BRYNA S. KLEVAN VS. CITY OF NEWTON & ANOTHER[1]

Docket:	19-P-191
Dates:	October 10, 2019 - February 14, 2020
Present:	Wolohojian, Blake, & Englander, JJ.
County:	Middlesex
Keywords:	Practice, Civil, Summary judgment. Sewer. Municipal Corporations, Sewers. Massachusetts Tort Claims Act. Governmental Immunity. Negligence, Governmental immunity, Duty to warn.

Civil action commenced in the Superior Court Department on September 4, 2015.

The case was heard by C. William Barrett, J., on a motion for summary judgment.

Maura E. O'Keefe, Assistant City Solicitor, for city of Newton.

Gerald S. Frim for the plaintiff.

ENGLANDER, J. On New Year's Day in 2014 the sewer pumps under the road outside the plaintiff's home in the city of Newton (city) stopped operating, after they were inundated due to a breach in a nearby water main. As a result several inches of water, silt, and sewage backed up through the plaintiff's connecting service pipe and entered the basement of the plaintiff's home. The plaintiff sued the city under the Massachusetts Tort Claims Act, G. L. c. 258 (tort claims act), alleging among other things that the city negligently failed to warn of the risk of such an event. A Superior Court judge denied the city's motion for summary judgment, which was based upon the immunities set forth in § 10 (b) and (j) of the tort claims act. We reverse, because in our view § 10 (j) operates to bar the plaintiff's claim.

Background.[2] The city owns and operates[3] an underground sewer system within its boundaries. The system transports sewage from properties connected to

the system, ultimately to a treatment facility operated by the Massachusetts Water Resources Authority (MWRA). The sewage flows through underground mains, which operate mostly by the force of gravity. Where a particular location is below the elevation necessary to rely upon gravity, however, the sewage must be pumped up to a higher elevation, from which gravity can take over to move the sewage downhill to the MWRA facility.

The plaintiff, Bryna Klevan, purchased the home at 70 Longfellow Road in Newton in 1993. The plaintiff's home is connected to the Newton sewer system through an underground pipe -- a "private sewer service line" -- that runs from the home to the public sewer main. Sewage in the public main around 70 Longfellow Road must be pumped to a higher elevation in the system, and accordingly the homes at and around 70 Longfellow Road are serviced by a city sewage pumping station, located on Longfellow Road.[4]

On January 1, 2014, one of the city's underground water mains breached. The cause of the breach is not addressed in the record. The plaintiff does not contend that the city was at fault. Water from the main, along with entrained silt, entered the Longfellow Road pumping station and eventually overwhelmed the station's two pumps. One of the pumps stopped working altogether, and the other was unable to keep up with the flow. The water, silt, and sewage then "surcharged," and backed up through the plaintiff's service line into the basement of 70 Longfellow Road, entering through drains in a basement toilet and shower. The resulting property damage was substantial.

The plaintiff sued, alleging that the city was negligent for two reasons: (1) for "failing to maintain and [e]nsure the proper operation of the sewage pumps," and (2) for "negligently failing to warn" that the sewage pumps could possibly fail, and further, for negligently failing to warn that any potential harms from such a failure could be prevented by installation of a so-called "backflow preventer valve" in the service line leading from the plaintiff's home.[5]

The city responded, among other things, by invoking the government immunities contained in § 10 (b) and (j) of the tort claims act. See G. L. c. 258, § 10 (b), (j). Section 10 (b) sets forth the so-called "discretionary function" exception to the liability of a public entity; § 10 (j) is part of the statutory embodiment of the so-called "public duty rule." In response to the summary judgment motion the

plaintiff essentially conceded that her claim for negligent maintenance or operation was not viable, and she proceeded only on her failure to warn theory. Indeed, there was no evidence of a negligent failure to maintain; the pumps had been inspected the day before the incident, and they operated as designed until overwhelmed by water and silt.

The motion judge ruled that the plaintiff's failure to warn theory was not barred. As to § 10 (b), he reasoned that the decision not to warn of the surcharge risk was not the type of discretionary policymaking or planning decision immunized by the section. And he ruled that § 10 (j) did not apply either, reasoning that the city could be deemed the "original cause" of the harmful condition, because "[i]t was the [c]ity who constructed the sewer and water distribution systems, and also the [c]ity who placed the water main in close proximity to the sewer main, which facilitated the infiltration."

