IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20070514
Docket: M031124
Registry: Vancouver

Between:

Julie Boehmer

Plaintiff

And:

Jose Urcuyo, Randall Hink and The Corporation of the District of West Vancouver

Defendants

Before: The Honourable Madam Justice Garson

Oral Reasons for Judgment

In Chambers
May 14, 2007

Counsel for Urcuyo and Hink	P. Warnett
Counsel for the District of West Vancouver	A. Atherton
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** The third party, the Corporation of the District of West Vancouver ("the District"), applies pursuant to Rule 18A for dismissal of this action and third party proceedings against it.

[2] At the hearing, I concluded that the only issue suitable for disposition pursuant to the summary trial provisions of Rule 18A, is whether or not the District has a valid defence based on the common law rule exempting government agencies from liability arising from the consequences of a policy decision of the government agency.

[3] The plaintiff did not appear and took no position with respect to the District's application for dismissal of its claim. The defendant, Hink, agreed that the question of the validity of the District's policy defence was a discreet issue that is suitable for determination pursuant to Rule 18A. I agree that this one issue is suitable for determination under Rule 18A.

BACKGROUND FACTS

[4] This action arises from two motor vehicle accidents. The first was on March 30, 2001, and involved the defendant, Urcuyo. That cause of action and that defendant are not involved in the summary trial before me.

[5] The second motor vehicle accident occurred on November 8, 2002, at which time a vehicle operated by Julie Boehmer, the plaintiff, was involved in a head-on collision with a vehicle operated by the defendant, Hink. Hink was, at the time of the accident, travelling the wrong way on a one-way street. As he turned a right-hand

corner, he collided with the plaintiff's vehicle. Hink denies his liability, in part, on the basis that the two signs, indicating that the street on which he was travelling was a one-way street, were obscured by foliage.

[6] The District had a policy and a bylaw passed in conformity with that policy not to proactively inspect all its traffic signs for possible foliage obscuring those signs. Rather, pursuant to a bylaw, it passed the responsibility for trimming foliage on boulevards to the owners of land fronting on adjoining boulevards. The bylaw in question is the Boulevards Bylaw No. 3191, 1984 of the District. Paragraph 3 of the bylaw says:

> The owner of land fronting or adjoining a boulevard shall at his own expense keep the boulevard in good and safe condition. This includes tidying, pruning, trimming, mowing, weeding, watering, and any other activity necessary to achieve the above-stated conditions.

[7] The evidence before me is that the District did not have sufficient resources or staff to inspect all its boulevards, to determine if vegetation or foliage obstructed traffic control devices or signs. It was the District's policy to trim hedges, trees, shrubs, or other planting that obstructed the view of a traffic sign, only if it received a complaint. If it did receive a complaint about an obscured sign, or such an obstruction was otherwise brought to its attention, the District's policy required that the complaint be documented, investigated by a staff member of the District's Road and Transportation Department, who was trained to determine whether obstructions affect sightlines, and then the staff member would determine, based on his or her expertise, whether action was necessary.

[8] There was also a procedure in place that required police officers to report foliage obstructing traffic signs if, in the course of their duties, they noted such an obstruction. The District's policy of non-inspection was based on allocation of its available resources. Budgetary constraints did not permit the District to engage, as I said, in a proactive inspection or maintenance of all traffic signs in the District.

ANALYSIS

The issue for determination on this application is whether the District is exempt from liability on the grounds that the system of complaint-based inspections constituted a policy decision of a governmental agency. The parameters of the government agency policy defence are set out in ***Just v. British Columbia***, [1989] 2 S.C.R. 1228, 41 B.C.L.R. (2d) 350 at paragraphs 28 and 29:

> It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.
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> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision

> is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

[9] In this case, I understand that Hink acknowledges that the District's decision to inspect, on a complaints basis only, is a policy and not an operational decision. However, Hink's argument is that under the general rubric of policy decisions, for which there is generally no liability, there may be liability if the policy is not a *bona fide* exercise of the discretion of the government body and, in this case, he says that the absence of a threshold for reporting problems or for when the District will take action is proof that the exercise of discretion in this case is not a *bona fide* one.

[10] Hink relies on ***Tom v. City of Burnaby***, [1999] B.C.J. No. 1093 (S.C.) (QL), and ***Einarson v. City of Richmond***, [1998] 47 M.P.L.R. (2d) 70 (B.C.S.C.), in support of this proposition. Both these cases involve claims that injury was caused to a plaintiff on account of uneven joins in a sidewalk. In ***Tom***, the municipality was found negligent because it did not set a threshold measurement above which the sidewalk would require repair. Madam Justice Quijano held that because there was no policy concerning the measurement of whether a hazard existed, the decision to repair was necessarily arbitrary, based on the opinion of whoever happened to observe the uneven sidewalk.

