
CANADA / JUDGMENT

Mineault v. Kamloops (City)

2017 BCSC 316

COURT

Supreme Court of British Columbia

DECIDED

27 February 2017

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2017 BCSC 316 Mineault v. Kamloops (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mineault v. Kamloops (City),

2017 BCSC 316

Date: 20170227

Docket: 50773

Registry: Kamloops

Between:

Ruth Mineault

Plaintiff

And

City of Kamloops, Jacqueline Balaski and Derek Learmonth

Defendants

And

Jacqueline Balaski, Derek Learmonth and The City of Kamloops

Third Parties

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Plaintiff:

L.H. Coulter

Counsel for the Defendants and Third Parties, Jacqueline Balaski and Derek Learmonth:

J.C. MacDonald

No one appeared for the Defendant and Third Party, City of Kamloops

Place and Date of Trial:

Kamloops, B.C.

October 13, 2016

Place and Date of Judgment:

Kamloops, B.C.

February 27, 2017

INTRODUCTION

- [1] This is a summary trial initiated by the defendants, Jacqueline Balaski and Derek Learmonth (the "defendants").
- [2] The parties once owned adjacent residential properties in Kamloops, British Columbia. The plaintiff seeks damages against the defendants, alleging their lawn irrigation system leaked water onto her property, compromising the foundation beneath her driveway to the extent it needs to be replaced. She says liability is grounded either on the basis of the rule in *Rylands v. Fletcher* (1868), LR 3 HL 330, or in negligence. Her claim against the defendant, City of Kamloops, is no longer advanced.
- [3] Both parties agree this matter is suitable for determination pursuant to Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Civil Rules], as do I. This case is well suited for summary trial. The Affidavits, Examination for Discovery transcripts and admissions tendered are all sufficient for the Court to find the facts necessary to decide the issues of fact or law. Given the discrete issues for my determination and the amounts at stake, a summary determination is just in all of the circumstances.

FACTS

- [4] Most of the facts are not in dispute. Where they are, I will identify them and resolve the dispute.

- [5] The plaintiff owns property at 872 Linthorpe Road in Kamloops (the "plaintiff's property"). From August 2010 until May 2015, the defendants owned property at 1640 Hillcrest Avenue in Kamloops (the "defendants' property"). The plaintiff's property sits below the defendants' property. Their mutual property line was, at the relevant times, marked by a row of cedar hedges located on the defendants' property. The controversy between the parties revolves around a leak from the irrigation system watering the hedges.
- [6] When the defendants purchased their property in August 2010, the property came with an installed lawn irrigation system. It consisted of five separate zones. Four of the zones involved sprinklers and the fifth zone, watering the hedges, used a dripline. Upon purchase, the defendants tested the lawn irrigation system and noticed no issues with its operation. From that point until they sold the property in 2015, the defendant, Mr. Learmonth, received assistance from a family member and/or a friend each fall to "blow out" the irrigation lines. This is a process that uses an air compressor to remove residual water from the lines for the winter season. The aim is to prevent water from freezing in the lines over the winter which may cause them to crack.
- [7] Brett York, an irrigation maintenance worker, has provided maintenance services to irrigation systems for hundreds of people in Kamloops and blown out irrigation systems thousands of times. He deposed that when blowing out irrigation lines, it is essential to use the correct air pressure. He explained that too much pressure will cause cracks to form in the sprinkler heads, valves or irrigation lines. Too little pressure will leave water in the system to freeze and expand over the winter, with the same potential results.
- [8] In mid-August 2013, Dennis Forrester, the plaintiff's brother-in-law, noticed water running from the driveway of the plaintiff's property onto the street. The water was running in a steady flow from a black drainage pipe running parallel to the driveway and from the driveway itself. The pipe lies a few feet to the left of the plaintiff's driveway (when facing the house) and drains into Linthorpe Road.
- [9] Upon this discovery, Mr. Forrester informed the plaintiff, who was out of town at the time for medical treatment. The plaintiff contacted a lawn irrigation company, whose owner determined that her property was not the source of the running water.
- [10] The plaintiff then contacted the City of Kamloops (the "City"), which sent workers to investigate. As part of their investigation, they cut a roughly four foot by four foot hole in the driveway of the plaintiff's property to access the service box and check the curb-stop. The location of service boxes in areas difficult to access, including beneath concrete driveways, is a common occurrence.
- [11] Mike Aldrich, an experienced City utilities maintenance crew leader who cut the hole in the plaintiff's driveway, deposed that the weather in Kamloops had been quite warm and dry in the weeks leading up to and including the time he worked on the plaintiff's property. When he attended the plaintiff's property on or about August 14, 2013, he observed water running from the plaintiff's driveway into Linthorpe Road. After he cut the hole in the plaintiff's

driveway, his next step was to vacuum the soil to enable access to the service box. While doing this, he observed something unusual. He deposed that ordinarily, the exposed soil under a driveway is hard and able to hold its position. However, in this case, the exposed soil was highly saturated with water such that it began sloughing in from above.

