SUPREME COURT OF YUKON

Citation: *Fuller* v. *Schaff et al.,* 2009 YKSC 22

Date: 20090326
S.C. No. 05-A0075
Registry: Whitehorse

Between:

CHRISTOPHER LANCE FULLER

PLAINTIFF

And

DANIEL RICHARD SCHAFF, THE COMMISSIONER OF YUKON, HAROLD FRASER and THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

And

THE COMMISSIONER OF YUKON and HAROLD FRASER

THIRD PARTIES

Before: Mr. Justice L.F. Gower

Appearances:

Debra L. Fendrick	Counsel for the Plaintiff
Richard A. Buchan	Counsel for the Defendants Daniel Richard Schaff and The Attorney General of Canada
Zeb Brown	Counsel for the Defendants and Third Parties The Commissioner of Yukon and Harold Fraser

RULING
(Applicability of Defences)

INTRODUCTION

[1] At the close of this trial, counsel for Harold Fraser and the Commissioner of Yukon (the "Government defendants") made submissions on two defences which I will refer to

as the “policy” defence and the “statutory bar” defence. Counsel for Mr. Schaff and the Attorney General objected to these defences being raised at this point, as neither the defences, nor the material facts in support of them, were pleaded by the Government defendants. Counsel for the plaintiff also objected on these grounds, but only with respect to the statutory bar defence.

[2] With respect to the “policy” defence, counsel for the Government defendants submits that governmental authorities are entitled to make policy decisions based upon budgetary factors, and that such policy decisions are not reviewable by the courts as long as the policy itself is rational and made in good faith. This defence applies to the issue of duty of care. Counsel submits that, regardless of whether the duty of care is said to arise at common law or by statute, a court must go further and (a) review the applicable legislation to see if it provides an exemption from liability, and (b) consider whether the conduct at issue was the result of a true “policy” decision of the government agency, as distinct from an operational manifestation of such a policy. If it was the former, then the government may be exempt from liability.

[3] The “statutory bar” defence arises from s.18(7)(b) of the Yukon *Highways Act*, R.S.Y. 2002, c. 108, which reads as follows:

> “18(7) No action shall be brought against the Government of the Yukon for the recovery of damages caused
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> …
>
> (b) by or on account of any construction, obstruction, or erection or any situation, arrangement, or disposition of any earth, rock, tree, or other material or thing adjacent to or in, along, or on the highway that is not on the travelled surface.”

The argument is that the airborne snow in the snow cloud at issue was in the nature of "material" or a "thing" not on the travelled surface of the roadway, and therefore the Government is immune from any action for the recovery of damages resulting from such a snow cloud.

[4] All counsel have asked that I deliver my ruling on these objections before issuing my reasons for judgment on the merits of the case. The plaintiff's counsel and counsel for Mr. Schaff have both indicated that, if I were to allow these defences to be raised at this late stage, their clients would be significantly prejudiced because they have not sought document or other discovery from the Yukon Government relating to those issues, nor have they tendered relevant evidence of their own. Accordingly, if I am to allow the defences, either the plaintiff or Mr. Schaff, or both, may seek to reopen their respective cases so that further evidence can be led to meet these defences.

RULES OF COURT

[5] In resolving these objections, I begin by observing the object of the *Rules of Court* in Rule 1(6):

> "The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits …"[1]

[6] I refer to also certain sub-rules under Rule 20:

> "Contents
>
> (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.
>
> …

[1] I refer here to the Yukon *Rules of Court* effective September 15, 2008. Pursuant to Rule 1(18), "unless the court otherwise orders, all proceedings, whenever commenced, shall be governed by these rules." (my emphasis)

> (3) A party need not plead a fact if it is presumed by law to be true or if the burden of disproving it lies on the other party.
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> …
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> Objection in point of law
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> (9) A party may raise in a pleading an objection in point of law.
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> Pleading conclusions of law
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> (10) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.
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> …
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> Pleading after the statement of claim
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> (17) In a pleading subsequent to a statement of claim a party shall plead specifically any matter of fact or point of law that
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> (a) the party alleges makes a claim or defence of the opposite party not maintainable,
>
> (b) if not specifically pleaded, might take the other party by surprise, or
>
> (c) raises issues of fact not arising out of the preceding pleading.
>
> …
>
> General denial sufficient except where proving different facts
>
> (22) It is not necessary in a pleading to deny specifically each allegation made in a preceding pleading and a general denial is sufficient of allegations which are not admitted, but where a party intends to prove material facts that differ from those pleaded by an opposite party, a denial of the facts so pleaded is not sufficient, but the party shall plead his or her own statement of facts if those facts have not been previously pleaded. “

