IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Muirhead v. MacKenzie*, 2021 NSSM 34

Date: 20211001
Claim: No. SCP 506161
Registry: Pictou

Between:

Susan Muirhead and G. Frederick Muirhead

CLAIMANTS

And

Allan MacKenzie

DEFENDANT

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: August 19, 2021, in New Glasgow, Nova Scotia (Via Teams)

Counsel: Susan Muirhead, self-represented, for the Claimant
Hector J. MacIsaac, for the Defendant

Balmanoukian, Adjudicator:

[1] Good fences make good neighbours. Especially when the neighbour hosts twenty-odd cows.

[2] The Claimant has a pleasant property at Scotsburn, Pictou County. It is a rural area of mixed use, including agricultural and residential. The Claimant purchased the property in 2000 from one Jeff MacKenzie, son of the Defendant. By all accounts, they are attentive to its upkeep and landscaping. Their property is 5.23 acres, of which 1.75 is cleared. 1.25 acres of that is the subject of this proceeding.

[3] The neighbour is Jamie MacKenzie, another son of the Defendant. He owns an unspecified parcel of land immediately adjacent to the Claimant. It is where the cows are *supposed* to be.

[4] The Defendant is a semi-retired dairy farmer. At one time he had 135 head. He lives about 10 minutes away from the sites in question. About 20 years ago, he downsized his herd to about 22 cows, referred to in the statement of defence as "annual calves." These were placed on the Jamie MacKenzie lands about 10 years ago. Jamie MacKenzie is not a party to this action.

[5] The Defendant says he fenced the lands securely, with two gates – a steel one to the barnyard, and a four-rod one to the woods. The rest is bounded by barbed wire – four strands on the road and at least two elsewhere with "the heaviest they had." Fenceposts were replaced with a model which the Defendant said "will last longer than anything else." He monitors the state of repair of the posts and wire diligently.

[6] It is not disputed that the Defendant's cows went astray on at least four occasions onto the Claimant's property, although the Defendant said he only knew of two.

[7] That land is soft. Cows are heavy.

[8] When the cattle went walkabout, they caused damage to the Claimant's property, in the form of substantial lawn damage (pits and holes) together with the inevitable "cowpies." The first occasion was resolved directly between the parties, with the Claimant doing their own remediation and Mr. MacKenzie (as I will refer to the Defendant, in distinction to the other MacKenzies) providing a nominal payment.

[9] After the subsequent three occasions, and a breakdown of communication with Mr. MacKenzie, this suit ensued. The Claimants seek the cost of remediation

and provided different estimates of the cost of so doing. I will come round to those. They also say there was some damage to the flower garden and other flora, but they do not ask the Defendant to bring them a shrubbery; the estimates concentrate on different aspects of lawn repair.

[10] For Mr. MacKenzie's part, he says he doesn't know "who let the cows out," but intimates strongly that it was one Nathan Goodall, who testified for the Claimant. Mr. Goodall had a similar experience and also has or had a property (right of way) dispute with Mr. MacKenzie. There was no direct or indirect evidence implicating Mr. Goodall, but Mr. MacKenzie says that there was no problem beforehand, and that "someone" left the rodded gate open with the rails pulled and "set up nice and neat." The barbed wire was never breached.

[11] He provided his own estimate of repair costs, to which again I shall revert.

Liability

[12] At the hearing, I posited to defence counsel that this is a situation that falls under the scope of *Rylands v. Fletcher*, [1866] 1 Exch. 265, aff'd [1868] 3 HL 330. Mr. MacIsaac had clearly anticipated this proposition, and replied with citations of *Richards v. Lothian*, [1913] AC 263 (PC), and *Perry v. Kendricks*, [1956] 1 All

E.R. 154 (CA) . He focused, however, more on quantum than on liability which, as will appear, is appropriate and one might even say strategic.

[13] *Rylands* imposes strict liability – that is to say, liability without the requirement to prove negligence – when a person makes an unnatural use of land and damage ensues as a consequence. Our Court of Appeal summarized the principle, in its *per curium* decision in *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143:

> [57] The rule in *Rylands v. Fletcher* ((1866), L.R. 1 Ex. 265 (Ex. Ch.) aff'd (1868), L.R. 3 H.L. 330) emerges from 19th century jurisprudence which imposes strict liability on a land occupier who brings something on his land which subsequently escapes causing damage to his neighbour. Lord Cranworth put it this way:
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> > If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.
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> Other descriptions emphasise the potentially dangerous character of that which is accumulated by a Defendant, implying the likelihood of damage if it escapes from a Defendant's property, (e.g. Justice Blackburn's "anything likely to do mischief" description in the Exchequer Chamber in *Rylands v. Fletcher*).
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> [58] In *Smith v. Inco Ltd.* (2011 ONCA 628), rev'd 2010 ONSC 3790 (Ont. S.C.J.), leave to appeal denied, [2011] S.C.C.A. No. 539, the Ontario Court of Appeal describes the rule's status in Canada:
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> > [68] The rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the Defendant's property of a substance "likely to cause mischief". The exact reach of the rule and the justification for its continued existence as a basis of liability apart from negligence, private nuisance and statutory liability have been matters of controversy in some jurisdictions: see *Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.); *Burnie Port Authority v. General Jones*

