

# Government Liability in Negligence: The Supreme Court Weighs in on Core Policy Immunity

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The Supreme Court of Canada's recent decision in [\*Nelson \(City\) v. Marchi\*, 2021 SCC 41](#) ("*Marchi*"), provides helpful guidance for municipalities and other government actors in assessing whether their actions and decisions may attract liability for negligence. Generally, the courts have recognized that a sphere of government decision making should be free from judicial supervision, so "core policy decisions" (decisions as to course of action that are based on public policy considerations) are immune from liability.

*Marchi* provides qualified clarity on certain factors a court may examine when deciding whether a decision is a true "core policy decision".

## Facts

On January 4 and 5, 2015, the City of Nelson, British Columbia experienced heavy snowfall requiring the streets to be ploughed and sanded. On Baker Street, where there were angled parking stalls, City employees ploughed and banked the snow creating a curb that separated the parking stalls from the sidewalk without clearing an access route to the sidewalk for parked drivers. On the evening of January 6, Taryn Marchi parked in one of the angled parking stalls on Baker Street. As she crossed the snowbank to access the sidewalk, she fell straight through the snow and seriously injured her leg. Ms. Marchi subsequently sued the City for negligence.

## The Trial and British Columbia Court of Appeal Decisions

Justice McEwan, writing for the British Columbia Supreme Court ("trial court") held that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions. Justice McEwan considered that the City followed its written and unwritten policies on snow removal and its "decisions were dictated by the availability of resources." Further, the trial court found that the City did not breach the standard of care because the snowbank did not pose an objectively unreasonable risk of harm.

The British Columbia Court of Appeal ordered a new trial, holding that the trial judge did not properly "engage with the distinction between government policy and operation" and that Justice McEwan's analysis on the standard of care was improperly influenced by his conclusion on snow removal decisions. The City appealed to the Supreme Court of Canada.

## The Issues before the Supreme Court of Canada

There were three issues on appeal before the Supreme Court of Canada: (1) whether the trial judge erred in concluding that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions, (2) whether the trial judge erred in his standard of care analysis, and (3) whether the trial judge erred in his causation analysis. This article focuses on the first issue.

## The Supreme Court of Canada Decision

In determining whether the City owed a duty of care to the plaintiff, the Justices Karakatsanis and Martin (writing for the Court) relied on the decision in [Just v. British Columbia, \[1989\] 2 S.C.R. 1228](#) (" *Just*").

In *Just*, a boulder fell from a slope above a public highway onto a car, causing injuries to the driver. The Court held that users of a highway were in a sufficiently proximate relationship to the Province because in creating public highways, the Province creates a physical risk to which road users are invited. Further, the Province or department in charge can readily foresee a risk to road users if highways are not reasonably maintained.

In *Just*, the Court did not have any residual policy concerns with respect to finding that the Province owed a duty of care to the plaintiff, but recognized that a public authority has immunity from negligence for "true" policy decisions. Making a distinction between policy and "operational" decisions, the Court wrote:

"[T]he public authority had settled on a plan which called upon it to 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... '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."

Ultimately, the Court found that the duty of care should be applied to the public authority defendant.

Relying on the decision in *Just*, the SCC found in *Marchi* that there is an established duty of care between the City and the plaintiff:

"[T]he relationship between the plaintiff and defendant is sufficiently close to satisfy a novel proximity analysis. This case involves foreseeable physical harm to the plaintiff and therefore engages one of the core interests protected by the law of negligence.... It would be reasonably foreseeable to the City that carrying out snow removal in a negligent manner could cause harm to those invited to use the streets and sidewalks in the downtown core."

Before determining whether core policy immunity applied in *Marchi*, the Court revisited the test set out in *Just*, and how it has evolved through the jurisprudence. From this review, the Court acknowledged that four factors have emerged to assist in assessing the nature of a public authority's decision:

#### **a. The Level and Responsibility of the Decision Maker**

How closely related is the decision-maker to the democratically-accountable official who bears responsibility for public policy decisions? The closer the decision-maker is to an elected official within the executive hierarchy, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balance of public policy considerations, the more likely this factor will lean toward core policy immunity.

#### **b. The Process by Which the Decision is Made**

The more the process for reaching a decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.

### c. The Nature and Extent of Budgetary Considerations

A budgetary decision may be a core policy decision depending on the type of budgetary decision it is. Government decisions “concerning budgetary allotments for departments or government agencies will be classified as policy decisions” because they are more likely to fall within the core competencies of the legislative and executive branches

### d. The Extent to Which the Decision was Based on Objective Criteria

The more a government decision weighs competing interests and requires making value judgements, the more likely separation of powers will be engaged because the court would be substituting its own value judgement. Conversely, the more a decision is based on “technical standards or general standards of reasonableness,” the more likely it can be reviewed for negligence.

None of the above factors is determinative alone. Moreover, further factors and hallmarks of core policy decisions may be developed and the court must make an assessment based on all of the circumstances.

Ultimately, the Supreme Court of Canada agreed with the Court of Appeal that the trial judge erred on all three conclusions. On duty of care, the City’s decision was not a core policy decision immune from negligence liability. Therefore, the appeal was dismissed, and a new trial ordered.

### Key Takeaways

This decision provides further clarity on the distinction between “operational” and “policy” decisions of government actors. Plaintiffs, government actors, and insurers will look to this decision to evaluate the extent to which a government actor may be liable in tort for negligence.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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