CASE LAW ON PLEADINGS

[7] The essential purpose of pleadings is to define the issues, giving the opposing parties fair notice of the case they have to meet, and to provide the context for effective pre-trial case management, the extent of disclosure required, as well as the parameters

or necessity of expert opinions: See *Keene* v. *British Columbia (Ministry of Children and Family Development*), 2003 BCSC 1544; and *No. 1 Collision Repair & Painting (1982), Ltd.* v. *I.C.B.C.* (1994) 30 C.C.L.I. (2d) 149 (B.C.S.C.).

[8] In *Harry et al.* v. *British Columbia*, 1998 CanLII 6658 (B.C.S.C.) Smith J. stated at para. 5:

> "[5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide."

[9] In *Peterson* v. *Bannon et al.* (1993), 107 D.L.R. (4th) 616 (B.C.C.A.), at para. 21, the British Columbia Court of Appeal accepted the definition of "material fact" from *Odgers' Principles of Pleading and Practice*, 23d. ed. (London: Sweet and Maxwell, 1991) "…as a fact which is essential to the plaintiff's cause of action or to the defendant's defence... "

[10] Rule 20(17) of the *Rules of Court* is identical to its predecessor in Rule 19(15) of the British Columbia Supreme Court Rules, B.C. Reg. 221/90, which this Court followed prior to September 15, 2008. That sub-rule was considered by Gansmer Co. Ct. J. in *Ponti* v. *Marathon Motors Ltd*. (1978), 9 B.C.L.R. 46 (B.C.Co.Ct). In that case the defendant moved on the opening of trial to dismiss the plaintiff's action on the ground that the cause of action was statute barred. The defendant had not pleaded the *Limitations Act* in its statement of defence. The court noted the requirement under Rule 19(15)(a)

that a party shall specifically plead any point of law that he alleges makes the claim of the opposite party not maintainable. The court addressed and granted the defendant's motion to dismiss, but subject to the condition that the defendant amend its statement of defence within 10 days to plead the provisions of the *Limitations Act*. (See also *Hecht* v. *Grand Lodge* (1956), 20 W.W.R. 181 (Man. Q.B.), at paras. 13 and 16).

[11] Similarly, in *Hrynenko* v. *Hrynenko* (1997), 37 B.C.L.R. (3d) (S.C.), Maczko J., referred to Rule 19(15) of the *Supreme Court Rules* in British Columbia, and noted, at para. 9, that the Rule has been interpreted by courts in British Columbia to mean that a statute of limitations must be pleaded, relying in part on the *Ponti* decision, cited above.

[12] The Supreme Court of Canada in *Tolofson* v. *Jensen*, [1994] 3 S.C.R. 1022, has also concluded that a substantive limitation defence may be waived by the failure to plead it (para. 88).

[13] *Schoch* v. *Guaranty Trust Co. of Canada* (1991), 9 B.C.A.C. 224, applied Rule 19 outside the context of a statute of limitation. The plaintiff was granted judgment at trial in an action for a wrongful release of escrow shares owned by the plaintiff in a corporation, in breach of specific terms of an escrow agreement, with the defendant as escrow agent. At trial, the defendant advanced two arguments not contained in its pleadings; the first related to the free marketability of the shares, and the second related to causation. The defendant appealed its loss to the British Columbia Court of Appeal, which held that the provisions of Rule 19(15)(a) and (b) were both applicable and that the failure to plead specifically the arguments raised took the plaintiff (respondent) and indeed the trial judge by surprise. The Court of Appeal held that it would not consider the two arguments on the hearing of the appeal.

ANALYSIS

Necessity to Plead?

[14] The argument that the Government defendants wish to make begins with *Kamloops (City)* v. *Neilson*, [1984] 2 S.C.R. 2, in which the Supreme Court of Canada followed the House of Lords decision in *Anns* v. *Merton London Borough Council*, [1978] A.C. 728, and made it clear that a government authority could be held liable for a negligent act in breach of a duty to a particular person to whom it owed a duty of care. However, it was also recognized that governments do not have unlimited resources and are obliged to make policy decisions about how to allocate those resources. Those decisions may result in less than complete protection to those to whom a duty of care might otherwise be owed in a particular situation: see *Just* v. *British Columbia*, [1989] 2 S.C.R. 1228; *Brown* v. *British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; and *Swinamer* v. *Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445.

