IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

GILBERT RUEST and LISE RUEST	)	***D. G. Hill***
	)	*for the Appellants*
(Plaintiffs) Appellants	)	
	)	
- and -	)	
	)	***A. J. Ladyka***
THE WATER STEWARDSHIP DEPARTMENT in right of THE GOVERNMENT OF MANITOBA	)	*for the Respondent*
	)	
(Defendant) Respondent	)	*Appeal heard:*
	)	***September 28, 2018***
- and -	)	
	)	
THE MUNICIPALITY OF DE SALABERRY	)	
	)	*Judgment delivered:*
(Defendant)	)	***January 8, 2019***

On appeal from *Ruest v De Salaberry (Rural Municipality of)*, 2017 MBQB 196

PFUETZNER JA

[1] This is an appeal of an order for summary judgment dismissing the claim alleging negligence against the Water Stewardship Department in right of the Government of Manitoba (Manitoba) on the basis that the plaintiffs had not brought forward evidence to ‘establish the necessary proximity for a duty of care’ (para 35).

Background

[2] Drainage of water from the flat and fertile land of southern Manitoba is a perennial challenge. Gilbert and Lise Ruest (the plaintiffs) farmed two sections of land in the Municipality of De Salaberry (the RM) for decades. They claim that, as a result of the negligence of the RM and Manitoba, their farmland experienced significant flooding every year beginning in 1995 which resulted in damages.

[3] The plaintiffs filed a statement of claim in 2007 alleging that the RM was negligent in the manner in which it implemented, maintained, repaired and operated its water management and water-flow policy. Specifically, the plaintiffs allege that the RM removed bridges on Provincial Trunk Highway 59 (Highway 59) near the plaintiffs' property in 1995 and replaced them with culverts that were an inadequate size to handle the water flow and has, since then, failed to take proper remedial measures.

[4] The statement of claim alleges that Manitoba "has a duty to ensure that those locally responsible for the management of water and water flow systems act in a prudent fashion and that they investigate areas of concern in an expedient and prudent manner" and that this duty extends to the plaintiffs. The plaintiffs allege that Manitoba was negligent in failing to properly supervise the RM and in failing to properly address the plaintiffs' concerns.

[5] After examinations for discovery and discovery of documents took place, Manitoba brought a motion for summary judgment seeking the dismissal of the plaintiffs' claim against it.

[6] The issue before the motion judge was to determine if there was a

genuine issue for trial as to whether Manitoba owed a private law duty of care to the plaintiffs.

[7] The plaintiffs did not claim that Manitoba owed them a statutory duty of care. Rather, at the motion, they argued that a private law duty of care arose because of the relationship between the parties. The plaintiffs' position was that the actions of Manitoba and, in particular, of Geoff Reimer, a director in the Department of Conservation and Water Stewardship, showed that there was sufficient proximity between the plaintiffs and Manitoba to create a duty of care. In support, the plaintiffs relied on evidence showing that Reimer provided advice and written recommendations to the RM in respect of the flooding on the plaintiffs' land, including attending a meeting in 2006 with the male plaintiff and representatives of the RM. In addition, Manitoba issued four licences to the RM and one licence to the Rural Municipality of Hanover approving drainage works affecting the plaintiffs' land.

[8] Before the motion judge, Manitoba argued that its involvement was insufficient to create a duty of care to the plaintiffs. Manitoba said it acted merely as a statutory regulator reviewing applications for licences under *The Water Rights Act*, CCSM c W80. Any reports written or advice provided by Manitoba to the RM regarding the plaintiffs' land were done at the RM's request and provided recommendations only. Manitoba submitted that it had no authority to direct or supervise the RM in respect of drainage works within the RM as, under the terms of *The Municipal Act*, CCSM c M225, the RM is given authority over such matters (see section 294.1(2)).

[9] The motion judge granted summary judgment dismissing the plaintiffs' claim against Manitoba, finding that there was insufficient evidence

to establish the relationship of proximity required to establish a duty of care. The motion judge concluded (at para 35):

> The plaintiffs have not brought forward evidence that might establish that there was "a series of specific interactions between the government and the claimant[s]" from which a court could conclude that the Province "has, through its conduct, entered into a special relationship with the plaintiff[s] sufficient to establish the necessary proximity for a duty of care." See ***Imperial Tobacco*** [*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42] at para. 45.

Issue

[10] The issue on this appeal is whether the motion judge erred in granting summary judgment based on her finding that the plaintiffs have not raised a genuine issue for trial in respect of whether Manitoba owes them a private law duty of care.

Standard of Review

[11] The decision to grant or deny summary judgment is discretionary. Accordingly, such a decision is owed significant deference on appeal. In *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at para 25, Freedman JA described the standard of review by quoting from *Elsom v Elsom*, [1989] 1 SCR 1367 (at p 1375): "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice."

[12] Freedman JA then wrote (at para 28): "Assuming there have been no reversible errors on fact or law, the appellate judges are not to usurp the trial judge's role in discretionary matters, barring a decision so 'clearly

wrong' as to yield a truly unjust result."

