Brown v. British Columbia (Minister of Transportation and Highways)

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Judges:	La Forest, Gérard V.; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank; Major, John C.
On appeal from:	British Columbia
Subjects:	Torts
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Brown *v.* British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420

Montague Brown *Appellant*

v.

Her Majesty The Queen in right of the province of British Columbia as represented by the Minister of Transportation and Highways *Respondent*

and

The Attorney General of Canada *Intervener*

Indexed as: Brown *v.* British Columbia (Minister of Transportation and Highways)

File No.: 22946.

1993: November 8; 1994: March 17.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Torts -- Negligence -- Duty of care -- Governmental liability -- Maintenance of highways -- Driver injured after losing control of vehicle on icy highway -- Highways Department crew still on summer maintenance schedule at time of accident -- Whether Department's decision to maintain summer schedule one of policy -- Whether Department negligent in manner in which sanding was carried out under summer schedule.

The appellant left Gold River to drive to Campbell River shortly after 8:30 a.m. on a Friday in November 1985 and, about 30 minutes later, skidded on an icy patch of highway and went over the embarkment. Three other accidents had occurred on the same stretch of highway that morning. Because of the icy highway conditions, an RCMP officer had called his detachment at 7:25 a.m. requesting a sand truck, but it was not until 8:30 a.m., after a third call, that he was informed that the Highways Department had been contacted through the control tower and that a sanding truck should be on its way. The department offices in Gold River and Campbell River were still on the summer schedule at the time of the accident. The Gold River summer schedule was operated by four men working for one long day shift Monday through Thursday and a call-out system for emergencies for the rest of the week. The tower could not reach the employee on call in Gold River because it did not have his telephone number and contacted the Campbell River office, which immediately sent out a sand truck. The on-call Gold River employee fortuitously came to the office at 9:00 a.m., was instructed to load his truck and drove out at 9:15 a.m. The appellant contended that the province was negligent in failing (1) to respond in a timely fashion to the reports of icy conditions and to remedy them; and (2) to maintain the section of the road where the accident occurred so that ice would not form on it. The trial judge dismissed the action and the Court of Appeal affirmed the judgment.

Held: The appeal should be dismissed.

Per Gonthier, Cory, Iacobucci and Major JJ.: The province owes a duty of care to those using its highways. That duty of care ordinarily extends to reasonable maintenance and would include the duty to take reasonable steps to prevent injury to users of the roads by icy conditions. The imposition of this duty of care is not excluded by statute. There is no exemption from tort liability in the *Highway Act*, and the *Occupiers Liability Act*, in particular s. 8, was not passed to exempt the Highways Department from liability for its negligent acts. Nor is the Department immune, under s. 3(2)(f) of the *Crown Proceeding Act*, from liability for negligently failing to maintain its highways. The Department, however, is exempt from the imposition of the duty of care with respect to highway maintenance because its decision to maintain a summer schedule, with all that it entailed in terms of reduced service, was one of policy. That decision involved classic policy considerations of financial resources, personnel and significant negotiations with government unions. It was truly a governmental decision. Such a policy decision cannot be reviewed on a private law standard of reasonableness. Since no allegation was made that the decision was not *bona fide* or was so irrational that it could not constitute a proper exercise of discretion, it cannot be attacked. Finally, the appellant did not establish, on a balance of probabilities, that the province was negligent in the manner in which it carried out the operational aspect of the call-out system and of the road maintenance under the summer schedule. In particular, he did not establish that the Department's negligence was responsible for the unexplained delay in responding to the request for sanding. The undoubted negligence of the Department in failing to have the home telephone numbers of the call-out employees did not affect the result of the case. Even if the home telephone number had been available, the call-out employee in Gold River could not have been on the road in time to prevent the accident.

Per La Forest and McLachlin JJ.: Subject to the comments expressed in *Swinamer*, Cory J.'s reasons were agreed with.

Per Sopinka J.: The province has the power to maintain its highways but is under no duty to do so. The manner and extent to which the power is exercised is a matter of statutory discretion. The conduct complained of in this case, with the exception of the matters referred to by Cory J. as operational, were within

the exercise of the province's statutory discretion. Provided that a public authority exercises its discretion in accordance with the power conferred on it, its actions are not reviewable by the courts under the aegis of a private law duty of care. With respect to the matters referred to as operational, for the reasons given by Cory J., no liability for negligence arises. It would be preferable, however, not to use the "policy/operational" test as the touchstone of liability.

