Date of Release: December 18, 1992 No. 8591
Kamloops Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
	)	
MARY-ANNE JENSEN	)	REASONS FOR JUDGMENT
	)	
PLAINTIFF	)	OF THE HONOURABLE
	)	
AND:	)	MR. JUSTICE HOUGHTON
	)	
CITY OF KAMLOOPS, BRIAN IRELAND and OAKLAND CONSTRUCTION LTD.	)	
	)	
DEFENDANTS	)	
	)	
AND:	)	
	)	
BRIAN IRELAND and OAKLAND CONSTRUCTION LTD.	)	
	)	
THIRD PARTIES	)	

APPEARANCES:

ROBERT W. McDIARMID	- Counsel for the Plaintiff
CHRISTINE MOFFATT	- Counsel for the Defendant, City of Kamloops
BRIAN IRELAND	- In Person

DATE OF HEARING: December 4, 1992

In 1985, the plaintiff purchased a home at 586 Aberdeen Drive in Kamloops from the original purchaser of the house. She had the basement finished and landscaping done, and in the fall of 1985, she rented out the basement and provided board for a student. She estimates that she was netting $200.00 a month. In the fall of 1985, the plaintiff's basement flooded after a rain and the carpeting was wet. There was a further flooding in the summer of 1986 and the carpet again got wet and was musty. The water came in from the side of the basement near the laundry.

The house had been built in 1983 by Oakland Construction Ltd., of which Brian Ireland was the president. Mrs. Jensen got in touch with Mr. Ireland in 1986 and he suggested that the landscaping was wrong and she had the landscaping re-sloped. In September 1988, the basement again flooded after heavy rains. Mrs. Jensen then called in N & H Contracting who excavated at the point where the water appeared to be entering the house, and it was discovered that there was no perimeter drain tile nor rock at the footings. N & H Contracting put in a temporary sump pump and then, when winter approached, they jackhammered a hole in the basement floor of the laundry room and installed a sump pump there. There has been no problem since.

The Kamloops City bylaw refers to the Canadian ***Building Code*** which at subsection 9.14.2.1 reads:

> " **9.14.2.1**. Unless it can be shown to be unnecessary, the bottom of every exterior foundation wall shall be drained by drainage tile or pipe laid around the exterior of the foundation in conformance with Subsection 9.14.3. or by a layer of gravel or crushed rock in conformance with Subsection 9.13.4. "

The plans that accompanied the application for a building permit show drain tile and rock at the bottom of the footings around the house. Mr. Ireland admits that neither rock nor drain tile was installed and says that it was not customary to put drain tile in for houses in Kamloops in the early 1980s.

The application for a building permit dated February 1983 is in the name of Brian Ireland, and underneath that, Oakland Construction Ltd., being the owner and there is a tick beside that, and then it goes on " authorized agent "— blank.

The application is signed B. Ireland, the defendant's signature. The last two paragraphs of the application for permit read:

> " I agree to conform to all the by-laws of the City of Kamloops and to all the statutes and regulations in force in the City of Kamloops and to save the City harmless from any action or cost whatsoever arising out of or incident to, the granting of this permit, if issued.
>
> I recognize that within the boundaries of the City of Kamloops there are areas of ' problem soils ' and that these are widely distributed as to location. I affirm that it is my responsibility as owner/agent to identify foundation conditions generally on which the intended construction is to be placed and take all action required to ensure the adequacy of the foundation. "

There is a report from Golder Associates Ltd., consulting engineers, who inspected the premises in April 1989, and who concluded:

> A conventional footing drain is capable of collecting and discharging small to moderate seepage flows . . . .
>
> In consideration of the preceding, it is our opinion that installation of a conventional perimeter footing drain around the house would in probability have prevented past seepage into the basement. Further, it is anticipated that proper installation of a footing drain at this time will be sufficient to prevent future seepage of this kind into the basement. "

Golder Associates Ltd. are consulting engineers and no issue was taken with their expertise.

The law in this matter is set out in ***Anns*** v. ***London Borough of Merton***, [1977] 2 All E.R. 492, a decision of the House of Lords. Lord Wilberforce at page 504 said:

> " But leaving aside such cases as arise between contracting parties, when the terms of the contract have to be considered (see ***Voli*** v. ***Inglewood Shire Council***, per Windeyer J.), I am unable to understand why this

principle or proposition should prevent recovery in a suitable case by a person, who has subsequently acquired the house, on the principle of ***Donoghue*** v. ***Stevenson***: the same rules should apply to all careless acts of a builder: whether he happens also to own the land or not. I agree generally with the conclusions of Lord Denning MR on this point (***Dutton's*** case). In the alternative, since it is the duty of the builder (owner or not) to comply with the byelaws, I would be of opinion that an action could be brought against him, in effect, for breach of statutory duty by any person for whose benefit or protection the byelaw was made. So I do not think that there is any basis here for arguing from a supposed immunity of the builder to immunity of the council.

