

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Talbot-Kelly v. Fairfield,***
2005 BCSC 357

Date: 20050302
Docket: M024413
Registry: Vancouver

Between:

Matthew Talbot-Kelly

Plaintiff

And:

**Lorimer Fairfield, Mavis Susan Fairfield,
Her Majesty the Queen in Right of the Province
of British Columbia and Emcon Services Inc.**

Defendants

Before: The Honourable Madam Justice Loo

Oral Reasons for Judgment

In Chambers
March 2, 2005

Counsel for the Plaintiff

B. R. Brooke

Counsel for the Defendant Her Majesty
the Queen in Right of the Province of British Columbia

K. W. Inaya

Counsel for the Defendant Emcon Services Inc.

J. S. Stanley

No other appearances

Place of Hearing:

Vancouver, B.C.

[1] **THE COURT:** The defendants, Her Majesty the Queen in Right of the Province of British Columbia and Emcon Services Inc., apply pursuant to Rule 18A for an order that this action be dismissed against them.

[2] I am grateful to counsel for the defendants for their written submissions.

[3] On March 18, 2002 shortly before 10:00 a.m., the plaintiff was driving northbound along Highway 101 near Roberts Creek on the Sunshine Coast when he lost control of his vehicle, which crossed the centre line and collided with a southbound vehicle operated by the defendant Lorimer Fairfield. The accident occurred where there is a curve in the highway and a double solid yellow line. It was snowing at the time of the accident.

[4] Maintenance of the highways in the Sunshine Coast is carried out by Emcon pursuant to a maintenance contract between it and the Province.

[5] On the day of the accident, Rob McQueen was Emcon's acting foreman. Mr. McQueen drove over the area of the accident between 6:30 a.m. and 7:00 a.m. on his way to work. A few snowflakes were starting to fall at that time. By the time he arrived at Emcon's maintenance yard at 7:00 a.m., it was snowing heavily. Kevin Johnson who worked the nightshift patrol, left notes indicating that he had spot-salted various portions of Highway 101.

[6] Mr. McQueen reviewed the weather forecast that called for two to three centimetres of snow that day. He loaded a plough truck with salt and ploughed and salted the southbound lane of the highway to the Langdale ferry, and estimates that he passed over the accident area between 7:45 and 8:00 a.m. The spinner on the plough truck is situated so that it throws salt on both the south and northbound lanes. At the time he passed through the accident area, Mr. McQueen estimates

there was approximately one centimetre of snow. He ploughed down to almost the blacktop because after he ploughed, the black highway was visible.

[7] Mr. McQueen reached the ferry terminal, turned around and ploughed the northbound lane of Highway 101. There was approximately two centimetres of snow on the northbound lane as he ploughed. He made his second pass over the area of the accident between 8:30 and 8:45 a.m. Again he applied a heavy application of salt to both lanes. There was little snow in the southbound lane because it had already been ploughed and the salt was melting the snow. Mr. McQueen could see the blacktop in the southbound lane as he ploughed northbound.

[8] Mr. McQueen then decided that he wanted to examine the roads in Port Mellon, so he switched the plough for the pickup truck with Mr. Edgecomb. Mr. Edgecomb ploughed and salted southbound over the accident area between 9:00 and 9:15 a.m. He was in the process of ploughing and salting northbound back towards the area of the accident when the accident occurred.

[9] Mr. McQueen was approximately 10 kilometres south of the accident scene when he learned of the accident. At that time, there was approximately one centimetre of snow accumulated on the highway.

[10] Photographs of a vehicle involved in the collision and the accident scene show footprints, and little accumulation of snow. The black surface of the highway is clearly visible through the footprints.

[11] Sharon Goddard is employed as a project manager by the Ministry of Transportation. The morning of the accident Ms. Goddard left Gibsons at approximately 9:00 a.m., and travelled northbound along Highway 101. She arrived at the Ministry's office in Sechelt at approximately 9:20 a.m.

[12] When she arrived, she and Don Legault, the Area Manager for the Sunshine Coast, discussed the road conditions, as is their habit. Ms. Goddard told Mr. Legault that the highway between Gibsons and Sechelt was bare and wet, and that no snow was sticking to the highway.

[13] At approximately 10:00 a.m., Mr. Legault received the telephone call informing him of the accident.

[14] Ms. Goddard estimates that she passed the scene of the accident at approximately 9:10 a.m. that morning, and recalls that there was no snow accumulation on the highway at that time.

[15] After receiving the telephone call, Mr. Legault left the office immediately and drove to the scene of the accident about 10 kilometres from the Ministry's office. He was not driving a four-by-four and had no difficulty driving to the accident scene. It was snowing, but the snow was not sticking to the road surface, except in the immediate vicinity of the accident, likely because traffic in the area of the accident had come to a standstill because of the accident. A report Mr. Legault made following the accident indicates there was approximately two centimetres of snow on the road at the time of the accident.

[16] At the accident scene, Mr. Legault noted poor tire tread on the vehicle driven by the plaintiff.

[17] The maintenance contract between the Province and Emcon requires Emcon to patrol the area every four hours when freezing temperatures and snowfall are present. In this case, the area of the accident was patrolled four times in the four hours before the accident.

[18] The maintenance contract requires Emcon to apply salt within 90 minutes of the time when temperatures are below freezing and the pavements are wet or snow is forecast. These conditions were observed by Mr. McQueen at approximately 6:30 a.m. The area of the accident received three applications of salt between 7:45 a.m. and the time of the accident.

[19] The maintenance contract requires Emcon to begin ploughing the highway when the snow depth has reached two centimetres. The maximum allowable accumulation of snow is four centimetres. The area of the accident was ploughed three times in the four hours before the accident, and the snowfall at the time of the accident was far less than four centimetres.

[20] Emcon not only adhered to what was required of it under its maintenance contract, it exceeded what was required of it.

[21] The duty of care resting on the defendants is to reasonably maintain the highways.

[22] The allegations of negligence in the Statement of Claim against the Province and Emcon are almost identical, except for the allegations that the Province failed to properly plan and construct the highway, or adequately supervise Emcon's work, and the allegation that Emcon failed to advise the Province of the potential dangers of the highway during slippery driving conditions. As to both the Province and Emcon, the Statement of Claim alleges that each of them was negligent by failing to provide adequate warning signs, speed limits, maintenance, inspection, safeguards or warnings.

[23] Although the defendants apply to have the action against them dismissed, the plaintiff still has the onus of establishing negligence on a balance of probabilities. (See **Miura v. Miura**, Vancouver Registry No. CA012850 (BCCA), and **Edgar v. HMTQ**, 2004 BCSC 543.)

[24] In this case the plaintiff called no evidence and did not oppose the application of either defendant for dismissal of the action against it.

[25] On the basis of the evidence before me, there is no evidence of negligence on the part of either the Province or Emcon.

[26] Counsel for the Province and counsel for Emcon seek an order that the action be dismissed without costs. I therefore order that the action against the Province and Emcon be dismissed without costs.

“L.A. Loo, J.”
The Honourable Madam Justice L.A. Loo