

CANADA / JUDGMENT

Lynch v. Robertson

2014 BCSC 1158

COURT

Supreme Court of British Columbia

DECIDED

25 June 2014

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2014 BCSC 1158 Lynch v. Robertson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lynch v. Robertson, 2014 BCSC 1158 Date: 20140625 Docket: 18518 Registry: Terrace Between: Colleen Mae Lynch Plaintiff And James Douglas Robertson and Stacy S. Glasgow Defendants And 141187 Ventures Ltd., Her Majesty the Queen in Right of the Province of British Columbia as represented by Ministry of Transportation and Infrastructure Third Parties

- and - Docket: 18585 Registry: Terrace Between: Steven Fromholz Plaintiff And James Douglas Robertson and Stacy S. Glasgow Defendants And 141187 Ventures Ltd., Her Majesty the Queen in Right of the Province of British Columbia as represented by Ministry of Transportation and Infrastructure Third Parties Corrected Judgment: The text of the judgment was corrected on page 2, Place and Date of Judgment, on June 26, 2014. Before: Master Baker Reasons for Judgment Counsel for defendants: L.A.J. Dunn Q.C. Counsel for proposed third party Her Majesty the Queen: A. Dalmyn Place and Date of Hearing: Prince George, B.C. June 16, 2014 Place and Date of Judgment: Terrace, B.C. June 25, 2014 ISSUE

[1] The defendants apply to add as third parties 41187 Ventures Ltd., doing business as Nechako-Northcoast Construction Services ("Ventures") and Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Transportation and Infrastructure ("HMTQ"). A parallel application is brought in Terrace Registry File No. 18585. These reasons will apply to that matter, and I direct that a copy of these reasons be filed in that action.

BACKGROUND

- [2] The matter arises out a motor vehicle accident that occurred on November 26, 2011 on Highway 16 between Terrace and Port Edward, B.C. Ms. Lynch was a passenger and Mr. Robertson was the driver of the vehicle registered to Ms. Glasgow. Mr. Robertson lost control of the vehicle in wet or slushy snow and struck another vehicle.
- [3] Ventures was the contractor responsible for road maintenance on that part of Highway 16 and, of course, contracts with HMTQ in respect of that.

- [4] Ventures has taken no position on this application so that the order adding Ventures as a third party will go. HMTQ, on the other hand, opposes the application and third party notice against HMTQ as framed.
- [5] Mr. Dunn attempted to electronically file the third party notice on the 42nd day after service and, had he succeeded, this application would not have been required.[1] There was an error in the filing, however, so that the documents were not ready for filing until the 44th day, at which time the defendants required either a consent or a court order. Since the consent was declined this application followed.

ANALYSIS

- [6] HMTQ does not disagree that, in some capacity, it is a proper third party, but challenges specific terms of the third party notice. I will therefore quote those provisions, which are paragraphs 8(b), (e), (f), (g), and (i), which Mr. Dalmyn argues do not plead a cause of action against HMTQ: Particulars of the negligence and/or breach of statutory duty of the Third Party, Her Majesty the Queen, are as follows:
- (b) designing and constructing the said highway so that the users thereof were exposed to actual and potential danger from the environs of the said highway;
 - (e) failing to remove all foreseeable dangers from the said highway and its environs;
 - (f) failing to provide sufficient, or proper, or any, safeguards for users of the said highway against the dangers, inherent or otherwise, presented by the said highway and its environs;
 - (g) failing to provide users of the said highway with sufficient, or any, warning of the condition to expect on the said highway, when the Third Party, Her Majesty the Queen, knew or ought to have known that the said highway and environs were in dangerous condition and that ice had formed on the said highway;
 - (i) failing to adequately or reasonably supervise the repair, maintenance, inspections, alterations and improvements undertaken by the Third Party, Nechako-Northcoast.
- [7] Mr. Dalmyn argues that to allow a third party notice the court must be satisfied that there is liability or potential liability by the third party to the plaintiff (in addition, one assumes, to the defendant), citing McLachlin C.J.C. in *R. v. Imperial Tobacco Canada Ltd.*[2]. By analogy to striking or amending pleadings, he also argues that, while pleadings are read generously, they must not be allowed (including by way of third party notice) if the facts alleged cannot support a claim. That, as I understand HMTQ's position, is the pivotal point: the pleadings above rely on facts or circumstances that cannot, even if true, support a claim. To that extent, and though Mr. Dalmyn did not use the term, I understand HMTQ's position to be, essentially, a demurrer.

