IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: **MacKenzie v. Sheppard 2008 NSSM 47**

Date: 20080911
Claim: SCCH 298923
Registry: Halifax

Between:

Philip MacKenzie and Juanita MacKenzie

Claimants

v.

James K. Sheppard

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: September 8, 2008 in Halifax, Nova Scotia.

Appearances: James D MacNeil for the Claimants
Josh Martin for the Defendant

By the Court:

[1] This matter came on before me on September 8th, 2008. It involves a claim arising out of a collision between a piece of construction equipment operated by the defendant and a recreational trailer owned by the claimants. Liability was admitted. The only issue concerned the nature and amount of the various heads of damage claimed by the defendants.

[2] I heard the evidence of the claimant Juanita MacKenzie. I also heard the evidence of Ms Marjorie Conrad, a field service representative for Aviva Insurance. Aviva was the property insurer of the claimants.

[3] The defendant did not call any evidence, although counsel did put some documents into evidence during his cross-examination of Ms MacKenzie.

[4] Based on the oral evidence and the documents I make the following findings of fact.

Findings of Fact

[5] The MacKenzies purchased a 2007 Crossroads Sunset Trail Motor Trailer (the "Sunset Trailer") on March 2, 2007. The retail price for the trailer was $25,500.00. It came with an extended warranty. Once taxes, license and registration fees were added the total purchase price was $31,007.05. The MacKenzies could not afford to pay this in cash. They accordingly

financed the purchase through the Royal Bank. The bank had a special deal on trailer financing at the time, and the MacKenzies were able to secure financing for the purchase at a rate of 6.75%.

[6] The MacKenzies were able to use the trailer for a few weekends in 2007 before the winter set in. In 2008 they used it once or twice. It was parked at a recreational spot on June 5, 2008 when the defendant's excavating equipment damaged it.

[7] Mr Sheppard originally wanted to settle the matter without involving his insurer. He dealt with Ms MacKenzie. This did not work out, in part because it became apparent that it was difficult and costly to assess damage to trailers and difficult and costly to effect timely repairs of them. It was eventually decided to refer the matter to his liability insurer, ING Insurance. The MacKenzies started to deal with the ING adjuster, Mr Andrew Abraham. The MacKenzies grew frustrated with the slow pace of processing their claim and eventually decided to turn to their own insurer, Aviva.

[8] Aviva's policy with the claimants covered property damage to the trailer, with a limit of $30,000.00. Trailer insurance is a speciality line. ING does not write trailer insurance (in the sense of insuring trailers against property damage). Aviva does, and has developed quite an expertise in it. Because of that expertise Ms Conrad was able to "put a push on" both the appraisal and the projected cost of repair.

[9] Aviva obtained an estimate for the cost of repairs on or about June 17, 2008. The estimate was for $18,645.00. The estimate was also provisional, in that the appraiser was concerned that there might be hidden damage that would become apparent only after the repairs started.

[10] Aviva also obtained an appraisal of the trailer from Autosource/Audatex on or about June 18, 2008. The appraiser either was not able to find or did not use market value for a 2007 Crossroads trailer. Rather, it priced a comparable 2009 trailer and then reduced that price for "depreciation." The 2009 price was said to be $27,000.00. It was then reduced by 20% "for depreciation as a new 2009 comparable was used for ACV [*i.e.*, adjusted cash value"]." The resulting valuation for the 2007 Crossroads was $21,600.00. The price for the new trailer was obtained from L. J. Patterson Sales in New Brunswick, the same vendor who had sold the MacKenzies their 2007 Crossroads. "Bob" at the vendor apparently told the appraiser on or about June 18th, 2008 that a replacement could be available "within 2 weeks."

[11] Ms Conrad forwarded these appraisal and repair estimates to Mr Abraham and spoke to him on June 18th. At this point ING had already paid or committed to two weeks loss of use payments for the cost of a rental replacement while the trailer was being assessed. The rental was at $200/day. Mr Abraham noted that as of this date they had the ACV appraisal but still no total repair cost. He noted that the "entire wall skill as to be replaced @ $10,000. Unit would have to be shipped @ $8,000 + possible hidden damages. Downtime until August-September, probably. This would run into another $10,000-$20,000 in rental costs alone."

[12] Mr Abraham further noted following his discussion with Ms Conrrad was that "[t]he only economical way to handle is for Aviva to total the RV [*i.e.* the trailer], issue payment right away, then subro [*i.e.* subrogate] ACV less salvage to us." Mr Abraham agreed to this course of action "provided we receive proper paperwork – appraisal @ ACV."

[13] On the basis of this agreement Aviva then proceeded as follows:

a. on or about June 18th it issued the MacKenzies (or rather, Royal Bank) a cheque for its policy limits of $30,000, and

b. took the damaged trailer as salvage, which was then sold "as is" by auction to Armstrongs Auto Sales and Salvage Ltd for $12,500.00 plus HST, and then

c. claimed $17,083.75 from ING pursuant to its subrogation rights.

