

SCCH 242979

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Dow v. MacLean, 2006 NSSM 56

Between:

JOHN DOW and JESSIE DOW

CLAIMANTS

-and -

NEIL MACLEAN and WAWANESA MUTUAL INSURANCE

DEFENDANTS

**Adjudicator
David T.R. Parker**

Heard: December 6, December 7, 2005; January 4, 2006

Decision: March 6, 2006

Counsel:

W. Harry Thurlow and Erin Nauss represented the Claimants

Christopher J. Forbes represented the Defendants

This claim is for \$15,000.00 plus interest and costs. The reason for the claim is for various losses and damages that were incurred by the Claimants as a result of

oil spilling from the Defendant's insured property onto the Claimants' property. These expenses do not include the actual remediation expenses already paid for by the Defendant Wawanesa but rather additional expenses incurred by the Claimants as a result of the spill and the ensuing remediation project.

In their pleading the Claimants state:

"As a direct result of both the oil spill and the remediation work conducted on the Claimants' property (following the escape of oil from the Defendant MacLean's property) the Claimants sustained injury loss and/or damage to the Claimants' property as well as residual out-of-pocket expenses..."

The relief being sought by the Claimants is particularized as follows:

1.	Lost income (home office)	\$	5,600.00
	\$8,400 minus one third overhead deduction		
2.	Healthy Home (oil fume reduction)		360.41
3.	MGI accounts (remediation consultants)		2,732.23
4.	Cracks in ceiling		400.00
5.	Accommodations		1,000.00
6.	Paper weight		100.00
7.	Tree Surgeon (quote for recommended treatment (A-1 Tree Service))		400.00
8.	Steam Cleaning		190.00
9.	Computer (\$1,919.35 minus one third)		1,279.57

10. Eric Jordan invoices re services connected with Certificate of Compliance	5,459.69
11. General damages for inconvenience	<u>100.00</u>
Sub-Total:	\$ 17,621.90
Small Claims Court limit	\$ 15,000.00
Filing Fee	160.00
Service Fee	57.50
Prejudgment interest on \$15,000 @ 4% per Annum X 4 years	<u>2,400.00</u>
Total Allowable Claim:	\$ 17,617.15

The Defendants in their pleadings state, in part, that the losses being claimed did not result from the oil leak from the Defendant's property or work conducted on the Claimants' property.

In the alternative, that all losses being claimed were unnecessary costs in any event and the Defendant Wawanesa made it known to the Claimants it would not provide reimbursement of the costs being claimed. In the further alternative, the amount claimed is excessive and unreasonable.

The Claimant John Dow is a retired civil engineer.

On March 10, 1999, the Claimant detected a smell of oil in and around his home.

It was determined that the oil tank located on the Defendant Neil MacLean's ("MacLean") property had leaked oil.

The Defendant Wawanesa Mutual Insurance ("Wawanesa") are the insurers of the Defendant MacLean's property.

Following the detection of the smell of oil on the Claimants' property, the Claimant hired Healthy Homes to investigate where the oil smell was coming from. As it turned out, the Claimant determined where the oil was coming from.

The Defendant Wawanesa and the Claimant got in touch with each other and Strum Environmental Services was brought in by Wawanesa to install a vapor extraction system to remove vapors from underneath the concrete floor in the Claimant's residence and to construct three test pits to the east of the Claimant's residence and to supervise excavation of hydrocarbon affected material to the north of the Claimants' residence.

The Defendant Wawanesa eventually replaced Strum by Jacques Whitford Environmental Limited ("JWEL") to supervise remedial excavation and to deal with the foul soil impacts resulting from the MacLean spill.

The report of JWEL dated September 27, 2000, outlines the work completed by JWEL between August 1, 2000, and August 17, 2000, which was as follows:

1. Supervise Jamesway Environmental Restoration Ltd. ("Jamesway") in

the preparation of the work area, including safety measures.

2. Excavate two test pits with the garage
3. Supervise remedial excavation in garage area
4. Collect soil samples for field observation and submission of select samples for chemical analysis
5. Supervise back filling of the excavation

In general, JWEL concluded "that active site remediation has been completed. Based on the results of this remedial activity, JWEL concludes that regulatory guidelines have been met and no further action is required for the subject property."

