

CANADA / JUDGMENT

Aitken v. Bethell

2012 BCSC 260

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 260 Aitken v. Bethell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aitken v. Bethell,

2012 BCSC 260

Date: 20120222

Docket: M48385

Registry: Nanaimo

Between:

Steven Aitken

Plaintiff

And

William Jeffrey Bethell, Deceased, RCMP Constable Joe Furtmann, RCMP Constable Turner
(RCMP Regimental Number 47786), Theresa Braid, Minister of Public Safety and Solicitor General

Defendants

Before: The Honourable Mr. Justice D.A. Halfyard

Reasons for Judgment

Counsel for the Plaintiff:

J.J. Murphy and

V. Madaan, Articled Student

Counsel for Defendant William Jeffrey Bethell, Deceased:

D.C. Quinlan and

A. Mosher

Counsel for the Defendants RCMP Constable Joe Furtmann, RCMP Constable Turner (RCMP Regimental Number 47786) and Minister of Public Safety and

Solicitor General:

D. Kwan

Place and Date of Hearing:

Nanaimo, B.C.

February 8, 2012

Place and Date of Judgment:

Nanaimo, B.C.

February 22, 2012

The applications

- [1] There are two applications before the court. The first is an application by the defendants RCMP Constable Joe Furtmann, RCMP Constable Turner and Minister of Public Safety and Solicitor General ("the applicants"). This application is brought pursuant to civil Rule 9-7, and was filed on January 31, 2012. The applicants seek the following orders:
- a) An order dismissing the action as against the defendant Minister of Public Safety and Solicitor General ("the Minister"), on the ground that the action is barred by s. 10 of the Workers Compensation Act; and
 - b) An order dismissing the action as against the defendants Constable Furtmann and Constable Turner, on the ground that the action against them personally is barred by s. 21 of the Police Act.
- [2] The plaintiff consents to the granting of the second order being sought by the applicants, and the defendant William Bethell takes no position as to the granting of that order. Both the plaintiff and the defendant William Bethell oppose the granting of the first order sought, on several grounds.
- [3] The second application is made by the plaintiff and it was filed on February 1, 2012. In that application, the plaintiff seeks the following orders:

- a) An order amending the style of cause to delete the personal defendants, RCMP Constable Joe Furtmann, RCMP Constable Turner (RCMP Regimental Number 47786) from the style of cause.
 - b) An order to delete the allegation of gross negligence against the defendant Constable Joe Furtmann.
 - c) An order to delete any and all allegations of negligence against the defendant RCMP Constable Turner (RCMP Regimental Number 47786).
 - d) An order that the style of cause and deletions requested be made without the necessity of filing formal amended pleadings.
 - e) An order striking out paragraph 33 of the amended statement of defence of RCMP Constable Joe Furtmann, RCMP Constable Turner (RCMP Regimental Number 47786) and the Minister of Public Safety and Solicitor General.
- [4] I suggested that the plaintiff's application with respect to the first three orders sought should proceed first, because it appeared to me that there was no dispute on those issues and the granting of those orders would simplify Mr. Kwan's application to some extent. Mr. Kwan objected to that suggested sequence on several grounds. Counsel argued that the plaintiff's application would be unnecessary if the Minister's application was successful. It was also said that such a sequence could have disadvantageous cost consequences for his clients, and would allow the plaintiff to ignore the Rules of Court. In the end, I directed that Mr. Kwan's application would proceed first.

The application of the defendants Furtmann, Turner and the Minister

The procedural issue

- [5] These defendants ask for a summary trial and, if that is granted, they seek final judgment dismissing the plaintiff's claims against them.
- [6] I need not review the pleadings and the evidence in order to decide whether the issues are suitable for determination by way of summary trial. No objection for summary trial procedure was made by the other parties. There is no conflicting evidence on any essential issue. The court is not being asked to temporarily assume the truth of any material fact. If the application is successful, much trial time and expense will likely be avoided.
- [7] I conclude that I will be able to find the facts necessary to decide the issues of fact and law, and that it would not be unjust to proceed by way of summary trial.

The action

- [8] The plaintiff Steven Aitken alleges that he was injured in a motor vehicle accident which occurred on November 8, 2004, at Nanaimo. He says that the accident was caused by the negligent operation of two motor vehicles, one being driven by the defendant William Bethell and one being driven by the defendant RCMP Constable Joe Furtmann.

