

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Butler v. Municipal Ready-Mix Ltd.*, 2019 NSSM 29

Date: 2019-05-27

Docket: Sydney, No. 484153

Registry: Halifax

Between:

David Henry Butler

Claimant

v.

Municipal Ready-Mix Ltd.

Defendant

Adjudicator: Patricia Fricker-Bates

Heard: March 27, 2019

Decision: May 27, 2019

Appearances: David Henry Butler, Claimant, self-represented;
Municipal Ready-Mix Ltd., Defendant, represented by Paul
Yurchesyn, Manager, Concrete Plant.

BY THE COURT:

[1] On January 15, 2019, The Claimant, David Henry Butler, filed a Notice of Claim for \$3,054.83 dollars alleging the following:

Due to careless, negligent and unsafe operation of there (sic) cement truck caused same to pull down elect. (sic) wires of my cottage

Mr. Butler testified on his own behalf during the hearing of the matter.

[2] The Defendant Municipal Ready-Mix Ltd. Filed a Defence on January 30, 2019, stating:

Our truck height is lower than the required height of wires. Prior incident at Property (sic)

The Defence appears to have been signed by Paul Yurchesyn and Bill MacLeod. The Defendant company subpoenaed three witnesses: James Bartlett, Municipal Ready-Mix Ltd.; Howie Seal, Nova Scotia Power; and Janet Ley, Marsh Adjustment Ltd. At hearing, the company was represented by Paul Yurchesyn.

[3] A total of 15 exhibits were entered into evidence during the hearing: seven (7) by the Claimant and eight (8) by the Defendant.

[4] The Claimant has a cottage at Marion Bridge, Nova Scotia. He testified that in November 2018 the cottage next to his, occupied by Gary Hussey, was undergoing renovations involving the pouring of concrete. The truck driver for the Defendant company backed his truck into the worksite at Mr. Hussey's cottage and, in the process, came into contact with the power lines going into the Claimant's cottage, ripping down the wires, the mast and the wooden beam anchoring that mast to the Claimant's cottage.

[5] The Claimant introduced into evidence a Statutory Declaration purportedly signed by Gary Hussey on January 8, 2019. Mr. Hussey was not called as a witness by the Claimant.

[6] The Claimant testified that his bungalow was built in 1957 and that he inherited it from his father in 1991. He acknowledged in cross-examination that the electrical mast had not been replaced from at least 1991. He testified that he had contacted Nova Scotia Power in late October 2018 and asked them to check on

the looseness of the power lines going into this cottage. Nova Scotia Power did attend at the Claimant's property on October 22, 2018, to address low wires and fixed them up as best they could (Exhibit 2). In cross-examination, the Claimant agreed that he had not informed his neighbor, Mr. Hussey, of the low powerlines at any point prior to the delivery of the concrete to Mr. Hussey's cottage. The Claimant also acknowledged in cross-examination that he had been told by Nova Scotia Power to upgrade his attachment point for the wires but denied that he was given a timeline in which to do so (see Exhibit 2, pg. 2).

[7] Powerline technician Howard Seale testified that a call was received from the Claimant by Nova Scotia Power on October 22, 2018, concerning low wires and arcing wires at the Claimant's cottage. Mr. Seale arrived at the Claimant's residence and assessed the situation: the wires were low, the entrance to the bungalow was old, the attachment board was rotted. He testified that he was afraid to touch it. Consistent with the manner in which things had been done in the 1960s, the three separate wires running to the attachment board had three anchor points. Mr. Seale testified that normally he would have cut the three wires and used one, but he feared hooking one wire to the rotted attachment board and bringing down the entire stack. Instead, he took spreaders and lifted the wires up to prevent arcing. He contacted his office in Halifax, advised that "have repaired as best we can have sent email to tier II to contact customer to get meterbase mast and attachment point upgraded asap" (Exhibit 8). It was his opinion that, if something hit the wires, the anchor points wouldn't detach but that the mast would come down. It was Mr. Seale's recollection that he gave the Claimant a month to fix the problem rather than cut the power to his cottage.

[8] James Bartlett, the Defendant company concrete truck driver, testified that he attended a call for concrete at the cottage of Gary Hussey on November 2nd, 2018. He indicated that the cottage owner, Gary Hussey, showed him where to go. It was Mr. Bartlett's understanding that the route he was directed to take was the only route to Mr. Hussey's cottage. Based on his conversation with Mr. Hussey at the site, it also was Mr. Bartlett's understanding that other machinery had been down to the cottage, including a truck carrying roof trusses, that had cleared the wires even though to him they appeared low. He figured that the truck would clear the wires. Unfortunately, the truck did not clear the wires.

