

Date: 19981009
Docket: CI 98-01-05791
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

MANITOBA HYDRO,)	<u>J. Jeffrey</u>
)	for the plaintiff
Plaintiff,)	
)	<u>M. G. Finlayson</u>
- and -)	for the defendants Bradley Minsky
)	o/a Man-Trac Equipment
BRADLEY MINSKY o/a)	
MAN-TRAC EQUIPMENT and)	<u>G. Joynt</u>
THE CITY OF WINNIPEG,)	for the defendant City of Winnipeg
)	
Defendants.)	<u>Judgment delivered:</u>
)	October 9, 1998

McCawley J.

[1] On December 6, 1995, Bruce Park was clearing snow with a front end loader in front of 22 Arklie Place, in the City of Winnipeg, as part of the City's residential snow plowing operations when he struck a transformer owned by Manitoba Hydro. The transformer was damaged as a result and ten homes were left without power which had to be restored immediately.

[2] Hydro sued for damages alleging trespass and negligence against Bradley Minsky, operating as Man-Trac Equipment. Man-Trac had contracted with the

City to assist in snow removal and had hired the operator of the front end loader. Hydro also claimed damages against the City alleging it was negligent in failing to ensure that the snow clearing operation was carried out with proper care and instruction.

[3] The matter was heard before a court officer under *The Court of Queen's Bench Small Claims Practices Act* on December 3, 1997, and a decision was made in favour of the defendants. Hydro now appeals from this decision.

[4] The court had the benefit of a book of Agreed Statement of Facts and Exhibits which were filed at the outset of the hearing. Counsel also advised that there was no issue as to the vicarious liability of the City for the acts of its independent contractor, Man-Trac. As well the question of damages was not in issue.

[5] With respect to liability the following remains to be decided:

1. Did the damages to the transformer arise as a result of the negligence of Man-Trac?
2. Did the damages to the transformer arise as a result of a trespass by Man-Trac?
3. Was the City negligent in failing to ensure that the work was done properly and in failing to provide proper instruction?
4. Was Hydro contributorily negligent?

Issue No. 1:**Did the damages to the transformer arise as a result of the negligence of Man-Trac:**

[6] The transformer which Mr. Park struck while operating the front end loader was located on the private property of the residents of 22 Arklie Place. It was situated 18 feet 3 inches (5.57 meters) from the public roadway and 13 inches (.33 meters) from the line dividing the property owned by the homeowners and the property owned by the City. In most residential areas of Winnipeg, the City owns the land immediately adjacent to the public roadway. In the area of Riverbend, where 22 Arklie Place is situate, the City owns the first 17 feet 2 inches (5.24 meters) of all of the land located between the public roadway and the private residential property commencing at the public roadway. The transformer was also situated on the grass 38 inches (.87 meters) from the driveway of 22 Arklie Place. A fire hydrant was located a few feet in front of the transformer between it and the roadway.

[7] The facts disclose that prior to, or on, December 6, 1995, no instructions or directions were provided by the City to Man-Trac or Mr. Park regarding the location or existence of Hydro's transformers on or near property to be cleared by them, nor were any instructions or directions provided on how to locate and avoid Hydro transformers including the transformer in question. Furthermore, apart from a visual inspection done from the front end loader of the area where

he was moving snow, there were no attempts made by Mr. Park or Man-Trac to determine the location of the transformer. When the transformer was struck it was entirely covered in snow both from snowfall and from previous snow removal efforts by persons other than the City or its contractors. It could not be seen by Mr. Park on his visual inspection during his snow removal, and he was not aware of its location.

[8] Mr. Park was required to clear the windrows left on the driveway of 22 Arklie Place as well as the area around the fire hydrant located on that property. Due to the volume of snow present between the roadway and the fire hydrant, Mr. Park was not able to place the snow being removed from both the driveway and the fire hydrant there. He was attempting to push the snow to the south of the fire hydrant when he struck the transformer.

[9] Hydro argued that Man-Trac was negligent in that its driver hit the transformer after going beyond the City property onto private property some 18 feet beyond the roadway when it was not necessary or reasonable to do so. Alternatively, if it were necessary to go on private property its position was that Man-Trac took considerable risk that damage would occur particularly in light of the equipment used, the amount of snow present and the fact that no enquiries had been made of the City as to the location of any transformer. Accordingly, it

is argued that Man-Trac was negligent in not taking any precautions and in failing to exercise due care and skill in the performance of its duties.

[10] The contract between Man-Trac and the City provided that the contractor's operator would perform all obligations in "a good, safe and workmanlike manner". In considering whether Mr. Park did so one must look to the particular circumstances that existed at the time. The incident took place at 1:30 in the morning. The snow was piled high. Mr. Park was unaware of the existence of the transformer which was not visible and no one had provided any warning to him to be on the lookout. He was obligated to clear around a fire hydrant but found there was no room on City property to put the snow. He decided to push the snow onto the property of the homeowners. Although the facts indicated that, when it is not possible to store snow on the City owned boulevard, the City has the implied consent of homeowners to place the snow on the property owned by them, and this included the residents of 22 Arklie Place, there was no indication as to whether Mr. Park was aware of this.

