

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: MacKinnon v. Mills, 2013 NSSM 43

Claim No: SCK 417298

BETWEEN:

Name Don MacKinnon **Claimant**
Address 1066A King Street
Windsor, NS B0N 2T0
Phone [removed]

Name William Rene Mills **Defendant**
Address Wentworth Road
Windsor, NS B0N 2T0
Phone [removed]

Date of Hearing: August 14, 2013

Date of Decision: October 7, 2013.

The Claimant, Don MacKinnon appeared on his own behalf.

The Defendant, William Rene Mills appeared on his own behalf.

DECISION

This claim is for the replacement and repair of a wooden post and light assembly along with a frog lawn ornament allegedly damaged by the Defendant, William Mills, when backing a U-Haul truck into a driveway located at 1066 King Street, Windsor, Nova Scotia. In the Notice of Claim, the Defendant is named as Robert (Bob) Mills. The Defendant indicated in both his Defense and testimony that his name is William Mills. The style of cause is amended accordingly.

The Facts

Certain facts in this matter are not seriously in dispute. The Claimant, Don MacKinnon, lives at 1066A King Street, Windsor, Nova Scotia, with his common-law partner, Elizabeth Bacon. He

rented the building next door, 1066B King Street, to Dianna Skuffham. On June 24, 2013, the Defendant, William Mills, was assisting Ms. Skuffham move her belongings from the premises. Mr. Mills was the driver of the U-Haul truck, and was driving into a common driveway shared by Mr. McKinnon and his tenants when the incident allegedly occurred.

Issues

The issues in this matter are straightforward: did the Defendant, William Mills, cause damage to the lamp post and frog ornament as alleged by the Claimant? If so, what are the damages to be assessed?

Unlike many cases, it is clear that the damage in this case, if proven, was the result of negligence. The motor vehicle was under the control of the Defendant at all times. A driver of a motor vehicle has a duty of care to ensure that he or she drives in such a way that it does not cause injury to another person or damage to their property. None of the legal defences to negligence have been pleaded and the evidence adduced is not sufficient to establish any of those defences.

In other words, liability in this matter turns squarely on the findings of fact, namely if the Defendant damaged the lamp post and lawn ornament. If liability is found, then an assessment of damages is necessary.

Evidence

Don MacKinnon testified on his own behalf. He introduced into evidence a series of photographs taken by Jeffrey C. Goler. Each photograph was colour-coded and cross referenced to an index in a file he tendered into evidence. He referenced these photographs as he testified.

Mr. McKinnon testified that he is the landlord of the premises known as 1066B King Street, Windsor, Nova Scotia. He rented this property to Dianna Skuffham and she was in the process of moving out of the premises on June 24, 2013. On that date, he observed a 5-ton U-Haul truck turning off College Road too sharply to clear the post in the driveway. He attempted to stop the driver by waving his arms. He testified that the truck hit his "garden frog" which was situated in front of the lamp post he had installed. He testified that the box of the truck clipped the frog and forced it into the lamp post which, in turn, broke at its base.

He described the post as a 6" x 6" wooden veranda post cut in half lengthwise with a 1 1/2 inch slot exiting from one face and the side of the wood. The post was hollowed to allow the insertion of a PVC conduit for electrical wiring. At the bottom of the post, the wood was reduced to 4" x 4" to fit into the anchor point in the ground. The narrower portion is 12" long. The anchor point was further braced with cement. He constructed this himself approximately 8 years ago. He described the weakest point on the post at the 4" x 4" part in the ground. There was a hole drilled into the side of the post which in turn was attached to wiring running into his house. The post

had a light fixture at or near the top; at the bottom, the garden frog was attached. The other side opposite the driveway had a wagon wheel braced against it. His evidence includes a sketch of several cross-sections of the post.

The post and ornament are inside of a marked off area of his lawn, surrounded by an in-ground border which he says was made from a conveyor belt. There is a white stone next to the post. The pictures show that the post is covered by some type of shrubbery or other vegetation. I assume this to be for aesthetic purposes as the post itself is unremarkable in appearance. At the time of the incident, he was sitting on the deck with Elizabeth Bacon, who lives with him at 1066A King Street. He estimates he was approximately 42 feet away and watching what happened. He observed Mr. Mills driving the truck and attempting to "work his way around" the flower bed. Mr. MacKinnon heard a snap and went to the rail of the deck and waved to get him to stop.

