Oral Reasons for Judgment

Date: 19980904
Docket: 11586
Registry: Vernon

IN THE SUPREME COURT OF BRITISH COLUMBIA

(IN CHAMBERS)

Oral Reasons for Judgment
Mr. Justice B. M. Davies
September 4, 1998

BETWEEN:

JEREMY VIGUE, AN INFANT
BY HIS GUARDIAN AD LITEM, ARTHUR VIGUE

PLAINTIFF

AND:

HUMPHREY COOK AND CITY OF ENDERBY

DEFENDANTS

Counsel for the Plaintiff: John M. Baigent
Counsel for The City of Enderby: Dennis K. Hori
Counsel for the Humphrey Cook: Kent Burnham,
agent for Douglas A. Betton

[1] THE COURT: This trial involved the determination of liability in relation to an August 25th, 1993, collision between the infant plaintiff bicyclist, who was then twelve years old, and the defendant motorist, Mr. Cook, the sixty-three year old driver of a large van. The

collision occurred in Enderby, British Columbia, at the intersection of an alleyway and Old Vernon Road.

[2] The infant plaintiff alleges negligence against Mr. Cook, and Mr. Cook alleges contributory negligence against the infant plaintiff in relation to the collision. The intersection in issue is a blind one for pedestrians approaching the alley from the south on Old Vernon Road, and for motorists exiting the alley east onto Old Vernon Road. Neither can see the other until they are past the corner of a warehouse which is twenty-nine inches from the sidewalk on the west side of Old Vernon Road at the intersection of the alley, which abuts the warehouse on its south edge. The warehouse is a nonconforming use.

[3] There are no warning or stop signs at the intersection, and no lines marking the commencement of the crosswalk area extension of the sidewalk across the intersection. Hence, the claims against the City of Enderby by the infant plaintiff alleging negligence against the City of Enderby for failing to mark the intersection, post warnings or stop signs, mount a mirror to improve visibility, make the alley a one-way alley, preventing exiting onto Old Vernon Road, or otherwise preclude the use of the intersection as an exit onto Old Vernon Road.

[4] Counsel for the defendant, Cook, properly acknowledges that there should be a finding of some liability against the defendant, Cook, in the circumstances of the collision, but says that such apportionment should be less than that attributed to the infant plaintiff. Mr. Betton, on behalf of Mr. Cook, suggests an apportionment as between the infant plaintiff and the defendant, Cook, of seventy-five percent as against the infant plaintiff. Counsel for the infant plaintiff also properly acknowledges that there should be a finding of contributory negligence against the infant plaintiff in the circumstances of this case, but as between the plaintiff and the defendant, Mr. Baigent submits an apportionment of seventy-five percent against the defendant, Cook. Both the defendant, Cook, and the infant plaintiff say that the defendant, City of Enderby, should be found to be negligent for failing to take action to remedy the problems associated with the intersection and thus should share in any apportionment of liability.

[5] The apportionment of liability as between parties requires a determination of the relative blameworthiness of the parties. As stated by Mr. Justice of Appeal Lambert in ***Cempel v. Harrison Hot Springs Hotel Limited*** (1998) 6 W.W.R., 233 (B.C. Court of Appeal) at page 243:

> Fault or blameworthiness in the context of the **Negligence Act**, (R.S.B.C. 1996, c. 333) is a gauge of

> the amount by which each causative agent fell short of the standard of care that was required of that person in all of the circumstances.

[6] I will in these reasons deal firstly with the apportionment of fault between the plaintiff and the defendant, Cook.

[7] The infant plaintiff approached the alley intersection from the south on Old Vernon Road. He did so by riding his bicycle on the sidewalk in contravention of his understanding of the rules of bicycle safety, s. 185(2)(a) of the then in force **Motor Vehicle Act,** (R.C.B.C. 1979, c. 288), and City of Enderby Bylaw number 530, Article 7. While the plaintiff's riding on the sidewalk prior to the collision was not causative of the collision, his failure to ride on the right-hand side of Old Vernon Road, as required by the **Motor Vehicle Act**, was a breach of s. 185(2)(b) of that Act. That breach placed the infant plaintiff at risk as he approached the alleyway, since he then had to negotiate entry into that alley and then proceed through the intersection of the alley with Old Vernon Road.