- [12] After vacuuming out the saturated soil to enable access to the service box under the hole in the driveway, Mr. Aldrich, Mr. Forrester and Brandon Bullock, another City employee working in leak detection, observed that the driveway was undermined. They observed a large cavern extending across most of the driveway's left side up to the garage footings. In other words, not only was the quadrant of the driveway containing the freshly cut hole undermined, the undermining was prevalent in the other quadrants under the driveway as well.
- [13] Mr. Aldrich shut off the water running through both the curb-stop and the main line and observed that water continued to leak into the hole in the driveway and onto the street. In his opinion, the water was coming from somewhere other than the curb-stop and the main line. Mr. Bullock observed that the majority of the water leaking in from around the curb-stop was coming from the direction of the defendants' property.
- [14] City employees tested the plaintiff's service line and concluded it was not leaking. They then expanded their investigation to neighbouring properties, including the defendants'.
- [15] With their permission, Mr. Bullock investigated the defendants' backyard. He found an irrigation system, including a drip irrigation line watering the cedar hedges bordering the plaintiff's property. He found the ground near the hedges was heavily saturated by water. He found it to be soft, wet and spongy, much more so than other parts of the defendants' backyard. He called Mr. Aldrich. Mr. Aldrich made the same observations about the ground in the area of the hedges, noting that the saturated area was about ten feet by ten feet in size.
- [16] The saturation of the ground on the defendants' property is a source of controversy. Mr. Learmonth testified in his Examination for Discovery that when he examined the area in question near his cedar hedges, he observed only a small amount of water, as "if you were to pour a bottle of water on gravel, and it looked like there was water on it." He denied there was any pooling of water, any saturation, any mud, or that the ground was spongy.
- [17] In this area of the evidence, I accept the evidence of Mr. Bullock and Mr. Aldrich over that of Mr. Learmonth. Mr. Bullock and Mr. Aldrich are independent witnesses whose job it was to investigate potential sources of the water running from the plaintiff's driveway. They are disinterested persons who were paying particular attention for signs of water. They have no reason to exaggerate their evidence. Their evidence is consistent with one another. I find their evidence to be credible and reliable and accept it over that of Mr. Learmonth.

- [18] After observing the ten foot by ten foot saturated area near the defendants' hedges, Mr. Aldrich also noticed that an irrigation pipe extending from the defendants' home was vibrating, even though the irrigation system was not running. In his experience, this usually indicates the presence of a leak. Mr. Learmonth was informed of the leak. The water to the pipe was shut off.
- [19] Mr. Learmonth first became aware of the leak in his irrigation system when informed by the City employees. Mr. Learmonth determined that the leak stemmed from a valve that controlled the dripline to the cedar hedges. He subsequently replaced that broken valve.
- [20] The day after the defendants' irrigation line was shut off, Mr. Forrester noticed that the flow of water from the plaintiff's property onto Linthorpe Road had slowed. After another two or three days, the flow of water stopped completely.
- [21] The City employees did not locate another possible source of the water seepage through their investigation.
- [22] Mr. York deposed that a crucial part of maintaining an irrigation system is to check it for leaks when first using it each season. He deposed that it is especially important to check zones with soaker or driplines for leaks because it is harder to observe such leaks from a casual glance. He also deposed that pressure from a compressor is more likely to crack an irrigation system if a person only blows out one zone of the irrigation system at a time.
- [23] Mr. Learmonth had the assistance of his wife's grandfather, Peter Balaski, and/or Peter Balaski's friend, Dave Teichroeb, in blowing the water out of his irrigation lines each fall. The fall of 2012 was the only year that Mr. Teichroeb did not provide assistance. Mr. Learmonth and Mr. Balaski blew the water out of the lines themselves that year. They blew out the lines in each zone in sequence, rather than blowing out all zones at once. They used a rented air compressor and were unaware of the pressure they used.
- [24] The defendants did not check the irrigation lines at the beginning of each watering season. Mr. Learmonth simply believed that the process to blow out the irrigation lines was successful because each spring the sprinklers worked.
- [25] In the summer of 2013, Mr. Learmonth ran zone 5, the zone containing the soaker line to the cedar hedge, for 40 minutes every other day. He and his family did not use their backyard very often - once per month at most. Other than replacing a nozzle at some point and undertaking the annual procedure each fall to blow out the irrigation system, the defendants did not otherwise maintain or inspect their lawn irrigation system.
- [26] After seeing the extent of the undermining beneath the plaintiff's driveway, City workers provided a temporary repair to the area they had excavated by filling that hole with gravel. Prudently, the workers opted not to patch the hole they created with cement, as it only would have covered up the undermined driveway, which clearly needed repair.

