Citation: Law v. Truttman et al
2001 BCSC 509

Date: 20010404
Docket: 2712/98
Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WAYNE LAW

PLAINTIFF

AND:

MARY MAE TRUTTMAN, WILLIAM RICHARD TRUTTMAN and THE MUNICIPALITY OF THE DISTRICT OF NORTH SAANICH

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MELVIN

Counsel for the Plaintiff:	B. A. Marlatt
Counsel for the Defendant The Municipality of the District of North Saanich:	M.A.E. MacKenzie
No appearance for Mary Mae Truttman and William Richard Truttman	
Date and Place of Hearing/Trial:	March 13, 2001 Victoria, BC

[1] By its notice of motion issued January 5, 2001, the defendant Municipality of the District of North Saanich ("North Saanich") seeks an order of the court dismissing the plaintiff's action pursuant to R. 18A.

[2] By his statement of claim issued July 24, 1998, the plaintiff seeks damages from the defendants for injuries he sustained on November 11, 1997, when at approximately 1:30 a.m., the plaintiff tripped over a low chained fence erected by the defendants Truttman ("Truttmans") on North Sannich's property. The fence was located between the legal boundary of the residential property owned and occupied by the Truttmans and the curb marking the boundary of the paved portion of the road in front of the Truttmans' property. This narrow strip of land ("boulevard") between the Truttmans' boundary and the roadway is apparently owned by North Saanich, and was used by the Truttmans as part of their landscaping. The fence was located adjacent to the curb which marks the transition from the paved portion of the roadway to the boulevard area.

[3] It is North Saanich's policy to encourage property owners to maintain boulevards such as the one in issue. In this instance, the Truttmans did so to enhance the property on which they resided.

[4] North Saanich attacks the plaintiff's claim on three bases:

> (a) that North Saanich is not an occupier within the meaning of the ***Occupiers Liability Act***, s. 1(b); hence, there is no duty of care owed by this defendant to the plaintiff;
>
> (b) that North Saanich's policy decision concerning the maintenance of its boulevards was properly implemented;
>
> (c) that the action commenced by the plaintiff was not within the six month period prescribed by s. 285 of the ***Local Government Act***.

[5] As I have concluded that North Saanich must succeed on the policy ground, I will not address the other two defences.

[6] North Saanich's policy is set forth in Exhibit C to the affidavit of T. J. Parry, Municipal Engineer. The policy was approved by council on February 5, 1996. The salient features are as follows:

> Due to budgetary limitations, no active program will be carried out to identify existing encroachments and enforcement will be undertaken by staff on a complaint basis or staff observation basis only.
>
> 1. When the District receives complaint of an encroachment which has not been approved, staff is directed to advise in writing the property

owner responsible for the encroachment as to what action may be required.

2. While continuing with the policy of encouraging property owners to maintain the boulevards adjacent to their property, future such improvements without benefit of permit shall be limited to surface treatments that do not alter the elevation of the property, such as lawns, mulching, etc.

...

5. Due to budgetary restraints, no active program will be carried out to identify existing encroachments, and enforcement will be undertaken by way of a letter, on a complaint basis, or where staff has identified that such an encroachment is deemed:

- dangerous;

- to represent a fire hazard;

- to interfere with existing utilities;

- to interfere with scheduled or potential municipal or other public utility work;

- to represent a potential liability to the District;

- to impede access for an approved or potential future use; or

- to interfere with visibility or safe traffic sight distances.

[7] In his affidavit, Mr. Parry deposes as follows:

22. This Policy specifically states that the District's budgetary restrictions prevent an active program to identify encroachments. The enforcement will be undertaken on a complaint basis or staff observation basis only.

23. The Policy does not require that the District take active steps to remove encroachments. The District's enforcement of the bylaw is discretionary.

24. The District has the second lowest tax rate in British Columbia, a very small budget and a very low staff ratio.

25. The only District employees who may be in the position to report concerns are water-meter readers. Residential water-meter readings are conducted only three times a year. There is no mechanism on the handheld water-meter reading apparatus by which the water-meter readers can report concerns. All reports must be given verbally or in writing to supervisors. The chain and post fence on the Truttmans' property would not have interfered with the water-meter reader's duties.

26. When I drafted the Policy, I did not intend a dangerous encroachment to include the situation on the Truttmans' property. I drafted this Policy in response to other encroachment situations in the District. The main culprits I was targeting with this Policy were owners who had clearly extended their side yards over the District's boulevards by which they prevented public access to other District property. I also had in consideration rural areas in the District where some owner's fences and accessory buildings blocked District road allowances.

27. The District removes encroachments if they are dangerous. A dangerous encroachment is a structure causing immediate danger. In some cases, the District asks homeowners to remove other offending encroachments.

28. Property owners regularly place rocks on boulevards to protect their yards from motorists. These are acceptable obstructions and the District does not to (sic) expect its employees to report such rocks or similar obstructions.

> 29. The fence of the Truttmans' property serves the same purpose as rocks and is a similar type of obstruction.
>
> 30. The chain and post fence on the Truttman property is an encroachment but it is not considered a dangerous encroachment to the general public. Such fences are considered decorative landscaping features. I am not aware of any problems in the District with chain and post fences.

[8] Assuming, without deciding, that North Saanich had a duty of care to the plaintiff pursuant to s. 1(b) of the ***Occupiers Liability Act***, it is clear that a municipal government may be discharged or exempt from that duty of care due to the nature of its decisions. In ***Brown v. British Columbia (Minister of Transportation and Highways)***, [1994] 1 S.C.R. 420, in deciding that the defendants owed a duty of care due to highway users, the Supreme Court of Canada stated:

> [26] ... It therefore must be determined, first, whether this is a policy decision on the part of the Department. If it was, then no liability can be attached to the Department. This must follow since there is no suggestion that, if the decision was one of policy, it was not bona fide or that it was so irrational that it was not a reasonable exercise of ministerial discretion.
>
> [27] ... The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort. ...

> ... 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.
>
> ... 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 my opinion, these principles apply to the acts of North Saanich in respect of its policy of February 5, 1996. As the policy is rational (given both budgetary and staff restraints), and there is no evidence of bad faith in its implementation or application, it should not be reviewable by the court.

[10] Consequently, the plaintiff's action against North Saanich is dismissed. That defendant will recover its costs on Scale 3.

"F.A. Melvin, J."
The Honourable Mr. Justice F.A. Melvin