Claim No. SCCH 443960

The Small Claims Court of Nova Scotia

Cite as: Green v. Dunphy, 2016 NSSM 5

Between

Lloyd R Green and Pamela M Green **Claimants**

-and-

Fred M Dunphy **Defendant**

Adjudicator: David TR Parker QC
Heard: February 29, 2016 and March 24, 2016
Decision: March 31, 2016

Water through culverts placed in a brock/ flooding/Breach of Regulations and Permits/Trespass/Rule in Rylands and Fletcher/Nuisance/Negligence

Counsel: The claimant was represented by Tracy Smith
The Defendant was represented by Peter Kidston

DECISION

1. This matter was originally before the Supreme Court of Nova Scotia.

2. The Supreme Court of Nova Scotia action involve injunctive relief remedies which remedies are not available in the Small Claims Court and once these remedies were no longer applicable, the Claimants elected to have the proceedings adjudicated in the Small Claims Court.

3. Before the matter proceeded the parties were asked if there were any preliminary matters they wished to bring to the court's attention and whether they wished to amend any part of their pleadings. There were no requests by Counsel and the matter proceeded accordingly.

The Claim:

4. The Claimants alleged that the Defendant installed or placed a culvert in a brook [Cherry Brook] at the end of a cul-de-sac, in order have an access road onto the Defendant's property.

5. The Claimants stated that the Defendant failed to maintain or repair the culvert and as a result water backed up onto the Claimants' property resulting in flooding to the Claimants' basement apartment on October 2011, November 2011, June 2013, January 2014 and March 2014.

6. The Claimants plead that the Defendant and or any of his agents failed to maintain and repair the culvert, and this amounts to a breach of the legal requirements under the permit, and the Claimant also pleads negligence in the that the Defendant:

i. failed to allow for the natural drainage from the Claimants' property,
ii. created an unreasonable structure (the access road without proper culvert) that acted as a dam prohibiting storm water and surface water on the Claimants' property from draining into Cherry Brook, and/or rerouting water from Cherry Brook onto the Claimants' property
iii. failed to maintain the culvert/access road
iv. failed to remedy the problem when put on notice by the Claimants.

7. The Claimants further plead that the Defendant trespassed and caused nuisance related to the rerouting of water onto the Claimants' property and/or prohibiting the storm water and/or surface water from draining from the Claimants' property into Cherry Brook, a natural watercourse.

8. The claimant further claims against the Defendant based on the rule in ***Rylands and Fletcher.***

9. The relief sought by the Claimants includes general damages in the amount of $100.00, special damages for out-of-pocket expenses, incurred by the Claimants including all repair work performed on the Claimants' property as a result of the flooding as well as all of the Claimants' costs for investigations, reports contractors in the amount of $4,627.25. The Claimants also claim special damages for the loss of rental income in the amount of $13,600.00 plus their costs of the proceedings.

The Defence:

10. The Defendant admits to putting the culvert in the brook but did so in accordance with the license/permit. The Defendant denies the culvert cause any flooding on the Claimants' property, denies that the Defendant was negligent denies it failed to repair and upkeep the culvert in accordance with the legislation and/or permit and alleges that the claimant was negligent in failing to keep the property in a proper state of repair and that further the Claimants failed to mitigate any damages they may have suffered.

Facts:

11. The Claimants' property has its northern boundary being Cherry Brook, a brook which is approximately 15 to 20 feet wide.

12. The Claimants purchased their property in 2003.

13. The Defendant owns property which runs along the brook and is adjacent to the Claimants' property. The brook separates the Claimants' property from the Defendant's property and the Defendant's property continues past the Claimants' property.

14. Chamberlain Drive is the main road that provides access to the Claimants' property. The road ends in a cul-de-sac. The road and cul-de-sac runs along the Claimants' western boundary and right up to the brook.