- [27] The plaintiff's insurance company would not pay for the cost of the repairs as it was determined the leak did not emanate from the plaintiff's property. The City would not pay for the cost of the repairs because the City waterlines were not the source of the leak. The plaintiff obtained two quotes from two repair companies in May or June of 2014. These quotes were updated in 2015.
- [28] Specifically, the plaintiff obtained a quote from Ben Pregent, of Pronto Enterprises Ltd. Mr. Pregent attended the plaintiff's property in early June of 2014. He observed that at least half of the plaintiff's driveway was undermined and determined that in order to properly repair it, he would have to demolish and remove the existing concrete of the entire driveway, excavate and rebase the supporting material beneath, pour new concrete and remove and replace the retaining wall that borders the left side of the driveway. Mr. Pregent is of the view that the driveway cannot properly be repaired without first removing the retaining wall due to its proximity to the driveway. He quoted the cost of these repairs at \$16,422.75 on June 4, 2014. Mr. Pregent updated this quote on April 29, 2015, outlining that the total cost of repairs at that time would be \$19,697.80. He deposed that the cost of materials has increased consistently between 2014 and 2016.
- [29] The plaintiff obtained a second quote from Russ Bouveur of Big Horn Excavating and Landscaping Inc. Mr. Bouveur attended the plaintiff's property in mid-June of 2014. His findings were the same as Mr. Pregent's. He determined that a substantial amount of supporting material beneath the driveway had been washed away. In order to properly repair the driveway, he would have to tear up and remove the old concrete on the entire driveway, install a new base layer, pour new concrete and remove and replace the existing retaining wall. Mr. Bouveur's 2014 quote was very similar to Mr. Pregent's - \$16,254.00. Mr. Bouveur updated this quote in April of 2015. Due to the increased cost of material, his quote was increased to \$18,732.00.
- [30] The defendants retained Thompson Valley Restoration to investigate and take photographs of the area claimed to be damaged by the plaintiff. Reg Dennill, a Project Manager at Thompson Valley Restoration, took photographs of the driveway and surrounding area, and prepared an estimate of the cost to repair the damaged driveway. His May 12, 2014 quote represents the cost to repair the quadrant of the driveway that had been cut and excavated by the City only. The estimated cost of repairing that area was said to be \$4,804.20.
- [31] Since the damage was discovered, the plaintiff has advised others not to park on any part of the driveway. She absolutely forbids people to park on the left hand side of the driveway. She does this as a result of safety concerns related to the undermining of the driveway.

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- [32] The plaintiff first argues the defendants are liable for the damage caused by the water escaping their property based on the rule in *Rylands v. Fletcher*.

The Rule

[33] This rule of strict liability stems from decisions of the English Court of the Exchequer and House of Lords in the 1860s. In this case, a land owner granted permission to the defendants, Ryland & Horrocks, to build a water reservoir on his land to supply their textile mill. The plaintiff, Fletcher, had a coal mining operation on the same land. The reservoir and the mine shafts were near each other. The water reservoir burst into an unused mine shaft, flooding Fletcher's mining operation. Negligence, nuisance and trespass, as formulated at the time, did not apply in the circumstances.

[34] For a unanimous Court, Blackburn J. stated the rule as follows at 279:

the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

[35] The House of Lords affirmed the lower court's decisions. Lord Cranworth essentially adopted the rule articulated by Blackburn J. above, a rule which distinguishes between dangerous and ordinarily safe activities. However, Lord Cairns, in a concurring decision, distinguished instead between a defendant's "natural" and "non-natural" use of land. This difference in wording "has been responsible for creating much of the subsequent debate concerning the principles' proper application": Lewis N. Klar, Q.C., *Tort Law*, 5th Ed. (Toronto: Carswell, 2012) at 645.

[36] In *Smith v. Inco Limited*, 2011 ONCA 628, the Ontario Court of Appeal described the rule and its lineage this way:

[68] The rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the defendant's property of a substance "likely to cause mischief". The exact reach of the rule and the justification for its continued existence as a basis of liability apart from negligence, private nuisance and statutory liability have been matters of controversy in some jurisdictions: see *Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.); *Burnie Port Authority v. General Jones Pty. Ltd.* (1994), 179 C.L.R. 520 (Aust. H.C.); Murphy, "The Merits of *Rylands v. Fletcher*". In Canada, *Rylands v. Fletcher* has gone largely unnoticed in appellate courts in recent years. However, in 1989 in *Tock*, the Supreme Court of Canada unanimously recognized *Rylands v. Fletcher* as continuing to provide a basis for liability distinct from liability for private nuisance or negligence.

[37] Though this rule is one of strict liability, certain defences are available, including an act of God, consent of the plaintiff, default of the plaintiff, an act of an intervening third party, and statutory authorization.

[38] While the rule has various formulations, the Ontario Court of Appeal in *Smith* at para. 71 and the British Columbia Supreme Court in *John Campbell Law Corp. v. Strata Plan 1350*, 2001 BCSC 1342 at para. 22 framed it as requiring the plaintiff to prove the following elements:

1. The defendant made a "non-natural" or "special" use of his land;
2. The defendant brought onto his land something that was likely to do mischief if it escaped;
3. The substance in question in fact escaped; and
4. Damage was caused to the plaintiff's property as a result of the escape.

[39] As these reasons will disclose, I need not go any further than the first element as I conclude the plaintiff has not proven the defendants made a "non-natural" or "special" use of their property.