[14] ING paid the $17,083.75 to Aviva. With payment it appears to have concluded that it had satisfied its potential liability (or rather, that of its insured Sheppard) to the claimants. In this it was mistaken.

[15] The payment (together with the salvage) accounted only for the $30,000 that Aviva had paid out to the MacKenzies under its policy of insurance. It did not address the uninsured portion of the MacKenzies's loss; that is, for that part of the loss that the MacKenzies said they incurred but which were not covered by the $30,000 payment they had received from Aviva.

[16] They claimed an additional $8,969.34, broken down as follows:

a.	mileage for travel to and from Truro associated with repair estimates, etc	$338.00
b.	mileage for rental trailer	$92.62
c.	payout for damage trailer	$96.75
d.	difference between old trailer payout and new trailer replacement	$2,088.74
e.	difference in purchase price between old and new trailers	$5,103.38
f.	annual additional financing charges	$1,149.85
g.	general damages	$100.00

[17] At the commencement of the hearing the parties agreed to (a) and (b). Several reasons for the balance of the claim were advanced on behalf of the claimants at the hearing.

[18] When the MacKenzies looked for a replacement trailer they did not look for 2007 models in comparable condition to the one they lost. They were of the view that they were entitled to the cost of a *new* replacement trailer, not a used trailer. As Ms MacKenzie said at one point in cross,

"we always buy new cars, not used ones ... we wanted our trailer back, to us it was a brand new trailer, we had barely used it." So they did not look for a used model that was comparable to theirs. Rather, they looked for a *new* trailer that:

a. was the same as or comparable to the one they had lost or, if they could not find one within the range of what they could afford,

b. a model that was a step down from the one that they had had but still in the same price range.

[19] They ended up with a 2008 Laredo trailer that had slightly fewer of the features of the 2007 Crossroads, for a purchase price of $27,900.00. When the taxes and other fees were added the total price came to $32,185.00. Once again they had to finance this trailer. This time they were not able to get the special financing rate, and instead had to finance the purchase at a rate of 7.5% rather than the original rate of 6.75%. (Ms MacKenzie said that the extra cost associated with the higher rate was "about $1,400.00.")

[20] In essence, then, the MacKenzies's position was that because they could not in 2008 buy a 2007 Crossroads trailer for the same price they had paid and on the same financing rates they had received in 2007 they were entitled to claim the difference between what they had paid in 2007 for a new trailer and what they paid in 2008 for a new trailer.

[21] In my opinion the MacKenzie's approach represented a misunderstanding of the appropriate damage principles to be applied to their claim. The claim they had against the defendant (and hence, the claim that ING had to deal with) was a claim for damages at common law. And in general, such a claim in a case like this is comprised of:

a. the cost of repairing the trailer or,

b. if that cost exceeded the fair market value of the trailer, the fair market value of the trailer (minus any salvage value that the damaged property might have), and

c. any damages associated with the loss of use of the damaged property while it was being repaired or replaced, as the case may be: see, for e.g., *Nason v. Aubin* [1958] NBJ No. 21 (CA) at paras.6, 8.

[22] In other words, the MacKenzies were not entitled to insist on replacing their trailer with a *new* trailer; nor were they entitled to claim damages based on the cost of a new trailer. Rather, they could only claim what they had lost, and that was a 2007 Crossroads trailer that had been used, even if only for a few weekends.

[23] I am left then to determine what the fair market value of the claimants's 2007 Crossroads trailer was in June 2008. Unfortunately, some of the evidence I had was devoted more to the issue of the "adjusted cash value," or ACV, of the trailer. This evidence was not in my view helpful nor relevant. Fair market value and ACV are separate and independent, albeit

overlapping at times, concepts. They are applied in property insurance, but relate to different types of property.

[24] Fair market value–that is, the price that an arm's length purchaser will pay for property in an open market–is generally applicable to property that is fungible and for which there is a ready market. New and used cars are classic examples of property that is amenable to a fair market value analysis. There is a market for lots of cars of similar or identical makes and models. One can determine the fair market value of car without too much difficulty.

[25] The concept of ACV is a product of property policies of insurance (and, in particular, *building* policies). It is not a term or a concept that admits to an easy definition. Its meaning is generally taken from the common law and as a general rule is interpreted as being the actual cost of repair of a building, less depreciation.

[26] The element of "depreciation" is designed to deal with the fact that repairs to real property (particularly if they are extensive) can result in an improvement in the value of that property. If a 20-year old building is damaged and repaired the insured now has, in effect, a "new" building that is more valuable than it was immediately before the loss (because it now has new rather than 20-year old materials in it). To allow this to happen would be to over-compensate the insured. To prevent such over-compensation the insurer will apply "depreciation" to the cost of repair or replacement to allow for this improvement in the overall value of the property. The amount of this depreciation may be spelled out in the contract; or it may be a figure based on the insurer's judgment as to what would be appropriate in the circumstances. (Of course, absent a specific contractual term as to a specific percentage an insurer's "judgment" as to the amount of depreciation is not binding on the insured.)

