Date of Release: May 1, 1992

No. 17176
Kamloops Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
	)	
JACQUELYN BARBARA DAVIDSON	)	
	)	REASONS FOR JUDGMENT
PLAINTIFF	)	
	)	OF THE HONOURABLE
AND:	)	
THE CORPORATION OF THE CITY OF KAMLOOPS	)	MR. JUSTICE HOUGHTON
	)	
DEFENDANT	)	

APPEARANCES:

George Coutlee	- Counsel for the Plaintiff
Christine J. Moffatt	- Counsel for the Defendant

DATE OF HEARING: April 14th, 15th and 16th, 1992

This is an action arising out of an accident occurring about 5:30 in the morning of June 29th, 1990 at the intersection of 13th Avenue and Columbia Street in the City of Kamloops. The plaintiff was then a student who had graduated from the Kamloops High School and attended an all-night "dry" graduation party. She had left her car at a friend's house in the neighbourhood of the accident and he drove her back to his house where she picked up her car just before the accident. The plaintiff resided in Dallas, east of Kamloops and when she left her friend's house she proceeded along Pine Street to 13th Avenue, then north on 13th Avenue to Columbia Street intending to turn right in a easterly direction to her home. It was getting light with shadows created by trees.

Ms. Davidson said as she drove she was alert and had her seatbelt on. She was going slowly, 30 - 40 kilometres per hour, to let the car warm up. She said that she appreciated she was in the Columbia Street intersection when she saw Mrs. Sivertson's car. She said as she was proceeding along 13th Avenue to Columbia Street she saw the Nicola Street and St. Paul Street stop signs and was heading towards them. She did not see any other stop signs.

In cross-examination, Ms. Davidson said that she had lived all her life in Kamloops and had gone to Kamloops High School which entailed being driven along Columbia Street past the 13th Avenue intersection each day when she went to school. She recognized that Columbia Street was a major thoroughfare on which the traffic moves quickly and the only traffic controls are traffic lights. Ms. Davidson said that as she drove along 13th Avenue she was watching for Columbia Street. She knew it was just a short distance but she didn't see the intersection. She did not slow for the intersection, it was obscured. She said she thought that Nicola Street (the street beyond Columbia Street) was Columbia Street and she was heading there. She agreed she did not notice the Columbia Street roadway and she could not see the stop sign at all. She said there were trees and branches both to the left and the right as she approached the intersection. When she was shown the photographs she agreed there were no trees to her left as she approached Columbia Street. Ms. Davidson agreed that she first saw the Sivertson vehicle when it was almost hitting her and she figured she was in an intersection then. She said she did not look right or left. She did not notice the white crossbar painted across 13th Avenue as she entered Columbia Street, nor did she see the stop sign across Columbia Street for traffic going south on 13th Avenue. She said she was looking ahead to the stop signs to the north which she believed was Columbia Street.

Later on the morning of the accident Mr. Davidson took photographs of the scene for traffic going north on 13th Avenue as it approached Columbia Street. The photographs clearly

show that the trees obscured the stop sign at 13th and Columbia Street from seventy feet and partially obscured it even at twenty – thirty feet. There was conflicting evidence from Constable Saccomani who attended the scene of the accident and went back to it to check the intersection because of Ms. Davidson's complaint about not seeing the stop sign. He said that he found the stop sign partly visible at sixty-eight feet when observed from the driver's position in his car. He felt it was completely visible at thirty-nine feet back from the stop sign. On July 6th, Mr. Brandt, an I.C.B.C. adjustor, took photographs which clearly show the stop sign to be obscured at five to six car lengths away and partially obscured at approximately three car lengths away.

The plaintiff alleges that the Corporation of the City of Kamloops was in breach of its statutory duty under the ***Municipal Act*** to repair and maintain the streets and in particular the stop sign at the intersection of 13th Avenue and Columbia Street.

In ***Barratt*** v. ***Corporation of the District of North Vancouver*** (1980) 27 B.C.L.R. 182 Martland J. delivering the judgment of the Supreme Court of Canada in a case arising out of an injury to a cyclist from a pothole on a city street, said at p. 189:

> "The injury to the appellant resulted from a pothole which had not been disclosed by an inspection made one week prior to the accident. In imposing a duty of constant inspection and immediate repair, the trial judge is again seeking to make the municipality an insurer against damage resulting from the existence of a pothole.
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> The trial judge then goes on to say that, there being no absolute duty to repair, there should have been a "much more frequent system of inspection, coupled with a system of marking dangerous potholes". He concedes that the municipality's inspectors did put warning signs in respect of defects which they could not immediately repair. His criticism of the conduct of the municipality is therefore as to frequency of inspection. In essence, he is finding that the municipality should have instituted a system of continuous inspection to ensure that no possible damage could occur and holds that, in the absence of such a system, if damage occurs, the municipality must be held liable.

