Claim No: 432504

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: D'Arcy v. McCarthy Roofing Ltd, 2016 NSSM 10

BETWEEN:

KIM ANN D'ARCY

Claimant

- and -

McCARTHY ROOFING LIMITED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on September 28, October 19 and December 3, 2015

Decision rendered on March 21, 2016

APPEARANCES

For the Claimant	self-represented
For the Defendant	Dillon Trider, counsel

BY THE COURT:

Introduction

[1] The Claimant is a homeowner in Bedford, Nova Scotia. In 2005 she engaged the Defendant to redo her roof.

[2] Some seven to eight years later, it was discovered that there were serious, arguably catastrophic problems with her roof. The attic space was seriously wet and mouldy, and the only reasonable remedy was to have an expensive remediation and re-roofing job done.

[3] The Claimant holds the Defendant responsible for not doing the roofing job properly. She points to a number of alleged deficiencies, some of which are not seriously disputed, although the consequences of those deficiencies is a source of serious debate.

[4] The threshold questions for the court are whether the deficiencies in the Defendant's original work caused or contributed to the catastrophic roof failure, and (if so) to what extent? The further question then becomes, if the Defendant is found to have caused or contributed to the problems later experienced, to what extent must it answer financially?

[5] While I will go through the evidence and make the necessary findings of fact, I will observe at the outset that a roof failure like that experienced by the Claimant appears to be a complex, multi-factorial phenomenon. Not all of the causes can necessarily be traced to the Defendant's original work. And it is not possible to trace all of those causes precisely. Both sides called expert

witnesses, and they do not agree on the main causes of the failure. Each of the expert witnesses had some strengths, and some weaknesses, and I am justified in agreeing or disagreeing with their conclusions, in whole or in part.

The evidence

[6] The Claimant testified that she decided to re-roof the home as part of a series of mostly aesthetic upgrades that she undertook shortly after acquiring the property. She insisted that there was no actual problem with the previous roof. Mostly, she did not care for the somewhat dated appearance.

[7] The written contract is dated November 14, 2005. Including tax, the total contract amount was $4,128.00. This included a premium for a more expensive shingle, namely “Renaissance” by IKO.

[8] The contract specifications included the following items which are relevant to this case:

a. 4 rolls of tar paper
b. 2 - 3" vent covers
c. 40' Ridgemaster vents
d. 6' of ice and water shield along the edge of roof line
e. Install “felt paper to complete roof area”
f. Install new zinc flashing and ice shield around chimney
g. Install new (3") vent stack boots

[9] The contract also specified that the Defendant could replace any rotten wood it found, at an extra cost of $2.50 per square foot. The fact that it did not charge for any wood replacement establishes fairly conclusively that none was necessary, and the roof structure was in good shape when the Defendant did its work.

[10] The shingles came with their own manufacturer's warranty. The Renaissance shingles carried a 25-year warranty from IKO. The documentation that came with the shingles provided a procedure for making a claim, if the shingles were shown to leak during the warranty period. The Claimant never made a claim against IKO[1], although at one point the Defendant had brought IKO into the litigation in a separate claim, which it later dropped for reasons which were not explained. It is far from clear to me that involving IKO in this litigation would have done the Claimant much good, given the very limited nature of the warranty and the doubt that the shingles were actually the source of the immediate problem.

[11] The problems began for the Claimant in August 2010, when she experienced a minor water leak into her home. She called the Defendant, who dispatched two men to investigate and repair the problem. According to the Claimant, these two men went into her attic, and walked the roof, eventually identifying a leak near one of the vent stacks. They repaired it using some type of cement compound. The Claimant herself did not go onto the roof to inspect this repair. The Defendant does not appear to have any written records of this

[1]The Claimant is aware that some IKO shingles, including the Renaissance brand, are the subject of class actions in the US and Canada over allegations that they have aged prematurely. I am not aware whether the Claimant has chosen to participate in these proceedings, and (if not) whether she may still do so.

incident, possibly because it was being done under warranty and there was no charge.

