Date: 25 06 1998
Docket: CV 05247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

MICHAEL SPENRATH

Plaintiff

- and -

WAYNE CHARLES McKENZIE, CANADIAN BROADCASTING CORPORATION, COMMISSIONER OF THE NORTHWEST TERRITORIES and JOHN DOE

Defendants

Application for summary judgment by defendants; dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife , Northwest Territories
on June 15, 1998

Reasons filed: June 25, 1998

Counsel for the Plaintiff: Gordon G. Yake

Counsel for the Defendants,
C.B.C. and McKenzie: Kelly A. Payne

Counsel for the Defendant,
Commissioner of N.W.T.: Sharon R. Stefanyk

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BETWEEN:

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REASONS FOR JUDGMENT

[1] There are two applications before me brought by the defendants seeking summary judgment dismissing this action. One motion is brought on behalf of the defendants Canadian Broadcasting Corporation ("C.B.C.") and McKenzie; a separate motion is brought on behalf of the defendant Commissioner of the Northwest Territories.

[2] This action arises from a single-vehicle accident which occurred on June 1, 1992. The plaintiff was a passenger in the vehicle owned by the CBC and driven by McKenzie. At the time both the plaintiff and McKenzie were employees of the CBC on a job assignment. The plaintiff alleges negligence on the part of McKenzie in his driving, for which the CBC is vicariously liable, as well as faulty road conditions. The accident occurred on a territorial highway so the Commissioner, as the chief executive officer of the Government of the Northwest Territories, is sued for negligence in the maintenance of that highway.

[3] This matter came before me once before, in 1995, on a motion by the CBC and McKenzie to strike out the Statement of Claim. I dismissed the motion at that time due to a lack of the necessary factual underpinning. These two defendants now raise the same legal issue as they did in 1995.

Application by CBC and McKenzie:

[4] These defendants submit that the action is statute-barred due to the provisions of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5. That statute provides for compensation to an employee who is injured by an accident arising out of and in the course of his or her employment. By authority of an Order-in-Council issued in 1960, employees of the CBC are declared to be employees for the purpose of this Act. This is important because otherwise a CBC employee would not be covered by the Act. The *Broadcasting Act*, S.C. 1991, c. B-9.01, provides that the CBC is an agent of Her Majesty the Queen in Right of Canada (s.47) except with respect to employees. Section 44(3) of this Act stipulates that employees of the CBC are not themselves servants of the Crown.

[5] The *Government Employees Compensation Act* essentially establishes a workers' compensation regime. The Act authorizes the provincial workers' compensation authority in the province in which the injured employee works to determine the compensation. For those employees working in the Northwest Territories, the Act deems them to be employed in the Province of Alberta. If the employee is injured in circumstances that would entitle him or her to bring an action for damages against a third party, the employee may elect to claim compensation under the Act or may claim against that other party. If the employee elects compensation, then the Crown is subrogated to the rights of the employee and may bring an action in the employee's name against the third party. In all this the statute is quite unremarkable.

[6] What the injured employee cannot do, in essence, is sue the Crown. This immunity from suit provision is found in s.12 of the Act:

> 12. Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

Two points need to be addressed with respect to this section.

[7] First, it will be readily apparent that the precondition to immunity from suit is the "entitlement" of the employee to compensation under the Act. To me this does not mean that the employee must "elect" compensation, merely that he or she is "entitled" to it. It also does not mean that the employee must have actually received compensation. The term"entitled" could mean simply that compensation would be payable.

[8] Second, the section protects Her Majesty or any officer, servant or agent of Her Majesty. Hence the CBC is entitled to the benefit of this statutory protection. But it does not, at least on the face of it, protect other employees of the CBC (such as McKenzie). Employees of the CBC are expressly held, by the *Broadcasting Act*, not to be servants of Her Majesty.

[9] This second point is highly significant. Ms. Payne, counsel for both the CBC and McKenzie, submitted that the protection applies to McKenzie as well. Unfortunately she could offer no authority to support this proposition. One case referred to by her was *Lawrence v R.C.M.P.*, [1997] F.C.J. No. 75 (T.D.). That case held that the plaintiff, a Crown employee, was barred from claiming against the Crown. But while that case referred to the alleged negligence of other employees, those other employees were not defendants. The case merely held that the plaintiff's claim against the Crown was barred. It said nothing about any claim that may have been brought against another employee. Of course, if the other employee was a servant of the Crown, the claim would be barred.

[10] Another case referred to by Ms. Payne directly contradicts her position. In *Canada v Tremblay* (1989), 61 D.L.R. (4th) 649 (F.C.T.D.), the Crown brought a subrogated action against a CBC employee. That employee had assaulted a fellow employee who then received compensation under the *Government Employees Compensation Act*. The defendant sought the protection of s.12 of the Act (designated as s.8(7) in the case report). The court denied the defence. In doing so it held that the defendant employee was not an officer, servant or agent of Her Majesty and thus could not benefit from the protection of the statute. Pinard J. wrote (at page 658):

> Indeed, although a servant of the Canadian Broadcasting Corporation is an "employee" as defined in s.2 of the *Government Employees Compensation Act*, it is necessary to carefully read and understand the particular provision that s.8(7) of the Act represents. While on the one hand s.8(7) denies the right to claim to an "employee", on the other hand the provision does not deny the right to claim against another "employee", but denies it only against "Her Majesty or any officer, servant or agent of Her Majesty". If Parliament had also wished to exempt an employee as defined in s.2 of the Act, it would have so declared by using the word "employee", as it did for the person to whom it denies the right to claim at the beginning of the provision in question.

