Eliopoulos, Litigation Trustee of Estate of Eliopoulos, et al. v. Her Majesty the Queen in Right of Ontario, as Represented by The Minister of Health and Long-Term Care

[Indexed as: Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)]

82 O.R. (3d) 321

Court of Appeal for Ontario,
Sharpe, Armstrong and MacFarland JJ.A.
November 3, 2006

Torts -- Negligence -- Duty of care -- Public authorities -- Province owes no private law duty of care to individuals to prevent spread of West Nile Virus -- Prerequisite of proximity not made out on basis of province's duties under Health Protection and Promotion Act -- No private law duty of care arising from Surveillance and Prevention Plan -- Any operational duties created by Plan reside with local authorities and local boards of health -- Even if sufficient proximity existed, residual policy considerations negative imposition of private law duty of care -- Health Protection and Promotion Act, R.S.O. 1990, c. H.7.

E was bitten by a mosquito in 2002, became infected with West Nile Virus ("WNV") and died in 2003 from complications following a fall. His estate and family brought an action against Ontario in negligence, alleging that Ontario could and should have prevented the outbreak of WNV in 2002. Ontario moved to strike the statement of claim on the ground that it disclosed no cause of action. The motion was dismissed, and that decision was affirmed by the Divisional Court. Ontario appealed.

Held, the appeal should be allowed.

To determine whether a public authority owes a private law duty of care to an individual or class, the court must consider, first, whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act, and second, whether there are reasons that tort liability should not be recognized. Reasonable foreseeability of harm must be supplemented by proximity. The Divisional Court erred in finding that the facts as pleaded brought this case within one of the established categories in which the courts have recognized a duty of care. However, the novelty of the claim was not fatal to the plaintiffs' case. What was fatal was the lack of proximity. Proximity could not be made out on the basis of Ontario's statutory duties under the Health Protection and Promotion Act. That Act creates discretionary powers that are not capable of creating a private law duty. The discretionary powers are to be exercised, if the Minister chooses to exercise them, in the general public interest. They are not aimed at or geared to the protection of the public interests of specific individuals. From the statement of purpose in s. 2 of the Act and by implication from the overall scheme of the Act, there is clearly a general public law duty that requires the Minister to endeavour to promote, safeguard and protect the health of Ontario residents and prevent the spread of infectious diseases. However, a general public law duty of that nature does not give rise to a private law duty sufficient to ground an action in negligence.

A document issued by the Ministry in 2001, West Nile Virus: Surveillance and Prevention in Ontario, 2001 (the "Plan") did not trigger a common law duty of care. It was difficult to read the Plan as a policy decision of the kind that would engage Ontario at the operational level. Moreover, to the extent that the Plan [page322] amounted to a policy decision to act and created a duty of care, it was clear that any operational duties created by the Plan resided with local authorities and local boards of health. The Plan provided information about WNV and encouraged members of the public and local authorities, in cooperation with various governmental and non-governmental agencies, to undertake surveillance and prevention measures. The Ministry did not undertake to collect infected birds,

conduct inspections, or take measures to reduce or eliminate the mosquito population, nor did it mandate such measures. Finally, while the plaintiffs argued that the Ministry's policy decisions reflected in the Plan engaged an operational duty, their core allegations related to what could only be regarded as policy decisions. Those allegations related to issues of public health policy, the establishment of governmental priorities, and the allocation of scarce health resources, not the implementation of a specific health promotion or prevention policy at the operational level. The Plan did not amount to an operational plan, with commensurate duties, on which the plaintiffs could base a claim in negligence.

If that conclusion were wrong and there was sufficient proximity to give rise to a prima facie duty of care, there were residual policy considerations that negatived the imposition of a duty. To impose a private law duty of care on the facts as pleaded in this case would create an unreasonable and undesirable burden on Ontario that would interfere with sound decision-making in the realm of public health.