Non-Natural Use

[40] In *Rickards v. Lothian*, [1913] AC 263, the House of Lords narrowed the rule in *Rylands v. Fletcher* to apply to only "non-natural" uses of land. Moulton L.J. stated at 280:

It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

[41] In *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, Justice La Forest affirmed this "definitive statement" by Moulton L.J. regarding the requirement of a "non-natural" use of land and emphasized that it is a flexible concept at 1189:

The courts have, on the basis of this qualification, interpreted the notion of non-natural use as a flexible concept that is capable of adjustment to the changing patterns of social existence.

[42] Mr. Justice Melnick, in *John Campbell Law Corp.*, adopted the following discussion of "non-natural" at para. 31:

[31] Therefore, in *Remedies in Tort* (Canada: Carswell, 1987) at 21-20, the authors have concluded that non-natural must mean: special, exceptional, unusual or out of the ordinary. They further state that the courts not only look to the object or activity in isolation, but to the place and manner in which it was maintained and its relation to its surroundings. Time, place, circumstance and purpose are also material considerations.

[43] Madam Justice Ross relied upon the above definition in *Roberts v. Canadian Pacific Railway Co.*, 2006 BCSC 1649 at para. 66.

- [44] One of the most significant changes in society since the rule in *Rylands v. Fletcher* first emerged is the "ever-increasing" regulation of land use, development and planning: *Tock* at 1189. A court must consider this modern regulatory context, along with the place, time and manner of the use of land in determining whether a use is "non-natural": *Smith* at para. 97 and *Roberts* at para. 67.
- [45] The Ontario Court of Appeal in *Smith* discussed this concept at para. 98:
- [98] The approach to non-natural user taken in *Tock* and in *Cambridge Water Co.* restricts those situations in which *Rylands v. Fletcher* applies. The non-natural use requirement of the *Rylands v. Fletcher* rule serves a similar role to the "give and take between neighbours" principle that is applied when determining whether one person's interference with another person's use and enjoyment of his property constitutes an actionable nuisance. Like the reasonable user inquiry in cases involving amenity nuisance, the non-natural user inquiry seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user. The nature and degree of the risk inherent in the use is obviously an important feature of this inquiry, but as *Tock* demonstrates, it is not the entire inquiry: see *Cambridge Water Co.* at pp. 299-300.
- [46] As the rule in *Rylands v. Fletcher* emerged in a case where water escaped from one person's property to another, it is hardly surprising that numerous cases since then have considered the rule in similar circumstances. However, plaintiffs in subsequent cases have generally had less success than Mr. Fletcher in establishing that a defendant who allows water to escape his or her property should be held strictly liable. This may reflect the fact that the use and storage of water for various purposes has evolved to be a common occurrence.
- [47] In this regard, Lord Moulton in *Rickards* held at 281-282:
- The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognized as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who install or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even when there has been no negligence.
- [48] In *Tock*, the Supreme Court of Canada found that a municipal authorities' construction and operation of a sewer system was not a "non-natural" use of the land. In so finding, Justice La Forest noted that sewer systems are "an indispensable part of the infrastructures necessary to support urban life" and are "ordinary and proper for the benefit of the community": at 1190.

- [49] In *John Campbell Law Corp.*, the plaintiff sought damages after sewage effluent backed up into its strata unit due to a blocked sewer pipe. In concluding that the defendant strata owners' use of a sewer pipe for domestic water and sewage removal did not constitute a non-natural use of their land, the court reviewed a number of earlier decisions involving the escape of water from municipal infrastructure or household systems. There was found to be a rather clear consensus in Canadian law that sewer systems in domestic water supplies were ordinary uses of land.
- [50] Similarly, in *Carmel Holdings Ltd. v. Atkins*, 1977 Carswell BC 382 (SC), Craig J. observed at para. 22:

In determining whether to apply the rule, courts have distinguished, also, between things which are inherently dangerous and things which are not inherently dangerous. If a thing which escapes from the land is inherently dangerous and harm results, then there is "strict liability" under the rule in *Rylands v. Fletcher*. If the thing which escapes the land is not inherently dangerous, there is not a liability under the rule unless there has been non-natural use. Water is not an inherently dangerous thing and if water escapes from an occupier's normal domestic water supply the rule will not apply. On the other hand, if an occupier accumulates or stores a large amount of water on his land and it escapes, this is a non-natural use and he is liable for harm [Emphasis added]

- [51] In *Guerard Furniture Co. v. Horton*, 1978 Carswell BC 631, the plaintiff leased a portion of the ground floor of a two-storey building owned by the defendant. The plaintiff operated a furniture store in the leased premises. A toilet in a washroom on the second floor of the building leaked water through the ceiling and walls and damaged the plaintiff's goods. Citing *Carmel Holdings Ltd.*, Judge MacDonald of the County Court concluded at para. 16:

I cannot find here that the water contained within and flowing through the pipes and washroom fixtures contained on the second floor of the defendants' building on July 7, 1977, was inherently dangerous, nor can I find that it constituted a non-natural or special use of the land.

