Cameron v. GNWT et al, 2005 NWTSC 2 DATE: 2005 01 26
DOCKET: S-1 CV2001000130

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JERALD SCOTT CAMERON

Plaintiff

-and-

THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, THE HAMLET OF FORT LIARD, JOHN DOE I AND JOHN DOE II, HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF TRANSPORT.

Defendants

-and-

THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF TRANSPORT

Third Parties

REASONS FOR JUDGMENT

[1] This is an application by the Hamlet of Fort Liard (the "Hamlet"), a Defendant in this action, for summary judgment pursuant to Rule 175, dismissing this action against it.

[2] The action was brought after the Plaintiff was seriously injured in the early and dark morning hours of October 21, 1999, when his vehicle crashed after he failed to negotiate a ninety degree curve on Gravel Pit Road ("the road") in the Hamlet of Fort Liard. It is not disputed that the accident occurred on a portion of the road that lies within airport land. The airport land lies wholly within the Hamlet's boundaries.

[3] In his Amended Statement of Claim, the Plaintiff alleges that the Hamlet owed him a duty of care, which it breached in various ways, including failing to take any steps to warn motorists travelling on roads that were its responsibility that they were leaving such roads and entering on to a road which contained a trap and unusual danger in the form of the ninety degree curve. The Plaintiff also alleges that the Hamlet breached its duty of care by not maintaining the road in good condition.

[4] The Hamlet argues that it had no responsibility for, or authority or control over, the portion of the road where the accident took place. That being the case, it submits, it owed no duty of care to the Plaintiff and therefore cannot be held liable to him.

[5] Rule 175 provides that a defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. Rule 176 (1) sets out that the party responding to the application must show that there is a genuine issue for trial. Under Rule 176(2), where the Court is satisfied that there is no genuine issue for trial, the Court shall grant summary judgment accordingly.

[6] The focus on an application for summary judgment is to determine if there is "a genuine triable issue": *923087 N.W.T. Ltd. v. Anderson Mills Ltd.*, [1997] N.W.T.J. No. 31 (S.C.). To justify deciding the matter without a trial, the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success: *Allied Signal Inc. v. Dome Petroleum Ltd.* (1991), 81 Alta. L.R. (2d) 307 (Q.B.). The onus is on the applicant to establish that there is not a *bona fide* triable issue and that its case is manifestly clear, beyond doubt: *Wallace v. Wallace*, [1997] N.W.T.J. No. 5 (S.C.).

[7] Accordingly, to succeed on this application, the Hamlet must establish that it is manifestly clear and beyond doubt that it owed no duty of care to the Plaintiff that might render it liable in negligence.

[8] The map that was submitted as evidence on this application (found at Tab 1 of the Hamlet's Written Brief) shows that Valley Main Street in the Hamlet lies south of and parallel to the Liard River. Valley Main Street eventually turns further south at its western end and leads into or becomes Cottonwood Road, which leads further south and then turns back east, leading into or becoming Gravel Pit Road. As Gravel Pit Road continues in a south-easterly direction, it enters on to airport land. Within the

airport land, at the ninety degree curve, it turns south and eventually leaves the airport land and enters on to Hamlet land and continues to a gravel quarry. One way of describing the road is to say that at both ends, it is located on Hamlet land and only a portion in between, which includes the site of the accident, is located on airport land.

[9] Gravel Pit Road is not a formally constructed road. It came into existence through use. At the relevant time, its main use was for access to the gravel quarry, a location also used by some residents of the Hamlet as a place to have parties and campfires. There is evidence that the public used the road both night and day.

[10] The airport land is owned by the Government of the Northwest Territories (the "GNWT"). Administration and control of that land was transferred from the federal government to the GNWT in 1991, although the GNWT has had informal control since the mid-1970's. The affidavit of the Hamlet's Senior Administrative Officer says that the Hamlet and the GNWT have had no contractual relationship regarding the airport land since 1995, when the existing contract for airport maintenance was awarded to another entity. The contract held by the Hamlet did not provide for maintenance of the road where the accident occurred. There is, however, evidence in another affidavit that Hamlet employees were observed since then removing snow from Gravel Pit Road, including the portion on the airport land. The Hamlet disputes this.

