Indexed as:

Just v. British Columbia

John Just, appellant;
v.
Her Majesty The Queen in right of the Province of British Columbia, respondent.

[1989] 2 S.C.R. 1228

[1989] S.C.J. No. 121

File No.: 20246.

Supreme Court of Canada

1989: February 24 / 1989: December 7.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts -- Liability -- Government -- Policy decision or operational decision -- Boulder crashing onto car on highway -- System in place for inspection and remedial work on rock slopes -- Whether or not parties in relationship of sufficient proximity to warrant imposition of duty of care -- If so, whether policy decision to which liability does not attach or operation decision to which liability would attach -- Highway Act, R.S.B.C. 1979, c. 167, ss. 8, 14 -- Crown Proceeding Act, R.S.B.C. 1979, c. 86, ss. 2, 3.

Heavy snow fall forced appellant and his daughter to stop in a line of traffic by a rocky slope on a major highway. A boulder, which worked loose from the wooded slopes above the highway, came crashing down upon appellant's car, killing appellant's daughter and causing him very serious injuries. Appellant contended that respondent negligently failed to properly maintain the highway.

The Department of Highways had set up a system for inspection and remedial work upon rock slopes. Inspection and recommendations were made by engineers and the work was effected by a rock scaling crew responsible for performing remedial work throughout the entire province. The department's practice had been to make visual inspections from the highway unless rock falls or a

history of instability in an area indicated a need for the rock engineer to climb the slope. Numerous informal inspections were carried out by highway personnel as they drove along the road.

The trial judge found that the entire system of inspection and the way it was implemented was a policy matter which did not give rise to liability. No finding was made as to whether or not the system of inspection [page1229] was reasonable or whether the inspections themselves were properly carried out. The Court of Appeal upheld the finding of the trial judge.

Held (Sopinka J. dissenting): The appeal should be allowed.

Per Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.: The province owes a duty of care, which ordinarily extends to their reasonable maintenance, to those using its highways. The Department of Highways could readily foresee the risk that harm might befall users of a highway if it were not reasonably maintained. That maintenance could be found to extend to the prevention of injury from falling rock.

Government agencies may be exempt from the application of the traditional tort law duty of care if an explicit statutory exemption exists or if the decision arose as a result of a policy decision. Whether or not a decision is characterized as a policy decision or as an operational decision rests on the nature of the decision and not on the identity of the actors. Generally, decisions concerning budgetary allotments for departments or government agencies should be classified as policy decisions. A policy decision may be open to challenge on the basis that it is not made in the bona fide exercise of discretion.

If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered. The manner and quality of an inspection system, since it was clearly part of the operational aspect of a governmental activity, should be assessed when consideration is given to the standard of care issue. At this stage, the requisite standard of care must be assessed in light of all the surrounding circumstances including budgetary restraints and the availability of qualified personnel and equipment. In this case a new trial was necessary to make the necessary findings of fact on the negligence issue.

Per Sopinka J. (dissenting): Respondent had the power to carry out the inspections but was under no duty to do so. Conduct within the limits of this discretion gives rise to no duty of care; conduct outside of these limits may attract a private law duty of care.

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The respondent's liability, pursuant to the Crown Proceeding Act, was no greater than that of a municipality. A municipality has, within its statutory discretion, the authority to maintain highways but no duty to do so. A litigant may not attack a policy and it is not appropriate for a Court to pass on it, absent evidence that a policy was adopted for some ulterior motive and not for a municipal purpose. In order for a private duty to arise, it would have to be shown that the Rockwork Section acted outside its delegated discretion to determine whether to inspect and the manner in which the inspection is to be made.

Policy decisions are immune from review because they usually entail not only a decision to do something but also some call upon the public purse. Respondent was acting within its discretion when it decided that inspections should be done and the manner in which they were to be done. Responsibility for deciding the extent to which the inspection program was to be implemented was delegated to the Rockwork Section.

Cases Cited

By Cory J.

Applied: Anns v. Merton London Borough Council, [1978] A.C. 728; City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2; Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705; Yuen Kun Yeu v. Attorney-General of Hong Kong, [1988] A.C. 175; Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418; Blessing v. United States, 447 F.S. 1160; Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1; Indian Towing Co., 350 U.S. 61 (1955); United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984).

By Sopinka J. (dissenting)

City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2; London Passenger Transport Board v. Upson, [1949] A.C. 155; Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418; Kent v. East Suffolk Rivers Catchment Board, [1940] 1 K.B. 319; Anns v. Merton London Borough Council, [1978] A.C. 728.

