Claim No: SCAM 465094

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Smith v. Surrette, 2017 NSSM 61

BETWEEN:

DIANNE SMITH

Claimant

- and -

JOHN JACOB SURRETTE

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Amherst, Nova Scotia on November 6, 2017

Decision rendered on November 15, 2017

APPEARANCES

For the Claimant	Douglas Shatford, QC Liza Myers, articled clerk
For the Defendant	self-represented

BY THE COURT:

[1] The Claimant seeks damages of $25,000.00 resulting from an alleged collision between the Defendant's motor vehicle and her house at 169 Herrett Road in Springhill, in the early hours of the morning of January 23, 2017.

[2] Although strictly speaking irrelevant, it is an unfortunate fact in this case that neither the Claimant nor the Defendant had any type of insurance that would have applied. The Claimant testified that, because she was only an occasional user, and the property was unoccupied for much of the time, that it could not be insured. Accordingly, she knowingly (if reluctantly) ran the risk of loss. As for the Defendant, who ought to have been an insured driver, he was not in fact insured at the time of the accident. He had an explanation for how that might have happened, but in the end it is simply unfortunate that an accident such as this has to be dealt with in the absence of either homeowner's or automobile insurance.

[3] It is not in dispute that sometime about 5:30 a.m. the Defendant, who is a relatively young man from Springhill, was driving in his Volkswagen sedan on Herrett Road headed for Moncton, when he hit a patch of black ice and skidded off the road to his left. The out-of-control vehicle proceeded across someone's driveway and then into and across the yard of the Smith property. Along the way it encountered a low bank of snow and gravel, which caused some damage to the car, and probably also caused it to remain uncontrolled. Eventually it came to rest mere inches from the house owned by Ms. Smith. Somewhere along the way the airbag deployed.

[4] What is in dispute about this event is whether it hit the foundation of the house and bounced back, as the Claimant contends, or whether it came to a stop inches away from the house without ever making contact, as the Defendant contends.

[5] The house was unoccupied at the time of the incident. There were no eyewitnesses other than the Defendant himself.

[6] The house was being used as a secondary residence by the Claimant and her family. It had been inherited from her parents.

[7] The Defendant testified, and I accept, that his car was undriveable after the accident and he had good reasons to make it to Moncton without much delay. He called his mother who came and picked him up from the accident site and drove him to a friend's home where he would catch a lift to Moncton. He called the CAA who put him in contact with a tow truck driver. That driver eventually towed the vehicle, but counselled the Defendant that the accident needed to be reported and the police would need to be called. In the result, an RCMP officer came by that same morning and made a report which included photos, some of which were in evidence before me.

[8] The Claimant found out about the incident in a roundabout fashion, and was eventually in contact with the RCMP and with an individual, Wayne Smith, who regularly checks the property for her. Mr. Smith testified that he had checked the house about five days before January 23rd, and everything looked fine and the house was warm - as it ought to have been. He gained entry into the house on the 3rd day after the incident, and found extensive water damage

which was soon traced to a burst water return pipe in the heating system. The result of the burst pipe was that hot water was - at least for a time - spewing out and soaking ceiling tiles, causing them to fall off the ceiling in the front sunroom. The missing ceiling tiles revealed a moisture build up on the vapour barrier, which has led to mould growth and other problems. The cost estimate to remedy the situation is in excess of $26,000.00. I will discuss that later.

[9] The Claimant's theory is that the vehicle hit the house roughly at the level where the structure sits on the foundation, causing or exacerbating a crack in the foundation, which in turn allowed cold air to penetrate the wall and freeze a pipe, which eventually burst. The Claimant's expert plumber located the crack by looking from the inside in daylight, looking for light shining through. He photographed what he saw, which was a fairly lengthy crack some fractions of an inch thick.

[10] The Defendant flatly denied at the hearing that his car had hit the house. His position is that since there was no impact with the house, the frozen pipe and water damage was a sheer coincidence and had nothing to do with him.

[11] With such a clear credibility issue, I have to consider not only whether I believe the Defendant is being truthful, but also the inherent probabilities of the situation. The test has been stated in many ways, but none better than by O'Halloran J.A., of the British Columbia Court of Appeal in the case of *Faryna v. Chorny* [1952] 2 DLR 354 at p.357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The

> test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
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> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. ....

Other factors to consider

[12] The Claimant testified that on January 31, 2017 she had a conversation with the Defendant, who admitted that he did hit the house. It appears that this admission set the stage for a lot that followed, in the sense that the Claimant built her case on the assumption that the Defendant was not denying that his car hit the house. I found the Claimant to be credible on this point.

