

CANADA / JUDGMENT

Milward v. Cache Creek (Village)

2024 BCSC 352

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Supreme Court of British Columbia

DECIDED

12 March 2024

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2024 BCSC 352 Milward v. Cache Creek (Village)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Milward v. Cache Creek (Village),

2024 BCSC 352

Date: 20240312

Docket: S52179

Registry: Kamloops

Between:

Charlene Lynn Milward

Plaintiff

And

Village of Cache Creek

Defendant

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

R.M. Schubert

Counsel for the Defendant:

D. Buchanan

Place and Date of Trial/Hearing:

Kamloops, B.C.

January 16-18, 2024

Place and Date of Judgment:

Kamloops, B.C.

March 12, 2024

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Introduction

[1] On May 23, 2015, during a period of severe rainfall (the "Storm"), water, mud and debris flowed down Lopez Creek in the Village of Cache Creek ("Cache Creek"), backed up at a culvert crossing Stage Road (the "Culvert") and flooded onto Charlene Milward's property (the "Flood"). The Flood caused extensive damage to Ms. Milward's home and personal property.

[2] Ms. Milward is the plaintiff in this action. She brings the within application seeking judgment in her favour pursuant to Rule 9-7 of the Supreme Court Civil Rules, the Court's summary trial rule. Ms. Milward seeks damages resulting from the flood, including damages arising from the damage to her home and personal property, mental distress and income loss.

- [3] Cache Creek is the defendant in the action and cross-applies for dismissal of Ms. Milward's claim.

Suitability for Summary Trial

- [4] Both parties agree that this matter is suitable for determination by way of summary trial. In addition to the affidavit evidence filed by Ms. Milward and Cache Creek and read-in examination for discovery evidence, both parties filed expert evidence. The experts were cross-examined before this Court. I am satisfied, on the whole of the evidence, that I am able to find the facts necessary to decide the relevant issues of fact and law and that it would not be unjust to decide the issues on the parties' applications.

Background

- [5] The Culvert crosses Stage Road at the intersection of Lopez Creek. The Culvert is 1200 millimetres ("mm") in diameter and has been in place since the 1960s. At the time of the flood, the Culvert and Stage Road were owned by Cache Creek.
- [6] Lopez Creek runs from the surrounding hillsides, through private land adjacent to Ms. Milward's property and crosses underneath Stage Road through the Culvert. It is an ephemeral creek--meaning it only carries water periodically, during periods of heavy rain or a freshet--and drains a catchment area of approximately ten square kilometers.
- [7] Starting in 2001, Cache Creek started planning for an upgrade project along Stage Road, which involved road resurfacing, upgrading storm drains along the roadside and installing new sidewalks (the "Upgrade Project"). The Upgrade Project was designed by Stantec Consulting, an engineering firm ("Stantec").
- [8] In January 2003, prior to the work commencing on Stage Road, a Cache Creek councillor inquired as to the condition of culverts beneath Stage Road. Martin Dalsin, Cache Creek's Chief Administrative Officer at the time, requested that Stantec provide an assessment of culverts crossing under Stage Road.
- [9] On May 3, 2003, Stantec advised Mr. Dalsin by letter (the "Stantec Letter") that the Culvert was in good condition and had the capacity to handle peak water flow of 3.9 cubic metres ("m³") per second, which the letter indicates is approximately equivalent to the volume expected in a one in ten-year[1], two-hour storm. In addition, they advised that two 1500 mm culverts (the "Stantec Culverts") would be required to provide peak water flow capacity of 10.2 m³ per second, the volume of water expected during what Stantec considered to be the worst-case scenario storm--a one in 200-year, two-hour storm. The Stantec Letter did not specify what storm risk that Cache Creek should consider. Nor is it clear from the Stantec Letter whether Stantec was recommending that the Stantec Culverts be installed as part of the Upgrade Project.