> *Pty. Ltd.* (1994), 179 C.L.R. 520 (Aust. H.C.); Murphy, "The Merits of *Rylands v. Fletcher"*. In Canada, *Rylands v. Fletcher* has gone largely unnoticed in appellate courts in recent years. However, in 1989 in *Tock*, the Supreme Court of Canada unanimously recognized *Rylands v. Fletcher* as continuing to provide a basis for liability distinct from liability for private nuisance or negligence.
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> [59] Liability for breach of the rule in *Rylands v. Fletcher* is usually described as strict; that is to say it is no defence that what escaped and caused damage did so without a Defendant's neglect. But some defences may be available, (e.g. act of a stranger; "act of God"; acquiescence of the plaintiff, to name some).
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> [60] In *Smith v. Inco*, the Ontario Court of Appeal refers to four pre-requisites for establishing liability under the rule in *Rylands v. Fletcher*. In doing so they incorporate the criteria set out by Gregory S. Pun and Margaret I. Hall, in *The Law of Nuisance in Canada* (Markham, Ontario: LexisNexis Canada Inc., 2010) at p. 113:
>
> a) the Defendant made a non-natural use of his land;
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> b) the Defendant brought onto his land something which was likely to do mischief if it escaped [the requirement of dangerousness];
>
> c) the substance in question escaped; and
>
> d) damage was caused to the plaintiff's property (or person) as a result of the escape.
>
> [61] All formulations of the tort involve at least two elements: there must be an escape from property occupied by the appellant; and the use of land by the appellant must be "non-natural", "out of the ordinary" or "special". Recently in the United Kingdom the House of Lords has replaced "non-natural use" with "quite out of the ordinary in the place and at the time when [the Defendant] does it", (*Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.), [2004] 1 All E.R. 589, hereafter, all citations are from the All E.R.s). Also see: Lewis N. Klar, Q.C., *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 646 to 653).

[14] Both *Rickards* and *Perry* distinguish *Rylands* and, one might say, seek to narrow the scope of the rule. While not strenuously argued before me, they deserve a word.

[15] *Rickards* involved water damage from an upper floor of a property. The Privy Council decided that a water supply to a house was not an "unnatural" use of land, and thus did not attract strict liability. *Perry* in turn involved injuries suffered when strangers (not the owner) caused the damage in question. Put together, the argument (as I understand it) is that "someone" left the MacKenzie gate open, and even if pasturing cows is an "unnatural" act (or one of its paraphrased iterations), their escape and the subsequent damage is the act of a stranger and liability should not follow.

[16] First point first. I have no difficulty concluding that cows are "likely to cause mischief" if left to wander. It's why they are fenced. The area, while rural, is not devoted entirely to agriculture. The MacKenzie lands abut a residential property. It is "unnatural" or "out of the ordinary" or "special" to pastoralize cattle in these circumstances, within the meaning of the *Rylands* rule.

[17] As to the defence of "someone opened the gate, and it wasn't me." This is possible. It was certainly hinted. And it's unfortunate. But it's not a defence in today's environment. There are trail cams, fence monitors, alarms, and other means of alerting the owner or occupier of interference or breaches, or to identify a culprit. While I am able to infer that the cows got out through the gate (three times, in addition to the incident that the parties resolved directly), it is especially telling that

the Defendant did not take extra steps to secure the perimeter after it became apparent that there was a problem.

[18] As such, I mean no disrespect to the seriousness of the Claimants' case, or to the Defendant's response, when I say that in these circumstances, negligence is not an element of the cause of action, to attach liability for the action of cows.

[19] However, even if I am wrong about the application of *Rylands* (and in distinguishing *Rickards* and *Perry*), I would find the Defendant negligent for at least the second and subsequent excursions, having been on notice that the containment was being interfered with (at least according to the Defendant) and he did not take steps to secure against, monitor for, or be alerted to such chicanery.

Damages

[20] As noted, the parties wisely focused on this aspect of the case.

[21] The Claimant placed photographs and video in evidence showing the trespass, and the resultant damage. I am satisfied that what was a pleasant and kempt yard and a point of pride to the Claimants, was rendered asunder by the wandering stock. The holes and ruts are well established.

[22] They tendered different quotations in evidence. Fanning Landscape Solutions submitted $15,850 plus HST exclusive of water supply. White's Towing & Backhoeing submitted $9,000 plus HST for repair only; Blaine F. MacLane submitted $9,958 plus HST for repair, seeding, and mulch. Although there is something of a brook on or near the property, the Claimants submit that a water supply is needed to ensure proper growth. This was submitted as $3,080 plus HST from Westville Mobile Wash. As may be predicted, the Claimants are partial to the Fanning quotation, plus watering.

