MUNSHAW COLOUR SERVICE LTD. (*Plaintiff*) ..... APPELLANT; 1962 *Jan. 30, 31 Apr. 24

AND

CITY OF VANCOUVER (*Defendant*) ...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Negligence—Sewer flushing operations by municipality in vicinity of film developer's premises—Sediment in mains stirred up by opening of hydrant—Heavily sedimented water reaching processing tanks and damaging film therein—Failure of plaintiff's filter system—Whether municipality liable for negligence.*

In the course of sewer flushing operations carried on by the defendant municipality sediment was stirred up, due to the opening of a hydrant, in the city's water-mains in the vicinity of the premises of the plaintiff's film developing business. As a result, heavily sedimented water reached the plaintiff's processing tanks and damaged film then being processed. Because of an unexplained breakdown the plaintiff's filter system had failed to work properly. In proceedings brought against the city and the local water district, the trial judge gave judgment against the city and dismissed the action against the water district. On appeal, this judgment was set aside, one judge dissenting. The plaintiff then appealed to this Court pursuant to leave granted by the Court of Appeal.

*Held:* The appeal should be dismissed.

*Per* Cartwright and Ritchie JJ.: The evidence did not warrant a finding that there was so great an accumulation of sediment in the water-mains that the failure to have removed it amounted to negligence.

The contention that the defendant was negligent in failing to notify the plaintiff that the hydrant was going to be opened was rejected. The defendant, through its agents, knew that the opening of the hydrant would tend to stir up some sediment but it had no reason to anticipate that so great a quantity of sediment would be stirred up and no means of knowing whether it would be likely to reach the premises of the plaintiff. Even if it were held that the city should have foreseen that an undue amount of sediment would be contained in the water reaching the plaintiff's premises, a reasonable person in the position of the city would not have foreseen that it would do any damage. The giving of a warning would not have prevented the damage, as it was altogether probable that the plaintiff would have gone ahead with its usual operations relying upon its filter system to protect its product.

If, as was held by the trial judge, the evidence adduced by the plaintiff raised a presumption of negligence on the part of the city, the evidence taken as a whole rebutted that presumption.

*Per* Fauteux, Abbott and Judson JJ.: The plaintiff, as one who used water for processing colour films, was a consumer of extraordinary sensitivity; he could not use the water without filtering it at all times. If, therefore, his filtration system broke down through no fault of the city, the special loss was to be assumed by him.

*PRESENT: Cartwright, Fauteux, Abbott, Judson and Ritchie JJ.

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The use of the hydrant for sewer flushing purposes, an ordinary everyday procedure, could not in itself be negligence, nor could it be negligence even if considered in relation to the presence of sediment in the underground pipes. The city had been using the procedure for two days before there was any complaint and there was no evidence to suggest that it should have known that the use of the hydrant would stir up more silt than it had done on other occasions. There was no reason for the defendant to warn anyone of the operation; to impose on the city the duty of notice in the circumstances was to require a standard of perfection.

It was not negligence on the part of the city employee to fail, as no doubt he did, to think about the effect of opening the hydrant upon water consumers of peculiar sensitivity. Neither was it negligence to fail to clean out the sediment in the pipes; to say that the city must periodically flush the pipes to remove the sediment so that this particular kind of consumer would not be affected was again to impose too high a duty on a municipal waterworks system.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Lett C.J.S.C. Appeal dismissed.

*C. C. Locke, Q.C.,* for the plaintiff, appellant.

*B. E. Emerson* and *C. S. G. C. Fleming,* for the defendant, respondent.

The judgment of Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this appeal arises are set out in detail in the reasons of Lett C.J. and are summarized in the reasons of my brother Judson.

In maintaining and operating its system of water-mains and other water-pipes and carrying on its undertaking of supplying water the respondent was doing that which the legislature has authorized it to do. Counsel for the appellant did not question the finding of the learned Chief Justice that the city was not under an absolute statutory duty to supply water of a specified quality or standard. Counsel for the respondent conceded that the city would be liable for the damages suffered by the appellant if the city was guilty of negligence in its operations and that negligence caused the plaintiff's damage.

The grounds upon which the learned Chief Justice held the respondent liable are set out in the following passages in his reasons:

I hold that the Plaintiff has established negligence upon the part of the City consisting of

[1] (1961), 35 W.W.R. 696, 29 D.L.R. (2d) 240.

(1) supplying water from its mains to the Plaintiff which was not wholesome or ordinarily pure and was unfit for ordinary domestic purposes or ordinary human consumption;

(2) in permitting a hydrant in the vicinity of the Plaintiff's premises to be turned on when it knew or ought to have known that the sediment known to be in its mains was thereby likely to be released and likely to result in delivery to the Plaintiff of water which was not of proper quality;

(3) in failing either to take steps to remove the sediment from its water mains by means not injurious to the Plaintiff, or to warn the Plaintiff in advance that the means to be used by the City were liable to result in delivery to the Plaintiff of water which was not of proper quality.

