Alberta Court of Queen's Bench
Bidulock v. Alberta
Date: 1992-04-22

R. Wilkinson, for plaintiffs.

L. Merryweather, for defendant.

(Doc. Edmonton 9003-12415)

April 22, 1992.

[1] ANDREKSON J.:– This was an application to determine the following questions pursuant to the May 1991 order of Trussler J.:

1. Does the *Disaster Services Act,* R.S.A. 1980, c. D-36 (the "old Act"), or the *Public Safety Services Act,* R.S.A. 1980, c. P-30.5 (the "new Act"), apply to the case at bar?

2. Does s. 12 of either Act apply to the Crown?

3. Does the defendant owe the plaintiff a duty of care?

[2] The agreed statement of facts are as follows. The plaintiffs (Steven Bidulock and Mary Bidulock) were each 50 per cent shareholders in Bid's General Supplies Ltd., a corporation carrying on business in Hairy Hill, Alberta. On February 11, 1984, a fire caused by arson destroyed the premises owned by Steve Bidulock. A total loss of buildings and their contents, including Bid's General Supplies Ltd., resulted. This loss to the plaintiffs as shareholders amounted to $527,000. Subsequent to the fire Mr. Bidulock applied to Alberta Disaster Services for assistance. On May 18, 1984, the plaintiffs were notified that such assistance would be denied on the basis that the plaintiffs' loss was readily and reasonably insurable. At the direction of the then responsible minister, the Honourable Marvin Moore, the case was reviewed by a delegation from the Disaster Assistance committee on March 5, 1986. On October 15, 1986, the Honourable Ken Kowalski affirmed the decision not to provide disaster assistance.

[3] In the amended statement of claim, the plaintiffs allege that the defendant acted negligently or was grossly negligent in investigating the loss, particularly in assessing the insurability of the loss claimed. The plaintiffs also allege that the defendant has misused its authority because it has, in the past, provided assistance for insurable losses, but has denied it in this case.

[4] It is therefore necessary to determine the preliminary questions outlined above before any further steps can be taken in these proceedings.

Question 1. Does the Disaster Services Act or the Public Safety Services Act apply to the case at bar?

[5] The new Act replaced the old Act on June 2, 1985. The above question has been framed and argued as an "either/or" proposition: that one of these Acts is applicable. The issue of whether or not the arson of February 11, 1984 constitutes a "disaster" was not argued at this application and was left to be determined at trial. It is sufficient to say that under both the old and new Act, the definition of disaster is the same.

[6] Assuming for the moment that the arson is a "disaster," it becomes necessary to address the issue as raised by the order: which Act is applicable. The relevant section of both Acts to this application is s. 12:

Old Act

> 12(1) Neither the Minister nor any official or other person acting under his direction or authorization is liable for damage caused through any action under this Act or the regulations, nor is he subject to any proceedings by way of prohibition, certiorari, mandamus or injunction.
>
> (2) Notwithstanding subsection (1), the Minister or any official or other person acting under his direction or authorization is liable for *neglect of duty or misuse of authority in carrying out his duties* under this Act or regulations.

New Act

> (2) Notwithstanding subsection (1), the Minister or any official or other person acting under his direction or authorization is liable for *gross negligence in carrying out his duties* under this Act or the regulations.

[7] The old Act was in force in 1980 and the regulations thereunder providing for payment of disaster assistance were passed in 1979 ([*Disaster Assistance Regulation*] Alta. Reg. 164/79) and 1982 ([*Disaster Assistance Amendment Regulation*] Alta. Reg. 408/82). The new Act came into force on June 2, 1985 and the regulation thereunder providing for payment of disaster assistance ([*Disaster Assistance Regulation*] Alta. Reg. 321/85) was passed on October 17, 1985. Both parties agree, as does the court, that both Acts operate prospectively: *Hardy v. Albrecht* (1965), 53 W.W.R. 61 (Alta. C.A.).