Part of the JWEL report, however, states that "JWEL cannot warrant against undiscoverable environmental liabilities. When oil escapes onto another property soil contamination on the other's property is a network consequence of that escape."

The result is that remediation work to remove the oil has to be carried out in order to rectify the damage. This was done at no cost to the Claimants.

The next questions is whether there was any other damage that occurred to the Claimants as a result of the oil spill that would have to be rectified and what the cost would be to rectify that damage.

And the further question is that in rectifying the damage caused by the oil spill did

any other damage occur to the Claimants, what would be the cost of that damage and the cost to rectify same.

Healthy Home (Oil Fume Reduction)

On March 10, 1999, the Claimant noticed a smell of oil. He said it looked like oil on the ground and he went over to his neighbour's home, up hill from the Claimants' property, and tapped on his tank as he felt the oil was coming from the MacLean tank. He then called in Healthy Home for consultation to confirm there was a problem. The cost of this was \$360.00 including HST. After this the Claimant heard from the Defendant MacLean's insurance adjuster from Wawanesa.

Steam Cleaning - \$190.00

After the removal of the remediated material and fill put in, the Claimant said there was dust everywhere and he ordered his house washed at a cost of \$190.00.

(Exhibit C-8)

Computer - \$1,919.35 minus one third = \$1,279.57

Accommodations - \$1,000.00

This amount represents the Claimant's payment for rent in Prince Edward Island when the Claimants went away in August while remediation work was being done on this property.

Geotechnology Ltd. invoice regarding services connected with Certificate of Compliance - \$5,459.69

The Claimant said he received advice from MGI that he should drill a test hole and therefore he hired Eric Jorden of Geotechnology who agreed and the resulting cost for Geotechnology Ltd. claimed is \$5,459.69 (Exhibit C-13) of their \$9,423.19 bill. According to the Claimant, Mr. Jorden was going to assist him in obtaining a "Certificate of Completion". Ultimately in "May 2001 a drill was done and found out no oil in that", according to the Claimant. The Claimant said on direct, "I hired Eric Jorden to oversee site, it cost me \$8000.00 but it is not part of the claim."

Cracks in Ceiling - \$400.00

The Claimant went to Prince Edward Island while the contractor was digging out the garage. When he arrived home in September he noted cracks in the ceiling which he assumed were from the jackhammer and excavator causing vibrations. The Claimant on cross-examination said, "the cracks were in the south end away from where the jack hammering occurred", and he also said, "I think it was a year later when I claimed for the cracks."

Paper Weight - \$100.00

At some point after the work was completed, the Claimant noticed shelves in a cabinet had collapsed and that a paperweight was chipped. He remembered his mother telling him in 1983 that the paperweight was worth \$100.00. The Claimant provided no photographs or the paperweight to the Court, nor did he provide an appraisal of its value.

Tree Surgeon - \$400.00 (to fix pear tree)

The Claimant noticed a large chunk of bark missing from his pear tree in the yard and assumed the contractor doing the remediation work had caused the damage. He telephoned an arborist and was told it would cost \$400 to \$500 to repair/replace the tree.

John Dow - The Claimant

The Claimant in his testimony said:

"I could not work in my work area downstairs. I was occupied with determining the problem."

"I had intended to do some consulting work plus I was assigned as a court appointed expert."

"I had to go to a library to work."

The Claimant provided the Court with notes and time sheets on time lost between March 12, 1999 to September 22, 1999 amounting to 231 hours, and he said his hourly rate was \$150.00 plus taxes. The time was recorded when he was "looking after the problem, time away from assignments".

The total claim was \$8,400.00 less one-third for any overhead deduction, or \$5,600.00.

On cross-examination of what he did during the hours he submitted his response was "I cannot speak to hours. I was going around talking to people. It is a

reflection of what I spent checking out site." He stated, "when I had to attend to a particular think I would mark the time down." With respect to the Claimant's time taken away from his regular work he stated, "I cannot recall what time I spend on my work before the spill."