[8] I find that the infant plaintiff did, in fact, stop before the intersection and then began to move his bicycle forward from that point by straddling it and going forward slowly. While that finding may be somewhat at odds with

the possible conclusions to be drawn from the evidence of the infant plaintiff's cousin, Brendan Vigue, I am not prepared to reject the infant plaintiff's evidence that he stopped and then straddled forward. Brendan Vigue did not see otherwise, and suppositions from estimates of time and distance given at trial by a witness four years after the fact, when that witness was thirteen years of age at the time of the events and not paying particular attention to the actions of others are, in my judgment, insufficient to displace the sworn testimony of the infant plaintiff. I found the infant plaintiff to be a straightforward witness. I found his evidence to be generally in keeping with that of others, and I accept his evidence on this particular point, which is of significance. It is, therefore, my finding that Jeremy Vigue did not dart out quickly into the alley as suggested by counsel for Mr. Cook. I find that Jeremy Vigue was, in fact, proceeding slowly through the intersection by walking his bicycle in a straddling position.

[9] I do not, however, find that in the circumstances the infant plaintiff was a pedestrian when he was in the crosswalk. He did not fully dismount when entering the intersection. He was not walking. His choice of proceeding by straddling increased the risk of danger to him by necessitating the positioning of the bicycle well into the mouth of the alley before being able to look up

the alley for oncoming vehicles. That, in some measure, contributed to the failure to keep a proper lookout. In straddling his bicycle, the plaintiff also caused his maneuverability to be reduced in the circumstances and increased the danger which might arise in the event that an oncoming vehicle would create injury if the plaintiff could not avoid that vehicle.

[10] In my judgment, by straddling his bicycle the infant plaintiff was in breach of s. 185(2)(a.1) of the **Motor Vehicle Act** by, in fact, riding in a crosswalk. While the prohibition against riding in a crosswalk contained in that section is more likely directed to the safety of other pedestrians using a crosswalk than to the safety of the bicyclist, the facts of this case demonstrate that the bicyclist may also be put in greater danger than would arise if he were to observe the prohibition by dismounting and walking his bicycle through the crosswalk, rather than remaining astride.

[11] In summary, therefore, I find that the infant plaintiff was capable of being contributorily negligent as conceded by counsel for the infant plaintiff, and that his blameworthy actions did contribute to the collision.

[12] I turn, then, to the actions of the defendant, Cook.

[13] I accept the evidence of Mrs. Bawtree that Mr. Cook drove at a greater rate of speed than was appropriate in the circumstances when he was leaving the Bank of Montreal parking lot immediately prior to entering the alley and before proceeding to exit that alley onto Old Vernon Road. I also accept the evidence of Terry Vigue, Brendan Vigue and Mrs. Bawtree that Mr. Cook's vehicle ended up well past the sidewalk edge into Old Vernon Road after colliding with the plaintiff, and the evidence of the plaintiff, Brendan Vigue and Mrs. Bawtree that the defendant's vehicle then faced in a somewhat northerly direction. That evidence, together with the evidence of the plaintiff indicating that the defendant, Cook, was looking left indicates that the defendant was in the process of negotiating a left-hand turn at the time of the collision.

[14] I reject the evidence of Mr. Cook that his vehicle was struck by the plaintiff. I found his evidence to be generally unreliable and not in keeping with the evidence of the other witnesses which I do accept. I do not accept that Mr. Cook stopped five feet before the end of the building as he says he did. I accept Jeremy Vigue's evidence that the defendant's vehicle was moving forward when first seen by him at a time when he was already into the alleyway and the defendant vehicle was then five feet away. Had the defendant, Cook, been stopped at that

point, he would have seen the plaintiff and not moved forward. If he were creeping forward as he testified that he was, he would have stopped before colliding with Jeremy. Also, if the defendant, Cook, had been creeping forward he would have stopped immediately on collision rather than moving forward at least a further five feet, pushing Jeremy before him before being alerted to Jeremy's predicament by Brendan Vigue. It was at that point then the defendant, Cook, finally backed up.

[15] In driving his motor vehicle as he did, the defendant, Cook, breached s. 178(1) of the **Motor Vehicle Act**, which provides that:

> The driver of a vehicle in a business or residence district and emerging from an alley, driveway, building or private road, must stop the vehicle immediately before driving onto the sidewalk or the sidewalk area extended across an alley or private driveway.