Cases Cited

By Cory J.

Applied: *Just v. British Columbia,* [1989] 2 S.C.R. 1228; **referred to:** *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Portland (Town of) v. Griffiths* (1885), 11 S.C.R. 333; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418.

By McLachlin J.

Referred to: *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445.

By Sopinka J.

Referred to: *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *United States v. Gaubert*, 111 S.Ct. 1267 (1991); *Rowling v. Takaro Properties Ltd.*, [1988] A.C. 473; *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424.

Statutes and Regulations Cited

Crown Proceeding Act, R.S.B.C. 1979, c. 86, s. 3(2)(f).

Highway Act, R.S.B.C. 1979, c. 167.

Occupiers Liability Act, R.S.B.C. 1979, c. 303, s. 8.

Authors Cited

Bailey, S. H., and M. J. Bowman, "The Policy/Operational Dichotomy -- A Cuckoo in the Nest", [1986] *Cambridge L.J.* 430.

Cohen, David., and J. C. Smith. "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 *Can. Bar Rev.* 1.

Klar, Lewis N. "The Supreme Court of Canada: Extending the Tort Liability of Public Authorities" (1990), 28 *Alta. L. Rev.* 648.

Perell, Paul M. "Negligence Claims Against Public Authorities" (1994), 16 *Advocates' Q.* 48.

Smillie, J. A. "Liability of Public Authorities for Negligence" (1985), 23 *U.W.O. L. Rev.* 213.

Woodall, M. Kevin. "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992), 37 *McGill L.J.* 83.

APPEAL from a judgment of the British Columbia Court of Appeal (1992), 65 B.C.L.R. (2d) 232, 10 C.C.L.T. (2d) 188, 37 M.V.R. (2d) 70, 10 B.C.A.C. 303, 21 W.A.C. 303, [1992] 3 W.W.R. 629, dismissing appellant's appeal from a judgment of Drake L.J.S.C. (1989), 17 M.V.R. (2d) 69, dismissing an action for damages for negligence. Appeal dismissed.

John N. Laxton, *Q.C.*, and *Robert D. Gibbens*, for the appellant.

William A. Pearce, *Q.C.*, and *Thomas H. MacLachlan*, for the respondent.

Ivan G. Whitehall, *Q.C.*, and *Donald J. Rennie*, for the intervener.

The reasons of La Forest and McLachlin JJ. were delivered by

MCLACHLIN J. -- Subject to my comments in the companion case *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, on the source of a private law duty of care on public authorities, I agree with Cory J.

The following are the reasons delivered by

SOPINKA J. -- I have read the reasons of my colleague Cory J. and agree with the conclusion that he reaches. I would, however, adopt a somewhat different approach in arriving at this conclusion. The respondent does not have a statutory duty to maintain its highways. It has the power to do so, and the manner and extent to which the power is exercised is a matter of statutory discretion. See *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418. Indeed, 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, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

The conduct complained of in this case, with the exception of the matters referred to by Cory J. as operational, were within the exercise of the respondent's statutory discretion. Provided that a public authority exercises its discretion in accordance with the power conferred on it, its actions are not reviewable by the courts under the aegis of a private law duty of care. I agree with Cory J. that with respect to the matters discussed by him under the heading *The Operational Aspect* that no liability for negligence arises for the reasons that he gives. I would prefer not to use the "policy/operational" test as the touchstone of liability. This principle, which was formally adopted in *Anns*, was imported from the United States. It has since been rejected by the Supreme Court of the United States and by the House of Lords as an exclusive test of liability. (See *United States v. Gaubert*, 111 S.Ct. 1267 (1991), and *Rowling v. Takaro Properties Ltd.*, [1988] A.C. 473.) There is some doubt as to its status in Australia. (See *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.).) It has been criticized as ineffective and unreliable by academic writers Cohen and Smith, Woodall, Smillie, Bailey and Bowman, and Klar. (See D. Cohen and J. C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 *Can. Bar Rev.* 1; M. K. Woodall, "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992), 37 *McGill L.J.* 83; J. A. Smillie, "Liability of Public Authorities for Negligence" (1985), 23 *U.W.O. L. Rev.* 213; S. H. Bailey and M. J. Bowman, "The Policy/Operational Dichotomy -- A Cuckoo in the Nest", [1986] *Cambridge L.J.* 430; and L. N. Klar, "The Supreme Court of Canada: Extending the Tort Liability of Public Authorities" (1990), 28 *Alta. L. Rev.* 648, at p. 655.) In "Negligence Claims Against Public Authorities" (1994), 16 *Advocates' Q.* 48, at p. 57, P. M. Perell states:

Negligence Claims Against Public Authorities" (1994), 16 *Advocates' Q.* 48, at p. 57, I.M. Percell states:

> Whatever the criteria used, the cases show that characterizing the public authority's activity as a policy decision or operational activity is problematic and often unpredictable. In the *Just* case, of the 11 judges that gave judgments, six concluded that the province's actions were operational and five that the actions were a policy decision.

In view of the above, the Court may wish to reconsider at some future time the continued usefulness of this test as an exclusive touchstone of liability.

I would dispose of the appeal as proposed by Cory J.

The judgment of Gonthier, Cory, Iacobucci and Major JJ. was delivered by

CORY J. --This appeal raises again the question of the circumstances which may render a government or governmental agency liable for negligence. The questions presented in this appeal can, I believe, be answered by the application of the principles set out in *Just v. British Columbia,* [1989] 2 S.C.R. 1228.

I.Factual Background

On Friday, November 8, 1985, not long after 8:30 a.m., Montague Brown, who was the plaintiff in this case, left Gold River to drive to Campbell River in his new pickup truck. He described the road conditions at the time of his departure as good, with the road damp in places. Sometime later, when he rounded a slight curve he started having difficulty controlling his truck. He realized that he had hit black ice and should not apply his brakes. He stated that after several hundred feet of struggling he managed to pull his vehicle to the left and that shortly thereafter the truck "went like a Zamboni" and then left the road.

There had been three other accidents on the same highway that morning. All of them within a space of some seven kilometres.

The road was worn with cracks in some places and generally in need of maintenance. However,

there was no evidence that the cracking and wear and tear of the road had anything to do with the formation of the black ice that caused the accidents.

Corporal Eglinski of the RCMP was on duty in the area. Shortly before 7:00 a.m. that morning, he received a telephone call at his home concerning an accident which had occurred near the summit of the highway between Gold River and Campbell River. Ice had caused a vehicle to slide off the road into the Campbell River. At 7:25 a.m. he followed the established procedure and put in a call to RCMP offices in Courtenay to request a sanding truck because of the icy conditions on the highway. Sometime before 8:00 a.m. he was at the scene of the accident. Between 8:10 a.m. and 8:20 a.m. he made a second call to the RCMP offices in Courtenay concerning the need for sanding trucks.

At about 8:20 a.m. Corporal Eglinski came upon the scene of a second accident and shortly after that he came upon the scene of a third accident, all on the same stretch of highway. Between 8:20 a.m. and 8:30 a.m. the Corporal made a third call to the RCMP offices in Courtenay. At this time, he was told that the Ministry of Transport and Highways Control Tower at Deas Island had been contacted and that a sanding truck should be on its way.

The Highways Department office in Gold River had a duty employee assigned for any necessary work that might arise that Friday. The Deas Tower tried to reach him at about 8:30 a.m. but did not have his telephone number. Faced with this problem, the Deas Tower contacted the Campbell River office of the Department. That office sent out a salt and sand truck as soon as it was loaded, some five minutes after it received the call at 8:30 a.m.

It will be remembered that it was sometime shortly after 8:30 a.m. that Mr. Brown started from Gold River towards Campbell River. At 9:00 a.m. the Gold River employee who was on call fortuitously came to the Gold River office. Shortly after he arrived, he received a call from the Deas Island Control Tower asking him to take a salt and sand truck out to the icy parts of the highway. He immediately loaded and inspected a truck. This took about 15 minutes and he drove out of the yard around 9:15 a.m. It was about this time that Mr. Brown lost control and his truck went over the embankment on the highway.

The Campbell River salt and sand truck operator reached the scene of the Brown accident at around 9:23 a.m. He found Mr. Brown, who had been unconscious for a short period of time, climbing the embankment.