Cases referred to

Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024, 75 L.G.R. 555, 141 J.P. 526, 121 Sol. Jo. 377, [1977] J.P.L. 514 (H.L.); Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, 96 B.C.L.R. (3d) 36, 206 D.L.R. (4th) 193, 277 N.R. 113, [2001] 11 W.W.R. 221, 2001 SCC 79, 8 C.C.L.T. (3d) 26 (sub nom. Cooper v. Registrar of Mortgage Brokers (B.C.) et al.), apld

Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, [2001] S.C.J. No. 77, 56 O.R. (3d) 456n, 206 D.L.R. (4th) 211, 277 N.R. 145, 2001 SCC 80, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, consd

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police, (1998), 39 O.R. (3d) 487, [1998] O.J. No. 2681 (Gen. Div.), distd

Other cases referred to

Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, [1994] S.C.J. No. 20, 89 B.C.L.R. (2d) 1, 112 D.L.R. (4th) 1, 164 N.R. 161, 19 C.C.L.T. (2d) 268, 2 M.V.R. (3d) 43; Eliopoulos v. Ontario (Ministry of Health and Long-Term Care) (2005), 76 O.R. (3d) 36, [2005] O.J. No. 2225, 198 O.A.C. 377 (S.C.J.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 (sub nom. Hunt v. T & N plc); Just v. British Columbia, [1989] 2 S.C.R. 1228, [1989] S.C.J. No. 121, 41 B.C.L.R. (2d) 350, 64 D.L.R. (4th) 689, 103 N.R. 1, [1990] 1 W.W.R. 385, 1 C.C.L.T. (2d) 1, 18 M.V.R. (2d) 1; Mitchell (Litigation Administrator of) v. Ontario (2004), 71 O.R. (3d) 571, [2004] O.J. No. 3084 (Div. Ct.); Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445, [1994] S.C.J. No. 21, 129 N.S.R. (2d) 321, 112 D.L.R. (4th) 18, 163 N.R. 291, 362 A.P.R. 321, 19 C.C.L.T. (2d) 233, 2 M.V.R. (3d) 80

Statutes referred to

Health Protection and Promotion Act, R.S.O. 1990, c. H.7, ss. 2, 4, 5, 78(1), 78(2), 79(1), 79(2), 80(1), 80(3), 82(1), (3)(a), 83(1), 84(1)-(2), 85(1), 86.1(1)-(2), 97 [page323]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21, 21.01(1)(b)

Authorities referred to

Ontario Ministry of Health and Long-Term Care, West Nile Virus: Surveillance and Prevention in Ontario, 2001

APPEAL from the judgment of Matlow, Jennings and Reilly JJ.

(2005), 76 O.R. (3d) 36, [2005] O.J. No. 2225 (Div. Ct.), affirming an order dismissing a motion to strike a statement of claim.

Dennis W. Brown, Q.C., M. Michele Smith and Taia Wong, for appellant.

R. Douglas Elliott, J. Adam Dewar and Megan B. McPhee, for respondents.

The judgment of the court was delivered by

[1] SHARPE J.A.: -- George Eliopoulos was bitten by a mosquito in Mississauga and became infected with West Nile Virus ("WNV") in 2002. He was treated in hospital and released but died in 2003 from complications following a fall. His estate and family members (the "respondents") sue Her Majesty the Queen in Right of Ontario ("Ontario"), as represented by the Minister of Health and Long-Term Care (the "Minister"), in negligence, alleging that Ontario could and should have prevented the outbreak of WNV in 2002. This action, one of approximately 40 similar actions brought by Ontario residents who contracted WNV in 2002, has not progressed beyond the pleadings stage. Ontario moved to strike the statement of claim on the ground that it discloses no cause of action. The motions judge and the Divisional Court both rejected that contention. Ontario appeals, with leave, to this court.

[2] The central issue is whether, on the facts that have been pleaded, Ontario owed Eliopoulos a private law duty of care to provide the necessary legal basis for a negligence action for damages. The respondents submit that Ontario owed Eliopoulos a private law duty to take reasonable steps to prevent the spread of WNV, and that Ontario failed at the operational level to implement a plan it developed for the expected outbreak of WNV. Ontario submits that any duty it owed was to the public at large and that it owed no private law duty of care to specific individuals to prevent the spread of infectious diseases. Ontario further submits that any liability for failure to

implement measures to prevent WNV rests with local boards of health. [page324]

[3] For the reasons that follow, I conclude that it is plain and obvious on the facts that have been pleaded that Ontario does not owe a private law duty of care to individuals to prevent the spread of WNV and that the statement of claim should be struck.