[16] The defendant, Cook, also breached City of Enderby Bylaw number 530, Article 5, which provides that:

> The driver of any vehicle emerging from any lane, driveway or building shall stop such vehicle immediately prior to driving on or across any sidewalk or boulevard extending to or across such lane, driveway or building entrance and shall not proceed until such movement can be safely made.

[17] In my judgment, in addition to these breaches of the **Motor Vehicle Act** and the City of Enderby Bylaw number

530, the defendant, Cook, was also negligent in failing to keep a proper lookout. The evidence of the plaintiff, which I accept, establishes that the defendant, Cook, was looking left at the time of the collision. Had the defendant, Cook, looked right at the speed he says he was travelling when approaching the sidewalk from five feet away, he would have seen the plaintiff and could have avoided the collision. I find the defendant, Cook, was proceeding too quickly in the circumstances, without stopping and without sufficient lookout and care for the approach of others.

[18] In addressing the apportionment of liability as between the infant plaintiff and the defendant, Cook, I have reviewed all of the authorities provided by counsel. Of particular usefulness are the decisions of the British Columbia Court of Appeal, in ***Bajkov v. Canil*** (1990), B.C. Judgment number 145, unreported, Victoria Registry number V000914, and the British Columbia Supreme Court decision of Mr. Justice Edwards in ***Breary v. Costa*** (1993), unreported, Vancouver Registry B912604. Both cases involved collisions concerning bicyclists and motorists at intersections. Each case resulted in an apportionment of liability of fifty percent to the bicyclist and motorist involved in the collision.

[19] I find, however, that while those two cases are

useful, they are factually significantly different from the case at bar. In ***Breary***, the plaintiff was riding his bicycle in the crosswalk of a controlled intersection, and did not stop before entering that crosswalk and did not look left to see if any cars were approaching, notwithstanding that he could not be seen by north/south traffic because of the screening effect of a building. As to the driver in that case, Mr. Justice Edwards found that the defendant driver had proceeded to make a left-hand turn before it was safe to do so which resulted in the collision with the plaintiff.

[20] In ***Bajkov***, the plaintiff bicyclist, who was held fifty percent at fault, did not stop at the entrance to an intersection, but rather rode between a hydro pole and the curb over a bump in the asphalt and jumped his bicycle on that bump and then landed in the crosswalk. He did not see the defendant's vehicle until it was one or two feet away. The defendant motorist, who was held to be fifty percent at fault, was found to be negligent in failing to keep a proper lookout.

[21] While both of those cases do involve the actions of bicyclists and motorists at intersections in crosswalks, I do not find that on the facts of this case an equal apportionment of liability as between the infant plaintiff and the defendant would be appropriate. Contributory

negligence is essentially a question of fact, and while the decided cases offer valuable assistance and insight, they are clearly fact based. Bearing in mind the principles to be applied in this case as enunciated in ***Cempel v. Harrison Hot Springs Limited*** to which I previously referred, and considering the relative blameworthiness of the infant plaintiff and the defendant, Cook, especially considering the relative standard of care required of each in the circumstances, I have considered the following factors to be of particular significance:

1. The infant plaintiff was twelve years old and while he was a relatively experienced bicyclist, he was not as familiar with the intersection in issue as was the defendant, Cook, a licenced driver of more than fifty years;

2. The infant plaintiff did not dart out into the intersection. He slowed down before the corner and while his efforts at detecting traffic in the alley fell short of the standard required of him, he did make some effort, unlike the plaintiffs in either ***Bajkov*** or ***Breary***;

3. The infant plaintiff could reasonably have expected any traffic which came upon him to have stopped when he was seen in the alleyway;

4. The infant plaintiff's actions did help to create the risk and thus the collision which materialized, primarily by reason of his riding on the sidewalk rather than keeping to the right. I do, however, note the evidence of both the plaintiff and his mother that when there were cars parked on both sides of the street, the plaintiff had to consider the danger of that as well as the option of the sidewalk. While that possibility of taking the sidewalk rather than the right-hand side of the street does not lessen the fact of a breach of the bylaw and the **Motor Vehicle Act** by the plaintiff, and while it was not likely good advice from the mother, it does reflect upon the plaintiff's youth and inexperience, and his unfamiliarity with the area in making that determination to ride on the sidewalk. It is a child of twelve years old of like experience whose actions are now under consideration by me. If the infant plaintiff had been an adult, I would have had no hesitation in finding him fifty percent at fault in this case, but he was not an adult; and

