Citation: McDonagh v. Gavin et al
2004 BCSC 1756

Date: 20040108
Docket: M000714
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Madam Justice Baker
January 8, 2004

BETWEEN:

ATHENA McDONAGH, an infant, by her Guardian *Ad Litem*, Elizabeth McDonagh

PLAINTIFF

AND:

JOSEPH PERCIVAL GAVIN, an infant, LORILL CRABBE, MANDY SHADLOCK, an infant, JASON BILUK and THE CITY OF VERNON

DEFENDANTS

AND:

JAMES McDONAGH, ELIZABETH McDONAGH, and THE SUPERINTENDENT OF MOTOR VEHICLES/ INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTIES

For the Plaintiff	No appearance
Counsel for Defendant, Gavin	R.D. Watts
Agent for Counsel for Defendants, Crabbe and Biluk	R.D. Watts
Counsel for the City of Vernon	F.R. Scordo

No other appearances

Place and Date of Hearing:	Vancouver, B.C. January 8, 2004

[1] **THE COURT:** This is an application by the defendant City of Vernon to have the plaintiff's claim against it dismissed pursuant to Rule 18A of the ***Supreme Court Rules***.

[2] The action arises out of a motor vehicle accident that occurred on August 11th, 1999. The accident took place at an intersection in the City of Vernon at which traffic was controlled by a stop sign for traffic approaching the intersection from all four directions, together with a flashing red light suspended above the intersection, meaning that vehicles approaching from all four directions had a flashing red light as they approached.

[3] The plaintiff, who was then 16 years old, was a passenger in a vehicle driven by the defendant Gavin. The defendant Gavin's vehicle was driving from west to east on 32nd Avenue, approaching an intersection with Pleasant Valley Road which runs north and south. The defendant Mandy Shadlock was driving a vehicle on Pleasant Valley Road heading north. Mr. Gavin's vehicle was being followed by a vehicle driven by the defendant Jason Biluk. The defendant Lorill Crabbe is the mother of the defendant Gavin.

[4] The evidence before the court is that as he approached the intersection Mr. Gavin was driving at a speed in excess of the 50-kilometre-per-hour posted speed, and that he did not

intend to stop at the stop sign. As he approached the intersection, in addition to the stop sign, there was preceding it a road marker indicating that a stop sign was coming up.

[5] The vehicle following Mr. Gavin's vehicle, that of the defendant Biluk, has been the subject of expert evidence which suggests that he was, at the time he started to brake as he approached the intersection, travelling at a speed significantly in excess of the posted speed.

[6] The evidence of Ms. Shadlock is that as she approached the intersection from the south on Pleasant Valley Road she stopped at the stop sign, she looked both directions, saw no vehicles approaching and began to drive into the intersection. As she did so, she saw the headlights of Mr. Gavin's vehicle approaching at significant speed. She stopped her vehicle. Mr. Gavin, seeing her vehicle in the intersection, attempted to swerve to the northeast, around the front of her vehicle, and his vehicle collided with a power pole located on the northeast corner of the intersection.

[7] The Gavin vehicle, in which Ms. McDonagh was a passenger, struck the pole on the passenger side and then wrapped around the pole, and the plaintiff, Ms. McDonagh, has suffered significant injuries as a result.

[8] The allegation against the defendant Crabbe alleges negligence arising out of a failure to prevent the defendant Gavin from using his driver's licence, or allegations to that effect. Ms. Crabbe joined as third parties the parents of the plaintiff McDonagh, the Superintendent of Motor Vehicles and the Insurance Corporation of British Columbia. As I understand it, her claims against the third parties are that the McDonaghs failed to supervise the plaintiff and that it was the responsibility of the Superintendent of Motor Vehicles or the Insurance Corporation to ensure that Mr. Gavin was not permitted to drive.

[9] On this application by the defendant City of Vernon for a dismissal of the plaintiff's claims, the plaintiff takes no position and neither do any of the other defendants or third parties except the defendants Gavin, Biluk and Crabbe. Mr. Watts, appeared as counsel for Mr. Gavin, but he was also authorized to make submissions on behalf of Ms. Crabbe and Mr. Biluk.