[9] Mr. Bartlett testified that he has been with the Defendant company for 18 years and this was the first time that he came into contact with powerlines. He acknowledged that on two previous occasions during his 18-year career he had come into contact with wires—a telephone wire and a clothes line.

[10] The Claimant maintained that the Defendant company's crew did not practice adequate safety measures on the day of the incident. The Claimant relied on Nova Scotia Power safety guidelines when working around powerlines (see Exhibit 6). In particular, the Claimant maintained that Mr. Bartlett, the concrete truck driver, should have had a spotter to assist him in backing down to Mr. Hussey's cottage. In fact, the Claimant questioned why the Defendant company truck driver didn't ask Mr. Hussey to be a spotter.

[11] The Claimant also asserted that the minimum height for power lines around his cottage would have been 12 feet as his cottage operated on 120 volts (Exhibit 2—Google search “Power wire clearances height nova scotia”). However, Nova Scotia Power Powerline Technician Howard Seale testified that the height of wires

over a driveway should be 14 ½ feet or 4.42 metres. He testified that any upgrade to the powerline at the Claimant's bungalow would have been for 14 ½ feet as the wires span a driveway (see Exhibit 12, picture #1).

[12] The Claimant argued that the Defendant's cement truck exceeded 12 feet in height because it drove outside of the driveway/right-of-way rut on to more elevated ground by approximately eight inches thereby elevating the truck (see Exhibit 4, photos 3 & 4). He claimed that the tire tracks were those made by the cement truck. Paul Yurchesyn for the Defendant company testified that he took pictures of the cement truck that had been driven by Mr. Bartlett on November 20, 2018 (see Exhibit 14). He testified that the truck's height is 11 ½ feet, so, even if the wires to the Claimant's cottage were at 12 feet, the truck should have cleared them. However, he acknowledged in cross-examination that "if you put eight inches under an 11 ½ foot truck, it would be over 12 feet."

[13] Janey Ley for Marsh Adjustment Ltd. testified that she contacted the claims department of Nova Scotia Power concerning the November 2nd, 2018, incident at the Claimant's cottage and took notes of that conversation with Quinton Brigitte (see Exhibit 9). Based on that conversation, it was her belief the Defendant company had not been negligent. Quinton Brigitte of Nova Scotia Power was not called as a witness by the Defendant.

DECISION OF THE COURT

[14] The Claimant is alleging that the Defendant company was negligent in the operation of its cement truck resulting in damage to his cottage. The Defendant company has countered by submitting that the height of its cement truck was lower

than the required height of the wires going into the Claimant's cottage; and that the Claimant had a prior problem of low-hanging wires that he failed to rectify.

[15] The Statutory Declaration (Exhibit 1) signed by Gary Hussey on January 8, 2019, has been given little or no weight in my determination of this matter. He was not called by the Plaintiff either to give direct evidence or to be available for cross-examination by the Defendant company. He was not subpoenaed by the Claimant and no request was made of this court to adjourn matters because of Mr. Hussey's unavailability for hearing. I find it to be self-serving evidence untested by cross-examination.

[16] Further, the document entitled "Spoke to Quinton Brigette of Nova Scotia Power Nov 23, 2018" (Exhibit 9) has been given little or no weight in my determination of this matter. This document records an alleged conversation between Janet Ley of Marsh Adjustments Ltd. and the Claims Department at Nova Scotia Power. Mr. Brigette was not subpoenaed by the Defendant company. No reason was offered for Mr. Brigette's unavailability for hearing for purposes of either direct testimony or cross-examination, particularly given Ms. Ley's testimony that based on that conversation, she was led to believe that the Defendant Company had not been negligent, an issue in dispute before this court. I note that Ms. Ley sat at counsel's table with Mr. Yurchesyn who was representing the Defendant company.

[17] Negligence is a distinct category of tort law.

The tort of negligence is composed of a number of components or elements, most of which must be proved by the plaintiff [claimant] ...

There are three core elements: the *negligent act, causation* and *damage*. ... The negligent act is determined by identifying the appropriate standard of care and applying it to the facts of the case. Causation is established by showing a link between the defendant's negligent act and the plaintiff's [claimant's] damage. Damage is the vital element that triggers the claim and launches the litigation process.¹

In determining whether or not the act in question is negligent, the court must apply the reasonable person test: “[c]onduct is negligent only if it carries a risk of damage that a reasonable person would contemplate and guard against.”² Further, the “reasonably careful person avoids creating a foreseeable risk of injury to others.”³ Whether or not there has been a breach of the standard of care is a question of fact” and “the burden of proof is on the plaintiff [claimant] to establish on a balance of probabilities that the defendant was negligent.”⁴ As to causation, the plaintiff/claimant “must prove that the defendant’s negligence caused his loss” and the burden of proof is on the plaintiff/claimant. The Claimant in the case-at-bar asserts that the Defendant company was negligent.

