Bureaucrat Beware: B.C. Court refuses to strike novel tort of breach of statutory duty

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On September 10, 2021, the Supreme Court of British Columbia dismissed an application by the Attorney General of Canada to strike a claim by a plaintiff alleging a novel "tort of breach of statutory duty". In *Frazier v. Kendall,* 2021 BCSC 1791, the court held that the plaintiff's allegation that regulators owe a duty of care to the general public had a reasonable prospect of success, and could proceed to trial.

This is not a final decision, and only allows the plaintiff to advance her claim to trial. However, more broadly, *Frazier* represents a potential departure from the narrow scope of tort liability currently available against government regulators.

Background

On August 7, 2018, the plaintiff, Ms. Frazier, suffered physical and mental injuries from an explosion that occurred while she was shopping in Queen Charlotte Village, B.C. The blast was caused by improperly stored explosives located in a neighboring auto body shop that were ignited by a fire on the shop's roof.

The plaintiff sued the government of Canada in negligence for failing to properly administer the *Explosives Act,* R.S.C. 1985, c. E-17 and the *Explosive Regulations,* S.O.R./2013-211. Ms. Frazier claimed that the federal regulators of explosives knew or should have known that the explosives endangered public safety, and failed to reasonably carry out their statutory duty to safeguard the public.

The government of Canada brought a motion under Rule 9-5(1) of the *Supreme Court Civil Rules* to strike the plaintiff's pleadings on the basis that it disclosed no reasonable cause of action, as no such duty of care by government regulators to the general public exists.

The Court was thus tasked with determining whether public regulators owe a common-law duty of care to a member of the general public who was injured as a result of their alleged failure to perform their statutory obligations.

Decision

Mr. Justice Coval began his decision by acknowledging that no such "tort of breach of statutory duty" exists in Canadian law. As such, the Court embarked on an analysis of the *Anns/Cooper* framework, for establishing novel duties of care if the following two circumstances are met:

1. A novel duty of care is presumed if a similar duty of care has been recognized in analogous circumstances, or if the parties' relationship has sufficient proximity and foreseeability; and
2. There are no residual policy considerations (i.e. compelling negative effects on the legal system or society) that justify rebutting the presumed duty of care.

Analogous cases

The Court reviewed a number of analogous cases which found duties of care owed by public authorities, such as building inspection and mining cases (including the well-known case of Fullowka v. Pinkerton's of Canada Ltd., 2010 SCC 5 regarding the unfortunate deaths of several miners at the Giant Mine in Yellowknife, N.W.T.). However, the Court distinguished those cases on the basis that:

1. In the mining cases, the inspectors had visited the mines on several occasions and were intimately aware of the ongoing dangers and the specific miners at risk.
2. The Court of Appeal in *Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34 cautioned that building inspection cases may no longer serve as precedent for recognizing public duties of care, as they were decided before the changes to the duty of care analysis in *Cooper v. Hobart*, 2001 SCC 79.
3. In all of these cases, the regulators' statutory duties involved a duty to act and were directly related to regulating those risks and protecting the individuals in question.

Proximity and foreseeability

Finding no analogous duties of care, the Court then sought to determine if the parties' relationship had sufficient proximity, and whether there were any residual policy considerations limiting any such duty of care. Importantly, the Court caveated that the standard for finding novel claims is more generous in Rule 9-5(1) applications.

In finding that there was a reasonable prospect of establishing a novel duty of care in this case, Coval J. noted the following:

1. The regulators in the case at bar knew or should have known of the unsafe explosives and nevertheless approved licensing of the explosives and failed to remedy the danger posed;
2. The proposed duty would not interfere with the regulators' duties or the legislative scheme; and
3. The scope of claims would not be vast, as it would be limited to members of the general public who are in the immediate vicinity of a disaster, and where the regulator was aware of the special dangers posed.

Implications

The decision in *Frazier* represents a significant step in the expansion of tort liability for public regulators. Where such claims would otherwise be dismissed as disclosing no reasonable cause of action, this case may become precedent for recognizing a duty of the Crown to diligently safeguard members of the public, or risk tort liability for breach of their statutory duties.

However, there are a number of important caveats with respect to the precedential value of this case. For one, the proposed duty of care in this case would be limited to a small segment of the general public who are in the immediate vicinity of the danger posed, and where the regulator was aware of that specific danger. Secondly, this case involved a Rule 9-5(1) application, whereby the court can be more lenient in finding novel causes of action. As is the case in the ongoing dispute with respect to a novel tort of breach of customary international law in *Nevsun v. Araya*, 2020 SCC 5, finding a "reasonable prospect of success" is only half the battle, as the plaintiff faces a higher threshold in succeeding at a trial proper.

For any questions regarding this decision, please contact your BLG lawyer or any of the key BLG contacts listed below.

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