15. The cul-de-sac ends at the brook and at the other side of the brook is the Defendant's property.

16. The Defendant purchased its property in 1991 and at that time the Defendant replaced an old wooden culvert with a 40 inch culvert. There was no permit provided as evidence. The Defendant put an access road from the end of the cul-de-sac on Chamberlain Drive over the culvert and on to the Defendant's property.

17. In December 1995 the Defendant applied to the Department of environment "to install a 40 inch culvert alongside the existing 40 inch culvert to ensure sizing capability for 100 year storm flow".

18. The permit was approved to install the 40 inch diameter culvert subject to the terms and conditions in the application and Schedule A.

19. The existing 40 inch diameter culvert along with the 40 inch culvert to be installed by the Defendant was situated in the brook at the end of the cul-de-sac. The Defendant made a road access over the culverts onto the Defendant's property.

20. Approximately eight years after the Claimants purchased their property they experience flooding in October and November 2011, June 2013 and January and March 2014.

21. Water could not get through the culverts fast enough and it pooled on the east side of the culvert and overflowed onto the Claimants' property.

22. During these times the basement of the Claimants' home flooded.

Analysis:

23. There are eight issues which arise out of the pleadings and the facts in this trial. I will address the following issues:

i Was there a breach by the Defendant and/or his agents of the legal requirements under the Permit/License and if so do they affect the liability of the Defendant.
ii. Trespass
iii. The Rule of Ryland's and Fletcher
iv. Nuisance
v. Negligence
vii. Contributory Negligence
viii Damages

Breach of Permit/License

24. There was no breach of the permit/license to install a culvert by the Defendant. The Defendant went through the process obtain the permit and install the culvert.

25. The Claimants rely on articles 3.01 and 3.07 which are covenants and conditions required of the person putting in the culvert, in this case the Defendant. In short, these conditions stated that the Defendant will not do anything to damage adjoining and nearby land nor cause or permit nuisance to adjacent or nearby properties. And further the Defendant has a responsibility to maintain the culvert that has been approved.

26. If there were a breach of any of the conditions within the permit that would be an issue between the municipality and the Defendant. It remains up to the Claimants to prove what they are pleading that is, trespass, breach of the rule in Ryland's and Fletcher, nuisance and/or negligence.

Trespass:

27. In order for the intentional tort of trespass to succeed the claimant must show that there was a direct interference upon the Claimants' property. There must be direct entry onto land.

28. **R & G Realty Management Inc. v. Toronto**[2005] O.J. No. 609 at para 40 sets of the four requirements of trespass:

a.
Any direct and physical intrusion onto land that is in the possession of the plaintiff;
b.
The Defendant's act need not be intentional, but it must be voluntary;
c.
Trespass is actionable without proof of damage; and
c.
While some form of physical entry onto, or contact with, the plaintiff's land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto, the plaintiff's land.

29. I would add that mistake is no defense to trespass.

30. The Defendant in the current case before this court never entered upon the Claimants' land and it would be a stretch to say that he placed or directed the water from the brook on the Claimants' land.

The Rule in Rylands v. Fletcher:

31. Rylands and Fletcher imposes strict liability on someone who brings something out of the ordinary onto his land or does something that is a non-natural use of land resulting in damage to the claimant. The Defendant does something that changes patterns of use on his land and as a result something happens that result in damage. It is not necessary to get into a lengthy discussion of when and what amounts to a non-natural use of the Defendant's land or considering the time and place it happened, because in this case it did not happen on the Defendant's land. It happened off the Defendant's land.

32. In the case before this court the Defendant put in a culvert, in fact two culverts which were not on his land. For Ryland's and Fletcher to apply it must be unintended consequences of what the Defendant did on his property. This is not a case where the Defendant did something on his property which resulted in water escaping onto the Claimants' property.

33. The case of **Norris v. Roy Judge C. Ltd.**[1973] N.S.J. No. 62 refers to the rule in Rylands v. Fletcher ((1866), L.R. 1 Ex. 265 (Ex. Ch.) aff'd (1868), L.R. 3 H.L. 330) herein it said Ryland v. Fletcher "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: '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.'"

