Rothfield *v.* Manolakos, [1989] 2 S.C.R. 1259

The Corporation of The City of Vernon and William Phillips *Appellants*

v.

Peter Manolakos and Voula Manolakos *Respondents*

and

Ralph Gohmann and Barry Barber *Respondents*

and

B & L Landscaping & Maintenance Ltd. and Morris Reade, a.k.a. William Morris *Defendants*

and

Woodcraft Ventures Ltd. *Third Party*

and between

The Corporation of The City of Vernon and William Phillips *Appellants*

v.

Peter Manolakos and Voula Manolakos *Respondents*

and

Ralph Gohmann and Barry Barber *Respondents*

and

William Rothfield and Charles Burtch *Plaintiffs*

and

B & L Landscaping & Maintenance Ltd. and Morris Reade, a.k.a. William Morris *Third Parties*

indexed as: rothfield *v.* manolakos

File No.: 20740.

1989: March 21; 1989: December 7.

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.

on appeal from the court of appeal for british columbia

Torts -- Negligence -- Municipality -- Duty of care -- Building permit issued notwithstanding flawed design -- Owners and contractors failing to inform municipality that project at point where inspection required -- Whether or not duty of care on part of municipality to owners -- Whether or not municipality absolved of responsibility because of owners' failure to inform.

Respondent owners contracted with Gohmann, who in turn subcontracted with Barber, for the construction of a backyard retaining wall. Neither were engineers but both professed to have considerable experience in this type of construction work. The contractors, after the owners on their own initiative learned that a building permit was necessary, applied for a permit and presented the City's Chief Building Inspector (Phillips) with a rough sketch of the project. Phillips exercised his discretion, based on their experience and the relatively low cost of the wall, and granted a permit. Neither the owners nor the contractors advised the City as required by the by-law that the project had come to a stage where an inspection was required. The footings had been put in place, the concrete had been poured and the backfilling had been partially completed. The city inspector was not able to carry out the standard inspection which, if reasonably performed, would have revealed the flaws in design and construction.

The owners contacted the City when a large crack appeared in the wall. The city building inspectors attended and advised that further backfilling be delayed until the wall could be monitored in order to determine if there was any movement. The contractor finished the backfilling when he found that the wall had not moved in a twenty-day period. Some months later the wall collapsed.

In a first action, respondents brought suit against the contractor, the subcontractor, the city inspectors and the City. The neighbouring owners, Rothfield and Burtch, brought a second action against the respondent owners who in turn took third party proceedings against the parties

they had sued. The trial judge found that the rudimentary sketch was an inadequate basis for issuing a building permit and that the City, through its building inspectors, was negligent in issuing one. In the first action, the trial judge found the defendants jointly and severally liable to the respondents for all of the damages, but as between them he attributed 60% of the responsibility to the contractor and subcontractor, and 40% to the City and its inspector. In the second action, the trial judge found the respondent owners liable for the damages suffered by the neighbours, but held the third parties jointly and severally liable to indemnify them, but as between themselves liability was apportioned in the same manner as in the first action. An appeal to the Court of Appeal was dismissed.

Held (Lamer and Cory JJ. dissenting in part; Wilson and L'Heureux-Dubé JJ. dissenting in part): The appeal should be allowed. The judgments of the trial judge should be varied. As between themselves, the City and its inspectors should be liable for 70% of the damages and the respondents for 30%.

Per Dickson C.J. and La Forest and Gonthier JJ.: The City, once it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers. This duty was subject to those limitations arising from the statute bearing on the powers of the building inspector.

It was not unreasonable for the building inspector to exercise his discretion not to require plans by a professional engineer and to rely on on-site inspections to ensure compliance with the standards of the by-law in cases like the present. The City, nevertheless, must at least examine the specifications and sketches. A building permit might issue if the plans are inadequate in the sense of insufficiency but not if inadequate in the sense of an obvious departure from the standards required by the by-law.

Appellants' negligence must be assessed in the context of the legislative scheme. The owners are by the by-law required to give timely notice to permit the appellants to conduct an on-site inspection. Failure to do so constituted negligence on their part but not so as to totally absolve the appellants from liability. Every negligent act of an owner builder will not relieve the municipality of its duty to show reasonable care in approving building plans and inspecting construction. It is only in the narrowest of circumstances that no duty is owed because the owner is the source of his own loss.

Despite the negligence of the owners, the inspector was in a position to take reasonable care to ensure that all building was done in accordance with the applicable standards of the by-law. A due exercise by the inspector of his powers, even though he was summoned late, could have avoided the danger. He should have ordered the cessation of the work and whatever corrective measures were necessary to enable him to ensure that the structure was up to standard. Nothing in the nature of the owner's breach would support the view that they should not be entitled to rely on the building inspector to acquit the City of its responsibility to ensure that the project was up to standard.

A vital distinction exists between this case and instances where an owner builder determines to flout the building by-law, or is completely indifferent to the responsibilities that the by-law places on him. Such deliberate action places the owner builder outside the scope of the duty owed by the public authority. The duty of building inspectors should not be taken to extend to requiring them to ferret out those who are aware or indifferent as to whether work is being done illegally, and who persist in that course of action.

The City and its inspector and the respondent owners were contributorily negligent and liability should be apportioned at 70% and 30% respectively.

Per Lamer and Cory JJ. (dissenting in part): The City and its inspector should bear no liability for damages to the owner. The Chief Building Inspector, if he had been acting in a private practice, would have been liable in negligence. He was not, however, acting in a private capacity but as a municipal official. Nonetheless there was still such a close relationship that he could foresee that carelessness on his part might cause damage to the plaintiffs.

Considerations existed which would negate or limit (a) the scope of the duty, and (b) the persons to whom it is owed.

The granting of a building permit did not and could not relieve the respondent owners of their responsibility to have the work on the retaining wall carried out in accordance with the City's by-laws. Willingness to allow this relatively small and inexpensive project to proceed without requiring the respondents to incur the cost of a professional engineer did relieve the respondents of that responsibility. The Chief Building Inspector was neither dispensing advice to the respondents nor guaranteeing the success of the retaining wall. The respondents had hired a contractor to take care of their interests in this regard.

It is impossible for a municipality to constantly monitor all the building projects proceeding within its limits at any given time. The owners have a responsibility to advise the City as to when the required inspections could be made. The City has a concomitant obligation to reasonably and properly inspect the work in progress once it has received a notification. The owners' breach of their obligation to the City made it impossible for the City to fulfill its duty to inspect. The City was entitled to assume that the owner and contractors would comply with the provisions of the by-law and give timely notice that the work could be inspected. The failure to comply superceded any act of negligence of the City and so absolved the municipality from any liability. Such owners are the source of their own loss.

