IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Varner v. Vancouver (City),***
2009 BCSC 333

Date: 20090226
Docket: S032834
Registry: Vancouver

Between:

Gary Varner

Plaintiff

And:

"John Doe" and "Richard Roe" and the City of Vancouver

Defendants

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

February 26, 2009

Counsel for Plaintiff	No one appearing
Counsel for Defendants	K. F. W. Liang
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** The plaintiff in his statement of claim seeks damages arising out of an incident in which he was bitten by a police dog on July 31, 2002.

[2] The trial was set to commence on Monday, February 23, 2009. The plaintiff was not present in court at that time, but his counsel, Mr. Kent-Snowsell, was, and he applied for leave to withdraw as counsel. That application was granted, and the commencement of the trial was adjourned to Wednesday, February 25, 2009. Mr. Kent-Snowsell had the entered order delivered by courier to the plaintiff's residence, which is now his address for service. The entered order showed that Mr. Kent-Snowsell was no longer counsel and showed that the trial would commence on February 25, 2009, at 10:00 a.m.

[3] When the case was called on February 25, 2009, no one appeared for the plaintiff. At the request of the City of Vancouver (the "City"), the trial proceeded in the plaintiff's absence pursuant to Rule 39(33), which provides:

> 39(33) If a party is not in attendance when the trial of an action is called, the court may proceed with the trial, including hearing a counterclaim, in the absence of that party.

[4] The trial accordingly commenced, and no evidence was called on behalf of the plaintiff. That circumstance would ordinarily be sufficient for the City to seek judgment dismissing the plaintiff's claim, and indeed much of the plaintiff's claim could be dismissed on that basis.

[5] Paragraphs 4 through 12 of the statement of claim set out the basis on which the plaintiff claims relief:

4. The Defendant, City of Vancouver (herein after called the "City"), is a municipal corporation duly incorporated under the Vancouver Charter and has a municipal hall at 453 West 12th Avenue, in the City of Vancouver, in the Province of British Columbia. The City is joined as a Defendant in this action pursuant to s. 21(4) of the *Police Act*, S.B.C. 1953, C. 55 and amendments thereto. The City is also joined as a Defendant in this action pursuant to s. 294 of the Vancouver Charter, R.S.B.C. 1979, C. 553. The City employs the individual Defendants set out herein as police officers and as such is vicariously liable for the acts of those officers and the Plaintiff specifically pleads and relies upon s. 21(4) of the *Police Act*.

5. On or about the 31st day of July, 2002, the Defendants came upon the Plaintiff in the City of Vancouver, in the Province of British Columbia, and there wrongfully and intentionally assaulted and committed battery upon the Plaintiff, which included, but is not limited to, directing the police service dog under the care and control of one or both of the Defendants to attack the Plaintiff.

6. The Defendants and each of them handcuffed the Plaintiff and wrongfully detained the Plaintiff.

7. At no time was there a legal justification for the detention of the Plaintiff by the Defendants.

8. By reason of the wrongful arrest and detention, the Plaintiff was deprived of his liberty.

9. Alternatively, the Defendants and each of them, were negligent in failing to use reasonable care to ensure the safety and well-being of the Plaintiff including, but not limited to, the negligent handling, care and control of the Defendants' police service dog and were negligent in applying excessive force to the Plaintiff resulting in personal injury to the Plaintiff.

10. The Defendants, and each of them, breached their duty of care to the plaintiff pursuant to the provisions of the *Police Act* and the Criminal Code of Canada and the statutory onus falling on the Defendants pursuant thereto in that they failed to act in their capacity as police officers to protect the Plaintiff from unlawful assault and battery.

11. Alternatively, the Defendants, and each of them, were negligent in the execution of their duties and the result of such negligence caused harm to the Plaintiff.

12. The Defendants, and each of them, breached the Plaintiff's rights not to be subjected to any cruel or unusual treatment, not to be

> arbitrarily detained or imprisoned, and failed to inform the Plaintiff upon his detention of the reasons therefore in contravention of s. 7, 8, 9, 10 and 12 of the Canadian Charter of Rights and Freedoms, *Constitution Act*, 1982.

