

**SMALL CLAIMS COURT OF NOVA SCOTIA**

Citation: *Abbass v. Lewis*, 2019 NSSM 26

**Date:** 2019-03-11

**Docket:** Sydney, No. 480929

**Registry:** Halifax

**Between:**

**Christopher Abbass**

Claimant

v.

**Donald Lewis**

Defendant

**Adjudicator:** Patricia Fricker-Bates

**Heard:** January 9, 2019

**Decision:** March 11, 2019

**Appearances:** Christopher Abbass, Claimant, self-represented;  
Donald Lewis, Defendant, represented by  
Kim MacDonald, Sister of the Defendant.

**BY THE COURT:**

[1] On October 3, 2018, the Claimant Christopher Abbass filed a Notice of Claim for \$4,512.50 dollars. Mr. Abbass alleges the following as the reason for the claim:

Mr. Lewis's tree in his backyard fell over tearing my fence out of the ground and demolishing it.

The Claimant, a self-employed photographer, testified on his own behalf.

[2] The Defendant Donald Lewis filed a Defence on October 23, 2018. On the face of the Defence/Counterclaim, the Defendant states:

I was not the owner of the property when the incident occurred.

By way of a letter dated October 30, 2018, the Defendant, who lives in Oshawa, Ontario, gave permission for his sister Kim MacDonald to represent him in these proceedings. Ms. MacDonald is the Assistant Director of Support Services for the Cove Guest Home.

On a separate piece of paper attached to the Defence and Counterclaim and dated October 23, 2018, the Defendant's sister, Kimberly MacDonald writes, in part:

On October 11<sup>th</sup> 2016 after a wind and rain storm which occurred on October 10, 2016 I visited the property on 39 Cross Street. ... The house was vacant. When I and my husband checked on the property we found the tree completely uprooted and lying across the yard and on the property's garage. A portion of Mr. Abbass's fence was lifted and lying on the tree root ...

The Defendant's representative Kimberly MacDonald gave evidence on behalf of the Defendant.

[3] There appears to be no dispute between the parties that the infamous Thanksgiving Storm of October 10, 2016, brought down the oak tree located at 39 Cross Street, Sydney, Nova Scotia. A portion of the Claimant's fence was lifted by the tree's impressive root system that had been torn out of the ground as the tree fell onto 39 Cross Street and away from the Claimant's property.

[4] The Claimant acknowledged that he has no insurance on his property at 35 Cross Street, Sydney; but that, even if he did, he would still be seeking redress in Small Claims Court because an insurance claim would drive up his insurance premiums.

[5] Kimberly MacDonald, the Defendant's representative, testified that at the time the oak tree fell, the property at 39 Cross Street, Sydney, was vacant and still in probate following the death of her sister on February 25, 2016. Under her sister's will, the property at 39 Cross Street was left to her brother, the Defendant. Kimberly MacDonald referenced an email from solicitor Anna Manley dated December 6, 2016 (see Exhibit 3—attachments to the Defence and Counterclaim) which states, in part: "By way of update, the property is now registered in Donald's name. ... I'll wait until early January to make the call on whether a formal closing is required ..." She testified that on the day of the storm, the house did not belong to the Defendant as the estate still was in probate. Kimberly MacDonald indicated that she was the executor of her sister's estate; and that she and her husband checked the property periodically. On the day following the storm, she and her husband went to 39 Cross Street and found the oak tree laying across the yard and garage on the property.

[6] The Claimant acknowledges that he made no claim against the estate for the alleged damage to his fence. He maintained that he "didn't know what was what with the property." According to the Claimant, repairing the damage to his fence caused by the uprooting of the oak tree would cost \$4,750.00 (see Exhibit No. 2 "Work Quotation") but that he was content with the amount claimed of \$4512.50.

[7] After discovering the fallen oak tree, Kimberly MacDonald went to her insurance company and learned that to remove the tree would cost over \$2000.00 but that insurance would only cover that portion of the tree that fell on the garage at 39 Cross Street but not the root system. She was advised that the homeowner at 36 Cross Street should be covered under his own homeowner's insurance for any damage to his fence. Unfortunately, the Claimant did not carry homeowner's insurance.

[8] The Claimant testified that the root system was a haven for rats and mice, so he filled it in. Kimberly MacDonald in turn testified that she recently hired an exterminator who had come to 39 Cross St. to deal with the rodent problem. It was her position that the Claimant's fence was left  $\frac{3}{4}$ 's intact, that only  $\frac{1}{4}$  of the fence was affected (see Exhibit No. 4, photos 2-10 plus picture sequence narrative).

### **Decision of the Court**

[9] I find on the evidence before this court that the Defendant was not the owner of 39 Cross Street at the relevant time as his late sister's estate still was in probate.

[10] However, even if the Defendant were the owner, I find that there is no evidence before this court to establish an act or omission on the Defendant's part that led to or contributed to the fall and uprooting of the oak tree. As Adjudicator Eric Slone stated in *Cound v. BPM Construction Ltd.*, 2008 NSSM 33 (CanLII) (at para. 11), a case involving a tree that came down in a severe windstorm:

Negligence would apply if the Defendant had reason to suspect that the tree was rotten or otherwise liable to snap. Nuisance would apply if the Defendant was using his property in some unnatural way, giving rise to unusual dangers.

The evidence before this court establishes neither negligence nor nuisance on the part of the Defendant. In short, the Thanksgiving Storm of 2016 that took down the oak tree on the Defendant's property was an Act of God, "an extraordinary natural phenomenon that is beyond the foresight of a reasonable person and could not therefore be guarded against": Philip Osborne, *The Law of Torts*, 5<sup>th</sup> ed. (Toronto: Irwin Law Inc., 2015) at 481.

[11] The Claimant's case is dismissed.

[12] There will be no costs awarded in this action.

Patricia Fricker-Bates, Adjudicator  
Small Claims Court of Nova Scotia  
March 11, 2019