* * *

If I am in error in my findings of negligence against the City, then in my view the evidence adduced by the Plaintiff has raised a presumption which the City has not satisfactorily answered or explained so as to absolve itself from the implication of negligence: (See judgment of Evershed M.R. in *Moore v. R. Fox & Sons*, [1956] 1 Q.B. at p. 610), and in my view, as Lord Evershed M.R. stated at p. 611—"the sum of the Defendant's evidence was not to explain the accident, but to show that it was inexplicable".

In the Court of Appeal[1], O'Halloran J.A., who would have upheld the judgment given at the trial, was of opinion that the city "owed a common sense duty" to notify the plaintiff that it planned flushing the sewers from the hydrant; he ends his reasons as follows:

The negligence of the appellant is found as a matter of inference from the known evidential circumstances coupled with appellant's failure to notify respondent that it was going to clear the sewers during the day in question.

With respect, by reason of the preponderance of the evidence, the nature of the damage to the licenced operation of the respondent was foreseeable by the City and hence notice should have been given the respondent to enable it to withhold its operations during the hours the City was engaged in clearing the sewers in respondent's neighbourhood.

As is pointed out in the reasons of my brother Judson, Davey J.A. with whom Sheppard J.A. agreed, based his judgment upon two grounds. I find it necessary to consider only the second of these, *i.e.*, that the city was not guilty of negligence either in failing to remove the sediment from the water-mains or in failing to notify the plaintiff of its intention to have the hydrant opened.

I agree with Davey J.A. that in the circumstances of this case, the city was not under a duty to use procedures for cleaning out its water-mains that are not in general use.

[1] (1961), 35 W.W.R. 696, 29 D.L.R (2d) 240.

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No doubt if sediment accumulated in the mains to such an extent that as a result it frequently happened that the water delivered was not wholesome or ordinarily pure and was unfit for ordinary domestic purposes or ordinary human consumption a duty to use all reasonable diligence to remedy the situation would fall upon the city; but the evidence does not warrant a finding that there was so great an accumulation of sediment that the failure to have removed it amounted to negligence.

The contention that the city was negligent in failing to notify the plaintiff that the hydrant was going to be opened is based on the submissions, (i) that the city knew or ought to have known that the opening of the hydrant might cause an undue amount of sediment to be contained in the water delivered to the plaintiff's premises, (ii) that a reasonable person in the position of the city should have foreseen that if this happened it would cause damage to the plaintiff, and (iii) that the giving of the notification would have resulted in the damage being avoided. There is little, if any, dispute as to the primary facts of this case and the question is as to what inferences should be drawn from them.

As to the first of these submissions, it appears to me that the proper inference to be drawn from the evidence is that the city, through its agents, knew that the opening of the hydrant would tend to stir up some sediment but that it had no reason to anticipate that so great a quantity of sediment would be stirred up as was in fact stirred up and no means of knowing whether it would be likely to reach the premises of the plaintiff situate on another street and at a distance of 1,250 feet. It is significant that while the same hydrant had been used for the same purpose on the two days preceding the damage suffered by the plaintiff the evidence does not suggest that on those days any undue amount of sediment was contained in the water received by the plaintiff.

As to the second submission, it is my opinion that even if it were held that the city should have foreseen that an undue amount of sediment would be contained in the water reaching the plaintiff's premises, a reasonable person in the position of the city would not have foreseen that

it would do any damage. It would in fact have done no damage but for the unforeseen and unexplained failure of the plaintiff's filter system.

As to the third submission, it is necessary to consider the nature of the notification which the city should have given to the plaintiff, assuming it was under a duty to give one. It could not give notice that a large quantity of sediment would be contained in the water delivered to the plaintiff, for it did not know whether or not this would happen. The duty to give the notification, if it existed at all, existed equally on the two preceding days. I suppose the notice should have been worded somewhat as follows: "At — o'clock to-morrow the hydrant at the northwest corner of Helmcken and Homer Streets will be partially opened for the purpose of flushing sewers, this operation will continue until — o'clock. This may stir up sediment in the mains and may result in the water delivered to you containing a large amount of sediment." If such a notice had been given, what course would the plaintiff have been likely to pursue? One of the inferences drawn by the learned Chief Justice in his reasons is:

> That if Plaintiff had been warned in advance of the proposed sewer-clearing operations it could have taken precautions to avoid the damage to the films.

