

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Simpson v. Baechler et al.***,
2007 BCSC 347

Date: 20070313
Docket: S5696
Registry: Campbell River

Between:

Robert Burton Simpson

Plaintiff

And

**Guy Harvey Baechler
District of Campbell River and
British Columbia Hydro and Power Authority
Telus Corporation**

Defendants

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Plaintiff:	David J.F. Tees
Counsel for Guy Harvey Baechler:	James A. Graham
Counsel for District of Campbell River:	Donald C. McKay
Counsel for Telus Corporation:	Michael F. O'Meara
Date and Place of Trial:	December 12 - 19, 2006 Campbell River, BC
Supplementary Written Submissions Received:	January 2, 12, and 15, 2007

Introduction

[1] This action is concerned with liability arising out of an accident in Campbell River involving a pedestrian and a motor vehicle.

[2] At 9:00 p.m. on January 3, 2003, Robert Simpson finished his day's work as a pharmacist at Save On Foods in Campbell River and began his walk home. He emerged from behind a utility pole at the intersection of 12th Avenue and Dogwood Street, intending to cross Dogwood in a crosswalk. He and a Mazda 2000 truck driven by Mr. Baechler collided.

[3] Mr. Simpson claims that Mr. Baechler caused the accident by driving his vehicle in a negligent manner. He also claims that the District of Campbell River ("City"), British Columbia Hydro and Power Authority, and Telus Corporation were at fault because they negligently allowed the utility pole to create a hazard for pedestrians and motorists at the crosswalk. The action against BC Hydro was dismissed by consent. Mr. Simpson now seeks damages from Guy Harvey Baechler, the City and Telus Corporation.

[4] In his defence, Mr. Baechler says that Mr. Simpson failed to exercise reasonable care and attention before entering the crosswalk and his negligence caused the accident. Mr. Baechler agrees with Mr. Simpson's assertion that the City and Telus were negligent. The City and Telus deny negligence saying Mr. Simpson was the sole cause of this serious accident.

[5] Mr. Simpson was 23 years of age at the time of the accident. He graduated from the University of British Columbia as a pharmacist in 2002 and returned to Campbell River to begin his career. The injuries he sustained in the accident were very serious: a fracture of both knees that required surgery and will require future surgical attention; a fractured pelvis; an abrasion to the forehead; and a moderate closed head injury that has impaired Mr. Simpson's functional capacity. The parties have agreed on the appropriate measure of damages in the event liability is established. The issue before me is who among Mr. Simpson, Mr. Baechler, the City, and Telus caused the accident.

The Intersection and its History

[6] The T-intersection at 12th Avenue and Dogwood Street has long been considered dangerous among Campbell River residents. Dogwood originates at the Island Highway in the vicinity of what is now the Discovery Harbour Shopping Centre, approaches the downtown core as it proceeds south to 11th Avenue, and then ascends a hill called Dogwood Hill to a residential area of the City. The avenue originates west of Dogwood and does not extend east of its intersection with Dogwood.

[7] Dogwood was originally constructed as a two-lane road in the 1960s. At the time of its construction, Dogwood was bordered by a sidewalk on the west. BC Hydro and Telus maintained wood utility poles, first installed in 1961, to the west of the sidewalk. The poles interfered with neither pedestrians nor motorists. One of

the poles was adjacent to the northwest corner of the intersection of 12th Avenue and Dogwood, but clear of the sidewalk.

[8] Sometime during the 1980s the City widened Dogwood from two lanes to four. In the process, the configuration of the northwest corner of the intersection of 12th Avenue and Dogwood was modified. A let-down was installed to permit wheelchair access to 12th Avenue and, consequently, to Dogwood. The comparatively sharp right-angle corner was replaced by a curve. The north-south pedestrian sidewalk that crossed 12th Avenue parallel to Dogwood on its western edge was moved further west. The utility pole on the northwest corner was not relocated with the result that its base was incorporated into the sidewalk. A marked, east-west crosswalk on the north side of 12th Avenue provided pedestrians a means of crossing Dogwood.