Facts

[4] This appeal arises from a motion to strike the statement of claim pursuant to rule 21.01(1)(b) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194]. For the purposes of this appeal, the facts that are pleaded in the statement of claim must be taken as true. The issue for this court is simply to decide whether the respondents could succeed in law if the facts they have pleaded are established at trial. The central allegations in the amended statement of claim, identified as such in the respondents' factum, are as follows:

-- Ontario is charged with the duty of promoting and protecting public health in the province;

-- Ontario has the duty, through the Health Protection and Promotion Act, R.S.O. 1990, c. H.7 ("HPPA"), to prevent conditions which may put the health of Ontarians at risk and to provide early detection of health problems;

-- The primary vectors of WNV are mosquitoes, which feed mainly on birds from the corvid family of birds, including jays and crows. As a result, a concentration of dead birds in a given area is often an important predictor of WNV;

-- Medical treatment for persons with WNV may include hospitalization, intravenous fluids and respiratory support. Persons with WNV may contract encephalitis, paralysis, meningitis, permanent neurological damage or enter into a coma and die;

-- Since 1999, WNV has spread throughout much of the United

States and Canada. It should have become apparent to Ontario in 1999 and, in any event, no later than 2000 that WNV was endemic and would eventually reach Ontario;

-- Surveillance information and/or local confirmatory testing for WNV in the dead bird population determined the level of risk of transmission of WNV to humans, which would, in turn, dictate the appropriate response from Ontario; [page325]

-- The recommendations of the Centre for Disease Control and Prevention ("CDC") in Atlanta stressed the importance of local testing to make effective any plan for reducing the risk of transmission to humans;

-- Through the surveillance methods of the Laboratory Centre for Disease Control, a branch of Health Canada, WNV was identified in Canada in the corvid population as early as May 2000;

-- The Ontario Ministry of Health and Long-Term Care (the "Ministry") issued a document entitled West Nile Virus: Surveillance and Prevention in Ontario, 2001 (the "Plan") on May 7, 2001 and decided to implement it;

-- The Plan focused on detecting evidence of WNV in dead birds and in humans who presented with acute encephalitis or meningitis, both diseases being reportable in Ontario. The Plan also emphasized public education as the key element for implementation and preventive actions;

-- The Plan was deficient in certain aspects, including the fact that it did not include provisions for adequate testing capacity;

-- Ontario's efforts to prevent the spread of WNV into the human population were ineffective;

-- Since 1999 it has been known that WNV was a threat in North America and that governments had a duty to develop and implement effective prevention plans to avoid a public

health disaster;

-- Ontario's failure to ensure timely and accurate testing meant that its Plan rested on an unstable foundation, which was made more acute when Ontario removed several key scientists from the WNV project;

-- Ontario could have proceeded with measures such as larviciding in the spring of 2002 because of the presence of dead corvids in 2001;

-- Ontario's Plan was not fully implemented in a reasonable and careful manner for reasons known only to Ontario and therefore, Ontarians were exposed to and contracted WNV;

-- Ontario breached its duty to ensure the implementation of the Plan in a non-negligent manner; and [page326]

-- Ontario's negligence includes:

    -- its failure to take adequate steps to deal with WNV as an emergency in 2001 and 2002;

    -- its failure to implement the entire Plan;

    -- its removal of key scientists from the project;

    -- its failure to take timely and effective measures to reduce the mosquito population in Ontario;

    -- its failure to coordinate efforts with the CDC, neighbouring provinces and neighbouring states; and

    -- its failure to provide accurate information to the public about the threat of WNV.

[5] There is no allegation of bad faith, misfeasance or irrationality.