Statutes and Regulations Cited

Crown Proceeding Act, R.S.B.C. 1979, c. 86, ss. 2, 3(2).
Federal Tort Claims Act, 28 U.S.C. s. 2680.
Highway Act, R.S.B.C. 1979, c. 167, s. 8.
Ministry of Transportation and Highways Act, R.S.B.C. 1979, c. 280, s. 14.
Municipal Act, R.S.B.C. 1960, c. 255, s. 513(2). [page1231]

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Holding, John D. "The Relationship Between Recent Trends in Tort Litigation and the Current Insurance Crisis in Canada" (1986), 54 Assurances 435. Klar, Lewis. "Negligence -- Reactions Against Alleged Excessive Imposition of Liability -- A Turning Point?" (1987), 66 Can. Bar Rev. 159. Ontario. Ontario Task Force on Insurance. Final Report of the Ontario Task Force on Insurance. Toronto: The Task Force, 1986. Osborne, Philip. "A Critical Evaluation of Liability Insurance, Litigation and Personal Injury Compensation: The Lessons and Choices for Ontario." Study prepared for the Ontario Task Force on Insurance and cited in Final Report of the Ontario Task Force on Insurance. Toronto: The Task Force, 1986. Rea, Samuel A., Jr. "Economic Perspectives on the Liability Insurance Crisis," in Insurance Law. Special Lectures of the Law Society of Upper Canada, 1987. Don Mills, Ont.: De Boo, 1987. Stradiotto, Rino A. "Canadian Perspectives on Tort Law: Personal Injury Damages" (1988), 46 The Advocate 737. Trebilcock, Michael J. "The Insurance -- Deterrence Dilemma of Modern Tort Law: Trends in North American Tort Law and Their Implications for the Current Liability Crisis." Study prepared for the Ontario Task Force on Insurance and cited in Final Report of the Ontario Task Force on Insurance. Toronto: The Task Force, 1986.

APPEAL from a judgment of the British Columbia Court of Appeal (1986), 10 B.C.L.R. (2d) 223, [1987] 2 W.W.R. 231, 40 C.C.L.T. 160, 1 M.V.R. (2d) 357, dismissing an appeal from a judgment of McLachlin J. (1985), 64 B.C.L.R. 349, [1985] 5 W.W.R. 570, 33 C.C.L.T. 49, 34 M.V.R. 124. Appeal allowed, Sopinka J. dissenting.

T.R. Berger and J.N. **Laxton,** Q.C., for the appellant.
William A. Pearce and Harvey M. Groberman, for the respondent.

Solicitors for the appellant: **Laxton,** Pidgeon & Co., Vancouver.
Solicitor for the respondent: The Attorney General of British Columbia, Victoria.

The judgment of Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. was delivered by

1 **CORY J.**:-- This appeal puts in issue the approach that should be taken by courts when considering the liability of government agencies in tort actions.

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Factual Background

2 On the morning of January 16, 1982, the appellant and his daughter set out, undoubtedly with high hopes and great expectations, for a day of skiing at Whistler Mountain. As a result of a heavy snow fall they were forced to stop in the northbound line of traffic on Highway 99. While they were waiting for the traffic to move forward a great boulder weighing more than a ton somehow worked loose from the wooded slopes above the highway and came crashing down upon the appellant's car. The impact killed the appellant's daughter and caused him very serious injuries. He then brought this action against the respondent contending that it had negligently failed to maintain the highway properly.

3 Highway 99 is a major commuter road between Vancouver and the major ski resorts located at Whistler Mountain. The appellant alleged that there had been earlier rock falls near the scene of the tragedy. As well it was said that the climatic conditions of freezing and thawing, coupled with a heavy build-up of snow in the trees and resulting tree damage created a great risk of rock falls. Trees were said to be a well-known factor in levering rocks loose. It was contended that inadequate attention had been given to all these factors by the respondent and that a reasonable inspection would have demonstrated that the rock constituted a danger to users of the highway.

4 At the time of the accident the Department of Highways had set up a system for inspection and remedial work upon rock slopes particularly along Highway 99. At the apex of the organization was a Mr. Eastman, the regional geotechnical material engineer. He is a specialist in rock slope mainte-

nance and together with another engineer was responsible for inspecting rock slopes and making recommendations regarding their stability.

5 The Department contained a rock work section which included Mr. Oliver, the rock work engineer responsible for rock stabilization and inspections on Highway 99. The section also included a rock [page1233] scaling crew which was formed in 1971 to perform remedial work on the slopes. This crew serviced the entire province. The crew's function was to remove potentially dangerous rocks by prying them loose using a crowbar. As well, they removed trees that were considered a hazard to the safety of those using the highways. Mr. Oliver was required to inspect rock cut areas to assess the stability of the slope and to determine whether there was a risk that a rock might fall on the highway. His inspection duties extended to the entire slope from which such a danger might arise.

6 When the rock work engineer inspected the rock slopes on Highway 99 he would report his findings and recommendations to the district highways manager responsible for the area. The district manager in turn through the regional geotechnical material engineer submitted requests for the services of the rock scaling crew. The rock scaling crew itself had no discretion as to where and when it worked; its schedule was determined by the requests for remedial work made to the rock work section.

7 Prior to the accident the practice had been for the Department of Highways to make visual inspections of the rock cuts on Highway 99. These were carried out from the highway unless there was evidence or history of instability in an area in which case the rock engineer would climb the slope. In addition there were numerous informal inspections carried out by highway personnel as they drove along the road when they would look for signs of change in the rock cut and for rocks in the ditch.