- [10] After Mr. Dalsin conducted some further informal investigation into the history of waterflow in Lopez Creek, Cache Creek decided not to install the Stantec Culverts. This was because there was no history of flooding at this location or history of waterflow within Lopez Creek, the cost of upgrading the Culvert (estimated at \$50,000) was too high, and revising the Upgrade Project could result in project delays. The Upgrade Project was completed in or around 2005.
- [11] Ms. Milward's home, which she purchased in 2012, is located west of the intersection of Stage Road and Lopez Creek. On the day of the Storm, Ms. Milward was not at home and only returned home the day after, by which time she had learned that her property had been seriously damaged by the Flood.
- [12] The parties did not file any evidence from witnesses who may have observed water flowing down Lopez Creek, backing up at the Culvert and then flooding on to Ms. Milward's property. In addition, neither party were able to provide measurements of the volume of water, sediment and debris that flowed down Lopez Creek on the day of the Storm. Estimates of peak "clear water"[2] flow and the capacity of the Culvert and larger culverts to handle this flow have been provided by experts retained by each of the parties. This evidence will be reviewed later in these reasons.
- [13] It is not disputed that the Culvert was overwhelmed by water and debris during the Storm. This resulted in water and sediment escaping the Lopez Creek channel and entering and damaging Ms. Milward's property.
- [14] Although not submitted as an expert report in this proceeding, Cache Creek tendered a report prepared by McElhanney Consulting Services Ltd. (the "McElhanney Report"), which set out some observations with respect to the condition of Lopez Creek and Culvert before and after the Storm. The report writer described the pre-Storm condition of Lopez Creek as a one to two-metre-wide grassy creek bed which was normally dry. The report writer stated that, during the Storm, a six-metre-wide and one to two-metre-deep channel was carved into the sand/gravel subgrades of the creek bed. Finally, the report writer stated that, after the Storm, the Culvert was completely filled with sediment and that sediment damaged the pipe inlet. A photograph taken in 2014 showed that the Culvert was not blocked, although some rock and sediment is visible.
- [15] The observations in the McElhanney Report are consistent with the photographic evidence introduced during this hearing and with observations set out in reports completed by other consultants--Streamworks and Westrek. From all of the evidence, it is clear that on the day of the Storm, water transported a significant volume of sediment, including large rocks, down Lopez Creek. The sediment filled in the gully north of Stage Road and eventually blocked the Culvert.

The Theories of the Plaintiff and Defendant

- [16] Ms. Milward contends, as the principle legal basis for her claim, that Cache Creek was negligent in failing to replace the Culvert with a larger culvert or culverts capable of conveying larger quantities of water and sediment at the time it completed the Upgrade Project. In particular, Ms. Milward submits that Cache Creek failed to follow Stantec's advice to install the Stantec Culverts, or failed to install even larger culverts, when it completed the Upgrade Project in or about 2005.
- [17] In the alternative, Ms. Milward contends that Cache Creek is liable in nuisance for allowing water and debris to be diverted from Lopez Creek onto her property.
- [18] Although Ms. Milward plead in her notice of civil claim that Cache Creek is also liable as an "occupier" of the land on which the Culvert was installed, she abandoned this argument in the hearing before me. She also abandoned her argument that Cache Creek is liable for making a non-natural use of land pursuant to the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330.
- [19] Cache Creek contends that they are not liable in negligence for several reasons. First, it contends that its decision not to upgrade the culvert and install the Stantec Culverts is a core policy decision that immunizes it from a finding of negligence. Second, it contends that there is no evidence that Cache Creek breached the requisite standard of care in deciding not to replace the Culvert in 2005. Finally, it says that Ms. Milward has not proven that any breach of the requisite standard of care caused the flood to occur. In particular, it contends that even if it had replaced the Culvert with the Stantec Culverts, the Storm was so severe that the sediment that washed down Lopez Creek would have nonetheless blocked the Culvert and caused the Flood. In summary, Cache Creek says that Ms. Milward has not proven causation in negligence or nuisance.
- [20] In my view, determining causation is dispositive of the action. The question is whether Ms. Milward has proven that Cache Creek's decision not to replace the Culvert with the Stantec Culverts or a larger culvert caused the Flood.