The city brought this interlocutory appeal as permitted by Brum v. Dartmouth, 428 Mass. 684, 687-688 (1999) (interlocutory order denying application of government immunity may be appealed under doctrine of present execution).

Discussion. Section 2 of the tort claims act, G. L. c. 258, § 2, states that public employers "shall be liable" for property damage caused by the negligent acts of public employees, "in the same manner and to the same extent as a private individual." Section 10 of the act, however, contains several exceptions to this general rule of liability. Here we focus on § 10 (j), added to the tort claims act in 1994, see St. 1993, c. 495, § 57. Section 10 (j) is recognized as a statutory embodiment of the previously-existing common-law "public duty rule."[6] Brum, 428 Mass. at 693-694. Section 10 (j) exempts

"any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer."

The question here is whether § 10 (j) bars the plaintiff's claim that the city negligently failed to warn her that the sewer line could back up into her home. For the reasons that follow, we conclude that it does. By its plain language, § 10 (j) generally immunizes public employers from any claim "based on an act or failure

to act to prevent or diminish the harmful consequences of a condition or situation." The immunity does not apply, however, where the harmful "condition or situation" was "originally caused by the public employer." See Brum, 428 Mass. at 692 ("there is immunity in respect to all consequences except where 'the condition or situation' was 'originally caused by the public employer'"). Accordingly, under § 10 (j)'s plain language the plaintiff's claim based upon a failure to warn would be barred, unless the city was the "original cause" of the "condition or situation" that led to her harms.[7][8]

Section 10 (j) does not define what can constitute "original cause," but Brum discusses that issue at length. Brum involved a claim that public school officials were responsible for failing to protect a student who was assaulted inside a school, by persons who came from outside the school. Brum, 428 Mass. at 686-687. The court held that § 10 (j) barred the claim, and in doing so the court rejected the plaintiff's argument that the school officials' alleged "neglect of duty" -- the purported failure to provide adequate security -- was the "original cause" of the student's injuries. The court's analysis concluded that to qualify as the "original cause," there must be an "affirmative act" on the part of a public official, and that the affirmative act must have created the harmful situation. Id. at 695, citing Bonnie W. v. Commonwealth, 419 Mass. 122, 125 (1994). See Kent v. Commonwealth, 437 Mass. 312, 319 (2002) (affirmative act must have "materially contributed to creating the specific 'condition or situation' that resulted in the harm").

In reaching its conclusion that "original cause" requires an affirmative act by the public employer, the Brum court relied not only on the language but also on the history and purpose of § 10 (j), which demonstrated an intent to provide "some substantial measure of immunity from tort liability." Brum, 428 Mass. at 695. The court accordingly warned against construing "'originally caused' so broadly as to encompass the remotest causation . . . ." Id. The court concluded: "[T]he principal purpose of § 10 (j) is to preclude liability for failures to prevent or diminish harm, including harm brought about by the wrongful act of a third party. And to interpret . . . the subordinate clause referring to 'originally caused' conditions, to include conditions that are, in effect, failures to prevent harm, would undermine that principal purpose." Id. at 696.

We turn now to the question of what constitutes original cause in this case. That analysis must be done with attention to the particular claims asserted. Here the plaintiff's only remaining claim is based upon an alleged failure to warn that the sewer system could back up -- in other words, her claim is based upon a failure to act to prevent harm. Under the reasoning of Brum, that failure to warn cannot itself constitute the "affirmative act" required for original cause.

The plaintiff asserts that her failure to warn claim survives § 10 (j), however, because the "original cause" of the condition that harmed her property was the city's decision to build the sewer system in the first place -- with pumps that were capable of failing in the event they were overwhelmed by flooding.[9] In other words, the plaintiff contends that under § 10 (j) the harmful "condition or situation" was the existing sewer system design, with its fallible pumps, and that the "original cause" of her harm was the affirmative decision to build the system with the water main too close to the sewer pumps. And indeed, that is the theory of "original cause" that the motion judge articulated: the city "constructed the sewer and water distribution systems" and "placed the water main in close proximity to the sewer main."

