

CANADA / JUDGMENT

N.I.P.v. Blencoe

2000 BCSC 1563

COURT

Supreme Court of British Columbia

DECIDED

25 October 2000

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2000 BCSC 1563

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2000 BCSC 1563 Docket:

96/1925

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NANCY IRENE PARKER

PLAINTIFF

AND:

ROBIN BLENCOE AND HER MAJESTY THE QUEEN

IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BOUCK

Counsel for the Plaintiff: David R. Brooks

Counsel for the Crown: Timothy P. Leadem, Q.C.

Date and Place of Hearing/Trial: 2 October 2000

Victoria, BC

INTRODUCTION

- [1] Ms. Parker seeks an award of damages from Mr. Blencoe and the Provincial Crown. She claims that Mr. Blencoe sexually assaulted her at various times between January 1989 and April 1994. For the early part of that time period Mr. Blencoe was a sitting M.L.A. Later on in that time period he became a cabinet minister.
- [2] Ms. Parker contends that Mr. Blencoe was a servant of the Crown at all relevant times. Therefore, she claims the Crown is vicariously responsible for his alleged unlawful conduct. Ms. Parker also alleges that the Crown is directly liable for her injuries because it was negligent. She says that the Crown owed her a duty of care, and it breached that duty by not protecting her from Mr. Blencoe. The trial is set to proceed in early 2001.
- [3] On this Rule 18A application, the Crown seeks an order dismissing Ms. Parker's action against it on the grounds that it is not liable for Mr. Blencoe's alleged unlawful acts.
- [4] For the reasons that follow, I find there was no master servant relationship between the Crown and Mr. Blencoe. Therefore, the Crown is not vicariously liable for any monetary damages Mr. Blencoe may owe to Ms. Parker.
- [5] I also find that the Crown is not liable in negligence. I do not find any evidence that the Crown was aware of Mr. Blencoe's actions with Ms. Parker or any other complainants until official complaints were made. It was not reasonable for the Crown to have foreseen what Mr. Blencoe allegedly did to Ms. Parker. When the Crown became aware of Mr. Blencoe's actions, it rescinded his cabinet appointment until the matter could be investigated more fully.

FACTS

- [6] Voters first elected Mr. Blencoe to the British Columbia Legislative Assembly on 5 May 1983 as a member of the New Democratic Party sitting in opposition. They elected him again on 22 October 1986 to the same position. On 17 October 1991, they elected him once more, but this time his party formed the government. On 5 November 1991 Mr. Blencoe was first appointed to the cabinet.
- [7] The following is a brief summary of Mr. Blencoe's cabinet appointments and responsibilities.
 - 1. On 5 November 1991, The Lieutenant Governor/Administrator acting on the advice of the Executive Council/Lieutenant Governor in Council appointed Mr. Blencoe to be Minister of Municipal Affairs, Recreation and Housing.
 - 2. On 15 September 1993, the Lieutenant Governor/Administrator, acting on the advice of the Executive Council/Lieutenant Governor in Council, renamed that ministry the Ministry of Municipal Affairs. Mr. Blencoe became the Minister of Government Services and Minister Responsible for Sports and Commonwealth Games.

3. On 9 March 1995 the Lieutenant Governor in Council, acting on the advice of the Executive Council/Lieutenant Governor in Council, relieved Mr. Blencoe of his duties as Minister of Government Services and as Minister Responsible for Sports and Commonwealth Games.
4. On 4 April 1995, The Lieutenant Governor in Council, acting on the advice of the Executive Council/Lieutenant Governor in Council, rescinded Mr. Blencoe's cabinet appointment.
- [8] Ms. Parker says she first met Mr. Blencoe in September 1988 when she was living in provincially subsidized government housing. She says that in the early part of 1989 she had sexual intercourse with Mr. Blencoe because she was afraid that she would lose her housing benefits if she refused. During the time up to 4 November 1991, when Mr. Blencoe was an M.L.A. and not a cabinet minister, Ms. Parker alleges that Mr. Blencoe committed several other sexual assaults on Ms. Parker.
- [9] The last sexual assault allegedly occurred in 1994 when both Ms. Parker and Mr. Blencoe were attending the opening of a housing complex. Mr. Blencoe attended as the M.L.A. for the area, but he was not then Minister of Housing. It does not appear that he made any specific threats to Ms. Parker to the effect she might lose her housing benefits if she did not consent to his advances.
- [10] It appears that Ms. Parker first informed government representatives about Mr. Blencoe's conduct in April 1995. Ms. Parker was not aware of any other person being assaulted by Mr. Blencoe, other than those who were making complaints to the Human Rights Commission.