Decisions at Trial and on Appeal

8 In the reasons of the trial judge (1985), 64 B.C.L.R. 354, the term "rock scaling crew" is used to refer to the rock work section. In any event it was found at p. 354 that:

> ... the rock scaling crew had virtually an absolute discretion as to when and where it would work. It created the standards and it determined their enforcement. Its discretion went far beyond the limited operational [page1234] discretion of how to go about enforcing policies set by others. In effect, the Department of Highways had conferred upon the rock scaling crew the responsibility of formulating policy with respect to the prevention of rock falls on highways.

The reasons continued with the finding that there were no standards to which the rock scaling crew was required to work or against which its conduct could be evaluated as that determined its own standards. It was found that the decision as to what inspection was to be undertaken on a particular site was a "policy" decision. The conclusion was set out at p. 355 in these words:

> The number and quality of inspections as well as the frequency of scaling and other remedial measures were matters of planning and policy involving the utilization of scarce resources and the balancing of needs and priorities throughout the province. Decisions of that nature are for the governmental authorities, not the courts.

9 No finding was made as to whether or not the system of inspection set forth by the Department of Highways was a reasonable one or whether the inspections themselves were properly carried out. Rather, as indicated, it was found that the entire system of inspection as well as the way in which it was carried out was a matter of planning and policy for which there was no liability.

10 The Court of Appeal (1986), 10 B.C.L.R. (2d) 223, determined that the trial judge had considered the proper indicia in determining that the number and quality of decisions as to the inspections and the decisions as to the work to be done on a particular site were matters of policy, as opposed to an operational decision. That court upheld the finding of the trial judge that the decisions involved in this case constituted a policy decision for which there was no liability rather than the implementation of policy. The appeal was dismissed without calling upon the respondent.

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Test to be Applied

11 In cases such as this where allegations of negligence are brought against a government agency, it is appropriate for courts to consider and apply the test laid down by Lord Wilberforce in Anns v. Merton London Borough Council, [1978] A.C. 728. At pages 751-52 he set out his position in these words:

> Through the trilogy of cases in this House -- 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, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. 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: see Dorset Yacht case [1970] A.C. 1004, per Lord Reid at p. 1027. [Emphasis added.]

That test received the approval of the majority of this Court in City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2. As well it was specifically referred to by both Beetz and L'Heureux-Dubé JJ. in Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705. It may be that the two-step approach as suggested by Lord Wilberforce should not always be slavishly followed. See Yuen Kun Yeu v. Attorney-General of Hong Kong, [1988] A.C. 175 (P.C.), at pp. 190, 191, 194. Nevertheless it 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.

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12 In the case at bar the accident occurred on a well used major highway in the Province of British Columbia. All the provinces across Canada extol their attributes and attractions in the fierce competition for tourist business. The skiing facilities at Whistler are undoubtedly just such a magnificent attraction. It would be hard to imagine a more open and welcoming invitation to use those facilities than that extended by the provincial highway leading to them. In light of that invitation to use both the facilities and the highway leading to them, it would appear that apart from some specific exemption, arising from a statutory provision or established common law principle, a duty of care was owed by the province to those that use its highways. That duty of care would extend ordinarily to reasonable maintenance of those roads. The appellant as a user of the highway was certainly in sufficient proximity to the respondent to come within the purview of that duty of care. In this case it can be said that it would be eminently reasonable for the appellant as a user of the highway to expect that it would be reasonably maintained. For the Department of Highways it would be a readily foreseeable risk that harm might befall users of a highway if it were not reasonably maintained. That maintenance could, on the basis of the evidence put forward by the appellant, be found to extend to the prevention of injury from falling rock.

13 Even with the duty of care established, it is necessary to explore two aspects in order to determine whether liability may be imposed upon the respondent. First, the applicable legislation must be reviewed to see if it imposes any obligation upon the respondent to maintain its highways or, alternatively, if it provides an exemption from liability for failure to so maintain them. Secondly, it must be determined whether the province is exempted from liability on the grounds that the system of inspections, including their quantity and quality, constituted a "policy" decision of a government agency and was thus exempt from liability.

[page1237]

The Applicable Legislation

14 The Highway Act, R.S.B.C. 1979, c. 167, s. 8, provides for construction and maintenance of highways in these words:

> 8. The minister may ... maintain a highway across any land taken under the powers conferred by this Act ....

and the Ministry of Transportation and Highways Act, R.S.B.C. 1979, c. 280, s. 14, as follows:

> 14. The minister has the management, charge and direction of all matters relating to the acquisition, construction, repair, maintenance, alteration, improvement and operation of ... highways ....

The liability of the respondent in respect of the exercise of these powers is limited by ss. 2 and 3 of the Crown Proceeding Act, R.S.B.C. 1979, c. 86, in this manner:

> 2. Subject to this Act,
>
> . . .
>
> (c) the Crown is subject to all those liabilities to which it would be liable if it were a person, ...
>
> 3. ...
>
> (2) Nothing in section 2
>
> . . .
>
> (f) subjects the Crown, in its capacity as a highway authority, to any greater liability than that to which a municipal corporation is subject in that capacity.

On their face these statutory provisions do not appear to absolve the respondent from its duty of care to maintain the highways reasonably. Rather, by inference they appear to place an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads.

