Citation: Frost v. Resort Municipality of Whistler
2003 BCSC 22

Date: 20030107
Docket: S000561
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STEPHEN FROST

PLAINTIFF

AND:

RESORT MUNICIPALITY OF WHISTLER

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BAUMAN

Counsel for the Plaintiff	G.A. McEachran
Counsel for the Defendant	D.J.A. Bell
Date and Place of Hearing/Trial:	8 November 2002 Vancouver, B.C.

[1] This is a trip and fall case for disposition by way of summary trial.

[2] It was 3:30 p.m. on a sunny day in August 1999, when Stephen Frost stepped off a bus at a stop admittedly operated by the Resort Municipality of Whistler ("Whistler").

[3] Mr. Frost was carrying his infant daughter in his arms. They had enjoyed a day of sun and water at Lost Lake in the resort municipality and they were returning to their car.

[4] As far as bus stops go, this particular stop was pretty rustic. It consisted of a slightly widened portion of the gravel shoulder of the road, and a sign. The shoulder of the road sloped gently away from the pavement into an open ditch.

[5] Mr. Frost had parked his car in a parking lot across from the bus stop on Blackcomb Way. Instead of crossing Blackcomb Way at a well-marked pedestrian crosswalk immediately west of the bus stop, Mr. Frost elected to walk east along the shoulder of the road, with the intention of crossing Blackcomb Way mid-block after the bus pulled away.

[6] As he navigated along the shoulder he carried his daughter in his arms and he kept an eye on the departing bus.

[7] Mr. Frost did not see a depression in the shoulder of the road. He stepped into it with his left foot, lost his balance and fell.

[8] Mr. Frost injured his left ankle and this litigation ensued.

[9] It is conceded that the depression was probably caused by storm water channelling through a portion of the road shoulder into the adjacent ditch.

[10] It is further conceded by Whistler that, but for the considerations set out below, it owed Mr. Frost a duty of care under the ***Occupiers Liability Act***, R.S.B.C. 1996, c. 337.

[11] The principal issue between the parties is whether Whistler can make out a policy defence on the basis of the law discussed in, amongst other cases, ***Just v. British Columbia***, [1989] 2 S.C.R. 1228.

[12] In ***Just***, Cory J. summarizes his discussion of the principles at play where a governmental agency is sued in tort (at pp. 1244-45):

> 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.

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.

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.

[13] I now turn to discuss the evidence of Whistler's road inspection policy as described by its roads supervisor, Andrew Chalk.

[14] I would summarize the municipality's policy by noting that:

(i) Whistler has no written road inspection policy;

(ii) it follows an unwritten policy by undertaking inspections once per month when staffing and budgetary limitations permit;

(iii) Whistler relies on reports from the public of immediate hazards; it also relies on reports from its own work crews;

(iv) Whistler does have a written schedule of tasks which are to be undertaken by the Roads Department annually. That schedule states that "shouldering" is to be done in May, June and July if budget and staffing limitations permit: "In 'shouldering' the roads, we inspect for all obvious hazards, including but not limited to potholes, pavement and shoulder failures, and bent signs, and then repair these hazards as necessary."

[15] Mr. Chalk deposes that the road inspection records for the area of the plaintiff's slip and fall indicate that this location was inspected on 16 July 1999 and that no problems or hazards were noted. This is just three weeks before the incident on 9 August 1999.

[16] Mr. Chalk further deposes that the plaintiff's slip and fall is the only incident of which he is aware involving a pedestrian being injured due to the condition of the road shoulder.

[17] Mr. Chalk's evidence in this regard is confirmed by that of the municipality's city clerk.

[18] The plaintiff submits that in effect, Whistler has no system in place for the periodic inspection of bus stops like the one in question here. While Whistler has in place a contracted system of inspection and maintenance for stops with bus shelters, it is said that there is no inspection system in place for bus stops which simply utilize the road shoulder for the boarding and discharge of passengers.

[19] Further, the plaintiff says that there is no evidence of Whistler considering and making a decision not to have a system for the inspection of these types of bus stops. It is therefore urged that Whistler cannot be heard to say that its

system of "no inspection" is the product of a discretionary decision making process - that is a policy decision.

[20] In any event, the plaintiff submits that a failure to adopt any inspection system for this type of bus stop is wholly unreasonable given the knowledge of Whistler as to the patrons who use, and the manner they might be expected to use, this type of bus stop.