- [52] The County Court in *Kinaschuk v. Day*, 1986 Carswell BC 2651 faced a situation similar to the case at bar (and in Kamloops no less). The plaintiff and defendant owned adjoining properties, with the plaintiff's property situated approximately 12 feet below the defendant's. A retaining wall existed between the two properties and the defendant had a garden which adjoined the plaintiff's lot. The defendant began to water a fruit tree one day around 8:30 a.m. He left the hose running on full and intended to turn it off before he left for work at noon, but forgot. The plaintiff came home at 3:30 p.m. and saw that the defendant's property had slid down against the retaining wall, toppling one portion of it and cracking another.
- [53] The plaintiff brought its claim for damages based on the rule in *Rylands v. Fletcher*. Citing the House of Lords decision in *Rickards*, Judge Houghton concluded at para. 6:

In my opinion the use of domestic water for irrigation of a garden in the city of Kamloops is a normal use of the property and liability will attach only if negligence is shown. This is not a case of accumulating water in large quantities which becomes dangerous in itself.

- [54] The court in *John Campbell Law Corp.* interpreted *Kinaschuk* to mean that "the ordinary use of water in private residences is natural and not inherently dangerous": para. 46.
- [55] In the case at bar, the plaintiff submits that the defendants "made a non-natural use of their land by installing an irrigation system". I do not agree. The overwhelming weight of the authorities canvassed above supports the conclusion that domestic water systems, including lawn irrigation systems, do not constitute a non-natural use of land.
- [56] The plaintiff relies specifically on *Carmel Holdings Ltd.* to suggest that the following uses are non-natural:
1. Accumulating or storing a large amount of water on a property; and
 2. Constructing an artificial work that alters the flow of water and causes damage to a neighbour.
- [57] In my view, these propositions do not assist the plaintiff because the defendants undertook neither activity.
- [58] The plaintiff also relies on *Canadian Pacific Railway Co. v. Parke*, [1899] AC UKPC 34, a decision of the Judicial Committee of the Privy Council, for the proposition that a person will be liable if they damage another person's property through irrigation, even if their conduct is not negligent.
- [59] *Parke* is distinguishable not only on its facts, but also in respect of its social context. In that 1899 case, a land owner in the Thompson River Valley diverted water from two creeks to irrigate his lands under statutory authorization. The statute also required him to carry off the surplus water from his land, which he apparently did not do. His lands were located on benches above the Thompson River. The property was approximately 800 metres from the railway line, which was closer to the river. Water saturated the soil and caused occasional landslides toward the river, damaging the railway line.
- [60] In reasons indexed at 1897 Carswell BC 90, the Full Court of British Columbia noted that the plaintiffs relied on the rule in *Rylands v. Fletcher*, but that the defendants were exercising a statutory right: para. 12. While this lower court concluded that the statutory language authorizing the water withdrawals was imperative, the Privy Council disagreed. The Privy Council did not refer to the rule in *Rylands v. Fletcher*, but framed the issue this way at para. 23:

whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility.

[61] Parke concerned the scope of the defence of statutory authority to avoid liability under the rule in *Rylands v. Fletcher*. Implicit in the decision is the notion that bringing water onto land is a non-natural use. However, it is important to remember that the concept of "non-natural" use is flexible and one that is "capable of adjustment to the changing patterns of social existence": Tock at 1189. Given the social conditions in which Parke was decided, the distinguishable facts and the more recent jurisprudence holding that the use of water in this context is a natural one, I find that Parke is not applicable to the present case.

[62] From the above authorities and analysis, I conclude that the plaintiff has failed to prove the defendants' use of a lawn irrigation system in their backyard was a non-natural use of land. According, the rule in *Rylands v. Fletcher* is not engaged and the plaintiff's claim on this basis must fail.

NEGLIGENCE

[63] The plaintiff asserts that the defendants, as neighbours, owed her a duty of care which was breached by their failure to properly maintain and inspect their irrigation system. She argues that the defendants used an improper pressure to blow out the irrigation lines in the fall of 2012 and thereafter failed to properly maintain and inspect the lines. These failures, alone or in combination, caused the leak, which caused damage by undermining her driveway.

[64] In *Agar v. Weber*, 2014 BCCA 297, Smith J.A. set out the elements of negligence at para. 29:

[29] In negligence, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54.

