Date: 19961213
Docket: 20126
Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

1996 CanLII 1032 (BC SC)

BETWEEN:

WILLIAM WATCHEL and ALENA WATCHEL

PLAINTIFFS

AND:

THE CITY OF KAMLOOPS, CANADIAN NORTHERN SHIELD INSURANCE COMPANY and ECONOMICAL MUTUAL INSURANCE COMPANY

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LAMPERSON

Counsel for the Plaintiffs:	J. Barry Carter
Counsel for the Defendant Canadian Northern Shield:	Richard B.T. Goepel
Counsel for the Defendant The City of Kamloops:	Frank R. Scordo
Place and Date of Hearing:	Kamloops, B.C. November 19, 20, 21, 22, 1996

[1] The plaintiffs, who suffered substantial water damage to their house and property, seek the following in two actions which have been consolidated:

(1) Damages from the City of Kamloops (City), and

(2) Indemnity from their insurers, Canadian Northern Shield Insurance Company (Canadian Northern).

(It should be noted that the plaintiffs cannot recover against the insured if they in fact recover their damages from the City.)

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THE ACTION AGAINST THE CITY OF KAMLOOPS:

[2] The issues with respect to the City are:

(a) Whether the harm to the plaintiffs' house and property was caused by a leaking watermain and if so, whether that leak resulted from the City's negligence, and

(b) Whether the plaintiffs' action was commenced on time.

[3] In November 1989 the plaintiffs purchased a house situate on Westsyde Road in the City of Kamloops in an area known as the Karindale subdivision. The house, which faces west, is on a lot which is situated on a fairly low bench above and to the west of Westsyde Road. The driveway, which parallels the northern property line, drops fairly steeply onto Westsyde Road whereas a portion of the property which forms the back garden is level. On the west side of the property is a 1.1 meter concrete retaining wall behind which there is a 40 to 45 degree

slope which rises roughly 12 meters to the backyards of the two adjoining properties, the fronts of which face east onto Karindale Road. Adjoining the plaintiffs' property to the north is a house and lot referred to as the Waldo residence. Because that property is higher than the plaintiffs, there is a 1.4 meter concrete retaining wall separating the properties.

[4] In December 1989 the plaintiffs found that their septic tank was flooding and needed to be pumped out on an average of two times per week. This problem continued unabated until April of 1990 when the problem ceased. Mr. Peterson, who was then the City's utility foreman responsible for that area, as well as going himself, sent his subforeman Mr. Muir, who has since died, to the area several times to find the cause of the problem.

[5] A sample of the water seeping onto the plaintiffs' property contained the same levels of fluoride as the city water which led Mr. Peterson to conclude that the problem was most likely a leaking watermain. Mr. Muir did both a visual inspection and also used a device called an aquaphone to check the service connections of all the properties located on Karindale Road which are above both the plaintiffs' and Waldo's lots.

[6] Finding a water leak takes much experience and is close to being an art in which some persons have more skill than others.

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Mr. Muir was respected for his ability in this area. He detected no leaks. Mr. Peterson also enlisted the aid of the Health Department which took water samples. In April the water flow slowed and then stopped. Consequently Mr. Peterson concluded that the problem resulted from ground water because leaks in watermains get worse and do not stop. In the meantime the plaintiffs' house and land had suffered significant damage.

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[7] In January 1991 the problem reoccurred with respect to both the plaintiffs' and the Waldo's properties. Once again the City tried to find the cause of the problem. Mr. Muir, once again, visually inspected the neighbourhood and did leak detection work with both an aquaphone and a more modern electronic device. Fluoride tests were done. Unfortunately these were not determinative because fluoride exists naturally in the ground water in parts of this area. The Health Department, at the request of the City, conducted tests on the water in an attempt to find the source of the problem. No fecal coliform was found. This indicated that sewage effluent was not the cause. Dye tests were attempted but to no avail. The pumping station records were checked to determine whether there was an unusual flow of water which would indicate a major leak. The results were inconclusive. Upon realizing that all normal procedures had failed, the City engaged T. R. Underwood Engineering to find the problem. Unfortunately, the water flow stopped in the spring of 1991 with the result that the engineers could no longer carry out any meaningful tests. Once

again the stoppage indicated to Mr. Peterson that there were no problems with the watermain or the service connections. Consequently nothing further was done.

