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Nanaimo Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: EVAN DALE BOYD and BARBARA LYNN BOYD PLAINTIFFS AND: CITY OF NANAIMO and CENTRAL GAS BRITISH COLUMBIA INC. DEFENDANTS AND: CENTRAL GAS BRITISH COLUMBIA INC. and DONALD BAXTER THIRD PARTIES	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE JOSEPHSON

Counsel for the Plaintiffs:	In Person
Counsel for the Defendant (City of Nanaimo):	Greg M. Nielsen
DATE OF AND PLACE OF HEARING:	January 24, 25 & 26, 1995 Nanaimo, B.C.

1 Water from an unusually heavy rain fall flowed down the defendant city's laneway, bypassed a drainage grate, flowed onto the plaintiffs' property, entered their residence and caused damage. That lane is perpendicular to the centre of the rear property line of the plaintiffs. It declines sharply towards the plaintiffs' property. At the point where it contacts the rear

property line of the plaintiffs, the lane branches into a T-intersection.

2 The water bypassed the drainage grate because the grading of the unpaved lane was not sufficient to contain it. The reason for that lack of sufficient grading has been the focus of this trial.

3 The plaintiffs maintain the likelihood is that the grading of the lane was altered by underground gas installation work carried out in the lane approximately one month earlier. They argue that the City negligently failed to supervise and/or inspect the lane after this installation had been completed. They point out that the defendant quickly restored an adequate grade after the flooding.

4 The defendant submits that neither the cause of the flooding nor negligence has been proven. The defendant also led evidence that the plaintiff Evan Boyd had earlier removed some gravel material from that portion of the laneway and submits he was the author of his own misfortune.

5 The action against the third parties was dismissed before commencement of this trial.

6 Section 755.3 of the ***Municipal Act***, R.S.B.C. c. 290 specifically excludes nuisance and the rule in ***Rylands*** v. ***Fletcher*** as a cause of action in circumstances such as this. Thus, the plaintiffs' only remedy lies in establishing negligence on the part of the defendant.

7 Approximately one month before the flooding, a gas line was installed from the lane to the plaintiffs' neighbour. The gas line ran parallel to the border between the two properties and approximately 4 metres on the neighbour's side of that border line. The gas line was connected to the main in the laneway directly behind the neighbour's property, again some 4 metres from the plaintiffs' property line. That boundary line between the plaintiffs and his neighbour is some distance from the laneway T-intersection where the flooding occurred.

8 The plaintiffs submit that, because they had experienced no flooding problems before, the gas installation must have sufficiently altered the grade in the laneway to enable this to occur. The evidence does not support this conclusion.

9 The evidence, which I accept, is that the excavation and restoration activities related to the installation of the gas line did not extend beyond the border line between the two properties,

let alone to the T-intersection in the lane where the run off occurred. The contractor installing the gas line brought in ample fill material to restore the lane after installation and there is no evidence that it may have removed any fill material from the surface of the laneway for that purpose.

10 The plaintiffs submit that perhaps heavy equipment involved in the lane restoration may have travelled past the T-intersection and altered the grade, but there is no evidence to support this speculative possibility.

11 It is not proven that the gas installation activities caused an alteration in the grade of the lane behind the plaintiffs' residence. It follows that any failure on the part of the defendant to inspect the job site, even if proven, has no causal connection with the flooding that occurred.

12 The next issue is whether the defendant was negligent in failing to maintain a lane grade at that location to a reasonable standard. The City followed a policy of lane maintenance which no one suggested was unreasonable. That policy was followed with respect to this lane. The lane was graded once per year and was last graded before the flooding in June 1991.

13 The plaintiffs cannot find comfort in the evidentiary principle of ***res ipsa loquiter,*** for the reason that it cannot be said that the flooding would not have happened without negligence. ***Hellenius et al*** v. ***Lees*** 20 D.L.R. (3d) 369 at 374 (S.C.C.).

14 The standard of care on the defendant is not one of perfection. There is evidence that the rainfall at the time of the flooding was unusually excessive. There is no evidence that the City was negligent in maintaining the lane as it did.

15 The defendant led evidence which, it submits, explains the failure of the lane to contain the water on the day of the flooding, January 23, 1992. Mr. Baxter is a neighbour of the plaintiffs living across the lane from them. He is the Assistant Fire Chief for the City of Nanaimo after a long career with the Nanaimo Fire Department.

16 The plaintiffs installed a fence along the rear property line in September and October 1991. Mr. Baxter testified that during this installation, he observed the plaintiff Evan Boyd using a wheel barrow to take gravel from the lane at the crucial T-intersection and use it for cementing post holes. This he observed on three occasions over two days. This is rather devastating evidence for the plaintiffs as it is the only evidence that tends

to explain how the grade at that location may have been sufficiently altered to allow the flooding that occurred.

17 The plaintiff Evan Boyd denied that this occurred. He testified that he did use his wheel barrow to bring gravel for his post holes, but that he took this gravel from a car park area in his neighbour's back yard adjacent to the lane.

18 The plaintiffs suggest that Mr. Baxter concocted this evidence because of bitterness over being once named a third party in these proceedings. The plaintiffs also point out that only two post holes had cement, while the rest contained gravel, and that Mr. Baxter was mistaken in describing the old fence that was removed for the new installation. The plaintiff Mr. Boyd also argues that he could have used cement from that supplied by a cement truck for a retaining wall he was installing on his neighbour's property at the same time.

19 While Mr. Baxter may or may not be mistaken about whether the gravel was used to mix cement for the post holes or simply applied directly to the post holes, I accept his evidence that the plaintiff removed gravel from the laneway in the area where the run off subsequently occurred. This removal would have reduced the ability of the lane to contain water run offs and is the only

explanation, provided by the evidence, for the flooding incident in question.

20 However, even if I am wrong with respect to Mr. Baxter's credibility, the plaintiff has nonetheless failed to establish that the inability of the lane to contain the excessive water run off on June 23, 1992, was caused by the negligence of the defendant.

21 The action is dismissed, with costs to the defendant.

February 10, 1995
New Westminster, B.C. "I.B. Josephson, J."