File No. 28347
Kamloops Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Small Claims Division

BETWEEN:

BRIAN MAXYMUIK

CLAIMANT

AND:

CITY OF KAMLOOPS
MOUNTAIN VIEW CONSTRUCTION

DEFENDANTS

REASONS FOR JUDGMENT

OF THE HONOURABLE

JUDGE H. ROHRMOSER

DATES OF TRIAL: – September 12, 1997
– June 12, 1998

APPEARANCES:
ON BEHALF OF CLAIMANT: – Personal Appearance
ON BEHALF OF DEFENDANTS:
City of Kamloops: – J. Locke
Mountain View Construction – John Cameron Wemps

INTRODUCTION:

1. FACTS:

On February 13, 1996, a broken City water main flooded Mr. Maxymuik's basement while he was not home. Water ran from it into the stairwell of his house and down into basement so that when he got home there was between two and six inches of water in it, depending on whose evidence is accepted. I find that it was towards the lower amount. In this case, the ground being frozen, the water took the path of least resistance following the trench line from the water main to the house. City crews attended that day under the supervision of Mr. Campmans and repaired it the same day. Mr. Campmans

was invited inside the house by Mr. Maxymuik and shown the water damage. He described the scene as being one of two to three inches of water in the basement. He saw boxes, bags and paper bags strewn about in disorderly fashion. The bedroom was raised off the floor at 2 x 4 height. There was a bed and dresser there. He did not recall seeing a stereo and television equipment. The shag carpet was damp. He did not need rubber boots to walk around in it, he could do so in his work boots.

It was the "saddle" that malfunctioned. This piece of equipment is installed on the water line for the purposes of providing a feed from the main line to the house. That particular saddle was of a type that was commonly in use fifteen to eighteen years ago and was itself installed in 1980. It formed part of an infrastructure that would only be replaced as part of a capital works program for replacement, or, if it had been exposed for any other reason and thus became a matter of engineering concern, it might be examined or inspected.

The break, in this case, resulted form the saddle being worn out where the stainless steel meets a brass collar. The defect was most likely a result of deterioration that is not normal for that type of equipment in those soil conditions, though the usual life of that kind of equipment is thought normally to be about twice as long. The soil conditions were alkalide and were described as "aggressive" and could have accelerated the breakdown.

The most recent work done near that water main was in 1992, by Mountain View Construction, contractors for the City of Kamloops. That contract was for the installation of a sewer line and other pipe in the general vicinity of the water main. If the saddle had been damaged during the time of that work, then it is highly unlikely that it would have shown up over three and a half years later. It most likely would have shown up well within a year.

The City has a one year maintenance policy in which they assume that problems with the equipment within that period are their responsibility.

Mr. Maxymuik was uninsured. He said, after talking to representatives of the City, that he was advised to take all of the damaged items to the dump, and he did. He never thought to take pictures.

He then put in his claim for over $6,000.00. In the course of this, he spoke to Mr. Capone, who looks after City claims against the City of Kamloops. He was told to submit a written proof of loss that would be looked into by an adjuster.

2. ISSUES:

1. Liability and nuisance
2. Liability and negligence
3. Damages

3. ANALYSIS:

The most recent work done near the water main was in 1992 by mountain View construction. That contract was for the installation of a sewer line and other pipe in the general vicinity of the water main. John Watson, from the firm of the Watson Engineering Ltd., gave uncontradicted evidence that all work was done to proper specifications and that the water main was not exposed during this work. If the saddle had been damaged then, it is highly unlikely to have shown up three and a half years later. It most likely would have shown up well within a year. There is not adequate proof that the installation of the saddle was negligent or that the deterioration for that type of saddle in that type of soil was outside

normal limits, or somehow the result of negligence by the City. The precise cause of the failure of the line is not known but it probably has to do with corrosion of the line by the "aggressive" (alkalide) soil conditions.