The learned Chief Justice does not specify what precautions the plaintiff could have taken. In the factum of the appellant it is said that obviously it could have deferred its operations; but it appears to me very unlikely that it would have done so, particularly in view of the fact that the opening of the hydrant on the two preceding days had not had any observable ill effect on the quality of the water supplied. It is, I think, altogether probable that the appellant would have gone ahead with its usual operations relying upon its filter system to protect its product. I share the view of Davey J.A. that the giving of a warning would not have prevented the damage.

If, as held by the learned Chief Justice, the evidence adduced by the plaintiff raised a presumption of negligence on the part of the city, it is my opinion that the evidence taken as a whole rebutted that presumption.

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For the above reasons, and for those given by Davey J.A. on this branch of the matter, I have reached the conclusion that in carrying out its undertaking of supplying water the respondent was not guilty of any negligence which caused the damage suffered by the appellant.

I would dismiss the appeal with costs.

The judgment of Fauteux, Abbott and Judson JJ. was delivered by

JUDSON J.:—The appellant carries on the business of developing and finishing photographic coloured film in the City of Vancouver. On August 1, 1957, it claimed that heavily sedimented water had reached its processing tanks from the city's water system and had damaged large quantities of film then being processed. It brought an action for damages against the city and the Greater Vancouver Water District. The action was dismissed against the water district but the trial judge gave judgment against the city for $3,694.89. On appeal, this judgment was set aside, O'Halloran J. dissenting. The plaintiff now appeals to this Court pursuant to leave granted by the British Columbia Court of Appeal.

The City of Vancouver purchases its water from the Greater Vancouver Water District and distributes it to the consumer through a grid system of water-mains under the streets. It supplies water to domestic, commercial and industrial consumers. On the morning of August 1, 1957, and for two days previously a crew of city workmen had been engaged in cleaning and flushing sewers on Homer Street between Davie and Helmcken Streets. To do this the workmen connected a hose to a fire hydrant located at the northwest corner of Helmcken and Homer Streets, 1,250 feet from the appellant's premises. The complaint about the sedimented water was received by the waterworks department about mid-morning on August 1. It was given immediate attention and the fire hydrant was turned off, but by this time the damage had been done, the sedimented water being already in the tanks. After the hydrant had been shut off the water being delivered to the appellant returned to its normal condition.

The findings of the learned Chief Justice at trial show

(*a*) That the water supplied by the water district to the city contains a certain amount of sediment but that except for some slight discolouration in freshet seasons, is ordinarily and consistently of excellent quality;

(*b*) That it was the sediment in the water that damaged the plaintiff's films and that this sediment included sand and iron oxide;

(*c*) That the filter system of the plaintiff was ordinarily effective to accomplish its purpose of eliminating from the water particles of sediment larger in size than 25 microns;

(*d*) That the filter system of the plaintiff broke down and permitted entry into the plaintiff's tanks, of particles of sediment of a size larger than 25 microns. No witness was able to explain why the filter system broke down. It was designed to permit the passage of sediment not larger than 25 microns, but the evidence disclosed that particles as large as 74 microns were found in the tanks of the processing machines. It was not satisfactorily established that the breakdown in the filter system was caused by "bursts" or changes in pressure or velocity of the water supplied by the city;

(*e*) That the city knew or ought to have known that there was sediment consisting of particles of sand and rust in its water-mains in the vicinity of the plaintiff's premises and that it knew or ought to have known that the sewer flushing operation within 1,250 feet of the plaintiff's premises was likely to cause the sediment to be disturbed so that it could enter the plaintiff's premises.

The inference drawn by the learned Chief Justice from all this was that it was the opening of the hydrant on August 1 that did stir up the sediment in the city's pipes and caused the damage. It is admitted that no warning of the sewer clearing operation was given by the city to the plaintiff or anyone else.

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The city's powers in connection with the supply of water are to be found in the Vancouver Charter, 1953 (B.C.), c. 55, in the following sections:

300. The Council may provide . . .

(a) For acquiring water from the Greater Vancouver Water District, or elsewhere, and for distributing, supplying, and making it available for use to persons within the city at such rates and upon such terms and conditions as may be provided by by-law, . . .

(b) For the construction, installation, maintenance, repair, and regulation of a system of water-mains and other water-pipes, including valves, fittings, hydrants, meters, and other necessary appliances and equipment, for the purpose of such distribution and supply . . .

330. The Council may make by-laws:

(d) For providing for the periodical examination and analysis of the water supplied by the city and for tests as to its purity and wholesomeness.

It was admitted that there is no statutory duty upon the city to supply water of a specified quality or standard. The litigation was therefore conducted on the basis that the city had done negligently what it was authorized to do by statute and it seems obvious that the negligence, if any, must be found in

(i) conducting the sewer cleaning operation by the use of water from a hydrant;

(ii) failure to warn;

(iii) stirring up the sediment in the pipes; and

(iv) possibly allowing sediment to collect in the pipes so that it could be stirred up by an operation of this kind.