[11] Common sense would dictate that in using heavy equipment particular care must be taken by the operator to avoid damage to persons or property. I do not find that Mr. Park failed in that duty or the duty to operate in a good, safe and workmanlike manner. A reasonable operator clearing snow in these

circumstances, who conducted a visual inspection from his machine, who was unaware of the existence or location of a transformer which was not in any way visible to him, working in winter conditions including a significant amount of snow which obscured property lines and who is required to clear the windrows and around the fire hydrant, would not have foreseen this risk. It is not unlikely that such a reasonable operator would have made the same decision. To suggest that Man-Trac's operator was required to get out of his machine and conduct some kind of closer inspection is both unrealistic and impractical and would impose an unnecessarily high standard in these circumstances. Accordingly, I find that the defendant Man-Trac did not fail to take due care in the snow removal operation and the plaintiff's claim in negligence against Man-Trac fails.

Issue No. 2:

Did the damages to the transformer arise as a result of a trespass by Man-Trac?

[12] It is argued that the damage to the transformer arose because Man-Trac trespassed onto private property when it was not reasonable or necessary to do so thereby interfering with the easement rights of Hydro under a registered caveat.

[13] Unlike an action for negligence in which the plaintiff bears the onus of proving that the defendant's negligence caused the loss complained of, in a trespass action where direct damage is done either to person or property, the

onus shifts to the defendant to prove that the damage did not occur as a part of any intentional or negligent conduct on his part. *Cook v. Lewis*, [1952] 1 D.L.R. 1; *Bell Canada v. Bannermount Ltd.*, [1973] 2 O.R. 811. In this case Hydro has pled both negligence and trespass.

[14] In *Bell Canada v. COPE (Sarnia) Ltd.* [1980] O.J. No. 69, Linden J. stated at para. 28:

The gist of the trespass action today is fault; if it can be established by the defendant that there was no negligence and no intentional interference then, the action will fail because no fault exists. Consequently, trespass is based on fault and is no longer a strict liability cause of action. (See *Weaver v. Ward* (1616) 80 E.R. 284).

[15] Under the grant of easement Hydro was entitled to construct the transformer and place it on the right-of-way. Hydro contends that by interfering with its right-of-easement the defendant Man-Trac is guilty of trespass and relies on *Douglas Lake Cattle Co. v. British Columbia* [1990] B.C.J. 2307 (B.C. C.A.). In that case the court declined to find that the Crown's interference with a grazing licence constituted trespass, however it was clear that the court considered that such interference could support a trespass action in other circumstances, as could interference with a right-of-easement.

[16] I have already found that Man-Trac's operator did not fail to perform the snowclearing operation with due care and that it was neither unnecessary ~~or~~ unreasonable for him to attempt to put the snow onto the private property of the homeowners at 22 Arklie Place. Man-Trac was not negligent. Man-Trac's operator was unaware of the location of the transformer which was unmarked and covered in high drifts of snow. Property lines were obscured. There was no place to push the snow in clearing around the hydrant which he was required to do, and the homeowners had impliedly consented to having snow placed on their property. Given these facts, it is difficult to suggest that Man-Trac's operator was at fault and that he acted intentionally or negligently such as to justify a finding of trespass. Even though Hydro's easement may have been temporarily interfered with, as in the *Douglas Lake Cattle Co.* case, I find that such interference, in these circumstances, does not amount to trespass and that the onus on Man-Trac has been met.

Issue No. 3:

Was the City negligent in failing to ensure that the work was done properly and in failing to provide proper instruction?

[17] Hydro argued that the City knew of the location of the transformer at 22 Arklie Place and its proximity to the fire hydrant and that it knew the size and type of equipment being used. It also argued that the City knew of the

importance of ensuring that any independent contractor hired to assist with the clearing and hauling of snow be familiar with the site and all local conditions including the location of any utilities. Hydro points to a contract between the City and John Minski & Sons Ltd. dated September 12, 1995 in support of this. It also argued that the City was aware of the need to prevent damage to private property which is why the standard form of contract for snow removal with John Minski & Sons Ltd. provides that snow shall not be stored or deposited on private property. Hydro's position is that despite this knowledge and these circumstances no instructions or directions were provided by the City to Man-Trac or Mr. Park with respect to the location or existence of Hydro's transformers on or near the property to be cleared, nor were any instructions or directions provided on how to locate and avoid such transformers including the transformer at 22 Arklie Place. It also noted that, although standard procedure in a major residential street plowing operation includes a briefing of the crew by a City foreman, including instructions with respect to the clearing of fire hydrants and bus stops, no reference is made to the location of transformers or the placement of snow in or around transformers.

[18] Under the provisions of *The City of Winnipeg Act* and its by-laws, the City is responsible for snow clearing within the city. The law is clear that the City, on which there is a statutory duty, cannot escape liability simply by delegating the

work to an independent contractor, in this case Man-Trac. The positive obligation imposed by statute remains the responsibility of the particular entity on which it is imposed.