The issuance of the building permit could not reasonably be taken as an indication that the wall was sound. That responsibility, as a matter of policy, must remain with the owners who engaged contractors to undertake and be responsible for the design and construction of the project on their behalf. The municipality, if the policy were otherwise, would be unreasonably and unfairly burdened with insuring an owner as to the compliance with its by-laws and in that way insure the proper design and workmanship of projects undertaken by an owner.

It is clearly reasonable for the neighbours, who were completely blameless, who did not choose the contractors and who could not ensure that the required notice of inspection be given to the City, to rely upon the municipality to ensure that the construction was carried out in a way that would not threaten their health or safety. It was appropriate, with regard to the neighbours' claims, to accept the trial judge's finding that the City was negligent in granting a building permit based on the inadequate information submitted to the Chief Building Inspector by the contractor and sub-contractor.

Per Wilson and L'Heureux-Dubé JJ. (dissenting in part): Failure on the part of the owners to discharge their responsibilities under the by-law did not disentitle them from recovering for the whole of the damages against the City. The owners were not "negligent" or "the source of their own loss" and therefore outside the scope of the City's private law duty of care. Negligence means more than a failure to comply with the notice requirements of the by-law in circumstances where the City issued a permit notwithstanding obvious deficiencies in design and did not notify the plaintiffs to this effect. As a result of this omission, the owners could reasonably assume that all was in order when the permit was issued and follow the normal practice of relying on the contractors to give the required notices on their behalf. The City, when it issued the permit notwithstanding the design deficiencies, assumed the risk that it could remedy the deficiencies as construction progressed. Had the owners been made aware that the permit was issued on

defective plans it would have appreciated the importance of the notices and seen to them personally. Their damage was the result of the combined negligence of the City and the contractors.

Cases Cited

By La Forest J.

Applied: *Anns v. Merton London Borough Council*, [1978] A.C. 728; **distinguished**: *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; **referred to**: *Acrecrest Ltd. v. W. S. Hattrell & Partners (a firm)*, [1983] 1 All E.R. 17; *McCrea v. White Rock*, [1975] 2 W.W.R. 593; *Curran v. Northern Ireland Co-Ownership Housing Association Ltd.*, [1987] A.C. 718.

By Cory J. (dissenting in part)

City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.*, [1985] 1 A.C. 210; *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 5; *Yuen Kun Yeu v. Attorney-General of Hong Kong*, [1988] A.C. 175; *Donoghue v. Stevenson*, [1932] A.C. 562; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228; *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465.

By Wilson J. (dissenting in part)

City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Dennis v. Charnwood Borough Council*, [1982] 3 All E.R. 486; *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.*, [1985] A.C. 210.

Statutes and Regulations Cited

Building and Plumbing By-law of The Corporation of The City of Vernon, Number 2450, 1976, ss. 101, 300, 600, 700, 800, 800(4), 1000, 1000(1), 1001(e).

Municipal Act, R.S.B.C., c. 290, Division (5), ss. 734, 740.

APPEAL from judgments of the British Columbia Court of Appeal, *Rothfield v. Manolakos* (1987), 20 B.C.L.R. (2d) 85, dismissing appeals from judgments of Arkell Co. Ct. J., [1986] B.C.W.L.D. 425. Appeal allowed, Lamer and Cory JJ. dissenting in part; Wilson and L'Heureux-Dubé JJ. dissenting in part.

R. B. T. Goepel, for the appellants.

Greg Reif, for the respondents.

//*La Forest J.*//

The judgment of Dickson C.J. and La Forest and Gonthier JJ. was delivered by

LA FOREST J. -- I have had the advantage of reading the judgment of my colleague, Justice Cory, but I am respectfully unable to agree with his proposed disposition of this case for the reasons that follow.

Factual Background

The facts of this appeal are generally sufficiently set out in the reasons of Cory J., and I need not repeat them. I think it important, however, to stress some matters concerning the specifications and the rudimentary sketch submitted by the subcontractors when they attended at the municipal offices to obtain a permit for the retaining wall they had been hired to construct for the respondent owners. The trial judge found as a fact that Phillips, the chief building inspector, had seen the specifications and the sketch, but it seems fair to assume in the light of Phillips' testimony that he had not examined them with the care necessary to permit him to ascertain whether they could reasonably serve in the construction of the project. It is undisputed that the sketch was only a rough and ready drawing, and that the project, if built in accordance with the specifications, would be seriously deficient. The building inspector himself testified that the proposed steel reinforcement was wholly inadequate to support the structure, and that if he had seen the sketch, he would not have issued the permit. The footings described on the sketch were also inadequate. Despite the manifest inadequacy of the plan, however, the city issued a permit for the construction of the retaining wall. This was in accord with its usual practice. In construction projects of this kind, the city relied on on-site inspections to ensure that the requisite standards had been met.

The city by-law placed responsibility on the owner to summon the building inspector for this on-site inspection. Here, of course, the owner failed to give notice in good time, and it is the significance to be accorded to this failure that is at the heart of this appeal.

The Scope of the Duty Owed by the City

The city adopted the relevant building by-law "for the health, safety and protection of persons and property" pursuant to s. 734 of the *Municipal Act*, R.S.B.C., c. 290, as amended. By application of the test formulated by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and adopted by this Court in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, the city, once it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers. This duty is, of course, subject to such limitations as may arise from statutes bearing on the powers of the building inspector.

In *City of Kamloops v. Nielsen*, this Court did not deal with an owner builder, but I see no reason why such a person would not fall within the scope of the duty of care owed by a municipality. There is, admittedly, an important distinction between the reliance of third parties on a municipal building inspector and the reliance of an owner builder. Third parties, such as neighbours and subsequent purchasers or occupiers of a building, obviously have no say in the actual construction of a building that proves defective. It is therefore reasonable that they should be entitled to rely on the municipality to show reasonable care in inspecting the progress of the construction. Owner builders, by contrast, are in a position to ensure that the building is built in accordance with the relevant building regulations, and from this it may be argued that they are not entitled to rely on the municipality. This would appear to be the view of Cory J. who states that it is the owner who should ensure through his contractors that the building is safe and structurally sound, and complies with the municipal by-law.

I am unable to accept this position. As a preliminary matter, it is not clear to me how owner builders, unless possessed of a high degree of technical knowledge, are supposed to see to it that their contractors comply with the technical aspects of building by-laws. Doubtless owner builders can choose their contractors, and it is incumbent on them to hire reputable tradesmen.

But I fail to see how, having done that, they are in a position to ensure that construction actually proceeds according to standard. Owner builders can hardly be expected to serve as their own inspectors. It can, I think, safely be assumed that the great majority of those who engage building contractors to undertake a project must rely on the disinterested expertise of a building inspector to ensure that it is properly done. In that respect, owner builders are in a position similar to third parties who may be affected by the construction. Like them, they are, in my respectful opinion, entitled to rely on the municipality to properly inspect construction to see that it conforms to the standards set out in the municipality's building by-laws.