Was the Decision of the Rock Section as to the Quantity and Quality of Inspections a "Policy" Decision Exempting the Respondent from Liability?

15 The respondent placed great reliance on the decision of this Court in Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418. In the Barratt case injury occurred as a result of a [page1238] pothole on the road. It was established that the City of North Vancouver had a policy of inspecting its roads for potholes every two weeks. Indeed it had inspected the road where the accident occurred one week earlier and found no pothole. It was found that the inspection policy established by the municipality was a reasonable and proper one. However, Justice Martland in giving the reasons for this Court went on to express an opinion that the municipality could not be held negligent for formulating one inspection policy rather than another. He put it this way at pp. 427-28:

> In essence, he [the trial judge] is finding that the Municipality should have instituted a system of continuous inspection to ensure that no possible damage could occur and holds that, in the absence of such a system, if damage occurs, the Municipality must be held liable.
>
> In my opinion, no such duty existed. The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted

> negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another.

This statement was not necessary to the decision as it had already been determined that the system of inspection established by the municipality was eminently reasonable. Neither was there any serious question raised that there had been any negligence in carrying out the system of inspection. The finding that a reasonable system of inspection had been established and carried out without negligence constituted the basis for the conclusion reached by the Court in that case. With the greatest respect, I am of the view that the portion of the reasons relied on by the respondent went farther than was necessary to the decision or appropriate as a statement of principle. For example, the Court would not have approved as "policy" a system that called for the inspection of the roads in a large urban municipality once every five years. Once a policy to inspect is established then it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of discretion [page1239] and to demonstrate that in all the circumstances, including budgetary restraints, it is appropriate for a court to make a finding on the issue.

16 The functions of government and government agencies have multiplied enormously in this century. Often government agencies were and continue to be the best suited entities and indeed the only organizations which could protect the public in the diverse and difficult situations arising in so many fields. They may encompass such matters as the manufacture and distribution of food and drug products, energy production, environmental protection, transportation and tourism, fire prevention and building developments. The increasing complexities of life involve agencies of government in almost every aspect of daily living. Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy". Thus the dilemma giving rise to the continuing judicial struggle to differentiate between "policy" and "operation". Particularly difficult decisions will arise in situations where governmental inspections may be expected.

17 The dividing line between "policy" and "operation" is difficult to fix, yet it is essential that it be done. The need for drawing the line was expressed with great clarity by Becker J. of the United States District Court, in Blessing v. United States, 447 F.S. 1160. The case required him to deal with a claim under the Federal Tort Claims Act, 28 U.S.C. s. 2680 which provides:

[page1240]

> The provisions of this chapter and section 1346(b) of this title shall not apply to --

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

He wrote at p. 1170:

> Read as a whole and with an eye to discerning a policy behind this provision, it seems to us only to articulate a policy of preventing tort actions from becoming a vehicle for judicial interference with decision-making that is properly exercised by other branches of the government and of protecting "the Government from liability that would seriously handicap efficient government operations," United States v. Muniz, 374 U.S. 150, 163, 83 S.Ct. 1850, 1858, 10 L.Ed. 2d 805 (1963). Statutes, regulations, and discretionary functions, the subject matter of s. 2680(a), are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts generally have no substantive part to play in such decisions. Rather, the judiciary confines itself -- or, under laws such as the FTCA's discretionary function exception, is confined -- to adjudication of facts based on discernible objective standards of law. In the context of tort actions, with which we are here concerned, these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political or economic decisions.

18 The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions [page1241] may well be subject to claims in tort. What guidelines are there to assist courts in differentiating between policy and operation?

19 Mason J., speaking for himself and one other member of the Australian High Court in Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1, set out what I find to be most helpful guidelines. He wrote:

> Anns decided that a duty of care cannot arise in relation to acts and omissions which reflect the policy-making and discretionary elements involved in the exercise of statutory discretions. It has been said that it is for the authority to strike that balance between the claims of efficiency and thrift to which du Parcq LJ referred in Kent v. East Suffolk Rivers Catchment Board [1940] 1 KP 319 at 338 and that it is not for the court to substitute its decision for the authority's decision on those matters when they were committed by the legislature to the authority for decision (Dorset Yacht Co. v. Home Office, [1970] AC 1004 at 1031, 1067-8; Anns, at p. 754; Barratt v. District of North Vancouver (1980) 114 D.L.R. (3d) 577). Although these injunctions have compelling force in their ap-

> plication to policy-making decisions, their cogency is less obvious when applied to other discretionary matters. The standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions.
>
> Accordingly, it is possible that a duty of care may exist in relation to discretionary considerations which stand outside the policy category in the division between policy factors on the one hand and operational factors on the other. This classification has evolved in the judicial interpretation of the "discretionary function" exception in the United States Federal Tort Claims Act -- see Dalehite v. United States (1953) 346 US 15; ... United States v. Varig Airlines, supra. The object of the Federal Tort Claims Act in displacing government immunity and subjecting the United States Government to liability in tort in the same manner and to the same extent as a private individual under like circumstances, subject to the "discretionary function" exception, is similar to that of s. 64 of the Judiciary Act, 1903 (Cth).
> [page1242]
> 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.]