He was sitting on the deck and watched the truck hit the frog into the post breaking the post causing a loud snap. The post itself was not broken off but he later observed it to be loose. He described the wagon wheel as having turned 60°. He tendered into evidence a sketch of the dimensions of the truck driven by Mr. Mills. He measured the truck at the U-Haul lot. It had a length from bumper to bumper of 33 feet. The width of the box was 7'11 ¼" while the rails were 2'5".

When the truck stopped in the driveway, he observed Mr. Mills exit the truck and go around to the front of it. He could not get out beside it because the space available was too narrow. Mr. MacKinnon testified that the driveway on King Street is not wide enough and most use the entrance from College Road. Mr. Mills returned that afternoon and no further discussion ensued. Mr. MacKinnon went to the U-Haul lot and spoke with Mr. Hood. He observed the truck that had been rented and noted a green stripe several places on the box of the truck. He tendered several pictures into evidence showing a green mark.

He spoke with Dianna Skuffham who denied any involvement and according to Mr. MacKinnon, stated, "nobody pays for accidents".

Mr. MacKinnon presented a quote prepared by Rob Davidson showing \$710 to replace the lamp post. Mr. Davidson was not called to give evidence. Mr. Mills also presented an estimate from New Boundaries which stated they will charge \$125 to construct and paint the frog lawn ornament out of pine. There were no estimates tendered as to the cost of repairing the damage rather than replacing it. For reasons stated below, I find these estimates completely unreasonable and exaggerated. As noted later in this decision, it is a significant factor in my findings of credibility among the witnesses.

Jeff Colin Golar works for Service Canada and is a resident of Windsor, Nova Scotia. He was contacted by Mr. MacKinnon about a day or so after the episode. He was directed by MacKinnon to take the pictures tendered into evidence. His camera was in working order. He attended to

1066 King Street a few days after the incident and observed a scuff mark near the post. There were no other tire tracks visible.

Mr. MacKinnon introduced an affidavit sworn by Elizabeth Bacon on August 13, 2013. Ms. Bacon did not testify and was not present at the hearing. The contents of the affidavit addressed the incident on June 24, 2013.

An affidavit is admissible but the deponent should swear only to what they observed not an opinion. A witness' opinion about what they believe another person to have thought or should have been able to observe is not relevant. Accordingly, I order portions of the affidavit excluded. Specifically, I allow the following paragraphs into evidence: Paragraphs 1, 3-5, 10, 12, and 15-22 which in my view, summarizes what she intended to state. I include paragraphs 2 and 11 with some limitations. The reasons for exclusion are noted below:

- Paragraphs 6, 8, 9, 13 and 14 are excluded as they are matters of opinion about what others were thinking or surmising.
- Paragraphs 7 and 11 are excluded as they have nothing to do with these proceedings.
- Paragraph 2 is included. The following statement: "clearly too close to the ditch and lamp post" is excluded.
- The following statement in paragraph 11: "It would be impossible not to see the break", is excluded.

Affidavit evidence should only be used for the simplest and uncontested of points of evidence, unless the deponent appears in person for cross-examination. Affidavit evidence can provide an effective summary of uncontentious evidence, especially if delivered to the court and the other parties in advance of the hearing. As I indicated to Mr. MacKinnon, that evidence is not given as much weight as those who testify in court.

The essence of Ms. Bacon's affidavit can be summarized as follows: she was on the deck at 1066A King Street and watched the U-Haul truck pulling into the driveway. She observed Mr. MacKinnon waving his arms at the truck. The truck did not stop. There were two loud cracks. There were others present in the driveway watching Mr. Mills drive the truck including Dianna Skuffham, Jennifer Skuffham and several others. Two men gave the post "a good shaking". She found the post to be leaning and the frog broken in several pieces. Nobody spoke to her about the damage, so she subsequently spoke with Dianna Skuffham. She testified that Ms. Skuffham first denied it happened then attributed blame to Owen Cochrane. She then said she knew they damaged the post and would speak later about damage. She later refused to pay. There was some dispute over payment for home heating oil. The tenancy ended with a return of the damage deposit.