The Gold River sand truck operator said that he met the Campbell River operator 15 to 20 minutes after he left the Gold River yard. The meeting took place either some 10 to 15 miles or 10 to 15 kilometres on the Gold River side of the accident scene.

A.*The Schedule for the Gold River Highways Department Crew*

At the time of the accident, the Highways Department detachments at both Gold River and Campbell River were still on the summer schedule. They were to change over to the winter schedule the week following the accident. There is a marked difference between the winter and summer schedule. The Gold River summer system was operated by four men working for one long shift from 7:00 a.m. to 4:20 p.m. from Monday through Thursday. There was as well a call-out system for emergencies which might occur during the remainder of the week. The Gold River winter system for road maintenance called for six or seven men to work on three shifts, seven days a week.

The dates and conditions of work during the summer and winter schedules were matters of negotiation between the Department and the members of its union. Among other things, the collective bargaining agreement contemplated that the winter schedule would be posted for a period of two weeks before it came into effect, and that employees would be given an opportunity to bid on the shifts they wished to work. It can be seen that there could not be a quick change from the summer to the winter schedule simply because of unusual weather conditions. The fixing of the date for the winter schedule to come into effect had a very real significance for the Department of Highways and its personnel. It was a decision that had an impact on both the budget and finances of the Department and the work schedule of its employees. The decision required a careful consideration of matters of finance and personnel.

B.*Climatic Conditions*

Unlike the appellant, I find it difficult to find any pattern of deteriorating or dangerous conditions for the highway based on the reports of the meteorological stations at Gold River and Upper Campbell Lake for the days preceding the accident. At Upper Campbell Lake (the nearest climatic readings to the accident site) on November 5, a minimum temperature of -1°C was recorded, with a maximum of 2°C. The mean temperature was 0.5°C. On November 6, the mean temperature rose to 1.3°C. On November 7, it rose to 2.5°C with 0.4 centimetres of rain and a trace of snow. The Gold River Townsite weather station recorded an estimated 2.2 centimetres of snow on November 5, when the minimum temperature was 0°C and the maximum temperature was 3°C. On November 6 and 7, the maximum temperatures rose to 6°C and 6.5°C respectively and the minimum rose to 2°C and 3°C.

These reports give no warning of dangerous weather conditions. Rather, the accidents on November 7 appear to have been caused by black ice. No evidence was led as to what special conditions give rise to black ice. However, a number of witnesses indicated that the condition can arise quickly and disappear quickly. William Ball, the District Highways Manager, testified that he had seen black ice occur in a space of five minutes in situations where, at certain temperatures, the cloud cover disappears for a few minutes. In his experience, it can occur suddenly anywhere in the highway district at any particular moment and disappear just as quickly.

II.Decisions Below

Trial Division

At trial two allegations of negligence were made against the Crown. First, it was said that the Crown was negligent in failing to respond in a timely fashion to the reports of icy conditions and to remedy them. Second, it was said the Crown was negligent in failing to maintain the section of the road where the accident

occurred so that ice would not form on it." With regard to the failure to respond in a timely fashion, the trial judge found that the Deas Tower did not know about the need for sanding on the highway until 8:30 a.m. The trial judge concluded that once the information as to the need for sanding was received, the Department's employees acted with dispatch to fulfil their obligations. He therefore determined that there was no negligence on the part of the Department in failing to respond in a timely fashion. He also considered that the choice of the system itself was a matter of policy.

With regard to the second allegation, that the Crown was negligent in failing to maintain the road so that ice would not form, the trial judge found that these were policy matters which excluded any duty of care with respect to the injury received by Mr. Brown. On this point, I would add that there does not appear to have been any evidence before the trial judge that either the state of the road or its design led to the formation of the black ice which caused the accident. In the result, the trial judge dismissed the action: (1989), 17 M.V.R. (2d) 69.

Court of Appeal

In the Court of Appeal the appellant alleged that the summer schedule system of calling up duty employees in case of emergencies, which was in place in Gold River, failed to work properly. First, it was said that this arose because the Deas Tower did not know how to get in touch with the Department's employee on duty in Gold River. It was said that this constituted negligent behaviour on the part of the Crown.

Secondly, it was submitted that the system in place for getting the sanding done was defective. It was argued that there should have been someone at work in Gold River on Friday morning at 7:00 a.m. available at the office to take out a sand truck if one was required. In other words, the system in the smaller community of Gold River should have been the same as that in place in the larger centre of Campbell River.