Nature of the damages recoverable and arising out of the cause of action. There are many questions here which do not directly arise at this stage and which may never arise if the actions are tried. But some conclusions are necessary if we are to deal with the issue as to limitation. The damages recoverable include all those which foreseeably arise from the breach of the duty of care which, as regards the council, I have held to be a duty to take reasonable care to secure compliance with the byelaws. Subject always to adequate proof of causation, these damages may include damages for personal injury and damage to property. In my opinion they may also include damage to the dwelling-house itself; for the whole purpose of the byelaws in requiring foundations to be of certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health or safety of occupants.

To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement. "

In ***Canadian National Railway Co.*** v. ***Norsk Pacific Steamship Co.*** 91 D.L.R.(4th) 289 (S.C.R.), McLachlin J. said at p.364:

" In subsequent years this court repeatedly held that economic loss can be recovered in tort in the absence of injury to the plaintiff's person or property in appropriate cases: ***Agnew-Surpass Shoe Stores Ltd.*** v. ***Cummer-Yonge Investments Ltd.***(1975), 55 D.L.R. (3d) 676 at pp.692-3, [1976] 2 S.C.R. 221, [1975] I.L.R. 1171; ***Kamloops*** v. ***Neilsen, supra***; and ***B.D.C. Ltd.*** v. ***Hofstrand farms Ltd.***, (1986), 26 D.L.R. (4th) 1 at p.10, [1986] 1 S.C.R. 228, 33 B.L.R. 293. It has, moreover, repeatedly affirmed the test for tort liability adopted in ***Anns*** v. ***Merton London Borough Council, supra***. "

In ***York University*** v. ***Vroom Developments (Central) Ltd.*** (1988), 30 C.L.R. 190, Macfarlane J. held at p.194:

> " On the material it is clear that York leased the land to OSHC for a 50-year term (which lease became vested in OHC) after which both the land and building reverted to York. I agree with counsel for the respondent that on the authorities, a builder owes a duty of care to future owners" see ***Anns*** v. ***Merton London Borough Council***) [1977] 2 All E.R. 492 (H.L.) at p.513 [All E.R.]. Consequently I also reject this ground of argument. "

On the facts before me it is clear that the defendants, Ireland and Oakland Construction Ltd., are liable to the plaintiff in negligence for failing to install the drain tile and rock. I find the damages proven by Mrs. Jensen and not proven by Mrs. Jensen as follows. I note that Mrs. Jensen was not cross examined as to details of any of these items and I therefore accept her evidence:

Payments to N & H Contracting	$ 1,512.59
Damage to furniture, books and records	1,100.00
Carpet replaced in bedroom	385.00
Loss of rental for 1986, 1987 and 1988	4,800.00

I find that Mrs. Jensen could have rented the premises out after the sump pump was installed inside on January 4th, 1989. She subsequently put new carpet in the bedroom only and rented the place out in 1991. She could have done this early in 1989, so I only allow three years loss of income.

Mrs. Jensen did not replace the whole carpet at an estimated cost of $1,370.00. Although, she got an estimate for the cost of the drain tile installation at $7,691.00, but this was not done. She relied on the sump pump and had no further problems. Eventually she sold the house in April 1992.

Mrs. Jensen says that she listed the house for $124,900.00 on the 24th of January 1992 and had difficulty selling it and finally on the 27th of April, 1992 she sold the house to a realtor for $119,000.00 but she had to include in the sale a shed, fridge, stove, dryer, mini-freezer and gas fireplace, items which she had not offered with the house when it was listed. Mrs. Jensen has estimated her loss on the sale at $8,000.00. That would be $5,900.00 off the list price and $2,100.00 for the extra items that she sold with the house.

Mrs. Jensen's estimate of the loss of $8,000.00 on the sale of the house would cause me concern if it were not almost the amount for the cost of installing the drain tile of $7,691.00 and the rest of the carpeting at $1,000.00. Once again, Mrs. Jensen was not cross examined on this and no issue was taken with her estimate and I accept the figure of $8,000.00 as a loss that she suffered as a result of the negligence of the defendants. There will therefore be judgment for the plaintiff against the defendants, Ireland and Oakland Construction Ltd., in the amount of $15,797.59.

The City of Kamloops, by third-party action, is seeking indemnity for its costs and expenses incurred in the defence of this action and in settling the claim against the City for $3,500.00. The bills produced and paid by the City amount to $7,382.78 for legal services. The services were billed at the City's preferred rate and were scrutinized by the City staff. The accounts were not questioned by Mr. Ireland. The City seeks to be indemnified for these amounts and on a reading of the application for permit signed by Mr. Ireland, they are entitled to recover. Mr. Ireland did not specify in the document that he acted only as an officer or agent for Oakland Construction Ltd. He set out both his own name and Oakland Construction Ltd. at the top of the document and signed his own name at the bottom. There will be judgment against the third parties, Ireland and Oakland Construction Ltd. in favour of the City of Kamloops for $10,882.78 and the

City is entitled to its costs of the third party action. However, the registrar, on taxation must endeavour to exclude items that are duplications of the items already paid to their solicitors by the City and included in the sum of $7,382.78.

The plaintiff has been paid $3,500.00 by the City and that sum will be credited to the defendants, Ireland and Oakland Construction Ltd.

The plaintiff is entitled to her costs and interest from January 4, 1989 at the rate from time to time allowed by the registrar.

"K.D. Houghton"

HOUGHTON J.

Kamloops, B.C.
11 December 1992