[15] Counsel for the Government defendants argues that it was sufficient for his clients to deny the allegations of negligence by the plaintiff and Mr. Schaff (by counterclaim and third party claim) in order to join issue on the duty of care which those parties must prove to be successful on their torts claims. He submits that when a plaintiff alleges negligence against a government agency, a careful examination of the duty of care is required, based on the approach taken to the issue by the Supreme Court of Canada in *Just*, *Brown* and *Swinamer.* Those cases hold that the first step in establishing a duty of care is to determine whether there is a sufficient relationship of proximity between the plaintiff and the government agency to give rise to a *prima facie* duty of care. If such a

relationship is proven, a court must next look to the applicable legislation to see if it provides any exemption from liability or limitation on the duty of care. Lastly, it must be determined whether the government agency is exempt from liability on the grounds that its conduct was the result of a true "policy" decision by the government agency. Thus, counsel for the Government defendants argues that it was implicit that the parties and this Court would have to address both the questions of the policy defence and the statutory bar defence, since the latter is arguably a limitation on the Government's duty of care.

[16] Further, and specifically with reference to the statutory bar defence, counsel for the Government defendants submits that the parties cannot maintain they have been taken by surprise on this issue, since he gave them written notice of his intention to raise the defence in the context of a pre-trial settlement conference.

[17] However, in their statement of defence, the Government defendants expressly acknowledge that the *Highways Act* imposes a legal duty upon the Yukon Government to clear the roads. This is obviously a reference to the "duty to maintain highways", set out in ss. 18(1), (3) and (4) of the *Highways Act*. As noted, there is no reference in any of the defensive pleadings of the Government defendants to either the policy defence or the statutory bar under s. 18(7)(b) of the *Highways Act*. Nor are there any facts pled by those defendants which would suggest reliance upon either of those defences.

[18] With respect to the policy defence, counsel for the Government defendants called as a witness, Donald Hobbis, Director of the Transportation Maintenance Branch of the Yukon Government's Department of Highways. Mr. Hobbis testified, among other things, about the operations and maintenance budget for the Department of Highways, the

number of grader stations in the Yukon, the total number of kilometres the Department is responsible for, and other related facts. Counsel now seeks to argue that the manner in which Mr. Fraser was operating the snowplow on the day of the accident was pursuant to certain policy decisions by his employer resulting from those budgetary considerations. Thus, goes the argument, the Government should be immune from a judicial review of those policy decisions and that immunity negates its duty of care in this context.

[19] However, the evidence of Mr. Hobbis differed significantly from the material facts pleaded by the plaintiff and Mr. Schaff and was certainly not foreshadowed by any of the defensive pleadings of the Government defendants. Accordingly, it seems to me that Rule 20(22) applies. That sub-rule allows that a general denial of a previous pleading is sufficient in most cases,

> "… but where a party intends to prove material facts that differ from those pleaded by an opposite party, a denial of the facts so pleaded is not sufficient, but the party shall plead his or her own statement of facts if those facts have not previously pleaded."

This seems to follow from the general requirement in Rule 20(1) that a pleading must contain "the material facts on which the party relies." I repeat that the Government has not pled any material facts relating to either the policy defence or the statutory bar defence.

[20] In addition, I view the failure to plead the statutory bar defence as akin to the failure to plead a substantive limitation defence and for that reason alone, it should have been pled.

[21] Most importantly, both of these defences involve matters of fact or points of law, which the Government, in effect, submits makes the claim of the opposite parties "not

maintainable." Therefore, they fit squarely within the gamut of Rule 20(17)(a). In addition, both defences can be said to have taken the plaintiff and Mr. Schaff by surprise, contrary to Rule 20(17)(b). Finally, both defences raise issues of fact not arising out of the preceding pleadings, contrary to Rule 20(17)(c).

[22] In the result, I conclude that the failure to plead either the policy or the statutory bar defences can be deemed to be a waiver of those defences and, accordingly, I give them no effect.

Settlement Privilege?