> In my opinion no such duty existed. The municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the municipality cannot be held to be negligent because it formulated one policy of operation rather than another. "

That decision was reviewed by the Supreme Court of Canada in ***Just*** v. ***R. in Right of British Columbia*** (1991) W.W.R. 385. At p. 398 Cory J. said:

"In cases such as this, where allegations of negligence are brought against a government agency, it is appropriate for courts to consider and apply the test laid down by Lord Wilberforce in ***Anns v. Merton London Borough Council***, [1978] A.C. 728, [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492 (sub nom. ***Anns v. London Borough of Merton***) (H.L.). At pp. 751-52 he set out his position in these words:

> Through the trilogy of cases in this House – ***Donoghue v. Stevenson*** [1932] A.C. 562, ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** [1964] A.C. 465, and ***Dorset Yacht Co. Ltd. v. Home Office*** [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. *Rather the question has to be approached in two stages.* First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see ***Dorset Yacht*** case [1970] A.C. 1004, per Lord Reid at p. 1027. [emphasis added] "

And further on p. 399, he said:

"Nevertheless, it is a sound approach to first determine if there is a duty of care owed by a defendant to the plaintiff in any case where negligent misconduct has been alleged against a government agency. "

At p. 401, Cory J. refers to the above quotation from Martland J. in ***Barratt*** and said:

"This statement was not necessary to the decision, as it had already been determined that the system of inspection established by the municipality was eminently reasonable. Neither was there any serious question raised that there had been any negligence in carrying out the system of inspection. The finding that a reasonable system of inspection had been established and carried out without negligence constituted the basis for the conclusion reached by the court in that case. With the greatest respect, I am of the view that the portion of the reasons relied on by the respondent went farther than was necessary to the decision or appropriate as a statement of principle. For example, the court would not have approved as "policy" a system that called for the inspection of the roads in a large urban municipality once every five years. Once a policy to inspect is established, then it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of

discretion and to demonstrate that in all the circumstances, including budgetary restraints, it is appropriate for a court to make a finding on the issue. "

After discussing some cases regarding the need for distinguishing between a governmental policy decision and its operational implementation, at p. 405 Cory J. said:

"Thus a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.

The consideration of the duty of care that may be owed must be kept separate and distinct from the consideration of the standard of care that should be maintained by the government agency involved.

Let us assume a case where a duty of care is clearly owed by a governmental agency to an individual that is not exempted either by a statutory provision or because it was a true policy decision. In those circumstances the duty of care owed by the government agency would be the same as that owed by one person to another. Nevertheless, the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that, balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits and the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.

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 the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty or care in situations which arise from its pure policy decisions.

> 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.
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> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment. "

In this case I have the evidence of Mr. Pouliotte, the City of Kamloops Transportation Technician, in charge of the traffic controls system. On coming to Kamloops in 1989 he found no formal maintenance program in place for stop signs and he instituted an inventory field sheet to record the results of an inspection of stop signs for their condition and visibility. The inspection was done starting in October, 1989 and completed in January, 1990. There were approximately 1,100 stop signs recorded and the information was put into a computer data base. That inspection showed the condition of the stop sign at 13th and Columbia to be good and the visibility good. It was done on January 3rd, 1990 by the Sign Shop Foreman and crew. Mr. Pouliotte established a policy that the stop signs would be inspected twice a year, winter and summer, by the Sign Shop personnel who had been doing the maintenance of the stop signs for many years. Mr. Pouliotte stated why he chose the inspection in winter and summer, to fit in with the department's workload and to enable them to observe the signs and any tree growth that might interfere with the signs. Mr. Pouliotte said that in addition to the regular inspections, there was day to day operational maintenance when complaints

were phoned in, either on a high priority basis or as soon as possible. In the case of this particular sign, he did receive a complaint about nearby stop signs at a meeting on July 26th which he followed up and in the process of doing so, he checked the sign at 13th and Columbia and made out a requisition that the tree limbs should be pruned. This of course was a month after the accident and the work was subsequently done.

On the evidence before me, I am satisfied that the City had made a policy decision through Mr. Pouliotte to inspect the signs twice a year and the initial inspection had been done in January, 1990.

Applying the law as set out in ***Barratt*** and ***Just***, I find that while there was a sufficient relationship of proximity that a duty of care arose to the users of 13th Avenue, the City had in fact made a policy decision regarding the inspection of the stop signs. On the evidence before me I find the policy decision was made in a bona fide exercise of discretion. There was no evidence that the inspection was negligent. The frequency and method of inspection were reasonable in the circumstances. I find the City is not liable to the plaintiff in this case.

I further find that the plaintiff's driving in approaching the intersection of 13th Avenue and Columbia Street at 5:30 in the morning of June 29th, 1990 was negligent. She said she did not know that she was in the intersection until she saw the Sivertson car beside the her. That car was coming from her right, travelling in a westerly direction and had the right of way over Ms. Davidson's vehicle. Ms. Davidson said she looked neither right nor left as she entered the intersection which was marked with a white line across her path of travel. Even without a visible stop sign, Ms. Davidson owed a duty under the ***Highway Act*** to oncoming traffic approaching from her right as she entered the intersection.

I was referred to several cases and in particular ***Greatrex*** v. ***Ennismore*** [1984] 33 M.P.R. 287 and ***Jacobson*** v. ***R. in the Right of British Columbia*** (1979) 11 B.C.L.R. 85. In both these cases, the drivers were found contributorily negligent. In ***Campbell*** v. ***The City of Calgary*** (1984) 55 A.R. 73 which was a case of trees obstructing a stop sign, the court found that the City had a duty to maintain the stop sign. The City had not followed any established system or routine of periodic site inspections or inspection recording and was held liable in the circumstances.

In this case, if I am in error and the municipality is liable I would find that the plaintiff was 90% contributorily negligent.

The case is dismissed with costs.

"Houghton J."

HOUGHTON J.

Kamloops, British Columbia
May 1st, 1992