Moreover, in my view, the distinction sought to be made between owner builders and third parties overlooks the fact that both are ratepayers for whose safety the by-law was passed. The inspection of plans and the supervision of construction increases the costs of construction for everyone. But I think that most ratepayers, were they to give the matter any thought, would justify the increased expense as an investment in peace of mind: faulty construction, after all, is a danger to life and limb and may result in future expense and liability. This applies equally to owner builders and third parties. Both are justified in saying: "I pay for the provision of an inspection service, and so long as I act in good faith, I should be entitled to rely on the city to exercise reasonable care to ensure that all construction is built according to the standards set out in the by-laws."

Finally, I do not share the view that applying the law to owner builders in this way would make the municipality an insurer in respect of compliance by the owner with applicable building standards. It must be borne in mind that a municipality, once it has made the policy decision to inspect construction, is not bound to discover every latent defect in a given project, nor every derogation from applicable standards. That would be to hold the municipality to an impossible standard. Rather a municipality is only called upon to show reasonable care in the exercise of

its powers of inspection. Accordingly, a municipality, whether the duty of care is owed to an owner builder or a third party, will only incur liability for such defects as it could reasonably be expected to have detected and to have ordered remedied. This is implicit in the decision of this Court in *City of Kamloops v. Nielsen*.

In summary, I cannot subscribe to the view that considerations of policy militate against viewing both owner builders and third parties as entitled to place reasonable reliance on the city to ensure that construction does not pose a threat to their health or safety.

The City's Duty Respecting the Specifications

As Cory J. has noted, the building inspector exercised his discretion in this case not to require plans by a professional engineer, and in such cases it was the practice to rely on on-site inspections to ensure compliance with the standards of the by-law. I am prepared to accept that as a general proposition this is not an unreasonable thing to do. The many small projects that come to the city must be processed with a reasonable measure of flexibility and efficiency, and undoubtedly many of the rudimentary specifications and sketches that are submitted to the inspector do not contain all the information necessary to enable the city to fully assess whether a project is up to standard. It would be unrealistic for the city to insist that owners submit fully adequate plans for such projects. By the same token, however, it would be unreasonable to impose on the city the burden of perfecting all such plans.

It seems to me, however, that it is incumbent on the city to at least examine the specifications and sketches. If an examination of these reveals that they may reasonably serve in the construction of a project, it would appear sensible to issue a permit. The inspector is functioning within the parameters of a legislative scheme in which it is normal to ensure that a project fully

meets the standards of the by-law at the on-site inspection stage. It would tend to defeat the discretion not to require professional plans if a more exacting standard were imposed on the city inspector. The city's duty, after all, is only to exercise reasonable care.

Inadequacy in the sense of insufficiency is one thing, however; inadequacy in the sense of an obvious departure from the standards required by the by-law is another. In the present case, it was clear from the specifications that the project was inadequately designed. The building inspector's testimony itself draws attention to the fact that the retaining wall would not hold if built with the amount of steel reinforcement described in the specifications.

Under these circumstances, I have no difficulty in holding that the appellants were negligent in this case, and barring other considerations, that they are liable for the loss resulting from that negligence. The appellants' negligence must, however, be assessed in the context described above and, in particular, of the legislative scheme in which they were operating. That scheme provides for on-site inspections at which time inadequacies can be corrected during the course of construction. These inspections are under the scheme triggered by notification from the owner. The by-law squarely imposes this duty on the owner at particular stages of construction. I should perhaps advert to the fact that the by-law includes a contractor in the definition of owner, but I emphasize that it is an inclusive provision; it can scarcely be read as excluding the owner upon whom the duty is originally imposed. Relying on these provisions, the appellants argued that the failure of the owners in the present case to give timely notice to permit the appellants to conduct an on-site inspection absolved the latter from liability.

The Negligent Owner Builder

I turn then to a consideration of the consequences to be ascribed to the failure of the owners and their contractors to give timely notice for the on-site building inspection. I agree with Cory J. that this failure constituted negligence, but I do not share his view that this failure must completely absolve the municipality from liability. In my respectful view, Lord Wilberforce's dictum that no duty is owed "to a negligent building owner, the source of his own loss" does not apply to the facts of this case.

I do not think Lord Wilberforce's pronouncement was meant to extend to every failure by an owner builder, or his contractors, to comply with the applicable building regulations. It is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building by-laws. That is why municipalities employ building inspectors. Their role is to detect such negligent omissions before they translate into dangers to health and safety. If, as I believe, owner builders are within the ambit of the duty of care owed by the building inspector, it would simply make no sense to proceed on the assumption that every negligent act of an owner builder relieved the municipality of its duty to show reasonable care in approving building plans and inspecting construction.

These considerations suggest that it is only in the narrowest of circumstances that Lord Wilberforce's dictum will find application. By way of example, I think that the negligent owner would be viewed as the sole source of his own loss where he knowingly flouted the applicable building regulations or the directives of the building inspector; see the observations of Stephenson L.J., Donaldson L.J., and Sir David Cairns in *Acrecrest Ltd. v. W. S. Hattrell & Partners (a firm)*, [1983] 1 All E.R. 17 (C.A.), at pp. 25, 30 and 33, respectively. Again owner builders may totally fail to acquit themselves of responsibilities that properly rest on them; see the decision of the British Columbia Court of Appeal in *McCrea v. White Rock*, [1975] 2 W.W.R.

593, where a builder unreasonably relied on the city to take the initiative in inspecting the progress of construction.

The common thread in the examples cited above is that they involve circumstances in which it is reasonable to conclude that an owner builder had, by his actions, excluded himself from the scope of the municipality's duty of care. Sir David Cairns puts the matter well when he observes in *Acrecrest Ltd. v. W. S. Hattrell & Partners (a firm)*, *supra*, at p. 33, that the "local authority's function . . . is not that of restraining a wrongdoer from persisting in his wrongdoing". In my view, however, on the facts of this case it is not open to the city to advance a similar argument and say that the action of the owners was such that they were no longer owed a duty of care. And I say this, even apart from the initial negligence of the appellants to which I shall refer later.

As I noted above, the city issued the building permit on the assumption that an on-site pre-pour inspection would enable it to determine whether the design met applicable standards. The pre-pour inspection is a key part of the inspection process because it permits the inspector to determine if the foundations of a project are up to standard. Lord Wilberforce touches upon this very point in *Anns v. Merton London Borough Council*, *supra*, at p. 753:

> One of the particular matters within the area of local authority supervision is the foundations of buildings -- clearly a matter of vital importance, particularly because this part of the building comes to be covered up as building proceeds. Thus any weakness or inadequacy will create a hidden defect which whoever acquires the building has no means of discovering: in legal parlance there is no opportunity for intermediate inspection.