[18] “Contributory Negligence is the failure of the plaintiff [claimant] to take reasonable care for her [or his] own safety which contributes to the accident or her [or his] loss.”⁵ Like negligence, contributory negligence is “determined by applying the objective standard of the reasonably prudent person.”⁶ The assessment of contributory negligence “is made on the basis of the comparative

¹ Philip H. Osborne. *The Law of Torts* (5th ed.) (2015: Irwin Law, Toronto) at pg. 25.

² *Ibid.* at 30.

³ *Ibid.*, footnote 1.

⁴ *Ibid.* at 50.

⁵ *Ibid.* at 112.

⁶ *Ibid.* at 114.

blameworthiness of the conduct of the parties.”⁷ In Nova Scotia, the *Contributory Negligence Act*, RSNS 1989, c. 95 states (at ss. 3(1), 4)

Apportionment of Liability

3. (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

...

Determination of degrees of fault

4. Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault.

In alleging that the Claimant had a prior and existing problem with low-hanging wires as of the date of the incident on November 2, 2018, the Defendant company is, in effect, alleging that the Claimant was negligent.

[19] The evidence establishes that when operating the cement truck on November 2, 2018, the Defendant company’s cement truck driver, James Bartlett, struck the overhead powerlines going into the Claimant’s cottage resulting in the downing of the wires and the power mast and the wooden beam anchoring the mast to the Claimant’s cottage. I find that Mr. Bartlett owed a duty of care to all occupants along the right-of-way/driveway, including the Claimant. I also find that Mr. Bartlett knew that the wires were low but failed to take adequate measures, such as putting a spotter in place, to ensure that the cement truck would clear the wires before proceeding to back down the right-of-way/driveway past the Claimant’s

⁷ *Ibid.*

cottage to Mr. Hussey's cottage. Whether the cement truck drove inside of or outside of the ruts in the right-of-way/driveway is irrelevant—the driver owed a duty of care to the inhabitants along the right-of-way/driveway to ensure that his truck would not strike the wires. He did not discharge that duty by “figuring” that the truck would clear the wires based on a conversation he had with cottage owner Gary Hussey. I find that the Defendant company cement driver James Bartlett was negligent in his operation of the cement truck and caused damage to the Claimant's cottage.

[20] I also find that the Claimant was contributorily negligent. It was the Claimant who contacted Nova Scotia Power to report low hanging wires running into his house. The Claimant also was concerned about the arcing of the electrical wires. Nova Scotia Power attended at his cottage on October 22, 2018, in response to his request-for-service call. I find that the wooden attachment board supporting the wires running to the Claimant's cottage was rotted out. The Claimant acknowledged in cross-examination that he was advised by Nova Scotia Power to upgrade his meter-base mast and attachment point but he failed to take action to do so, arguing that Nova Scotia Power had not given him a timeline in which to get the work done. However, I find that the Claimant was aware of the danger of the low-hanging wires, and that he was aware that his neighbor Gary Hussey had started renovations to his own cottage in June 2018 (see Ex. 12, photo No. 2) but failed to advise Mr. Hussey of the low-hanging wires spanning their common right-of-way/driveway. There is no evidence before this court concerning any steps that the Claimant had taken to rectify the low-hanging wires spanning the common right-of-way/driveway between October 22, 2018, following the service call by Nova Scotia Power, and November 2, 2018, when the Defendant company's cement truck made contact with the power wires.

[21] In keeping with s. 3 of the *Contributory Negligence Act*, I find that it is not possible to establish different degrees of fault as between the Claimant and the Defendant; therefore, the liability shall be apportioned equally.

[22] I accept the quote from Winmar Cape Breton in the amount of \$2,696.10 for “repairs provided at the above claim due to damage caused by cement truck pulling power mast off side of cottage”: See Exhibit 3. I also accept the quote for the rental of the power generator at \$208.73. Given that liability has been apportioned equally between the Claimant and the Defendant, each shall be responsible for the sum of \$1452.41.

[23] The Defendant has raised the *Occupiers Liability Act*, S.N.S. 1996, c. 27, but, in the circumstances of this case, I find that it is not necessary to consider that *Act* in deciding this case. “Occupiers liability continues to be a discrete area of tort law, albeit one that is increasingly indistinguishable from the tort of negligence.”⁸

[24] There will be no costs awarded in this matter. The Claimant’s request for damages of \$100 is denied.

Patricia Fricker-Bates
Adjudicator

⁸ Ibid., footnote 1 at 168.