[8] At the beginning of December 1991 the same problem emerged. Mr. Underwood told the City to conduct leakage tests. On this occasion the City discovered a leak at a service connection of the house located on Karindale Road directly above the plaintiffs' property. After that leak was fixed the plaintiffs problems stopped and have not reoccurred.

[9] The City sent the offending components which leaked to a metallurgical engineering firm for examination. Mr. Johnson of that firm concluded that:

> 1. It is our opinion that the fracture of the plastic waterline connector occurred as a result of bending loads applied by the plastic pipe;
>
> 2. It is our opinion that the erosion on the brass reducer bushing surfaces is not consistent with concentrated water flow (leakage) over a two year period;
>
> 3. It is our opinion that the erosion on the threaded surface of the plastic connector is not consistent with concentrated water flow (leakage) over a two year period;
>
> 4. It is our opinion that the erosion is more consistent with leakage from a fractured fitting for the period of months (less than six months);
>
> 5. The flow rate required to cause erosion would be consistent with the water flow shown in the supplied photographs. (The photo pertained to the exposed service connection.)

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[10] The plaintiffs say that all their problems and the consequent damages resulted from this leak and that it was not discovered earlier because of the City's negligent procedures and lack of a proper maintenance program for its water distribution system. In their opinion the City's policy of only repairing breaks when they occur is evidence of negligence. They contend that the leak would have been discovered early on if the City had conducted pressure tests.

[11] The City in turn asserts that the water leak existed at most for six months and that the plaintiffs' problems resulted from excess ground water and waste water discharge from septic tank fields for which the City is not responsible. It is the opinion of the City's engineering consultant that the problem was resolved because the plaintiffs, at the time that the leak was discovered, hired a contractor to dig drainage ditches and to enlarge the septic field located on their property. According to the consultants, this action allowed the excess water to drain from their property without causing damage.

[12] Mr. Van Maydell, a civil engineer who testified on behalf of the plaintiffs, did not quarrel with Mr. Johnson's conclusions. Hence Mr. Johnson's evidence that the leak existed for less than six months is uncontradicted. This in turn indicates that the plaintiffs' water problems on previous occasions did not stem from this leak.

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[13] According to the City, pressure tests on existing waterlines are not conducted since they can create serious damage which is very expensive to repair. Insofar as the lack of a maintenance program is concerned, the City points to 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. The plaintiffs also assert that the Karindale area has more than its share of water problems which should have prompted additional maintenance measures. However, no evidence was led to indicate what those measures might be or whether the problems experienced in the Karindale area were greater than elsewhere in the City.

[14] It is clear from Mr. Johnson's report that the plaintiffs' problems probably did not result from the leak. Mr. Van Maydell could not give a satisfactory explanation as to why the other experts may be wrong. This comment is not a reflection on his expertise but results from the fact that on the evidence, the leak in the watermain existed for no more than six months. Consequently, if one does not ascribe to the ground water theory, the water flowing into the plaintiffs' property in previous winters remains unexplained.

[15] For the plaintiffs to be successful they must prove that their problems resulted from a break in the watermain and that the City was negligent in not locating and repairing this leak

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before the damage occurred. Unfortunately, the plaintiffs have not proved that their problem resulted from the leak detected in December 1991, and perhaps more significantly have not proved that there was negligence on the part of the City. I fail to see what else the City could have done to detect the source of the problem. There is no evidence before this court that the City failed to meet its duty of care. There is no cogent evidence beyond the opinion of the plaintiffs that a pressure test would have located the problem, nor is there any evidence to refute the City's position that pressure tests should not be done to existing waterlines because of problems they can create. There is also no evidence what maintenance program the City could have undertaken. 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.