The accident

- [9] I will outline the facts relating to the accident, in summary form, which facts were not really in dispute.
- [10] Shortly before noon on November 8, 2004, Sarah La Von Bethell telephoned the Nanaimo Detachment of the Royal Canadian Mounted Police and reported, in substance, that her husband (the defendant William Bethell) had forcibly confined her and assaulted her at their home in Nanaimo; that Mr. Bethell was going to the Nanaimo Christian School to abduct their daughter Jessica with the intent to harm or kill her; and that Mr. Bethell was driving her (Mrs. Bethell's) van.
- [11] Constable Furtmann was dispatched to go to the school and he drove there in a marked police car. He saw Mrs. Bethell's van parked in the school parking lot. He saw a man throw a small child into the van, and saw the man jump into the driver's seat. Constable Furtmann tried to prevent the van from driving away, but the driver of the van rammed into a vehicle parked ahead of it, forced that vehicle out of the way, and drove out of the school parking lot at a high rate of speed.
- [12] Constable Furtmann followed the van, with his dome lights and siren activated, but the van did not stop. It continued travelling west on Jinglepot Road at high speed. Constable Furtmann pursued the van, keeping a distance of about 300 metres behind it. As the Bethell vehicle approached the intersection of East Wellington Road, Constable Furtmann's view of the van was partially obstructed as it went over the crest of a hill, but he did see it move to the left, and then immediately saw dust and steam. Constable Furtmann then saw that a collision had occurred between the van and an oncoming vehicle, and that at least one of those vehicles had collided with a truck that had been parked at the side of the road.
- [13] The plaintiff was sitting in the parked truck, having lunch, when the collision occurred. He had been doing landscaping work at a nearby property, and had stopped work to have lunch, in his employer's truck, along with a co-worker.
- [14] The plaintiff sustained serious injuries as the result of the collision. William Bethell was killed. The driver of the oncoming vehicle was seriously injured. Jessica Bethell was injured.
- [15] It appears that the police pursuit of the van before the collision occurred was fairly short in distance and in time. No direct evidence was given about time and distance on this application, but I infer that the time was not more than a few minutes, and the distance covered was not more than a few kilometers.

The claims of the plaintiff

- [16] In his statement of claim filed October 10, 2006, the plaintiff alleged negligence against the defendant William Bethell, gross negligence against the defendant Constable Furtmann, negligence against the defendants Theresa Braid and Constable Turner and negligence against the Minister. The plaintiff also alleged that the Minister was jointly and severally liable for the negligence of the police officers Furtmann and Turner, by operation of s. 11 of the Police Act.
- [17] The negligence alleged against the defendants Braid and Turner included the failure to obtain, and pass on to Constable Furtmann, sufficient information relating to the defendant William Bethell, or complete information about the threats he had made.
- [18] The defendant Theresa Braid had been working as the RCMP dispatcher at the time of the accident. On June 23, 2008, the Workers' Compensation Appeal Tribunal ("WCAT") determined, among other things, that both the plaintiff and the defendant Theresa Braid were workers within the meaning of Part 1 of the Workers Compensation Act. That decision led to a consent order, whereby the action of the plaintiff as against Theresa Braid was dismissed, on September 25, 2008.
- [19] On October 3, 2008, an amended statement of defence was filed on behalf of the defendants Furtmann, Turner and the Minister. In addition to a denial of negligence, it had previously been pleaded on behalf of the defendants Furtmann and Turner that the action against them personally was barred by s. 21(2) of the Police Act. In the new paragraph 33, the defendants Furtmann, Turner and the Minister all pleaded that the plaintiff's action as against all of them was barred by s. 10 of the Workers Compensation Act ("the Act").
- [20] In the present application, s. 10 of the Act was only raised as a bar to the action against the Minister.
- [21] As mentioned, the plaintiff has filed an application in which he seeks, among other things, to delete the allegation of gross negligence against Constable Furtmann, to delete the allegation of negligence against Constable Turner and to remove Constable Furtmann and Constable Turner from the style of cause. In making this application, the plaintiff is effectively conceding that the action against Constable Turner cannot succeed and should be dismissed, and that gross negligence cannot be proved against Constable Furtmann. The plaintiff is also accepting that Constable Furtmann is protected by s. 21(2) of the Police Act and cannot be personally liable for any negligence that might be proved against him.
- [22] At the present time, the plaintiff intends to pursue a judgment for liability as against William Bethell, deceased, and the Minister. There are two claims against the Minister. The first is dependent on proof of negligence against Constable Furtmann in his pursuit of the Bethell vehicle, which, if established, would make the Minister "vicariously liable" for his negligence. The second claim against the Minister is a claim of direct negligence which is pleaded in paragraph 19 of the statement of claim as follows:

Particulars of negligence of Minister:

- a) Failing to take such measures as were reasonably necessary to ensure safe travel by the public of the local roadways, and particularly while RCMP constables [are] in high speed pursuit of dangerous motorists;
- b) Failing to provide adequate policies regarding high speed pursuits by RCMP constables;
- c) Failing to devise and implement practices to ensure the safety of motorists during high speed pursuits;
- d) Failing to ensure prompt communication of high speed pursuits and co-ordination with other law enforcement personnel;
- e) Failing to identify the significant hazard posed by high speed pursuits, the heavy volume of traffic in residential areas, the extended duration of the pursuit and the failure to provide measures to discontinue high speed pursuits when dangers and risks become intolerable;
- f) Such further particulars as counsel may advise.