Proceedings in the Superior Court

(a) Motions judge

[6] The motions judge found that Ontario failed to demonstrate that it was plain and obvious that the respondents could not succeed at trial. She held that there could be a duty of care arising from the alleged negligent implementation of the Plan. Once Ontario created and decided to implement the Plan, it owed Eliopoulos a duty of care to act without negligence. The motions judge refused to deal with policy arguments that would negative a duty of care as she considered it preferable to address those concerns at trial.

(b) Divisional Court

[7] Ontario sought and obtained leave to appeal to the Divisional Court, which dismissed the appeal: Eliopoulos v. Ontario (Ministry of Health and Long-Term Care) (2005), 76 O.R. (3d) 36, [2005] O.J. No. 2225 (S.C.J.). The Divisional Court agreed with the analysis of the motions judge and, at para. 17, added that it was unnecessary to determine whether a new duty of care should be recognized as the pleadings brought the case within a recognized category, namely, "circumstances that disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care". [page327]

Issue

Did the motions judge and the Divisional Court err in refusing to strike the statement of claim on the ground that it discloses no reasonable cause of action?

Analysis

(a) The Rule 21 test

[8] It is common ground that the test for striking a statement of claim at the pleadings stage is a stringent one with a difficult burden for defendants to meet. The allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven. In order to succeed, rule 21.01(1)(b) requires the moving party to show

"that it is plain, obvious, and beyond doubt that the plaintiff could not succeed". Moreover, the claim "must be read generously with allowance for inadequacies due to drafting deficiencies" and should "not be dismissed simply because it is novel": see Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at p. 980 S.C.R.

(b) The Cooper/Anns test

[9] It is also common ground that to determine whether a public authority owes a private law duty of care to an individual or to a class, the court is to apply the two-part test first announced by the House of Lords in Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) at pp. 751-52 A.C., and refined by the Supreme Court of Canada in Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, at paras. 30-31:

> At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. . . .
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> On the first branch of the Anns test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of

> categories. The categories are not closed and [page328] new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

(Emphasis in original)

I will refer to this test as the Cooper/Anns test.

[10] The key issue in this case is whether there is sufficient proximity between Ontario and the respondents to justify finding that a private law duty of care exists. Foreseeability of harm by itself is not sufficient to establish a duty of care: "there must be reasonable foreseeability of the harm plus something more", namely proximity, to establish a duty of care as described in Cooper, at paras. 29 and 31. Assuming for the purposes of this appeal that the spread of WNV was a reasonably foreseeable consequence of the acts alleged against Ontario, is it possible that there was a sufficient degree of proximity between Ontario and Eliopoulos giving rise to a private law duty of care?

[11] According to Cooper, at para. 34, proximity is determined by "looking at expectations, representations, reliance, and the property or other interests involved" to "evaluate the closeness of the relationship between the plaintiff and the defendant" and by asking "whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant".

(c) Does this case fall within or is it analogous to a recognized category?

[12] The first question to ask is whether this case falls within or is analogous to one of the categories of cases in which the courts have recognized a duty of care: see Cooper, at para. 36. The case must fit within or be analogous to a category having a degree of analytic precision comparable to the examples listed in Cooper, namely, an act that foreseeably

causes physical harm to the plaintiff or the plaintiff's property; nervous shock; a negligent misstatement; misfeasance in public office; breach of a recognized duty to warn; failure by a municipality to inspect housing developments without undue negligence; or failure to execute a policy of road maintenance in a non-negligent manner. I agree with Ontario that the Divisional Court erred in finding that the facts pleaded bring this case within one of these established categories. There is plainly no category of cases that supports the respondents' assertion that Ontario owes a private law duty to protect all persons within its boundaries from contracting a disease and the respondents cannot succeed on the basis that their claim falls within or is analogous to one of the recognized categories. [page329]

[13] The claim is novel but that, of course, is not fatal to the respondent's case. It has long been recognized that the categories of negligence are not closed and that the law must remain open to the recognition of new duties of care: see Cooper, at para. 23.

