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Elson v. Gibsons (Town)

Between
Colleen Joan Elson, Douglas Elson, Todd Simpson and Brenda Simpson, claimants, and Town of Gibson, defendant

[1997] B.C.J. No. 3185

Sechelt Registry No. 839

British Columbia Provincial Court
(Small Claims Division)
Sechelt, British Columbia

Giroday Prov. Ct. J.

April 7, 1997.

(27 paras.)

Municipal law -- Duties of municipalities -- Maintenance of sewerage or drainage systems -- Liability of municipalities -- Negligence -- Standard of care, construction and maintenance of water lines, sewers and drains -- Nuisance -- Defences, statutory immunity or authority.

Action by Elson against the defendant Town of Gibsons for negligence or nuisance for damages to his home. The damage resulted because the Town's sewage system was clogged on Saturday, January 9, 1994. The Town responded to the incident within one hour of the call. It found that the blockage was caused by a rock. The rock was clean. This indicated that it had not been in the system for long. The Town upgraded the sewer treatment plant in 1992. It had a flusher truck and commenced a program of systematic flushing in 1993. Elson's area had been flushed in early 1993. Elson claimed that the rock caused a similar blockage in a neighbourhood home in November 1993.

HELD: Action dismissed. The Town fulfilled its duty of care. Its maintenance of the sewer system was adequate and reasonable. It devoted appropriate funds to the maintenance of the system. The blockage was not reasonably foreseen. The Town had no duty to foresee and prevent it. Elson did not prove that the rock caused the previous blockage. The Town also promptly responded. Its

treatment was effective. The claim in nuisance was statute- barred by section 755.3 of the Municipal Act. It provided that a municipality was not liable for a nuisance action that resulted from the breakdown or malfunction of the sewer system.

Statutes, Regulations and Rules Cited:

Municipal Act, R.S.B.C. , c. 290, ss. 596, 596(6), 598, 600, 755.3.

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1 **GIRODAY PROV. CT. J.**:-- The Claimants Elson sued the town of Gibsons in negligence or alternatively nuisance for damage done to their home and expenses incurred as the result of clogging of the defendant's sewage system on Saturday January 8, 1994. Their claim was initially in the amount of $4,032.00, and was amended to $4,509.77. The Claimants Simpson, tenants of the Elsons, were added as parties at the Settlement Conference. Their claim is for $777.00, damage to contents.

2 The trial commenced in July 1995 and continued on various dates until December 1996, with written argument and judgement to follow.

EVIDENCE

A. FOR THE CLAIMANTS

3 Mr. Simpson, the tenant of the Elsons at 571 North Fletcher Road, Gibsons, B.C., noted his toilet start to overflow shortly after 8:00 a.m. on January 8, 1994. He called a plumber and the defendant's emergency paging service. The plumber, Dean Hunt, arrived in about twenty minutes and he and Mr. Simpson poked an overflowing manhole near the home. They could not dislodge the blockage. Mr. Cotton, a town employee, arrived about ten minutes after the plumber (who may have called the town pager again). Cotton left to get a pump truck, returned in about twenty minutes with a labourer and the truck, left again and returned with a steel pipe. The plumber had dislodged a rock, and Mr. Cotton or labourer cleared the blockage with the pipe and retrieved the rock. Mr. Cotton told Mr. Simpson the same thing had happened seven weeks earlier up the road, and according to Mr. Simpson he said "I wonder if this was the same rock?"

4 The sewage had flowed quite extensively through the house, and the Simpsons suffered damage to personal property such as sleeping bags and quilts which they had to throw out.

5 Douglas Saunderson testified that his mother Mrs. McKay, who lives on North Fletcher Road uphill from the Elsons, had a sewer blockage about seven weeks before the Elson incident. Shortly after Mrs. McKay's blockage, probably the next day, he saw a town employee, who he now knows as Mr. Cotton poking at the next manhole downstream. Mr. Cotton advised that he had dislodged a

rock and that the rock would work its way down the system. Mr. Saunderson felt that Mr. Cotton was still trying to remove the rock at that point, although he, Mr. Saunderson, did not see it. I comment that the expression "had dislodged a rock" could refer to the previous day or a more distant time as easily as it could refer to the few moments before this conversation.