[23] The Claimants have already removed the cows' manure.

[24] They also claim costs, including their time at $25 an hour for gathering the quotations and administration (and manure), and liaising (generally unsuccessfully) with the County officials. Lastly, they claim the costs of filing and service. All in all, it comes to just over $23,000.

[25] The Defendant says that the work can be done for a fraction of this amount. He says it needs $286.68 worth of materials, plus $708.40 in topsoil. He said that four hours' tractor work at $70 an hour, $230 for a spreader and a roller, and 20 hours' labour would suffice. He received the tractor and spreader/roller quotes from a farmer, Mark Dykstra.

[26] Labour was not part of the figures quoted above and the Defendant says that 20 hours' labour which would be "at least $20 an hour" would add $400 to the tab, for a grand total of $1,905.08.

[27] The Defendant cites a large field that Mr. Dykstra did which is a hayfield, not a lawn. He says that Dykstra, although not a landscaper, "is a full time farmer and grows good crops." The only thing wrong with the field Dykstra worked on, he says, is that it's "now full of geese." He did not know whether Mr. Dykstra is insured, a point of concern for the Claimants as the area to be repaired includes their septic tank and field.

[28] As with many cases, it falls to me to sort this out as best I can.

[29] As a starting point, I accept that the yard needs professional repair. It is not a job for "some guy with a tractor" or for a weekend warrior. A hayfield is not a yard, and it is reasonable to require the professional to be insured (liability and, if applicable, workers' compensation). I do not accept that reasonable labour can be had at $20 an hour in our current environment, or that it would only need the couple of person-days advocated by the Defendant. That may be the case if one was creating a hayfield – or a cow pasture. But not a front lawn. I accept the

Claimants' rate of $25 per hour as reasonable, so far as I will allow it. More on that later.

[30] I also add that normally I would consider such a repair job to include an element of betterment that would need to be discounted back – in other words, the measure of damages is what it would take to replace the old lawn with a new lawn, minus the level by which the new lawn is an improvement over the old. The Claimants are not entitled to an Aladdin-lawn, trading old sod for new at the Defendant's expense.

[31] I say "normally." It was established that the "old lawn" was well kept and established. One may even say "lush." I am satisfied that the repair will entail no or minimal betterment, and to any such extent it is more than compensated by the flowerbed and shrub damage to which I earlier alluded.

[32] I do not accept, on a balance of probabilities, that watering service is needed. It was well established that the ground in question is soft – that is to say (however distasteful the word itself may be), moist. The adjacent brook may not constitute a sufficient water supply, but it was not established to my satisfaction that outside water is necessary for the yard to flourish.

[33] I am also not satisfied that post-repair mowing is a recoverable component. Yard care is a Sisyphean exercise at the best of times – with or without the repair work, the lawn needs to be mowed. In fact, some time was spent at the hearing describing the lawn care equipment used by the Claimant, both before and after the damage in question.

[34] I am satisfied that seeding, repair, and mulching is reasonable.

[35] That leaves me with the MacLane quote of $9,958 plus HST as the best available evidence. I note this is close to the White quote of $9,000 plus HST which excluded fertilizer. In conjunction, I am satisfied that the MacLane quote is reasonable and comes closest to doing justice between the parties.

[36] I note that Mr. Goodall testified that he paid $23,920 for repair of like damage to a four acre parcel, with his assistance. Here, we are dealing with 1.25 acres. While this is not a lineal exercise, a pro-rate of that would be $7,475, again bearing in mind that Mr. Goodall "lent a hand," to an unspecified extent. I am satisfied that $9,958 plus HST falls within the range of reasonable outcomes, when taken through that lens.

[37] I do not award the Claimants anything for their preparation and administration time. To do so would in effect be a counsel fee in disguise, and over which I do not have jurisdiction.

[38] I do however, on a *quantum meruit* basis, allow their claim of 14 hours' time at $25 per hour for manure collection. $350 is more than reasonable for what must have been a rather unpleasant task – the temptation to allude to "BS" is substantial, if somewhat gender-inaccurate.

[39] I allow the costs of filing and service.

[40] This action was brought and advanced promptly. In my discretion, I decline prejudgment interest, as although the damage has been wrought there is no indication that the Claimant has incurred any of the repair costs as yet. The loss of some enjoyment for the 2021 season is in the nature of general damages, which were not claimed and in which this Court has a token jurisdiction of $100 only.

[41] I therefore award the Claimant the following:

Repair Costs:	$9,958.00
HST:	$1,493.70
Cleanup:	$350.00

Costs:	$452.88
Total:	$12,254.58

[42] I will forward an order to like effect upon filing this decision, for issuance by the Clerk of the Court.

Balmanoukian, Adj.