SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Linquist v Lynds*, 2023 NSSM 29

Date: 20230626
Docket: No. SCT521916
Registry: Truro

Between:

Jill Linquist and Al Bégin

Claimant

v.

Sheila Lynds

Defendant

Adjudicator:	Julien S. Matte, Adjudicator
Heard:	June 23, 2023, (Via teleconference)
Counsel:	Al Bégin self-represented for the claimants Sarah Gray, for the Defendant

By the Court:

Matte, Adjudicator,

[1] Good fences make good neighbours and for fourteen years the parties were, by all accounts, good neighbours. Things began to change in September of 2022 when an unwanted intruder knocked the Defendant's tree over and onto the Claimant's fence causing the damages now claimed. The intruder, hurricane Fiona, caused havoc all over Nova Scotia and the parties now ask this Court to determine whether the Defendant or ultimately Fiona is responsible for those damages.

[2] The parties agree that a tree, a Poplar, once stood on the corner of the Defendant's property. As seen in pictures, the tree was surrounded by a chain link fence that the parties agree belongs to the Claimants. The parties also agree that on September 24, 2022 a hurricane named Fiona passed through the area causing high winds to uproot the Defendant's Poplar onto the Claimants' fence.

[3] Mr. Bégin ("Claimant") on behalf of the Claimants suggest that his actions in the years preceding Fiona, gave the Defendant sufficient notice to act to prevent the damage to his fence by the Poplar. While the Defendant says that she had no

obligation to remove a healthy tree from her property and that the ultimate cause, hurricane Fiona, was not foreseeable.

[4] The Claimant testified that he spoke to the Defendant's now deceased husband about his concerns over the possibility of the tree falling over on two occasions. The Claimant testified that by 2022, he was so concerned about the possibility that the tree might fall over onto his property, that he hired an arborist at his expense to trim any overhanging branches that were over his property at a cost of $1,100 plus tax. No claim is made for this amount.

[5] In the Claimant's opinion poplar trees are akin to weeds and more prone to falling over. Under cross examination, the Claimant noted that he had lived at his property for 14 years and that in that time he had numerous conversations with the Defendant's husband before he passed in 2019. The Claimant reiterated that he had two conversations with the Defendant's husband about the Poplar but admitted that he never mentioned it directly to the Defendant.

[6] The Defendant's son testified that his parents had lived on their property for 67 years and that over the years he had an estimated thirty conversations with the Claimant. He further testified that none of the discussions he had with the Claimant had to do with the boundary line of the trees or the Poplar and confirmed

that there were no neighbourly disputes between the Claimants and himself or his parents.

[7] The Defendant's son also testified that he cleaned up the Poplar after it fell. He noted that the trunk was approximately 14 inches in diameter and that he estimated the age at 28 years based on his count of the rings. He noted no rot, healthy leaves and that the tree had been pulled out at the roots. Based on his observations he concluded that the tree was not diseased.

[8] The Defendant testified that when she sold another property that she owned, at the request of the buyer she cut down a tree that was between her property and the property being sold as she did not want the tree to blow down on the new owners' home.

Analysis

[9] Both parties offered opinions about poplar trees. The Claimant on the one hand insists that poplar trees are really just a weed and is notorious for falling over while the Defendant states many Poplar trees survived hurricane Fiona and that, based on his observations the tree was not diseased. Neither party called an expert to support their opinions.

[10] The Claimant also opined that in this region, hurricanes are sufficiently commonplace that such events are foreseeable.

[11] The Claimant relies on three cases to support his contention that the Defendant had notice of the potential looming hazard and should have acted prior to Fiona. The Claimant first relies on a Saskatchewan Small Claims court decision in *Sykes v. Labuick*, 2014 SKPC 145, which accepts that private nuisance law can apply to tree cases where "trees result in damages where the effects are outside whatever is reasonably expected based on community standards" (para 10). This case involved a claim for damages arising from seed pods, fuzz and other debris in addition to branches overhanging onto the neighbour's property.

[12] The Claimant also relies on *Ehman v. Nixon,* 2018 BCCRT 558 for the proposition that liability can flow from ignoring a known risk. In particular at paragraph 17 the tribunal writes "to be liable, the evidence must show that they knew or ought to have known that the tree, or part of it, was at risk of falling and causing damage." In that instance the tribunal found that the Claimant had not met its burden of showing that the respondent knew or ought to have known the risk of the trees falling.

[13] Finally, the Claimant relies on *Hayes v. Davies,* 1991 *CarswellBC* 5716 *BCCA* for the proposition that where a tree is a known hazard, liability for damages can follow. In *Hayes* the majority of the B.C. Court of Appeal found that liability flowed because the tree in question "not only bowed badly in high winds but did so to an extent that they caused the Hayes to be concerned about the danger from the trees to themselves and to their property and caused Mr. Hayes to express this concern to Mr. Davis" (para. 37).