Relevant Legal Principles

Causation

- [21] In *Jorgensen v. Kamloops (City)*, 2020 BCSC 864, a flood case, Justice Norrell set out a helpful summary of the legal authorities dealing with causation in negligence and nuisance. In *Jorgensen*, the plaintiff alleged that the defendant's installation of a French drain in lands above their property affected the natural flow of water above the plaintiff's property and caused a flood. The plaintiffs advanced claims in negligence, nuisance and pursuant to the rule in *Rylands v. Fletcher*.

- [22] Justice Norrell set out that causation is an element that must be proven for each cause of action, including negligence and nuisance: para. 78, citing *Blatz v. Impact Energy Inc.*, 2009 ABQB 506 at para. 5-9, *aff'd* 2011 ABCA 92.
- [23] Justice Norell articulated the test for causation, as confirmed by the Supreme Court of Canada, as the "but for test", under which a plaintiff must prove that but for the alleged tortious event, they would not have suffered the damages alleged: *Jorgensen* at para. 79, citing *Clements v. Clements*, 2012 SCC 32 at paras. 8-11.
- [24] Justice Norrell referred to Justice G.P. Weatherill's decision in *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581, *rev'd* in part on other grounds 2020 BCCA 378 [Waterway], another flooding case, in which he described the test for causation in this way at para. 383: "even if [the defendants] did what the plaintiffs say they should have done, would it have made any difference?": para. 79.
- [25] As well, Justice Norrell confirmed, from her review of the case law, that but for causation does not require scientific certainty and inferences of causation can be drawn on the basis of common sense: para. 80. The trier of fact can consider the relative positions of the parties to adduce evidence on causation; however, the burden remains on the plaintiff to prove causation throughout: para. 80.

Negligence

- [26] Justice G.P. Weatherill summarized the well-known elements of negligence at para. 193 of *Waterway*, noting that a plaintiff must establish all of the following:
- a) the defendant owed the plaintiff a duty of care;
 - b) the defendant's behaviour breached the requisite standard of care;
 - c) the plaintiff suffered damage; and
 - d) the damage was caused, in fact and in law, by the defendant's breach of that standard.

Nuisance

- [27] Nuisance is an interference with a plaintiff's use or enjoyment of land that is both substantial and unreasonable: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para. 19. The focus is on the harm done rather than the conduct of the defendant: *Antrim* at para. 28.
- [28] In the context of nuisance related to a flood, Justice Norrell wrote:
- [85] . an uphill property owner is generally not liable in nuisance for water naturally flowing from their property. To be liable in nuisance, generally an uphill property owner must take positive steps that cause a change in the direction, volume, or velocity of the natural flow of water that interferes with another party's property: *Trans Mountain Pipeline Co. v. Nicola Valley Sawmills Ltd.* (1975), 52 D.L.R. (3d) 279 at 299-300 (B.C.S.C.) [Trans Mountain];

Suncourt at para. 90; Middelkamp v. McMath, [1990] B.C.W.L.D. 833 (S.C.) [Middelkamp]; and Kraps v. Paradise Canyon Holdings Ltd., 1998 CarswellBC 703, [1998] B.C.J. No. 709 at para. 15 (B.C.S.C.). For example, in Trans Mountain and Middelkamp, the courts describe situations involving a property owner diverting water onto a neighbour's property, changing the course of the water flow, negatively altering the ability of the ground to absorb water, or channelling the water in such a way so as to increase the rate of the water flow.

- [86] Although the focus in nuisance is not on the defendants' negligence or fault, the plaintiffs must still prove that the defendants' [action] caused the unreasonable interference leading to the damages: Blatz at para. 7; Murray v. Langley (Township), 2010 BCSC 102 at para. 36; Nelson v. British Columbia (Environment), 2020 BCSC 479 at para. 267.

[Square bracketed word added.]

- [29] Causation is a pre-requisite to a finding of nuisance; the onus of proof that the defendant caused an unreasonable interference with the use and enjoyment of the plaintiff's land lies with the plaintiff: Murray v. Langley (Township), 2010 BCSC 102 at para. 36. Once a plaintiff proves causation, the burden shifts to the defendant to establish that the use of the land was reasonable: para. 36.

