

*loose manhole covers in lawn*

THE HONOURABLE MR. JUSTICE  
R. B. McD. HUTCHISON



THE SUPREME COURT  
OF BRITISH COLUMBIA



THE LAW COURTS  
250 BURDETT AVE.  
VICTORIA, B. C.  
V8W 1B4

MEMORANDUM

TO: JUDY MACFARLANE, TRIAL COORDINATOR  
FROM: THE HONOURABLE MR. JUSTICE R.B.McD. HUTCHISON  
DATE: October 22, 1996

Please bring the following memorandum to the attention of counsel:

**MEMORANDUM TO COUNSEL**

Brent J. Kitzke, Esq.  
T. Clifford Chiu, Esq.

Counsel for the Plaintiff  
Counsel for the Defendant

RE: **ROBERT PONCELET v. THE CORPORATION OF THE  
DISTRICT OF OAK BAY  
VICTORIA REGISTRY NO. 95 211**

The Plaintiff on Friday the 4th of October, 1996, sought Judgment under Rule 18A against the Municipality of Oak Bay. Mr. Poncelet lives at the corner of Byng and Hazel streets in south Oak Bay. Neither Hazel Street nor Byng Street have a sidewalk or sidewalk boulevard. The Municipal boulevard starts at the Poncelet's property line and continues to the travelled portion of either Byng street or Hazel street. Accordingly, the Poncelets' lawn continues from their own property on to Municipal property.

The Municipality does not cut the boulevard portion, but relies on the homeowners on each street to carry out this work. If the homeowners neglect to cut the lawn, the Municipality sends a work crew around, but infrequently so that the grass becomes long and unsightly. Most homeowners choose, as is common in Oak Bay, to keep their yards and gardens neat and well cared for. Accordingly, they mow their own lawn and the Municipal lawn at the same time without objection from the Municipality.

On the boulevard in front of the Poncelet property there are two manhole covers.

On the 19th of April, 1995, Mr. Poncelet was cutting the boulevard and in doing so stepped on the manhole cover situated on the north-east portion of the boulevard. The manhole cover was not properly seated in its frame, thus enabling the cover to rotate on its axis. Mr. Poncelet's foot and leg went down the manhole and the cover flipped onto his leg, crushing it slightly. He undoubtedly received injuries, missed 2 1/2 days of work, and the soft tissue damage he says has resulted in him giving up playing soccer for the Victoria Orcas. A medical report from his family doctor concludes as follows:

In summary Mr. Poncelet has suffered a significant injury to his right leg as a result of a fall into a manhole on April 19, 1995. He had severe contusion, and bruising. He was given antibiotic prophylactically to stop any infection in the anterior compartment of his right leg. Though he had made significant progress rapidly it may still be three to eight weeks before we see complete resolution.

That report was dated May 14, 1995, a little less than a month after the accident.

The argument before me was confined solely to whether or not the Municipality could be found liable in damages for failure to maintain a proper inspection system of keeping track of dangerous manhole covers. It was also argued failure to take steps to paint the manhole covers in such a way as to make it clear to pedestrians that the manhole cover is not properly seated on its base, amounted to failure to have a proper system to protect pedestrians.

This suggestion, amounting to something of a counsel of perfection, is contained in a report of Mr. C. Derek Wild, Professional Engineer, who reported to Plaintiff's counsel as follows:

Turning now to what might have been done to avoid this unfortunate accident, the following actions would have reduced the possibility of such an accident occurring. These are, to my mind, reasonable and prudent actions to undertake, which would cost very little.

1. Lift the manhole frame and cover to a position more appropriate to the ground level to avoid the collection and falling in of dirt and surrounding ground into the frame seating;
2. Ensure that the outside rim of the frame

is clean and visible. If this is done, then it can be seen by an observer whether the manhole cover is safe to step upon (i.e., whether it is seated properly, both concentrically and levelly);

3. Paint the cover and frame more noticeably than it was on my inspection. I noted that it was only partially painted and that the paint was quite faded. The paint colour was white - not a good contrast colour in this circumstance.
4. Inspect all such manhole covers which may be walked upon and made sure that they are properly seated and/or elevated to the correct level. I am aware, in this respect, that the Municipality of Oak Bay does have water meter readers noting cracks in sidewalks, potholes, etc. on a regular basis.