The Court of Appeal rejected both grounds and dismissed the appeal: (1992), 65 B.C.L.R. (2d) 232, 10 C.C.L.T. (2d) 188, 37 M.V.R. (2d) 70, 10 B.C.A.C. 303, 21 W.A.C. 303, [1992] 3 W.W.R. 629. On the issue of the failure of the Deas Tower to have the telephone number of the employee on call, the Court of Appeal

found that this could not be the basis for a finding of liability. Its position was put in this way (at pp. 237-38 B.C.L.R.):

> Assuming that the Gold River operator had been contacted at his home at 8:30 a.m., as soon as the Deas Tower knew of the need for sanding, it would have taken the operator some minutes to prepare himself and get to the yard where he was to load and inspect his truck and leave. It would have taken him more than the quarter of an hour it actually took him between 9:00 a.m. and 9:15 a.m. to accomplish that because he would have been starting from his home instead of the office. So, we know that it would have been after 8:45 a.m. before he left.
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> We also know that the plaintiff had been travelling for 30 or 40 minutes when he had his accident. That is what he says himself. In those circumstances he must have left Gold River before 8:45 a.m. The Gold River operator would therefore have been behind the plaintiff on the highway and could not have done any sanding which would have prevented this accident.
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> ... Nonetheless, it is my conclusion that the plaintiff/appellant did not establish at trial, and did not establish on this appeal on the balance of probabilities, that any failure, if there was one, on the part of the Ministry of Highways and its employees by not having the ability to communicate with the call-out operator at Gold River before 9:00 a.m. was a contributing cause of the accident, having regard to the fact that the Deas Tower did not know of the need for sanding until shortly before 8:30 a.m.

On the second issue as to whether there should have been an employee on duty in the office at Gold River, the Court of Appeal put its position in this way (at p. 240 B.C.L.R.):

> Turning again to the facts of this case my conclusion is that it has not been established by the plaintiff, on the balance of probabilities, either that the decision about staffing at Gold River was not a rational one having regard to all of the considerations that were facing the Department of Transportation and Highways, or alternatively, that it was a decision that left the staffing on a basis that failed to meet the standard of care that the law imposed on the Crown and its employees with respect to the maintenance of the Gold River and Campbell River highway in the period that included November 1985.

III. Analysis

A. *Central Issue and Basic Principles*

It will be recalled that the Department's employees at Gold River worked a very long shift from Monday through Thursday and thereafter were on a "call-out" arrangement for the balance of the week. The appellant challenges this decision of the Department and alleges that, had there been an employee on duty and available to do sanding at 7:00 a.m., the accident and the resulting injuries to Mr. Brown would never have occurred. It therefore must be determined, first, whether this is a policy decision on the part of the Department.

If it was, then no liability can be attached to the Department. This must follow since there is no suggestion that, if the decision was one of policy, it was not *bona fide* or that it was so irrational that it was not a reasonable exercise of ministerial discretion.

The principles to be applied in determining whether a decision of government or a governmental agency is one of policy or operations are set out in *Just v. British Columbia*, *supra*. It may be helpful to set out the portions of the reasons of the majority that may be applied to this case. At pages 1239–45 of *Just,* the following appears:

> 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.
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> The dividing line between "policy" and "operation" is difficult to fix, yet it is essential that it be done.
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> ...
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> 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 may well be subject to claims in tort. What guidelines are there to assist courts in differentiating between policy and operation?
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> 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:
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> > *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 application to policy-making decisions, their cogency is less obvious when applied to other discretionary matters. <u>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</u>. 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).

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.)

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 high level.

...

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 duty of care in situations which arise from its pure policy decisions.

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.

Before attempting to apply these principles to this case a preliminary matter should be considered. At the outset, the Court of Appeal considered that it had to determine whether or not the policy was *bona fide* and reasonable or rational. In the vast majority of cases such a consideration will not be necessary. It will always be open to a plaintiff to attempt to establish, on a balance of probabilities, that the policy decision was not *bona fide* or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion. This is not a new concept. It has long been recognized that government decisions may be attacked in those

relatively rare instances where the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion. The test to be applied when a policy decision is questioned is set out in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at p. 24, by Wilson J. in these words:

> In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.