[6] Paragraphs 13 to 14 allege that the plaintiff sustained injuries and special damages as a result. Paragraph 15 claims punitive damages on the basis of alleged willful and malicious conduct. Paragraph 16 claims aggravated damages.

[7] With respect to most of the claims, the onus of proof is on the plaintiff, and since he failed to adduce any evidence, the City would be entitled to have the claims dismissed. Counsel for the City, however, very fairly points out that in paragraph 3 of its amended statement of defence, the City admits that the plaintiff was bitten by a police service dog on the date claimed by the plaintiff and that pursuant to s. 20 of the ***Police Act***, R.S.B.C. 1996, c. 367, the City is jointly and severally liable for any torts committed against the plaintiff by the constable, who is a municipal police constable with the Vancouver Police Department, who was acting in the performance of his duties, and who was the officer responsible for the police dog that bit the plaintiff.

[8] Section 20 of the ***Police Act*** provides the only possible route to liability on the part of the City. The City has denied in its pleadings, and the plaintiff has not proved, that the constable is an employee of the City, and therefore there can be no vicarious liability based on a master/servant relationship.

[9] Counsel for the City submits that in light of the admissions in the amended statement of defence there is one and only one claim advanced by the plaintiff on

which the City bears the burden of proof, and that is the claim of an intentional assault and battery as set out in paragraph 5 of the statement of claim. Counsel for the City submits that the tort of intentional assault and battery is actionable without proof of damages, and having admitted in its amended statement of defence that there was a dog bite, the City bears the burden of advancing evidence to support a defence for this tort.

[10] The City was prepared to call the officer in support of a defence under s. 25 of the ***Criminal Code of Canada***, but counsel submitted that there is another basis upon which the entire statement of claim ought to be dismissed, and that relates to a lack of notice under s. 294(2) of the ***Vancouver Charter***, S.B.C. 1953 c. 55. The City specifically pleaded that defence in paragraph 2 of its amended statement of claim. Section 294(2) of the ***Vancouver Charter*** provides as follows:

> The city is in no case liable for damages unless notice in writing, setting forth the time, place, and manner in which such damage has been sustained, shall be left and filed with the City Clerk within two months from and after the date on which such damage was sustained; provided that in case of the death of a person injured the want of a notice required by this subsection is not a bar to the maintenance of the action. The want or insufficiency of the notice required by this subsection is not a bar to the maintenance of an action if the Court or Judge before whom such action is tried or, in the case of an appeal, the Court of Appeal is of the opinion that there was reasonable excuse for the want or insufficiency and that the city has not been thereby prejudiced in its defence.

[11] The plaintiff's statement of claim was filed on May 26, 2003. It alleges damages sustained on July 31, 2002. Section 294(2) of the ***Vancouver Charter*** required that the plaintiff provide written notice of the claim to the City by October 1, 2002. Ms. Kathy Bengston, a correspondence clerk with the City Clerks department

for the City of Vancouver, testified that she searched the City's files and determined that no written notice of the plaintiff's claim was given to the City during the period from July 31, 2002, to July 31, 2003. Counsel for the City also read in a number of questions and answers from the plaintiff's examination for discovery in which he admitted that he did not give written notice to the City. He said he was not aware of the requirement to do so. In question 579 he was asked, "Do you know why no notice was provided to the city?" And he answered, "I don't know. It's the one and only time I've ever gone to court against the police."

[12] Section 294(2) of the ***Vancouver Charter*** gives the court a discretion to grant relief from the notice requirement if there is a reasonable excuse for the want or insufficiency of the required written notice and the City has not been prejudiced in its defence. Counsel for the City concedes that the City has not been prejudiced in its defence. However, as the British Columbia Court of Appeal held with respect to a similarly worded section, the discretion to relieve against the notice requirement has two elements that are conjunctive, not disjunctive. In ***Schmidt v. Prince Rupert (City)*** (1960), 24 D.L.R. (2d) 443 (B.C.C.A.), the court held at page 445:

> A study of the section points up that the elements of "reasonable excuse" and "no prejudice in defence" are essential ingredients to be proven in order to escape the bar to the maintenance of the action. These two essential ingredients must exist together. The word "and" is used; the word "or" is not used; and in the context "and" must necessarily be construed as meaning "and" and not "or"; in short if one of the two essential ingredients is found not to exist then, with deference, the action must fail.