[16] The City contends that the plaintiffs did not commence action until May 12, 1993, and that the action is therefore barred by s.754 of the ***Municipal Act***, R.S. Chapter 290 which states:

> "754. All actions against a municipality for the unlawful doing of anything purporting to have been done by the municipality under the powers conferred by an Act of the Legislature, and which might have been lawfully done by the municipality if acting in the manner prescribed by law, shall be commenced within six (6) months after the cause of action shall have first arisen, or within a further period

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> designated by the council in a particular case, but not afterwards.

[17] I accede to the plaintiffs' argument that s.754 is not a bar to this action since this is not a situation where the City purported to do something under the powers conferred upon it by the legislature. Thus s.6(3) of the ***Limitation Act***, R.S. Chapter 236, applies. Because the actual water leak was not detected until December 1991, it is unrealistic to say that the plaintiffs should have known beforehand that the City was a proper defendant in this action. Accordingly I find that time started to run in December 1991 when the water leak was detected. Hence this action was brought on time.

[18] With respect to notice which must be given to the City pursuant to s.755 of the ***Municipal Act***, I find that this is a proper situation to apply the saving provision contained therein because in the circumstances of this case the City was, from the outset, aware of the plaintiffs' problems and the damage which was occurring to their property.

[19] It follows from what I have said previously that the plaintiffs' action in negligence against the City must be dismissed even though it was brought on time.

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THE ACTION AGAINST CANADIAN NORTHERN SHIELD INSURANCE COMPANY:

[20] There is no question that the plaintiffs have suffered extensive damage to their house, patio, driveway, retaining wall and garden. They seek reimbursement from their insurer, the defendant Canadian Northern, which has refused to make payment on the following grounds:

1. The loss was not caused by an "accidental discharge or overflow of water" from a public watermain;

2. If the loss was caused by an "accidental discharge or overflow of water", the damage was caused by "continuous or repeated seepage or leakage" and is excluded from coverage;

3. The plaintiffs damages occurred prior to April 1, 1991, and are time barred;

4. The plaintiffs have failed to file a Proof of Loss as required under the policy;

[21] In order to succeed the plaintiffs must bring themselves within the specific coverage as set out in the policy of insurance which is for named perils only. Paragraph 8 of the policy reads:

A. Accidental discharge or overflow of water or steam from within a plumbing, heating, sprinkler or air conditioning system, domestic appliance (including waterbeds and fish tanks) swimming pool or equipment attached and public watermains;

B. Sudden and accidental bursting, tearing apart, cracking, burning or bulging due to the pressure of water or steam, or lack of water or steam, in a plumbing, heating,

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> sprinkler, or air conditioning system, or appliance for heating water;
>
> C. . . . This peril does not include damage:
>
> (a) caused by continuous or repeated seepage or leakage.

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[22] Thus the plaintiffs must establish that the loss was caused by a break in the public watermain and that the loss resulted from that break being undetected for almost two years. This the plaintiffs have not done. Also, it is evident that the seepage or leakage was continuous or repeated. The plaintiffs cannot succeed against the insurers for the above reasons alone.

[23] It is a condition of the policy of insurance that claims must be brought within one year of the date of loss. In this instance the action against the insured was commenced on April 1, 1992. Thus, the plaintiffs can only recover damages which occurred between April 1, 1991 to November 30, 1991, when the policy of insurance expired. Unfortunately, it is apparent from the facts of this case that damages suffered by the plaintiffs occurred before April 1, 1991.

[24] It is a statutory condition that the plaintiffs file a sworn Proof of Loss setting out in detail the alleged damages suffered by the plaintiffs so that the insurer can examine the claim to determine whether it falls within the terms of the insurance coverage. The Proof of Loss in this instance was

deficient in that it provided no information as to the damages suffered by the Plaintiff and it did not meet the requirements of the contract of insurance with respect to the Proof of Loss.

[25] It is for all the foregoing reasons that the plaintiffs claim against the insurers Canadian Northern must fail.

[26] Accordingly the plaintiffs' claim against both defendants is dismissed with costs.

"G.W. Lamperson"

LAMPERSON J.

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