[9] The edge of the utility pole was 37 centimetres, approximately 14.6 inches, from the curb on Dogwood. The pole was also 37 centimetres in diameter at the eye level of a standing pedestrian of average height. A plastic pilaster or covering had been installed by Telus on the northwest quadrant of the pole in order to provide protection for telephone cables to an adjacent service station. The pilaster increased what may loosely be described as the overall "diameter" of the pole to 48 centimetres, approximately 18.9 inches, at the eye level of the average pedestrian. The diameter increased to approximately 60 centimetres, approximately 23.6 inches, near the base of the pole.

[10] It is not disputed that the combination of the pole and the pilaster, located as close to the corner as they were, obscured the view of a pedestrian standing on the south side of the pole looking north for approaching vehicles on Dogwood. Likewise, the pole and pilaster obscured pedestrians standing on the south side of the pole from the view of a driver proceeding south on Dogwood. A pedestrian and motorist had a full view of each other for a distance of approximately 3 metres west of the utility pole, after which visibility was further obscured by shrubbery.

[11] In 1996, the City, the RCMP, and the Insurance Corporation of British Columbia ("ICBC") identified the portion of Dogwood between and 11th and 13th Avenues as accident prone and problematic with respect to traffic operations. As part of a road safety and accident prevention initiative designed to reduce the frequency and severity of accidents, ICBC asked the City to participate in a study of improvements that might be made to Dogwood. Delcan Engineering Ltd. studied the corridor and reported to the City in December 1996. One of the firm's recommendations was to relocate the utility pole at the northwest corner of 12th and Dogwood. The engineers reported as follows:

The positioning of the telephone pole on the northwest corner of the intersection ... hides pedestrians, about to cross from west to east, from the view of drivers of southbound vehicles. The sudden appearance of a pedestrian causes braking and subsequent conflicts between

- The vehicle and the pedestrian; and
- Any following vehicles.

The other source of conflict at this intersection occurs in the northbound left turn movement. The opposing southbound through traffic is congested and slow-moving causing the northbound left turn

to encroach into the intersection and force the through movement to give way.

[12] In August 1997, City Council authorized modifications to the Dogwood corridor, including relocation of the utility pole. In furtherance of the objective, City officials asked BC Hydro and Telus, who shared ownership of the pole on a 60/40 basis, to agree to the relocation of the pole. BC Hydro did not object to the proposed relocation. Telus was opposed. No record of the discussions in 1997 between Telus and the City can now be found. The basis for the opposition from Telus cannot be determined from the evidence that was adduced at trial. In any event, all of the improvements recommended by Delcan, but one, were made: the utility pole remained unmoved and embedded in the sidewalk.

[13] City officials continued to be concerned about the presence of the pole which Mr. Skognes, the City's engineering services manager from 2000 to 2005, recognized as a hazard to motorists and pedestrians. In August 2000, a Campbell River resident called Telus to express concern about the utility pole. Mr. Skognes testified that he may have encouraged the resident to make the call. On September 8, 2000, the Telus service manager, wrote to the City's engineering department as follows:

I would like to see the crosswalk at the corner of 12th and [Dogwood] (at the Chevron Station) relocated to the south side of 12th Avenue.

The reason for this request was a call from Mr. Clarence Ewart concerning the location of the joint B.C. Hydro-Telus pole on this corner. He called very concerned when a pedestrian stepped out from behind this pole onto the crosswalk with no regard for oncoming traffic, which almost caused a very shaken Mr. Ewart to run down the pedestrian.

Mr. Ewart claimed that he could not see the pedestrian because of the pole. I have visited the location and agree with Mr. Ewart. Unfortunately the pole cannot be relocated because of the Telus laterals that feed the Chevron Station and adjacent mall.

[14] On September 22, 2000, Mr. Skognes replied to Telus saying that at the direction of the City's Technical Traffic Committee, the request that the crosswalk be relocated had been forwarded to the traffic consultant who was studying safety issues on Dogwood Street. The letter closed with the following paragraph:

It should be noted that the subject pole was identified as a candidate for possible relocation in an earlier traffic study. Unfortunately, I am unable to locate any follow-up correspondence with B.C. Tel in our files. Is relocation totally out of the question or could the pole be relocated with additional works? I would appreciate receiving clarification.

[15] City officials say that Telus provided no response to its query. Telus adduced no evidence to the contrary.

