Provincial Court of British Columbia
SMALL CLAIMS
JUN 10 1999
MAPLE RIDGE, B.C.

Maple Ridge Registry
File No. C07340

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

SMALL CLAIMS ACT

BETWEEN:

RANDY AND PEGGY GAUDETTE **Claimants**	)	**REASONS FOR JUDGMENT**
	)	**OF THE HONOURABLE**
AND:	)	**JUDGE C. E. WARREN**
THE DISTRICT OF MAPLE RIDGE **Defendant**	)	

J. Fisher	**Counsel for the Claimants**
M. Sheardown	**Counsel for the Defendant**
Hearing Dates:	**March 3, 1999 and April 13, 1999**

On January 14, 1996, a rainy winter night, at about 8:00 p.m., Randy and Peggy Gaudette discovered water backing up in their basement on 202 Street in Maple Ridge, BC.

Mr. Gaudette obtained a sump pump and fire hose from his neighbor and attempted to pump the water out but the sump pump was unable to keep up. He therefore went out to the storm drain at the edge of his driveway, removed the grate, reached down and discovered that the drain was completely plugged.

He pulled away some debris, a combination, he said, of pieces of trees and mud. The water in the drain immediately began to flow and the water in the basement started to subside.

As a result of the water back-up and consequent flooding the subfloor and carpeting in the Gaudette basement was damaged, as was some gyproc and cedar all of which had to be replaced. The damages exceeded $10,000. These damages form the basis of the claim by the Gaudettes against the District of Maple Ridge.

The Gaudettes framed their claim in negligence, or in the alternative, nuisance.

Counsel agreed that in deciding the case the court should consider first, whether nuisance occurred and if so whether the District was exempt from liability by reason of section 288 of the *Municipal Act*, RS Chapter 323 which reads:

> **Immunity against certain nuisance actions**
>
> 288 A municipality, council, regional district, board or improvement district, or a greater board as defined in section 872, is not liable in any action based on nuisance or on the rule in the Rylands v. Fletcher case if the damages arise, directly or indirectly, out of the breakdown or malfunction of
> (a) a sewer system,
> (b) a water or drainage facility or system, or
> (c) a dike or a road.

If immunity did exist with respect to the claim of nuisance then secondly, the court must consider whether an action of negligence could succeed.

ANALYSIS

Nuisance

The law of nuisance is succinctly summarized by Alan M. Linden in Canadian Tort Law, 4th edition page 493.

> Nuisance is a field of liability. It describes a type of harm that is suffered, rather than a kind of conduct that is forbidden. In general a nuisance is an unreasonable interference with the use and enjoyment of land by its occupier or with the use and enjoyment of a public right to use and enjoy public rights of way. For the most part, whether the intrusion resulted from intentional, negligent or nonfaulty conduct is of no consequence, as long as the harm can be categorized as a nuisance.

Counsel referred me to three B.C. decisions which dealt with the issue of nuisance and all of which had to do with drainage or sewer ditches.

The first is the decision of ***Medomist Farms Ltd. and H. Douglas Bose vs. Corporation of District of Surrey*** [1992], 62 B.C.L.R. The next was an unreported decision of Mr. Justice MacDonald made December 2, 1992 and indexed as ***Moffat vs. White Rock (City)***. The last decision was one of Mr. Justice Burnyeat made February 24, 1999 and indexed as ***Port Alberni (City) v. Moyer***. Each of the three decisions involve factual situations in which a sewer or drainage ditch operated and maintained by a Municipality caused a flooding on a property-owner's property.

In ***Medomist,*** the defendant municipality held a road allowance across the plaintiff's land along which ran a drainage ditch. The Municipality permitted residential development on lands to the west of and above the plaintiff's land. This development reduced the surface area available to absorb water causing more run-off into the drainage ditch. The drainage ditch was unable to handle the greater run-off resulting in flooding of the plaintiff's farm lands. In ***Medomist,*** Mr. Justice Hinkson scrutinized the words "breakdown" and "malfunction" in what was then 755.3 of the *Municipal Act* and now section 288 as set out above.