[11] The Hamlet does not have a licence from the GNWT pursuant to the Commissioner's Airports Lands Regulations (N.W.T. Reg. 067-97) to use the portion of Gravel Pit Road that falls within the airport land.

[12] The Hamlet argues that in these circumstances it cannot be said to have any duty or authority to maintain the road or post signs warning of the ninety degree curve. Even if employees of the Hamlet did remove snow, which the Hamlet does not admit, snow had nothing to do with the Plaintiff's accident and so any such work is irrelevant and in any event would not confer jurisdiction where there is none. The GNWT has control and ownership of the land and so it has the duty of care. The Hamlet points out that the GNWT officer who was examined for discovery acknowledged that the GNWT had authority to place signage on, and make changes to, the portion of Gravel Pit Road that is on airport land. After the Plaintiff's accident, it was the GNWT that decided to close Gravel Pit Road. Gravel Pit Road, even where it is on Hamlet land, is not a designated highway under the Hamlet's bylaws.

[13] Based on the map which I have described above, the Plaintiff and the GNWT point out that Gravel Pit Road is part of, or a continuation of, a road that travels right through the community of Fort Liard. Since the Hamlet has a duty of care for the parts of the road that are within its jurisdiction, they say at the very least it has a duty to warn motorists leaving that portion of the road within its jurisdiction that there is a danger ahead on the portion of the road that is not within its jurisdiction. At least, that is the argument; the Plaintiff has only to show that it is a triable issue. They also point out that the Hamlet has passed a traffic control bylaw for roads within its boundaries and that under the bylaw it could, if it chose, authorize traffic control devices on Gravel Pit Road. That it has not done so despite knowing of the danger the curve presents is, they argue, negligence.

[14] The leading case on liability of government agencies in tort actions is *Just v. British Columbia* (1989), 64 D.L.R. (4th) 689 (S.C.C.). The Supreme Court held in that case that where allegations of negligence are brought against a government agency, it is appropriate to apply the test laid down in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) in determining whether a duty of care arises in a particular situation. That test involves two questions. The first is whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter. If the answer to that question is yes, then a *prima facie* duty of care arises and it is necessary to consider the second question: whether there are any considerations which ought to negative or reduce or limit the scope of the duty, the class of person to whom it is owed, or the damages to which a breach of the duty may give rise.

[15] In *Just*, the accident occurred on a well-used major highway which gave access to popular skiing facilities. The Supreme Court found that:

> In light of that invitation to use both the facilities and the highway leading to them, it would appear that apart from some specific exemption, arising from a statutory provision or established common law principle, a duty of care was owed by the province to those that use its highways. That duty would extend ordinarily to reasonable maintenance of those roads. The appellant as a user of the highway was certainly in sufficient proximity to the respondent [province] to come within the purview of that duty of care. In this case it can be said that it would be eminently reasonable for the appellant as a user of the highway to expect that it would be reasonably maintained. For

> the Department of Highways it would be a readily foreseeable risk that harm might befall users of a highway if it were not reasonably maintained.

[16] The Supreme Court noted that the province was not obligated by statute to maintain the highway, but had the statutory authority to do so and had undertaken a policy of road maintenance.

[17] The requirement for proximity in characterizing the type of relationship which gives a rise to a duty of care to guard against foreseeable negligence was again considered by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, 2001 SCC 79. The Court stated at paragraph 35 that, "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case". It noted that among the categories of negligence in which proximity has been recognized are the duty of a government authority as set out in *Just* and the duty to warn of the risk of danger. It went on to say that when a case falls within one of the recognized categories or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited (paragraph 36).