The proceedings before the Workers' Compensation Appeal Tribunal

[23] On October 6, 2006, the plaintiff applied under s. 257 of the Act, for determination of the status of himself and other parties to the action, by WCAT. In its final decision (the panel consisted of Herb Morton, Vice Chair) made on June 23, 2008, WCAT issued a certificate which contained the following decisions:

- 1) The plaintiff, Steven Aitken, was a worker within the meaning of Part 1 of the Workers Compensation Act.
- 2) The injuries suffered by the plaintiff, Steven Aitken, arose out of and in the course of his employment within the scope of Part 1 of the Workers Compensation Act.
- 3) Sodbuster Landscaping Ltd. was an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act.
- 4) The defendant, Theresa Braid, was a worker within the meaning of Part 1 of the Worker's Compensation Act.
- 5) Any action or conduct of the defendant, Theresa Braid, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the Workers Compensation Act.
- 6) The City of Nanaimo was an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act.
- 7) The defendant, Minister of Public Safety and Solicitor General, was not an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act.

- 8) The government of British Columbia was an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act.
- 9) Any action or conduct of the Government of British Columbia, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Workers Compensation Act.
- [24] In the proceedings before WCAT (which were conducted by way of written submissions) counsel for the Minister made a lengthy argument intended to persuade WCAT that the Minister should be found to be an employer engaged in an industry within the meaning of Part 1 of the Act. Counsel for the plaintiff responded to these arguments. Counsel's arguments and Mr. Morton's reasoning and decision in respect of them, are set out in pages 18 to 28 of the 29-page decision.
- [25] Mr. Morton found that the Minister was not a "worker" or an "employer" within the meaning of Part 1 of the Act (see page 20 and page 28 of the decision). Counsel for the Minister made an extensive argument based on s. 11(1) of the Police Act to the effect that the Minister was liable on behalf of the government for torts committed by provincial constables in the performance of their duties, and that if the government was an employer, then the Minister should be accorded the same status by reason of being the designate, representative or agent of the government for the purposes of s. 11(1) of the Police Act. It was argued, in effect, that the government, and not the Minister, was liable to pay any damages that might be awarded against negligent police officers. These arguments were countered by counsel for the plaintiff.
- [26] Mr. Morton stated his conclusions with respect to these arguments of the Minister at pages 27 and 28 of his decision in these words:

Counsel for the Minister does not argue that the Minister is an employer (or a worker), in his own right. Rather, the argument is that the Government is an employer. Accordingly, the Minister should similarly be accorded the status of an employer, so that the Minister can claim the protection of the section 10 bar to a legal action. It seems to me that the submissions of counsel for the Minister are concerned with the effect of the WCAT certification for the legal action, rather than being restricted to questions as to the status of the parties. For the reasons set out above in WCAT Decision #207-02502 and Appeal Division Decision #97-1701, I consider that WCAT must be mindful of the limits of its jurisdiction under the Act, and to refrain from addressing questions which may be reserved to the courts.

On the question as to whether the Minister is an employer in his or her own right, my determination is in the negative. Evidence has not been provided to show that the Minister is an employer, as that term is defined in law and policy. For similar reasons to those provided in WCAT Decision #2008-01353, I find that the Minister was not an employer within the meaning of Part 1 of the Act.

...

I would comment, by way of obiter dicta which is not necessary to my decision, that it appears that the thrust of the argument by counsel for the Minister is that the Minister should be equated with the Government. It appears to me that such an argument is more properly considered by the court than by WCAT, given the limitations on WCAT's jurisdiction. I appreciate that an ambiguity arises in relation to the finding that any action or conduct of the Government, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act. Obviously, this finding can only refer to action or conduct of the employer, or a worker, in connection with a relationship of employment within the scope of Part 1 of the Act, and the Minister is neither a worker nor an employer in his own right. In relation to the question as to the role of the Minister as a putative agent of the Government, this would appear to get back to the question as to whether the Minister should be equated with the Government for the purpose of considering the effect of the section 10 bar to a legal action. It seems to me that this issue is one which would be within the jurisdiction of the court to address.