Duty of Care

- [65] The first question to consider in this action for negligence is whether the defendants owe the plaintiff a duty of care. This question focusses on the relationship between the parties, asking "whether this relationship is so close that one may reasonably be said to owe the other a duty to take care not to injure the other": *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 4.
- [66] The duty of care analysis begins by considering whether the relationship between the parties falls into a category which the law already recognizes as giving rise to a duty of care. If it does, then the court need not consider the two-stage analysis set out in *Cooper v. Hobart*, 2001 SCC 79 and refined in subsequent cases: *Douglas v. Kinger* (Litigation Guardian of), 2008 ONCA 452, leave to appeal refused [2008] SCCA No. 363 at paras. 13-14.
- [67] The law seems well settled that adjacent property owners owe each other a duty of care when it comes to the foreseeable risks of activities they undertake on their property. Lord Atkin, in *Donoghue v. Stevenson*, [1932] UK HL 100, famously discussed the neighbour principle, which taken more literally would support this position. More recent cases in British Columbia involving adjoining property owners and the flow of water from one property to the other supports the position that such neighbours owe each other a duty of care regarding that water.
- [68] For example, in *Orangeville Raceway Ltd. v. Adera Nurseries Ltd.*, [1995] B.C.J. No. 3061 (S.C.), the plaintiff sued an adjoining property owner in nuisance and negligence. The defendant operated a nursery business, which involved significant irrigation. It had built several ditches to divert water off its property and onto the plaintiff's property. The winter rains in Victoria also contributed to the amount of water coming off the defendant's property. Portions of the plaintiff's property had become heavily saturated with water throughout the year and were unusable. The Court found the defendant liable in nuisance and also in negligence, holding at para. 45:

the overall failure of the defendant to consider the effects of its use of its land on the plaintiff's land amounts to negligence. The defendant, because of its physical proximity to the plaintiff's land and the foreseeable risk of harm which the defendant's actions and operations created, owed a duty of care to the plaintiff. The damage to the plaintiff's land created by the water flow indicate a breach of that duty.

- [69] In *Kinaschuk*, discussed earlier in these reasons, the court addressed the duty of care issue this way at para. 8:

The first question is whether the defendant owed a duty of care to the plaintiffs. The defendant knew his garden lay above the plaintiffs' retaining wall and garden. He knew that from a few years before, water from watering his garden had run down into the plaintiffs' basement. The defendant had lived in his house many years and as he gardened, he must have been familiar with the type of soil which is described by the engineer as silt which dissolves when wet and is a

common condition of the soils in the valley. The answer to the question must be that the defendant owed a duty to his neighbour whom he might reasonably anticipate would suffer loss if water were carelessly allowed to saturate the soil in his garden above the plaintiffs' lot.

[70] In my view, the relationship between the plaintiff and the defendants in the case at bar falls into the category which the law already recognizes as giving rise to a duty of care. The defendants knew their property lay above the plaintiff's property. They knew they had an irrigation system on their property. They knew they needed to blow out the irrigation system each year to prevent damage and potential leaks. They knew, or certainly ought to know, that water flows downhill. The defendants owe a duty to their neighbours, including the plaintiff, who they might reasonably foresee would be at risk of harm if water were allowed to flow from the irrigation system.

Standard of Care and Whether it was Breached

[71] The second question in a negligence action is whether the defendants' behaviour breached the standard of care.

[72] The standard of care is not one of perfection. Rather, the standard of care must be one that would be expected of an ordinary, reasonable, and prudent person in the same circumstances. What is "reasonable" is fact specific, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which will be incurred to prevent the injury. One may also look to external indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standards: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at 28.

[73] The plaintiff alleges that the defendants breached the standard of care by failing to properly maintain and inspect their irrigation system. She argues that proper maintenance involves blowing out the lines at the conclusion of each watering season which includes using the correct pressure to blow out those lines as too much or too little pressure will result in cracks in the system causing leaks. Proper maintenance also involves regularly inspecting the system. By having a lay person, unaware of the pressure required to properly blow out the system, blow out the lines, by failing to inspect the system at the commencement of the 2013 watering season and by failing to repair degrading valves before they broke, the plaintiff says the defendants breached the standard of care owed to her.

[74] The defendants contend that the plaintiff has failed to adduce sufficient evidence that their maintenance of the irrigation system fell below the standard of care of a reasonable homeowner. They point to the fact that they tested the irrigation system when they purchased the property in 2010 and determined it was in working order. They emphasize that they blew out the lines annually and were unaware of any leak in the irrigation system until City employees informed them in August of 2013. They quickly repaired the leak once they were informed.

- [75] I agree with the plaintiff's position here. A leaky irrigation system is a foreseeable consequence of failing to properly maintain the system. While the harm must be foreseeable to the reasonable person, the defendants in this case also foresaw the harm because they endeavoured to blow out their irrigation system each fall. The gravity of the foreseeable harm is uncertain, but it was clearly enough to compel the defendants to blow out the system each year. The burden to prevent the harm would be minimal.
- [76] A prudent homeowner in the circumstances of the defendants, aware of their irrigation system and its potential to leak if not properly maintained and their location in relation to the plaintiff's property, would inspect the irrigation lines at the commencement of a watering season and periodically thereafter to assess the need for any repairs and make those repairs. A prudent homeowner in the circumstances of the defendants would also conduct regular preventative maintenance on the system, including blowing residual water out of the lines at the end of each watering season. In so doing, a prudent homeowner would ensure that he or she was fully informed on how to properly maintain the system, including how to properly blow residual water out of the lines.
- [77] The defendants breached this standard of care. Mr. Learmonth and Mr. Balaski blew out the irrigation lines in the fall of 2012 without the requisite knowledge required to do so properly. The defendants did not inspect the irrigation lines at the commencement of the 2013 watering season, or at any time prior to the discovery of the leak.