Donald A. Carey

Mr. Carey is a geotechnical engineer that worked for JWEL for 24 years. In April 1999 his firm was retained by the Defendant Wawanesa to take over the operation, involving the remediation of the Defendant MacLean's property and the Claimants' property. He reviewed the work and report of Strum Environmental and he surmised that Strum "appeared to be doing a reasonable job".

His opinion differed from Eric Jorden's. Based on Mr. Carey's review of excavation on the Claimants' property, ground water was above bedrock and therefore there would be no oil in bedrock. However, in May 2001 a monitoring well was installed at the request of Eric Jorden acting on behalf of the Claimant. The results were as Mr. Carey had expected. "There was no visual or olfactory evidence of petroleum hydrocarbon impacts in the soil or bedrock samples, or in the groundwater as reported by Mr. Carey on June 14, 2001."

The report of Mr. Carey concludes, "based on the above noted results and the remediation work carried out by the site, JWEL is prepared to issue a Certificate of Compliance....indicating that petroleum hydrocarbon issues have been dealt with and the site meets N.S. Department of Environment and Labour Criteria."

Mr. Carey on cross-examination said it was not possible to inspect every bit of soil and his company would not warrant that the property was without contamination.

Christopher Smith

Mr. Smith was a senior product manager working for JWEL and has dealt with over 500 oil spills in his twenty-four years in this area. He noted in his testimony there were a number of issues occurring at the Claimant's site. In summary fashion, the Claimant was requesting that the work be done in a certain fashion so that the Claimants' property could not be damaged any further than it was. As well, there was a certain amount of acrimony between JWEL's staff and the claimant and as a result there were certain minor delays in doing the remediation work. There were also delays with what Mr. Smith called "lawyer delays".

Brian James

Mr. James was the owner and operator of the construction company that did the actual testing and remediation/excavation work on the Claimants' property. His company, Jamesway Environmental Restoration Limited, was retained by the Defendant Wawanesa. He indicated that the work was stopped by the Claimant on several occasions. When they had finished they steam cleaned the house and garage. He indicated that when he left the job site, the Claimant and Eric Jorden were happy with the work. He indicated much of the delay was over safety issues with the excavation work.

The Defendant Neil MacLean did not add anything different or new to what all the

other witnesses said. He did say he wanted a second opinion from Strum and the Defendant Wawanesa got him a second opinion.

Barbara Cross

Barbara Cross was an adjuster with the Defendant Wawanesa but was not the main adjuster on the Claimants' site. The adjuster who handled the matter passed away.

Contrary to the Claimant's testimony she said the Defendant would not pay for the Claimants' consultants and advised him of this verbally and in writing. The Defendant Wawanesa only agreed to do a monitoring well to satisfy the Claimant.

Decision

There is no dispute over the fact that oil from the Defendant MacLean's oil tank escaped and migrated down the hill onto and into the Claimants' property. I agree with Claimants' Counsel who cited the case Tridan Developments Limited et. al v. Shell Canada Products Limited et. al [2002] O.J. No. 1, 57 O.R. (3d) 503 wherein it stated in the head note:

"Where a product that may cause mischief escapes to a neighbour's property, there is responsibility for all damage that is the natural consequences of the escape."

The Court of Appeal went on to say, "***Of course, they must be reasonable.***"

The oil in this case caused the mischief when it escaped upon the Claimants' property.

ISSUES:

The issues before this Court are simple and can be stated as follows:

- (1) What is the damage the Claimant claims occurred?
- (2) Is that damage a natural consequence of the escape?
- (3) Has the Claimant shown the amount of the damages resulting from the damage referred to in #2 above?

Loss of Income

Loss of income could well be a natural consequence of having oil escape onto your property. The Claimant, while particularizing hours for loss of work or for attending to spill, has not particularized what lost work that he was doing and, except for some brief written notes, when he had to attend to the spill I do not think the latter would fall under a claimable amount when it was connected with the former, in any event. That is, loss of work as a result of having to attend to the problem. The Claimant also said the project he was working on resulted in no loss of income. He was able to work on projects in a library and as he was working on his own schedule i.e. his schedule was flexible as to when he worked. There is also no evidentiary reference point for the hourly rate for which he claims. There just is simply not enough proof based on the civil standard to allow the amount the Claimant is claiming.