(d) Ontario's statutory duties

[14] The respondents assert that proximity can be made out on the basis of Ontario's statutory duty to safeguard the health of its residents. According to their factum, the respondents "rely solely on the provisions" of the HPPA as the source of the duty of care. Accordingly, as in Cooper, in this case the statute is the only possible source for a duty of care. I agree with Ontario's submission that as the duty issue rests solely on an interpretation of the HPPA, as in Cooper and Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, [2001] S.C.J. No. 77, the question of whether Ontario owes the respondents a prima facie duty of care is a question of law that can properly be decided on a Rule 21 motion.

[15] I turn then to the HPPA with a view to determining whether the powers and duties it prescribes create a relationship of proximity between Ontario and Eliopoulos sufficient to ground a private law duty of care. The purpose of the HPPA is stated in s. 2:

2. The purpose of this Act is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario.

[16] In addition to that general purpose, the respondents point to the statutory discretion conferred by the HPPA upon the Minister, which includes his or her discretion to exercise the following specific powers:

-- To "make investigations respecting the causes of disease and mortality in any part of Ontario" (s. 78(1));

-- To "direct an officer of the Ministry or any other person to investigate the causes of any disease or mortality in any part of Ontario" (s. 78(2));

-- To "establish and maintain public health laboratory centres . . . as the Minister considers proper" (s. 79(1));

-- To "give direction . . . to a public health laboratory centre as to its operation and the nature and extent of its work, and the public health laboratory centre shall comply with the direction" (s. 79(2)); [page330]

-- To "appoint in writing one or more employees of the Ministry or other persons as inspectors" (s. 80(1));

-- To "limit the duties or authority or both of an inspector" (s. 80(3));

-- To appoint assessors to "carry out an assessment of a board of health for the purpose of ascertaining whether the board of health is providing or ensuring the provision of health programs and services in accordance" with provisions of the HPPA (ss. 82(1), (3)(a));

-- To provide "a board of health a written direction" if the Minister "is of the opinion, based on an assessment . . .

that the board of health has failed to provide or ensure the provision of a health program or service in accordance" with the HPPA, "failed to comply" with the HPPA, or "failed to ensure the adequacy of the quality of the administration or management of its affairs" (s. 83(1));

-- Where "a board of health has failed to comply" with a Ministerial direction, the power to "do whatever is necessary to ensure that the direction is carried out", and "no person shall hinder or obstruct the Minister in the exercise of his or her powers" to do so (ss. 84(1)-(2));

-- Where, "in the opinion of the Minister, a board of health has failed to comply" with a Ministerial direction, the power to "give the board of health a notice of failure to comply" (s. 85(1));

-- Where the Minister "is of the opinion that a situation exists anywhere in Ontario that constitutes or may constitute a risk to the health of any persons", the power to "apply to a judge of the Superior Court of Justice for an order" that the board of health "take such action as the judge considers appropriate to prevent, eliminate or decrease the risk caused by the situation" (ss. 86.1(1)-(2)); and

-- The power to "make regulations specifying diseases as communicable diseases, reportable diseases and virulent diseases" under the HPPA (s. 97).

[17] In my view, these important and extensive statutory provisions create discretionary powers that are not capable of creating a private law duty. The discretionary powers created by the HPPA are to be exercised, if the Minister chooses to [page331] exercise them, in the general public interest. They are not aimed at or geared to the protection of the private interests of specific individuals. From the statement of purpose in s. 2 and by implication from the overall scheme of the HPPA, no doubt there is a general public law duty that requires the Minister to endeavour to promote, safeguard and protect the health of Ontario residents and prevent the spread

of infectious diseases. However, a general public law duty of that nature does not give rise to a private law duty sufficient to ground an action in negligence. I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals. Although Mitchell (Litigation Administrator of) v. Ontario (2004), 71 O.R. (3d) 571, [2004] O.J. No. 3084 (Div. Ct.) was concerned with a different statute, I agree with and adopt Swinton J.'s analysis at paras. 28 and 30 as applicable to the present case:

> [T]he governing statutes make it clear that the Minister has a wide discretion to make policy decisions with respect to the funding of hospitals. The legislative framework gives the Minister the power to act in the public interest, and in exercising her powers, she must balance a myriad of competing interests. The terms of the legislation make it clear that her duty is to the public as a whole, not to a particular individual.
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> [A] consideration of the statutory framework makes it clear that the requisite proximity in the relationship between the plaintiffs and the defendant has not been established so as to give rise to a private law duty of care. The overall scheme of the relevant Acts confers a mandate on the Minister of Health to act in the broader public interest and does not create a duty of care to a particular patient.