Inasmuch as inadequately inspected foundations will always pose a threat to the health and safety of the public, building by-laws contain measures aimed at preventing the occurrence of such "hidden defects". Thus, the City of Vernon building by-law sets out definite standards for foundation work and, as my colleague Cory J. points out, Division 700 of the by-law confers on

the building inspector a broad spectrum of powers designed to enable him to ensure that these standards are respected. The building inspector is empowered to order the correction of any work which has been improperly done, and similarly may order the cessation of any work that is proceeding in contravention of the by-law. As I will go on to explain, these powers of the inspector to insist on any correction necessary to bring the work up to standard take on a particular importance in this case.

It cannot be disputed that the owners were negligent in failing to give timely notice for the pre-pour inspection. The by-law places this obligation squarely on every property owner. But the fact remains that when the inspector did attend at the site he was confronted with a situation in which it must have been at once clear to him that the retaining wall was potentially substandard. As I have just pointed out, there is no mystery to the fact that uninspected foundations may give rise to hidden defects. This will always be the case, and here two additional facts heightened this possibility. First, it must be remembered that the city had issued the permit on the basis of inadequate plans which themselves afforded no basis for a preliminary evaluation of the soundness of the foundations. In this case, moreover, an assessment of the plans would have revealed that the steel reinforcements and the footings were inadequate. Secondly, there was the telling fact that a crack had already appeared in the wall.

My colleague takes the view that the failure of the owners to give timely notice made it "impossible for the city to fulfill its duty to inspect". In my respectful view, however, it is necessary to take a broader view of the question and not simply focus on the fact that the negligence of the owners made it difficult to conduct one particular inspection. The key question, it seems to me, is whether it is reasonable to conclude that despite the negligence of the owners, the inspector was still in a position to acquit himself of the responsibility that the by-law placed on him, i.e., to take reasonable care to ensure that all building was done in accordance

with the applicable standards of the by-law. In other words, is it reasonable, in the circumstances to conclude that a due exercise by the inspector of his powers, even though he was summoned late, could have avoided the danger? See the formulation of Lord Bridge of Harwich in *Curran v. Northern Ireland Co-Ownership Housing Association Ltd.*, [1987] A.C. 718, at pp. 727-28.

When the question is framed in this way, I think that the answer must be in the affirmative. The inspector could not and did not rely on the plan submitted to him; it was inadequate. He chose instead to rely solely on the on-site inspection. And when he attended at the site, he was confronted with a situation which, if left unremedied, manifestly stood to pose a threat to the health and safety of the public, including the neighbours and the owner builder. Of course, the cause of the problem would have been evident if the inspector had been asked to come at the proper time. But this does not absolve the inspector of his duties. It must be remembered that the inspector was, at the time, armed with all the powers necessary to remedy the situation. As I see the matter, it was incumbent on the building inspector, in view of the responsibility that rested on him, to order the cessation of the work, and the taking of whatever corrective measures were necessary to enable him to ensure that the structure was up to standard.

Instead, the inspector stipulated that the situation be monitored for a certain time and that construction proceed if no further damage occurred. In my view, this was negligence. When a building inspector authorizes a given project to proceed this must be taken as an indication that the inspector has satisfied himself that the project conforms to applicable standards. On what other basis could the building inspector, acting prudently, authorize construction to proceed? Here, on the facts, I do not see how the building inspector, using reasonable care, could have satisfied himself that this was the case. Even leaving aside the fact that the project was already showing signs of damage, the inspector, never having inspected the structure, simply did not have at his disposal any information on which to base a conclusion that the project was up to

standard. Indeed, had the inspector simply turned to the city's records or enquired about the manner in which the structure was built or about the materials used in the construction, he would have discovered from the specifications what he ought to be taken to know in any event, that the structure was deficient in a number of important aspects.

To return, then, to my initial proposition that it would be unreasonable to hold the owners to be the "sole authors of their loss", I see a vital distinction between this case and instances where an owner builder determines to flout the building by-law, or is completely indifferent to the responsibilities that the by-law places on him. In such circumstances, owner builders cannot reasonably allege that any damage they suffer is a result of the failure of the building inspector to take reasonable care to ensure that a given construction project is built in conformity with the by-laws. They have, by their actions, placed themselves outside the scope of the duty owed by the public authority. In effect, their breach of the regulations is such as to justify the conclusion that they can have no reasonable expectation that they are entitled to rely on the due exercise of the inspection power to forestall dangers to their health and safety. In summary, the duty of building inspectors should not be taken to extend to requiring them to ferret out those who are aware or indifferent as to whether work is being done illegally, and who persist in that course of action.

Here, the situation is entirely different. Admittedly, the owners had breached the applicable by-laws. One could indeed characterize the breach as serious, even though they had instructed the contractors to obtain the requisite permits. But the key point, as I view the matter, is that nothing in the nature of the breach would support the view that the owners should not be entitled to rely on the building inspector to acquit themselves of their responsibility to ensure that the project was up to standard. The very by-law contemplated that breaches of the sort committed here would occur. That is the reason the powers of the building inspector extend to allowing him

to halt construction, and to order the correction of work improperly done when such breaches come to his attention.

In short, I am unable to share the view of Cory J. that the negligent breach of the by-laws by the owners was such as make them the sole authors of their own loss. To return to the formulation of Lord Bridge, *supra*, I remain of the view that in the circumstances of this case the due exercise by the building inspector of the powers at his disposal would have avoided the danger caused by the negligent behaviour of the owners. In failing to exercise these powers the building inspector was again in breach of his duty to take reasonable care to see that the by-laws were complied with.

But if I cannot agree with my colleague that the responsibility of the building inspector to discover and correct breaches of the building by-law was completely negated by the respondents' oversight, I am of the view that they should bear some responsibility for any loss they incurred because of their failure to summon the inspector in good time. The damage could have been avoided if notice had been given at the proper time. The by-law, I repeat, places responsibility for giving notice to the inspector squarely on the owner. It could not really function without this requirement and, in the case of small projects, we saw, there are additional reasons making on-site inspection critical if the by-law is to function with reasonable flexibility and efficiency. These are not technical matters for which the average person must rely on an experienced contractor. People generally should know that a building permit is required and that inspections cannot be done when the work is covered up. Of course, owners generally rely on a contractor to give notice at the appropriate time, but the responsibility is ultimately the owner's, not the city's. Failure to give timely notice places an unenviable burden on the inspector to decide whether the expensive task of digging up the area should be undertaken. All concrete cracks, and

his failure to act, though negligent, may in some measure reasonably be attributed to the negligence of the owner in placing him in that position.