[27] In other words, the cost of repairs is "depreciated" (written down) to allow for the improvement in the overall value of the property caused by the repairs. The ACV of the property would thus become the cost of its replacement, less an amount intended to reflect the fact that the insured would (after replacement) have exchanged a new building for an old one.

[28] In the end the meaning of ACV in any particular case depends upon the *particular* insured and his or her *particular* use of the building insured. As noted by Anglin, J in *Canadian National Fire Insurance Co. v. Colonsay Hotel* [1923] 2 DLR 1001 (SCC) at p.1007 (emphasis added),

> "[ACV means] 'the actual value of the property to the insured at the time fo the loss,' *having regard to all the conditions and circumstances then existing*, not necessarily its market value on the one hand and certainly not, on the other, its 'replacement value' which, while it may sometimes be less that its actual value to the insured, will more often exceed that value and sometimes, as in the present instance, very grossly exceed it. The right of recovery by the insured, is limited to the actual value destroyed by fire."

[29] In all cases, the test of ACV is always based on *this* property and *this* insured. Whether the ACV is the cost of repair, or replacement, or market value, or diminution of market value,

will depend on all of the circumstances of the case and in particular, the evidence of the value of the building to the insured in question. As was noted in *Ziola v. Coop. Fire & Casualty Co.* [1976] 6 W.W.R. 159 (Sask. Q.B.), a court in assessing ACV must look at all the evidence of value, not just the cost of repair or replacement; and

> "[i]n the case of buildings such other relevant evidence would, for example, include, inter alia, the use being made of the same, the purchase price, its sale value, age and obsolescence, condition, location and the opinions of experts."

[30] We are here of course dealing with a trailer, not a building. But the principles remain the same. A trailer is in my view fungible. There is a market for used (or "pre-used" as the marketers inexactly put it) trailers. It is thus possible to determine what an arm's length purchaser would pay for a trailer of a particular type and condition. That being the case the concept of ACV is not appropriate, if only because the starting point is not the cost of a new trailer but rather the value of a used one in the market.

Fair Market Value

[31] I have a Kijiji ad (printed on August 12, 2008) for a 2007 Crossroads Sunset trailer. The listed price is $25,000.00. There is no evidence as to its condition. As well, the listed price could be the first price, which the seller was prepared to go below; or it could be a firm price. There is no evidence either way. I also have the evidence that an identical 2008 model could have been purchased from Patterson for $27,000 cash, subject to a two week delivery date. And I have the evidence that they purchased their trailer in the winter of 2007 when prices are traditionally lower for $25,500.00, albeit that that was a financed price.

[32] Accepting Ms MacKenzie's evidence that the trailer had been used very little at the time of the accident, and doing the best that I can with the limited evidence available to me, I am satisfied that the fair market value for their trailer at the time of the loss was $24,000.00. I say this because:

a. the trailer was less than a year old and had not been used much;

b. it was in excellent condition;

c. it had been purchased at a time of the year when purchase prices were at their lowest;

d. it would be valued for purposes of fair market value at a time of the year (June) when prices are traditionally higher;

e. the Kijiji ad for $25,000 suggests at least an upper range for a similar model;

f. a person buying a 2007 used trailer when 2008 models were available for $27,000.00 would not pay an amount too close to that price; and

g. a person proposing to purchase a used 2007 trailer would likely pay more than what the owner had paid for it, at least if they knew what the price was.

[33] Since the claimants would have to pay tax on the trailer (as they did in 2007), I add an amount equal to 13% of $3,120.00 to the value of the trailer.

Cost of Rental Replacement

[34] The next question concerns the cost of a rental replacement. The accident happened June 5, 2008. The Kijiji ad is dated August 12, 2008. On this evidence I am satisfied that it would be reasonable to conclude that the MacKenzies, acting reasonably, would have obtained a replacement within 2 months of the damage. Ms MacKenzie said at one point that rental costs were $160/day plus mileage and gas until the end of June, when they went up to $303/day plus mileage and costs. She did not say if the trailer was rented for the whole week, or only for weekends. I have to conclude that it would not be reasonable to rent a replacement for weekdays during which it was not being used. Two months of three day weekends (allowing for rentals of Friday to Sunday) at an average rental rate of $231.50 equals $5,833.80 (that is, $231.50 times three days times 4.2 weeks times two months).

General Damages and Conclusion

[35] As far as general damages are concerned, I am satisfied that a defendant who damages property that is used solely for recreational purposes knows or ought to know that there will be significant interference with the plaintiff's mental and emotional happiness. I would accordingly ad $100.00 in general damages to the claim.

[36] Finally, the defendant agreed to the claims for mileage at $338.00 and $92.62.

[37] This brings the total loss of the claimants to $33,484.42. They have been paid $30,000.00, resulting in a loss of $3,484.42 plus costs.

Dated at Halifax, this 11th day of September, 2008

Original: Court File)
Copy: Claimant)
Copy: Defendants)

W. Augustus Richardson, QC
ADJUDICATOR