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BARRISTERS AND SOLICITORS

Business Bulletin January 2009 When is the Crown Liable for Negligence? by Malte von Anrep, Q.C.

To answer this question we must first understand who we are referring to when we refer to “the Crown”. The proper designation is Her Majesty the Queen in Right of the Province of Ontario. In short, our provincial government.

Our government provides many services to the public and has a general duty to provide those services in a proper and prudent manner. What happens if some government service, through negligence or neglect, does not function as anticipated and as a result someone is hurt?

Let us take the example of the government’s responsibility to provide the public with safe roads and bridges. Suddenly, a bridge collapses and a motorist is hurt.

The courts have devised a two part test to determine whether the Crown is responsible and therefore has to pay to compensate for the injury or loss.

The first question to determine is whether the injury or loss was a reasonably foreseeable consequence of the Crown’s act or omission where there is a duty to care.

The second question is whether there are policy reasons that justify not imposing liability on the Crown. For example, would imposing liability on the Crown in relation to a certain service it provides, impose such a heavy burden that the service would be discontinued?

In the case of the motorist injured when the bridge collapsed, the Crown would probably be responsible for the loss suffered as it is clearly foreseeable that if a bridge collapses, motorists travelling on that road could be injured and suffer losses. Secondly, there are no established policy reasons why the Crown should not be accountable if a loss is suffered as a result of poor workmanship or improper maintenance of its bridges.

An example of where an injured party failed to meet either test posed by the two questions is the case of a person injured in a tobogganing accident. He was taken to a hospital where a doctor requested that he be transported to another hospital by air ambulance (a service provided by the Crown). No air ambulance was available for two hours. The injured person was then taken by land ambulance to the other hospital but died en route. The Crown was held not responsible in damages for failing to have an air ambulance available when requested. It was not reasonably foreseeable that the death of the injured party would result from the unavailability of an air ambulance within the two hour time frame in this case. Secondly, requiring the Crown to have an air ambulance available in every case on shorter notice would impose such a financial burden that there was the risk that the service would have to be discontinued.

So, the long answer to the short question is: Do the circumstances giving rise to the loss enable the injured party to pass the two pronged test established by the Court decisions? The facts of each case have to be analyzed carefully before an opinion on liability can be given.

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