6 Fred Cotton testified that he had been twenty-two years with the defendant, and was the lead hand, public works. He attended at the McKay blockage, which broke loose when he poked at it with a shovel. A rock "scooted off down the line". He followed the rock and lifted a manhole cover on School Road well down stream from the Elson home, and saw the rock come through. He said he is certain the rock, in the Elson incident was not the same rock which plugged the McKay line. He has no recollection of talking to Mr. Saunderson, but he could have, as he was working back in the McKay area a day or so after the blockage there, on maintenance. He stated placed a riser in the manhole, this evidence is challenged by Mr. Elson.

7 Richard Charlton has worked for the city of North Vancouver for some sixteen years and has been head foreman in the sewer department for three years. He was accepted as an expert in the maintenance of sewer lines. He described in some detail how he would deal with a blockage. He would prevent further blockage by inserting tire chains downstream to catch debris. He said it was "possible" for blockage to occur ten to fifteen homes down from a previous blockage and some seven weeks later. He thought it unlikely that the McKay rock could travel as indicated by Mr. Cotton in one day, as the pressure in the Gibson's system is not sufficient. North Vancouver response time to such incidents varies from fifteen minutes to an hour.

8 Douglas Elson and Colleen Elson, the claimants, testified that they were away at the time of the incident. Mr. Elson worked for the defendant for eleven years, including some work on sewer lines. He said he used tire chains to catch sewer debris three or four times out of the six times when he had to deal with clogged sewer lines. At the time, the defendant appeared to have no written policy to deal with such blockages. He did not get along well with Mr. Cotton (who worked with him), and he testified as to occasions when he felt Mr. Cotton's performance was not satisfactory.

9 Mrs. Elson said she was shown a map in late 1994 by one of the defendant's officials indicating where flushing and filming had taken place in the Gibson's sewer system, and it appeared that neither had been done in the McKay-Elson area in the some seven weeks between the two incidents.

B. FOR THE DEFENDANT

10 Ian Poole is the defendant's treasurer. Expenditure on the sewer system has increased each year since 1992, partially to cope with increased water inflows. The town of Gibsons spends more on sewer maintenance than the town of Sechelt, which is about twice the size of Gibsons. The Gibsons sewer treatment plant was upgraded in 1992. The town purchased a flush truck in 1992 and there is a program in place to flush the sewer lines annually. Filming of the system started in December 1993. North Fletcher Road was flushed in the spring of 1993 and partially flushed and video taped in December 1993. There were no obstructions revealed in the North Fletcher line as at

December 1993, but the flushing and video taping did not cover the immediate area of the Elson blockage. Although the defendant had a budgetary surplus in the 1993-1994, this did not necessarily relate to sewer operations. While Mr. Cotton has prior reprimands on his record, the defendant's position is that he dealt with the McKay and Elson incidents properly. He is still employed by the defendant.

11 Wilbert Fair was the superintendent of public works for the defendant in January 1994. He reviewed the reports on the McKay and Elson blockages and felt the incidents were handled satisfactorily. He testified that there can be several explanations for blockage in sewer system, including vandalism, root invasion and line blockage. Such blockages cannot always be prevented.

12 Dean Hunt was the plumber called in by Mr. Simpson in January 1994 to deal with the Elson blockage. Mr. Cotton traced the blockage to the manhole down stream from the overflowing manhole by the Simpson/Elson house, and dislodged it with a pipe. Mr. Hunt, who was qualified as an expert in plumbing matters, felt that Mr. Cotton dealt with the blockage promptly and properly. He said in his experience of some sixteen years as the proprietor of Sun Coast Plumbing in Sechelt, it is unusual for a rock to cause a blockage in the Gibsons sewer system. Since the rock apparently responsible for the Elson incident, which was retrieved, was relatively clean, he considered that it could not have been in the system for any length of time, and was not the McKay rock.

13 Fred Cotton described how he dealt with the Elson blockage. He received a call from the answering service about 8:00 a.m. and arrived on the scene of 8:25 a.m. He located the blockage downstream from the overflowing manhole. He went to the works yard and got the flusher truck and returned to the scene. That probably took another twenty minutes. He found a rock in the manhole, but could not clear it with the flush truck. He returned to the yard and got a pipe, then removed the rock from the system with the assistance of the pipe. This rock could not possibly have been the McKay rock which he had seen considerably down stream from Elsons seven weeks earlier. The rock he removed from the Elson blockage was clean and white. It had not been in the system long; a rock turns black if in the line three to four days. He dealt with the Elson incident within a hour of the call, which is fair response time for a week-end. He did not use chains in the McKay or Elson incident as he could see the rocks - chains are used in flushing lines or to catch debris such as sand or small gravel. Mr. Cotton testified that he is very familiar with the Gibsons sewer system, having built a substantial part of it in 1969, when employed privately.