[23] With respect to the statutory bar defence, it is no answer that counsel for the Government defendants made a communication to the other parties about that defence in the context of a settlement conference. It is trite to observe that all communications in a settlement conference context are assumed to be without prejudice and off the record, unless the parties agree, or the court orders, otherwise. In other words, all such communications are subject to settlement privilege. Indeed, Rule 37(6) of the *Rules of Court* states: "Settlement conferences are without prejudice and offers, discussions or briefs cannot be raised at trial."

[24] The three criteria for settlement privilege are set out by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*, 2d. ed. (Markham: Butterworths, 1999) at p. 810:

> "(a) litigious dispute must be in existence or within contemplation;
>
> (b) the communication must have been made with the express or implied intention that it would not be disclosed to the court in the event that the negotiations failed; and,

(c) the purpose of the communication must be to attempt to effect a settlement."

It would seem to me that the communication alleged by counsel for the Government defendants would fit squarely within these three criteria.

[25] However, in response, counsel cited my earlier decision in *Ross River Dena Council* v. *The Attorney General of Canada*, 2009 YKSC 04, where I addressed the question of whether settlement privilege can be waived in certain circumstances.

In that case, I referred to *S. & K. Processors Ltd.* v. *Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.), where McLachlin J., as she then was, commented on the waiver of solicitor-client privilege, at para. 6:

> ""Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. …" (my emphasis)

There, I also referred to *Leadbeater* v. *Ontario* (2004), 70 O.R. (3d) 224, and *Sovereign General Insurance Co.* v. *Tanar Industries Ltd.*, 2002 ABQB 101, as support for the proposition that waiver may arise when a party raises an issue about their state of mind.

[26] In his reply submission on the pleadings issues, counsel for the Government defendants refers to the objections of the other parties that they were taken by surprise by the statutory bar defence. He then submits that this objection "lifts the veil of settlement conference privilege". It is unclear what exactly is meant by this submission. It may be that he is suggesting the other parties put their "state of mind" in issue by claiming surprise. Alternatively, it may mean that it would be "unfair" in the circumstances to deny the Government the opportunity to raise the statutory bar defence

now, when it was clearly communicated to the other parties on the previous occasion of the settlement conference.

[27] With respect to the former possible interpretation, the cases referred to in *Ross River* deal with situations where "state of mind" has been put in issue through the pleadings or by a party's words or conduct. None of those circumstances pertain here, since we are simply dealing with the submissions of counsel. I also note that, in *Sovereign General Insurance*, Clackson J., at para. 46, quoted authorities for the proposition that there is not waiver in every instance where the state of mind of an opposite party is in issue.

[28] With respect to the possible "fairness" argument, in *Ross River* I acknowledged that settlement privilege is a privilege which belongs to both parties and cannot be unilaterally waived by either. Rather, both parties must expressly or impliedly intend to waive the privilege. However, I continued that waiver may also occur in the absence of an intention to waive, where fairness so requires. The circumstances in *Ross River* were that the defendant had pleaded "no knowledge" of certain facts which were expressly referred to in an allegedly privileged document, which was exclusively in the defendant's possession (I was aware of the contents of the document because the parties agreed that I could inspect it in order to decide the application under Rule 25(15) of the *Rules of Court*). I concluded that the issue was of such central importance to the plaintiff that it would be unfair to deny them the opportunity of discovering the defendant on the document by upholding the asserted settlement privilege. Accordingly, I found that there had been a waiver of settlement privilege by the defendant's "no knowledge" pleadings.[2]

[2] The case is currently under appeal to the Yukon Court of Appeal, 08-YU627

[29] *Ross River* is distinguishable from the case at bar. Here, the plaintiff and Mr. Schaff were entitled to assume that all communications in the settlement conference context would remain without prejudice, as that is the law and the usual practice in this Court. Having received no communication from the Government outside the settlement conference context that it intended to rely upon the statutory bar defence, the plaintiff and Mr. Schaff had no reason to anticipate that the argument would be raised at trial. That is the very purpose behind Rule 20(17)(a), which requires a party to "plead specifically" any matter of fact or point of law that it says makes the claim of the opposite party not maintainable. At a minimum, Rules 20(1) and 20(22) require the material facts in support of a defence be pleaded, if those facts are not otherwise raised by an opposite party. Whether the default by the Government was by oversight or design matters not for present purposes. I cannot accept the proposition that it would be "unfair" to the Yukon Government to deny it the opportunity of raising the statutory bar defence at this stage, based upon its own default under Rule 20. Accordingly, in this procedural context, I can give no effect to the submission that settlement privilege has been waived.