William Mills testified that he was the driver of the U-Haul truck that was used to move Ms. Skuffham's belongings. He is an experienced truck driver having operated trucks for over forty years. He tendered into evidence several pictures he took following the incident. Picture number four is the location where the post was installed. It shows a large rock in front of what must have been a flower bed as there is considerable mature vegetation in it. Behind that is the curved driveway in front of 1066B King Street. This picture was taken from College Road. He also tendered into evidence another picture of the back of 1066A King Street, indicating where he observed Mr. MacKinnon and Ms. Bacon sitting on the second deck.

Prior to driving into the driveway, Mr. Mills checked for clearance, backed his truck up and turned it in. He knew it would be a difficult fit. When he drove into the yard, he noticed Mr. MacKinnon jumping up and waving. After he stopped the truck, he observed tire marks on the guard rail, meaning the black conveyor belt referred to by Mr. McKinnon. He did not observe the border to have been damaged. He touched the post and shook it and noted it was solid in the ground. Further, he observed the frog on the other side of the post from the driveway, and the wagon wheel felt solid as well. He indicated that while Mr. MacKinnon had flagged him down, he did not come down from the deck.

Mr. Mills later discussed the issue with Dianna Skuffham and she indicated that she would take care of the issue and speak with Mr. MacKinnon if necessary. After she was presented with an invoice for \$710, she showed it to Mr. Mills who both decided against paying it. Mr. Mills attempted to contact Mr. MacKinnon to look at the post again, but he could not get through to him on the phone.

Michael Paul Cochrane lives at 199 Rand Street, Hantsport, Nova Scotia. He was present on the date the truck drove into 1066 King Street. As the truck pulled into the driveway, he was walking down College Road to go into the yard to help Ms. Skuffham. He had started into the yard standing on the passenger side of the truck and then ended up behind it when the truck was pulling into the driveway. He did not observe the truck strike anything. He was coming to help with the move. He saw where the tire hit the rubber border, but not the post. He had grabbed the pole and shook it. He testified that it was still solid in the ground. Under cross examination he testified that his father is Owen Cochrane.

Jennifer Lee Skuffham, is the daughter of the tenant, Dianna Skuffham. She was present on moving day, June 24, 2013. After her mother moved out, Jennifer assisted with the final inspection. She testified to discussing the post with Ms. Bacon. She discussed the issue of the post as well as a claim for oil arising from the tenancy. She attempted to contact Mr. MacKinnon and Ms. Bacon multiple times since then but without success.

Dianna Betty Skuffham rented 1066B King Street from Mr. MacKinnon and Ms. Bacon. She had asked Mr. Mills to assist her with moving. She first learned of the incident involving the post and the frog the evening of June 24. At that time, Ms. Bacon showed her the scuffed mark on the frog and the track in the driveway. They discussed the post and she was presented with the estimate of

\$710. She refused to pay to the Claimant that amount. There was no request for compensation for the frog until “the amount increased to \$835 for the hearing”. I took it from that she had subsequently discussed the amount with Mr. Mills. On July 1, she called Elizabeth expecting her to do an inspection. She left a message indicating that she did not wish to leave on bad terms. The next contact occurred when Mr. Mills was served with the Notice of Claim. At the time of the alleged incident, she was inside getting her place organized. She did not see the truck. After that she was pointed to a mark on the post where was hit, but did not see that it was broken.

Findings

In order to find liability for negligence, the court must find that Mr. Mills breached the duty and standard of care of a driver of the vehicle. Further, that through this breach he caused damage to the post and the frog ornament. Finally, if negligence and damage have been proven, then I must determine an appropriate sum of damages. The onus is on the Claimant to prove the claim on the balance of probabilities.

