Date: 19990630
Docket: SO35959
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KELLY SHANNON WOLFORD

PLAINTIFF

AND:

GLEN JAMES SHAW, CITY OF BURNABY, CITY OF COQUITLAM, CITY OF COQUITLAM, MAINROAD CONTRACTING LTD., COLUMBIA BITULITHIC LTD., ANSAN INDUSTRIES LTD., HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA as represented by the MINISTRY OF TRANSPORTATION AND HIGHWAYS, ELAINE KATCSMA, JANE DOE and JANET ROE

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE STROMBERG-STEIN

Counsel for the Plaintiff:	T.L. Spraggs
Counsel for the Defendant City of Burnaby:	J.D. Cotter
Counsel for the Defendant City of Coquitlam:	T.W. Barnes
Place and Date of Hearing:	New Westminster, B.C. June 18, 1999

[1] Kelly Wolford was injured in a head-on collision on July 10, 1995 while driving on Lougheed Highway at or near the intersection of North Road. At the time, a highway maintenance crew was working on Lougheed Highway and a flag person directed Glen Shaw's vehicle into the path of Ms. Wolford's vehicle.

[2] The plaintiff claims one of the causes of the accident was negligent traffic control in the construction area. She claims Burnaby and Coquitlam are negligent:

i) in not providing for proper traffic control at the construction area;

ii) in not providing proper contractual requirements in respect to the flow of traffic at the construction area; and

iii) in not providing proper direction or supervision to those responsible for directing traffic in the construction area.

[3] In addition, the plaintiff has advanced an argument, not raised in the pleadings, that the defendants owed a duty of care to the plaintiff to provide a safe route of travel by way of a detour around the construction site.

[4] The plaintiff has cast a wide net, naming numerous parties as defendants. Counsel for the plaintiff suggests the liability of these defendants, the City of Burnaby and the City of Coquitlam, is at least 10% and at most 35%.

[5] This is an application by the City of Burnaby and the City of Coquitlam, pursuant to ***R. 18A***, to dismiss the action as against them on the basis that:

i) Lougheed Highway is not within their jurisdiction or control;

ii) the highway construction project was undertaken by the Ministry of Highways;

iii) neither city had notice or knowledge of the construction project; and

iv) neither defendant had any involvement with traffic control.

As well, the City of Coquitlam raises a limitation defence.

[6] None of the other defendants take a position on this application and have suggested these defendants are not properly part of the proceedings.

Rule 18A

[7] It is the position of the defendants that the issue of their liability is appropriate for determination by ***R. 18A*** because few facts are in dispute and the law is not complex. It is their position that it would be prejudicial to the defendants to be forced to proceed to trial since the issues are narrow and clear. The position of the plaintiff is that this may not be an appropriate case for disposition pursuant to ***R. 18A*** since all material may not be before the court to make the proper determination of the facts.

[8] I am satisfied this matter is appropriately dealt with by way of ***R. 18A***. I am able to find the facts necessary from the affidavit evidence to enable me to properly decide the legal issues without the necessity of a full trial. There are no credibility problems. This is not a complex matter. The legal issues are relatively straightforward so that a full and fair determination can be made on the basis of the material before me. The cost of a trial is unwarranted having regard to the nature of the evidence the witnesses may give in connection with any liability on the part of Burnaby and Coquitlam. The relevant evidence will not improve or vary significantly at a trial.

Facts

[9] Lougheed Highway and the intersection of North Road is the boundary between Burnaby and Coquitlam. This location is under

the exclusive ownership, control and jurisdiction of Her Majesty the Queen in Right of the Province of British Columbia (Ministry of Highways). The construction project, of four hours duration, was undertaken by other named defendants at the request of, and under contract to, the Ministry of Highways. Neither city had notice of or any involvement in the construction project or traffic control.

[10] The only connection between either defendant and this action is that the accident may have occurred within the municipal boundary. No duty of care arises on the facts of this case merely because the highway runs through the municipal boundaries. It has been admitted that the Ministry of Highways owned Lougheed Highway, it controlled the construction project, and it did not give the cities notice of the construction. I cannot conclude that risk of injury to the plaintiff was reasonably foreseeable by either city since they had notice or knowledge of the construction. One cannot be expected to guard against something one has no knowledge of.