The learned Chief Justice made the following findings of negligence:

1. That the water on this occasion was not wholesome or ordinarily pure and was unfit for ordinary domestic purposes or ordinary human consumption.

2. That the city was negligent

(a) in turning on the hydrant in the vicinity of the plaintiff's premises when it knew or ought to have known that the sediment was likely to be stirred up and delivered to the plaintiff's premises;

(b) in failing to take steps to remove the sediment from its main or to warn the plaintiff in advance that the means to be used by the city were liable to result in the delivery to the plaintiff of water containing the sediment and the rust.

The Court of Appeal founded its judgment on two grounds. It said in effect that the damage was done by the failure of the filter system and that in opening the hydrant for sewer flushing purposes the city was following ordinary routine practice, which could not involve it in liability for an accident of this kind.

The plaintiff was conducting a very sensitive operation and had at all times to filter the water in order to exclude pieces of sediment larger than 25 microns. The evidence furnished no explanation of the breakdown in the filter system. In the past, when a situation of this kind had arisen, the filter system had done the work for which it was intended by stopping the larger particles and eventually clogging up and obstructing the flow of water. The Court of Appeal found that everybody knew that there would be occasionally excessive amounts of sediment in the water and that there was nothing in the city's experience from which it ought to have foreseen that the flushing of the sewer from the hydrant in question would be likely to stir up more silt than on other occasions when the use of hydrants had caused temporary departures from ordinary standards of purity, with which departures the consumers were familiar.

This finding is linked to the filtration problem within the appellant's plant. This kind of disturbance does no harm to the ordinary consumer. He can see the water coming through the tap. He lets the tap run until the water comes clear. He does not drink or use turbid water. If he did it would not be harmful to health but might be unpleasant to taste. But a consumer of extraordinary sensitivity, such as one who is using water for processing colour films, must at all times filter the water. He cannot use it without doing this. If, therefore, his filtration system breaks down through no fault of the city, he must assume the special loss.

It seems to me clear that the Court of Appeal has declined to accept the findings of negligence made by the learned trial judge and I think it was right in so doing. The use of the hydrant for sewer flushing purposes was an ordinary everyday procedure. How else is it possible to flush sewers? The use of this procedure, in itself, cannot be negligence. Nor do I think it can be negligence even if it is considered in relation to the presence of silt and

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rust in the underground pipes. The city had been using this procedure for two days before there was any complaint and there is no evidence to suggest that it should have known that the use of the hydrant would stir up more silt than it had done on other occasions.

There was no reason for the city to warn anyone of a simple operation of this kind. What kind of warning could be given? Should it be a warning that a hydrant is going to be opened to flush a sewer and that it may stir up some rust and sediment? It had not done this on the previous two days. Over what area should such a notice be given? This hydrant was 1,250 feet away from this particular consumer. To impose on the city the duty of notice in circumstances such as these is to require a standard of perfection. Hydrants have to be opened repeatedly not only for this purpose but for street cleaning purposes and, in emergencies, for fire purposes. There is no evidence that the hydrant was opened in a careless manner. On the contrary, the evidence is that the hydrant was open to a thirty pounds pressure which would deliver no more water than the plaintiff itself was consuming in its own operation.

Even if it were foreseeable that the use of the hydrant would result in the delivery to some consumers of turbid water, this in itself amounts to nothing. Everybody is familiar with turbid water and knows what to do with it. Although the waterworks officials, had they thought of the matter, might have concluded that there must be people in the city engaged in the processing of films, the city should not have to pay damages because a routine operation results in the delivery of turbid water to a film processing plant. I have not the slightest doubt that the city employee, in going about his work, never thought about the effect of opening the hydrant upon water consumers of peculiar sensitivity. In my opinion, it is not negligence to fail to turn one's mind to this problem. It would be impossible to do anything with a waterworks system if the city had to consider these minutiae, in relation to routine operations. Those who have particular requirements, and in this case it was a particular requirement over and above water of ordinary standards, must deal with the problem as part of their ordinary operating procedure.

It was not negligence to fail to clean out the sediment and rust in the pipes. It was not shown that Vancouver had more of this than any other municipality. It was admitted that at certain times of the year there was apt to be more sediment in the water than at other times. It was also shown that there was more sediment in the water before a certain dam was constructed in the area where the water is collected. This dam acted as a settling basin. But the presence of sediment and rust in cast iron pipes is an everyday matter in the operation of a waterworks system and to say that the city must periodically flush the pipes to remove the sediment and rust so that this particular kind of consumer will not be affected is again to impose too high a duty on a municipal waterworks system.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.*

*Solicitor for the defendant, respondent: B. E. Emerson, Vancouver.*