The court went on to say at page 448:

> As already indicated this Court cannot escape the conclusion that the intractable language of s. 736 requires that a reasonable excuse for failure to give the 2-months' notice must be established as an essential in the proof of the cause of action, and that the action must fail when this is not done.

[13] In the present case, counsel for the City submits that the plaintiff has not shown any reasonable excuse for the failure to give notice. The only excuse offered is that he was unaware of the requirement.

[14] In ***Teller v. Sunshine Coast (Regional District)*** (1990), 43 B.C.L.R. (2d) 376 (C.A.) Southin J.A. wrote at page 388:

> In my opinion, ignorance of the law is a factor to be taken into account. So for that matter is knowledge of the law. But all matters put forward as constituting either singly or together a reasonable excuse must be considered.

[15] In ***Keen v. Surrey (City),*** 2004 BCSC 1161, Burnyeat J wrote at paragraph 22:

> In determining the issue of whether there was a reasonable excuse, British Columbia Courts have taken into account a number of other factors in addition to the knowledge of a claimant about the law. Those factors include whether there is uncertainty as to whether a municipality was involved or not, whether a potential plaintiff is incapacitated and not in a position to provide the notice, where the gravity of the injury did not become apparent until after the notice period had lapsed, the mental condition and age of the complainant, or whether the potential claimant has been lulled into a false sense of security as a result of actions or inactions on behalf of the municipality.

[16] In the present case the plaintiff has provided no explanation for his failure to give notice other than his ignorance of the law.

[17] In ***Griffiths v. New Westminster (City),*** 2001 BCSC 1516, the court held at pages 48 to 49 in relation to the similarly worded provision of the ***Local Government Act***, R.S.B.C. 1996, c. 323:

> If the time provisions set out in s. 286(1) of the *Act* are to have any meaning at all then it cannot be the case that only ignorance of the section is sufficient excuse to bring into play the two fold test set out in s. 286(3) of the *Act*. The Legislature long ago decided that municipalities should be given notice of potential claims long prior to the expiry of the limitation periods for actions relating to those claims. That decision having been taken by the Legislature, it is not for the court to remove the effectiveness of the notice provisions where a plaintiff can only rely on his or her ignorance of s. 286. In the circumstances of this case, I am satisfied that Mr. Griffiths has not shown that he had reasonable excuse for not giving the notice within the required two months.

[18] I am of the opinion that there was no reasonable excuse for the plaintiff's failure to give the required written notice of his claim to the city within the two-month time period. Section 294(2) of the ***Vancouver Charter*** provides a complete defence to the City, and the plaintiff's claim is therefore dismissed in its entirety.

[19] Ms. Liang, is your client seeking costs?

(SUBMISSIONS RE COSTS)

[20] THE COURT: In the ordinary case costs would follow the event, and you will be entitled to costs on scale B. There shall be such an order. You will draft the order for entry?

[21] MS. LIANG: Yes, My Lord.

[22] THE COURT: And it will not be necessary for you to obtain the plaintiff's endorsement as to form on the order.

[23] MS. LIANG: Thank you.

[24] THE COURT: Is there anything further?

[25] THE REGISTRAR: My Lord, I have one question.

[26] THE COURT: Yes.

[27] THE REGISTRAR: A notice of trial was filed by Mr. Kent-Snowsell and whoever files the notice of trial has to pay for the trial.

[28] THE COURT: Yes.

[29] THE REGISTRAR: And we have had three days of trial, which comes to $936. Now, he is not counsel of record, so I am just wanting to know who do I bill for that or do we waive costs?

[30] THE COURT: Do you have any submissions on that?

[31] MS. LIANG: No, I haven't even turned my mind to it. I have never been in this situation before.

[32] THE COURT: I cannot see any reason why costs would be waived. He set down the trial. The trial proceeded.

[33] THE REGISTRAR: So I will just bill him.

[34] THE COURT: Is there anything further?

[35] MS. LIANG: And delivery of the order be effected in accordance with the order that you granted on Monday, My Lord?

[36] THE COURT: Yes. You have his current address for delivery which is set out in the order which was made on Monday.

The Honourable Mr. Justice Ehrcke