[11] With respect to the public safety argument advanced by the plaintiff, city approval is required for detours, pursuant to a bylaw. Such approval could take anywhere from 24 hours in Burnaby to up to 10 days in Coquitlam. Although no one responsible for the construction project sought approval for a detour from either city, the plaintiff submits the mere fact that an approval process was in place acted as a deterrent to

seek approval because of "red-tape", thus putting the plaintiff's safety at risk. The plaintiff argues that she was injured because the defendants had in place a procedure requiring consent to a detour; the cities could have prevented the accident by allowing a detour to a safer route. This argument is speculative at best; illogical and nonsensical at worst.

Limitation Defence of Coquitlam

[12] Section 285 of the ***Municipal Act***, R.S.B.C. 1996, c. 323 establishes a six-month limitation period to commence an action against the municipality. Section 286 requires written notice to be delivered to the municipality within two months from the date upon which damages were sustained, describing the time, place and manner in which the damages claimed were sustained.

[13] It is important to note that the City of Burnaby was notified properly of the plaintiff's claim and does not advance a limitation defence.

[14] The writ of summons was issued on December 3, 1996 naming as defendants both the City of Burnaby and the City of Coquitlam. The City of Coquitlam received no notice of the claim against it until the writ was served on August 27, 1997. The statement of defence, finally filed January 29, 1999 after negotiations to discontinue failed, raised the limitation issue. The plaintiff did not reply to the defence by advancing

a reasonable excuse for failure to comply with the limitation period. The plaintiff has filed no affidavit evidence in this proceeding to establish a reasonable excuse for failing to comply with the limitation periods.

[15] The question of prejudice is not advanced by Coquitlam and does not arise in the circumstances. I conclude the plaintiff's failure to comply with the limitation periods is fatal to her action against the City of Coquitlam.

Conclusion

[16] The application by the City of Burnaby and the City of Coquitlam, pursuant to ***R. 18A***, to dismiss the action as against them is allowed on the basis that no duty of care was owed by either of them to the plaintiff. In addition, in respect of Coquitlam, her action is barred by failure to comply with the limitation periods.

Costs

[17] The defendants apply for increased costs assessed at least at 80% of special costs, and to set the scale for assessment of costs at scale 3. To support this argument for increased costs, the defendants allege a large disparity between the indemnification provided by ordinary costs and increased costs. The defendants also point to the unreasonable conduct of the plaintiff following the filing of the writ and statement of claim.

[18] Increased costs may be awarded pursuant to Appendix B, s. 7 if "the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5". Subsection (2) sets out that increased costs are set by fixing the fees that would have been allowed if special costs had been awarded and then allowing one half of those fees, or a higher or lower proportion if ordered by the court, plus disbursements.

[19] In ***Just v. British Columbia*** (1992), 9 C.P.C. (3d) 302 (B.C.S.C.), the court held that an award of a higher or lower percentage of special costs should be granted where 50% would not produce a just indemnity having regard to the nature of the case and the conduct of the parties.

[20] However, the latest word on increased costs from the Court of Appeal is ***Rieta v. North American Air Travel Insurance Agents Ltd.,*** [1998] B.C.J. No. 640 (23 March 1998), Vancouver No. CA021878/CA022494 (C.A.). In his reasons for the Court, Donald J.A. made the following comments at p. 16:

> The law on costs has now evolved to the point where a discrepancy must be accompanied by some other reason in order to justify an order of increased costs. My use of the phrase "presumptive injustice" in referring to any discrepancy greater than 50% in ***Just v. British Columbia*** (1992), 9 C.P.C. (3d) 302 at 308, may not have been happily chosen. The better and current view is that a discrepancy is only a factor, and by itself not a decisive factor, in deciding a claim for increased costs. As has been observed in a number of the cases cited to us, a large disparity is often associated with some additional factor relating to the nature of the case or the conduct of the

parties which usually provides an explanation for the disparity. The following statement by Madam Justice Rowles in ***Edgar v. Freedman***, [1997] B.C.J. No. 1643 at para. 79 reflects the present state of the law:

> My impression is that a quite significant disparity must be found to trigger an order for increased costs and even then, such an order is by no means likely to be made "as of course" or automatically. Usually, there must be found special importance, difficulties or complication associated with the litigant or as seen in ***National Hockey League***, *supra*, conduct of a litigant which the court finds deserving of a penalty in added costs. [emphasis in original]

[21] The test set out in s. 7 is that increased costs are warranted when "for any reason there would be an unjust result" if ordinary costs were ordered. Factors which have given rise to an injustice or encouraged a finding of increased costs are:

1. Disparity: Significant disparity between an award of ordinary costs and the amount that would be assessed for special costs: ***Just*** at 308, and ***Rieta***. As the disparity decreases, the need for some additional reason to warrant increased costs increases. (***National Hockey League v. Pepsi-Cola Canada Ltd.*** (1993), 102 D.L.R. (4th) 80 (B.C.S.C.) at 86, aff'd (1995), 2 B.C.L.R. (3d) 14 (C.A.) at 21)

2. Misconduct: Misconduct by one party which is deserving of condemnation: ***National Hockey League*** at 25 (B.C.C.A.).