20 The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at different levels although usually at a high level.

21 The decisions in Anns v. Merton London Borough Council and City of Kamloops v. Nielsen, supra, indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a bona fide exercise of discretion. To do so they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all the circumstances.

22 For example, at a high level there may be a policy decision made concerning the inspection of lighthouses. If the policy decision is made that there is such a pressing need to maintain air safety by the construction of additional airport facilities with the result that no funds can be made available for lighthouse inspection, then this would constitute a bona fide exercise of discretion that would be unassailable. Should then a lighthouse beacon be extinguished as a result of the lack of inspection and a shipwreck ensue no liability can be placed upon the government agency. The result would be the same if a policy decision were made to increase the funds for job retraining and reduce the funds for lighthouse inspection so that a [page1243] beacon could only be inspected every second year and as a result the light was extinguished. Once again this would constitute the bona fide exercise of discretion. Thus a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of bona fide discretion based, for example, upon the availability of funds.

23 On the other hand, if a decision is made to inspect lighthouse facilities the system of inspections must be reasonable and they must be made properly. See Indian Towing Co., 350 U.S. 61 (1955). Thus once the policy decision to inspect has been made, the Court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care.

24 At a lower level, government aircraft inspectors checking on the quality of manufactured aircraft parts at a factory may make a policy decision to make a spot check of manufactured items throughout the day as opposed to checking every item manufactured in the course of one hour of the day. Such a choice as to how the inspection was to be undertaken could well be necessitated by the lack of both trained personnel and funds to provide such inspection personnel. In those circumstances the policy decision that a spot check inspection would be made could not be attacked. (See United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984).)

25 Thus a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.

26 The consideration of the duty of care that may be owed must be kept separate and distinct from [page1244] the consideration of the standard of care that should be maintained by the government agency involved.

27 Let us assume a case where a duty of care is clearly owed by a governmental agency to an individual that is not exempted either by a statutory provision or because it was a true policy decision. In those circumstances the duty of care owed by the government agency would be the same as that owed by one person to another. Nevertheless the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.

28 It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a [page1245] duty of care in situations which arise from its pure policy decisions.

29 In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

30 The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

31 Turning to the case at bar it is now appropriate to apply the principles set forth by Mason J. in Sutherland Shire Council v. Heyman, supra, to determine whether the decision or decisions of the government agency were policy decisions exempting the province from liability. Here what was challenged was the manner in which the inspections were carried out, their frequency or infrequency and how and when trees above the rock cut should have been inspected, and the manner in which the cutting and scaling operations should have been carried out. In short, the public authority had settled on a plan which called upon it to [page1246] inspect all slopes visually and then conduct further inspections of those slopes where the taking of additional safety measures was warranted. Those matters are all part and parcel of what Mason J. described as "the product of administrative direction, expert or professional opinion, technical standards or general standards of care". They were not decisions that could be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature. As such, they were subject to review by the Court to determine whether the respondent had been negligent or had satisfied the appropriate standard of care.

32 At trial the conclusion was reached that the number and frequency of inspections, of scaling and other remedial measures were matters of policy; as a result no findings of fact were made on the issues bearing on the standard of care. Since the matter was one of operation the respondent was not immune from suit and the negligence issue had to be canvassed in its entirety. The appellant was therefore entitled to a finding of fact on these questions and a new trial should be directed to accomplish this.

33 It may well be that the respondent at the new trial will satisfy the Court that it has met the requisite standard of care. It is apparent that although the Crown Proceeding Act imposes the liability of a person upon the Crown, it is not in the same position as an individual. To repeat, the respondent is responsible not for the maintenance of a single private road or driveway but for the maintenance of many hundreds of miles of highway running through difficult mountainous terrain, all of it to be undertaken within budgetary restraints. As noted earlier, decisions reached as to budgetary allotment for departments or government agencies will in the usual course of events be policy decisions that cannot be the basis for imposing liability in tort even though these political policy decisions will have an effect upon the frequency [page1247] of inspections and the manner in which they may be carried out. All of these factors should be taken into account in determining whether the system was adopted in bona fide exercise of discretion and whether within that system the frequency, quality and manner of inspection were reasonable.

34 To proceed in this way is fair to both the government agency and the litigant. Once a duty of care that is not exempted has been established the trial will determine whether the government agency has met the requisite standard of care. At that stage the system and manner of inspection may be reviewed. However, the review will be undertaken bearing in mind the budgetary restraints imposed and the availability of personnel and equipment to carry out such an inspection.

Disposition

35 In the result, a new trial must be held to determine whether the respondent had in all the circumstances met the standard of care that should reasonably be imposed upon it with regard to the frequency and manner of inspection of the rock cut and to the cutting and sealing operations carried out upon it.

36 The appellant is entitled to costs of the appeal to this Court and in the Court of Appeal of British Columbia. The issue of costs of the first trial is reserved to the judge presiding at the new trial.