Nonetheless, it is clear that the lion's share of responsibility in the present case lies upon the appellants. I would, therefore, find the appellants (the city and its inspectors) and the respondent owners contributorily negligent and would accordingly apportion liability between them. In my view, a just apportionment would be in the order of 70% for the appellants and 30% for the owners, for which, pursuant to the trial judge's orders, the appellants are jointly and severally liable. As between the owners and the contractors, it must be remembered that the latter had contracted to construct the project and were thus under an obligation to do so with reasonable care and skill. Indeed, not only did they construct the work in an improper manner, it was really their fault, rather than the owners', that the building inspector was not notified at the appropriate time. Accordingly, the owners, pursuant to the trial judge's orders, are entitled to recover jointly and severally against the contractors for all the loss sustained by them. The trial judge also ordered (and the appellants did not dispute this) an apportionment of liability as between the contractors and the appellants of 60% and 40% respectively. These orders were not contested and I have not disturbed them.

Disposition

Accordingly, I would allow the appeal and set aside the judgment of the Court of Appeal. The judgments of the trial judge should be varied as follows. In Action 241/81 Vernon, the plaintiffs are held to be contributorily negligent to the extent of 30% and judgment against the appellants is reduced accordingly. In Action 228/82 Kelowna, the defendants, Peter and Voula Manolakos, are held contributorily negligent to the extent of 30% and damages against the appellants are reduced accordingly. In all other respects, the judgments of the trial judge are confirmed.

I would apportion costs between the appellants and respondent owners in this Court and in the Court of Appeal on the basis of 30% to the appellants and 70% to the respondent owners. The owners and the appellants are entitled to recover these costs against the contractors, the former fully, the latter on the basis of the contribution to the liability apportioned between the contractors and the appellants by the trial judge.

The reasons of Lamer and Cory JJ. were delivered by

CORY J. (dissenting in part) -- The issue to be resolved on this appeal is what if any duty was owed by the municipal authorities of the City of Vernon to the respondents who were having a retaining wall built on their land.

Factual Background

The respondents, Peter and Voula Manolakos owned a house situated on a steeply sloping lot in the municipality of Vernon. Before they could have and enjoy a backyard, a retaining wall had to be built. They entered into a contract with Ralph Gohmann to build one, to erect a fence on top of it and to do some landscaping. Mr. Gohmann in turn subcontracted with Barry Barber for the construction of the retaining wall. Mr. Barber prepared a brief written proposal together with a rough sketch of the wall which was to be 74 feet long, 8 feet high and 8 inches wide. Although neither Mr. Gohmann nor Mr. Barber were engineers they professed to having considerable experience in construction work of this type.

The respondents, in their desire to avoid any problems with the wall, telephoned the City of Vernon to make enquiries about a building permit. In response to the call, William Morris-Reade, a city building inspector, visited the site on May 26, 1980. By that time the excavation had been completed and the footing forms were already in place. Mr. Morris-Reade did not

conduct an inspection but he advised the respondents that a building permit was required. Later that afternoon Messrs. Gohmann and Barber attended the building department offices to apply for the permit. They met with William Phillips, a professional engineer and the city's chief building inspector.

Mr. Phillips was presented with the rough sketch of the wall and the proposal Mr. Barber had drafted. Mr. Phillips carefully enquired of the contractor and subcontractor about their experience with building retaining walls and he was assured by them that they had been involved in a number of similar projects. Based upon their experience and the relatively low cost ($5,000) of the wall, Mr. Phillips exercised the discretion which he possessed under the city by-law and decided that he would not insist upon a professional engineer's plan for the wall. He concluded that detailed specifications would be unnecessary because the adequacy of the wall's foundation, siting, reinforcing and drainage could be evaluated during the on-site inspections which were specifically required by the city's by-law. He therefore gave instructions to issue the building permit for the retaining wall.

The City of Vernon's building by-law (like most such by-laws) places an obligation upon the owner to inform the city when a building has reached certain stages of completion in order that inspections can be carried out by the city's building inspectors. The concrete had been poured and backfilling had been commenced without any notification to the city. As a result, it was impossible for the city inspector to carry out the requisite inspection which, if reasonably performed, would have revealed the flaws in design and construction.

On June 12, 1980, Mr. Manolakos called Mr. Morris-Reade, the city building inspector, to advise him that a crack had appeared in the wall. The inspector went to check the wall but found that a large part of the backfilling had already been done. He was able to see a crack but was

unable to evaluate the wall's foundations, siting, reinforcing or drainage, for the obvious reason that everything had been covered over.

Mr. Morris-Reade in turn told Mr. Phillips about the crack and he visited the site himself on June 16 and 19. He suggested to Messrs Gohmann and Barber that they monitor the situation carefully to see if there was any movement of the wall and that they check the drainage from the house. The contractor found no further movement during the next 20 days. He then finished the backfilling, landscaping and sodding and put up a fence on the wall.

On February 19 the respondents found that the retaining wall was moving. Mr. Manolakos called the general contractor to have the wall stabilized and, as well, notified the city of the problem. The police arrived and took immediate steps to protect the lives and property of others by barricading and securing the area. The respondents were ordered to remove the wall. Fortunately, any physical danger to the neighbours living below the wall was averted, although they did sustain some damage to their property. Mr. Manolakos retained a professional engineer who found that the reinforcing for the wall had been inadequate. Mr. Phillips inspected the site and came to a similar conclusion. He testified that if an on-site inspection had been conducted when it should have been, before the concrete was poured, the project would not have been allowed to continue.

The respondents brought an action against the contractor, the subcontractor, the city inspectors and the city. The neighbouring owners, Mr. Rothfield and Mr. Burtch, brought an action against the respondents who in turn took third party proceedings against the parties they had sued.

Decisions of the Courts Below

The trial judge found that the subcontractor's original proposal and rudimentary sketch was an inadequate basis for issuing a building permit and that the city, through its building inspectors, was negligent in issuing one. In both the actions (one brought by the Manolakoses and one by their neighbours) he attributed 60% of the fault to the contractor and subcontractor, and 40% to the city and its inspectors. He ordered the defendants to pay $12,416.68 in damages to the Manolakoses and $2,600 to the neighbouring owners.

Although divided on other issues, the Court of Appeal was unanimous in deciding that the inspector Mr. Morris-Reade could not be held liable. That finding was not challenged before this Court. The majority of the Court of Appeal agreed with the trial judge that chief building inspector Phillips and the city were liable. This conclusion was based upon findings that Mr. Phillips had been negligent in two respects: firstly, in failing to warn the respondents that the original proposal was inadequate; and secondly, in failing to conduct an on-site inspection. The majority went so far as to conclude that the city had assumed the burden of conducting a pre-pour on-site inspection and thereby relieved the respondents of their obligation of notification as to when such an inspection could be conducted.