[8] The Crown takes the position that the old Act must apply because the loss, subsequent application, and its denial, occurred in 1984 when the old Act was still in force. The plaintiffs assert that the actions of the defendant prior to June 1985 are subject to the

old Act; and the actions subsequent to June 1985 are subject to the new Act. They say that it must be left to the trial judge to decide which Act applies, depending on when the date of the alleged wrong-doing is established.

[9] The position of the plaintiffs on this point makes sense. The amended statement of claim points to both applications: the one in the spring of 1984, and the subsequent review and rejection in 1986. The allegations of wrong-doing are not confined to either of these time frames. If the trial judge does find merit to either or both of the allegations of wrong-doing, he or she will have to apply the appropriate standards set out in the respective statutes (if they are applicable, see below). That is, negligence for the 1984 application, and gross negligence for the application in 1986.

[10] Without further information, it is not possible, in my view, at this time to pinpoint the time of the alleged wrong-doing. Therefore the answer to the first question is that if the arson is a disaster within the meaning of the Acts, both Acts could apply; which one will apply depends on the facts proven at trial.

Question 2. *Does s. 12 of either Act apply to the Crown?*

[11] Both counsel properly agreed, as does the court, that the Crown is bound by s. 12 of either Act. The Crown is either bound directly under the Act, or vicariously for the acts of its servants, officers or agents: *Proceedings Against the Crown Act,* R.S.A. 1980, c. P-18, as amended.

Question 3. Does the defendant owe the plaintiffs a duty of care?

[12] Assuming that the plaintiffs do fall within the scope of the legislation, the key issue in my view is, does the defendant owe a duty of care to the plaintiffs? The test to be applied in this case is formulated from *Anns v. London Borough of Merton,* [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.), per Lord Wilberforce at pp. 751-52 [A.C.]:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise …

This test was approved by the Supreme Court of Canada in *Nielsen* v. *Kamloops (City),* [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81, 8 C.L.R. 1, 10

D.L.R. (4th) 641, 54 N.R. 1, and most recently in *Just* v. *British Columbia,* [1989] 2 S.C.R. 1228, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350, 1 C.C.L.T. (2d) 1, 18 M.V.R. (2d) 1, 103 N.R. 1, 64 D.L.R. (4th) 689, 41 Admin. L.R. 161, [1990] R.R.A. 140. The approach to be used in applying the test in *Anns* is set out by Wilson J. in *Nielsen* v. *Kamloops (City)* at pp. 662-63 [D.L.R.]:

> Lord Wilberforce rejected the notion that a distinction was to be made in this context between statutory duties and statutory powers, the former giving rise to possible liability and the latter not. Such a distinction, he says, overlooks the fact that parallel with public law duties owed by local authorities there may co-exist private law duties to avoid causing damage to other persons in proximity to them. The trilogy of House of Lords cases – *M 'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004 – clearly established that in order to decide whether or not a private law duty of care existed, two questions must be asked:
>
> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?
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> These questions, Lord Wilberforce said, must be answered by an examination of the governing legislation.
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> Lord Wilberforce categorized the various types of legislation as follows:
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> (1) statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the Legislature authorized but done it negligently;
>
> (2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.
>
> Lord Wilberforce found that the defendant in *Anns* was under a private law duty to the plaintiff. It had to exercise a *bona fide* discretion as to whether to inspect the foundations or not and, if it decided to inspect them, to exercise reasonable skill and care in doing so. He concluded that the allegations of negligence were consistent with the council or its inspector having acted outside any delegated discretion either as to the making of an inspection or as to the manner in which the inspection was made.

[13] Despite some subsequent English case law retreating from the test in *Anns,* it is clear that in Canada the *Anns* test "is a sound approach to first determine if there is a duty of care owed by a defendant to the plaintiff in any case where negligent misconduct has been alleged against a government agency": *Just,* supra, at p. 399 [W.W.R.]. By

implication, I respectfully disagree with the use of the "just and reasonable" test derived from English authorities as applied *Longchamps v. Farm Credit Corp.* (August 7, 1990), Doc. 8603-20192 (Alta. Q.B.) [reported 76 Alta. L.R. (2d) 78, [1990] 6 W.W.R. 536, 108 A.R. 115]. (This decision is under appeal.) The "just and reasonable" test basically does away with the second branch of the *Anns* test with the result that a duty of care will be recognized only when it is just and reasonable in the circumstances to do so. It is clear that the *Anns* approach is the one to be used in Canada, as the Supreme Court of Canada has yet to move away from it. This means that in Canada the approach is a move towards extending the potential tort liability of public authorities: see Klar, *Tort Law* (Carswell, 1991), at pp. 124-25, and pp. 196-200.