The following are the reasons delivered by

37 SOPINKA J. (dissenting):-- This appeal raises the issue of the liability for negligence of a public body in the absence of the breach of a statutory duty of care. The facts are set out in the reasons of Justice Cory, which I have had the advantage of reading. Regrettably, I find that I cannot agree with his conclusion. In my opinion, the conclusion of the trial judge (1985), 64 B.C.L.R. 349, and a unanimous Court of Appeal (1986), 10 B.C.L.R. (2d) 223, was the correct one. This conclusion is expressed by Hinkson J.A., speaking for the court, [page1248] affirming the following passage from the reasons of McLachlin J. (as she then was):

> ... I conclude that the decisions here complained of fall within the area of policy and cannot be reviewed by this court. The number and quality of inspections as well as the frequency of scaling and other remedial measures were matters of planning and policy involving the utilization of scarce resources and the balancing of needs and priorities throughout the province. Decisions of that nature are for the governmental authorities, not the courts.

38 In comparatively recent years the law of torts has evolved by imposing on public authorities a common law duty of care based on the neighbourhood or proximity principle, frequently called the Anns principle. This has resulted in substantially increasing their liability in negligence for activity which they are authorized to carry on by statute but in respect of which the statute imposes no duty

of care. This change in the law was not brought about by legislation but through the evolution of the common law which has traditionally taken account of the changing views and needs of society. The expansion of liability by reason of this and other developments in the law of torts has created a crisis in this area of the law leading to demands for the fundamental reappraisal of the tort system itself. The basic premise of adjusting losses on the basis of fault is being subjected to intense criticism. In the United States there is a growing consensus that the tort system is responsible for the crisis in liability insurance. There is now substantial support for wholesale legislative reform of the tort system. These developments are discussed in the Final Report of the Ontario Task Force on Insurance (May 1986) to the Ministry of Financial Institutions, at p. 52. Reference is made to the study made by Professor Michael J. Trebilcock and entitled "The Insurance -- Deterrence Dilemma of Modern Tort Law: Trends in North American Tort Law and Their Implications for the Current Liability Crisis" (April 21, 1986). At pages [page1249] 53-54 of the Final Report of the Ontario Task Force on Insurance, it is stated that:

> A crucial finding in the Trebilcock study was that the current "explosion" in American tort law was not the result of judicial extensions of already-advanced American strict liability doctrines but rather the judicial extension of traditional negligence liability and its application to an ever-widening range of activities and injuries.

The Report goes on to state at p. 54:

> There is every indication that similar tendencies exist in Canadian negligence law and that similar developments will occur in the future in Canada as well. The reason for this inevitable expansion of liability, even within the bounds of traditional negligence doctrine, is a matter that is intractably and unavoidably rooted in what we will later describe as the "insurance-deterrence dilemma" in modern tort law.

39 The insurance-deterrence dilemma is described in a study paper prepared by Philip Osborne for the Task Force and cited at pp. 61-62 as follows:

> The massive transformation of the fault system ... is a change which is explicable only on the basis of liability insurance and judicial compassion for the victims of social progress. Judges who in their written judgments give no indication of the prevalence of liability insurance are in fact keenly aware that in almost all cases the defendant is not paying, and that they are in the last analysis deciding whether or not the plaintiff should be compensated from insurance monies .... The prevalence of liability insurance fundamentally altered the moralistic nature of the loss-shifting function of fault. The loss-shifting mechanism was converted into a loss-spreading mechanism and it became more realistic to speak of the fault system as a fault-insurance system. The punitive and deterrent aspects of fault were diminished and compensation became the predominant function of tort law.

40 Other commentators are generally in support of the above criticisms of the tort system: Holding, "The Relationship Between Recent Trends in Tort Litigation and the Current Insurance Crisis

in [page1250] Canada" (1986), 54 Assurances 435; Stradiotto, "Canadian Perspectives on Tort Law: Personal Injury Damages" (1988), 46 The Advocate 737; Rea, "Economic Perspectives on the Liability Insurance Crisis," in Insurance Law, Special Lectures of the Law Society of Upper Canada, 1987; Klar, "Negligence -- Reactions Against Alleged Excessive Imposition of Liability -- A Turning Point?" (1987), 66 Can. Bar Rev. 159.

41 I draw attention to these developments in order to emphasize that while the law of torts must move with the times, this is not a time to move. Yet, I am of the opinion that the reasons of my colleague would considerably expand the liability for negligence of public authorities by subjecting to judicial review their policy decisions which were hitherto not reviewable.

42 The starting point for the application of the Anns principle is that there is no statutory duty in favour of the plaintiff to do the thing the lack of which is alleged to have caused the injury to the plaintiff. Many public bodies have the power to carry out a function but no duty to do so. In these circumstances, they have a discretion whether to do the thing or not. Conduct within the limits of that discretion gives rise to no duty of care. Conduct outside of these limits may attract a private law duty of care. In City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2, Wilson J. speaking for the majority, summed up the Anns principle as follows, at p. 11:

> 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.

[page1251]

43 If a statutory duty to the plaintiff is breached, the private duty based on the neighbourhood principle is unnecessary. In London Passenger Transport Board v. Upson, [1949] A.C. 155, at p. 168, Lord Wright stated:

> The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty.