Lambert J.A., in dissent, found that while the chief building inspector may have been careless in granting the building permit, it was not reasonable for the respondent owners to rely upon the municipality to guarantee the adequacy of their own proposed design for the wall. He determined that the owners had not discharged their obligation to inform the city as to when inspections could be carried out. He thought this obligation was of fundamental importance as it would be impossible for the city to keep track of all the projects carried out within its limits in order to know when to inspect. He found that there was a significant difference in the owners' attempt to rely on the city to ensure the adequacy of their wall and that of the neighbouring land owners. The neighbours who, unlike the owners, had no control over the design or construction

of the wall could reasonably assume the city's by-law would be complied with and that the city would ensure that there was such compliance. In his view, it was reasonable and appropriate for the neighbouring owners to rely upon the chief building inspector to ensure that the designs submitted were adequate.

The Applicable Legislation and By-law

Division (5) of the *Municipal Act*, R.S.B.C. 1979, c. 290, as amended, provided for the promulgation and implementation of building regulations by City Councils in British Columbia. In particular, s. 734 reads:

> **734.** The council may, for the health, safety and protection of persons and property, and subject to this Act, the *Health Act* and the *Fire Services Act* and their regulations, by bylaw
>
> . . .
>
> (f) prescribe conditions generally governing the issue and validity of permits, inspection of works, buildings and structures, and provide for the levying and collecting of fees and inspection charges;

Section 740 of Division (5) and the regulations thereunder provide that the British Columbia Plumbing Code and certain parts of the National Building Code of Canada apply to cities in British Columbia, including the City of Vernon. In order to fulfill its responsibilities under the Plumbing Code and Building Code, and pursuant to s. 734 of the *Municipal Act*, the city passed By-law Number 2450 in 1976. The by-law states its purpose in these words:

> **101.** Purpose:
>
> To provide for the administration and enforcement of the Plumbing and Building Code and to provide regulations for the erection, construction,

maintenance, moving and safety of buildings with the corporate limits of The City of Vernon, but are not related to land quality.

Division 300 specifies the scope of the by-law's application:

This Bylaw shall apply:

300. To the erection, construction, maintenance, moving, demolition and safety of all buildings subject to the limitations set out in the Building Code.

The by-law applied to the Manolakoses' retaining wall because of the definition of the term "building":

"Building":

Shall mean a structure located on the ground which is designed, erected or intended for the support, enclosure or protection of persons or property.

Division 600 sets out the duties of the building inspector:

600. The Building Inspector, under the supervision and direction of the *Director of Community Development* shall:

(i) Administer this Bylaw;

(ii) Keep records of all applications received, permits and orders issued, inspections and tests made, and shall retain copies of all papers and documents connected with the administration of his duties;

(iii) Establish whether any method or type of construction or materials used in the construction of any building conforms with the requirements and provisions of this Bylaw.

Division 700 specifies the powers that are granted to inspectors in order to fulfill these duties, including the powers to enter premises at any reasonable time, to revoke or refuse to issue a permit in situations where the construction method is not satisfactory in the opinion of the inspector, to order the correction of work improperly done and to order the cessation of work proceeding in contravention of the by-law.

Two other divisions of the by-law are of particular relevance to this appeal: Division 800 which deals with building permits and Division 1000 which deals with the duties of the owner.

Subsection 800(4) indicates that there is discretion which rests with the chief building inspector to decide whether a proposed project requires that engineering plans should be submitted as a condition to the granting of a building permit:

800. . . .

> (4) Notwithstanding any other provision of this bylaw, whenever, in the opinion of the authority having jurisdiction, the proposed work requires specialized technical knowledge, it may be required as a condition of the issuance of any permit, that all drawings, specifications and plot plans, or any part thereof, be prepared and signed by, and the construction carried out under the supervision of, an architect or professional engineer.

Section 1001 makes it clear that the owner, (which by definition includes the contractor and subcontractor) is responsible for giving at least 24 hours notice and having pre-pour and pre-backfill inspections carried out:

1001. Every owner of property shall:

. . .

> (e) Give at least twenty-four (24) hours notice to the authority having jurisdiction and obtain his inspection and approval of the work:

(i) after the forms for footings and foundations are complete, but prior to placing any concrete therein;

(ii) after removal of formwork from a concrete foundation and installation of perimeter drain tiles and damp-roofing but prior to backfilling against foundation;

Under the terms of subs. 1000(1), the granting of a permit does not relieve the owner "from full responsibility for carrying out the work or having the work carried out in accordance with the requirements of this bylaw or the Building Code."

Was a Duty of Care Owed by the Municipality to the Respondents?

The duty of care which may be owed by a municipality to its residents was reviewed by this Court in the *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2. In that case Wilson J., writing on behalf of the majority, adopted the criteria for determining this question which was set forth by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728. She restated in the following way the two questions which must be asked in order to determine whether a private law duty of care exists (at pp. 10-11):

(1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

I recognize that some critical comments have been made with regards to the *Anns* case. See, for instance, *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.*, [1985] A.C. 210 (H.L.); *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 5 (H.C.A.); and *Yuen Kun Yeu*

v. Attorney-General of Hong Kong, [1988] A.C. 175 (P.C.) Nevertheless, the approach set forward in the *Anns* case which has been confirmed and approved by this Court in the *City of Kamloops v. Nielsen*, *supra*, is sound. It can be applied effectively and should be applied in any case where negligence or misconduct has been alleged against a government agency. According to the criteria set forth in the *Kamloops* case, the proximity or neighbourhood test familiar to all since *Donoghue v. Stevenson*, [1932] A.C. 562, may well establish a *prima facie* duty of care on the part of a public authority. Nevertheless, the statutory provisions pursuant to which the public authority must act may well restrict the scope of that duty or enact specific conditions for its exercise. I would note that to say a statute restricts the scope of the duty of a government agency may mean that the standard of care owed by a government agency is reduced by the provisions of the statute which authorizes that agency to act.

The two criteria as set forward in *City of Kamloops v. Nielsen*, *supra*, separate the two sets of conditions for imposing liability on a public authority; first, the finding of a close relationship between the authority and the claimant and second, defining the scope of the duty or standard of care owed by the authority to the claimant and defining the class of persons to whom that duty is owed. In that case, it was recognized and emphasized that the extent to which any duty is owed by a public authority is dependent upon the statute under which it operates. There a municipal by-law similar to the one enacted by the City of Vernon was reviewed. It was noted that there existed a duty on the building inspector to enforce the provisions of the by-law. At the same time, it was expressly observed that there was a duty imposed upon the owner to advise the building inspector when various stages of construction had been reached in order that appropriate inspections could be carried out by the municipality. Thus it was recognized that the extent of the duty owed by a public authority will be dependent upon and may be limited by the statute under which the public authority acts.