In respect to the above, it is quite obvious to me that the manhole cover displacement would have been easier to see if it was painted properly and if the rim was fully visible and also painted. The eye would have been drawn to the problem (e.g. if they were not aligned properly and/or the rim and seating were covered by overhanging turf) if both were painted a bright reflective yellow or fluorescent orange all the way around the edge and kept clean and clear of the surrounding grass and soil areas. Further, if the manhole's frame and cover at grade, it would not be as possible for the seating to become fouled by dirt and grass during maintenance or inspection activities, forming an impediment to a proper seating of the cover. It would again also be easier to see any non-alignment which could lead to "flipping" when a weight is applied at the non-supported point.

It is clear that this report was filed under s.10 of the *Evidence Act*, but it appears to be mere argument dressed up as expert opinion.

Be that as it may the decision of Mr. Justice Martland in *Barratt v. Corporation of the District of North Vancouver* (1980), 27 B.C.L.R. 182 (S.C.C.) at 189 says:

If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the municipality cannot be held to be negligent because it formulated one policy of operation rather than another.

The Municipality of Oak Bay does have an inspection system for manhole covers which is reasonable in the circumstances. Obviously as in the *Barratt* case (*supra*), the Municipality does not have a duty of constant inspection and immediate repair.

The Affidavit of Mr. Lynol Mack, retired meter reader, of the Municipality shows that the Municipal Administrator, Mr. William Cochrane, instigated a risk management plan for road and sidewalk inspection on December 9, 1992. That system is conceded to be reasonable by the Plaintiff's solicitor. It involves meter readers entering into their hand-held computers code numbers for such things as broken meters, broken sidewalk panels, potholes and includes as Code #56, unsafe manholes.

Mr. Lynol Mack indicates in his Affidavit that he last inspected the residence at 830 Byng Street, the week prior to February 24, 1995, and that he looked at the manhole cover, and at that time there was no deficiencies in it.

As Mr. Justice Martland said in the *Barratt* case (*supra*) at p.189:

The injury to the appellant resulted from a pothole which had not been disclosed by an inspection made one week prior to the accident. In imposing a duty of constant inspection and immediate repair, the trial judge is again seeking to make the municipality an insurer against damage resulting from the existence of a pothole.

Similarly this plaintiff is attempting to make the Municipality an insurer for others carelessness in somehow dislodging the manhole cover.

It is not uncommon for manhole covers to become dangerous from the activities of youngsters, and the Municipality cannot be held liable as an owner might be under the *Occupiers Liability Act*.

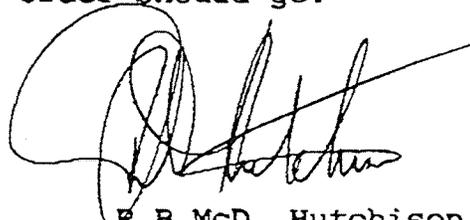
Further, as the Supreme Court of Canada ruled in *Brown v. British Columbia (Minister of Transportation & Highways)* (1994), 89 B.C.L.R. (2d) 1 (S.C.C.), so long as a policy is made bona fide and is not irrational, the Court should not review the maintenance policy on the standard of reasonableness. That would seem to cover a policy of "bright reflective yellow or fluorescent orange paint",

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a prospect which would not likely be embraced with enthusiasm by the good burghers of south Oak Bay.

In the case at bar, the Plaintiff is unable to show any misfeasance on the part of the Municipality. At law, municipalities have long been held not liable for mere non-feasance.

In these circumstances, I do not think the Plaintiff's claim can succeed, as against the Municipality and accordingly, the Defendant's application for dismissal of the Plaintiff's claim under Rule 18A should succeed and the Order should go.

A handwritten signature in black ink, appearing to read 'R.B. McD. Hutchison, J.', with a large, stylized initial 'R' and a long horizontal stroke extending to the right.

R.B.McD. Hutchison, J.