POLICY DEFENCE NOT APPLICABLE

[30] If I am in error in refusing to give effect to the policy defence, I conclude that it would not arise in any event. In short, I agree with the plaintiff's counsel that ss. 18(1), (3) and (4) of the *Highways Act* gives rise to a statutory duty of care, to which a policy defence is not applicable.

[31] In *Kennedy* v. *Waterloo County Board of Education* (1999), 45 O.R. (3d) 1, the Ontario Court of Appeal referred to the *Just, Brown* and *Swinamer* trilogy of cases. At para. 19, Feldman J.A., speaking for the Court, observed that one issue not specifically

addressed in those three cases was whether the policy defence can have any application where the duty of care on the government agency does not arise as a result of a relationship of proximity, but instead by statute. He posed the question this way:

> "… in such a case, can there be room for a policy decision to be made which would in any way exempt the government agency from its statutory duty? In effect, the legislature has already made its policy decision by mandating the statutory duty."

Feldman J.A. noted that Sopinka J. pointed this out in his dissenting judgment in *Just*, where, at para. 37, he stated that the issue in that case was "the liability for negligence of a public body in the absence of the breach of a statutory duty of care" (my emphasis). Sopinka J. further said that the analysis of the House of Lords in *Anns* applied strictly where a statute confers a power on a government agency, as opposed to a duty, and that it was only in the former situation that the law had been altered by that case. Sopinka J. concluded at para. 43: "If a statutory duty to the plaintiff is breached, the private duty based on the neighbourhood principle is unnecessary." Feldman J.A. observed that, although Sopinka J.'s conclusion may appear to be self- evident, the majority decision made no direct reference to the distinction. Further, he interpreted Cory J. in *Just* as finding that the province of British Columbia owed a common law, not statutory, duty of care to users of its highways to reasonably maintain those highways. Similarly, Feldman J.A. looked to Cory J.'s comments in *Swinamer*, where, in considering s. 5 of the *Public Highways Act* of Nova Scotia, which provides that "… nothing in this Act compels or obliges the Minister to construct or maintain any highway or to expend money on any highway", he said at para. 26:

> "… [I]n my view, the absence of a provision providing a specific statutory obligation to maintain is not sufficient to exempt the

> Crown from the general common law duty of care owed to users of the highway…" (my emphasis)

Feldman J.A. interpreted Cory J.'s analysis as relevant to the duty of care arising at common law, and found that there was nothing in the majority decisions in *Just* or *Swinamer* which derogated from Sopinka J.'s position that the cases did not involve a statutory duty, but only a statutory power. Therefore, Feldman J.A. concluded that the exempting effect of a policy decision is not applicable where a duty of care is imposed by statute rather than arising at common law (paras. 25 and 26).

[32] It is significant to me that an application for leave to appeal *Kennedy* to the Supreme Court of Canada was dismissed without reasons on March 23, 2000.[3]

[33] The Ontario Court of Appeal followed *Kennedy* in its subsequent decision in *Restoule* v. *Strong (Township)* (1999), 123 O.A.C. 346. That was a negligence action against the Township of Strong. The plaintiff had slipped and fallen on ice on an icy road, where there were no sidewalks. Due to a lack of resources, the Township seldom sanded all of its roads, and did so only when rain and freezing temperatures were expected. Further, to save overtime costs, the Township did not sand or inspect its roads on weekends, except in emergencies. The trial judge applied a policy defence and dismissed the action. Disagreeing, the Court of Appeal held that the Township owed a statutory duty of care to the plaintiff under s. 284(1) of the *Municipal Act* and concluded:

> "[14] … It follows that it was unnecessary for [the trial judge] to enter upon the policy/operational analysis in respect to the liability of the Township as it was under a statutory duty to keep the highway in good repair. Accordingly, [the trial judge] erred in exempting the Township from liability on the basis of this analysis.