Incident in Summary

On June 24, 2013, Mr. Mills was driving front-on into the driveway from College Road. He found the entrance to be difficult to properly turn the U-Haul truck. He was observed by Mr. MacKinnon who waved at him in an effort to make him stop. He drove past the lamp post and frog ornament. He exited the truck to determine if he damaged the post and shook it. Mr. Cochrane was also present and shook the post as well. They resumed packing the truck and moving Dianna Skuffham’s belongings. There were subsequent discussions between MacKinnon, Bacon and Dianna Skuffham concerning the damage deposit and a claim for oil. However, the full damage deposit was returned.

Facts In Dispute

Credibility - In reviewing all of the evidence, I find the Claimant has not proven his case. I have summarized my reasons below. However, taken as a whole, I find the evidence of Mr. Mills and his witnesses in this matter to be more consistent with the corroborating evidence than that presented by Mr. MacKinnon. Frankly, I find Mr. Mills’ evidence more believable. Where they differ, I favour the evidence of Mr. Mills and the witnesses called on his behalf over that of Mr. MacKinnon. I find the affidavit evidence of Elizabeth Bacon to be largely a restatement of the evidence of Mr. MacKinnon with the exception of the number of cracks heard (he testified to hearing one and she deposed to hearing two). There was nothing else tendered to corroborate her testimony. She was not available for cross-examination to demonstrate the completeness and limitations of her evidence. It is important to emphasize while affidavit evidence is admissible, it is not as strong as equally compelling evidence given in person.

Conduct of William Mills, Dianna Skuffham and Don MacKinnon – I find Mr. Mills was genuinely concerned about ensuring the truck was able to fit in the driveway. Further, when he

observed Mr. MacKinnon waving at him, he stopped the truck. I find both he and Mr. Cochrane shook the post and found it did not move. Their testimony was consistent in cross-examination and throughout the hearing. He acknowledged driving on the rubber border. Having observed his testimony and its limitations under cross-examination, I found him to be a straightforward witness. Likewise, I was favourably impressed with the evidence of Dianna Skuffham. I find she was not present in the driveway when Mr. Mills drove in. She learned of the incident later on. I accept her explanation that she was seeking to negotiate a favourable settlement to this matter but was deterred from the amount sought by Mr. MacKinnon which she found to be excessive. I believe her version of events over that contained in the affidavit of Elizabeth Bacon. I do not find this to be an admission of liability but simply an attempt to settle the issue and put it behind her.

Both Mr. MacKinnon and Ms. Bacon testified to hearing a cracking noise and witnessing the collision. Yet, they did not approach the scene even after the truck had left. He had the opportunity to address it directly with his tenant and the Claimant. Why he would not do that in those circumstances is curious. I do not accept his explanation that he was waiting to hear from Dianna Skuffham or the Claimant before proceeding. None of the other witnesses testified to hearing a noise. I find as a fact that it did not happen.

Evidence of Damage to the Lamp Pole – Mr. MacKinnon went to impressive effort to have photographs of the incident tendered into evidence. They were well organized and on the whole, well presented. He went to similar effort to diagram the dimensions of the truck and the construction of the post. However, the pictures do not reveal any evidence of breakage. The post is scuffed and scratched. One photograph shows it to be leaning slightly. I am not satisfied that this is the result of being hit by the truck. Mr. Mills submits that if the truck had hit the post, it would have snapped off. In his evidence, Mr. MacKinnon has provided only a picture of the post (paragraph 5) which he purports to be leaning as the result of the post breaking at the base. However, the lean is only slight and the post appears to run straight up from the anchor point. If it was broken at the base as Mr. MacKinnon testified, it would have been leaning from above the anchor point. There is a separate picture of the anchor pin when the post was removed. However, even though he removed the post, Mr. MacKinnon did not provide any photographs of the break in the wood, the light fixture or the other electrical hardware. He could have easily proven breakage by removing the post and taking photographs of the break point and any damaged electrical hardware.

Reference is made to the case of *Scotia Fuels Limited v. Lewis* 102 N.S.R. (2d) 12 where Justice Jamie Saunders then of the Supreme Court of Nova Scotia, stated as follows:

“24It is well recognized that where a party or a witness fails to present evidence, which was in the power of the party or witness to give, then such failure justifies the court in drawing the inference that the evidence would have been unfavourable to the party to whom the failure was attributed....”