[14] The first branch of the *Anns* test then is whether a prima facie duty arises between the defendant and the plaintiffs. There are two components to the test: foreseeability and proximity. *Yuen Kun-Yeu* v. *Attorney-General of Hong Kong,* [1988] A.C. 175, [1987] 2 All E.R. 705 (P.C.), at pp. 191-92 [A.C.]; *Akhtar* v. *MacGillivray & Co.* (1990), 77 Alta. L.R. (2d) 337, [1991] 2 W.W.R. 489, 112 A.R. 242 (Q.B.), at pp. 385-86 [Alta. L.R.].

[15] The Disaster Services Agency or Public Safety Services Agency (the "agency") is established to deal with disasters and/or emergencies in the province. The Act establishes a scheme for identifying and declaring emergencies. It empowers the minister to take the necessary action to deal with emergencies and disasters. As part of the scheme, compensation is provided for damage to property as a result of action taken by the government in "preventing, combatting or alleviating the effects of an emergency or disaster" (s. 16(2) both old and new Act). As well the Lieutenant Governor is empowered to make regulations governing, among other things, the assessment of damages or loss caused by disaster, and payment of compensation (s. 5(*c*) both old and new Act). Under this latter power, the minister may assess and evaluate each application for compensation. Once an application has been made, and once the application is received, a relationship is established by the minister, through the agency, with the applicants.

[16] It would seem reasonably foreseeable by the defendant that someone applying under either the old or new Act, could be adversely affected by the result of a decision or manner in which a decision is made. That is, if the agency is negligent or grossly negligent in assessing an application, it is foreseeable that an applicant could suffer damages. Establishing proximity between applicants and the defendants seems equally clear. Considering that an evaluation or assessment is made by the defendants, and that this

decision will directly affect the financial compensation, if any, of applicants, it seems clear that there is a direct – proximate – relationship between the applicant plaintiffs and the defendant. The statute itself, under s. 12, establishes a cause of action for negligence or gross negligence thereby recognizing that some kind of a duty of care is owed to the class of persons who would come under the Act. In my view, therefore, a prima facie common law duty of care exists.

[17] The test from *Anns,* as adopted in *Nielsen v. Kamloops* and *Just,* has a second branch: are there considerations which negative, reduce or limit the scope of the duty? In my view, there are two matters that must be considered under this branch: limits inherent in the applicable legislation, and whether decisions made, amount to policy instead of operations. *Just,* supra, at pp. 399-400. The burden lies with the defendant to demonstrate the validity of these considerations: *Diversified Holdings Ltd. v. British Columbia,* [1983] 2 W.W.R. 289, 41 B.C.L.R. 29, 23 C.C.L.T. 156, 143 D.L.R. (3d) 529 (C.A.), at p. 170 [C.C.L.T.].

[18] Before specifically addressing the matters which may limit or reduce the scope of the duty of care, it may be useful to set out the relevant statutory provisions. The part of the Act with which this application is concerned is completely discretionary. The provisions at issue in the case at bar are the regulations made under s. 5 of both Acts. First, it must be noted that s. 5 is permissive in that it states that "The Lieutenant Governor in Council *may* make regulations" with regard to a number of enumerated matters, including s. 5(c) "governing the assessment of damage or loss caused by a disaster and the payment of compensation for the damage or loss." Secondly, the regulation which is in substance almost identical under both Acts is also permissive (Alta. Reg. 321/85):

> 1 In this regulation, "disaster assistance" means financial assistance that may be given in respect of
>
> (*a*) damage or loss caused by a disaster, and
>
> (*b*) the costs of any action taken under the *Public Safety Services Act* in an emergency.
>
> 2(1) The Minister may
>
> (*a*) make an assessment of
>
> (i) damage or loss caused by a disaster, and
>
> (ii) the costs of any action taken or to be taken, as the case may be, in or as a result of an emergency,
>
> and

(*b*) subject to subsection (2), direct the payment of disaster assistance, in amounts determined by him having regard to an assessment made under clause (a), to persons who have

(i) suffered damage or loss caused by a disaster or have incurred costs in taking action in an emergency, and

(ii) made application for disaster assistance to the Managing Director in the manner prescribed by the Managing Director.