5. As to the defendant, Cook, I note his many years of driving experience, his greater familiarity and experience with the actual intersection, the fact that he had control of a very heavy motor vehicle which required some distance to stop even at low speeds. I find that because of his actions in failing to stop on approach to the sidewalk,

and especially at the sidewalk, and proceed with sufficient caution in proceeding at too great a rate of speed in the circumstances, in failing to immediately stop upon impact with the plaintiff, and in failing to keep a proper lookout to his right while turning left, the defendant, Cook, must accept the greater portion of liability in this case.

[22] In the result, as between the plaintiff and the defendant, Cook, I find the defendant, Cook, seventy percent at fault for the collision and the injuries suffered by the infant plaintiff, and the infant plaintiff thirty percent responsible.

[23] I turn, then, to the question of the liability of the City of Enderby. The foundation of the plaintiff's claim against the City of Enderby is a submission that Mr. Vernon Glen, the City of Enderby's Superintendent of Public Works at the time of the collision and prior thereto, had assessed the intersection as a dangerous one and had recommended remedial action by way of creating a one-way lane with no exit onto Old Vernon Road. That was not done and no other corrective action was taken, and the plaintiff, therefore, says that a finding of negligence must follow. The allegations of negligence against the City of Enderby arising from the collision as they were developed during trial on the evidence, may be summarized

as follows:

1. Negligence in failing to post stop signs or warning signs at the intersection which would warn motorists and pedestrians of the potential danger and reduce the risk of improper actions by either;

2. Negligence in not painting the crosswalk so that the defendant, Cook, would better know where to stop;

3. Negligence in failing to place a mirror at the intersection to give a better view of the alley to pedestrians and of the sidewalk to motorists; and

4. Negligence in failing to designate the alley a one-way alley exiting only onto Highway 97A or otherwise precluding exiting onto Old Vernon Road, thus requiring the use of other available exit points from the alley, for example, through city-owned public parking lots.

[24] These allegations of negligence bring into issue the question of the duty of care owed by a municipality to its citizens for road safety and the question of whether the City of Enderby's response to the situation was a policy or an operational decision. The allegations also require examination of the specific facts of this case in light of the state of knowledge of the potential danger, not only

as can be imputed to the City of Enderby, but also as known by the plaintiff and the defendant, Cook.

[25] It is settled law that a municipality may be liable in negligence in the same fashion as an individual. See ***Just v. Regina in right of British Columbia*** (1989) 41 B.C.L.R. (2d), 351 (Supreme Court of Canada). It is also settled law that otherwise possibly tortious conduct by a municipality is not reviewable by the courts if it relates to acts or omissions which reflect the policy making and discretionary elements involved in the exercise of a statutory discretion. See ***Brown v. Her Majesty the Queen in Right of Province of British Columbia***, (1994) 89 B.C.L.R. (2d) 1 (Supreme Court of Canada).

[26] There has thus arisen in the decided cases a dichotomy between these two concepts, and in many cases the classification of municipal action or inaction as a true policy, or as an operational action or decision, is fundamental to a determination of whether tort liability may be imposed upon the municipality. The classification in issue can be a difficult one, and has been the subject of much judicial and academic debate and some criticism. See the minority judgment of Mr. Justice Sopinka in ***Brown*** at page 17 to 18. Notwithstanding the difficulty of the dichotomy, however, and the criticism of it, it is a matter which I must address in this case.

[27] Pursuant to s. 120 of the **Motor Vehicle Act**, the City of Enderby has a discretion whether to install traffic control devices. In 1993, prior to the accident, that discretion was not delegated by the City of Enderby to its Superintendent of Public Works, then being, then, Mr. Glen, who also acted as the City Engineer for the purposes of the city bylaw. In 1993, Mr. Glen had a duty to advise of possible concerns with respect to traffic safety, but the ultimate decision as to implementation of any recommendation remained with the elected officials of the City of Enderby through its council. The evidence establishes that Mr. Glen likely informed council of his concern with respect to the intersection in issue at a retreat before the accident. His primary concern was the use of the intersection by City of Enderby heavy equipment vehicles. By their configuration, they would be well past the corner of the alley before they could see traffic. Of particular concern was vehicular traffic. A secondary concern of Mr. Glen was possible danger arising at the intersection if the public did not obey the rules of the road. His unofficial recommendations were for a change of designation of the alley in issue to a one-way alley which would preclude exiting at Old Vernon Road.