[21] Finally, the plaintiff says that Whistler could have adopted a so-called "fool proof" method of inspection at little or no cost by having bus drivers "keep an eye out for potential dangers at the road shoulder bus stops" and report any hazards to the Whistler Roads Department.

[22] It will be seen that the plaintiff's case appears to engage two aspects of the ***Just*** analysis, that is:

(i) there is no policy defence available here because there was no decision concerning budgetary allotments as no decision on an inspection system was ever made; and

(ii) if there was a conscious decision made to adopt a no inspection policy that decision was not made in the *bona fide* exercise of the discretion, given the

> nature of the risk and the low cost of a viable system of inspection.

[23] I will consider these points as well as the third aspect of ***Just***: if one concludes that indeed Whistler has put in place an inspection system, namely that described by Mr. Chalk and set out above, does the manner and quality of that system, and its operation in the case at bar, meet the requisite standard of care?

[24] I do not accept that Whistler has failed to adopt any inspection system for road shoulder bus stops.

[25] It has adopted a general road inspection policy as detailed by Mr. Chalk in his evidence and this, in particular, includes the shouldering work which he has described and which is undertaken in the summer months as budget and staffing limitations permit.

[26] That is an inspection and maintenance policy, albeit in part unwritten, which includes the road shoulders in the area of bus stops.

[27] I believe that it is the counsel of perfection and wholly unrealistic to suggest that a distinct and special inspection policy need be adopted for road shoulder bus stops as urged by the plaintiff.

[28] It is, with respect, slicing the road inspection issue much too thinly.

[29] In ***Oser v. Nelson (City)*** (1997), 44 M.P.L.R. (2d) 231 (B.C.S.C.), Justice McEwan considered a municipality's apparent policy of inspecting roads and sidewalks, at least in low traffic areas, on the occasion of complaints only. His reaction mirrors mine in the case before me (at paras. 11 and 12):

> 11 The plaintiff submits that the defendant's "policy" of having no schedule of inspections of sidewalks and roads before June 1994 is "so irrational and unreasonable as to constitute an improper exercise of government discretion", as that test is enunciated in *Brown v. British Columbia (Minister of Transportation and Highways)* (1994) 112 D.L.R. (4th) 1 (S.C.C.) at p. 11, per Mr. Justice Cory. That decision establishes that the person who asserts such an improper exercise of discretion must prove it on a balance of probabilities. Here, the only evidence offered is the *fact* that there were no scheduled inspections. From this, an inference of irrationality or unreasonableness is invited. But, as submitted by the City, it is not unreasonable not to inspect if a *bona fide* policy decision has been made that certain hazards fall below a threshold established due to budgetary or manpower considerations. That is the evidence before me.
>
> 12 Without evidence that clearly dangerous situations were being ignored or that the "threshold" was irresponsibly high or arbitrary, no inference of irrationality or unreasonableness is warranted from the mere fact that there were no scheduled inspections. That submission is tantamount to an assertion that the City is an insurer respecting any mishap within or upon its public places. That is not the defendant's legal burden.

[30] That is sufficient to deal with the first two aspects of the ***Just*** analysis.

[31] Turning to the third aspect, does the manner and quality of the Whistler system meet the requisite standard of care? - I have concluded that it does.

[32] Here, I recognize that Whistler is allocating a limited road inspection/maintenance budget amongst various needs within the municipality. It has set up a system of responding to reports of hazards and it has proactively established a shouldering program during the summer months.

[33] That system was at work here, with an inspection of the road shoulder in the area of the incident undertaken only three weeks before the accident.

[34] As in ***Barratt v. North Vancouver (District)***, [1980] 2 S.C.R. 418, this particular hazard could only have been discovered if Whistler had adopted a more regular, virtually continuous, system of shoulder inspections. In the exercise of its discretion, for obvious budgetary reasons, it has not and as that is a *bona fide* exercise of discretion, no liability can attach.

[35] In my view, Whistler has adopted a reasonable system of road inspection and has carried it out without negligence in this case.

[36] The plaintiff's action is dismissed with costs on Scale 3 unless there are circumstances which counsel wish to bring to my attention.

"R.J. Bauman, J."
The Honourable Mr. Justice R.J. Bauman