[18] The decisions of the Supreme Court of Canada in Cooper and Edwards are particularly instructive. Both cases centred on claims by a specific class of individuals who alleged that they had suffered loss as a result of the failure of a public authority to exercise its supervisory and investigatory powers. Cooper involved a claim by investors who suffered losses at the hands of a mortgage broker. The plaintiffs alleged that the British Columbia Registrar of Mortgage Brokers owed them a private law duty to suspend a mortgage broker's licence or to notify investors if a mortgage broker was under investigation. In Edwards, the plaintiffs suffered losses at the hands of a

lawyer who allegedly used his trust account improperly. The plaintiffs alleged that the Law Society of Upper Canada, which had knowledge of the manner in which the lawyer operated his trust account, owed them a private law duty to ensure that the lawyer's trust [page332] account was operated according to the regulations or to warn the plaintiffs that it had abandoned its investigation.

[19] In both Cooper and Edwards, the statements of claim were struck because the public authority owed no private law duty of care to the plaintiffs. In both cases, after reviewing the statutory powers and duties of the defendant, the Supreme Court concluded that any duty was owed to the public as a whole rather than to individual investors or clients who interacted with the brokers or lawyers regulated by the legislation. In Cooper, the Supreme Court concluded, at para. 49:

> Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.

Similarly in Edwards, the Supreme Court found, at para. 14:

> The Law Society Act is geared for the protection of clients and thereby the public as a whole, it does not mean that the Law Society owes a private law duty of care to a member of the public who deposits money into a solicitor's trust account. Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

[20] As I see it, the proximity argument in this case is significantly weaker than in either Cooper or Edwards. Those cases pertained to narrow classes of individuals whose specific interests were vulnerable to the very agents the public authorities were mandated to supervise, yet no duty of care was found. This case is concerned with a general risk faced by all members of the public and a public authority mandated to promote and protect the health of everyone located in its

jurisdiction. The risk of contracting a disease that might have been prevented by public health authorities is a risk that is faced by the public at large. It is a much more generalized risk than the type faced by mortgage investors or clients of lawyers. Moreover, the nexus or relationship between a member of the public who contracts WNV and the Minister is more attenuated than the nexus or relationship between a mortgage investor and the regulator of mortgage brokers or a client and the regulator of the legal profession. It was held to be plain and obvious in Cooper and Edwards that there could be no private law duty of care and I find it impossible to conclude otherwise in this case.

(e) Did the Plan trigger a common law duty of care?

[21] The respondents submit that the even if the HPPA by itself imposed no private law duty, by issuing the Plan, Ontario [page333] made a policy decision to act and therefore triggered a private law duty to use due care to implement the Plan at the operational level: see Just v. British Columbia, [1989] 2 S.C.R. 1228, [1989] S.C.J. No. 121; Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, [1994] S.C.J. No. 20. The respondents rely on Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445, [1994] S.C.J. No. 21, at p. 450 S.C.R., where McLachlin J. notes:

> There is no private law duty on the public authority until it makes a policy decision to do something. Then, and only then, does a duty arise at the operational level to use due care in carrying out the policy. On this view, a policy decision is not an exception to a general duty, but a precondition to the finding of a duty at the operational level.

[22] I am unable to accept this submission for three reasons. First, I find it difficult to read the Plan as a policy decision of the kind that would engage Ontario at the operational level. Second, to the extent that the Plan amounted to a policy decision to act and created a duty of care, it is clear from the terms of the Plan itself and from relevant legislation to which I will refer that any operational duties

created by the Plan resided with local authorities and local boards of health. Third, although the respondents frame their arguments in terms of the alleged failure to execute operational duties in a non-negligent manner, their statement of claim essentially rests on the ground that Ontario failed to adopt adequate policies to prevent WNV, not on its failure to implement the Plan in a non-negligent manner.