[28] I am not satisfied that in these circumstances that the City of Enderby council was mandated to react as the

plaintiff says by adopting the recommendations suggested by Mr. Glen, or by adopting one of the other measures now suggested by the plaintiff as being appropriate. I agree with Mr. Hori, counsel for the City of Enderby, that the evidence establishes that there were no previous accidents at the intersection and that the potential danger of the intersection was obvious to users of the intersection and was specifically known to the plaintiff and to the defendant, Cook. I am also satisfied that the decision as to whether the alley should be changed to a one-way alley or that exiting should be prohibited onto Old Vernon Road was a policy decision involving considerations not only of safety, but also of financial resources as well as social and political factors, including the possible effect upon business, traffic flow and traffic congestion.

[29] I also do not find that the City of Enderby ignored the issue by inaction. There is no record of the unofficial recommendation of Mr. Glen at the retreat, and there is no evidence that any recommendation made by him was not considered by council. The plaintiff has failed to meet the burden of proving its allegation of inaction on a balance of probabilities.

[30] I am also not satisfied that the defendant, City of Enderby, was negligent in not placing warning or stop signs or in marking the crosswalk by painting. While such

a decision of traffic device implementation does, in my view, more likely involve an operational decision and could result in an imposition of liability based on the principle of failure to warn of known dangers (see ***Ryan v. City of Victoria***, (1994) 21 M.P.L.R. (2d) 148 (B.C.S.C.) as affirmed by the British Columbia Court of Appeal (1996) unreported Vancouver Registry CA019021), I am not satisfied that the plaintiff has established the existence of a type of danger or the extent of knowledge of the municipality of that danger that such principle should be applied in this case. I note again the evidence of Mr. Glen that his recommendation was informal and did not include the suggestions now urged upon me, that being painting of the sidewalk, placement of warning signs or stop signs.

[31] In my judgment, the plaintiff cannot succeed on the principle of failure to warn in this case in any event, because the evidence establishes that both the plaintiff and the defendant were well aware of the potential danger at the intersection and each testified that they knew they must proceed cautiously. There is no evidence that lack of warning signs, stop signs or a painted crosswalk were causative of the collision in this case, where both parties were fully aware of the potential danger of not proceeding with caution and still proceeded with less than such caution. If the City of Enderby owed a duty of care

to the plaintiff, and if it is reviewable by the court, and if it was breached, I find that the plaintiff has still failed to prove on a balance of probabilities that any such actions or inactions were causative of the plaintiff's injuries or increased his risk of injury in this case. Any other conclusion would be speculative at best.

[32] I turn finally to the suggestion that the failure to mount a mirror at the intersection is a breach of the duty of care owned to the plaintiff by the defendant, City of Enderby. While such a device, if erected, might have assisted in alleviating the potential danger by making the alley or sidewalk more visible to the user of the other, I am not prepared to say that in the circumstances the City of Enderby was negligent in not installing such a mirror. There had been no previous accidents at the intersection. The installation of a mirror had not been recommended by Mr. Glen, and the evidence establishes that such a device is not a common or accepted traffic control device. In my judgment, the evidence does not establish that any duty of care owed by the City of Enderby to the plaintiff in the circumstances, if it is reviewable by the courts, extends to the placement of a nonstandard traffic control device.

[33] In result, the infant plaintiff's claim against the defendant, City of Enderby, is dismissed.

[34] In summary, the plaintiff shall have judgment for his injuries suffered in the collision in an amount to be assessed, based upon seventy percent of those injuries to be payable by the defendant, Cook. The plaintiff is held to be thirty percent contributorily negligent for his injuries, and the claim against the City of Enderby by the plaintiff is dismissed.

[35] If counsel cannot agree on the disposition as to costs in this case, they shall as I previously indicated have liberty to apply with respect to the same and should make arrangements through the Registry to do so. I should also say that having regard to the evidence which I heard in this case as to the injuries suffered and the manner of that injury, that effective use of judicial resources would see me seized of the quantum aspect of this case, and I so order.