We are not persuaded that the sewer system design qualifies as the original cause of the plaintiff's claim. As discussed supra, to identify the "original cause" under § 10 (j), we first need to identify the "condition or situation" that the plaintiff is complaining about. We think that here, the harmful "condition or situation" was that sewage backed up through the connecting sewer pipe and into the plaintiff's home.

The summary judgment record does not show that the original cause of the sewage backup was the design of the sewer system itself, or the placement of the sewer pumps near the water main. With respect to the plaintiff's home, the record shows that the sewer system had operated as designed for decades, without incident. In this instance, the backup occurred because the sewer pumps were flooded as a result of the water main break. Under the ordinary meaning of the word "cause," the flood from the water main break was the original cause of the plaintiff's harm. Critically, however, the plaintiff does not point us to any affirmative act by the city that caused the water main to break; indeed, she does not contend that the city was the cause of the break, and there is nothing in this record that would raise a triable issue in that regard.

We accordingly reject the contention that the city was the original cause of the plaintiff's harms. It is true, of course, that the plaintiff would not have been harmed if the city did not operate a sewer system. But here the condition or situation that caused the plaintiff's harms was the sewer backup, which in turn occurred because of a flood that has not been shown to have come about through any affirmative act of the city. Put another way, the plaintiff's claim is that the city failed to act to diminish the possibility that sewage might back up into her home, where the backup resulted from an unexplained flood. Such a claim falls within the immunity of § 10 (j).[10]

The § 10 (j) case law supports our conclusion. In Jacome v. Commonwealth, 56 Mass. App. Ct. 486 (2002), for example, the plaintiff's son had drowned at a public beach, after succumbing to a strong undertow. The plaintiff brought suit against the Commonwealth, claiming negligence, among other things, in the actions of the publicly-employed lifeguards. Notably, the plaintiff also alleged a failure to post proper warnings. This court ruled that § 10 (j) barred the claims as a matter of law:

"Here . . . it was the conditions in the water that late afternoon that brought about Wilson's death. The Commonwealth did not create those conditions. Had the public employees acted differently, e.g., had the beach been closed, had conspicuous warning signs been posted, had lifeguards remained on duty until 6:00 P.M., it is possible that the tragedy might have been averted. But the very statement of these possibilities demonstrates why this claim is barred by § 10(j). They are all examples of ways in which the public employees might have prevented the harm to Wilson, and consequently they fall within the immunity from suit in such circumstances that the Legislature has preserved."

Id. at 490.

More recently, in Cormier v. Lynn, 479 Mass. 35 (2018), the Supreme Judicial Court again applied § 10 (j), this time to immunize a claim brought against the Lynn public schools. The plaintiff was injured by a school bully, after the students had lined up at the beginning of the school day. The allegations of the complaint, which were accepted as true at the motion to dismiss stage, were that the school had been advised that there had been prior bullying of the plaintiff, had been asked to take steps to prevent same, and had negligently failed to do so. Id. at 36-37. The court specifically rejected the argument that the city could be deemed the

"original cause" of the plaintiff's injuries, even though school policies had brought the plaintiff and his tormentors into close proximity, without supervision. The court reasoned: "There can be little doubt that some actions by the public defendants contributed indirectly to Matthew's injuries, for example, Matthew and his tormentors were required to attend school and were placed in the same class. These actions, however, 'are too remote as a matter of law to be the original cause' of Matthew's injuries . . . ." Id. at 41, citing Kent, 437 Mass. at 319. See Jane J. v. Commonwealth, 91 Mass. App. Ct. 325, 330 (2017) ("we do not think it a fair inference that by merely allowing both men and women access to a common recreation room, the hospital was an original cause of the plaintiff's rape . . .").