[12] The next event relative to the roof occurred in September 2012, when the Claimant got up on a ladder to clean out her rain gutters. She got a close up look at the shingles, and noticed that they were cracking and unsightly. She left a phone message for someone at the Defendant's office, and says that her call was never returned. She did eventually get in touch by email, and was told to contact IKO. She spoke to someone at IKO and was told that cracking was normal, and not to be concerned.

[13] Not much later, in January 2013, after a serious windstorm, the Claimant heard a drip around her chimney and noticed water around the attic hatch. She looked into the attic and saw water marks on the plywood, as well as what appeared to be black mould in many places on the wood. The Claimant described what she saw as a "real mess" and was shocked. She believed (with apparent justification) that her home environment was now contaminated with mould, which (she contends) caused her cats to become ill.

[14] The Claimant testified that she did not call the Defendant at that time because they had been unresponsive a few months earlier when she had called about the cracked shingles. With the added concern about mould, she contacted a company called Envirobate which specializes in mould remediation. She also contacted another roofing company. At the instance of her insurance company, she also used a company called Roofcheck to perform a full inspection of the roof and make recommendations. The inspector and author of the report, Dave McDonald, testified.

[15] It can be noted here that the insurance company did not accept any claim from the Claimant, as her coverage would only have been for shingles blowing off in a storm - something that did not occur.

[16] In brief, some of the things that Mr. McDonald found and reported on were these:

a. The shingles were severely cracked and deformed over the entire surface of the roof.

b. The felt paper, or tar paper, that the Defendant had used was a perforated paper, which Mr. McDonald stated was not appropriate for sloped roofs. He says the Defendant should have used a non-perforated paper, which would have added an extra layer of protection from water getting through to the plywood and penetrating into the attic space.

c. The ridge vent installed by the Defendant was covering an opening between the plywood sheets which were cut to an inadequately small size, not allowing the roof to vent properly.

d. Water had penetrated through the cracked shingles into the ridge vent, and into the attic.

e. In some areas the shingles had been cut flush around the perimeter, instead of overhanging by 1/4 inch on all sides of the roof edges, with the result that wind driven rain could more easily penetrate.

f. The detail around the vent stacks was improperly installed thus allowing water to penetrate in one area.

g. The 2005 re-roofing (by the Defendant) did not include new chimney flashings but only apparently the application of plastic cement.

h. Some of the roofing nails were rusting.

i. The ice and water shield was not six feet, as had been specified in the contract, but was only between 18 and 20 inches - i.e. at most one third of what was agreed upon. This meant that ice damming above the level of the shield (i.e. between the 18 - 20 inch actual and the six feet promised) could have led to additional water penetration.

[17] The recommendation that the Claimant received was to entirely replace the roof, including the plywood. Roofcheck also recommended that the roof trusses be cleaned of all mould and all wet insulation replaced.

[18] The report contained extensive photographs before and after the roof replacement was done by Central Roofing.

[19] The Claimant also produced numerous photographs of her own to illustrate the points she was making.

[20] Counsel for the Defendant took great exception to Mr. MacDonald and his report. His credentials were also called into question, as was his impartiality.

[21] Mr. MacDonald is an experienced roofer (with more than 20 years of experience in the industry). He has taken many industry-sponsored courses, and has been doing roof inspections for approximately seven years.

[22] On cross-examination, Mr. MacDonald admitted that he had actually worked for the Defendant some years ago as a supervisor, and that he left under a cloud of some conflict in that George McCarthy (the owner of the Defendant) had tried to interfere with his Employment Insurance claim. He insisted, however, that he and Mr. McCarthy were still friends.

[23] Mr. MacDonald also admitted that during his time with the Defendant, he would have supervised many roofing jobs where perforated felt paper was used, similarly to what had occurred here. He said that his responsibility was to do the jobs, as specified by his Employer in the materials list, even if it was not necessarily the way that he would have done it. He did not know whether using perforated paper would have voided any manufacturer's warranty, although he testified that the recommendation for pitched roofs is to use non-perforated paper.