[18] The root of the argument in favour of proximity in this case is that the Plaintiff was a motorist on a road located within the Hamlet and which the Hamlet was well aware the public used. At the very least the Hamlet acquiesced in the use by the Plaintiff and other motorists of the road on its land. It allowed the public to have access to the gravel pit. In respect of the portion of Gravel Pit Road on Hamlet land, it is certainly arguable that the Hamlet had a duty of care to the Plaintiff, the situation being analogous to the one in *Just*.

[19] As to the portion of the road that falls within airport land, the question is whether any relationship of proximity between the Hamlet and the Plaintiff evaporated when the Plaintiff left Hamlet land and entered on airport land. The complicating factor is that the Plaintiff had to do that to continue on to another portion of the road on Hamlet land. It is at least arguable that the Hamlet, knowing of a possible danger on the airport land that motorists must cross to access the part of the road on Hamlet land, had a duty to warn those motorists. It is certainly arguable that any relationship of proximity did not evaporate, but continued.

[20] If it is accepted at trial that Hamlet employees did remove snow from the airport portion of Gravel Pit Road, that could be evidence of the Hamlet exercising or acknowledging a duty of care for that portion of the road.

[21] In *Just*, the Court said that having determined the proximity issue, where dealing with a government agency, one must go on to consider whether any applicable legislation provides an exemption from the duty of care or liability or an exemption on the basis of a pure policy decision. The legislation on which the Hamlet relies for exemption is the *Hamlets Act*, R.S.N.W.T.1988, c. H-1, as it read at the relevant time. Section 71(2) provided that a hamlet council may, by by-law, provide for the repair of municipal roads. The definition of municipal roads is found in s. 69(1):

> (1) A council may make by-laws under this Part in respect of the following roads in the municipality:
>
> (a) a road shown on a plan of survey registered under the Land Titles Act;
>
> (b) a road on public land that is designed or intended for or used by the public but not shown on a plan of survey registered under the Land Titles Act;
>
> (c) a road on private land dedicated for public use by the owner by instrument in writing and adopted as a municipal road by by-law;
>
> (d) a road maintained at the expense of the municipal corporation on a frozen body of water or water course;
>
> (e) a road outside the municipality and designated as a municipal road by the Minister, by order, on the recommendation of the Executive Council.

[22] The Hamlet argued that none of the definitions apply to Gravel Pit Road and so it could not make by-laws in respect of the road. I would have thought that subsection (b) might apply in that Gravel Pit Road, or at least some portions of it, was a road on public land that was used by the public. I need not, however, resolve that issue as in my view there is other legislation that is more relevant to the Plaintiff's case as put forward on this application. In any event, I think that once a *prima facie* duty of care is

established, any basis for exemption would have to be dealt with at trial and not on summary application.

[23] The other legislation is the *Motor Vehicles Act*, R.S.N.W.T. 1988, c.M-16. Section 343 provides that a hamlet council may make by-laws in respect of highways within its municipality. The definition of highway in s. 1 includes a road, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage of vehicles, but does not include primary highways designated under the *Highway Traffic Act* (there is no evidence that Gravel Pit Road would fall into the latter category). Section 346 provides that a council may, by by-law, with respect to a highway, authorize the location, placement and erection of traffic control devices that it considers necessary. "Traffic control device" includes a sign or marking placed for the purpose of warning traffic.

[24] The Hamlet did pass By-Law No. 95-75 which adopts the definition of highway as it is contained in the *Motor Vehicles Act*. Section 14 of the By-Law provides that the Hamlet Council shall, by motion, authorize the location, placement and erection of traffic control devices that it considers necessary. It also, in s. 7, sets speed restrictions for vehicles operated on highways within the Hamlet. The definition of highway, as set out above, would appear to include all of Gravel Pit Road, even that part of it falling within the airport boundaries, if the airport land is considered to be privately owned.