34. The case of **Ivall (Balkwill) et al. v. Aquiar et al.** 86O.R.(3d) 111 was cited by Counsel and deals with Plaintiffs and Defendants who were neighbors and a natural stream that flowed through both properties. The Defendant altered the topography of their property creating a large pond on the property and replacing the natural watercourse of the stream with piping. The piping was too small to properly drain the pond. As a result during heavy rains the pond would raise and flood onto the Plaintiff's land.

35. Justice Harris of the Ontario Superior Court of Justice in discussing the rule of Rylands and Fletcher and at para 26 and 27 stated: [26] "Strict liability may also be found where there is interference with the natural course of a stream. In **Greenock Corp. v. Caledonian R. Co**. Lord Finlay L.C. said: 'It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such was taken to be the law in **Smith v. Ontario and Minnesota Power Co. Ltd.** and **Kelley v. Canadian Northern Railway Co**. [27] Similarly, in **Steele v. Lofranco**, Le Bel J. at paragraph 5 aptly summarized the relevant principles: ' If by raising the level of his lands the Defendant interfered with a natural watercourse to the injury of the plaintiffs, he is liable, but if such waters were mere surface waters not flowing in a defined channel, he owed the plaintiffs no obligation to receive the drainage and is not liable unless he was negligent or created a nuisance: Ostrom v. Sills (1897), 24 O.A.R. 526, affirmed 28 S.C.R. 485; McBryan v. The Canadian Pacific Railway Company (1899), 29 S.C.R. 359; Rural Municipality of Scott v. Edwards, [1934] S.C.R. 332, [1934] 3 D.L.R. at 796, affirming [1934] 1 W.W.R. 33, [1934] 3 D.L.R. 793; Woolner v. Dyck, [1950] O.R. 190, [1950] 2 D.L.R. 158, affirmed on this point [1950] O.W.N. 779, [1950] 4 D.L.R. 745.8'"

36. These cases begin to deal with action taken by the Defendant on his own property which is consistent with the fact situation that occurred in the case of Rylands v. Fletcher. But that is not the situation here. Also the Defendants "works" were not the reasons for the backup of water and I shall explain that more fully later in this decision.

37. It would be inappropriate to impose strict liability for the consequences of something the Defendant did that is carried out in accordance with the rules and regulations of the municipality and not emanating from the Defendant's land.

Nuisance:

38. The Defendant applied to the Department of Environment to put in a second 40 inch culvert over the brook alongside an earlier 40 inch culvert, the Defendant had put in over the brook.

39. There was rock and crushed rock put over the two culverts to allow passage onto the Defendant's land from Chamberlain Drive. Flooding occurred to the Claimants' basement in October and November 2011 when the brook overflowed but this has been covered by the Claimants' home insurer and is not part of the this action.

40. In June 2013 the brook overflowed its banks again in the basement of the claimant was flooded with water. At that time the Defendant was notified by the Claimants' son. In fact during the storm the Defendant was contacted three times by the Claimants' son who asked him to do something about the flow of water over the roadway where the culverts were located. The Defendant at that time used a backhoe to try and clear the culverts and allow the flow of water through them.

41. The Defendant said he knew the Claimants had a water problem because they had put drainage pipes from their home into the brook and when the brook was high with water it would backup into the pipes and into the Claimants' property. The claimant suggested that this was not what happened as he put in the pipe as there was a natural stream going through their septic system on their land and they wanted the water diverted around the septic. There was no evidence by contractors or others as to whether either this was correct.

42. The Defendant said pieces of lumber, plywood, wooden pallets, bikes, grocery cart would be in the brook and most of his employees would check the culverts from time to time to ensure there was no blockage. The Defendant said he would also check it after a heavy rain. One of the Defendant's employees who was a witness said when he traveled over the culverts he would often look for any blockage and would clear it out from time to time.