Let us turn now to the application of the *Anns* test as set forth by Wilson J. in the *Kamloops* case. It will be recalled that the first criterion is as follows:

> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person?

It was held by this Court in *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, at p. 238, that "proximity" requires a "special relationship" which "would arise in circumstances where the defendant, being so placed that others would reasonably rely on his judgment or skill, knows that the plaintiff will rely on his statements." (See also *Sutherland Shire Council v. Heyman*, *supra*, *per* Brennan J. and *Yuen Kun Yeu v. Attorney-General of Hong Kong*, *supra*.) If this were a case in which William Phillips, as a professional engineer in private practice was consulted by the respondents as homeowners seeking advice respecting a small construction project, then the relationship between Mr. Phillips and the respondents would seem to be indistinguishable from that relationship which is described in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.) In those circumstances the respondents might well have been in a position to rely on Mr. Phillips' judgment or skill provided he would have reason to know that the respondents would act on his advice. In such a situation the special relationship or proximity would be clearly established.

However, Mr. Phillips was not acting in a private capacity but as an official of the appellant municipality. Nonetheless there was still such a close relationship that in the reasonable contemplation of Mr. Phillips, carelessness on his part might cause damage to the Manolakoses. It is necessary therefore to consider the second criterion for establishing liability, which is in this form:

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

In applying this criterion it can be seen that there are considerations which, in this case, "negative or limit" (a) the scope of the duty, and (b) the persons to whom it is owed. It must be remembered that Mr. Phillips, although a professional engineer, was a senior employee fulfilling certain specific duties on behalf of the city. He was neither dispensing advice to the respondents nor was he guaranteeing that the respondents' home improvement project (the retaining wall) would be a success. The respondents had hired a contractor to take care of their interests in this regard. Further, the granting of a building permit did not and could not relieve the respondent owners of their responsibility to have the work on the retaining wall carried out in accordance with the city's by-laws. Nor did Mr. Phillips' willingness to allow this relatively small and inexpensive project to proceed without requiring the respondents to incur the cost of obtaining drawings completed by a professional engineer relieve the respondents of that responsibility.

By means of its by-law, the city had put into place a system of inspections designed to ensure that at the crucial stages in the project and before the next step in construction was undertaken which would conceal earlier errors, the progress of the work could be reviewed. As noted earlier, it is impossible for a municipality to constantly monitor all the building projects proceeding within its limits at any given time. It is properly incumbent upon owners to inform the city when the time for inspection has arrived. Where the owner has given timely notice, the city must reasonably and properly inspect the work in progress. That is the obligation which the municipality imposed upon itself pursuant to its by-law. The concomitant responsibility cast upon the owners was to advise the city as to when the inspection could be made. Since neither the Manolakoses nor their contractors gave the requisite timely notice to the city as to when the critical inspections could be made, they were in breach of their obligation to the city and their

failure to give notice rendered it impossible for the city to fulfill its duty to inspect. As a result of their failure to notify the city, the Manolakoses absolved the municipality from any liability and their claim must be dismissed on that ground alone.

There may be cases in which the city would be liable to a negligent building owner. For example, if the city received due notice of inspection but negligently carried out the inspection and as a result missed a fatal flaw in the construction, the city could be held liable. Nevertheless, where a by-law places upon a building owner a duty to inform the city when an inspection should be conducted and where the inspection would have revealed the very problem that ultimately manifests itself, then the owner's negligent failure to inform the city precludes the owner from recovering against the municipality. Such owners are the source of their own loss. The owners not the municipality must be responsible for and bear any losses occasioned to the owners as a result of the failure to comply with the building by-laws due to a failure to give timely notice to the municipality to inspect the work in progress.

Further, it was not reasonable for the respondents to rely upon Mr. Phillips' agreement to issue a permit as an indication that the wall was sound. That responsibility remained, as it should, with the owners who engaged contractors of their choosing to undertake and be responsible for the design and construction of the project on their behalf.

If tort law is, as it is said to be, a matter of policy, then it is fitting that owners remain primarily responsible for the work which they carry out on their property. It is the owners who should ensure through their contractors and subcontractors that the building is safe, structurally sound and complies with the municipal by-law. As well it is the owner who must ensure that due and proper notice of inspections is given to the municipality. If the policy were otherwise it would place an unreasonable and unfair burden upon all the other ratepayers of a municipality

as it would require a municipality to be an insurer of the owner as to the compliance with its by-laws and in that way an insurer of the proper design and workmanship of projects undertaken by an owner.

In *Anns v. Merton London Borough Council*, *supra*, Lord Wilberforce indicated that a public authority owed no duty to a negligent building owner who was the source of his or her own loss. He put it in this way at p. 758:

> *To whom the duty is owed.* There is, in my opinion, no difficulty about this. A reasonable man in the position of the inspector must realize that if foundations are covered without adequate depth or strength as required by the bylaws, injury to safety or health may be suffered by owners or occupiers of the house. The duty is owed to them -- not of course to a negligent building owner, the source of his own loss. [Emphasis added.]

A negligent building owner certainly is the source of his or her loss where, as here, the owner's negligent failure to inform the city that an inspection must be conducted precludes the city from taking steps which would have averted the loss. Nor can it be said that the city contributed to the loss suffered by the owners by its failure to insist upon engineers' drawings of the project. On this small project the city was entitled to rely upon the owners' complying with the by-law and giving timely notice that the inspection of the work could take place. If that had been done the inspection would have revealed the deficiencies and ensured that they were rectified, thus avoiding any loss to the owners. Although the city engineer waived the requirement of engineers' drawings as a favour to the owners, he did so in the very reasonable and proper expectation that the by-law inspection requirement would be complied with and in the knowledge that the inspection would reveal any deficiencies. It was the subsequent intervening breach of duty of the owners (and their contractor) which is in these circumstances the sole cause of their loss.

I would therefore agree with the conclusion of Lambert J.A. that the respondents cannot succeed in their claim against Mr. Phillips or the City of Vernon.

Liability of the Municipality to the Neighbours

That conclusion, however, does not constitute an answer to the claims against Vernon brought by the neighbours of the respondents. For the reasons set out earlier it was unreasonable for the respondents the Manolakoses to rely upon the city to ensure that their property improvement (the retaining wall) would be successful. Nonetheless it was clearly reasonable for the neighbours who were completely blameless, who did not choose the contractors and who could not ensure that the required notice of inspection be given to the city, to rely upon the municipality to ensure that the construction carried out by the Manolakoses would not threaten the health or the safety of those residing below them on the hillside. Pursuant to s. 734 of the *Municipal Act*, city councils may pass by-laws, such as the one that presents itself in this case, for the protection of the health and safety of persons and the protection of property. The damage sustained by the neighbours is precisely that type of damage which the by-law was designed to avoid. It is therefore appropriate, with regard to the neighbours' claims to accept the trial judge's finding that Mr. Phillips was negligent in granting a building permit based on the inadequate information submitted to him by the contractor and subcontractor.