[11] The opposite conclusion was reached in ***Einarson***. The policy of that municipality required repair if the differential between sidewalk panels was more than three-quarters of an inch, in which case the sidewalk was classified as

dangerous and repaired. In the latter case, the policy was found to be *bona fide* and the municipality was not liable.

[12] The Supreme Court of Canada decided in ***Brown v. British Columbia*** (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, 89 B.C.L.R. (2d) 1, that the test for determining if a policy decision is a *bona fide* exercise of the discretion of the government body, turns on the question of the rationality or reasonableness of the policy. At paragraph 28, Cory J. held that:

> ... It will always be open to a plaintiff to attempt to establish, on a balance of probabilities, that the policy decision was not *bona fide* or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion. This is not a new concept. It has long been recognized that government decisions may be attacked in those relatively rare instances where the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion. ...

[13] In ***Just***, Cory J. had to consider the question of whether the province was exempted from liability on the grounds that the system of highway inspections, including their quantity and quality, constituted a policy decision of a government agency and was, thus, exempt from liability. In the result, he held that the manner and quality of an inspection system was operational and he ordered a new trial to determine whether the respondent had, in all the circumstances, met the standard of care with respect to the frequency and manner of inspection of the rock above the highway. ***Just*** turned on the question of whether the impugned decisions about inspection were policy or operational decisions, but in so deciding, he held at paragraph 22 that a policy decision was unassailable provided "it constitutes a

reasonable exercise of *bona fide* discretion based, for example, upon the availability of funds."

[14] In the case at bar, the defendant does not contend that the impugned decision is operational, nor does he challenge the evidence of the District that a proactive system of inspection of all foliage in its district would be economically prohibitive. Rather, he restricts his submissions that the policy is not *bona fide*, to the lack of measurable standards for the public and District staff to reply.

[15] Brent Dozzi, Manager of Roads and Transportation for the District, deposed in part in his affidavit that:

> ... it is recognized by the District that the general public and District staff from other departments do not necessarily have the expertise to make a determination as to whether an obstruction of a sign might affect sightlines and thereby constitute a hazard. Therefore, it is expected that any concerns that an obstruction might or could obstruct the sightlines would be reported to my department. Upon receiving such a report, my department would commence a Request for Service process which would include documenting the concern, an investigation by a staff member from my department who has the expertise to determine if the obstruction affects sightlines, and a determination by that staff member as to whether the District would act upon the concern based on the District's guidelines. ...The District does not have the resources to train staff in other departments on these issues.

[16] In this case, there had been no complaint made about foliage obstructing the signs in question before the accident, so there is no question that the failure to trim the foliage was an operational decision. The only question is whether the lack of measurable standards is an unreasonable exercise of the District's policy-making function. In my view, the District has determined that the question of sightlines to a

traffic sign is a matter that requires some level of expertise, involving considerations of whether the sign could be seen by its intended audience.

[17] I conclude that the standard Hink would impose on the District is too high and it is not one supported by the authorities I have mentioned, nor the others cited to me by both counsel. I disagree with counsel for Hink when he says that the decision to trim foliage is a matter of chance. The evidence of Mr. Dozzi is to the contrary. It is a decision based on the expertise of District staff, made partly on the basis of a consideration of sightlines for the intended audience.

[18] Once an impugned decision is determined to be a policy decision, the threshold to find that it is unreasonable, or not a *bona fide* one, is a high one. The court must find that the decision is either arbitrary or not made for a proper purpose, or is irrational. Some decisions do not lend themselves to an easily measurable standard, like sidewalk differentials do. I find that this is one of those decisions.

[19] The policy decision made by the District cannot be assailed. It cannot be said that the standard adopted by the District is not *bona fide*, or that it is unreasonable. Consequently, I conclude that the District is exempt from liability for any claim that it failed to ensure that these street signs were not obstructed by foliage. The plaintiff's claim and third party notice against the District cannot, therefore, succeed. The claim against the District by the plaintiff and the defendant is dismissed.

[SUBMISSIONS re COSTS]

[20] THE COURT: The District is entitled to its costs from the plaintiff for defending the action. The District is entitled to its costs from the defendant, Hink, for defending the third-party proceedings, including the 18A application. The plaintiff should not be liable for costs of the 18A. As between the plaintiff and the defendant, Hink, the issue of who is ultimately responsible for the costs of the District is a matter for the trial judge to determine. The trial judge might leave it as it is now, or may find that Hink has to indemnify the plaintiff for all costs, or vice-versa.

D. Garson J.

Garson J.