The court made reference to the **Oxford English Dictionary,** second edition, 1989, 265 which defined malfunction as "faulty function" and determined that although the drainage ditch, called Hook Brook, continued to function it did not have the capacity for the increased flow of water. The court found that the

incapacity did not result from any fault in the functioning of Hook Brook and therefore the Act did not afford the Municipality a defence.

In the ***Moffat*** decision, MacDonald J. distinguished ***Medomist*** saying the system there was functioning as designed, whereas in ***Moffat,*** the blockage which caused the flooding was a double handful of roots and plastic bags. This occurrence, MacDonald J. found to be a malfunction.

In ***Moyer***, Burnyeat J. reviewed the meaning of breakdown and malfunction. Breakdown he determined meant a mechanical failure of which he determined there was none. In dealing with meaning of malfunction, Burnyeat J. made reference to ***Medomist***.

Burnyeat J. said at page 7, paragraph 20:

> The question at issue in the case at bar is whether the build-up of gravel constituted a common occurrence within the sewer system and one which the system, if functioning properly, should have handled.

He determined that the build-up of gravel in the water run-off line, which had likely caused the back-up, could not be construed to be a malfunction of the sewer system. He said the sewer system functioned as it was intended to but it could not do so effectively clogged with gravel. He found there was no malfunction. It does not appear that Burnyeat J. was referred to the decision in ***Moffat.***

The facts in the case at bar are slightly different than either ***Moffat*** or ***Moyer***. Here the Superintendent of Sewers with the District of Maple Ridge testified on cross-examination that debris in the catch basin was not a deficiency in the system. He agreed that the system was designed to handle debris.

There was debris but this was precisely what the system was expected to handle. I find that the system was not malfunctioning and therefore the District is not exempt from liability by reason of section 288 of the *Municipal Act*.

The District made no claim that the Gaudettes should have taken certain steps in mitigation of their damages and certainly the evidence would not have borne out such a position.

I find the Claimants have proven their case in nuisance. Notwithstanding this finding, I consider the alternative claim of negligence.

Negligence

THE LAW

Counsel referred me to the case of ***Kamloops (City) v. Nielsen*** (1984), 2 S.C.R.

2. In that case, the majority quoted at page 5 from ***Anns v. Merton London Borough Council*** [1978] A.C. 728. Lord Wilberforce stated in that case:

> "... that in order to decide whether or not a private law duty of care existed, two questions must be asked:
>
> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

Lord Wilberforce is again quoted at page 6 of the ***Kamloops*** case as follows:

> Lord Wilberforce categorized the various types of legislation as follows:
>
> (1) statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized but has done it negligently;

(2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.

In the case at bar, we are dealing with the second category of legislation.

Counsel also referred to ***Just vs. R. in the right of British Columbia,*** a Supreme Court of Canada decision November 7, 1989 and reported at 41 B.C.L.R. (2d) page 350. At page 371, Mr. Justice Cory who wrote the judgment for the majority set out the principles to be applied in cases such as these.

> "It may be convenient at this stage to summarize what I consider the be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists, the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.
>
> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

RELEVANT FACTS AND ANALYSIS

The District in the case at bar made a policy decision to maintain and inspect the storm-sewer system in their district. The authority to do this work was delegated to the Sewer Works Department. This was the operational aspect of the decision. In the District, there were five-hundred kilometers of open ditches, approximately one-hundred-forty kilometers of storm sewers and approximately thirty-eight hundred catch basins. Given the policy decision to maintain and inspect the storm-sewer system, the Superintendent of Sewer Works' role was to carry out the operations. This included an annual inspection and rating of all ditches. It was from the inspection and rating that the schedule of yearly cleaning was generated.

More particularly, once the individual foreman had done the ditch inspection, by driving along in a car and visually inspecting each ditch, he would present the inspection report to the Superintendent, his supervisor. Each ditch was rated from one to ten where one indicated that the ditch required immediate attention and ten, indicated that the ditch had just recently been cleaned.

