty and predictability are not guaranteed, and the usefulness of this new analytical structure remains to be seen.

Potential uncertainty moving forward

One area that could be ripe for uncertainty is how litigants and courts should untangle multi-layered government conduct. Despite the new analytical structure, the Court provides little guidance on how this should be done. Some might argue that the Court in *Marchi* over-simplifies how government bodies operate in the real world. Intermediate appellate court decisions have grappled with this issue in more depth than *Marchi*.[8] Further, the Court's repeated emphasis on "decisions"[9] and "decision-makers"[10] may overlook the fact that a negligence claimant is often challenging a course of conduct rather than a discrete decision.

Finally, it should be noted that *Marchi* did not (and did not try to) address all of the thorny issues involved with government liability in negligence. Litigants will have to look elsewhere for answers to these issues.

One such issue is the role of statutes that purport to define the bounds of government immunity. In Ontario, section 11 of the *Crown Liability and Proceedings Act, 2019*[11] sets out criteria for assessing whether government liability is immune from suit in negligence. The Court of Appeal for Ontario has held that section 11 codified the common law as it existed before *Marchi*.[12] Arguably, the provincial legislature has frozen the common law in a statute, and because *Marchi* alters the common law, it may not apply in Ontario. After all, absent constitutional issues, no court can alter a statute.[13]

Also, it is important to note that Ms. Marchi's claim was for physical injury, not pure economic loss. It is not clear whether the analysis would proceed on the same footing were the claim for pure economic loss. If there were such a claim, presumably courts would still have to account for the law in this area, which provides that "in cases of pure economic loss … care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the

time and the amounts are determinate."[14]

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[1] S.O. 2019, c. 7, Sched. 17.

[2] *Just v. British Columbia,* [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689; *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 72.

[3] See for example *Just* at 1239 S.C.R.; *R. v. Imperial Tobacco* at paras. 72 and 78; and *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, at para. 133; and *Marchi* at para. 44.

[4] Linden, Feldthusen, Hall, Knutsen, Young, *Canadian Tort Law*, 11th ed. (Toronto: LexisNexis, 2018) at §14.19.

[5] *Marchi v. Nelson (City of)*, 2019 BCSC 308, at paras. 11, 27 and 29–34.

[6] See paras. 3 and 68.

[7] *Marchi* at paras. 62–68.

[8] The Court does not cite a recent decision of the Court of Appeal for Ontario that addresses this, *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, at paras. 130–141.

[9] See paras. 3, 56, 62, 68 and 70.

[10] See paras. 3, 56, 62, 68 and 70.

[11] S.O. 2019, c. 7, Sched. 17.

[12] *Francis* at paras. 127 and 129.

[13] *Canada (Attorney General) v. Utah*, 2020 FCA 224, 455 DLR (4th) 714, at para. 27.

[14] *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at para. 62.