Health Home - \$360.00

While the Claimant identified the source of the smell and was able to identify that it was oil, it is reasonable that he would call someone in to make a determination as quickly as possible. One could only imagine how unsettling this would have been

and it seems to me to be quite reasonable to allow such a claim. Therefore, I shall allow the claim of \$360.00.

Cracks in Ceiling - \$400.00

The Claimant did not report these cracks until a year after work was done on his property. While this in itself may not be conclusive as to the cause or non-cause of the cracks, there was no photography of the cracks and no estimate or reasoning on how the Claimant arrived at the \$400.00 amount. Therefore, I shall not allow this part of the claim.

Accommodation - \$1,000.00

There was no reason to leave his home and go to P.E.I. while work was being completed on his home. The jack hammering, according to the Defendant's witness, was not extensive and there was no work going on at night. The work being conducted was outside the living area of the home. The Claimant also said he usually went to Prince Edward Island at that time of year. In other words it was a vacation expense he would normally incur in any event. I would therefore not allow this part of the claim.

Paperweight - \$100.00

The standard of proof is not met as to damage or as to damages. There is also a problem with causation as there is no direct link other than through supposition as to what happened to the paperweight and when it happened. Therefore, I shall not allow this part of the claim.

Tree Damage - \$400.00

There is no foundation for any tree damage or what it would cost to repair the problem and this also suffers from a lack of proof. I shall not allow this part of the claim.

Steam Cleaning - \$190.00

There is the invoice for the steam cleaning of the home. While Mr. James said he steam cleaned the home after he left, it does not make any sense why the Claimant would go out and have it done shortly thereafter unless it was not cleaned properly as a result of the excavation work that was being done. I shall allow the claim of \$190.00.

Eric Jordan Invoice re Services Connected With Certificate of Compliance - \$5,459.69

Eric Jordan did not provide this Court with any evidence; however, it was evident that the Claimant hired his company, particularly as the Defendant Wawanesa bent to his suggestion that an additional test should be done to confirm Mr. Carey's opinion that the oil would not be in the bedrock. It was not reasonable to charge the Defendant Wawanesa with another consultant as JWEL was providing detailed information and was prepared to obtain a Clearance Certificate. Barbara Cross, representing Wawanesa, said she was clear that Wawanesa was not prepared to pay for Eric Jordan or MGI Limited and this was confirmed in writing. It appears clear Eric Jordan was not necessary for the completion of the remediation and certainly he was not available to give an opinion on same and to be cross-examined.

M.G.I. Limited Account

It was understandable that the Claimant was concerned about what was being done with his property. He saw safety issues in excavating within the garage. He was not in accord with Strum and another consultant had been brought in, plus he became upset with Wawanesa's offer of settlement.

M.G.I. Limited was brought in by the Claimant near the beginning to advise during the assessment and remediation of the Claimants' property, as the Claimant was not satisfied with Strum Environmental Services. It is not clear what M.G.I. did based on invoices presented to the Court, and while it is understandable that the Claimant was concerned there is no evidence to show Strum and then JWEL were not taking care of the problem. The Claimant said that the Adjuster said go ahead and hire M.G.I., that Wawanesa would take care of it. If Wawanesa had refused to bring in environmental consultants and contractors to remedy the problem I would understand M.G.I. being hired to support a claim where remediation was refused. Bringing in another consultant has not been proven to be necessary or justifiable. I shall not allow this award.

Computer Claim - \$1,919.35

There is no evidence to show what happened to the computer. The only evidence I have is an invoice showing an upgrade to a computer. That part of the claim is not allowed.

For the most part the claim has not been successful. I will however allow the

normal costs and if there are any other costs that the parties want me to consider then they can make an Application to be heard on same.

IT IS THEREFORE ORDERED THAT THE Defendant Neil MacLean pay the Claimants the following sums:

\$360.00 Health home bill

\$190.00 Steam cleaning

\$160.00 Court costs

\$710.00 Total

Dated at Halifax, this 6th day of March, A.D., 2006.

David T.R. Parker
Adjudicator of the Small Claims
Court of Nova Scotia