43. The claimant said that he and his wife would also pull debris out of the brook from time to time.

44. In **Norris v. Roy Judge Co. Ltd.** [1973] N.S.J. No. 62 the Nova Scotia Court of Appeal in discussing Nuisance and Rylands and Fletcher said at para 14: "Actions based on Nuisance and actions based on Rylands v. Fletcher are distinct from one another; but it is possible that either may lie on the same facts. (Winfield on Torts, 5th ed., s. 143; Salmond on Torts, 11th ed., s. 187). There is a close affiliation between the two actions, however, and many judges and writers have taken the view that Rylands v. Fletcher is in effect but a specialized variety of nuisance. Thus Lord Simonds has noted 'that so closely connected are the two branches of the law that text books on the law of Nuisance regard cases coming under the rule in Rylands v. Fletcher as their proper subject, and, as the judgment of Blackburn, J., in that case itself shows, the law of Nuisance and the rule in Rylands v. Fletcher might in most cases be invoked indifferently.' (Read v. J. Lyons & Co. Ltd., [1947] A.C. 156 at p. 183). Nevertheless, 'nuisance is not only different in its historical origin, but in its legal character and many of its incidents and applications' as Lord Wright has said. (Northwestern Utilities Ltd. v. London [*page197] Guarantee and Accident Co. Ltd., [1936] A.C. 108, at p. 119); Bohlen, Studies in the Law of Torts, 1926, ch. 7; Prosser on Torts, pp. 446-52; Newark, 'The Boundaries of Nuisance' (1949), 65 L.Q.R. 480). And as Winfield has remarked [p. 501], 'they differ notably in details, and that it is

only where none of these differences of detail is in question that it is immaterial whether the action is for nuisance or is on the rule in Rylands v. Fletcher' and he goes on to specify the differences between the two torts. None of these differences is relevant here and for the purposes of making a prima facie case it is immaterial in my view whether the plaintiffs proceed on the ground of Nuisance or on Rylands v. Fletcher provided causation in fact be proved (Winfield, p. 500); and in neither event need they be concerned with proving negligence."

45. It is not the actual putting in the culverts in order to have a roadway but rather did this result in having an impact on the Claimants' land.

46. Did the Defendant's conduct impact on the Claimants' enjoyment of their property? The nuisance must be caused by something or some conduct traceable to the Defendant's activities. In all cases that I have reviewed nuisance comes from the presence of something the Defendant did on their land or on some property they owned such as an oil tanker and as a result of the activities of the Defendant it caused harm to the Claimants' property. It is not whether the conduct of the Defendant is negligent or not, it is a matter of whether the Defendant's activities caused harm.

47. There was also testimony from the Claimant that more than one of the neighbors had problems with flooding in their home when the brook overflowed.

48. It is only a private nuisance which is actionable and if it's a public nuisance then it has to be dealt with by legislation or municipal bylaws but no action for public nuisance will be actionable as a private nuisance.

49. Railings and Fletcher and nuisance are very closely related and in this situation the harm or the damages did not result from anything the Defendant did on his property.

50. The Defendant did not cause the material, wooden pallets, plywood, branches, shopping cart, and branches to enter the brook and float down the stream and block the culverts during heavy rain.

The Question of Negligence:

51. I have considered all the elements of negligence:- to whom do you owe a duty of care, standard of care, breach of that standard of care, proximate cause, foreseeability and damages.

52. In this case the Defendant decided to put culverts in Cherry Brook after he purchased his own property. This would allow the Defendant access on a roadway over the culverts onto the Defendant's property from Chamberlain Drive.

53. At the time the Defendant did this work, the brook was very low for most of the year. "The Defendant said he could "walk across the brook in his stock feet without getting wet". As building development continued in the area there was an increase in water flow and whether that was the reason or not, the Defendant put in another 40 inch culvert beside the original 40 inch culvert and placed rocks small and large around and over the culverts to allow access to his property. The Defendant took on the responsibility of ensuring these culverts were not blocked by foreign materials and he and his employees would check the culverts and would remove materials from time to time. The Defendant himself would check for materials after heavy rains.

54. There were heavy rains in October and November 2011 and there was flooding into the Claimants' basement. These claims were dealt with by the Claimants' insurer and there was no loss to the claimant.