ISSUES

- [11] 1. Is the Crown vicariously liable to Ms. Parker for the alleged sexual assaults committed by Mr. Blencoe?
2. Is the Crown liable to Ms. Parker for the alleged sexual assaults committed by Mr. Blencoe because it was negligent?

ANALYSIS

- [12] It may be convenient to divide the judgment into five parts:
1. Common Law - Master and Servant Relationship and Vicarious Liability.
 2. Common and Statute Law Regarding the Position of Crown.
 3. Liability of the Crown while Mr. Blencoe was an M.L.A.
 4. Liability of the Crown while Mr. Blencoe was a Cabinet Minister.
 5. Liability of the Crown for Negligence.
1. Common Law - Master and Servant and Vicarious Liability

[13] In *The Law of Master and Servant*, 5th ed. (London: Sir Isaac Pitman and Sons Ltd., 1967) Judge F.R. Batt commented at page 1, that the relationship between a master and servant is so fundamental that it eludes precise definition. He described a "servant" as "one who is under an obligation to render services and obey the orders of a person or body of persons, especially in return for wages and salary." He goes on at page 1 to state that a "master" is "one having direction or control over the actions of others".

[14] At page 5, Judge Batt discusses the relationship between a master and servant:

Whether any relation is that of master and servant is entirely a question of fact ... the law is not concerned with the terminology used by the parties but only with the nature of the relation which the parties intended, or, in the absence of clearly expressed intention, must be deemed to have intended to create ...

[15] In *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967), P.S. Atiyah discusses the master and servant relationship at 47 and 48. He states:

... what the courts now look for is not so much the power to direct how the work shall be done, but the power to control the servant in relation to the incidental features of his employment - what has been termed the "when" and the "where" of the work.

...

Insofar as control is still an important test it is the "ultimate" control that matters, the power of the employer to tell the servant what he is to do, when he is to do it and where he is to do it.

[Emphasis in original.]

[16] For vicarious liability to exist, the employer must have effective control over the employee: see *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.) at 169. The British Columbia Court of Appeal affirmed the need to find this element of control in *A.(C.) v. C. (J.W.)* (1998), 60 B.C.L.R. (3d) 92 at 121.

[17] At common law, employers or masters are vicariously responsible for the torts of their employees or servants that are committed by the latter during the course of their employment: L.N. Klar et al. *Remedies in Tort*, looseleaf, vol. 4 (Toronto: Thomson Canada Limited, 1987) at para. 65. If I find Mr. Blencoe was a servant of the Crown when he allegedly committed the sexual assaults, the plaintiff must still prove that what Mr. Blencoe allegedly did to her was done during the course of his employment as an M.L.A. and later as a cabinet minister.

[18] Generally speaking, to prove vicarious liability on the part of the Crown, Ms. Parker must establish on a balance of probabilities that:

1. The alleged sexual assaults Mr. Blencoe committed were connected with his duty as a Crown employee.

2. The connection to his duties as an employee of the Crown was of such a nature that the assaults could be seen as ways, even improper ways, of performing his duties.
- [19] If the alleged sexual assaults were independent acts by Mr. Blencoe, done outside the course of his employment, the Crown is not vicariously responsible: Klar, *supra*, at paras. 73 - 74.
2. Common and Statute Law on the Position of Crown
- [20] In Canada, the provinces and the federal government each have a separate existence defined by a separate treasury, separate property, separate employees, separate courts and a separate set of laws to administer. The Queen is the formal head of state in the provinces and the federal government. Commonly, many refer to the federal and provincial governments as the Crown. They are called the Crown in the right of Canada or the Crown in the right of each individual province, as the case may be: P. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Thomson Canada Limited, 1997) at 269. In this instance we are dealing with the Crown in the right of the Province of British Columbia.
- [21] Under the Crown Proceeding Act, R.S.B.C. 1996, c. 89, s. 1, the word "Crown" is defined as "Her Majesty the Queen in Right of British Columbia." Section 11 (1) of that statute allows a person to bring proceedings against the Crown and obtain relief from the Crown almost as if the Crown were a natural person.
- [22] Hence the statute gives Ms. Parker the right to bring this action against the provincial Crown. However, it also limits the nature of the remedy she can recover from the Crown to the remedy that she could recover from an ordinary person as an employer. In other words, if the Crown and Mr. Blencoe did not have a master servant relationship when the alleged assaults occurred, the Crown cannot be found vicariously liable for Mr. Blencoe's actions.
- [23] With respect, it is imprecise to describe the parliamentary system as consisting of three separate and distinct branches of government consisting of the legislature, the executive and the judiciary. While the judiciary is separate and distinct from the executive and the legislature, the legislature and executive are not distinct from one another. Some members of the elected legislature are also members of the executive. They are called cabinet ministers. The Crown appoints cabinet ministers to direct the functions of their ministries in accordance with legislation applicable to a particular ministry.
- [24] In Canada, the Crown exists in the form of the federal Governor General or provincial Lieutenant Governors. Canadian constitutional law does not grant Governor Generals and Lieutenant Governors the powers of absolute monarchs. Instead, it recognizes that these monarchial powers are now vested in the legislature. As Hogg, *supra*, states at 241 - 242:

Since 1930, all Canadian Governors General have been selected by the Canadian Prime Minister with the Queen merely formalizing the appointment ... The effect of responsible government is to transfer effective political power to elected officials.

Hence, Parliament is supreme because it represents the will of the people.

- [25] Decisions once made by a monarch in the name of the Crown are now made by the executive branch of government under the authority of the legislature. Within that authority, the executive administers the activities of government. Often, the executive's activities are referred to as "Crown" activities, for want of a better description.
3. Liability of the Crown while Mr. Blencoe was an M.L.A.
- [26] British Columbia voters elected Mr. Blencoe to the Legislative Assembly on 5 May 1983, 22 October 1986 and again on 17 October 1991. The Crown neither hired nor appointed him to the Assembly. In section 23 of the Constitution Act, R.S.B.C. c. 66, the Legislature fixed Mr. Blencoe's term of office at a maximum of 5 years. The Crown did not set the length of the term he could serve as an M.L.A. The only direct master servant relationship between Mr. Blencoe and the Crown arose when the Crown paid his salary from the public purse. However, while the Crown paid his salary, the Legislature set the amount: Legislative Assembly Management Committee Act, 1996 R.S.B.C. c. 258, s. 3.
- [27] Again, the Legislature and not the Crown described the conditions whereby Mr. Blencoe could lose his position as an M.L.A. Section 34 of the Constitution Act, sets out when an M.L.A. loses his or her seat. Failing to attend the Legislative Assembly during the whole session and being convicted of an indictable offence that can only be prosecuted by indictment, are examples of the type of conduct set out in s. 34.
- [28] It is also possible for the people to recall an elected M.L.A. Section 19(1) of the Recall and Initiative Act, 1996 R.S.B.C. c. 398, states that "a registered voter for an electoral district may apply under subsection (2) for the issuance of a petition for the recall of the Member of the Legislative Assembly for that electoral district". Therefore, it is the people, not the Crown, through legislation and recall actions, who have the power to dismiss an M.L.A.
- [29] Based on this analysis, there was no master and servant relationship between the Crown and Mr. Blencoe while he was an M.L.A. The Crown did not appoint Mr. Blencoe to the position of M.L.A. The Crown did not direct or control his activities in return for paying him wages or salary. Nor did the Crown set his wages. It did not tell him what he was to do and how he was to do it. As a sitting M.L.A. he was an independent operator, not a servant of the Crown. If anything he was the servant of the people whom he represented.
- [30] Without there being a master and servant relationship between the Crown and Mr. Blencoe as an M.L.A., the Crown cannot be vicariously liable for his alleged sexual assaults on Ms. Parker committed while he was an M.L.A. He alone must pay any damages she may recover for these alleged sexual assaults.
4. Liability of the Crown while