[25] There is no evidence before me as to whether the Hamlet has authorized any traffic control devices at all. However, since it clearly has the authority to do so, and to do so in respect of Gravel Pit Road, it is arguable that knowing of the danger presented by the curve, it was negligent in not authorizing or erecting such devices, whether on its own or airport property, to warn motorists about the curve they would encounter while travelling to and from the gravel pit.

[26] The Hamlet relied on *Housen v. Nikolaisen*, [1997] S.J. No. 759 (Q.B.), [2000] S.J. No. 58 (C.A.), [2002] S.C.J. No. 31 (S.C.C.). In that case, the plaintiff sued in negligence, claiming that the accident occurred in part due to a municipality's breach of its duty to maintain a road in a reasonable state of repair. The trial judge found that there was a statutory duty of care and that no common law duty of care existed concurrently with it. The Court of Appeal agreed. The majority in the Supreme Court of Canada found it unnecessary to consider the existence of a common law duty

because it concluded the municipality was liable under the statute. I understand from this that the Supreme Court left open the question whether there could be a common law duty of care when there is a statutory duty. In any event, I do not think the case assists on the issue whether, in this case, it is arguable that the Hamlet had a duty of care. It is open to the Plaintiff to argue that the Hamlet had either a statutory duty of care, or a common law one, or both. The extent or content of any duty are issues not before me on this application.

[27] Because Gravel Pit Road runs in part through airport, i.e. GNWT , property, and in part through Hamlet property, the facts of this case are somewhat unusual. The importance of the specific facts of a case where proximity and duty of care are issues was recognized in *Cooper v. Hobart, supra*. In *Fullowka v. Whitford*, [1997] N.W.T.R. 1 (C.A.), the Court of Appeal, dealing with the issue of striking out pleadings, said the following (at page 11):

> In any event, many of the reported cases refusing to strike out pleadings are about just such proximity or duty questions in negligence law. They say that the law of negligence in Canada is now fluid and being rebuilt, especially respecting the duty of care, and decisions are very sensitive to the facts of individual cases, so the courts should not strike out a claim over such difficult or uncertain proximity or duty questions.

[28] Although *Fullowka* dealt with an application to strike out a pleading and not a summary judgment application, the comments made by the Court of Appeal are applicable to the issue before me. The facts put forward lead me to conclude that there is a *bona fide* triable issue as to whether the Hamlet has a duty of care.

[29] It is also significant that this litigation involves multiple defendants. The Plaintiff alleges that the federal government, the GNWT and the Hamlet each had some responsibility with respect to Gravel Pit Road or were negligent in failing to warn motorists about the curve or failing to alter the curve in the road. None of the three governments has admitted responsibility. The GNWT and the Hamlet have issued cross claims against each other and the GNWT and the federal government have issued third party notices against each other. The prospect arises that the Defendants will each point the finger at the others. If the Hamlet were to be granted summary judgment and the action against it dismissed, there is the prospect of the remaining

Defendants arguing at trial, perhaps successfully, that the Hamlet was solely responsible, to the prejudice of the Plaintiff.

[30] Potential prejudice to a plaintiff in similar circumstances has been held sufficient reason not to grant judgment summarily: *Boehler v. Blaser Jagdwaffen GmbH*, [2000] B.C.J. No. 931 (S.C.) and not to grant a non-suit: *Hunt v. MacLeod Construction Co.*, [1958] S.C.R. 737.

[31] For the reasons set out above, I am satisfied that there is a genuine issue for trial and that the application for summary judgment should not be granted. The application is therefore dismissed. Costs normally follow the event but if counsel wish to make submissions they may file them in written form within 30 days of the date this judgment is filed or, alternatively, make arrangements to appear before me.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT this
26th day of January, 2005

Counsel for the Applicant, the Hamlet of Fort Liard: David R. Syme, QC
Counsel for The Government of the Northwest Territories: Lawrence W. Olesen, QC
Counsel for Jerald Scott Cameron: Robert McBean
Counsel for Her Majesty the Queen: Scott Duke