The claims against the RCMP officers

- [27] With respect to the claim of the applicants for an order dismissing the action against Constable Furtmann and Constable Turner personally, there is no opposition. As to Constable Furtmann, his counsel submits that s. 21(2) of the Police Act is a good defence, because he is deemed to be a Provincial Constable under the Police Act, and because the evidence does not establish gross negligence on his part so as to deprive him of the defence under s. 21(2).
- [28] The evidence of Constable Josef Furtmann is given in his affidavit sworn February 13, 2009. In his affidavit he describes what actions he took and why he took them. His evidence is not challenged and the plaintiff has effectively conceded that the evidence could not support a finding of gross negligence on the part of Constable Furtmann.
- [29] One of the accepted tests for gross negligence is whether the conduct in question amounts to "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves." See *Ward v. Vancouver (City)*, 2007 BCSC 3 at paragraph 101.
- [30] I am satisfied that the evidence cannot support the inference that the conduct of Constable Furtmann amounted to gross negligence. That means that he is entitled to the protection given by s. 21(2) of the Police Act, and the action as against him must be dismissed. Also, the allegation of gross negligence will be struck from the statement of claim.
- [31] As to Constable Turner, only simple negligence is alleged against him. It is conceded that he, along with Constable Furtmann is deemed to be a "police constable" within s. 11(1) of the Police Act. As a consequence, the action as against Constable Turner personally is also barred by s. 21(2) of the Police Act and must be dismissed for that reason.

- [32] Counsel submits on behalf of Constable Turner that there is a second reason why the action should be dismissed as against him. Counsel relies on the affidavit of William Turner (now a Corporal) sworn December 5, 2008.
- [33] The evidence of Corporal Turner establishes that he had no involvement in or connection with the events leading up to the accident on November 8, 2004. That evidence is not challenged, and I accept it. There is truly no evidence of negligence on his part, and the claim against the Minister based on Constable Turner's alleged negligent conduct is bound to fail. That claim is dismissed.

The claims against the Minister

Position of the applicants

- [34] As to the plaintiff's claims against the Minister, Mr. Kwan submits that both the claim based on vicarious liability and the claim based on direct negligence are barred by the operation of s. 10(1) of the Workers Compensation Act. In making this submission, counsel for the Minister relies firstly on the statements made by Mr. Morton in his reasoning to the effect that WCAT did not have jurisdiction to decide the issues raised by counsel for the Minister in the proceedings before WCAT. Mr. Kwan takes the position that, as suggested by Mr. Morton, this court, and not WCAT, has jurisdiction to decide those issues.
- [35] On the footing that Mr. Morton's decision on the jurisdiction question was correct, Mr. Kwan has made arguments on this application that are similar to the arguments made by counsel for the Minister to WCAT. The essence of his argument is that the Government of British Columbia was found to be an employer by WCAT, that the Minister either stands in the shoes of the government or is the agent of the government for the purposes of s. 11 of the Police Act and that, as a consequence, the Minister should be accorded the same status as the government, i.e. that of an employer, so as to qualify for the defence in s. 10(1) of the Act. It is contended that WCAT decided only that the Minister was not an employer in his capacity as an elected official. Counsel maintains that the Minister should be accorded the status of employer by reason of the "office" of the Minister of Public Safety and Solicitor General being "a part of government and which transcends elections and appointments;" or alternatively on the ground that the Minister is the agent of the government. Counsel did not repeat the argument made by counsel for the Minister to WCAT (referred to at page 19 of the decision) to the effect that provincial constables act on behalf of the Minister in enforcing the law and preserving the peace.

Position of the respondents

- [36] Mr. Murphy, counsel for the plaintiff, and Mr. Quinlan, counsel for the defendant William Bethell have both argued that WCAT has conclusively determined that ". . . the Minister was not an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act." It is contended that this was a question within the exclusive jurisdiction

of WCAT to answer, and that WCAT's decision was ". . . final and conclusive and . . . not open to question or review in any court." Finally, it is pointed out that no application for a judicial review of WCAT's decision was made.

- [37] By necessary implication, counsel for the respondents are asserting that Mr. Morton was in error when he decided that the court had a residual discretion or jurisdiction to decide whether the Minister was an employer within the meaning of the Act.
- [38] The respondents oppose this application (as it relates to the status of the Minister) on a procedural ground. It is first argued that the applicants filed an application for summary trial in February 2009, seeking relief similar to what is now being claimed, but never brought the application on for hearing. Next, counsel submit that on May 17, 2011, the court ordered the applicants to bring their application to hearing in July or August of 2011 (so as to preserve the trial date of February 6, 2012), but that the defendants failed to do this and had not even set a hearing date for the application as of January 25, 2012. It is correctly pointed out that this conduct of the applicants resulted in the trial having to be adjourned. The respondents say that, in these circumstances, the court should decline to consider the application on the merits and should dismiss it.
- [39] If the court were to accept jurisdiction and decide the application on the merits, the respondents would argue that whatever the Minister's relationship to the government might be, he is not an agent of the government.

Reply position of the applicants

- [40] In reply to the exclusive jurisdiction argument of the respondents, the applicants submit that WCAT's decision as to the scope of its jurisdiction, and the court's jurisdiction, was correct. Counsel argues that the court can properly decide the issue raised by the Minister, because it is a question that falls within the court's authority to determine the legal effect of WCAT's certified findings on the plaintiff's action.
- [41] In reply to the procedural objection raised by the respondents, Mr. Kwan states that he did not consider the court's direction that the summary trial application be heard in July or August of 2011, to be a formal order. But he acknowledged that he was obliged and expected to bring the application within that time period, and that he simply failed to do so. No real explanation for this failure was offered.