My colleague, Cory J., states (at p. 1237) that the statutory provisions "place an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads." Sections 2 and 3(2) of the Crown Proceeding Act, R.S.B.C. 1979, c. 86, referred to by him, make it clear that the respondent's liability cannot be greater than that of a municipality. The extent of the liability of a municipality in British Columbia was settled by Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418. While a municipality has the authority to maintain high-

ways, it has no duty to do so. What it does in this respect is within its statutory discretion. At page 426, Martland J. said:

> The Municipality, under the provisions of subs. 513(2), had authority to lay out, construct, maintain and improve highways. Unlike the provisions of some other similar statutes, no duty was imposed upon the Municipality to maintain its highways.

44 My colleague's reasons are based essentially on an attack on the policy of the respondent with respect to the extent and manner of the inspection program. In my opinion, absent evidence that a policy was adopted for some ulterior motive and not for a municipal purpose, it is not open to a litigant to attack it, nor is it appropriate for a court to pass upon it. As stated by Lord du Parcq in Kent v. East Suffolk Rivers Catchment Board, [1940] 1 K.B. 319, at p. 338:

> ... it must be remembered that when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there would be some inconvenience in [page1252] submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority had acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.

This statement was approved by Lord Wilberforce in Anns v. Merton London Borough Council, [1978] A.C. 728, at p. 754.

45 If a court assumes the power to review a policy decision which is made in accordance with the statute, this amounts to a usurpation by the court of a power committed by statute to the designated body. As pointed out by Wilson J. in City of Kamloops v. Nielsen, supra, at pp. 9-10:

> It is for the local authority to decide what resources it should make available to carry out its role in supervising and controlling the activities of builders. For example, budgetary considerations may dictate how many inspectors should be hired for this purpose, what their qualifications should be, and how often inspections should be made. He approved the statement of du Parcq L.J. in Kent v. East Suffolk Rivers Catchment Board ... that public authorities have to strike a balance between the claims of efficiency and thrift and whether they get the right balance can only be decided through the ballot box and not in the courts.

46 In Anns v. Merton London Borough Council, supra, Lord Wilberforce was of the opinion that although the exercise by a public authority of discretionary power was not entirely immune from attack, it was open to challenge only if no consideration was given to whether to exercise the power which, there as here, was whether to inspect and the manner of the inspection, supra, at p. 755. He did not elaborate as to whether such a challenge could be by way of a claim for damages by a person injured by the failure to inspect. Lord Salmon, however, was of the view that an improper exercise of discretion could only be corrected by certiorari or mandamus, and did not give rise to an action for damages, supra, at p. 762.

47 In the following passage, at p. 755, Lord Wilberforce makes it clear that a decision to inspect, [page1253] and the time, manner and techniques of inspection, may all be within the discretionary power:

> There may be a discretionary element in its exercise -- discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care. But if he can do this, he should, in principle, be able to sue.

48 If, as here, the statute creates no duty to inspect at all, but simply confers a power to do so, it follows logically that a decision to inspect and the extent and manner thereof are all discretionary powers of the authority.

49 It is not suggested here that the respondent failed to consider whether to inspect or the manner of inspections. The trial judge and the Court of Appeal found that a policy decision [page1254] was made that inspections would be carried out by a crew of men called the Rockwork Section. In view of the fact that the crew had responsibility for the inspection of the slopes of all highways, the extent and manner of the inspection was delegated to the Rockwork Section. While it might be suggested that guidelines for inspection should have been laid down for the guidance of the crew, this would be second guessing the policy decision and not a matter for the Court. The appellant's attack on the conduct of the respondent and its employees is an attack on the manner in which they carried out the inspection and scaling of the mountain. The Rockwork Section had decided it could not closely monitor all slopes at all times. Some slopes would only be visually inspected from the highway. The appellant contended that the slopes above man-made cuts should have been closely inspected and that the trees should have been removed within ten feet of a cut slope. The trial judge made the following important findings concerning the decision of the respondent as to the extent and manner of the inspection program:

> The question in the case at bar is thus whether the failure of the Crown to take the steps which the plaintiff says it should have taken to prevent the rock fall was a matter of policy or operational. In order to answer it, it is necessary to consider the nature of the decisions here in question. The Crown had never established as a matter of policy that all slopes above highways must be inspected for potential rock fall. Nor had it laid out specific guidelines for dealing with problems if danger was perceived. What it had done was to establish a small crew of men (the rock scaling crew) to deal with problems arising on cliff faces throughout the Province. This crew responded to specific requests from various highway districts for inspection and scaling. For the most part, however, it developed and followed its own program. Given that it was responsible for inspection of slopes and appropriate remedial measures for all the highways in the Province, it could not closely monitor all slopes at all times. The slope here in question was visually inspected from the highway on a number of occasions. However, there had never been scaling or close inspection of the area above the cut because the rock scaling crew did not deem that work to be a priority.