[24] The Defendant argued that Mr. MacDonald's lack of formal credentials, combined with his prior involvement with McCarthy's undermined his value as an expert witness. I will comment on that argument later as I make factual findings.

[25] The Claimant also called as a witness (briefly) Jason Wall, the manager of Envirobate, who confirmed that the roof sheathing and trusses were riddled with mould.

[26] The Defendant called several witnesses, including the owner, George McCarthy. The Defendant company is a large one, with approximately 200 employees, which does projects of all sizes throughout Atlantic Canada.

[27] Mr. McCarthy spoke at length about the issue of perforated vs. non-perforated felt. He testified that many years ago, they were having trouble with shingles buckling, and he determined that the underlying problem was actually buckling of the tar paper underneath the shingles. His company began to experiment with perforated felt or tar paper, which seemed to solve the problem. He stated that despite the fact that the paper has small holes, water does not

actually penetrate the paper to any significant degree. Instead, it runs down the paper and is shed in the same way that it would if there were no perforations.

[28] Mr. McCarthy conceded that the manufacturers appear to specify non-perforated paper, but his company has used perforated paper on millions of square feet of roofs with no problems. He said that at the time of this job in 2005, his company's practice was already to use perforated paper, and the specification in the contract for "4 rolls of tar paper" did not mean anything different than the perforated paper that he was commonly using.

[29] Mr. McCarthy was rather vague on the 2010 repair that the Claimant testified about. He was shown photos of the sloppy looking job around the vent pipe and stated that this was not the way his company would have done it. He also denied that his company was called by the Claimant in 2012 when she noticed her shingles cracking.

[30] Mr. McCarthy defended some of the other practices that were alleged by the Claimant to have been incorrect. He said that cutting the shingles flush, rather than with a 1/4 inch overhang, is the proper procedure; otherwise, the shingles are more vulnerable to getting caught by the wind and damaged.

[31] Mr. McCarthy insisted that the ridge vent was adequate, and pointed to the Claimant's photos as confirmation of that. (I find it difficult to tell from the photos, as there is insufficient detail.)

[32] The Defendant called its own expert, Karmen Brison, who is self-employed as a roof inspector and has been qualified as an expert in other court cases.

[33] Mr. Brison did not see the roof at any time, either before or after its replacement, but based his testimony solely on the photographs and other available evidence.

[34] It was Mr. Brison's central thesis that the roof failure was caused by inadequate ventilation in the attic, which he says caused the attic to become overheated and "cook" the shingles. He said that the shingle deterioration could only have been caused by heat, which in turn makes them brittle, although there is no evidence that their brittleness had caused them to leak.

[35] Mr. Brison initially testified that there did not appear to have been any soffit ventilation, which would have prevented the heated air from escaping the attic space. He based this testimony (at least in part) upon the Claimant's earlier testimony that there were decorative (but non-functioning) gable end vents as of 2005. He was later recalled as a witness after the Claimant clarified, in reply, that the actual soffit material in 2005 (which were not replaced) had perforations that are not easy to see from the photographs, and they did in fact allow air to circulate. Mr. Brison had to allow for the fact that there was soffit ventilation.

[36] Mr. Brison stated that the ridge vent installed by the Defendant was adequate, as far as the photos disclosed.

[37] Mr. Brison discounted the theory that the use of perforated felt paper allowed for any leaking, and stated that this product is in widespread use, in part because it "breathes" and actually allows some moisture to dissipate.

[38] Looking at the photos of all of the mould in the attic space, Mr. Brison insisted that the water inside was not from leaking, but was rather condensation caused by the inadequate ventilation.

[39] Mr. Brison was not able to say conclusively whether or not there were Tru-Vents (or similar structures) allowing air to circulate freely from the attic space into the soffit space, although he did not think there was. This was at odds with the Claimant who insisted that there had been such a system in place.

[40] Mr. Brison agreed that the lesser amount of ice shield could create a greater problem with ice damming.

[41] He also agreed that it was unacceptable for the nails to have rusted.

[42] He agreed that the repairs done near the vent stack were unprofessional in their appearance, but he could not tell whether there was any new (2005) zinc flashing underneath the patching compound. He was also critical of the apparent lack of a new rubber boot around the other vent stack.