Mr. Blencoe was a Cabinet Minister

- [31] It seems undisputed that Mr. Blencoe allegedly assaulted Ms. Parker only once while he was a cabinet minister. Therefore, the question is whether or not Mr. Blencoe was a servant of the Crown when he was no longer just an M.L.A., but also a member of the provincial cabinet.
- [32] Under s. 9 of the Constitution Act, the Lieutenant Governor appoints the Executive Council, including the Premier, who is President of the Council. From those appointed to the Executive Council, the Lieutenant Governor must designate a portfolio for each one. Section 13 of the Constitution Act states that despite any Act, the Lieutenant Governor in Council may determine the organization of the executive government and its various ministries. Thus, the Lieutenant Governor appoints and the Lieutenant Governor in Council organizes.
- [33] By constitutional convention, a Lieutenant Governor acts on the advice of the Lieutenant Governor in Council or, in some cases, the Premier: Hogg, *supra*, at 19. The words "Lieutenant Governor in Council" really mean the provincial cabinet: Hogg, *supra*, at page 9. In British Columbia the Executive Council is the same as the cabinet.
- [34] In this instance, the Lieutenant Governor (the Crown) appointed Mr. Blencoe to cabinet. No orders in council specifically defined Mr. Blencoe's cabinet responsibilities. All they did was direct Mr. Blencoe to assume certain duties, powers and functions connected with his ministerial position. These duties, powers and functions are spelled out in various statutes enacted by the Legislature. Mr. Blencoe's base salary as an M.L.A. was set. Other legislation specified the salary he was entitled to receive for his services as a cabinet minister: Legislative Assembly Allowances and Pension Act, R.S.B.C. 1996, c. 257, s. 4.
- [35] As is the case with all cabinet appointments, Mr. Blencoe served at the discretion of the Premier: Hogg, *supra*, at 243. Thus, Mr. Blencoe's only master servant relationship with the Crown was the Premier's power to appoint and dismiss him. It was the legislation that he administered that controlled his day-to-day duties, powers and functions.
- [36] As a cabinet member, Mr. Blencoe had various duties to four separate entities. First, he was also an M.L.A. with certain duties to his constituents as their elected representative. Second, he had duties to the Legislature as prescribed by the statutes that set up the ministries he supervised. Third, he owed duties, such as cabinet solidarity, to the Premier and Executive Council who hired him and could fire him. Fourth, he had political duties as a member of a political party that formed the government. From time to time these duties were bound to conflict. No one entity controlled him.

[37] As His Honour Judge Batt stated above, the issue of whether a master servant relationship exists is entirely a question of fact. On a day-to-day basis, the Crown (Premier/Executive Council) did not control how Mr. Blencoe should perform his cabinet ministry work. Nor did it control where he should be and when he should be there. Mr. Blencoe only had a limited employment relationship with the Crown. He had more significant master servant type obligations to the three other entities mentioned above.

[38] Given these circumstances, I find as a fact there was no certain master servant relationship between Mr. Blencoe and the Crown during his term as a cabinet minister. Because no such relationship existed, the Crown is not vicariously liable to Ms. Parker for Mr. Blencoe's actions during his term as a cabinet minister.

5. Liability of the Crown for Negligence

[39] Ms. Parker submits that if the Crown is not vicariously liable for Mr. Blencoe's conduct as a servant of the Crown, then it is directly liable to her in negligence. She argues the Crown owed her a duty of care because it knew or ought to have known of his actions and failed to prevent him from injuring her. There is little or no evidence proving that the Crown knew about the alleged assaults of Mr. Blencoe. Nor, was it reasonably foreseeable to the Crown that Mr. Blencoe would assault Ms. Parker or anybody else: *R. v. Cote*, [1976] 1 S.C.R. 595 at 604.

[40] From these findings it follows that the Crown's Rule 18A application must succeed.

JUDGMENT

[41] 1. Ms. Parker's claim against the Crown is dismissed.

2. Costs follow the event.

"J.C. Bouck, J."

The Honourable Mr. Justice J.C. Bouck

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