The City is attuned to liability issues arising from claims against them. They would likely do in most cases what they said they did in this one -- advise the claimant to document his loss and submit it. It is far less likely that they would advise a claimant to destroy the evidence without keeping any kind of record or photographs, as is implied here by the claimant, who says they told him to take the items to the dump. To do so could expose the City to huge punitive damages for dealing in bad faith (the suggestion is that they deceived Mr. Maxymuik to act to his own prejudice) by persuading him to destroy the evidence. There is absolutely no good reason for the City to do this, particularly in respect to a minor claim. So, I accept the evidence of Mr. Capone that he told Mr. Maxymuik to submit a written claim and that he never told him to take the items to the dump, or that he would be compensated, or that the City was responsible. That kind of advice makes more sense, because it would enable the City to verify the accuracy of the amount claimed through further investigation. For the City to advise Mr. Maxymuik to take the items to the dump could just as easily be contrary to their own interests since it would prevent them from determining whether the claim is inflated. It is possible that Mr. Maxymuik drew the conclusion that he could take the items to the dump through his discussions with the City, but I am rather skeptical that anyone, just as a matter of common sense, would completely destroy the very evidence on which the claim is based without even keeping a photographic record of the damage and then expect the particulars of the claim to be accepted on face value. This is especially so where they include some questionable items, as for example, significant labour costs that were never actually paid out.

The particulars of the claim, generally speaking, are not well-established in evidence. I refer again to the claim for labour charges of $700.00 by way of example. That was supposed to have been for the clean-up work some of Mr. Maxymuik's friends did, though he never actually paid them anything because he discovered later on, he said, that they owed him money. Whether the figure of $700.00 is reasonable is not clear in the first place since they were the ones that supposedly kept track of time and they were not witnesses.

4. LAW:

1. The applicable test for negligence in cases where allegations of negligence are brought against a government agency is found in *Anns* v *Merton London Borough Council*, [1978] A.C. 728 (H.L.), wherein it is said:

> "In order to establish that a duty of care arises in a particular situation ...First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach or it may give rise ..."

The defendants concede that there is sufficient proximity for the duty of care to arise.

The defendants rely on the unreported case of *Watchel* v. *The City of Kamloops*, Kamloops Registry, #201216. This case is factually different because the water leak into the plaintiff's septic system in that case was never conclusively proven to have been from a City water line, or at least exclusively from that source. However, the principles of that case

are still relevant to this one. Mr. Justice Lamperson held that "for the Plaintiff to be successful they must prove that their problems resulted from a break in the water main and that the City was negligent in not locating and repairing this leak before the damage occurred" (my emphasis).

Insofar as the lack of maintenance was concerned, Justice Lamperson said:

> "...the City points out the fact that a maintenance program is not feasible because it would mean tearing up streets and exposing waterlines. All it can do is respond to complaints and then quickly remedy the problem."

and,

> "I have concluded that the city did everything that they could reasonably do to inspect, maintain and repair the water service in the area. There is no basis on which to find the City negligent."

Those comments, as I say, are applicable to this case. There is some suspicion in Mr. Maxymuik's mind that with the amount of work that had been done in and around the area of the water line, a better inspection program might have been warranted, but that suspicion was never elevated to the level of evidence. The only available evidence shows that the breakage occurred from other causes and that those could not readily be inspected without actually digging up the pipe and that there was no reason ever to do so because it had never been exposed. It fell within the normal maintenance regime, which was to respond quickly if there was a problem, and that they did.

Accordingly, on the question of negligence, the *Watchel* case governs this one and so I do not find the City was negligent.

2. Nuisance was not argued by the claimant, but it was addressed by the defendants who say that s. 288 of the ***Municipal Act*** provides a full defence. It states:

> "A municipality ...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 ...
>
> (b) a water or drainage facility or system, ..."

There is , as a result of this section, no liability based on a claim of nuisance.

3. The finding that there was no negligence is dispositive of this claim. The claimant's remedy would have been under an insurance policy, had he had one. He did not, but that does not mean the defendants must be his insurer. However, turning to the particulars of the claim itself, I would have to say that the claimant has failed to meet the burden on him to establish through evidence that it would have been anywhere close to the amount he suggests.

CONCLUSION:

The claim is dismissed. There will be no order as to costs.

ROHRMOSER P.C.J.

July 31, 1998
Kamloops, B.C.