[14] The Defendants rely on three decisions of this Court in *Doherty v. Havill's Mini & Mobile Home,s* 2009 NSSM 51, *Cound* v. *BPM Construction Ltd,* 2008 NSSM 33 and *Abbass v. Lewis,* 2019 NSSM 26.

[15] In *Doherty*, adjudicator Slone writes at paragraph 8, "[t]he owner of land upon which a tree is growing can be held legally responsible if the tree does damage to someone else's property, but only where there is known or at least foreseeable danger". In *Cound*, Adjudicator Slone reviews and cites the law of nuisance as it applies to trees and cites the headnote in the case of *Doucette v. Parent* at para 12 before concluding at para 14 that "there is nothing unusual about the existence of a tree or the use of land as to attract nuisance or the Ryland principle." Finally, the Defendant cites *Abbass* for the proposition that hurricane Fiona was an Act of God and therefore the defendant could not be held liable.

[16] The Claimant relies on the fact that on two occasions prior to 2019 he spoke to the Defendant's now deceased husband about his concerns with the Poplar. The Claimant was concerned that given that the tree was of the poplar variety, it would be more prone to falling over onto his yard. The Claimant further suggests that given that the Poplar did fall during hurricane Fiona while other variety of trees, on the Defendant's property, did not, his opinion that poplars are more akin to a weed and prone to falling is borne out. Therefore, the Claimant argues the Poplar was a known hazard and the Defendant is subject to liability. However, without leading any expert evidence on the propensity of certain tree varieties to be uprooted, the Claimant's opinion can be given little weight.

[17] The Defendant testified that the Claimants never spoke to her about the Poplar. The Defendant's son also testified that the Claimants never spoke to him about the Poplar. Further, he testified that when he cleaned up the fallen tree he noted that it had what appeared to be healthy green leaves, no evidence of rot and that it had been uprooted rather than snapped by the hurricane winds. He described the trunk as approximately fourteen inches in diameter and counted 28 rings indicating that the tree was nearly thirty years old. The Claimant did not challenge the Defendant's son on his observations of the Poplar.

Findings

[18] Inasmuch as the conclusions in *Doucette* and *Cound* on the applicability of nuisance law to falling trees differ from the reasoning of the court in *Sykes*, I adopt *Cound.* A tree is not unusual in Nova Scotia and in most circumstances having a tree on land is natural. Whether liability flows from a tree knocked over in a windstorm is assessed by applying the law of negligence.

[19] The fact that trees fall in high winds is uncontroversial. There are likely no hurricanes where trees are not snapped or uprooted. However, liability for damage done by trees that fall is not automatic, there must be a known danger giving rise to an obligation to act to mitigate the danger. Whether the event is foreseeable is an objective test.

[20] The foreseeability of the event to the reasonable person in the circumstances will determine the outcome, not whether a particular litigant predicted an event. Further, the issue is not whether it is foreseeable that a hurricane can knock over trees but rather whether it was foreseeable to the Defendant that her tree would be knocked over based on what she knew or ought to have known of the circumstances.

[21] There was no evidence tendered that the Defendant or her son were advised of the Claimant's concerns. If they were told they would have been told no earlier

than 2019 by the Defendant’s now deceased husband. Regardless of whether the Defendant knew of the Claimant’s concerns, no evidence that the Poplar was diseased, prone to having its branches break or bend excessively in the wind was offered by the Claimants. In the fourteen years that the Claimants lived next to the tree they did not report branches falling on their property. The Court notes that the Claimant did not challenge the Defendant’s description of the Poplar as healthy. Further given its estimated age of 28 and noting the Claimant’s submission that hurricanes are a regular occurrence, the Poplar is likely to have survived earlier windstorms without falling over. There was no indication that the Poplar was a danger.

[22] The Court finds that the Claimants have not met their burden of showing that the Defendant knew or ought to have known that the Poplar presented a known hazard. In other words, it was not foreseeable that the Poplar would be uprooted by hurricane Fiona any more than it was foreseeable that other trees on the Defendant’s property would remain standing.

Damages

[23] With respect to damages, the Claimant submitted an estimate of $2,415.00 to repair approximately 30 feet of six-foot tall, galvanized fencing. Although the

Defendant did not object to the scope of work required to fix the fence, the Defendant argued that the estimate provided was only an estimate and given the time elapsed since it was obtained, the estimate was no longer valid. As a result, the Defendant asked this Court to conclude that the Claimant has failed to lead any evidence of damages.

[24] While a paid invoice may be better evidence of the claimed damages, the estimate is the best evidence available. The Court assesses provisional special damages of $2,415.00.

Order

[25] The Claim is dismissed.

Julien S. Matte, Adjudicator