Decision as to the "estoppel" argument

- [42] In these circumstances, I see no meaningful difference in characterizing the obligation of the applicants as being "ordered" or "directed." It was supposed to be done and it was not done.

[43] However, when August 2011 came and went without any application having been made by these defendants, the plaintiff could have promptly sought an order requiring Mr. Kwan to bring his application on immediately. That was not done. The evidence does not reveal whether counsel for the plaintiff was privately pressing Mr. Kwan to bring his application to hearing. But no formal complaint was registered with the court until the trial management conference on January 25, 2012, almost five months after the time when the application should have been brought. I think the complaint of the plaintiff about the unexplained and prolonged delay is well founded. But in my opinion, the conduct of the applicants may more properly be considered as a relevant factor on the issue of costs which may have been incurred by the other parties in preparing for a trial that did not proceed. In my opinion, the application should be heard and decided.

The issues

[44] Counsel for the applicants describes the issue as being "whether the statutory bar [in s. 10(1) of the Act] precludes a claim against the Minister." In my view, this description is too generalized. I would frame the issues in this way:

- a) Has the question of whether the Minister is an employer within the meaning of s. 10(1) of the Workers Compensation Act been conclusively determined against the Minister by WCAT?
- b) If not, then does the court have jurisdiction to determine whether the Minister is an employer for the purpose of s. 10(1) of the Act on a ground not decided by WCAT, or is that question within the exclusive jurisdiction of WCAT?
- c) If the court has jurisdiction to decide the issue, then is the Minister an employer for the purpose of s. 10(1) of the Act, by reason of his powers and duties under the Police Act, and by reason of him (or the "office" of the Minister) being the designate or the agent of the government?

The first issue: Has the question of whether the Minister is an employer within the meaning of s. 10(1) of the Workers Compensation Act been conclusively determined against the Minister by WCAT?

[45] Under s. 254 of the Act, WCAT is given:

... exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part ... including ...

- (c) all matters that the appeal tribunal is requested to determine under s. 257.

[46] Under s. 257(2)(d) of the Act, WCAT is given jurisdiction (among other things) to determine in a personal injury action whether

- (d) An employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.
- [47] In paragraph 7 of the certificate issued on June 23, 2008, WCAT decided that:
7. The defendant, Minister of Public Safety and Solicitor General, was not an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act.
- [48] As pointed out by counsel for the respondents, s. 255(1) of the Act makes WCAT's decision: . . . final and conclusive and . . . not open to question or review in any court.
- [49] The effect of subsections 255(4) and (5) is that a certified copy of WCAT's final decision may be filed in the Supreme Court and upon it being so filed, it "has the same force and effect . . . as if it were a judgment of the Supreme Court."
- [50] As I see it, WCAT's task was to determine whether the Minister was an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act, at the time the plaintiff's cause of action arose on November 8, 2004. The tribunal did determine that issue and decided it in the negative. A certificate of WCAT's findings has been filed in this action. By operation of s. 255(5) of the Act, the finding by WCAT that the Minister was not an employer is tantamount to a judgment of this court. A judge of this court cannot sit in appeal of such a judgment.
- [51] In my view, WCAT has exercised its exclusive jurisdiction in deciding that the Minister is not an employer within the scope of the Act, and that decision has become equivalent to a judgment of this court by the filing of the WCAT certificate. It seems to me that the court must accept that decision and cannot revisit the issue. To do so would not only amount to a collateral attack on a final decision of WCAT made within its exclusive jurisdiction, but would also amount to entertaining an appeal from a judgment of this court.
- [52] The logical effect of WCAT's finding on the plaintiff's action is that his action against the Minister is not barred by s. 10(1) of the Act.
- [53] My conclusion on the first issue is that the court would be entrenching on the exclusive jurisdiction of WCAT if it embarked on an inquiry to determine whether the Minister had a status that WCAT has decided he did not have. Because the certificate has been filed, such an inquiry would also infringe the rule against entertaining an appeal from a judgment of this court.
- [54] For the reasons set out above, the first order sought by the applicants will be refused. That part of the application is dismissed.
- [55] It is not strictly necessary for me to decide the other two issues that I have previously defined. However, since extensive argument was presented by the applicants on these questions, I will state what my decisions on these other two issues would be, and give some reasons for those decisions.

The second issue: Does the court have jurisdiction to determine whether the Minister is an employer for the purpose of s. 10(1) of the Act on a ground not decided by the WCAT, or is that question within the exclusive jurisdiction of WCAT?