Here, no question was raised that the decision was not made in good faith or that it was patently unreasonable. There was therefore no need to consider these questions. Rather, the Court was required to struggle with the fundamental question of whether the decision in question was one of policy or operation. The importance of distinguishing between policy decisions and those that are operational was emphasized in *Just*, at pp. 1239 and 1243, in the following words:

> 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.
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> The dividing line between "policy" and "operation" is difficult to fix, yet it is essential that it be done.
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> ...
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> 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.
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> ...
>
> 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. [Emphasis added.]

It may now be appropriate to apply the principles set out in *Just* to the facts presented in this case.

We must first determine if a *prima facie* duty of care exists, and then determine whether the imposition of this duty is excluded by statute or because the decision at issue is one of policy.

B.*Duty of Care*

The question that must be answered is whether a duty of care is owed by the Department of Highways to those who use provincial roads. The issue was put in this way in *Just* (at pp. 1236−37):

> 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....
>
> 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.
>
> <u>The Applicable Legislation</u>
>
> 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.

There it was determined that there was a duty of care resting on the Department to reasonably maintain the provincial highways.

That duty to maintain would extend to the prevention of injury to users of the road by icy conditions. However the Department is only responsible for taking reasonable steps to prevent injury. Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive. It can be expected that a Department of Highways will develop policies to cope with the hazards of ice. Before applying the principles set out in *Just* to determine what may be the policy pertaining to ice and what may be the operational aspects of that policy it should be determined whether, as the respondent contends, there are any statutory provisions that would exempt the Department from the imposition of a duty of care in the repair and maintenance of highways.

C. *Statutory Exemptions*

Once again it is clear that there is no statutory exemption from tortious liability provided by the *Highway Act*, R.S.B.C. 1979, c. 167. The respondent argued that s. 8 of the *Occupiers Liability Act*, R.S.B.C. 1979, c. 303, and s. 3(2)(f) of the *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, provided the requisite statutory exemptions. Further the Crown submitted that it is under no obligation to repair the highway. It contends that Crown liability can only arise from acts of misfeasance and not of nonfeasance.

I cannot accept these submissions. I will deal first with the suggestion that there is no obligation to repair highways and that liability cannot arise from a failure to act but only from an act negligently performed. It

repair highways and that liability cannot arise from a failure to act but only from an act negligently performed. It seems to me that any distinction between negligence founded on misfeasance or nonfeasance will often be unnecessary or inappropriate. More importantly, as long ago as 1885, this Court in *Town of Portland v. Griffiths* (1885), 11 S.C.R. 333 held that a statute which placed public streets and highways under the control of a municipality imposed upon that municipality the duty of keeping them in repair. It follows that once the duty to repair or to maintain is assumed by a government then it must fulfil that obligation in a manner that is not negligent. That is the duty that rests upon the respondent in this case.

Further, the *Occupiers Liability Act* simply has no place in a consideration of the obligations of the Department of Highways for the repair and maintenance of its highways. The enactment of occupiers' liability acts in common law provinces resulted from two legitimate concerns of the legislator. The first was the desire to do away with the medieval morass of "pigeon holing" and labelling that governed cases prior to the passage of the acts. The other was a concern for the increasing risk of liability for occupiers of property arising from accidents occasioned by snowmobilers running into wire fences or wire gates on farm and rural properties. I cannot believe that the *Occupiers Liability Act* of British Columbia was passed with a view to exempting the Department of Highways from liability for its negligent acts, whether they be acts of misfeasance or nonfeasance. To achieve that result a clear exemption would have to be found in the *Highway Act*. There is no such exemption here.

Alternatively, if the *Crown Proceeding Act* had exempted the Crown from liability for <u>all</u> tortious acts, there would be a statutory exemption. However, there is no statutory exemption in that Act which would exempt the Crown for negligently failing to maintain its roads.

D.*Policy or Operations: Was the Decision of the Department to Maintain the Summer Schedule in Effect at the Time of the Accident a Policy Decision or an Operational Decision*?