[43] Mr. Brison also initially gave the opinion that a roofer in the position of the Defendant in 2005 would not have been expected to examine the attic to consider whether the ventilation was adequate. In a brief written report later submitted, he changed his position and stated that it is the responsibility of a roofer to familiarize itself with the site conditions that may affect the long term performance of the work, but that the owner is obliged to disclose relevant information such as where there are gable end vents that are decorative only and do not actually perform any ventilation function.

Discussion

[44] I have considered the testimony of all of the witnesses, including the two experts.

[45] As already mentioned, the Defendant was highly critical of Mr. MacDonald because of his past involvement as an employee of the Defendant and his possible bias. His credentials were also questioned.

[46] While Mr. MacDonald may not have all of the formal credentials that other experts may have, I believe his considerable experience amply qualified him to give the opinions that he gave. It should be remembered that he was not hired for purposes of litigation. He was brought in by the Claimant and/or her insurer to get a handle on the problem and make recommendations, and to inspect the situation both before and after a third-party contractor, Central Roofing, completed the work. I got the sense that Mr. MacDonald was uncomfortable testifying, had not expected to do so, and only did so under some compulsion.

[47] It was slightly damaging to his credibility not to have disclosed in chief that he was a former employee of the Defendant, but I attribute this mostly to the fact that the Claimant is not a lawyer and likely did not know that it is good practice to bring such potentially negative facts out in examination-in-chief.

[48] While Mr. Brison may have slightly better credentials, on paper, Mr. MacDonald had the considerable advantage of seeing the roof in its deteriorated shape, and observing the remediation and re-roofing. Mr. Brison, though a reasonable enough witness, appeared to me to be stretching to support his

central thesis (of inadequate ventilation) and did not always concede points that ought to have been conceded that might have cast doubt on his theory.

[49] Even so, as I have already said, I believe this roof failure can be attributed to many causes. Mr. MacDonald did not dismiss the theory of inadequate ventilation, but seems to have focussed on the ridge vent as the factor that inhibited proper air flow. Mr. Brison thought the ridge vent was adequate, but focussed on the soffits (which he initially thought did not admit air) and the baffles (or lack thereof) that he believes prevented air from moving freely.

[50] Going back to the initial roofing job, there is no evidence one way or the other, that the Defendant did anything to assure itself that the attic was adequately ventilated and that there was air getting through the soffits.

[51] I agree with Mr. Brison's written statement that it is part of the role of a roofer to examine the site conditions, which would include the adequacy of ventilation that would be taking place under the roof. I believe that any reasonable roofer, being instructed to re-roof a property, and given carte blanche to replace any rotten boards, would want to have some assurance that the roofing job would last. It would not have taken much more than a quick inspection of the attic space to make sure that everything was in seeming order. I am satisfied that the Defendant either did such an inspection, and knew of no obvious deficiencies, or that it ought to have done so and was negligent not to have done so.

[52] I find it hard to believe that the Defendant could have been fooled into believing that the gable end vents were anything but decorative. Had they looked into the attic, they would have noticed that there were no vents visible at

the gable ends on the inside. I can only conclude that they were satisfied that there was ample ventilation through the soffits, or - if they made no such assessment - that they failed in their duty to consider the adequacy of ventilation.

[53] As indicated at the outset, I find that the failure of the roof was caused by many factors, at least some of which are knowable based on the evidence.

[54] The evidence satisfies me that there was a ventilation problem, caused at least in part by an inadequate ridge vent. I prefer the evidence of Mr. MacDonald to that of Mr. Brison on this point. The photos are equivocal. Mr. MacDonald saw the ridge vent as it was being disassembled, up close, and his evidence was pretty clear that the space allowed was inadequate, which would have had the effect of limiting air circulation.

[55] If the soffit venting had been inadequate, which is a finding that I am not prepared to make, this is something that the Defendant should have noticed in 2005 and remarked upon. A roof needs venting both from the soffits (or gables) and through the ridge vent, for a cross-draft to occur and air to circulate.