- [56] The second issue requires a determination of whether Mr. Morton was in error when he said, in effect, that his decision did not foreclose the Minister from seeking to persuade the court that the Minister was an employer by reason of him (or his office) being the government's designate (equivalent) or agent for the purposes of s. 11 of the Police Act. In considering this issue, it must be kept in mind that WCAT did decide that the government was an employer.
- [57] Mr. Morton seems to have reasoned to his conclusion that WCAT had no jurisdiction to determine the issue raised by counsel for the Minister, by the following sequence of decisions:
- a) It is accepted that WCAT has exclusive jurisdiction to determine the status of the parties to a civil action under the Workers Compensation Act, when asked by a party to do so.
 - b) WCAT does not have jurisdiction to decide what effect the tribunal's findings as to the status of the parties will have on the law suit. That is, WCAT cannot decide whether s. 10(1) of the Act does or does not bar the plaintiff's action against a defendant. That is an issue that can only be decided by the court.
 - c) To decide the issue raised by counsel for the Minister would go beyond determining the status of a party, and would entrench upon the jurisdiction of the court to determine the effect of WCAT's findings (as to the status of a party) on the plaintiff's action.
- [58] The first two of these decisions are clearly correct. But in my opinion, the question of whether or not the Minister was an employer for the purpose of s. 10(1) of the Act, for reasons argued by counsel for the Minister, is not a matter relating to what legal effect WCAT's findings will have on the civil action of a plaintiff. If Mr. Morton was of the opinion that the Minister might be an employer other than "in his own right," for reasons that only the court could decide, then I think he was in error. As previously stated, it is my opinion that only WCAT can decide whether or not a person or entity is an employer within the meaning of the Workers Compensation Act.
- [59] My conclusion on the second issue is that WCAT should have decided whether or not the Minister was an employer, based on a consideration of the reasons advanced by counsel for the Minister in the proceedings before WCAT. Only WCAT, and not the court, has jurisdiction to decide whether any person or legal entity is an employer within the meaning of the Act.

The third issue: If the court has jurisdiction to decide the issue, then is the Minister an employer for the purpose of s. 10(1) of the Act, by reason of his powers and duties under the Police Act, and by reason of his (or the "office" of the Minister) being the designate or the agent of the government?

- [60] In its certificate of findings, the appeal tribunal found that the Minister was not an employer engaged in an industry within the meaning of Part 1 of the Workers Compensation Act, but found that the Government of British Columbia was such an employer. This latter finding, together with the wording of s. 11(1) of the Police Act, was the foundation of Mr. Kwan's argument.
- [61] It seemed to be accepted by all parties that at the time of the accident, the defendant RCMP officers were not "workers," the Government of British Columbia was not their employer and they were not acting in the course of employment, within the meaning of the Workers Compensation Act. Counsel informed the court that RCMP officers are employees of the Federal Government. It must follow that the defendant RCMP officers are not employees of the Minister.
- [62] Notwithstanding these apparently accepted facts, counsel for the Minister requested a determination from WCAT as to whether the government of British Columbia was an employer. WCAT found not only that the government was an employer but further found that
9. Any action or conduct of the Government of British Columbia, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Workers Compensation Act.
- [63] Since WCAT also found that the Minister was not a "worker" or an "employer," and since the plaintiff was not alleging a cause of action against the government of British Columbia or an employee of the government, I am unable to see the relevance of such a finding to the facts of this case. Mr. Morton (at page 28 of his decision) recognized that there was "an ambiguity" in this finding, but does not clearly explain what this ambiguity consists of. One might speculate and say that Mr. Morton was leaving open the possibility that the court might find that the Minister was an employer because he was an "agent" of the government. It is possible Mr. Morton further reasoned that, to accommodate this potential finding by the court, WCAT should decide in advance that any potential negligent conduct of the Minister that could have caused or contributed to the plaintiff's injury, "arose out of and in the course of employment within the scope of Part 1 of the Workers Compensation Act." Such findings by the court would trigger the s. 10(1) statutory bar defence, so that the plaintiff could not maintain his action against the Minister (at least, not for direct negligence). That is a possible explanation for why Mr. Morton made the finding in paragraph 9 of the certificate (and at page 28 of the decision). But the intended purpose of that finding (paragraph 9 of the certificate) remains unclear to me.

[64] With respect to the present application, the issue is complicated further by the particulars pleaded in paragraph 33 of the amended statement of defence of the applicants. In summary, those particulars were said to constitute the defence in s. 10 of the Act, and included the following:

- a) The government of British Columbia was an employer;
- b) Constables Furtmann and Turner were acting as provincial constables and agents of the government of British Columbia;
- c) The Minister is named as a defendant on behalf of the government of British Columbia pursuant to s. 11 of the Police Act; and
- d) Any action or conduct of the agent of the government of British Columbia, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Workers Compensation Act.

[65] The applicants on the present hearing did not argue that Constables Furtmann and Turner were acting as agents of the government of British Columbia.