Analysis

- [30] With respect to Ms. Milward's claim in negligence, in addition to the other elements of a negligence claim, she must establish that if Cache Creek had installed larger culverts during the Upgrade Project, the Storm would not have overwhelmed the Culvert and resulted in the Flood and damage to her property. In my view, Ms. Milward must prove the same causation as for negligence in respect of her claim in nuisance.
- [31] A claim in nuisance cannot be grounded on the basis that Cache Creek created a diversion by installing Stage Road and the Culvert in the 1960's and no such pleading is included in Ms. Milward's claim. There is no evidence that Cache Creek either constructed or installed this infrastructure.
- [32] The plaintiff acknowledges the same. Her theory of her nuisance claim is that Cache Creek knew about the inadequate state of the Culvert at all material times, and that, by receiving professional advice that the Culvert was not of adequate capacity, Cache Creek was responsible for the nuisance it created during the flood. She says this is the case even though Cache Creek was not responsible for construction of Stage Road or the Culvert.
- [33] Ms. Milward relies on Huang v. Fraser Hillary's Ltd., 2017 ONSC 1500, aff'd 2018 ONCA 527, for the proposition that liability for a nuisance created by a previous owner can be "predicated on actual or constructive knowledge of the hazardous condition, and the occupiers' lack of reasonable care in responding to it": para. 146. However, as the court went on to find in Huang, there nonetheless must be a causal link between a party's permitting of a nuisance they did not create and the damage caused: paras. 147-148. In Huang, the court

declined to hold a defendant liable in nuisance because the plaintiff failed to demonstrate that the defendant's inaction since becoming aware of contamination on his property caused any of the substantial interference with the plaintiff's properties: para. 155. I do not find that the reasons in Huang assist Ms. Milward.

- [34] Ms. Milward must show that Cache Creek took positive steps or, in this case failed to take positive steps, by replacing the Culvert that caused a change in the direction, volume, or velocity of the natural flow of water: Jorgensen at para. 85, citing Trans Mountain Pipeline Co. v. Nicola Valley Sawmills Ltd. (1975), 62 D.L.R. (3d) 279 at 299-300, 1975 CanLII 1001 (B.C.S.C.).
- [35] In support of her position on causation, Ms. Milward relies exclusively on the expert report prepared by Brian LaCas. Mr. LaCas was qualified to provide opinion evidence as a hydrotechnical engineer. Cache Creek relied on the expert report prepared by Jamie Stirling. Mr. Stirling was qualified to provide opinion evidence as a geoscientist. Both Mr. LaCas and Mr. Stirling have expertise in calculating rainfall, peak stream flows and culvert design.

Expert Opinion of Brian LaCas

- [36] In his report, Mr. LaCas first noted that, as a result of a lack of necessary data, he could not estimate the amount of rainfall that fell into the catchment area feeding Lopez Creek during the Storm.
- [37] Mr. LaCas provided an opinion with respect to whether the Culvert was designed in accordance with standards applicable to a qualified engineer exercising reasonable skill when the Upgrade Project was completed or as at the date of the Flood. He calculated that the Culvert had the capacity to carry 1.8 m³ of clear water per second, which was sufficient to handle water volumes in a one in ten-year flood. Mr. LaCas, relying on guidelines set out in the design guide for culverts under highways created by the BC Ministry of Transportation and Highways in 2001, opined that Cache Creek should have installed a larger culvert capable of handling a one in 200-year flood.
- [38] Mr. LaCas also provided an opinion on whether the Stantec Culverts were designed in accordance with standards applicable to a qualified engineer exercising reasonable skill as at the date the Upgrade Project was completed or the date of the Flood. In his opinion, the Stantec Culverts were not designed to the appropriate standard because they would only have been able to handle up to 6.8 m³ of clear water per second, being the estimated volume of clear water that could potentially flow down Lopez Creek once in a 50-year return period.
- [39] Despite stating earlier in his report that he was unable to estimate rainfall in the Lopez Creek watershed on the day of the flood, Mr. LaCas opined that the peak clear water flow in Lopez Creek was of 9.1 m³ per second during the Storm. In coming to this conclusion, he relied on weather radar data to estimate rainfall and utilized a hydrological model which accounted for watershed characteristics. Mr. LaCas also estimated, relying on gauged data

for other watersheds (as no such data existed for Lopez Creek), that the peak water flow at Lopez Creek during a one in 200-year flood would be 13.3 m³ per second.