[16] The second safety review of the Dogwood corridor occurred in 2000. On February 19, 2001, Mr. Skognes reported to the City's Technical Traffic Committee on the recommendation of the safety consultant. At the time, Mr. Skognes wrote as follows:

The accident data revealed that 11th Avenue has a relatively high crash history resulting from left turn movements. There have also been a number of rear end collisions as a result of confusion. The 12th Avenue intersection has a low accident frequency and severity history but there were rear end collisions on Dogwood Street in the southbound lanes. Pedestrian involvement is relatively high.

[17] In 2001, a new plan for modification of the corridor was approved in principle. The plan included the relocation of the utility pole which had been a concern for City

officials since 1997. BC Hydro and Telus agreed to the proposed relocation which was completed with minimal difficulty in the spring of 2003 in the same manner that had been proposed in 1997. The telephone cable conduit and lateral which Telus described as the impediment to the move in its letter of September 8, 2000, was dug up, the sidewalk was reconstructed, the pole was moved 2.97 metres from its former location to a point off the sidewalk, and the lateral was reinstalled. The relocation eliminated the restrictions on pedestrian and motorist visibility. The relatively modest cost of approximately \$3,000 was shared by BC Hydro, Telus, and the City.

Evidence Regarding the Accident

(a) *Mr. Simpson*

[18] Mr. Simpson testified that he could not remember events immediately before or after the accident. He admitted that he knew of the obstruction created by the pole and the need for caution. He had crossed Dogwood at the intersection on at least 60, and perhaps as many as 100, occasions. He knew he could see northward on Dogwood as he approached the pole, and that his view of Dogwood to the north was obscured when he was on the south side of the pole. He knew that he had a clear view of Dogwood after passing the utility pole, and before stepping into the southbound traffic lane. He testified that his usual practice when approaching the intersection was to look left, look right and then look left again when not standing on the south side of the pole and before crossing Dogwood.

[19] Mr. Simpson testified that he remembered seeing cars approaching from the south on the opposite side of Dogwood. He testified that he saw no vehicles

approaching from the north. At the time of the accident, he was wearing dark clothing and carrying an umbrella. In the course of an independent medical examination some time before trial, Mr. Simpson is reported to have told his physician he remembered getting to the curb, but nothing thereafter until he regained consciousness as he lay on the road.

(b) Mr. Baechler

[20] Mr. Baechler testified as follows. He dined at the home of friends on the night of the accident, but had consumed no alcohol in the course of the evening. There is no evidence that contradicts that testimony. Mr. Baechler left to go home just before 9:00 p.m. It was dark, a light rain was falling, and the streets were wet. His lights and wipers were functional. He recalled entering Dogwood at 16th Avenue, from which point he proceeded south. He recalled stopping at the traffic light at 13th Avenue and then continuing south in the curb lane. He moved to the right side of the lane as he proceeded south, anticipating the constriction of Dogwood from two lanes to one at the base of Dogwood Hill.

[21] Mr. Baechler stopped for a traffic light at 13th Avenue. After the light changed and he passed through the intersection, a vehicle overtook him on the left. He could not describe that vehicle's path of travel after it passed. As he proceeded south, he shifted to fourth gear at a speed of approximately 45 kph. He did not intentionally accelerate, but he agreed that the higher gear would cause his truck to gain speed. He estimated he was travelling at 50 kph as he approached the intersection. There is no other evidence of the speed of the Baechler vehicle.

[22] When he was what he estimated to be 10 metres from the north edge of the marked crosswalk at 12th Avenue, Mr. Baechler saw a foot and lower leg extend from behind the utility pole and step onto the street. What he saw was Mr. Simpson's leg. Mr. Baechler was sufficiently close to the intersection when he saw the pedestrian that he did not have time to react in order to avoid contact by stopping or steering his vehicle to the left. The point of impact was the right headlight of the Baechler vehicle. Mr. Baechler stopped his vehicle in the vicinity of the southwest corner of the intersection.

[23] Mr. Baechler knew of the dangerous nature of the intersection; he had seen pedestrians cross inappropriately or with difficulty from east to west, but not from west to east (Mr. Simpson's direction of travel); he looked for, and did not see, any movement to the right, or west, of the utility pole as he approached 12th Avenue; he saw no vehicles approaching from the south; and he was focused on the approach to Dogwood Hill because of the narrowing of the road from two lanes to one.

