Date: 19991019
Docket: CA155529

NOVA SCOTIA COURT OF APPEAL

[Cite as: Munroe v McCarron, 1999 NSCA 123]

Freeman, Hart and Pugsley, JJ.A.

BETWEEN:

ANGELA ELIZABETH MUNROE, MERLYN THOMAS MUNROE, AARON PAUL MUNROE by his Litigation Guardian, ANGELA ELIZABETH MUNROE, and CORY THOMAS MUNROE, by his Litigation Guardian, ANGELA ELIZABETH MUNROE	Jamie MacGillivray for the Appellants
Appellants	
- and -	
JAMES C. McCARRON and JOHN W. McCARRON LIMITED, a body corporate, incorporated pursuant to the laws of the Province of Nova Scotia	James C. MacIntosh for the Respondents
Respondents	
	Appeal Heard: September 24, 1999
	Judgment Delivered: October 19, 1999

THE COURT: The appeal is dismissed with costs, per reasons for judgment of Pugsley, J.A.; Hart and Freeman, JJ.A., concurring.

Pugsley, J.A.:

[1] The principal issue in this appeal, as expressed by counsel for the appellants, is whether the trial judge erred in failing to make adverse findings respecting the credibility of the individual respondent, James McCarron.

[2] The appellant, Angela Munroe, then twenty-nine, was operating the family car, a 1989 Beretta, on the proper side of a paved, two-lane country road outside Antigonish, at about 7:30 p.m. on October 19,1996. Her husband, and their two young boys, also appellants, were passengers. It was a dark, clear night. She suddenly was confronted with a full-grown steer which ran directly into her vehicle. As a result of the collision, the vehicle sustained substantial damage, and both Mr. and Mrs. Munroe suffered significant injuries. The two children, while experiencing no significant physical injury, continued to suffer from "abnormal fears" at the time of the trial in September of 1998. The steer died as a result of the impact.

[3] In a reserved decision, after a trial of almost three days, Justice Moir concluded that Mrs. Munroe "could have done nothing to avoid the accident".

[4] He also determined that:

- The steer escaped from a pasture adjacent to the roadway. The pasture was owned and maintained by the respondents. It was fenced with spruce posts and wire stretching along the highway and open lands, and spruce posts joined by barbed wire along the wooded lands;

- The entire fence was inspected in the spring of 1996, and was strengthened as required, including replacement of any rotting posts. It was periodically inspected, and maintained regularly, through the summer and fall and was in sound condition at the time of the accident;
- Cattle from the respondent's herd had never escaped onto the highway, or other properties, over the twelve years preceding the incident, except for the evening of October 19, 1996, and an earlier incident in or about July of 1996, when a cow in heat broke a post jumping over the fence.

[5] Justice Moir concluded that the ordinary rules of negligence applied, and that the appellants' damage and injuries resulted "from an unusual occurrence, not a breach of duty", and accordingly dismissed the appellants' claim, as well as the counter claim which had been advanced by the respondents for damages consequent upon the loss of the steer.

[6] I would summarize the submissions of the appellants as alleging the following errors on behalf of the trial judge:

- he failed to take into account numerous inconsistencies in Mr. McCarron's evidence on discovery held in July of 1997, and his evidence at trial in September, 1998;
- he erred in applying an incorrect, and too lenient standard of care, in light of the strict standard of duty of imposed on livestock owners by s.168(1) of the

Motor Vehicle Act, R.S.N.S., C-293, and s. 5(1).of the **Fences and Detention of Stray Livestock Act**, R.S.N.S., C-166.

Analysis

[7] In essence, counsel for the appellants seeks to have us retry the case. It is not our mandate. It was the responsibility of Justice Moir to find the facts and he has done so.

[8] Mr. McCarron offered explanations at trial for the discrepancy between his evidence at discovery and his evidence at trial. All of the discrepancies were stressed by counsel during his cross-examination. Justice Moir obviously accepted Mr. McCarron's explanation, as he found:

> I encountered no serious issues of credibility in this case. Each witness honestly stated their perceptions and their memories of them.

[9] The credibility of a witness is:

> ...a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanor and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. ... (MacDonald, J.A., in **Travellers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434, (C.A). at p. 437, as approved by this court in **Parker v. Parsons** (1997), 160 N.S.R. (2d) 321 at 334.)

[10] After reviewing the evidence adduced at trial, I am satisfied that there are no reasons, let alone any strong and cogent reasons, justifying this court to reverse the findings of credibility made by the trial judge.

