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TORT LIABILITY IN A COVID WORLD PART 3: GOVERNMENT OVERSIGHT OF THE CARGILL BEEF PLANT

On Monday, April 20, 2020, Cargill Inc. temporarily halted operations at its High River beef plant. It did so after over 400 of its employees and their families tested positive for COVID-19, and one employee died of the disease.[1] A similar COVID-19 outbreak at Greenhill Produce in Southwestern Ontario has seen 43 employees test positive, and resulted in calls for governments to evaluate their oversight, including inspection and regulation of working conditions and workers' accommodations.[2]

The outbreaks, along with recent announcements that governments across Canada may soon be lifting COVID-19 related restrictions over the next several weeks,[3] have also led to questions about the legal obligations of governments to prevent the spread of COVID-19, and whether governments could be held liable for damages caused by outbreaks like the ones at the Cargill plant and Greenhill Produce operation.

Private law tort claims are often difficult to advance against governments or government entities, and for good reason. Canadian Courts recognize that governments regularly make discretionary decisions in the public interest. Those decisions often require the balancing of competing interests and may impact members of the public in different ways. For example, the decision to categorize some services as "essential" but not others engages health and safety concerns - but those concerns must also be balanced with economic considerations.

For this reason, Courts draw a distinction between policy decisions (which are discretionary decisions made based on social, economic or political factors), and operational decisions made while carrying out those policies. Governments cannot owe private law duties of care in respect of "policy" decisions (provided they are not irrational or made in bad faith).[4] When governments decide high level courses of action based on balancing a myriad of factors that pull in competing directions, they are generally not accountable to any one person, or group of people, in respect of the decisions they make, except at the polls. The relationship in those circumstances is simply not direct enough to give rise to a duty

1 Calgary Herald, *Labour Group Calls for Criminal Investigation into Cargill Beef Plant COVID019 Death*, online: https://calgaryherald.com/business/labour-group-call-for-ohs-and-criminal-investigations-into-cargill-beef-plant-covid-death/wcm/c132f267-fd99-48db-a3c5-f27f6c2e1fb5/

2 The London Free Press, *COVID-19: Southwestern Ontario outbreak puts migrant farm workers in the spotlight*, online: https://lfpress.com/news/local-news/covid-19-southwestern-ontario-outbreak-puts-migrant-farm-workers-in-spotlight/

3 CBC News, *Coronavirus: What's happening in Canada and around the world on May 1* online: https://www.cbc.ca/news/canada/coronavirus-covid19-may1-canada-world-1.5550865

4 *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para 90 [*Imperial Tobacco*]

of care. By comparison, governments *can* potentially be held liable for negligent operational decisions - that is, the more on the ground steps taken to carry out the higher level policy decisions.

The Policy/Operational Distinction in the Context of COVID-19

Distinguishing "policy" decisions from "operational" ones is not always easy. Indeed, the Supreme Court of Canada recognized that "courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line". [5]

That said, previous decisions respecting government liability for damages arising from the 2003-2004 SARS outbreak provide some guidance. In 2009, the Ontario Court of Appeal concurrently heard five appeals which all raised the issue of whether the Province of Ontario could be held liable for damages suffered by those who had contracted SARS during the outbreak.[6] The Court held that no private law duty of care was owing by the government of Ontario in any of the five cases.

In *Williams v Ontario*, a proposed class action (on behalf of individuals who contracted SARS while in the hospital) alleged that the Province eased infection protocols at hospitals too early, leading to a reoccurrence of the disease.[7] In rejecting the claim at a threshold level, the Court explained:

> When assessing how best to deal with the SARS outbreak, Ontario was required to address the interests of the public at large rather than focus on the particular interests of the plaintiff or other individuals in her situation. Decisions relating to the imposition, lifting or re-introduction of measures to combat SARS are clear examples of decisions that must be made on the basis of the general public interest rather than on the basis of the interests of a narrow class of individuals. […] The public officials charged with the responsibility for imposing and lifting such measures must weigh and balance the advantages and disadvantages and strive to act in a manner that best meets the overall interests of the public at large.[8]

It held that there was no proximate relationship between the Province and the proposed class members, as "[t]he risk of contracting an infectious disease from attending a hospital for treatment or to visit a loved one was a random risk facing the public at large".[9] The *Williams* case will likely be particularly instructive when it comes to any claims that could be brought in respect of the removal of COVID-19 related restrictions.

In *Abarquez v Ontario*, the Court similarly held that the Province of Ontario did not owe a duty of care to nurses that had been infected with SARS while on the job, and that there was no proximate relationship between the government and the nurses:

> When developing a public policy and elaborating standards in relation to the containment of SARS, the interests of Ontario's compassionate and courageous nurses were but one of the

5 *Imperial Tobacco*, para 78

6 *Williams v Ontario*, 2009 ONCA 378, para 1 [*Williams*]. See also: *Jamal Estate v The Scarborough Hospital*, 2009 ONCA 376; *Henry Estate v The Scarborough Hospital*, 2009 ONCA 375; *Laroza Estate v Ontario*, 2009 ONCA 373; and *Abarquez v Ontario*, 2009 ONCA 374 [*Abarquez*].

7 *Williams*, paras 5-7

8 *Williams*, para 31

9 *Williams*, para 30

> myriad of factors to be weighed and balanced. […] the very nature of a duty by a public authority to the public at large is ordinarily inconsistent with the imposition of a private law duty of care to any individual or group of individuals.
>
> Recognizing a duty of care to protect the health of the nurses would raise the potential for conflict with the overarching duty to the public at large. Where recognizing a private law duty of care on the part of a public authority towards a certain class of individuals could conflict with the public authority's overarching duty, proximity does not exist and no private law duty should be found.[10]

An argument could be made to protect governments from liability for decisions about imposing particular health and safety requirements and protocols at facilities where outbreaks have occurred. Those decisions were part of overall government strategies to deal with the COVID-19 outbreak, and the imposition of a private law duty of care owed to particular workers could conflict with governments' overarching public obligations.

Of course, a plaintiff may seek to argue that actual health and safety inspections are operational in nature, and that decisions regarding the safety protocols at individual facilities are operational decisions undertaken as part of the application and enforcement of an overarching policy strategy. The Ontario Court of Appeal noted in Williams, for example, that even though the plaintiff could not establish a duty of care owed by the Province, "this result does not leave the plaintiff without a remedy if she can show that she suffered harm as a result of negligence at the operational level on the part of those responsible for the application and enforcement of the Directives".[11]

Conclusion

Policy and operational acts are closely linked. The decision to undertake an operational act may "involve and flow from a policy decision".[12] There are strong arguments in favour of generously protecting the range of decisions that do not give rise to a private law duty of care. Ultimately, though, in each case, the question will be answered based on the circumstances, the statutory regime, and the relationships between the parties. The lawyers at JSS Barristers have significant experience advising clients on these issues and are happy to assist.

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[10] *Abarquez*, paras 26-27
[11] *Williams*, para 36
[12] *Barrett v Enfield London Borough Council*, [2001] 2 A.C. 550, p 571