55. The Defendant said he was aware the Claimants had water problems because there were pipe outlets into the brook from the Claimants' property and the Defendant figured water from the brook backup in these pipes onto the Claimants' property during high water flooding of the brook. The testimony of the Defendant was that the pipes were to divert water from their septic system. As I stated earlier without an engineer's report or contractor's report there is no way for me to know that this contributed to the Claimants' basement flooding. What I can infer from the evidence is that the water flowed onto the Claimants' property during flooding of the banks of Cherry Brook during heavy rainfall and water at those times entered the basement of the Claimants.

56. There is insufficient evidence to show that the Defendant knew of a flooding problem into the Claimants basement until after June 2013, when the claimants' son said he met with the Defendant during the flooding of water over the culverts and over the roadway and on also to the Claimants' land.

57. The Defendant attempted to clear the path to the culverts and this was the time when one of the culverts hooked onto the backhoe which mangled the culvert to some extent and it would appear affected the water flow.

58. The Department of Environment became involved on February 21, 2014. The department concluded the partially collapsed culvert was impairing the

watercourse flow and that the roadway area around the culverts had been eroded and sediment from the roadway had effected the watercourse.

59. The snagging of the culvert ended up impeding the water flow and that along with the debris which both parties were aware, resulted in the overflow of water onto the Claimants land in January 2014.

60. The claimant said in his testimony "I did not say that he (the Defendant) did not put in proper culverts but I say he did not maintain them". There is no evidence that the Defendant did not maintain the culverts however there is sufficient testimony and exhibits to infer that the debris was continuously blocking the culverts and both the Defendant and his employees and the claimant and his wife pulled debris out of the brook.

61. Both the claimant and the Defendant had an interest in clearing debris from the culvert. The Defendant to ensure the water flowed freely through the culvert so as not to be potentially liable and the Claimants to ensure there was a free flow of water through the culverts of the brook to ensure water would not back up resulting in flooding onto their property.

62. After damaging the one culvert in the June 2013 flood the problem of blockage became even more critical.

63. There was also testimony from the claimant that more than one of the neighbors had problems with flooding in their home when the brook overflowed.

64. It is not clear when the Claimant put a sump pump into their basement. It was either put in before or after the 2014 flood. It would be conjecture only that it was put in after and not before the January 2014 flood. As there is insufficient evidence put to the court on this It is not possible to determine if the pump was effective and was it effective after it was put in.

65. The claimant made a claim for loss of rental in the basement apartment in his home. There are two leases before the court one between the Claimants and David McConnell commencing September 1, 2012. The end date of that lease would have been August 31, 2013. In June 2013 there was flooding. Therefore there would have been a loss of two months' rent at $850 per month or $1700.00. The apartment was rented later to Michael Green on September 1, 2013 and the lease would have ended on August 31, 2014. The information before the court was from Mr. Green that his grandson moved in and then a flood occurred again in January 2014. There was no more information about loss of rental after the January 2014 flood. I can extrapolate from the above

information that it would take two months to get the apartment in order to rent the basement apartment. I would therefore allow the loss of two months' rent or again $1700.00. I have no evidence about what happened to the apartment in March 2014.

66. The Defendant pled contributory negligence and I would hold both parties Responsible for clearing debris which they knew was in the stream and could block water during heavy rains. However the main responsibility would lie on the Defendant. The Defendant also mangled one of the culverts during one of the heavy rains and that contributed to a decrease in water flow. I would therefore hold the Defendant 60% responsible and the claimant 40% responsible.

67. I would allow the losses after the insurance company's involvement which in 2013 and 2014 amounted to $6719.95 in repairs and I would allow $3400.00 for lost rental or a total of $10,119.95 of which the Defendant will be held 60% responsible or $6071.97.

It Is Therefore Ordered That the Defendant pay the claimant the following sums:

$6071.97
$ 246.80 Court Costs
$6318.77 total

DATED AT Halifax March31, 2014