[24] There were no independent witnesses to the accident.

Findings of Fact and Negligence

(a) *Mr. Simpson*

[25] I prefer the evidence of Mr. Baechler with respect to events surrounding the accident. Notwithstanding his attempt to recall what happened, I have little confidence, given the circumstantial evidence and Mr. Simpson's testimony, that Mr. Simpson recalled events at or around the time of the accident. He was rendered

unconscious in the accident. He told medical practitioners that he had pre or post-accident amnesia.

[26] There is a conflict between the testimony of Mr. Simpson and Mr. Baechler with respect to the presence of other vehicles in the vicinity of the intersection. Mr. Simpson says he saw vehicles approaching 12th Avenue from the south, but he did not see any vehicles approaching from the north. Mr. Baechler saw no northbound vehicles as he travelled south. He had been passed by another southbound vehicle as he drove south from 13th Avenue on Dogwood.

[27] I do not accept Mr. Simpson's evidence that he looked north and saw no approaching vehicles. The Baechler vehicle was readily visible if Mr. Simpson looked north from a point where his view was not obstructed by the pole. I accept the testimony of Mr. Baechler who said that a vehicle passed his at a point south of the 13th Avenue intersection and continued south toward the 12th Avenue intersection where the accident occurred. That vehicle was readily visible to a pedestrian looking north from the corner of 12th Avenue and Dogwood. The circumstantial evidence which I accept compels me to find as a fact that Mr. Simpson either did not look north for oncoming traffic, or he looked north and observed only the vehicle that had passed the Baechler vehicle.

[28] Mr. Simpson's evidence that he saw vehicles approaching from the south contradicts that of Mr. Baechler who testified that he saw no vehicles travelling north as he travelled south. I prefer and accept Mr. Baechler's evidence on the point and

find as a fact that no vehicles were approaching the intersection from the south at the time of the accident.

[29] While one cannot know with certainty what happened on that fateful night, the evidence reasonably permits of the inference, and I find as a fact, that as Mr. Simpson approached the intersection, but before he arrived at the pole, he saw the vehicle that passed the Baechler vehicle; he failed to observe the Baechler vehicle at the same time, although it was readily visible in the 3-metre distance from the shrubbery to the west edge of the pole; he stopped behind the pole to let the unidentified vehicle pass; and, after stepping from behind the pole and regaining his unobstructed view of Dogwood to the north, he omitted to look for southbound approaching traffic, including the Baechler vehicle, before entering the crosswalk.

[30] I draw the foregoing inferences from Mr. Baechler's evidence, which I accept, that he looked for, but did not see, any pedestrian approaching the pole from the west; no vehicles were approaching from the south; and a vehicle passed the Baechler vehicle between 13th and 12th Avenues. Mr. Simpson did not see the Baechler vehicle because it was obscured from view by the pole.

[31] As I have recounted, Mr. Simpson was aware of the characteristics of, and danger associated with, the intersection. He was under a common law duty to take reasonable care to ensure his safety when crossing the intersection: see *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194 (C.A.), 68 D.L.R. (4th) 602. Mr. Simpson breached the duty imposed on him by entering the crosswalk without looking to his left at a point when he had full view of approaching traffic.

[32] By proceeding as he did, Mr. Simpson also breached the duty imposed on him by s. 179(2) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, which provides as follows:

179(2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

[33] In the result, Mr. Simpson was negligent.

(b) *Mr. Baechler*

[34] I accept Mr. Baechler's evidence of his speed and his observations as he approached the intersection of 12th Avenue and Dogwood. I find as fact that he looked and saw no pedestrian approaching the intersection from the west because the pedestrian was standing behind the utility pole. I find as a fact that Mr. Baechler first became aware of someone in the vicinity of the intersection when he saw a lower leg and foot emerge from behind the utility pole as Mr. Simpson stepped into the intersection. I find as a fact that when he first became aware that Mr. Simpson was behind the utility pole, Mr. Baechler had insufficient time to react and take evasive action in order to avoid colliding with Mr. Simpson.

[35] The time and distance evidence relating to a motor vehicle travelling at 50 kph, the time and distance evidence relating to a pedestrian walking at average speed, and the evidence of the reaction time of an average driver, all support Mr. Baechler's evidence that he was within approximately 10 metres of the intersection

when he first detected danger and he was unable to take effective action that would have averted the accident.