3. Hard nosed and burdensome tactics: ***Just*** at 308.

4. Complexity and importance of the case: ***Bari Cheese Ltd. v. British Columbia Milk Marketing Board*** (1993), 23 C.P.C. (3d) 384 (B.C.S.C.) at 390.

Ordinary costs

[22] The ***Rules of Court***, Appendix B, s. 2 sets out the principles for which the court should have regard when deciding which scale of ordinary costs is appropriate. Scale 2 is for matters of less than ordinary difficulty, scale 3 is for matters of ordinary difficulty or importance, scale 4 is for matters of more than ordinary difficulty or importance and scale 5 is for matters of unusual difficulty or importance.

Application of the Law

[23] To assess whether increased costs are warranted, I must first determine the appropriate scale for ordinary costs.

[24] If a case is of ordinary importance or difficulty, scale 3 is appropriate. Scale 3 is the standard. To move to scale 4, the case must have more than ordinary importance or difficulty. I find it appropriate to use scale 3 here.

[25] Having determined that scale 3 is appropriate in this case, I must assess whether awarding scale 3 costs would lead

to an unjust result for any reason. Relevant factors are disparity, misconduct, and hard nosed or burdensome tactics.

[26] To assess disparity, I must compare the costs award which would result from special costs as compared to ordinary costs. Counsel for the defendants provided the following figures which I will assume to be accurate for these purposes. The actual fees incurred by the City of Burnaby are $10,560 plus taxes and disbursements. Assuming special costs would be awarded at 90% of actual costs, that would mean an award of $9,504. Scale 3 costs were calculated to be $7,534.14. In this case, the disparity between special costs and scale 3 costs is $1,969.86. This is a disparity here.

[27] The City of Coquitlam has estimated their actual fees will be $17,499. Their fees, assessed at scale 3 would be $5,360. Special costs would be approximately $15,749.10. This produces a discrepancy of $10,389.10. This disparity is quite large.

[28] Although I find the disparities to be quite high, they alone do not make the award unjust without other considerations. As stated above, courts have considered the conduct of a party and the hard nosed or burdensome tactics with which the party engages in the proceedings. The defendants say they have done all they could in the past two years to convince plaintiff's counsel that the action against them was ill-conceived and ill-advised. They agreed to waive

costs in the event the plaintiff did discontinue the action. They obtained admissions from the other defendants that should have convinced plaintiff's counsel to discontinue against the two defendants. The defendants have now been forced through discoveries and have obtained formal admissions from other defendants. They have made four attendances in court in an attempt to have this ***R. 18A*** application heard. I find the tactics used by plaintiff's counsel in this case to have been burdensome and to have led to unjustified, lengthy and costly proceedings against the defendants.

[29] Pursuant to s. 7, I have a discretion to award increased costs if scale 3 costs would be unjust for any reason. On the basis of the disparity and the conduct of the plaintiff's counsel, I conclude that scale 3 costs would be unjust in the circumstances. Accordingly, I order increased costs.

[30] Section 7 stipulates that increased costs are to be calculated at 50% of what would be allowed for special costs unless the court orders a different proportion. Counsel for the defendants submit that 50% to 80% is appropriate to produce a just result given the nature of the case and the conduct of the parties.

[31] I calculate 50% of what would be allowed for special costs to be $4,752 for the City of Burnaby and $7,874.55 for the City of Coquitlam.

[32] The figure for 80% would be $7,603.20 for the City of Burnaby and $12,599.28 for Coquitlam. This still leaves over $1,900.80 plus taxes in legal bills for the City of Burnaby to pay, and over $4,899.72 plus taxes for the City of Coquitlam to pay.

[33] In all the circumstances, I believe the just result is to award the defendants increased costs calculated at 80% of special costs.

"S. Stromberg-Stein, J."
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