Damage

- [78] The next question to be answered is whether the plaintiff sustained damage. Although quantum is in dispute, the evidence clearly proves the plaintiff suffered damage in this case.

Causation

- [79] The fourth and final question to consider in a negligence claim is whether the defendants' breach caused the plaintiff's harm in fact and law. This requires consideration of whether the evidence establishes the defendants' breach of their duty of care in fact caused the plaintiff's damage and whether the breach also caused the plaintiff's damage in law, or whether it is too remote to warrant recovery: *Mustapha* at para. 11.
- [80] In *Clements v. Clements*, 2012 SCC 32, McLachlin C.J. set out the test for causation as follows:
- [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

- [9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074, at p. 1090, per Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311.
- [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell and Athey v. Leonati*, [1996] 3 S.C.R. 458. See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe*, [1945] HCA 31, 71 C.L.R. 637, at p. 649; *Bennett v. Minister of Community Welfare*, [1992] HCA 27, 176 C.L.R. 408, at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.
- [81] The Court in *Clements*, referencing *Snell v. Farrell*, [1990] 2 S.C.R. 311, also underscored the importance of the plaintiff establishing a substantial connection between the damage in question and the defendant's negligence. At para. 21, the Court wrote:

the usual requirement of proof of "but for" causation should not be relaxed where the result would be to permit plaintiffs to recover in the absence of evidence connecting the defendant's fault to the plaintiff's injury. Thus, Sopinka J. stated that if the injury likely was brought about by "neutral" factors, that is it would have occurred absent any negligence, the plaintiff cannot succeed. To allow recovery where the injury was the result of neutral factors would neither further the goals of compensation, fairness and deterrence, nor comport with the theory of corrective justice that underlies the law of negligence.

- [82] The plaintiff submits that the defendants' irrigation system was broken and leaking at the time water was discovered running out from her driveway onto the street in August of 2013. She says she has proven causation to the requisite standard. Specifically, she submits the evidence establishes that the leak in the defendants' irrigation line caused the damage underneath her driveway and that said leak was caused by the defendants' breach of their standard of care in maintaining and inspecting their irrigation system. In other words, but for the defendants' breach of the standard of care in maintaining and inspecting their irrigation system, the damage to her driveway would not have occurred.
- [83] The defendants submit the plaintiff has failed to prove causation. They first say the only damage proven is the damage caused by the City when they cut a hole in the plaintiff's driveway. This damage was necessitated by the location of the water shut off valve, which was installed underneath the plaintiff's driveway in contravention of municipal bylaws. They take the position that the plaintiff has failed to prove they breached the standard of care, but assert that if they did breach the standard of care, the plaintiff has failed to prove that their breach caused the leak and that the damage caused was not reasonably foreseeable by them.
- [84] I find the plaintiff has proven causation, in fact and in law, on a balance of probabilities.

- [85] First, I find the evidence establishes the excessive water that was seen to run out from the plaintiff's driveway in August of 2013 emanated from the defendants' irrigation system leak. I reach this conclusion on the basis of the totality of the evidence, which points only in this direction.
- [86] Kamloops weather had been warm and dry for weeks prior to the discovery of the water running out from the plaintiff's driveway. The defendants admit the dripline to their cedar hedge was found to have a leak at the time of this discovery. I accept the evidence of the City investigators who observed substantial saturation of a sizeable area of ground near the hedges on the defendants' property. The plaintiff's property is located immediately adjacent and downhill from this hedge. Investigation revealed no other leak or source that could potentially have caused the excessive water. The water only stopped running from under the plaintiff's driveway when the defendants turned off the water supply to the offending irrigation line. The only reasonable conclusion to be drawn is that the leak from the defendants' faulty irrigation line caused the excessive water running from the plaintiff's driveway.
- [87] Similarly, I find there is no other reasonable conclusion to draw from the evidence other than this excessive water undermined the plaintiff's driveway, as observed by the City workers. The undermining of the driveway did not occur as a result of the City workers' excavation in one quadrant. After they excavated that one quadrant, the City workers observed undermining to encompass most of the driveway. I am satisfied, on a balance of probabilities, that but for the water leak on the defendants' property, the damage suffered by the plaintiff would not have occurred.
- [88] However, this does not end the inquiry. There remains the question of whether the defendants' negligent conduct caused the damage. I have concluded that the negligent conduct in this case was the defendants' failure to properly inspect and maintain their irrigation system to the requisite standard of care. The question then is, but for this negligent conduct, would the damage have occurred?
- [89] Applying the "but for" test in a robust and common sense fashion, I am satisfied there is sufficient evidence connecting the defendants' breach of the standard of care to the harm suffered by the plaintiff to conclude the defendants' negligence caused the plaintiff's loss. It is more likely than not that the defendants used an improper amount of pressure to blow out the irrigation system in the fall of 2012, which damaged or degraded the system. Without an inspection at the beginning of the 2013 watering season anytime thereafter, any leak in the dripline could not be detected and repaired.
- [90] The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable": Mustapha at para. 12. The degree of probability that would satisfy the reasonable foreseeability requirement is "real risk" and "one which would occur to the mind of a reasonable man in the position of the defendant and which he would not brush aside as far-fetched": Mustapha at para. 13.