[36] Counsel for Mr. Simpson submitted that because of the wet road that affected stopping time, the rain which affected visibility, Mr. Baechler's imperfect eyesight, Mr. Baechler's awareness of the dangers associated with the intersection and the impediment to visibility created by the utility pole, he should have approached the intersection at a lower rate of speed and, had he done so, he would have been able to stop in time to avoid colliding with Mr. Simpson.

[37] On the evidence, I find as a fact that Mr. Baechler's eyesight was adequately corrected by prescription lenses which he was wearing at the time of the accident.

[38] The common law duty imposed upon Mr. Baechler as the driver of an automobile was to drive in a manner that would allow him to take evasive action when he became aware, or ought to have become aware, of a pedestrian at the intersection, and to respond to the reasonably foreseeable actions or movements of that pedestrian.

[39] There is no obligation upon a motorist to travel below the speed limit in order to meet unforeseeable emergencies, such as a pedestrian stepping off the curb into the path of an oncoming vehicle when it was impracticable for the motorist to stop: see *Ibaraki v. Ramford*, [1996] B.C.J. No. 724 (S.C.). As the Supreme Court of Canada recently affirmed in *Resurface Corp. v. Hanke*, 2007 SCC 7 at para. 11, "foreseeability depends on what a reasonable person would anticipate, not the

seriousness of the plaintiff's injuries (as in this case) or the depth of the defendant's pockets."

[40] Mr. Baechler was familiar with the intersection. He had observed close encounters between vehicles and pedestrians crossing Dogwood from east to west. He had not observed any incidents involving motor vehicles and pedestrians crossing from west to east. I find that it was not reasonably foreseeable to a motorist such as Mr. Baechler that a pedestrian would stop behind the pole which would obscure him from the motorist's view, and suddenly step into the intersection without first looking for oncoming traffic when clear of the pole.

[41] Had Mr. Simpson not been standing behind the utility pole, Mr. Baechler would have seen him in the vicinity of the crosswalk. His speed and location in the roadway were such that upon sighting a pedestrian at the crosswalk, other than one who was obscured by the pole, he would have had adequate time to slow down, stop, or take evasive action in order to avoid striking a pedestrian who entered the crosswalk.

[42] In all of the circumstances, I find that Mr. Baechler was not negligent in the operation of his motor vehicle and Mr. Simpson's action against him must be dismissed.

(c) *District of Campbell River*

[43] I have recounted the history of the City's concerns in relation to the location of the pole embedded in the sidewalk at the northwest corner of the intersection, its

attempts at action, the response of Telus to City initiatives and requests, and the manner in which the utility pole was ultimately relocated.

[44] From the City's perspective, the questions are whether it was negligent when it permitted the utility pole to be embedded in the sidewalk in close proximity to the intersection when Dogwood was widened from two lanes to four; whether, if not negligent at that point, it was negligent in omitting to remove a hazard once the utility pole was identified as such; and whether, if negligent, that negligence was a cause of this tragic accident.

[45] I do not accede to the City's claim that it was under no duty of care because the placement of utility poles was a policy rather than an operational decision: *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 41 B.C.L.R. (2d) 350. The City was under a duty of care to refrain from acting in a manner that would unreasonably compromise the safety of those using the streets. The City permitted the installation of the original pole. The pole was not initially installed in furtherance of, or in conformity with, any policy decision. The pole was installed on City property in order to allow BC Hydro and Telus to supply utilities to customers. Those companies in turn allowed a cable television operator to attach supply cables to the pole. The installation of the pole at the outset was a purely operational decision that had nothing to do with policy.

[46] There was no evidence of the standard or common practice pertaining to the location of utility poles at or near intersections within municipal boundaries. I cannot say that what the City did or permitted to be done was, or was not, in conformity with

common practice among municipal governments by reference to any evidence adduced at trial. That being the case, I am required to formulate the standard of care in conventional terms. The City must refrain from doing or permitting anything that unreasonably threatens or impairs the safety of pedestrians on municipal sidewalks and roads.

[47] Nothing done by the City in permitting the installation of the pole in its original location clear of any sidewalk would breach any standard of care. At the outset, the pole posed no threat to motorists or pedestrians.