After reviewing the ratings for the entire District the superintendent would generate an annual cleaning schedule. The superintendent generally picked a number between one and ten – such as five and then estimated the number of hours which would be required to clean all ditches rated five or below. He would then compare this to the available budget and depending on the results adjust the number chosen as necessary. If the work requirement, due to the number of ditches needing cleaning was such that an increment was required in the budget, the superintendent would make a recommendation to the manager of Engineering Operations and

through the staff hierarchy and ultimately to Council. If there were a more urgent matter such as a road collapse, there was a fund from which the Superintendent could authorize work without using this process.

Catch basins in Maple Ridge are cleaned once every two years but are not inspected as it is not economically feasible to do so. The Gaudettes' catch basin was last cleaned September 9, 1994. The open ditch near the Gaudettes was inspected December 1995 and was last cleaned in October 1993.

The flooding which occurred in the Gaudette basement in January of 1996 was not the first. The Gaudettes suffered a flooding of their basement in 1991. On that occasion, Mrs. Gaudette got up in the middle of the night and found herself standing in about three and one-half inches of water. The flooding was caused by debris in the catch basin and the damage was approximately $10,000.

With respect to this incident, the Superintendent stated that debris entering a culvert from an open ditch was fairly common and that they rarely took action on these types of incidents which usually involved minor flooding. He also acknowledged, however, a flooded basement with damages of $10,000 was a rare occurrence.

Following the 1991 flood, the Gaudettes installed an alarm to alert them to the possibility of another flood. The District of Maple Ridge did nothing following the cleaning of the debris, considering the blockage to be a one time incident notwithstanding the number of trees in the area, at least one of which overhung the open drain ditch leading to the catch basis at the foot of the Gaudette property. As part of operations, there was no list kept of possible problem ditches which might require more maintenance or repair.

In 1994, the Gaudettes' alarm went off and Mr. Gaudette called the City immediately. An auger truck was brought out and the drain was unplugged. On this occasion the back-up was caused by roots growing into the line which was flowing away from the

catch basin. The roots were completely cleared away and a video was taken of the interior of the catch basin and line to ensure the problem had been taken care of. No further preventative steps were taken with respect to the drain ditch but a Capital Works Project to improve the entire system in the neighborhood of the Gaudettes was moved forward from 1997 to 1996 following the 1994 flooding.

Although these two incidents had different causes, one being debris in the catch basin and the other being roots blocking the line, they both were indirectly the result of the fact that large trees were in the area. The incident presently before the court was also related to a large tree overhanging the drainage ditch according to the occurrence report.

Ultimately the Superintendent, following the 1996 flooding which brings these parties to court, made the decision in consultation with his foreman to enclose the open ditch at a cost of approximately $1,000. This cost was borne by the District and did not involve any consultation with the Superintendent's superiors or Council.

At no time were the Gaudettes told of any special measures which they could take to protect themselves from this major flooding. It was not suggested to them that the drainage ditch could be filled in, whether at their own expense or some shared expense nor was there any evidence that Mr. Gaudette was or could have been given authority to inspect and maintain the ditch or catch basin himself. The Gaudettes did all that was reasonably possible for them to do in order to protect themselves and beyond that they were reliant on the District.

In applying the facts, as found above, to the law, I find that the parties are in a relationship of sufficient proximity to warrant the imposition of a duty of care. I am satisfied that this is not a situation arising from a pure policy decision but is rather part of the operational aspect of the District's activity.

I assess the duty of care in light of all the surrounding circumstances including the budgetary restraints and the availability of qualified personnel and equipment and find that with particular reference to the Gaudettes, the duty of care owed by the District was not satisfied. The District's failure to do more in this particular situation constitutes negligence. I therefore find them liable for the damages which have been suffered by the Gaudettes in the amount of $10,000.

Costs are awarded to the Claimants.

C. E. Warren
Provincial Court Judge

DATED this 8th day of June, 1999