In distinguishing what is policy and what is operations, it may be helpful to review some of the relevant factors that should be considered in making that determination. These factors can be derived from the following decisions of this Court: *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418; and *Just*, *supra*; and can be summarized as follows:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

In my view, the decision of the Department to maintain a summer schedule, with all that it entailed, was a policy decision. Whether the winter or summer schedule was to be followed involved a consideration of matters of finance and personnel. Clearly the decision required the Department to discuss and negotiate the dates for the commencement of the summer and winter schedules with its unions. This was a policy decision involving classic policy considerations of financial resources, personnel and, as well, significant negotiations with government unions. It was truly a governmental decision involving social, political and economic factors.

Nor can I accept the suggestion that the Gold River area should be operated in the same manner as Campbell River. Campbell River is a larger region which requires a larger work force and a different approach to its operations. If this is not an attempt to compare apples and oranges, it is at least seeking to compare grapefruits to tangerines. Any difference in the manner of operating between the Campbell River area and the Gold River area is based upon their size. Surely what is appropriate for a larger centre need not be routinely applied to a smaller unit.

I should not leave this issue without addressing the two bases put forward by the appellant for the interpretation and application of *Just*. First, the appellant contended that policy decisions must be limited to so-called threshold decisions, that is to say, broad initial decisions as to whether something will or will not be done. This would be contrary to the principles set out in *Just* referred to earlier. Therefore, this submission cannot be

accepted. Policy decisions can be made by persons at all levels of authority. In determining whether an impugned decision is one of policy, it is the nature of the decision itself that must be scrutinized, rather than the position of the person who makes it. The appellant next alleges that the system itself was unreasonable. As I have already said, this decision was clearly one of policy. Such a policy decision cannot be reviewed on a private law standard of reasonableness. Since no allegation was made that the decision was not *bona fide* or was so irrational that it could not constitute a proper exercise of discretion, it cannot be attacked.

E.*The Operational Aspect*

It remains to be considered whether the manner in which the sanding was carried out under the summer schedule was negligent. If it was, the respondent could be found liable. There are two worrisome features of this aspect of the case.

The first is the length of time it took for the Deas Tower to respond to the request for sanding. Corporal Eglinski put in his first call requesting sanding at 7:25 a.m. The first time the call was acknowledged at Deas Tower was 8:30 a.m. The Deas Tower was apparently not aware of the problem until that time. There are a number of speculative reasons which can be put forward for the delay. It may have been because the conditions for radio transmission were poor and Deas Tower could not be reached by the RCMP at Courtenay. It may be that the RCMP did not press forward with the attempts to notify Deas Tower. However, there is no claim made against the police for negligence. In any event, the onus is on the plaintiff to establish, on a balance of probabilities, that the Department's negligence was responsible for the unexplained delay in responding to the request for sanding. That is to say, it is for the plaintiff to establish that the Crown was negligent in the manner in which it carried out the operational aspect of the call out system and of the road maintenance. Mr. Brown has not met that onus.

Once the Deas Tower was notified, things moved expeditiously. First through the dispatch of the sand and gravel truck from the Campbell River yard and secondly, through the fortuitous arrival and dispatching of an employee from the Gold River yard. It therefore follows that this delay, which might have given rise to liability, has not been shown to have occurred as a result of the negligence of the Department.

liability, has not been shown to have occurred as a result of the negligence of the Department.

The second worrisome aspect was the inability of the Deas Tower to reach the Department employee on call at Gold River. It would seem to be imperative that the home telephone numbers of the call-out employees should be provided to the Deas Tower so that they could be reached quickly in case of an emergency. However, this undoubted negligence did not affect the result in this case. There are concurrent findings made by the trial judge and the Court of Appeal that even if the home telephone number of the call-out employee had been available to the Deas Tower, he could not have been on the road in time to prevent the accident. It was observed by the Court of Appeal that, had he been reached at home at 8:30 a.m., he would have had to take some time to get himself ready, then to get to the Gold River yard, and after that to load and inspect the truck and take it out on the road. His fortuitous presence at the yard at 9:00 a.m. meant that he was on the road as early as he could have been had he been reached at his home shortly after 8:30 a.m. In those circumstances, the undoubted negligence of the Department in failing to have the home telephone numbers of the employees on file with the Deas Tower could not have had any effect on the accident. It follows that in light of these findings the Crown cannot be found liable for the accident.

IV. Disposition

In the result, the appeal must be dismissed with costs if demanded.

Appeal dismissed with costs.

Solicitors for the appellant: Laxton & Company, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener: John C. Tait, Ottawa.