[11] Ms. Payne sought to distinguish this decision on the basis that it was a subrogated action. With respect, I fail to see any significance to that point. The words of Pinard J. are, in my opinion, equally applicable to the case before me.

[12] This conclusion puts the solicitors for the two defendants in an awkward position. While they may succeed in removing one client, the CBC, from this action, their other client, McKenzie, would be left on the hook. And presumably the CBC has deeper pockets to respond to an award of damages.

[13] Mr. Yake, on behalf of the plaintiff, submitted that summary judgment should not be granted because there was an issue as to whether s.12 of the Act applied at all. He based his argument on the words "accident" and "entitle".

[14] First, Mr. Yake submitted that there must be an "accident" as that term is defined in s.2 of the Act. There "accident" is defined as "a wilful and intentional act...and a fortuitous event occasioned by a physical or natural cause". He suggested that a negligence claim is not encompassed by this definition.

[15] I cannot accept this submission. It seems to me that the statutory definition is somewhat circular. A "fortuitous event" is an accidental event. Hence, an "accident" is an "accident". And, whenever an accident occurs, the laws of negligence may be engaged.

[16] Second, however, Mr. Yake submitted that there is a factual dispute over the plaintiff's entitlement to compensation. On this point I think he is on firmer ground.

[17] There is evidence, albeit hearsay, in the affidavit filed on behalf of the CBC that the plaintiff's claim was accepted for compensation by the Workers' Compensation Board of Alberta. The plaintiff, however, swore an affidavit in which he states that he has never received compensation nor did he ever elect to receive compensation. He also attaches a letter from the Alberta Board, from a different official but from the same office in Alberta, that states that the claim has not been accepted by the Board. So, while it would appear that the plaintiff is, by the plain wording of the statute, entitled to compensation, whether he is actually in receipt of or eligible to receive compensation is a matter of controversy. Mr. Yake argued that this factual dispute goes to the issue of whether the plaintiff is "entitled" to compensation under the Act. If he is not entitled then s.12 does not apply. At a minimum, a resolution of this factual dispute may help to determine the question of entitlement.

[18] The test on a summary judgment motion is well-known. The motions judge must take a hard look at the evidence to determine whether there is a genuine issue for trial: see *923087 N.W.T. Ltd. v Anderson Mills Ltd.*, [1997] N.W.T.R. 212 (S.C.), at pages

221-223. If there is no genuine issue for trial then the court must grant summary judgment: Rule 176(2). The case law, while recognizing that a summary judgment motion is an effective way of avoiding expensive and lengthy litigation, demands however that it must be clear to the motions judge that a trial is unnecessary to resolve the issues. This was a point made by the Ontario Court of Appeal recently in *Agounie v Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (at page 235):

> ...it must be clear to the motions judge, where the motion is brought by the defendant, as in this appeal, that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.

And, it should also be emphasized that the court's function is not to resolve the issue but to determine whether a genuine issue exists.

[19] Ms. Payne argued that this motion involves a question of law: Does s.12 bar this action as against the CBC and McKenzie? I have already ruled that s.12 does not protect McKenzie. With respect to the CBC, there is a factual dispute which may assist the court in resolving the precondition to use of s.12, that being the plaintiff's entitlement to compensation. Thus there is a genuine issue for trial.

[20] The application by these defendants is dismissed.

Application by the Commissioner:

[21] The defendant Commissioner also applies for summary judgment on the argument that the plaintiff has no reasonable prospect of success as against this defendant. In support the defendant has filed affidavits suggesting that the highway was maintained in a reasonable condition and offering opinion evidence that road conditions had nothing to do with the accident. For his part, the plaintiff has sworn to observations that suggest that the road may not have been in as good a condition as the defendant says it was.

[22] It seems to me that this is exactly the type of issue that requires factual determinations. The standard of care of highways on the part of government is one of "reasonable maintenance". What is reasonable in the circumstances is a factual decision best made after a trial. Similarly, the question of whether decisions or actions of a government are policy (so as to avoid liability) or operational (so as to subject government to potential liability) is one that can only be decided after consideration of numerous factors (including political, social and economic concerns): see, for example, *Brown v British Columbia* (1994), 112 D.L.R. (4th) 1 (S.C.C.). These are all factual issues that require a trial to decide.

[23] Accordingly, the Commissioner's motion for summary judgment is dismissed.

[24] Ms. Stefanyk, on behalf of this defendant, sought alternative relief, that being an order that this action be placed under case management pursuant to Part 19 of the Rules of Court. Considering the lengthy history of these proceedings, I think there is merit in this request. Other counsel agree as well.

[25] Therefore, I will issue an order placing this proceeding under case management. Counsel are directed to forward to me an outline of (a) further steps to be taken in this action; (b) anticipated interlocutory motions; and (c) a proposed schedule of steps leading up to trial. If counsel can prepare such an outline together then all the better; if not then I expect each counsel to prepare such an outline independently. They are to be forwarded to me within 60 days of these Reasons for Judgment. A case management judge will then be designated.

[26] Normally costs follow the event. I will, however, give counsel an opportunity to make submissions on costs should they be unable to agree.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 25th day of June, 1998

Counsel for the Plaintiff: Gordon G. Yake

Counsel for the Defendants,
C.B.C. and McKenzie: Kelly A. Payne

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