



Out of the Line of Fire



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In New Brunswick, firefighters' new immunity from suit and indemnity against defence costs is strong, bold and broad.

Municipalities have the statutory authority to provide fire protection services and are responsible for their establishment, implementation and operation. In turn, municipalities may be held liable for losses incurred in the course of the delivery of such services and may be held vicariously liable for the actions of their agents and employees.

Recent amendments to the New Brunswick Municipalities Act¹ have drastically altered the landscape of the law of negligence as it relates to providers of fire protection services. This may have a significant impact on litigation involving municipal fire services in the province and, in turn, on municipal insurers.

The legislative amendments prescribe a broad-sweeping immunity from suit provision, which may effectively bar all claims against fire services and firefighters for actions done in the course of their duty. At the same time, the amendments also allow the province of New Brunswick to indemnify firefighters against expenses incurred in

relation to any civil, criminal or administrative action or proceeding to which they are made a party by reason of their actions as a member of a fire department.

These new provisions are found at s.27.02 and s.193.3 of the act, the latter providing a strong immunity from suit defence to municipalities:

193.3 No action or other proceeding for damages shall be instituted against any of the following bodies or persons for any loss, injury or damage suffered by reason of anything in good faith done or omitted to be done by a member or former member of a fire department, brigade or association that provides fire protection services within a municipality, rural community or local service district, by reason of the member or former member acting as a member of the fire department, brigade or association:

- (a) Her Majesty in right of the Province;
- (b) the minister;
- (c) a municipality;
- (d) a rural community;
- (e) the fire department, brigade or association;
- (f) a member or former member of the fire department, brigade or association; or
- (g) the legal representatives or heirs of a person referred to in paragraph (f).

LIABILITY AT COMMON LAW

Allegations of negligence may be made against a municipality in the context of its delivery of fire protection services in numerous circumstances. Possible exposures could arise related to the response to the emergency call, the equipment used (including sufficiency of water supply), the steps taken to ensure the fire does not rekindle, inspection and enforcement activities, the operation of emergency vehicles and the overall conduct of the employees in the performance of these services (including professional and volunteer firefighters).

The traditional law of negligence makes a distinction between policy and operational decisions.² Municipalities are generally not held liable for consequences directly flowing from policy decisions unless the policy decision was made in excess of jurisdiction or in bad faith.³ At the same time, municipalities are held to a reasonable standard of care in implementing their policies; they may be found negligent if they fail to do so.⁴

Even under this common law standard of care, actions against municipalities based on fire protection services have rarely been successful in New Brunswick or in Canada generally.⁵ However, firefighters, like all emergency services providers, are expected to act reasonably and the legislature has imposed some statutory duties upon them. For example, operators of emergency vehicles have statutory privileges that allow them to contravene some traditional rules of the road (such as exceeding the speed limit when responding to an emergency), but only when sounding the appropriate warning signals and only with due regard for the safety of persons and property.⁶ Although a breach of these statutory requirements would not in and of itself amount to a finding of negligence, it may nonetheless be on first appearance evidence of such negligence.⁷

New Brunswick courts have weighed in on firefighters' duty of care in light of these statutory requirements. In *Saint John (City) v. City Transit Ltd.*,⁸ a bus and a fire truck collided when they simultaneously

attempted to cross an intersection. The driver of the fire truck was held 40% liable. A similar situation presented itself in *Michaud (Estate) v. Michaud, Edmundston (City) et al.*,⁹ in which a firefighter struck the plaintiff's vehicle at an intersection while responding to an emergency call. The defendant had proceeded through a red light while sounding the emergency siren and signals. The plaintiff was unable to avoid the collision and died as a result of his injuries. The court found that the accident was solely caused by the firefighter's negligence and awarded Cdn\$275,000 to the plaintiff's estate.

IMPACT ON NEW BRUNSWICK LAW

The statutory immunity provisions added in s.193.3 of the act have changed firefighters' common law standard of care in New Brunswick.

Although the immunity provision contained in this act is qualified, the threshold is very high: in order to negate good faith, the plaintiffs must prove bad faith, which apparently in this context means maliciousness, gross carelessness or serious negligence.¹⁰ While this high threshold may be considered a political trade-off aimed at protecting emergency personnel from claims from homeowners whose homes are destroyed by fire — the persons whose homes they are seeking to protect — the immunity is not limited in scope to actual fire fighting. Rather, the statutory protection is so sweeping it would likely apply to motor vehicle accidents involving the operation of emergency vehicles in situations in which bystanders might be seriously injured. Unless they are able to prove bad faith (which is unlikely), these plaintiffs would not be able to recover damages incurred from the person or group that committed the civil wrong.

It is difficult to conceive of a scenario in which a person responding to an emergency fire call would act dishonestly, with malice or in bad faith. By the nature of their work, we must assume that firefighters will almost always deliver their services in good faith.

While such a "good faith" require-

ment is not foreign to statutory immunity provisions, this wording is usually included to protect persons carrying on policymaking, investigatory or quasi-judicial functions. For example, the *Fire Prevention Act*¹¹ includes a "good faith" provision that protects fire marshals, investigators and inspectors for acts or omissions done in good faith in the execution of their duties.

Furthermore, this amendment risks affecting the ability of a motor vehicle accident plaintiff to recover from their own Section D insurer, since they may not be "legally entitled to recover" any sums from the owner or driver of the motor vehicle operated in the rendering of firefighting services.

In light of these legislative changes, it is questionable whether plaintiffs in cases such as those in *Saint John*, *supra*, or *Michaud*, *supra*, would now be entitled to recover for their losses.

OVERALL IMPACT

This new provision has not yet been tested in New Brunswick courts and its precise application remains somewhat uncertain. Although it may be subjected to vigorous challenge in the future, at this time it is another tool in municipalities' — and their insurers' — litigation defence arsenal. ≡

1 *R.S.N.B. 1973, c.M-22.*

2 *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

3 *Brown v. British Columbia (Ministry of Transportation & Highways)*, [1994] 1 S.C.R. 420.4 *Kamloops (City) v. Nielsen* [1984] 2 S.C.R. 2, adopting the rule from *Anns v. London Borough of Merton*, [1977] 2 All. E.R. 492 (H.L.); *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.5 See, for example : *Hachey v. Bathurst (City)* (1991), 117 N.B.R. (2d) 355 (C.A.).6 *Motor Vehicle Act, R.S.N.B. 1973, c.M-17, ss.1, 110, 119, 168.7 R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Michaud, Infra.8* [1954] N.B.J. No. 9 (NBSCAD).

9 2004 NBQB 145.10 *Finney v. Barreau du Québec*, 2004 SCC 36.

11 *R.S.N.B. 1973, c.F-13*