I would accept the apportionment of damages suggested by Lambert J.A. namely, 30% to the respondents the Manolakoses, 42% to the contractor and subcontractor on an individual allocation of 21% each, and 28% allocated to the chief building inspector for whom the city is vicariously liable. Further, the damages suffered by the neighbours are properly recoverable on the facts of this case. The retaining wall collapsed and it was the movement of the material from

the wall down the slope that damaged the neighbours' property. It is not therefore necessary to consider the problem of recovery for economic loss on the facts of this case.

Disposition

In the result, I would allow the appeal of Mr. Phillips and the City of Vernon in the action brought by the respondents the Manolakoses. I would also allow their appeal in the third party proceedings to the extent of the findings of contributory negligence on the part of Mr. and Mrs. Manolakos.

In the result, the appeal of the municipality will be allowed, the order of the Court of Appeal and the judgment at trial set aside and the actions of the Manolakoses dismissed with costs.

In action 22882-82, Kelowna, that is the action of the neighbours of the Manolakoses, I would allow the appeal and vary the Order of the Court of Appeal and the judgment at trial in that the defendants Peter and Voula Manolakos will be held contributorily negligent to the extent of 30%, Ralph Gohmann and Harry Barber 42% (apportioned 21% each) and the City of Vernon 28%. There should be no costs on that appeal.

//*Wilson J.*//

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

WILSON J. (dissenting in part) -- As my colleagues Justices La Forest and Cory point out, this case is to be distinguished from *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, on the basis that in this case it is the owners of the property and not a subsequent third party purchaser who

are suing the City for negligence. The question is whether the fact that the owners failed to discharge their responsibilities under the by-law should disentitle them from recovering against the City who failed to discharge its responsibilities. My colleague Cory J. says yes and my colleague La Forest J. says no. On this aspect I agree with La Forest J.

I believe that the test of proximity set out by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728, is met in this case. It must have been obvious to the City that any breach of duty on its part could cause damage to the plaintiffs just as it must have been obvious that it would cause damage to third party purchasers. The key issue is whether there is any reason then to exclude the owners from the class of persons to whom the City's private law duty of care is owed. Cory J. and Lambert J.A. (dissenting in the Court of Appeal) rely on Lord Wilberforce's statement in *Anns v. Merton London Borough Council* that a public authority owes no duty of care "to a negligent building owner (who is) the source of his own loss". Cory J. says that is the case here. If the owner had sent the notices which they were required under the by-law to send, the City would have made the necessary inspections, seen the defects in construction, and ensured that they were rectified. But this, in my view, overlooks one very important aspect of the case, namely that the City issued a permit to the contractors to proceed with the construction despite obvious deficiencies in the design of the wall. The City assumed the risk that it could check on the design deficiencies as construction progressed. Yet it did not notify the plaintiffs to this effect. Thus, it seems to me perfectly reasonable for the owners, knowing that the permit to proceed had been issued on the basis of the design submitted by the contractors, to assume that the design had the City's approval and that they could rely on the contractors to give whatever notices were required to be given on their, the owners', behalf. This, after all, is what normally happens. The contractors are, in the normal course, the owner's agent for this purpose. They are included in the definition of "owner" in the statute. They are primarily responsible for the proper construction of the wall and know when the crucial stages for

inspection by the City have been reached. Moreover, they knew how important it was, in light of the deficiencies in their design, that the notices be given in a timely fashion so that the City could conduct its inspection. The owners, on the other hand, had no way of knowing that they were taking any special risk in relying on the contractors to give the notices. Had the City informed the owners that the plan was deficient and that it was therefore vital for the safety of the owners as well as for the safety of their neighbours that the requisite notices be given, I have no doubt that the plaintiffs would have attended to this matter personally or at the very least checked with their contractors to ensure that it was being done. But because of this omission on the part of the City which led the plaintiffs to rely on the contractors in the normal way, I do not believe that the plaintiffs can be viewed as "negligent", less still as "the source of their own loss".

I believe that negligence in the circumstances of this case must mean something more than a failure on the part of the owner to personally give the notices required by the by-law and I find support for this view in the decision of the English Court of Appeal in *Dennis v. Charnwood Borough Council*, [1982] 3 All E.R. 486, where, despite the fact that the plaintiffs had failed to meet all the requirements of the by-law, Templeman L.J. stated at p. 489:

> In my judgment, if local authorities are liable within the limits prescribed in the *Anns* case for negligence in connection with the discretionary inspection of building works, they must similarly be liable for negligence in failing to use reasonable care in considering and approving plans.
>
> There is no suggestion that Mr. and Mrs. Dennis, the building owners, were negligent or the source of their own loss. They were entitled to trust the builder and the council. They were entitled to claim damages against the builder if he was negligent. They were entitled to claim damages against the council if the council were negligently in breach of their duty to take reasonable care in the consideration of the plan of the house or in the exercise of their supervisory and discretionary power of inspection.

The decision in *Dennis v. Charnwood Borough Council* was explained by the House of Lords in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.*, [1985] A.C. 210, where Lord Keith stated at pp. 244-45:

> The decision is in my opinion to be justified on the basis that the plaintiffs, as owners who were the intended occupiers of the house, were within the ambit of the duty of care laid down in *Anns*. They were persons injury to whose safety or health might necessarily be expected to occur if the foundations of the house were inadequate. There can be no doubt that, under the ratio decidendi of *Anns*, a remedy against the local authority would have been available to any subsequent occupier who had purchased the house. The plaintiffs were in breach of certain material provisions of the relevant by-laws dealing with the adequacy of foundations, but the fact remains that plans showing the intended foundations had been submitted with their authority and had been approved. This approval might reasonably be taken as an indication that the foundations were satisfactory, and considering that the plaintiffs themselves had no technical knowledge nor understanding of the position and that their own safety and health were in issue, it would be unreasonable and unjust to hold that the local authority owed them no duty.

I think the present case parallels the *Dennis* case and I would apply to it the last sentence of the above quotation from Lord Keith's judgment. We are dealing here with inexperienced owners seeking to have a retaining wall built on their property and relying on the expertise of their contractors and on the watchdog function of the City. Both let them down. I think it was perfectly reasonable for the plaintiffs to rely on the City in that capacity particularly since it had issued a permit for the work to go ahead without any advice to the plaintiffs that it, the City, was taking a calculated risk in doing so and that subsequent on-site inspections were therefore absolutely vital.

I would dismiss the appeal with costs.

Appeal allowed, LAMER *and* CORY JJ. *dissenting in part,* WILSON *and* L'HEUREUX-DUBÉ JJ. *dissenting in part.*

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