- [40] Mr. LaCas further opined that if Cache Creek had installed the Stantec Culverts, they still would not have had the ability to convey the peak water flow in Lopez Creek on the day of the Flood. This was premised on his estimate of peak clear water flow of 9.1 m³ per second and his opinion that the surface water elevation at the location of the culverts' inlets would have caused sedimentation, with a likelihood that they would become blocked or partially blocked. He indicated that he was not aware of a sediment concentration analysis of the floodwaters carried out on the day of the Flood. That is, he did not know the extent to which sediment may have increased the volume of material flowing down Lopez Creek.
- [41] Later in his report, Mr. LaCas stated that if the Stantec Culverts had been installed, that based on a clear water flood (that is, not taking account additional volume from debris, sediment etc.) these culverts would have had enough capacity to prevent an overflow over Stage Road and onto Ms. Milward's property.
- [42] Finally, Mr. LaCas concluded that an "adequately sized" concrete box culvert could have been installed to mitigate water and debris that flowed over and onto Ms. Milward's property on May 23, 2015. He did not explain what size concrete box culvert would be required or whether the Flood would have been avoided if such a culvert was installed.
- [43] During his cross-examination at trial, Mr. LaCas admitted that to estimate peak clear water flow at Lopez Creek on the day of the Flood, it is first necessary to determine rainfall. As noted, he indicated in his report his inability to do so. Mr. LaCas testified that he used the midpoint of the range for rainfall in the Lopez Creek area as indicated on radar data to estimate rainfall. He admitted that because of this, the actual rainfall could have been higher or lower than his estimate of 68 mm over two hours. He also admitted that the radar stations that provided the data he utilized--located in Abbotsford and Vernon--were some distance away and this also impacted the reliability of his rainfall estimate. Finally, Mr. LaCas acknowledged that the watersheds he relied upon in modelling peak clear water flow at Lopez Creek during the Flood were significantly different in size, water flow frequency and peak flow.
- [44] Mr. LaCas similarly agreed during his cross-examination that it was not possible to determine the actual peak water flow at Lopez Creek on the day of the Flood without knowing the quantity of sediment in the floodwaters. He testified that sediment was deposited in front of the Culvert and that the actual peak flow during the flood would have been higher than the amount he estimated. However, he was unable to say by how much.
- [45] With respect to his opinion that installation of the Stantec Culverts would have prevented water from flooding onto Ms. Milward's property, Mr. LaCas agreed during cross-examination that sedimentation may have resulted in a dam effect during the Flood which may have caused water to flow over Stage Road (and I assume onto Ms. Milward's property).

- [46] Finally, Mr. LaCas agreed during cross-examination, in summary, that the one in 200-year standard for culvert design--that he described as a standard of good engineering design--was not a standard per say, but was widely-accepted by engineers.

Expert Opinion of Jamie Stirling

- [47] Mr. Stirling disagreed with Mr. LaCas' opinion regarding the return period that a reasonable engineer should have considered in deciding what size culvert would be appropriate for the crossing at Lopez Creek and Stage Road. In Mr. Stirling's opinion, Stage Road is classified as a "collector road" and it would have been appropriate to apply a 25 to 50-year return period. Mr. Stirling applied the standard set out in the Roads and Transportation Association of Canada's Drainage Manual Volumes 1 and 2 (1982), which he says would have been commonly available in 2003. However, Mr. Stirling was unsure whether Cache Creek would have been subject to this standard in 2003 by way of municipal ordinance.
- [48] As stated earlier, Mr. LaCas opined that a 200-year return period was commonly applied. Despite their differences of opinion, Mr. Stirling and Mr. LaCas agree that the Culvert was not sufficient to convey the flow of clear water expected in a one in 25-year storm.
- [49] Mr. Stirling estimated that the peak clear water flow at the time of the Flood was between 13.1 and 20.7 m³ per second. He states in his report that this estimate is rough and based on limited data. In his opinion, based on return periods calculated for nearby Maclean Lake, this flow is the range of a 100 to 200-year event. He estimated that to accommodate this clear water flow, a culvert of between 2740 mm and 3360 mm in diameter would be required. In his opinion, the two 1500 mm culverts described in the Stantec Letter would not have been sufficient to carry the potential flow, as it is likely that one pipe would become blocked with sediment or debris.
- [50] Mr. Stirling was unable to say if a larger culvert would have prevented the flood. He stated near the conclusion of his report:

The live video footage recorded during the May 23, 2015 Storm, and the various documentation following the Storm show significant sediment deposition immediately upstream of the Culvert. However, the amount of sediment deposition is itself a function of the small size of the Culvert and the fact that a still water pond was created upstream of Stage Road. The ponded creek had no ability to move sediment and that is at least partially why is [sic] was deposited in such large volumes. It is possible that if a larger culvert had been present, there would still have been too much sediment, and some level of erosion and flooding would have still occurred. However, that is conjecture and not fact.

The only thing that can be said with certainty is that a much larger culvert, say of 2360 mm diameter, would have been more able to safely convey the peak flow of May 23, 2015. However there is no guarantee that damage to property would have been avoided entirely.

It is important to understand that I don't know that a larger culvert would have safely conveyed the Storm. What I am offering here is my professional opinion based on knowledge and experience but there is very little in terms of facts in this case, specifically related to the amount of flow and more importantly sediment that was transported during the Storm at this site.

[underline added]

Conclusions

- [51] The question to be answered here, to paraphrase the words of Justice G.P. Weatherill in *Waterway*, is, even if Cache Creek had installed the Stantec Culverts, or an even larger culvert, as Ms. Milward says they should have done, would it have made any difference? I am unable to say if it would not have.
- [52] The amount of rainfall in the Lopez Creek watershed on the day of the Storm is a key fact in this case. The theory of Ms. Milward's case is that the Stantec Culverts or a larger culvert would have prevented the Flood from flowing onto her property. Unfortunately, the opinion evidence estimating the amount of rainfall is inconclusive. As a result of a lack of data, both Mr. LaCas and Mr. Stirling were unable to provide this Court with a compelling opinion as to the amount of rain that fell on the Lopez Creek watershed on the day of the Flood or the resulting peak water flow.
- [53] Mr. LaCas' estimate of peak clear water flow of 9.1 m³ per second has, in my view, not been proven. During his cross-examination Mr. LaCas was forthcoming in admitting that his estimate of 63 mm of rain over two hours may be either high or low, and that the accuracy of this estimate in turn impacted on his estimate of peak clear water flow. As well, he admitted that the volume of water flowing down Lopez Creek would have to be adjusted upwards to reflect the sediment that he agreed was present in the water during the Flood.
- [54] As a result of my uncertainty concerning the validity of the assumptions underlying Mr. LaCas' opinion, I am unable to give any weight to Mr. LaCas' opinion that if Cache Creek had installed larger culverts, the Flood would not have occurred.
- [55] It is clear from the photographs and factual observations of engineers tendered at trial that during the Storm, a large amount of sediment and rock were scoured from Lopez Creek and at some point, blocked the Culvert. It has not been shown whether this would not have occurred if a larger culvert had been installed. This finding is supported by Mr. Stirling's opinion that he was unable to say whether a larger culvert would have safely conveyed the floodwaters on the day of the Flood.
- [56] I conclude that Ms. Milward has not proven, as is her burden, that Cache Creek's decision not to install larger culverts at the intersection of Lopez Creek and Stage Road caused the Flood. As a result, it is not necessary for me to address the other elements of her claim in negligence, including an alleged breach of the requisite standard of care, or the other elements of nuisance.

[57] Ms. Milward's action against Cache Creek is dismissed.

"Mayer J."

[1] This metric describes a flood which could occur in a ten-year period. This period is referred to by the experts as a "return period". The longer the return period, the greater the likelihood of a larger volume flood.

[2] Clear water describes the volume of water not accounting for sediment and other debris.

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Prepared on 29 October 2026 · Esheria