[3] [1999] S.C.C.A. No. 399

> [15] … as *Kennedy* holds, the Township could not make a policy decision which would allow it to avoid compliance with its' statutory obligation. Therefore, if the failure of the Township to maintain a reasonable inspection system of the relevant area, together with its decision to work a five day week, constituted a breach of its statutory duty, it would be no defence for the Township to say that it made a policy decision to exempt itself from that duty. See, also, *R.* v. *East Sussex County Council, Ex parte Tandy,* [1998] A.C. 714. (H.L.)." (my emphasis)

[34] *Kennedy* has been considered in British Columbia. In *Fox* v. *Vancouver (City)*, 2003 BCSC 1492, Brooke J., was considering the liability of the City under the *Occupiers Liability Act*, in a situation where the plaintiff had injured herself on an uneven sidewalk. He referred to *Kennedy* as a "carefully considered decision", but went on to distinguish it on its facts. In *Kennedy*, the defendant school board had erected a vehicle barrier by connecting a row of 22 bollards with chains. The chains were removed, but the bollards were left in place. The plaintiff was seriously injured when he lost control of his motorcycle, upon leaving the school grounds, and his head hit one of the bollards. The defendant school board sought immunity for its decision to leave the bollards in place and argued that it was a true policy decision. As I noted above, the Court of Appeal in *Kennedy* held that the policy defence was not applicable because the duty of care arose by statute. However, in the alternative, the Court also held, at para. 32, that if it were relevant to determine whether the decision not to remove the bollards was a true policy decision, there was no evidence that the school board's decision was based upon considerations of policy, financial resources and constraints, or social and economic factors. Brooke J. in *Fox* purported to distinguish *Kennedy* because in *Fox* the defendant had provided ample evidence of the social and economic factors that went into their decision to not fix the uneven ground.

[35] Similarly, in *Knodell* v. *New Westminster (City)*, 2005 BCSC 1316, Joyce J. was trying an action where the plaintiff fell on ice and injured herself while walking on a sidewalk owned and maintained by the City of New Westminster. The plaintiff alleged that the City was negligent and breached its duty at both common law, and as was the case in *Fox*, under the *Occupiers Liability Act*. The City raised the policy defence, as Joyce J. noted at para. 14:

> "Counsel for the City submits that governmental authorities, including municipalities, are entitled to make policy decisions based upon budgetary factors and that such policy decisions are not reviewable by the courts as long as the policy itself is rational and made bona fide … Counsel submits that the City's policy with respect to sidewalk inspection and maintenance is just such a policy and that the City is immune from liability as long as it was not negligent in carrying out the policy." (citations omitted)

[36] Joyce J. also commented on the difficult task of determining which decisions fall under the category of "true policy" decisions and which are actionable as "operational" decisions. At para. 15 he stated:

> "*Just* and *Brown* deal with the dichotomy between true policy decisions, which are immune from review on traditional negligence principles, and operational decisions, which are not. It is a distinction that is often not easy to make." (my emphasis)

And again at para. 19:

> "The difficult nature of determining which decisions fall under the category of "true policy" and which fall under the category of "operational decisions" is apparent from the decision in *Gobin*. That case, like *Just*, involved a situation where a rock fell from a bluff above a highway. In *Gobin* the rock was small but it crashed through the windshield of a pick-up truck travelling on the highway, striking and seriously injuring an 8-year old passenger. The trial judge held that the decision of the Ministry of Transportation and Highways to postpone implementing a recommendation to mesh the relevant area until the fall rainy season was operational rather than a policy decision." (my emphasis)

[37] Briefly, the Court of Appeal in *Gobin (Guardian ad litem of)* v. *British Columbia*, 2002 BCCA 373, held that the decisions under consideration were all directed towards balancing social, economic and political needs of British Columbians and were true policy decisions. Notably, in concurring reasons, Southin J.A., decried the lack of clear provincial legislation with respect to Crown liability in the matter of highways which would "avoid the policy/operational dichotomy, which in these highway cases leads to a substantial expenditure of judicial ink" (para. 65).

[38] Continuing with *Knodell,* Joyce J. remarked at para. 23 that *Just, Brown* and *Gobin* all involved claims in negligence where there was no statutory duty imposed upon the governmental authority, and that in such cases it was necessary to determine whether the policy defence applied. He continued:

> "[25] I should have thought that where a statutory duty of care exists the policy/operational analysis simply does not arise. The policy defence, if it applies, negates a common law duty of care. That was the view taken by Sopinka J. in his concurring judgment in *Brown* at para. 2:
>
> > ... if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns* v. *Merton London Borough Council*, [1978] A.C. 728. Moreover, <u>it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care</u>.(emphasis added)
>
> [26] It was also the view taken by Southin J. in her concurring judgment in *Gobin* at para. 65, quoted above, and at para. 67 where she said:
>
> > In *Brown* v. *British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, Sopinka J. set out correctly, in my opinion, the law of British Columbia."