- [91] I conclude that it is reasonably foreseeable that a failure to properly maintain and inspect an irrigation system on property that is located above a neighbouring property could cause water damage to the lower property. This is a real risk that would occur to the mind of a reasonable person in the position of the defendants.

The Plaintiff's Contributory Action

- [92] The defendants allege that the City was required to excavate a quadrant of the plaintiff's driveway because her water shut off valve was located underneath the driveway surface. The defendants submit this is a violation of City bylaws, which require property owners to make the valves readily accessible. If the property owner fails to do so, then the City will perform the necessary work at the property owner's expense. Although the defendants have not framed this as a contributorily negligent act by the plaintiff, it seems implicit in their argument.
- [93] In my view, the defendants have incorrectly focussed on the damage caused by the City workers' excavation of the plaintiff's driveway, rather than the damage to the driveway's foundation as a whole. The undermining of the plaintiff's driveway was caused by the leak from the defendants' irrigation system, not by the hole dug by the City workers. The hole simply allowed the extent of the undermining of the plaintiff's driveway to be revealed. The plaintiff was not contributorily negligent.

DAMAGES

- [94] The plaintiff seeks damages in the amount of \$19,697.80, reflecting the cost of repairs from the 2015 estimate of Mr. Pregent. The plaintiff also seeks court ordered interest.
- [95] The defendants take the position that the plaintiff is entitled only to the cost of repairs for the quadrant of the plaintiff's driveway excavated by the City workers, in the amount of approximately \$5,000. They also argue that the plaintiff should not be entitled to any costs associated with the retaining wall, as that would constitute a substantial betterment.

General Principles

- [96] When determining the measure of damages for loss of property, the fundamental principle is *restitutio in integrum*. The court attempts to achieve placing the injured party in the same position as before the tortious conduct which caused the loss: *Taylor v. King*, [1993] B.C.J. No. 1709 at para. 46.
- [97] There are two primary methods of assessing damages to property: the cost of repair/reinstatement and the diminution in value. In this case, there is no evidence with respect to diminution in value. The plaintiff seeks only the cost of repair. This desire of the plaintiff is, I find, reasonable in the circumstances.

Mitigation

- [98] The plaintiff is entitled to recover damages for her losses suffered, but the extent of those losses may depend on whether she has taken reasonable steps to avoid their unreasonable accumulation: *Mann v. Bains et al*, 2006 BCSC 837 at para. 32.
- [99] The onus is on the defendants to show the plaintiff failed to mitigate her damages. The defendants have not done so. The plaintiff did not have the financial means to carry out the repairs once she learned her home owner's insurance policy would not cover the loss as the loss did not emanate from her property. The filling of the hole in the driveway by the City workers at the time the damage was discovered was reasonable and done for the purpose of preventing any further potential damage to the driveway. There is no evidence that leaving the driveway as it was temporarily repaired by the City workers has made the problem any worse. In short, I find the plaintiff has not failed to mitigate her damages.

Time of Assessment

- [100] The usual rule with respect to the time to assess damage to property is that damages are to be assessed at the time of the loss. This rule is not, however, absolute. The court has the power to fix such other date, including the date of trial, as may be appropriate in the circumstances: *Mann* at paras. 36-42.
- [101] If damages are to be assessed as of the date of trial, the plaintiff is usually not entitled to pre-judgment interest. This is because pre-judgment interest is awarded to compensate a plaintiff for loss of use of money and inflation. When damages are assessed at the time of trial, the award necessarily takes into account higher costs due to inflation: *Mann* at para. 43.
- [102] In all of the circumstances, I conclude that damages should be assessed as of the most recent estimate, the estimate from 2015. In so concluding, I take into account that I have found the plaintiff did not fail to mitigate her damages both because of her financial circumstances and the temporary repairs done by the City workers.

Quantum of Damages

- [103] I conclude the plaintiff is entitled to the cost of repairs as estimated by Mr. Bouveur in 2015, which is the lower of the two repair estimates introduced into evidence by the plaintiff. Given the time of assessment of damages, the plaintiff is entitled to pre-judgment interest on that amount only from the date of the estimate forward.

- [104] The defendants' position that the plaintiff should only be entitled to the modest cost of repair to only one quadrant of the driveway fails to appreciate that most of the foundation beneath the plaintiff's driveway, encompassing much more than that one quadrant, was compromised by the water flow from the defendants' property and all needs to be replaced. The evidence establishes that in order to properly do so, the existing driveway and retaining wall must be removed and replaced.
- [105] I award the plaintiff damages in the amount of \$18,732.00, plus court ordered interest from April of 2015.

COSTS

- [106] The plaintiff is entitled to her costs to be assessed in accordance with Appendix B of the Civil Rules, unless there are matters of which I am not aware. Should counsel wish to speak to the issue of costs further, they may arrange a time through Supreme Court Scheduling within the next 30 days.

"S.A. Donegan J."

DONEGAN J.

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