[23] I turn to the issue of whether the Plan amounted to the adoption of a policy that engaged Ontario at the operational level. The Plan was prepared by the Public Health Branch of the Ministry in cooperation with a number of non-governmental agencies. Its purpose, as described at p. 5 of the Plan, was "to describe the Surveillance Plan for WNV in the Province of Ontario" and "the Prevention and Public Education measures aimed at reducing the risk of WNV disease for the population of Ontario". The Plan's focus, as described on pp. 5-6, was on "surveillance systems to identify WNV in dead birds, mammals and mosquitoes", on "passive surveillance systems for human cases" and on public education to encourage certain preventative measures, namely "(1) 'source reduction' (reducing or eliminating mosquito breeding sites), and (2) 'personal protective measures' against mosquitoes. The key strategy for implementing these preventative actions is through public education." As I read it, the Plan represented an attempt by the Ministry to encourage and coordinate appropriate measures to reduce the risk of WNV by providing information to local authorities and the public. [page334] The Ministry undertook to do very little, if anything at all, beyond providing information and encouraging coordination. The implementation of specific measures was essentially left to the discretion of members of the public, local authorities and local boards of health.

[24] The Plan explained the epidemiology of WNV and the level of risk of a WNV outbreak in Ontario in 2001. Dead bird surveillance was described, at p. 10, as "a vital part of WNV surveillance activities". The public was asked to contact local boards of health to report findings of dead corvids and local boards of health were instructed to follow a protocol in order to determine whether to submit the carcass to the Canadian

Cooperative Wildlife Health Centre in Guelph for testing, at pp. 11-12. The only specific action identified for the Ministry in the Plan was to supply information, as specified on p. 12, in the form of a "direct mailing" to specialty physicians and emergency departments in Ontario regarding diagnosis of WNV in humans. It was left to local health departments, at p. 12, to "contact approximately sixty hospitals in southern Ontario to provide advice, protocols as required, and establish prompt diagnostic efforts and reporting of suspected cases to the local medical officer of health" as required. Testing of mosquito pools in the event that a bird, mammal or human was confirmed to be infected with WNV was left to local authorities. Local health units were asked to consider "enhanced surveillance" in areas of confirmed WNV activity and could notify local physicians accordingly, at p. 14. Reporting, collecting and testing was left to local authorities and the public. Public education measures to reduce or eliminate mosquito-breeding sites were recommended, not mandated, and it was essentially left to the local authorities and members of the public at large to decide what measures were appropriate. Similar recommendations were made regarding personal protective measures. No direction was given as to the "use of chemical, as well as non-chemical, means of mosquito abatement/control", besides noting that this matter was under review by the National Steering Committee for West Nile Virus, chaired by Health Canada from which a final response was "expected very shortly from Health Canada".

[25] To summarize, the Plan provided information about WNV and encouraged members of the public and local authorities, in cooperation with various governmental and non-governmental agencies, to undertake surveillance and preventative measures. The Ministry did not undertake to collect infected birds, conduct inspections or take measures to reduce or eliminate the mosquito population, nor did it mandate such measures. The Ministry [page335] merely provided others with information and recommendations. In my view, the Plan falls well short of the sort of policy decision to do something about a particular risk that triggers a private law duty of care to implement such policy at the operational level in a non-negligent manner.

[26] I cannot accept the contention that the facts pleaded here bring the case within the principle identified in Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998), 39 O.R. (3d) 487, [1998] O.J. No. 2681 (Gen. Div.). There, the defendant police force plainly bore the day-to-day responsibility for general police investigations, knew that the specific individual Jane Doe was one of a handful of persons at risk of imminent harm, and used her as bait to lure a perpetrator. Here, the appellant bears general responsibility for promoting the health of all the province's residents but no facts are pleaded to distinguish the risk faced by Eliopoulos from the risk faced by everyone else in the province.