The reasoning in Cormier, Jacome, and other § 10 (j) cases cements our view that the building of the city sewer system, even if poorly designed, cannot qualify as the original cause of the plaintiff's claims here. In most suits against a public entity, if one were to retreat far enough from the actual harm one could identify an "affirmative" government act that could be claimed to be part of the chain of causation and thus an "original cause." For example, one could point to the maintenance of a public beach in Jacome, or to the creation of a public school system in Cormier and in Brum. But § 10 (j)'s language requires a more rigorous causation analysis, focused on the cause of the actual harmful "condition" that is alleged. Here the harmful condition was a sewage backup into the plaintiff's home. That backup resulted from flooding of the pumps, and the city was not the original cause of the flood.[11] Rather, the city's alleged negligence was a failure to act falling squarely within § 10 (j)'s immunity.[12]

Conclusion. So much of the order as denied the city's motion for summary judgment is reversed. In all other respects, the order is affirmed.

So ordered.

footnotes

[1] Mayor of the city of Newton.

[2] The facts are taken from the summary judgment record. They are either undisputed or, if disputed, viewed in the light most favorable to the plaintiff, the nonmoving party. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002); Jane J. v. Commonwealth, 91 Mass. App. Ct. 325, 327 (2017).

[3] Technically, the city has contracted for the system to be operated by a third party, defendant Weston & Sampson Services, Inc. By stipulation of the parties, Weston & Sampson was dismissed from the case prior to the motion for summary judgment.

[4] The record does not indicate when the Newton sewer system was built, or when the plaintiff's home at 70 Longfellow Road was connected to the system. This lack of information does not alter our analysis. Both the home and the sewer system have existed for many years. The home was built in 1948.

[5] The plaintiff also alleged claims for trespass and nuisance. Those claims were dismissed at the summary judgment stage and are not before us on appeal.

[6] The common-law public duty rule was described thusly (although it was subject to various exceptions): "[N]o liability attaches for failure to use due care in carrying out general government functions . . . because the duty of due care is owed to the general public and not to any specific individual" (citation omitted). Cyran v. Ware, 413 Mass. 452, 455 (1992).

[7] While § 10 (j) is often applied to situations where the harmful consequences resulted from the tortious conduct of a third party -- that is, a nongovernment employee -- it is clear from § 10 (j)'s language that the immunity is not limited to situations involving third-party tortious conduct. See Jacome v. Commonwealth, 56 Mass. App. Ct. 486, 489 (2002).

[8] The question whether § 10 (j) bars a particular claim has been addressed in our cases as a question of law rather than a question of fact, although without explicit discussion of the issue. We have previously stated that the question whether § 10 (b) bars a particular claim is a question of law. See Alter v. Newton, 35 Mass. App. Ct. 142, 148 (1993). At least on this record, the application of § 10 (j) can be decided as a matter of law.

[9] We note that by its express terms § 10 (j) immunity does not apply to claims "based on negligent maintenance of public property." G. L. c. 258, § 10 (j) (3). As discussed supra, however, the plaintiff has abandoned any claim of negligent maintenance.

The plaintiff also does not assert a negligence claim based directly upon the design of the sewer system, its pumps, or its proximity to the water main. At argument plaintiff's counsel conceded that such negligent design claims would be barred by the discretionary function immunity, § 10 (b).

[10] Because we conclude that § 10 (j) bars the plaintiff's claim, we do not reach the question whether § 10 (b), the discretionary function exception, might also bar the claim. The question of § 10 (b) immunity raises a separate question from § 10 (j) immunity. See Brum, 428 Mass. at 693 (noting that in general the various immunities in § 10 "stand on their own bottoms").

[11] The decision in Shapiro v. Worcester, 464 Mass. 261 (2013), is not to the contrary. Shapiro allowed a suit to proceed based upon inadequacies in Worcester's sewer system, but it did so because Worcester had affirmatively and knowingly acted to increase the sewage burden on the system, without following through on its corresponding plan to improve its system to accommodate that additional burden. Id. at 272-273.

The decision in Magliacane v. Gardner, 483 Mass.

842, 859 (2020), also is distinguishable. Magliacane involved a claim that a city "delivered to its residents water that it knew to be corrosive because of both what it added to the water and what it failed to add." The court concluded that the delivery of that corrosive water was an affirmative act of the town. There is no comparable affirmative act in this case.