Joyce J. also acknowledged that the Ontario Court of Appeal in *Kennedy* had taken this view. However, for reasons of judicial comity, he declined to follow *Kennedy* because it was previously distinguished by Brooke J. in *Fox*.

[39] I am not similarly constrained and prefer to follow the reasoning in *Kennedy.* I do not find the facts in *Kennedy* serve to distinguish the reasoning and I think it is applicable here.

[40] I note as well that the majority of the Supreme Court of Canada in *Housen* v. *Nikolaisen*, 2002 SCC 33, held, at para. 76, that it is unnecessary to consider the existence of a common law duty of care when a statutory duty of care exists. Bastarache J. in dissent, agreed with this and concluded that *Just*, *Brown* and *Swinamer*, could be distinguished from *Housen* on the basis that no statutory duty of care existed in those cases (paras. 171 - 172).

FAILURE TO PLEAD DUTY OF CARE

[41] Counsel for the Government defendants also made a submission that there was an onus on the plaintiff and Mr. Schaff to specifically plead that the Yukon Government owed them a duty of care. As I understand the argument, since the plaintiff and Mr. Schaff failed to do so, the Government defendants joined issue with the general allegations of negligence by their denial of negligence. That, says counsel, put the opposing parties on notice that all of the elements of negligence were in dispute, beginning with the duty of care.

[42] Once again, I am unable to accept this argument. First of all, I find that there is no need to expressly allege that a duty of care exists if admissions are made, or facts are alleged, which, if proved, would permit a finding that a duty of care existed: see *Mitran* v.

Southland Canada Inc. (1993), 140 A.R. 272 (Q.B.). In addition, Rule 20 does not require the pleading of points of law, providing that the material facts upon which a party relies to establish such points are pleaded. In this case, I accept the submission of the plaintiff's counsel and counsel for Mr. Schaff that both of those parties have pled sufficient material facts in support of their respective claims of negligence against the Government defendants to permit this Court to hold that a duty of care exists. Further, the Government defendants have admitted that the *Highways Act* imposes a legal duty upon the Yukon Government to clear the roads, which I deem, for the reasons stated above, to be an admission that the Government owed a statutory duty of care.

[43] Even if I am wrong on this point, I note in closing that, at a case management conference, counsel for the Government defendants resiled from his written submission that the failure to plead duty of care was fatal to the cases of the opposite parties.

CONCLUSION

[44] On this ruling I conclude as follows:

1. The Government defendants ought to have pleaded the policy defence and the statutory bar defence in their statement of defence and other related pleadings. At a minimum, the Government defendants should have pleaded the material facts upon which they intended to rely in arguing those defences, in order to put the opposing parties on notice that the defences were being raised.
2. There has been no waiver of settlement privilege which would allow the Government defendants to rely upon a previous notice of their intention to

raise the statutory bar defence in the context of a pre-trial settlement conference.

3. The result of the failure to plead these defences is that I deem them to be waived.

4. Regardless of the failure of the Government defendants to plead the policy defence as a point of law, I find that it does not arise in any event, because the duty of care in this case originates from statute and not by common law.

POST SCRIPT

[45] Counsel for the Government defendants seemed to take umbrage with the implied submission of Mr. Schaff's counsel that the Government defendants "lay in the weeds" with the statutory bar argument. However, this position was expressed in the context of the point that the Government defendants had given advance notice to the opposing parties of their intention to raise the statutory bar defence during a pre-trial settlement conference, which point was unsuccessful. I would add that there has been no additional explanation provided by counsel for the Government defendants as to why this defence, or indeed the policy defence, was not specifically pleaded. I understand the argument, which I have addressed above, that the Government defendants felt the duty of care issue had been joined by their simple denial of negligence and that both defences related to that duty of care. However, that argument still fails to explain why their pleadings were not amended to put the issues squarely on the table. I cannot imagine how the Government defendants would have been prejudiced in any strategic way by doing so. Indeed, the function of pleadings is to define the issues and prevent surprise. Unfortunately, the result of their default in this regard has led, to borrow the phrase from

Southin J. in *Gobin*, to an unnecessary “expenditure of judicial ink”, not to mention time and resources by the opposing parties. It is also inconsistent with the object of the *Rules of Court* “to secure the just, speedy and inexpensive determination of every proceeding on its merits.”

Gower J.