[27] I turn to the second point and whether, to the extent the Plan may be read as creating operational duties, those duties reside with Ontario. As I have already stated, the Plan does not identify operations that are to be performed by the Ministry beyond providing general information and coordination. To the extent the Plan may be read as identifying specific operations to be performed, those tasks are left to local authorities and local boards of health. In this regard, the Plan mirrors the scheme of the HPPA, ss. 4 and 5: responsibility for the implementation of health policy, including superintending and carrying out health promotion, health protection, disease prevention, community health protection, and control of infectious diseases and reportable diseases, rests with local boards of health, not the Ministry. Local boards of health are subject to direction from the Minister (s. 83(1)), and in the event the local board of health fails to follow such direction, the Minister can act in its stead (s. 84(1)). However, this serves only to emphasize that under the HPPA, local boards of health, constituted as independent non-share capital corporations, bear primary operational responsibility for the implementation of health promotion and disease prevention policies.

[28] Finally, while the respondents argue that the Ministry's policy decisions reflected in the Plan engage an operational duty, fairly read, the core allegations relate to what could only be regarded as policy decisions. In Brown, at p. 441 S.C.R., the Supreme Court of Canada described the distinction

between policy and operational decisions as follows: [page336]

> True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> The operational area is concerned with the practical implementation of the formulated policies; it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

[29] The allegations of negligence in the respondents' statement of claim essentially rest on a number of broad-ranging allegations that Ontario failed to adopt adequate policies and failed to devote adequate resources to prevent the spread of WNV. It is alleged in the statement of claim, for example, that Ontario failed:

- "to take steps to deal with WNV as an emergency in Ontario in 2001 and 2002";
- "to give the safety and health of Ontario's citizens the highest priority";
- "to take reasonable, timely and effective measures to reduce the mosquito population in Ontario";
- "to take reasonable, timely and effective measures to warn the citizens of Ontario about the potentially fatal threat of WNV"; and
- "to develop a test for WNV in a timely an effective manner".

[30] In my view, these allegations relate to issues of public

health policy, the establishment of governmental priorities, and the allocation of scarce health care resources, not the implementation of a specific health promotion or prevention policy at the operational level. I see no similarity between allegations of this nature and the alleged failure to inspect and maintain public highways at issue in Just and Brown. Developing an appropriate policy to control mosquitoes and the spread of an infectious disease across all of southern Ontario bears little similarity to implementing a specific policy for the maintenance and repair of public highways. The Plan does not, therefore, amount to an operational plan, with commensurate duties, on which the respondents could base a claim in negligence. [page337]

(g) Residual policy concerns

[31] If I am wrong that it is plain and obvious that on the facts pleaded there is no proximity sufficient to give rise to a prima facie duty of care under the first stage of the Cooper/Anns test, I would find under the second stage of the Cooper/Anns test that there are residual policy considerations outside the relationship of the parties that negative the imposition of a duty. These residual policy concerns are explained in Cooper, at para. 37:

> These [residual policy concerns] are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[32] The risk of contracting disease spread by mosquitoes is one to which all who live in Ontario are exposed. It is not a risk that is created by the provincial government or that arises from the use of a public facility, such as a highway, provided by Ontario. In deciding how to protect its citizens from risks of this kind that do not arise from Ontario's actions and that pose an undifferentiated threat to the entire

public, Ontario must weigh and balance the many competing claims for the scarce resources available to promote and protect the health of its citizens.

[33] I agree with Ontario's submission that to impose a private law duty of care on the facts that have been pleaded here would create an unreasonable and undesirable burden on Ontario that would interfere with sound decision-making in the realm of public health. Public health priorities should be based on the general public interest. Public health authorities should be left to decide where to focus their attention and resources without the fear or threat of lawsuits.

Conclusion

[34] For these reasons I would allow the appeal and dismiss the action on the ground that the facts pleaded by the respondents disclose no cause of action. Ontario has not pressed its claim for costs, and in the circumstances of this case, I would make no order as to costs.

Appeal allowed.