The statutory bar in S. 10(1) of the Workers Compensation Act

[66] I have attached s. 10(1) of the Act as an appendix to these reasons. It seems to me that, in a negligence action for damages for personal injury, in order for a defendant to succeed in this defence, it must be established:

- a) that the plaintiff, at the time of the alleged injury, was a "worker;"
- b) that the alleged injury "[arose] out of and in the course of [the plaintiff's] employment;"
- c) that the defendant was the plaintiff's employer, or the plaintiff's co-worker, or "any employer within the scope of this Part" (i.e., Part 1 of the Act), or "any worker;" and
- d) that the conduct of the defendant which is alleged to have caused the injury "arose out of and in the course of employment within the scope of this Part" (i.e. Part 1 of the Act).

[67] Where the statutory bar applies in favour of a defendant, the plaintiff cannot maintain his or her action as against that defendant. The plaintiff is restricted to making a claim for workers compensation in respect of the injury caused by that defendant.

[68] It appeared to be common ground that, if the Minister was an employer within the meaning of the Workers Compensation Act, then s. 10(1) would be an absolute bar to any action being brought against him by the plaintiff, i.e., a "worker," (for any tort allegedly committed by him or by a police officer), even though neither the government nor the Minister was the employer of the police officers involved. The potential scope of the statutory bar appears to be broad.

The argument

- [69] In arguing that the Minister was the designate or the agent of the government, Mr. Kwan relied heavily on the fact that s. 11(1) of the Police Act contains the introductory words: "the Minister, on behalf of the government, is jointly and severally liable" Similar wording is contained in s. 14(1) of the Police Act, which authorizes the Minister to enter into agreements with Canada to arrange for the Royal Canadian Mounted Police to provide services to British Columbia. It is said that this makes the Minister the designate or the agent of the government for the purposes of the Police Act. That may be a reasonable conclusion. But if it is, I do not agree that this conclusion logically strengthens the proposed legal inference that the Minister, like the government, is an employer within the scope of Part 1 of the Workers Compensation Act.
- [70] In support of his submission, Mr. Kwan placed considerable importance on the judgment of Mr. Justice Macaulay in *Hill v. Hurst*, 2001 BCSC 1191. In that case, an RCMP officer was found to have been negligent in driving through a red light at an intersection while responding to an emergency call in a marked police vehicle with dome lights flashing and siren activated. The police car struck the plaintiff's vehicle which was moving through the intersection on a green light, and the plaintiff was injured. The plaintiff sued the police officer, the Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia. The Attorney General of British Columbia (who was then "the Minister" under the Police Act) was not sued.
- [71] The issues relevant to the present dispute that were decided by Macaulay J. were whether the plaintiff could obtain judgment against any of the named defendants, and whether the plaintiff should be granted leave to join the Attorney General of British Columbia as a defendant. The defendants had pleaded (and argued) that the RCMP officer could not be personally liable by reason of the operation of s. 21(2) of the Police Act, and that s. 10 and s. 11 of the Crown Liability and Proceedings Act prevented the Attorney General of Canada from being vicariously liable. Macaulay J. accepted both of these submissions.
- [72] The defendants also argued that vicarious liability under s. 11 of the Police Act could not be imposed on Her Majesty the Queen but only on "the Minister" (who was then the Attorney General of British Columbia). This defence based on s. 11 of the Police Act had not been pleaded by the defendants.
- [73] The plaintiff opposed the raising of this defence at the end of the trial, without having pleaded it, and on the further ground that the defendants had acquiesced in the procedure taken by the plaintiff. In the alternative, the plaintiff sought leave to add the Attorney General of British Columbia as a defendant.

[74] Macaulay J. decided that the "wrong party" defence should have been pleaded. He then noted (at paragraph 69) that s. 11 imposed liability on the Minister "on behalf of the government," which he considered to imply "that the Minister be a nominal or representative defendant, in effect the agent of government." At paragraph 71, Macaulay J. stated:

The wording of s. 11 is broad enough, in my view, to found a claim against the Crown not just the Minister.

[75] And at paragraph 72, he said this:

I can see no bar to a plaintiff naming one or both the Minister or the government as defendants when advancing a claim under s. 11.

[76] Finding no prejudice to the defendants, Macaulay J. granted the plaintiff's application to join the Attorney General of British Columbia as a defendant. He then found both the Attorney General of British Columbia and Her Majesty the Queen liable, and dismissed the action as against the other defendants.

[77] Based on the reasoning in *Hill v. Hurst*, Mr. Kwan argued that, if a plaintiff can claim against both the Minister and the government for vicarious liability for the torts of police officers under s. 11 of the Police Act, and if the government can claim the statutory bar in s. 10(1) of the Workers Compensation Act, then:

It would be inconsistent in law for a statutory bar to apply to one and not the other.