[10] The position of the City of Vernon is that the action should be dismissed against it because the plaintiff or the other defendants will not be able to establish, the defendant City says, that the City breached the standard of care in its placement of the power pole with which the Gavin vehicle

eventually collided. The City submits that Mr. Gavin is wholly responsible for the accident because of the manner in which he was driving his vehicle.

[11] The City says that even if it could be shown that the placement or maintenance of the pole and the position in which it had originally been placed was a breach of the standard of care on the part of the City, neither the plaintiff nor the other defendants can show that the placement of the pole in a different location would have made any difference. In other words, the defendant City takes the position that even if the pole had been moved a couple of feet or a curb placed in front of it, the accident would still have occurred and there would have been no significant difference in the injuries to the plaintiff.

[12] In response, the defendants say that it would be unfair for the court to dismiss the claim against the City at this time because it would deny the defendants the possibility of claiming for contribution and indemnity as against the City in the event that the plaintiff is not found contributorily negligent and, therefore, there could be joint and several liability against all remaining defendants.

[13] The defendants also say that at trial something might emerge from the cross-examination of the City's expert

witnesses or from the photographs of the scene which might permit the jury who will be hearing the trial to conclude that there was a breach of the standard of care, in that the pole was too close to the lane of travel on the roadway and, therefore, that there was a breach of the standard of care.

[14] The other defendants who oppose the City's application also point out that there have been two previous summary trial applications brought by other parties in this litigation and that both have been dismissed.

[15] The first of these was heard by Justice Vickers of this court on November 8th, 2002. It was an application by the defendant Crabbe, who is the mother of the defendant Gavin, for a dismissal of the plaintiff's action against her. In that case Justice Vickers concluded that it was not possible for him, on a summary trial, to determine the issues raised because they were all questions of fact that could only be decided in the context of all of the evidence following a trial of the action. It would be fair to say that he found all the issues —— whether or not there was a duty owed by the defendant Crabbe to the plaintiff, what the appropriate standard of care would be if there was a duty and whether there was a breach, and, finally, causation —— were all matters that were in issue, and that he was unable to reach a

conclusion with respect to all of those matters based on the evidence before him.

[16] Subsequently, on October 10th, 2003, Justice Tysoe heard an application by the third parties, Mr. and Mrs. McDonagh, the parents of the plaintiff, that Ms. Crabbe's third party claim against them be dismissed on a summary trial. Justice Tysoe dismissed that application by the McDonaghs on two grounds.

[17] First, he found he was not able to find the facts necessary to decide the issues. He concluded that although the evidence put forward by the McDonaghs in affidavit form was not contradicted, nevertheless it was incomplete and that he did not have evidence on some of the factual matters which he considered to be relevant to the issues he was asked to decide.

[18] He further concluded that while some of the gaps might have been filled by cross-examination of the third parties, he felt it best that that occur at trial, rather than a pretrial procedure. Finally, he held that he did not think that a determination of one part of the third party claim would assist in the efficient resolution of the proceedings, and he had in mind the possibility that there would be an appeal of

his decision which could result in an adjournment of the trial.

[19] Each application, of course, must be decided based on the law and the evidence put before the court. In this case there is no dispute about the facts of the case. The evidence of the City includes photographs, a police report, a report of a senior employee of the City of Vernon, a collision reconstruction report prepared by consulting engineers, and a report by an expert on intersection design.

[20] In response to this material, the defendants who oppose the application have not filed any opposing evidence or opinions. This is significant, in my view, because the City's motion was originally filed in August of 2003, approximately four months ago, and the opinions on which the City relies were filed and served in September, three-and-a-half months ago. As I pointed out earlier, the accident which led to this action occurred in August of 1999.

[21] The only allegation of negligence made against the City in the pleadings is that the City was negligent:

> ... in allowing or in placing the power pole on (as opposed to beside) the roadway when it knew or ought to have known that it was unsafe to do so.