[19] In this case the City received notice of Hydro's claim after the 30-day time limit required under section 519(3) of *The City of Winnipeg Act*. Counsel for the City correctly argued that the court has no jurisdiction to overrule this limitation and that position was not contested by the plaintiff. Accordingly, it is necessary to consider whether there was any duty owed by the City at common law.

[20] It was conceded by counsel for the City that no statutory duty exists requiring the City to clear windrows. This activity arises from a policy decision which is evidenced by the City's Snow and Ice Control Operations Manual 1995/96 approved by Works and Operations. In *Lewis et al v. The Queen in right of British Columbia* (1997), 153 D.L.R. (4th) 594 the Supreme Court of Canada considered the application of the traditional tort law duty of care to a government agency. It is clear that, apart from any statutory duty owed by a local authority or government agency, the exercise of discretionary statutory power may give rise to a duty to take reasonable care. In this case the statute confers the necessary powers and responsibility for snow clearing but leaves the scale on which the snow clearing operations are to be carried out to the City's

discretion. In electing to clear windrows the City made a policy decision which, having been made, created a duty at the operational level to use due care in giving effect to it.

[21] In an attempt to prove the City's knowledge of the location of the transformer at 22 Arklie Place, Hydro relies on a plan of development (Ex. 7) which had been submitted to and approved by the City's Underground Structures Committee in 1993. The membership of that committee was comprised of seven members appointed by the City, one representative from Hydro, one representative from Manitoba Telephone and one representative from Centra Gas. The committee is responsible for coordinating those activities relating to the location of underground construction built by the various utilities in the street rights-of-way. The agreed facts indicated that the City is interested in the location of works on private property only to the extent those private works are connected to structures located in the street right-of-way. The plan was approved on November 16, 1993 by the City's employee Robert N. Sciberras, supervisor of underground structures who had been involved in approving such structures for some 20 years. The transformer was placed at the location depicted in it and has not changed since its initial installation.

[22] The thrust of Hydro's argument is that, having approved the plan some two years earlier, the City should be taken to have knowledge of the existence of the transformer on the private property at 22 Arklie Place. As well, Hydro suggests that the City knew generally about the existence of transformers in newer developments and this should have formed part of its knowledge base. With this knowledge in its corporate mind, the City had a duty to communicate it to Man-Trac or its operator and instruct accordingly.

[23] I accept the City's argument that it did not know nor had it ever been specifically advised by Hydro of the location of the transformer. To suggest that, through the existence of a legal plan which was approved by a committee as part of a development some two years earlier the City is imputed to have specific knowledge of the existence of this transformer, thereby creating a duty on it to warn and specifically instruct the independent contractors it calls in from time to time to assist with snow clearing, imposes an unrealistic, indeed impossible, obligation. Since the City did not know of the existence or location of the transformer it can not be found to have failed to warn of it.

[24] The criticism that the City did not include in its contract with Man-Trac a requirement to investigate the site as it does in its standard form contracts is answered by the fact that the standard form of contract is meant for an entirely

different situation involving a seasonal snow clearing contract of some duration. In this case, an independent contractor was operating under an hourly call-up contract in order to assist the City in its snow clearing operations from time to time. In such circumstances an independent contractor does not know in advance what area of the city or what particular roads it will be required to clear. Site investigations and familiarity which would be perfectly reasonable to require in other circumstances, would be impractical in this one. A visual inspection from the machine while doing the job would not, and in fact was carried out by the operator.

[25] Neither can it be said that the City failed in any duty to warn its independent contractor about the possible inherent danger in performing the work or in using the equipment specified. There was no evidence to suggest that the activity being performed was an inherently dangerous one. And, as pointed out in argument, the City is expected to hire competent and responsible individuals to carry out the job in an appropriate way. There was a requirement to do the job in "a good, safe and workmanlike manner". It was not necessary to warn about not knocking over transformers, just as it was not necessary to warn about not hitting cars or trees or people. A City supervisor was available to answer any questions or deal with any problems as they arose.

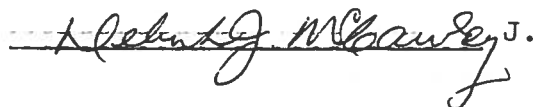
[26] In all of these circumstances I find that the City did not fail in its duty to ensure that the work was done properly nor did it fail to provide proper instruction. The plaintiff's claim in negligence against the City therefore fails.

Issue No. 4:

Was Hydro contributorily negligent?

[27] In light of the findings made it is not necessary to consider this question. However, it is implicit in these findings that Hydro had some responsibility for the damage done. The transformer was located near a fire hydrant which Hydro should have known had to be kept clear of snow in winter. It also was not flagged or marked in any way other than a sticker which Hydro would also have to know would not be visible in certain winter conditions. In the kind of winter conditions that are regularly experienced in the City of Winnipeg, it should be expected that unless Hydro transformers are flagged or otherwise marked or protected in some way or placed in an area well away from the City's necessary snow plowing activities they will continue to be vulnerable. This was not the first time a transformer had been hit. Given that these were all matters over which Hydro has some control, responsibility for them should not be attributed to others.

[28] The plaintiff's case is dismissed with costs.

 Robert J. McQuay J.