Positions of the Parties

[13] The plaintiffs argue that the motion judge made a reversible error in finding that there was no evidence of any specific interactions between Manitoba and the plaintiffs and, thus, insufficient proximity between them to establish a duty of care. The plaintiffs assert that, by giving professional advice, recommendations and direction to the RM on how to address the flooding on the plaintiffs' land, Manitoba went beyond its statutory role as a regulator and engaged in conduct that it knew could directly impact the plaintiffs. The plaintiffs also argue that Manitoba (rather than the RM, as alleged in the statement of claim) removed the bridges on Highway 59 in 1995 which they allege was the initial cause of the flooding.

[14] Manitoba submits that the motion judge made no reversible error in finding that Manitoba did not owe a private law duty of care to the plaintiffs. It maintains that the motion judge did not err in finding that there was no evidence of specific interactions sufficient to establish the proximity necessary for a duty of care. Manitoba argues that, prior to the appeal, the plaintiffs have never claimed that it removed the bridges on Highway 59 and there is no evidence to support this claim.

[15] As I will explain, the question of whether Manitoba had any role in the removal of the bridges and whether the plaintiffs' pleadings prevent them from arguing this point do not need to be resolved in order to dispose of the issue on this appeal.

Principles of Negligence

[16] As the plaintiffs framed their action in negligence, I will briefly review the principles of negligence. As correctly stated by the motion judge, (at para 20):

> To establish negligence, the plaintiffs must demonstrate (1) that the defendant owed them a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiffs sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. See ***Mustapha v. Culligan of Canada Ltd.***, 2008 SCC 27, [2008] 2 S.C.R. 114 at para. 3.

[17] The motion and this appeal deal only with the first factor required to establish negligence, that is, whether Manitoba owed the plaintiffs a duty of care.

[18] The test for determining whether a public body owes a private law duty of care to an individual was described by the Supreme Court of Canada in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, as follows (at para 39): "[T]he question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises". See also *Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19 at para 18.

[19] Importantly, both proximity and foreseeability must exist in order to establish a prima facie duty of care. As stated by the Supreme Court of Canada in *Imperial Tobacco* (at para 41), "Proximity and foreseeability are two aspects of one inquiry — the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law."

[20] The Supreme Court of Canada went on to describe two ways in which a government actor can be found to owe a prima facie duty of care. The first is where the duty of care arises from the statutory scheme—which is not at issue here. The second way is "the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute" (*ibid* at para 43).

[21] The Court further described this second situation as one "where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant" (*ibid* at para 45) (emphasis added).

[22] Since *Imperial Tobacco*, courts have focussed on the question of whether there has been a "series of specific interactions" in analysing proximity.

[23] The word "specific" is not synonymous with the word "direct". Angus Stevenson & Maurice Waite, eds, *Concise Oxford English Dictionary*, 12th ed (Oxford: Oxford University Press, 2011) sub verbo "specific" and "direct" defines "specific" as "clearly defined or identified"; "precise and clear"; "relating uniquely to a particular subject." The word "direct" has several meanings, including "without intervening factors or intermediaries".

[24] Despite the distinct meanings of "specific" and "direct" and the fact that the Court, in *Imperial Tobacco*, did not use the phrase "direct interactions", some courts have, post-*Imperial Tobacco*, substituted the language of "direct" interactions for "specific" interactions when analysing whether the relationship between the government body and the plaintiff was sufficiently proximate to ground a duty of care (see *Carhoun & Sons*

Enterprises Ltd v Canada (Attorney General), 2015 BCCA 163 at para 81; *Conley v Chippewas of the Thames First Nation Chief*, 2015 ONSC 404 at para 112; *George v Newfoundland and Labrador*, 2016 NLCA 24 at para 144; *Goyal v Niagara College of Applied Arts and Technology*, 2018 ONSC 2768 at para 64; and *Am-Stat Corporation v Ontario*, 2018 ONCA 877 at para 13).

[25] However, other courts have found that direct interactions are not mandatory for there to be proximity between parties. Indeed, some courts have recognised the possibility of proximity arising through indirect interactions. In *British Columbia (Workers' Compensation Board) v Flanagan Enterprises (Nevada) Inc*, 2017 BCSC 99, the Court said (at para 131): "Where the relationship between the alleged wrongdoer and the defendant is close and direct, proximity is more easily established", implying that proximity can be established without a direct relationship. Similarly, in *Evtropova v Minister of Education*, 2015 ONSC 3321, the Court said (at para 27):

> According to *Jane Doe* and *Hill* the relationship is not required to be close and direct to support a finding of proximity. Rather, the question is whether the actions of the wrongdoer have a close or direct effect on the victim and whether the wrongdoer should have had the victim in mind as someone who might be harmed.

[26] In *Taylor v Canada (Attorney General)*, 2012 ONCA 479, Doherty JA, for the Court, indicated that direct relationships were important but did not suggest they were mandatory (at para 80):

> Findings of proximity based on the interactions between the regulator and the plaintiff are necessarily fact-specific. The jurisprudence does, however, suggest there are two important factual features in those cases where the court has found a prima facie duty of care. First, the facts demonstrate a relationship and

> connection between the regulator and the individual that is distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator's work.