(2) The Minister shall not direct the payment of disaster assistance for any of the following:

(*b*) damage, loss or costs for which insurance coverage was, in the opinion of the Minister, readily available at the time of the occurrence

3 Notwithstanding section 2, if, in the opinion of the Minister,

(*a*) the loss or damage is so devastating as to threaten the viability of a business or the economic survival of an individual or his family, or

(*b*) the providing of assistance would be in the public interest,

the Minister may direct the payment of any disaster assistance that he considers necessary.

These provisions are, in my view, completely discretionary and there is no duty imposed on the minister, or his or her servants, to pay compensation. One of the changes between the old and new regulations is found in s. 1. Regulation 164/79 under the old Act states:

> 1 In this regulation "disaster assistance" means financial assistance that *may be paid* under the Disaster Assistance Regulation in respect of…

Regulation 321/85, under the new Act, in s. 1 states:

> 1 In this regulation, "disaster assistance" means financial assistance that *may be given* in respect of…

Presumably the change from "paid" to "given" is to emphasize the discretionary nature of the payment. In *R.* v. *Palmer* (1980), 14 Alta. L.R. (2d) 265 (C.A.), the word "payable" under s. 22 of the old Act, without any modifier, was interpreted as meaning an obligation to pay.

[19] In my view, it is correct to assert, as the defendant does, that there is no right to compensation; that the minister's decision is completely discretionary. *R.* v. *Palmer,* per Stevenson J. discussing predecessor Act and regulations [at p. 267]: "The Act and regulations do not establish an obligation to pay. There would be no common law right to compensation for loss due to a natural disaster."

[20] This discussion regarding the discretion in the statute has implications relating to assessing whether there are any limits to the prima facie duty of care – in determining

whether there are limits inherent in the legislation, and in terms of the policy/operational distinction.

[21] The first question is: are there any limits to the prima facie common law duty found in the applicable legislation? Under the old Act, s. 12(2) provided that the minister, or any person acting thereunder, is liable for "neglect of duty or misuse of authority in carrying out his *duties* under this Act or the regulations." Under the new Act, s. 12(2), the standard for liability is changed to "gross negligence" in carrying out duties. The new Act requires a lower standard of care than is required at common law. By implication this limits the prima facie common law duty of care after 1985.

[22] However, it could be questioned whether s. 12, and this post-1985 limit, apply to the facts of this case. That is, both Acts refer to neglect or gross negligence in carrying out "duties" under the Act or regulations. A review of dictionary definitions of "duty" denotes a sense of obligatory conduct by the party upon whom the duty is imposed: see, for instance, *Black's Law Dictionary,* 2nd ed.; *Jowitt's Dictionary of English Law,* 2nd ed.; and *Stroud's Judicial Dictionary,* 5th ed. Section 12 may not apply to the matters in this case which are clearly governed by the discretionary provisions in the statute; it may only apply where a statutory duty exists. Such a duty is imposed, for instance, in s. 16(2) of both Acts, which requires the minister to pay compensation for any property used or damaged in attempting to deal with the effects of an emergency or disaster.

[23] If there is no duty to pay, there may be no statutory cause of action founded in s. 12 available to the plaintiff. This type of analysis is used in *R.* v. *Palmer,* supra, to conclude that there is no right to arbitration under s. 22 where a purely discretionary payment is at issue. Indeed, a right to arbitration, or rights under s. 12, would only seem to attach when the minister or his or her servant is fulfilling a duty.