[48] The question of whether the City departed from the standard or care in the mid-1980s when it widened Dogwood from two lanes to four and permitted the utility pole to remain embedded in the sidewalk is more difficult. The evidence is that there was an unobstructed view of Dogwood at all points on the northwest corner of the intersection. There was an unobstructed view of Dogwood to the north from a point 85 centimetres, approximately 33.5 inches, from the curb to a point 10 feet further west along the sidewalk on 12th Avenue. There was unobstructed visibility from the edge of the curb to a point 37 centimetres, approximately 14.6 inches, west. The pole completely obscured traffic approaching from the north in the interval from 14.6 inches to 33.5 inches, a distance of approximately 19 inches. I find as a fact that the creation of an obstruction of that extent in the 1980s did not breach the standard of care at that time.

[49] The next question is whether the City breached its duty to take reasonable care to provide safety for pedestrians using its streets and sidewalks once the

engineering study identified dangers, including the location of the pole, associated with the intersection by omitting to require the recommended and approved relocation of the utility pole when implementing changes to the Dogwood corridor in 1997.

[50] By 1996, the City knew of the danger arising from the location of the pole. One of the specific dangers highlighted by the engineers was the conflict that had developed between pedestrians crossing Dogwood from west to east at its intersection with 12th Avenue, and southbound vehicles on Dogwood. The risk of injury to a pedestrian using the crosswalk was clearly identified. It is most likely that the danger evolved over time as traffic and pedestrian volume in the vicinity of the intersection increased with the growth of the municipality. I find as a fact that the potential for harm to a pedestrian using the crosswalk was readily foreseeable and known to the City's operating officials by the end of 1996.

[51] In 1997, City Council approved a plan that authorized the relocation of the pole. That was the policy decision. Implementation of the approval was an operating decision. In my opinion, the City breached the standard of care when it made other changes to the intersection, but succumbed to the position advanced by Telus that the pole could not be relocated. The position was unsupportable as evidenced by the fact that the pole was relocated in 2003, after the Simpson accident, at what can only be regarded as a very modest cost. The City had the power under legislation governing municipalities to compel Telus's participation in relocation of the pole.

[52] I cannot agree with the City's claim that compelling cooperation from Telus was a policy, rather than operating, decision that is not justiciable. None of the doctrines of legislative immunity, paramountcy, or inter-jurisdictional immunity has application in the circumstances.

[53] The defence of legislative immunity is derived from the premise that a governing body cannot be found negligent for the manner in which it exercises or refrains from exercising its legislative power. In this case, the City relies upon the references to compelling relocation by bylaw in s. 546 of the *Municipal Act*, R.S.B.C. 1996, c. 323, in force in 1997, and s. 533 (repealed by B.C. Reg. 465/03) of the *Local Government Act*, R.S.B.C. 1996, c. 323. Those sections provided as follows:

Municipal Act

- 546 (1) Despite any public or private Act but subject to the *Motor Vehicle Act*, a council may, by bylaw, regulate
- (a) all uses of or involving a highway or portion of it, other than uses referred to in section 545, and
 - (b) all uses of or involving a public place.

Local Government Act

- 533 (1) A council may, by bylaw, require the removal of
- (a) wires,
 - (b) poles, or
 - (c) towers or other structures

on, in, over, under or along a highway that are considered by the council to be dangerous to the public safety.

[54] This is not a case of a municipality engaging in the legislation of a broad policy initiative by bylaw or countermanding an operating decision following upon a bylaw being found unlawful: cf. *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] S.C.R. 957, 22 D.L.R. (3d) 470. In this case, the City made an unconditional policy decision without the requirement of any bylaw to relocate the pole as part of its program to provide safety for pedestrians and motorists at the intersection. Implicit in that approval is a commitment to do what was necessary to give effect to the approval.

[55] The only evidence of the reason operating officials did not act in conformity with the policy is the willingness to accept the unexplained opposition of Telus to the proposed relocation in 1997. The other owner of the pole, BC Hydro, approved of the relocation. In 2000, the City's operating officials did not pursue Telus for a response to the query whether there was any real impediment to relocation of the pole. In 2003, Telus acquiesced to the relocation. No bylaw was required. I find as a fact that there was no impediment to relocation.

