

## Does the Province of Ontario Owe a Duty of Care When Transporting Accident Victims?

By Robert McGlashan, McCague Borlack LLP

When accidents happen at ski lodges or other remote locations, decisions have to be made about when, how and to where victims are to be transported. The Province of Ontario's guidelines on how these decisions are to be made and the way these guidelines are administered could subject the Province to a private law duty of care, the Court of Appeal has recently held.

In *Heaslip Estate v. Ontario* 2009 ONCA 594 (Ont. C.A.) the plaintiff Patrick Heaslip was injured in a tobogganing accident at the Mansfield Ski Club. According to the claim, after the accident Patrick was taken to Stevenson Memorial Hospital in Alliston at about 7:55 p.m. At about 8:35 p.m., having assessed his injuries, one of the defendant doctors requested an air ambulance to take Patrick to St. Michael's Hospital in Toronto. However, the Medical Air Transport Centre (MATC), which is operated by Ontario, advised that an air ambulance would not be available for 2 hours. At about 10:00 p.m. Patrick was taken from Stevenson Memorial by land ambulance, destined for St. Michael's. By about 10:56 p.m. Patrick was pronounced dead.

The claim goes on to allege that there was an air ambulance helicopter near Stevenson Memorial at the time an air ambulance was requested and that it was carrying a patient with non-life-threatening injuries. The claim also alleges that the MATC's Manual of Operational Policies and Procedures provides for the reassignment of an air ambulance to deal with higher priority patients and that the MATC failed to reassign the air ambulance while it knew that Patrick's condition was life threatening and that the 2 other on-duty air ambulances were unavailable.

The Province of Ontario brought a motion to strike the claim on the basis that the alleged facts disclosed no reasonable cause of action. The motion judge identified the key issue as being whether, on the facts as pleaded, it was arguable that Ontario owed Patrick Heaslip a private law duty of care in the circumstances.

He determined this issue using the now familiar *Cooper-Anns* test, as articulated in *Cooper v. Hobart*, [2001] 3 S.C.R. 537. With respect to the first stage of the test, Ontario conceded that foreseeability was established. However, the judge found that the claim did not create either an established or new duty of care because "the Minister's duties are owed to the public at large, not to any individual member." Dealing with the second stage of the *Cooper-Anns* test, he held that, even if a duty of care were found, there were residual policy considerations that justified denying liability, such as the prospect of indeterminate liability and a chilling effect on Ontario in providing air ambulance services.

The Court of Appeal disagreed that the facts as pleaded could not give rise to a duty of care. Speaking for a unanimous Court, Sharpe J.A. held that, while certain allegations in the claim asserted purely public law duties and must be struck, the core of the claim contained allegations that, if proven, were capable of supporting the existence of a duty of care on the Province. These were:

- Ontario knew that Patrick Heaslip had suffered a life-threatening injury;

- A nearby air ambulance that could have taken Patrick Heaslip to an appropriate hospital was carrying another patient with non-life-threatening injuries;
- Ontario had adopted a policy for air ambulances that gave priority to those with life-threatening injuries, even if that meant diverting another patient; and
- Ontario negligently failed to follow that policy in relation to Patrick Heaslip.

The Court distinguished the case at Bar from cases like *Cooper* and *Attis v. Canada (Minister of Health)* 2008 ONCA 660 (Ont. C.A.). In the latter cases, negligence was alleged against a governmental authority charged with regulating an activity when the plaintiffs suffered harm due to a defendant involved in that activity. The Court points out that the plaintiffs in those cases had no direct relationship with the governmental authority. In this case, on the other hand, there was a direct relationship between Patrick Heaslip and the governmental authority, which could give rise to a duty of care, namely to act in accordance with an established policy where it is reasonably foreseeable that the failure to do so would cause physical harm.

The Court goes on to say that, even if a full *Cooper-Anns* analysis were required, it is arguable that a duty of care should be recognized on the basis that there was a sufficiently “close and direct” relationship between Patrick Heaslip and Ontario that, on the facts pleaded, it would be fair to require Ontario to be mindful of Patrick’s legitimate interests.

The Court of Appeal rejected Ontario’s argument that to recognize a duty of care would place the service provider in conflict with the individual who was already being carried in the air ambulance, to whom a duty was also owed. The Court noted that a duty of care can only be negated if there is a conflict between the duty and an overarching public duty that yields negative policy consequences. However, this was not the case here when Ontario had already determined how a potential conflict should be resolved, namely by giving priority to those with life threatening injuries.

Finally, the Court of Appeal held that the motions judge also erred by concluding that any duty of care was negated by residual policy considerations, the second stage of the *Cooper-Anns* test. The Court points out that, once it is accepted that the claim in this case is one of operational negligence, concerns about policy considerations, such as indeterminate liability, evaporate.