Presumably, counsel means to say that it would be unjust if the s. 10 bar would be a good defence against a plaintiff who sued only the government (an employer), but would not be a defence where the plaintiff sued the Minister. I am unable to see the logic in this argument. It seems to prematurely assume that, because the government and the Minister can both be vicariously liable under the Police Act, they must both be employers for the purpose of s. 10(1) of the Workers Compensation Act.

[78] Counsel for the defendant William Bethell submits that the judgment of the Court of Appeal in *Sulz v. British Columbia (Minister of Public Safety and Solicitor General)* 2006 BCCA 582; 60 B.C.L.R. (4th) 43 defeats Mr. Kwan's argument based on *Hill v. Hurst*. I think Mr. Quinlan's argument has merit.

[79] At paragraph 5 of *Sulz*, Madam Justice Levine, speaking for the court, said this:

[5] The Province also claims that the trial judge erred in finding the Province liable, when the person responsible for the actions of police constables under the Police Act is the Minister of Safety and Solicitor General. The relief the Province seeks for this error is an order substituting the Minister in place of the Province. I would make that order, effective with these reasons for judgment. For convenience, I will refer to the Minister in these reasons as the "Province".

Decision

- [80] It seems to me that the Court of Appeal is saying, by necessary implication, that the province cannot be vicariously liable under s. 11 of the Police Act, and that only the Minister can be. If that is so, then on hindsight, it would appear that Mr. Justice Macaulay should not have granted judgment against both the government and the Minister, but should only have found the Minister to be vicariously liable. To my mind, that result cancels out the argument of the applicants based on *Hill v. Hurst*.
- [81] If the plaintiff had sued the Government of British Columbia (which would have to be named as "Her Majesty the Queen in Right of the Province of British Columbia": s. 7 of the Crown Proceedings Act), the finding of WCAT that the government was an employer within the meaning of the Workers Compensation Act could have the legal effect of entitling the government to the statutory bar in s. 10 of the Act (but only if the conduct of the government, or its servant or agent, was a cause of the injury, and that conduct "arose out of and in the course of employment"). But the plaintiff has not sued the government, nor could he have sued the government, in my opinion. I am not persuaded that the Minister should be accorded the status of an employer for the purpose of s. 10(1) of the Act, simply because the government is an employer and because the Minister is the designate, or is the agent of, the government for the purposes of the Police Act.

Disposition

- [82] The application for an order dismissing the action as against the defendant Minister of Public Safety and Solicitor General is dismissed.

The application of the plaintiff

- [83] Only two defendants, William Jeffrey Bethell, deceased, and Minister of Public Safety and Solicitor General, remain in the action. The decisions I have already made would justify the order sought by the plaintiff to strike out paragraph 33 of the amended statement of defence filed October 3, 2008. I will grant that order.
- [84] The writ and statement of claim were filed on October 10, 2006. Although the statement of claim has never been amended, it appears that Civil Rule 6-1(1) would not allow the plaintiff to amend that pleading now, without leave of the court or the consent of the other parties.
- [85] In normal circumstances, I would have granted leave to the plaintiff to amend the statement of claim by deleting the allegation of gross negligence against Constable Furtmann. If that was the only amendment being sought, I would not have required the plaintiff to file and deliver an amended statement of claim to reflect that simple deletion. But I decline to make these orders at this time.

- [86] In my opinion, as of February 1, 2012, the amendments sought in paragraphs 1, 3 and 4 of the plaintiff's notice of application were not in accordance with the Rules of Court. If these amendments were permitted at that time, the plaintiff would in effect be circumventing civil Rules 9-8(2) and (4), and/or civil Rules 6-2(7(a) and 6-2(8)(a). I would not entertain these parts (paragraphs 1 to 4) of the plaintiff's application, for that reason.
- [87] In addition, the orders I have already made on the first application have removed the police officers as party defendants, struck out the allegation of gross negligence against Constable Furtmann, dismissed the allegation of negligence against Constable Turner and dismissed the claim against the Minister based on Constable Turner's negligence. The result being sought by the plaintiff appears to have been accomplished. Counsel may no longer wish to proceed.
- [88] I will adjourn generally the plaintiff's application for the relief sought in paragraphs 1 to 4 of his notice of application. If counsel for the plaintiff considers it necessary to amend the style of cause and the statement of claim to reflect the orders made, the application may be rescheduled.

Costs

- [89] In accordance with the request of all counsel, the costs of these two applications, and the costs that may have been thrown away by the plaintiff and by the defendant William Bethell in preparing for the aborted trial, may be spoken to. I think it would be best if counsel could arrange a date with the trial scheduling manager to speak to the application in court, rather than filing written submissions, unless all counsel would prefer to make submissions in writing.

"D.A. Halfyard, J."

The Honourable Mr. Justice Halfyard

APPENDIX A

Limitation of actions, election and subrogation

10 (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

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