As a result of the absence of evidence of the break, I infer that the inclusion of a picture of the alleged point of breakage on the post would have been adverse to Mr. MacKinnon's case.

Therefore, I find the post was “solid in the ground” as described by Mr. Mills and Mr. Cochrane and not damaged as alleged by Mr. MacKinnon.

Evidence of Damage to the Frog – Mr. MacKinnon brought with him a portion of the face of the frog ornament. This appears in several photographs beside the mark on the truck. The photos show the other portion of the face on its post affixed to the pole. It is broken along the grain with a scuff mark on one end. As noted by Mr. Mills, it is located on the opposite side of the post. There is no evidence of breakage on its supporting pole or any other part of the ornament. I accept Mr. Mills’ evidence that it was not located on the same side as the driveway. I am not satisfied that the mark on the side of the truck was the result of the frog being struck by the truck when it was parking. I am also concerned that the issue of payment for the frog only arose once the claim was filed. All of this evidence, together with my finding of credibility favouring the Defendant, leads me to conclude that Mr. MacKinnon has not proven that the frog was damaged by the actions of Mr. Mills.

Therefore, the claim should be dismissed.

Damages and Costs

As noted at the beginning of the decision, the estimate of the amount of damages was a significant factor in my assessment of credibility. I found the estimate of damages presented by Mr. MacKinnon in this matter to be exaggerated and wholly unreasonable.

In assessing damages, the objective is to put the Claimant into the position he would have been in but for the alleged negligence. When dealing with damage to personal property, the Defendant is not an insurer for the Claimant but is expected to compensate proven actual loss.

Lamp Pole – Mr. MacKinnon tendered into evidence an estimate of \$710 prepared by Rob Davidson to replace and install the post and electrical hardware. Mr. Davidson did not give evidence. He has estimated \$120 for a post and \$300 labour to “split post dado for wire and install post”. While there was no evidence called to refute it, I find that sum to be completely unreasonable. Further, there is no photograph or other evidence to show damage to any of the electrical hardware. He did not show evidence of damage to it. His submissions assume it would be replaced. If I were to have found liability, I would have limited it to the cost of either repairing or at most, replacing the wooden post itself. The modifications he suggested and which are quoted in the Davidson estimate are unreasonable, in terms of both effort and cost. It would defy common sense to expect that Mr. MacKinnon would have paid to have such steps taken. The actual cost to repair the post, had I found it to be damaged, would have been modest by comparison.

Let me reemphasize, I am not satisfied that the post is damaged, let alone needing replacement. Even if I had found in Mr. MacKinnon’s favour, I would not have awarded anything to repair or replace the post.

Frog Ornament - The Claimant has submitted an estimate of \$125 from New Boundaries to replace the three-foot wooden frog ornament. From the photographs, it is clear the ornament is an assembly of several pieces fastened together to resemble a frog holding a sign saying “Welcome to our Pad”. The photos make it clear that the piece representing the face of the frog is the only part of it which is broken. The rest of it is intact. I take judicial notice of the fact that there are many hand-craft businesses across Nova Scotia. A piece such as the part broken off the frog ornament should be readily available for purchase to be fastened to the frog, at a cost much less than \$125.

In summary, I would have awarded \$25 for the frog. I find the extent of damage alleged to have been done to the post, even if proven, would have justified an award of only \$50.

In finding the values presented to be unreasonable and largely contrived, this evidence adversely affected his credibility for this claim.

One postscript to this section, given the substantial discrepancy between this amount and the \$835 sought in his Notice of Claim, I would have declined to award costs had I found in favour of Mr. MacKinnon.

Costs

In litigation, the general rule is “costs follow the event”, meaning that in most cases, the successful party is entitled to his or her costs. In this case, there was no evidence of costs incurred by Mr. Mills to defend this matter, therefore, I decline to make any award.

Judgment

In summary, the claim is dismissed without costs. An order shall issue accordingly.

Dated at Dartmouth, NS,
on October 7, 2013;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)