

Adaptation and the Law



IPAC

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Overview

- Legal Options:
 - Statute
 - Standards
 - Contract
 - Tort
- Tort Law: Negligence
 - Duty of care
- Duty to adapt?



Legal Options

- Statute
 - Regulations/ statutory instruments
 - Tax
- Standards
- Contract
- Tort



Who do you want to decide?

- Governments
- Standards bodies
- Contracting parties
- Judges



Statutes might

- Exclude liability (statutory immunity)
- Limit liability (caps)
- Allocate liability
- Require adaptation
- Require / create insurance
- EA/ permits



Standards might

- Improve risk/ harm predictions
- Improve vulnerability assessment
- Revise infrastructure / building specifications
- Increase local/ distributed generation



Contracts might

- Allocate / exclude liability (eg landlord/tenant; APS)
- Assign responsibility (eg erosion protection)
- Provide for:
 - Insurance
 - Mutual aid



Tort Law (judges) might find

- Negligent failures to adapt:
 - Duty of care
 - Breach (standard of care / due diligence)
 - Causation
 - Injury / Damage



Basic Duty of Care

- To avoid causing unreasonable harm
- To my neighbour



Who is my Neighbour?

- *Donoghue v. Stevenson*, [1932] A.C. 562
- *Kamloops v. Neilson*, [1984] 2 S.C.R. 2
- Governments have a lot of neighbours...



What's unreasonable harm?

- Likelihood
- Severity



What's unreasonable?

- Statute
- Contract
- Precedent
- Analogy



Statutes, e.g.

- *CEPA, 1999*
- *Fisheries Act*
 - prevent spills, HADD
- Provincial laws on:
 - Water quality / quantity
 - Storm drainage
 - Occupational health and safety
 - Drinking water
 - Health



So, who is my neighbour?

- Power to prevent
- Relationship
 - Expertise
 - Reliance
- Foreseeability
 - Notice



Power to prevent

- *Scarboro (Scarborough) Golf & Country Club Ltd. v. Scarborough (City)* (1988), 66 O.R. (2d) 257 (Ont. C.A.)
- *Johnson v. Milton (Town)*, 2008 ONCA 440 (Ont. C.A.)



Relationship

- Gov't has lots of neighbours
 - Expertise
 - Reliance



Foreseeability

- *Overseas Tankship (U.K.) Ltd. v. Mort's Dock - The Wagon Mound (No. 1)*, [1961] A.C. 388 (P.C.)
- *Assiniboine South School Division No. 3 v. Greater Winnipeg Gas Co.*, [1971] 4 W.W.R. 746 (Man. C.A.)



Foreseeable Climate Impacts

- Fiercer Storms
 - Inadequate infrastructure (water, energy, transportation)
 - Floods / droughts
 - Erosion
 - Wind
- Heat (heat stress, smog)
 - Fires
- Water resources (supply and quality)
- Species change, protection and management
- Disease vectors



Lots of potential claims

- Who will they sue?



Limits on duties of care

- Statutory protection
 - Statutory authority / immunity
- Gov't: Policy / Operational
- Proximity/ Remoteness



Statutory authority

- Protects when adverse impact is necessary and *inevitable* consequence of providing public service, e.g. airplane noise at airport
- Rarely helpful



Statutory immunity: Alberta

Municipal Government Act, R.S.A. 2000, c. -26, s. 528

For operation or non-operation of public utility
(includes water, sewer systems), there is

- no proceeding for nuisance
- no action based on any other tort that does *not* require a finding of intention or negligence



Gov't: Policy/ Operational?

- Policy - political nature; accountable to electorate or legislature, not the courts
 - *Friends of Earth v. Minister of the Environment* (KPIA), 2008 FC 1183 (F.C. Oct 20, 2008)
- No duty to regulate
 - *Holland v. British Columbia*, 2008 CarswellBC 1523 (B.C. S.C.)
- Duty of care if operational- the practical execution of decisions/ activities
 - *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2
 - *Just v. British Columbia*, [1989] 2 S.C.R. 1228



Proximity/ Remoteness

- *Cooper v. Hobart*, [2001] 3 S.C.R. 537
- *Edwards v. Law Society*, [2001] S.C.J. No. 77
- *Eliopoulos v. Ontario*, [2006] O.J. No. 4400 (Ont. C.A.)
- *Mustapha v. Culligan*, 2008 SCC 27



Negligence, a reminder

- Duty of care is only the first of four elements:
 - Duty
 - Breach
 - Causation
 - Injury
- And there are other torts



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Duty to Adapt?

- Types of damage
 - Safety? Health?
 - Property damage?
 - Economic loss?



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Duty to adapt?

- Employment
- Physical assets
- Permitting
- Inadequate standards
- Negligent misrepresentation



Employment

- Duty to provide safe workplace, OSHA
 - Wind
 - Heat
 - Flooding
 - Power supply



Physical assets

- Inadequate for foreseeable climate change?
 - Owned/ occupied land / buildings
 - Trees
 - Infrastructure
 - Sewage pipes
 - Stormwater systems
 - Roads
 - Tunnels/ bridges
- *R. v. Ottawa Carleton* (October, 2008)
- *Johnson v. Milton*



Permitting

- Building permits

- *Ingles v. Tutkaluk* [2000] 1 S.C.R. 298

- *Heighington v. Ontario* (1989), 69 O.R. (2d) 484 (Ont. C.A.)



Inadequate standards

- *Berendsen v. Ontario* (2008), 34 C.E.L.R. (3d) 223 (Ont. S.C.J.)
- *Lafarge v. Ontario*, 2008 CanLII 30290 (Ont. S.C.J. Div)
- *Dicaire v. Chambly*, 2000 CarswellQue 361 (Que. CA)



Negligent Misrepresentation

- *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465 (H.L.)
- “Are we at danger of _____ here?”



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Thank you!!

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