[24] If this analysis is correct and s. 12 creates no statutory cause of action where there is purely a discretion to pay, then the limit found within the gross negligence standard under the new Act may be inapplicable to the case at bar. Therefore the prima facie common law duty of care would not be limited by s. 12.

[25] The second factor that must be considered in assessing whether the prima facie duty has been limited, is whether the discretion found in the statute can be characterized as policy or operational decision making. Cory J. cited with approval the following analysis of the distinction between policy and operations decisions in *Just,* supra, at p. 404

(Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1, 59 A.L.J.R. 564 (H.C.), at p. 35 [A.L.R.]):

> "The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that *a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints.* Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. *But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."* [emphasis added by Cory J.]

Policy decisions will not attract liability, but operational decisions are subject to the duty of care.

[26] The defendant notes that the decision whether to assess an application and after that, the decision to make any payment, are solely at the discretion of the minister. Indeed, the defendant states that the plaintiffs have no right to payment and the defendant has no duty to pay. In reliance for this proposition, the English Court of Appeal decision in *Jones* v. *Department of Employment,* [1988] 2 W.L.R. 493, [1988] 1 All E.R. 725, is cited. In that case, the Court of Appeal found that there was no common law duty of care owed by an adjudication officer in assessing and ultimately denying an individual unemployment benefit. This case is distinguishable from the case at bar on two bases: there is a statutory right of appeal in the governing Act in England; it dealt with the common law in England. In Alberta it is accepted that the Crown can be liable for negligence in private law: *Proceedings Against the Crown Act,* s. 5, *Kamloops,* supra, and *Just,* supra.

[27] While there is clearly no right to compensation under s. 5 of the Act or the regulations, that does not mean that once the agency decides to exercise its operational discretion, that it must not do so in a bona fide manner *Air India Disaster Claimants* v. *Air India* (1987), 62 O.R. (2d) 130, 44 D.L.R. (4th) 317 (H.C.), at p. 325 [D.L.R.]:

> It is well established that no duty of care arises in respect of acts or omissions involving a statutory discretion, so long as due consideration is given to the exercise of the discretion and the discretionary decision is made responsibly.

Furthermore, in *Home Office v. Dorset Yacht Co.,* [1970] A.C. 1004, [1970] 2 All E.R. 294, a decision relied on in formulating the *Anns* test, Lord Reid said at p. 1031 [A.C.]:

> Where Parliament confers a discretion … there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or

> unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that.

[28] It is clear in law, in my view, that discretionary acts made in carrying out the operation of a policy can attract liability. Ultimately, I agree with the plaintiffs' contention that an assessment of what are policy decisions and what are operational decisions must be left to the trial judge.

[29] Based on the above analysis, I would conclude that the common law duty of care prima facie established under the first branch of the *Anns* test may have been limited. Initially it appears to have been limited by s. 12 under the new Act, but based on the analysis above, s. 12 does not apply to the facts of this case. The duty may, however, be limited by the characterization of some or all of the discretionary power under the acts as policy. However, if the plaintiff can establish that the discretion is operational and has been exercised unreasonably or irresponsibly, then an action in negligence may lie. Without hearing the evidence, I cannot assess whether this will be a difficult or easy task.

Conclusion

[30] In conclusion, it is my view that it would be up to the trial judge to decide whether the act of arson can be interpreted to mean disaster thereby bringing the plaintiffs within the jurisdiction of the Act. In response to the second question, it is clear that s. 12 of either Act would apply to the Crown. But it will have to be decided at trial whether s. 12 applies to the case at bar. (Because the parties have not had the opportunity to argue about the interpretation of s. 12, a decision on that basis will not be made here.) If it does apply, deciding which Act, the old or the new, governs, will depend on when the allegation of wrong-doing is found to have occurred, i.e., in 1984 or 1986. On addressing the third question of whether the defendant owes the plaintiffs the duty of care, there are a few comments. Pursuant to the *Anns* test, the defendant does owe the plaintiffs a prima facie duty of care. This common law duty of care could be limited if all of the discretionary decisions are characterized as policy decisions; however, that matter is left for a trial judge to decide.

Order accordingly.