[13] The Claimant commenced her Claim with the assistance of her lawyer, in June 2017. The Claim stated, among other things: *"the Defendant operated his vehicle in a careless manner causing him to crash into the Plaintiff's (sic) property causing damage to both the structure and interior of the property ..."*

[14] The written Defence filed by the Defendant several weeks later stated: "*there is no evidence of structural damage caused by the accident, the house was uninsurable and vacant and the damage caused by the heating system was caused by a frozen pipe."* I believe it is significant that the Defendant did not outright deny that there had been a collision, but simply stated that it did no structural damage to the house. Only some months later, at the hearing, did he outright deny that his car even made contact with the house.

[15] I have looked at the photograph which the Defendant took showing his car inches away from the house. One has to ask how likely would it be for an out of control car skidding toward a house, to come to a full stop literally no more than 4 to 6 inches away from the house. My sense is that it is extremely unlikely. It is far more probable that the car hit the house, and rebounded a few inches.

[16] There are photographs showing damage to the front end of the Defendant's car, specifically a dent high up on the hood. The natural inference is that the car hit something. The Defendant's theory is that this was caused when the wheels hit the small bank of snow and gravel, which based on the photos was no more than maybe 8 to 12 inches high. I can see how this might have caused the car to jump up and come down, causing some damage to the underside or even the bumper, but it does not explain the damage to the hood.

[17] Also, in some of the photographs there appear to be pieces of the car's bumper or other front end structures on the ground, strongly suggesting that the car impacted the foundation.

[18] The air bag deployed at some point. It is possible that hitting the snow bank could have done it, but it is more likely that the air bags deployed with the deceleration that occurred when the vehicle came to an abrupt stop as a result of hitting something.

[19] In all, I find it to be more probable than not, that the vehicle hit the house.

[20] Apart from these inherent probabilities, there is the very real possibility that the Defendant is either not telling the truth, or that his perception was flawed. I allow for the possibility that the Defendant may honestly believe what he is saying, but I must also allow for the inherent reliability of his observations. It was probably just a matter of seconds from the time he lost control of the vehicle until it was all over. During that time he tried braking, started fish-tailing, let up on the brake and started giving gas, slid off the road, got jarred by hitting the snowbank, slid across a yard with a deployed air bag in his face and came to a halt. He was likely filled with fear and may not have been able to accurately perceive what was going on.

[21] I also find it to be extremely unlikely that the car could have stopped inches before hitting the house. After hitting the ice and gravel, there was nothing to stop the car's progress until the building itself. The lawn was only covered by a thin coating of snow and ice. Suggesting that the car stopped without hitting the building seems to me to be too convenient and farfetched.

[22] I accordingly find that it was more probable than not, that the Defendant's car hit the Claimant's house at the level of the foundation. It appears that the foundation was old and had cracks that had been repaired in the past. It is

entirely plausible that the impact of the car opened up an existing crack, or caused a crack at a weak spot, and created a crack large enough to allow cold air to enter the building and cause the pipe to freeze.

[23] Although the two events - the accident and the frozen pipe - could have happened entirely coincidentally, the more likely conclusion is that one caused the other.

Damages

[24] As mentioned, the Claimant seeks damages of $25,000.00, which is the maximum that this court may allow.

[25] The Claimant produced an expert report from the company PuroClean Nova Scotia North. The report gives the following opinion:

> A vehicle ran into the foundation of the property and that had caused the damage to one side of the foundation. The impact it also caused a shift in the front addition of the house. As a result, the roof started to leak and burst the hot water baseboard heater. The constant flow of the hot water inside the house caused a moisture buildup in the main floor and the second floor. The RH reading was 85% at the time of inspection. This estimate was prepared to clean up and fix all the related damages to the incident and to bring the property to its original condition prior to the incident. (sic)

[26] The author of this report was not called as a witness, and I do not propose to give any weight to his opinions concerning precisely how the damage occurred. I am unsure whether he was qualified to give that opinion. However, he did inspect the property and provided a detailed estimate as to what it would cost to remedy the damages that he saw, which was within his area of expertise. The total estimate to repair the damage is $26,137.50.

[27] The Claimant did call as a witness, and qualified as an expert, Philip Barkhouse, who is a red seal plumber. His credentials were conceded by the Defendant.