50 In stating that the authority "must specifically consider whether to inspect and if so the system must be a reasonable one in all the circumstances", my colleague is extending liability beyond what was decided in Anns v. Merton London Borough Council, Barratt v. District of North Vancouver, and City of Kamloops v. Nielsen, supra. The system would include the time, manner and technique of inspection. On this analysis it is difficult to determine what aspect of a policy decision would be immune from review. All that is left is the decision to inspect. It can hardly be suggested that all the learning that has been expended on the difference between policy and operational was expended to immunize the decision of a public body that something will be done but not the content of what will be done. It seems to me that a decision to inspect rather than not inspect hardly needs protection from review. The concern that has resulted in extending immunity from review in respect of policy decisions is that [page1255] those entrusted with the exercise of the statutory powers make the decision to expend public resources. It is not engaged by a decision simply to do something. It is the decision as to what is to be done that will entail the taxation of the public purse. Lord Wilberforce underscores this concern when he states, at p. 754:

> Let us examine the Public Health Act 1936 in the light of this. Undoubtedly it lays out a wide area of policy. It is for the local authority, a public and elected body, to decide upon the scale of resources which it can make available in order to carry out its functions under Part II of the Act -- how many inspectors, with what expert qualifications, it should recruit, how often inspections are to be made, what tests are to be carried out, must be for its decision. It is no accident that the Act is drafted in terms of functions and powers rather than in terms of positive duty. As was well said, public authorities have to strike a balance between the claims of efficiency and thrift (du Parcq L.J. in Kent v. East Suffolk Rivers Catchment Board [1940] 1 K.B. 319, 338): whether they get the balance right can only be decided through the ballot box, not in the courts.

51 In this case, the extent of the inspection program was delegated to the Rockwork Section. The respondent acted within its statutory discretion in making that decision. It was a decision that inspections should be done and the manner in which they should be done. In order for a private duty to arise, it would have to be shown that the Rockwork Section acted outside its delegated discretion to determine whether to inspect and the manner in which the inspection is to be made.

52 The principal authorities in this Court do not support my colleague's view that the manner and extent of inspections are operational. Indeed, they confirm that these are the very substance of policy. In Barratt v. District of North Vancouver, supra, the respondent municipality had authority under s. 513(2) of the Municipal Act, R.S.B.C. 1960, c. 255, to lay out, maintain and improve highways. It [page1256] was, however, under no statutory duty to maintain highways. The respondent adopted a system of road inspections which required an inspector to travel all roads once in each two-week period. An accident occurred when the plaintiff rode his bicycle into a pot-hole on Marine Drive which had been inspected a week before. There was no allegation that the inspection was made improperly or negligently. I do not agree with my colleague that the basis for this decision was a determination that the policy was reasonable. That finding does not appear in the reasons of Martland J. although he referred to the evidence that the system of road inspection was well organized. The basis for the decision was that the program of inspection was a matter of policy or planning which could not be the basis for an allegation of negligence. At page 428 Martland J. states:

> In my opinion, no such duty existed. The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another.

Then, after citing du Parcq L.J. in Kent v. East Suffolk Rivers Catchment Board, supra, he continued, at p. 428:

> My conclusion is that the trial judge sought to impose upon the Municipality too heavy a duty, that the determination of the method by which the Municipality decided to exercise its power to maintain the highway, including its inspection system, was a matter of policy or planning, and that, absent negligence in the actual operational performance of that plan, the appellant's claim fails.

53 In City of Kamloops v. Nielsen, supra, the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It exercised this power in favour of regulating construction [page1257] in accordance with a by-law which, inter alia, provided for the depth of footings. The by-law also imposed a duty in the City's building inspector to enforce the by-law by inspection. The inspector failed to inspect as required in order to determine whether work was progressing in accordance with the by-law. Wilson J., speaking for the majority, held that the provisions of the by-law were policy whereas in carrying out the inspection required by the by-law, the inspector was bound to act with reasonable care. It is clear that the provisions of the by-law which "provided for a scheme of inspections at various stages of construction" (at p. 12) was considered policy. The failure to enforce a stop work order and to inspect in order to determine whether the by-laws were being complied with was conduct outside of the area of delegated discretion. It was a departure from the duty created by the by-law and therefore a common law duty of care based on the proximity principle arose. It is significant that in the course of her reasons Wilson J. dealt with the judgment in Barratt v. District of North Vancouver, supra. She makes clear in the following passage, at p. 20 of her reasons, that Barratt v. District of North Vancouver decided that a decision by the municipality as to the extent of inspections is a policy matter which cannot be the foundation for an action in negligence:

> The second is that it seems to be central to his judgment that no duty was imposed upon the municipality. It was in the discretion of the municipality whether or to what extent it exercised its maintenance power. The courts could not therefore interfere in the absence of negligence in the implementation of the policy it adopted with respect to inspection. This, it appears to me, is the ratio of the decision in Barratt. [Emphasis added.]

54 In order for a private duty to arise in this case, the plaintiff would have to establish that the Rockwork Section, having exercised its discretion as to the manner or frequency of inspection, carried out the inspection without reasonable care or at all. [page1258] There is no evidence or indeed allegation in this regard. In this respect, the decision in Barratt v. District of North Vancouver, supra, is on all fours and ought to be applied here. I would therefore dismiss the appeal.

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