- [8] The claim cannot be made, it is argued, for several reasons. The liability of HMTQ for road maintenance must be grounded either in a statutory duty or in negligence. Neither, argues Mr. Dalmyn, can be established here so that the only possible liability for HMTQ would be vicarious.
- [9] First, the defendant cannot rely (nor could the plaintiff, I infer) on a statutory duty to maintain the highway as British Columbia legislation does not impose that duty, as opposed to Ontario whose legislation does impose a duty. Mr. Dalmyn relies on *Lewis (Guardian ad litem of) v. British Columbia*[3] in support of this.
- [10] Second, liability in negligence must pass the test described by *Anns v. London Borough of Merton*[4], i.e. there must not only be established the requisite proximity between the plaintiff/defendant and the third party (in this case), which proximity usually establishes or grounds foreseeability. The proximity may be created by a statutory scheme (that creates a so-called private relationship of proximity[5]) or "a series of specific interactions between the government and the claimant"[6]. HMTQ acknowledges that a user of a public road and HMTQ and the road maintenance contractor are brought within that "settled category" giving rise to a duty of care.
- [11] That does not resolve the test, however. Even if this relationship and duty is established, the question remains: was the public authority acting legislatively, or acting on policy considerations? If the latter, then tort liability may not be recognized. The Supreme Court's expression of this is: It is established that government actors are not liable in negligence for policy decisions, but only operational decisions.[7] The dichotomy or duality immediately presents itself, then: were the decisions involved in the circumstances leading up to the events of November 26, 2011 policy-based, or were they operational in nature? The court in *Brown v. British Columbia (Minister of Transportation and Highways)*[8] offered various factors as considerations; policy decisions involve social, political and economic factors. Operational matters are: concerned with the practical implementation of the formulated policies and the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.
- [12] Similarly, in *Just v. British Columbia*[9] the court described a variety of factors that might categorize a decision as a policy decision. Cory, J. referred to the level of authority of the decision-maker or whether the decision concerned budgetary allotments, but then indicated necessary flexibility in the analysis pointing out, for example, that a policy decision might be made by a person "of a lower level of authority", or that any decision defended as policy-based "is open to challenge on the basis that it is not made in the bona fide exercise of discretion."

- [13] In short, as I understand Mr. Dalmyn's submissions, they are that the impugned pleading describes matters that come squarely within the so-called "core policy" decisions that HTMQ must make and are therefore necessarily immune to a tort claim. The facts alleged, therefore, even if assumed to be true, cannot found a claim. Some, he argues, might come close to acceptable allegations such as a failure in design, but submits that no specifics of defect or manufacture have been pled.
- [14] Mr. Dunn replied to both aspects of the suggested immunity. First, he argued that the Transportation Act[10] replaced the Ministry of Transportation and Highways Act since the Supreme Court's decision in Lewis, and that legislative changes may affect the Lewis decision. Certainly, he argues, the question should be decided at trial and not on an application such as this.
- [15] In respect of any liability in negligence, Mr. Dunn argues that whether a matter is a question of core policy or an operational decision is so obviously fact-driven that it cannot be decided at this stage. If the pleadings are deficient, he submits, the deficiency itself should be the subject of an application, i.e. an application for particulars, for example, and not the basis for refusing the third party proceedings. He argues that the Supreme Court in Imperial Tobacco[11] and in Just[12] was clear that the question must be decided on the particular facts surrounding the decision or procedure itself. As such the question cannot, or should not, be decided on the proposed third party proceeding as pled.
- [16] I am persuaded that the application must be allowed and the third party proceedings issue. I regard the tort argument by the defendant to be the stronger one and that, fact-driven as it is, the question must proceed by allowing third party proceedings. I agree with Mr. Dunn that possible deficiencies in the pleading should not decide the question at this stage and that that issue should be addressed, if necessary, by itself. Certainly, in that context, I am not persuaded that the proposed pleadings are so bound to fail that they must be refused.
- [17] I regard the statutory argument by the defendant as weaker and, perhaps, less likely to succeed. Still, I do not think it appropriate to presume that, or to parse the defendant's third party notice and allow some elements but refuse others, particularly when the statutory context may have changed, as Mr. Dunn submits.
- [18] The third party notice will therefore issue. "D. C. Baker, M."
- [1] viz Rule 3-5(4)(a)
- [2] 2011 3 S.C.R. 45, at paras 29 and 30
- [3] (1997) 3 S.C.R. 1145
- [4] (1978) A.C. 728, cited by McLachlin C.J.C. and Major J. in Cooper v. Hobart, 2001 SCC 79 at paras. 24 et seq.
- [5] Imperial Tobacco, at para. 44

- [6] Ibid at para. 45
- [7] Cooper v. Hobart 2001 SCC 79 at para. 38
- [8] (1994) 1 S.C.R. 420, at para. 38
- [9] (1989) 2 S.C.R. 1228 at para. 29
- [10] S.B.C. 2004 c. 44
- [11] at para. 89
- [12] at para. 29
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Prepared on 26 October 2026 · Esheria