[28] His expert opinion included the following statement:

> My professional opinion and field experience that the draft of freezing wind flowed through the foundation and house plate. The copper tubing is type "K" soft copper a thick material. When the pipe froze the boiler couldn't supply heat in that. [NOTE: hot water freezes faster than cold water due to molecule structure] With no heat the ice inside the copper pipe travelled to the slant fin, which is a thinner material type "N" is used. The slant fin pipe is what split open called a butterfly splint, where two pieces of slant fin or join together the splint was at the slant fan hub even thinner material. As the water supplied to the boiler it would keep leaking out of the split area and he wouldn't stop because of the 1156F pressure reducing valve will not supplying water until the boiler reaches 12 to 15 psi. This is my professional evaluation. (sic)

[29] I accept this opinion as to how the damage inside the house occurred. As such, the damage to the house has been proved to my satisfaction. The Claimant has not yet done the work because of financial constraints. The amount of money involved to fix this issue is considerable.

Foreseeability

[30] Although the Defendant did not specifically argue this point, there was certainly a live issue in my mind as to whether the damages that occurred were foreseeable. Based upon ordinary experience, one has to ask whether someone in the position of the Defendant, driving a car and hitting a concrete foundation, could possibly foresee that this would result in frozen pipes and extensive water damage inside the house.

[31] The law of foreseeability does not require the precise type or extent of damage to be foreseeable. It is enough if one could have foreseen the type of damage that actually occurred. In other words, could the Defendant have possibly foreseen that hitting a building with his car would cause physical damage?

[32] The law was well put by the New Brunswick Court of Queen's Bench in *Tooley et al. v Arthurs*, 2002 NBQB 32:

> 21. The general rule is that wrongdoers can only be held liable for reasonably foreseeable damages. The legal meaning of foreseeability has been developed in a number of cases including: *Hughes v. Lord Advocate*, [1963] A.C. 837 (H.L.); [1963] 1 All E.R. 705: *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (Wagon Mound No. 2),* [1967] 1 A.C. 617 (P.C.); [1966] 2 All E.R. 709; *School Division of Assiniboine South No. 3 v. Hoffer et al.* (1972), 1971 CanLII 959 (MB CA), 21 D.L.R.(3d) 608 (Man. C.A.); affirmed [1973] S.C.R. vi, 1973 CanLII 1313 (SCC), 40 D.L.R.(3d) 480 (S.C.C.); and *Williams et al. v. Saint John et al.* (1983), 53 N.B.R.(2d) 202 (Q.B.); affirmed (1985), 1985 CanLII 126 (NB CA), 66 N.B.R.(2d) 10 (C.A.).
> [Page 5]
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> 22. In *Williams* 21 people were killed by a fire started in a padded cell in a modern police lock-up in Saint John in 1977. The New Brunswick Court of Appeal upheld the trial decision on liability and (at para. 31, page 26) approved the following summary of the law from *School Division of Assiniboine*, at page 614:
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> > "It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable."
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> 23. Also in a recent decision of the Supreme Court of Canada, *Bow Valley Husky v. Saint John Shipbuilding*, 1997 CanLII 307 (SCC), [1997] 3 S.C.R. 1210, at para 76, page 1255, McLachlin J. summarized foreseeability in these words:

> "It was not necessary ... to foresee the precise type of damage or sequence of events that would result from its negligence ...".
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> 24. Applying those principles to this case, it was not necessary for anyone to have been able to foresee the extent, precise type, sequence of events or manner of incidence of the resulting damage.
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> 25. All that had to be foreseeable was that the dozer could physically damage the stone foundation. In my opinion that was reasonably foreseeable.

[33] After full consideration, I have concluded that the damage suffered by the Claimant's house was foreseeable damage. Perhaps this might be seen as placing a an undue burden on the Defendant. He may be seen as having been exceptionally unlucky. However, the law has always favoured innocent parties over tortfeasors in these unusual cases. In other words, this may have been something of a fluke occurrence, but if so (so long as it meets a minimum test of foreseeability) the burden of that risk falls on the tortfeasor, and not the innocent party.

[34] In the result I find that the Claimant has proved her damages in excess of $25,000.00, which allows her to recover the maximum amount in this court, which is $25,000.00.

[35] The Claimant also seeks costs of $199.35 to issue the claim, $159.33 to serve it, plus expert witness fees of $724.50 for Mr. Barkhouse. There is ample authority for allowing these disbursements, and the order will reflect these costs. No interest is claimed, and none would be proper given that the expense of fixing the damage has not yet been incurred.

Eric K. Slone, Adjudicator