ISSUES

14

(1) Was the defendant negligent in its maintenance of the sewer system, or in its response to the treatment of the Elson blockage?
(2) Is the defendant responsible to the claimants in nuisance?

THE LAW

(1) NEGLIGENCE

15 The defendant has a duty of care to its residents reasonably to maintain its systems, including the sewer system. A failure of that duty of care would render the defendant liable in negligence, unless then Section 598 of the Municipal Act, R.S.B.C. CAP. 290 constitutes a bar. Section 598, which was repealed later in 1994 and replaced by Section 596(6), read as follows:

> "no action arising out of, by reason of or in respect of the construction, maintenance or use of a drain or ditch authorized by Section 596, whenever the drain or ditch is or was constructed, shall be brought or maintained in a court against a District Municipality."

16 A reading of Section 596 and of Section 600ff of the Municipal Act persuades me that "drain or ditch" includes "sewage system".

17 Whether the defendant reasonably maintained its sewer system is a matter to be decided on the evidence. The defence counsel submits that the case of Brown v. British Columbia (minister of Transportation & Highways) 1994, S.C.C., 89 B.C.L.R. (2nd) p. 1 is authority for the proposition that policy decisions of governments are not reviewable on a private law standard of reasonableness, so long as the decisions are made bona fide and are a proper exercise of discretion. This leaves open the question of whether in this case there was a failure to exercise discretion properly.

(2) NUISANCE

18 Section 755.3 of the Municipal Act states; in part:

> "a Municipality .... is not liable in any action based on nuisance... where the damages arise, directly or indirectly, out of the breakdown or malfunction of (a) a sewer system ...."

19 In Moffat v. Whiterock (City), [1992] B.C.J. No. 2559, 13 M.P.L.R. (2d) 283, a municipal sewer (blocked by roots and plastic bags) backed, up and flooded the plaintiffs' basement. The blockage was held to be a malfunction of the sewer system within the meaning of Section 755.3 of the Municipal Act, and the defendant was therefore exempted from liability in nuisance.

20 The decision in Medomist Farms Ltd. v. Surrey (District), [1991] B.C.J. No. 3591, [1992] 2 W.W.R. 303, cited by counsel for the claimants, was distinguished in Moffat on the ground that in the Medomist case; the system was functioning as designed, but the design was inadequate to handle increased volumes. This did not constitute "malfunction".

21 North Vancouver v. McKenzie Barge & Marine Ways Ltd., [1965] S.C.R. 377, 51 W.W.R. 193 held that nuisance claims are barred by Section 598 of the Municipal Act, previously cited.

FINDINGS

(1) NEGLIGENCE

22 (a) Maintenance of the sewer system. I conclude from the evidence that the defendant fulfilled its duty of care to the claimants in this regard. Its maintenance of the sewer system was adequate and reasonable. It devoted appropriate funds to servicing of the system. It had upgraded the sewer treatment plant in 1992, it had a flusher truck, it commenced a program of systematic flushing and filming in 1993. The North Fletcher area had been completely flushed in early 1993. The incident at the McKay home in November 1993, being it appears completely random, did not impose any additional responsibility on the defendant to accelerate inspection of the balance of the line. The Elson blockage could not on my view of the evidence have reasonably been foreseen. Therefore the defendant had no duty to foresee and prevent it. The claimants have failed to establish on a balance of probabilities that the Elson rock was the McKay rock.

23 (b) Response to and treatment of the Elson blockage I find the response time was within acceptable parameters. The treatment was effective in that the blockage was cleared. There is no evidence at all that the defendant's actions in this regard increased any damage suffered by the claimants.

24 There is no recovery available to the claimants in negligence.

(2) NUISANCE

25 I find the claim in nuisance to be statute barred by Section 755.3 and then Section 598 of the Municipal Act, on the authority of Moffat v. Whiterock (City) and North Vancouver v. McKenzie Barge & Marine Ways Ltd., previously cited, which I find to be directly on point.

JUDGEMENT

26 The claim herein is dismissed, without costs, except that the defendant shall recover its fee for filing the Reply, and a payment order shall issue in that regard.

27 I note the comment of defence counsel as to a lack of proof of damages, and point out that according to the Settlement Conference notes, trial was to be on the issue of liability only.

GIRODAY PROV. CT. J.

qp/s/np/qlsng/qlbrl