[56] By omitting to require relocation, and by failing to proceed in the manner directed by Council, those responsible for the operating decision, whoever that was, allowed the hazard to remain. There is no evidence from which I can conclude that the decision not to proceed with relocation was a policy, as opposed to operating, decision that should afford the City any protection.

[57] With respect, the claims that the doctrines of paramountcy and inter-jurisdictional immunity have application in the circumstances cannot succeed. The

relocation of a single pole in the circumstances of this case does not invoke s. 44 of the *Telecommunications Act*, S.C. 1993, c. 38, upon which the City relies. That section provides as follows:

44. On application by a municipality or other public authority, the Commission may
- (a) order a Canadian carrier or distribution undertaking, subject to any conditions that the Commission determines, to bury or alter the route of any transmission line situated or proposed to be situated within the jurisdiction of the municipality or public authority; or
 - (b) prohibit the construction, maintenance or operation by a Canadian carrier or distribution undertaking of any such transmission line except as directed by the Commission.

[58] Relocation of the pole was carried out in 2003 without bylaw and without the intervention of any federal authority.

[59] In sum, I find that the City breached the standard of care by omitting to remove a hazard for pedestrians, the nature and extent of which were fully known to the City.

(c) *Telus Corporation*

[60] Telus was under a duty to ensure that its works did not create a foreseeable risk of harm. The reasoning that I have applied to the City's position is applicable to Telus. I find as a fact that by 1997, Telus was fully aware of the nature and extent of the hazard which was augmented by the attachment of its pilaster to the pole. For reasons which it did not identify and which, in view of the eventual relocation, could not be found to have had any substance, Telus refused to participate with the City

and BC Hydro in the elimination of the identified hazard. I find as a fact that Telus breached the standard of care applicable to it in the circumstances of this case and was therefore negligent.

(d) *Causation*

[61] Whether or not the City and Telus were negligent by omitting to remove the hazard, the ultimate question must be whether, in all of the circumstances, the location of the pole was a cause of the accident. In my opinion, it was. It obscured Mr. Simpson's view of approaching traffic on Dogwood. Its location left him minimal room, barely one foot, to peek around the pole, after stopping behind it to let previously detected traffic pass, for the purpose of determining whether there was additional or previously unobserved, oncoming traffic. But for the presence of the pole, Mr. Simpson would have been able to see and would have seen the approaching Baechler vehicle.

[62] In *Resurface Corp., supra*, the Supreme Court of Canada affirmed that, except in unusual circumstances, the "but for" test is still the basis for the finding of liability in tort. In other words, Mr. Simpson must prove on the balance of probabilities that "but for" the negligence of the City, he would not have suffered injury. In the present case, there was such close proximity between the obstruction of Mr. Simpson's view, the recovery of his unobstructed view, and his entry into the crosswalk, that the "but for" test is satisfied. I find as a fact that the pole was a cause of the accident.

[63] It follows that the causes of this accident were the negligence of Mr. Simpson, the negligence of the City, and the negligence of Telus.

(e) *Apportionment*

[64] The question of apportionment must be determined by reference to blameworthiness and not by reference to causation: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.* (2000), 80 B.C.L.R. (3d) 153, 2000 BCCA 505.

[65] Mr. Simpson was aware of the pole. He was aware of the manner in which it obstructed his view as he approached Dogwood to cross. He knew of the manner in which he should take reasonable care for his safety. He had done so on many occasions without misadventure. He was fully aware of the environment in which he found himself on the night of January 3rd. On that occasion, for whatever reason, he let his guard down and omitted to exercise reasonable care for his safety.

[66] The City and Telus were aware of the hazard created by the pole by 1996. The City authorized removal of the hazard in 1997. Telus opposed removal of the hazard. The City acquiesced to the Telus view that the pole could not be relocated in 1997. Relocation was effected in 2003, some six months after the accident.

[67] In this case, I am satisfied that Mr. Simpson was more blameworthy than the City and Telus. I cannot say that either of the City and Telus is more blameworthy than the other. In all of the circumstances I find that fault is appropriately allocated 60% to Mr. Simpson, 20% to the City, and 20% to Telus.

[68] Accordingly, Mr. Simpson is entitled to judgment.

"Mr. Justice Pitfield"