[11] Counsel for the appellants suggests that this case is analogous to a barrel of beer dropping from the upstairs of a warehouse on a pedestrian walking the street below, invoking memories of the fact situation in **Byrne v. Boadle** [1863] 2 H. & C. 722.
In the statement of claim, the appellants "specifically plead and rely upon the doctrine res ipsa loquitur".

[12] The comments of Justice Major, speaking on behalf of the court in **Fontaine v. British Columbia (Official Administrator),** [1998] 1 S.C.R. 424, at 435 are apposite:

> It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[13] As was the case in **Fontaine**, the position advanced by the appellants would virtually subject the respondents to strict liability.

[14] The trial judge made direct findings, supported by the evidence, that the respondents had not breached any duty of care. The steps taken by the respondents were, in the words of Justice Major, at 432:

> ...adequate to neutralize whatever inference the circumstantial evidence could permit to be drawn.

[15] There was no evidence before the court to establish that the height of the wire between the fence posts was inadequate to ensure that steers would not normally escape from the enclosure.

[16] Justice Moir's findings were not unreasonable and should not be interfered with by this Court.

[17] Counsel for the appellants submits that s. 5(1) of the **Fences and Detention of Stray Livestock Act**, as well as s. 168(1) of the **Motor Vehicle Act**, disclose a legislative intent to hold livestock owners to a higher standard of care to motorists using the highway, than that used by the trial judge.

[18] Section 5(1) of the **Fences and Detention of Stray Livestock Act**, provides that:

> The owner of a livestock farm shall build and maintain fences adequate to prevent his livestock from escaping from his farm.

[19] The provisions of this **Act**, as well as the provisions of Chapter 167, S.N.S. 1989 (**The Fences and Impounding of Animals Act**), suggest that both **Acts** were designed to protect land from damage by straying livestock, or animals at large, not for the protection of motorists lawfully proceeding on a public highway.

[20] Justice Moir, in any event, concluded that the obligations imposed under s. 5(1) “do not exceed the common law duty”.

[21] The extent of that duty, he determined, was to be ascertained:

> . . . in light of the danger reasonably foreseen . . . and a routinely inspected and properly maintained page and barbed wire fence meets the standard . . .

[22] The respondents, Justice Moir determined, complied with the standard. This finding was supported by the evidence.

[23] Justice Moir noted that s. 168(1) of the **Motor Vehicle Act** provided a higher standard than that imposed at common law.

[24] Section 168(1) provides:

> 168 (1) The owner of a domestic animal, other than a cat or a dog, shall not permit the animal to be unattended on a highway.

[25] A violation of this section will subject the offender to a penalty of not less than $15.00 (s. 299).

[26] Justice Moir determined that:

> Similar statutes have been held not to impose a special civil duty.

[27] He relied, in support of this conclusion, upon the decision of Justice Gillis, of the Nova Scotia Supreme Court, in **Crosby v. Curry** (1969), 7 D.L.R. (3d) 188.

[28] In that case, one remarkably similar to the present factual situation, Justice Gillis stated, at p. 191:

> I am also of the opinion and hold that it is inappropriate to hold the defendant to any application of a strict liability or liability without duty rule. In effect, I hold that any cause of action that might be had by the plaintiff, in the circumstances, must be based upon the negligence of the defendant.

[29] The issue of the relation of a breach of statutory duty to a civil cause of action was considered by the Supreme Court in **Canada v. Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 205.

[30] Justice Dickson, on behalf of the Court, stated at p. 225:

> Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

[31] At pp. 227-228, Justice Dickson summarized his views, in these words:

> 1. Civil consequences of breach of statute should be subsumed in the law of negligence.
>
> 2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.
>
> 3. Proof of statutory breach, causative of damages, may be evidence of negligence.
>
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

[32] Justice Major's recent comments on behalf of the Court, in **Ryan v. Victoria (City)**, [1999] 1 S.C.R. 201, at 222 are instructive:

> Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. . .

[33] Justice Moir obviously rejected the submission that in the circumstances of this case, s. 168(1) of the **Motor Vehicle Act** provided a standard of reasonable conduct. In my opinion, he was correct in so doing. The imposition of a doctrine of absolute liability under s. 168(1) of the **Motor Vehicle Act** for reasons germane to that **Act** does not justify extension of such a doctrine to enlarge the duty of care owed by the respondents at common law, in the circumstances of this case.

Conclusions

[34] Justice Moir correctly concluded that, in the circumstances of this case, the appellants have failed to establish any negligence on the part of the respondents.

[35] I would, accordingly, dismiss the appeal, with costs to the respondents in the aggregate amount of $750.00, plus disbursements.

Pugsley, J.A.

Concurred in:

Hart, J.A.

Freeman, J.A.