[22] As I stated earlier, the collision occurred only after the defendant attempted to avoid a collision in the intersection, moved out of the lane in which he was travelling, crossed the opposite lane and collided with the pole on the opposite corner. In other words, where the defendant Gavin's vehicle ended up was not a place where, in the ordinary course, it would have come anywhere near the utility pole.

[23] The evidence of the City on standard of care, as I have said earlier, comes from both an employee of the City of Vernon, a long time employee, and an independent expert in intersection design.

[24] The independent expert in intersection design essentially concluded that the location of the utility pole is an acceptable intersection design due, he said, to the need to tie in cross-street above-ground utilities. While he suggested that a curb bulge could have been created by the pole, he suggests that from an aesthetic rather than a safety perspective. In other words, the report of the expert is that the pole location met the standard in intersection design.

[25] The evidence of the City employee, Mr. McKay, a municipal technician, is that the pole at this intersection has been in

its present location since at least 1974 when he began his employment with the City of Vernon.

[26] Mr. McKay's affidavit is also interesting in that it indicates that this intersection was, in the past, a problem intersection, having been the location of several motor vehicle accidents. Mr. McKay, in his affidavit, reviews the history of the City's consideration of this location and steps that it has taken to make - successfully I would note - to make this intersection safer. This includes studies by City employees in the engineering department, consultations with the Royal Canadian Mounted Police and other consideration by Council.

[27] I note that in all of this documentation no reference is made to the hydro post location as posing any type of risk or having been involved in any of the accidents that occurred at the intersection. Ultimately, what the City did many years prior to this accident in 1999 was to add the four-way stop, and the warning sign; change the size of the signs; and place the flashing red light. This, according to Mr. McKay's evidence, largely resolved the problem of this being a high collision intersection.

[28] There is, therefore, no evidence that the location of this pole has, despite the history of this intersection as

being problematic from other perspectives, contributed in the past to difficulties at the intersection.

[29] In response to this opinion evidence, no evidence has been filed by the defendants to the contrary. Mr. Watts candidly said that an expert has now been retained, but he does not know if there will be contradictory evidence. No adjournment was sought pending production of that report. The argument was simply that at trial it would be open to the jury, based on the photographs alone and perhaps on something that might be elicited from the City's experts on cross-examination, to conclude that there was a breach of the standard of care.

[30] A summary trial is a trial, and a party does have an obligation, absent explanation for its inability to do so, to produce whatever necessary evidence there is to meet the applicant's case. Given the length of time that the defendants have had notice of this application, the fact that we are very far down the road in this lawsuit, although not yet past the deadline for filing of expert reports, I do not think that the court is obliged to speculate that evidence might emerge that could cast doubt on the opinions of those experts now before the court.

[31] Accordingly, I am satisfied I can find the facts and the law necessary to determine the issues placed before me on this application. There is no dispute as to the law. It is set out in a number of authorities including statements by the Supreme Court of Canada that the obligation on a municipality is to maintain roadways in such reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety.

[32] The Court has been referred to a number of decisions. Perhaps most pertinent is ***Roe v. The Queen in Right of British Columbia***, 56 D.L.R. (4th) 541, a decision of this Court dealing with a boulder located some distance from the travelled portion of the road, which was struck by a vehicle. The court concluded that the standard of care did not require the Crown to remove roadside obstructions which present a hazard only to drivers who veer off a relatively flat and straight portion of a highway.

[33] There can be no doubt here that ordinary vehicles driving in the lane and in the direction that Mr. Gavin’s vehicle was approaching the intersection would face no hazard whatsoever from the post in question.

[34] In all of the circumstances, then, I am satisfied that the defendant City is entitled to the relief it seeks, and

that the evidence does not establish that the City breached the standard of care required of it in the circumstances, or that any action on the part of the City caused or contributed to the plaintiff's injuries.

[35] The claim should, therefore, be dismissed as against the defendant City.

(DISCUSSION BETWEEN THE COURT AND COUNSEL RE COSTS)

[36] THE COURT: All right. I see no reason, then, why costs should not follow the cause, and the defendant, then, is entitled to one set of costs in total as against the three defendants who opposed the application on Scale 3.

"W.G. Baker, J."
The Honourable Madam Justice W.G. Baker