[27] See also:

- *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 29-30;
- *Roe v Leone*, 2012 ONSC 6237, where Grace J said (at para 117): "The law does not require direct communication or interaction between the government authority and the plaintiff";
- *Harrison v XL Foods Inc*, 2014 ABQB 431, where Rooke ACJA wrote (at para 71): "This argument . . . that ***Cooper v Hobart***, [[2001] SCC 79] . . . and ***R v Imperial Tobacco Ltd.***, . . . dictate that an absence of direct contact negates proximity, is incorrect"; and
- *Williams v Toronto (City)*, 2016 ONCA 666 at para 13.

[28] From this jurisprudence, I conclude that, while the existence or lack of a direct relationship between the parties is an important factor in evaluating proximity, it is not determinative.

[29] It is also apparent from the jurisprudence that a proximity analysis is highly fact-driven. Rather than focussing on whether there was direct contact between a plaintiff and a government body, the real issue is to determine the nature of the relationship between the parties. In *Taylor*,

Doherty JA wrote (at para 104):

> Where the relationship of proximity is said to arise out of the interaction between a plaintiff and the regulator, the question must be -- what is there in the factual allegations that distinguishes the relationship between this plaintiff and the regulator from the relationship that exists between the regulator and all those affected by the regulator's actions?

[30] I agree with the statement of Brown J in *Whiteman v Iamkhong et al*, 2013 ONSC 2175 at para 85, that "factors considered in defining the proximity of the relationship include representations, reliance, property or other interests involved, causal nexus, parties' expectations, and any assumed or imposed obligations."

Analysis and Decision

[31] Between 2003 and 2006, Manitoba, through Reimer and other staff, had the following involvement with the RM concerning the RM's attempts to address the plaintiffs' complaints about the flooding issues affecting their land:

- Between 2003 and 2006, Manitoba issued four drainage licences to the RM and one to the Rural Municipality of Hanover to conduct drainage works in the vicinity of the plaintiffs' land.

- Through 2005 and 2006, at the request of the RM, Manitoba engaged in numerous discussions and meetings with council members of the RM to review the issues affecting the plaintiffs' land and to offer possible solutions.

- On December 14, 2005, Manitoba received an e-mail from the Chief Administrative Officer of the RM requesting that Manitoba review and make recommendations regarding a particular drainage issue affecting the plaintiffs' land.

- On December 20, 2005, Reimer provided a two-page letter to the CAO of the RM in which he reviewed the existing drainage infrastructure in the vicinity of the plaintiffs' land and the proposed improvements and provided recommendations. The letter states, "No additional drainage works other than those recommended are to be undertaken in these two sections."

- In 2006, Reimer attended a meeting with representatives of the RM and the male plaintiff respecting flooding on the plaintiffs' land.

- On November 1, 2006, in response to a further request from the RM, Reimer sent a ten-page report to the RM, "outlining the existing problems as explained by [the male plaintiff], and as separately interpreted by [Manitoba]. A hydraulic analysis of the drainage area and culvert capacities affecting [the plaintiffs' land] was undertaken" and the results were included in the report. The report provided detailed recommendations.

[32] I now turn to the question of whether the motion judge erred, in light of the evidence and the jurisprudence that has developed since *Imperial Tobacco*, in concluding that there "is no genuine issue to be tried" (at para 37).

[33] In my view, the motion judge erred by misdirecting herself on what

could constitute a "series of specific interactions" (at para 35). A reading of her reasons for decision as a whole shows that she construed the test too narrowly and essentially interpreted "specific" to mean "direct". As already stated, the law is that direct interactions are not necessarily required in order to establish the proximity necessary for a duty of care.

[34] While Manitoba's issuance of the five licences on its own may not be sufficient to establish the proximity required, these licences form part of the "nature of the overall relationship" and the "entirety of the circumstances" (*Taylor* at paras 69, 118) contemplated by the case law.

[35] The purpose of the December 2005 letter, the November 2006 report and the 2006 meeting was to address water management in the vicinity of the plaintiffs' land. The plaintiffs' property was the specific focus of the reports, the male plaintiff was referred to by name in the communications between the RM and Manitoba, and he attended the 2006 meeting.

[36] In my view, the motion judge should have considered all of these events as part of the "specific interactions" test. Unfortunately, it is apparent that the plaintiffs did not provide the motion judge with the post-*Imperial Tobacco* jurisprudence. The motion judge noted in her reasons that (at para 35) "the plaintiffs provided no case law to support their position."

[37] In my view, the motion judge should have decided that the question of whether there was a series of specific interactions that established the necessary proximity for a duty of care was a genuine issue for trial.

[38] At the hearing of the appeal, the plaintiffs brought a motion to introduce fresh evidence. The panel reserved its decision on the motion. In

light of the result of the appeal, the fresh evidence motion is moot and I would dismiss it.

[39] In the result, the appeal is allowed with costs to the plaintiffs.

Pfuetzner JA

I agree: Hamilton JA

I agree: Beard JA