[56] If there were not adequate baffles to allow for air flow between the rafters, which is suggested by the Defendant, this is also something that the Defendant could easily have ascertained.

[57] In short, the problem of inadequate ventilation - to the extent that it contributed to the problem - can all be traced to failures - of commission or omission - on the part Defendant.

[58] Even so, Mr. Brison's conclusion that the shingles were "cooked" (by inadequate ventilation) may well over-simplify the problem. He assumes that the deteriorated state of the shingles was a result of being overheated from the bottom by the overheated air in the attic. He did not appear to consider the possibility that the cracked and deteriorated shingles were an inherent defect in the shingles themselves, which appears to be the thesis of the class action lawsuits ongoing against IKO. Although those claims have yet to be determined in court, they provide some evidence of what appears to be a widespread problem with the Renaissance shingle and others that IKO marketed as "organic" shingles.

[59] The conclusion that the shingles were severely cooked led Mr. Brison to the conclusion that there would have been significant condensation in the attic, as warm, humid air became cooled and gave off its water before it had a chance to escape. I accept that condensation was likely occurring, but I also find that there was water entering the attic through various parts of the roof.

[60] Despite this being the centrepiece of the Claimant's argument, I am not fully convinced that the use of perforated felt paper contributed to the problem. There may well be a disconnect between what manufacturers are recommending, and what experienced roofers are doing. I do not find that the evidence before me was sufficiently cogent to lead to a conclusion that the use of perforated felt paper was a significant factor in the failure of the roof. In particular, neither of the experts had sufficient credentials to address this specific point expertly.

[61] I accept the evidence of Mr. McCarthy that he has been using perforated paper for years, to address a different problem - buckling shingles. While it is

tempting to believe that these perforations allow water to penetrate, that conclusion does not take into account the smallness of the holes and the physical properties of water - namely the surface tension that might prevent it from penetrating such small perforations rather than run down the slope. There is also the value, as stated, of allowing moisture vapour to pass through the paper, which accordingly "breathes."

[62] The use of the terms felt paper, or tar paper, as used in the contract cannot be read as specifying non-perforated paper, so its use was not a contractual breach.

[63] I find as a fact, which is not really disputed, that the six feet of ice and water shield agreed to be applied along the edge of roof line was not done. No explanation was offered by the Defendant. The evidence supports the fact that the Defendant installed only 18 to 20 inches of ice and water shield along the edge of the roof line . This deficiency very likely contributed to the problem of water entering the attic, during and after periods of ice damming, where the ice extended above the 18 - 20 inch line. This would likely have occurred even with non-perforated tar paper, as that paper is lapped (like the shingles) and water can get under it and find its way to the plywood seams and find entry into the attic space below.

[64] I find also that the ridge vent was another source of difficulty. I accept the evidence of Mr. MacDonald that the ridge vent was installed over an inadequately small opening cut into the peak of the roof to allow proper air ventilation. The photos are equivocal, but the direct observations of Mr. MacDonald are not. A properly functioning ridge vent would have been critical to

the proper circulation of air, and the lack thereof created a build up of excess moisture in the attic.

[65] There was no explanation offered by the Defendant for why some of the nails were rusting. Galvanized nails should not rust. This was a breach of the Defendant's obligations, and would have contributed to the assessment that the roof needed replacement, although there was no evidence that rusting nails were yet contributing to the water incursion problem.

[66] The evidence satisfies me that the Defendant did not deliver on its promise of new zinc flashing and ice shield to be installed around the chimney, and new boots around the vent stacks. The sealing around the chimney and vent stacks appear to have been shoddily done. The vent stack boots appear not to have been properly installed, and it is possible that new ones were not used. We know for a fact that there was leaking around one of the vent stacks in 2010, and it is hard to know how much water entered at that time and what damage it did inside.

[67] The Claimant asserts that the Defendant damaged her chimney, but the evidence on this point falls short of satisfying me that this created or contributed to any of the problems experienced.

[68] I am not convinced that the flush cutting of the shingles around the perimeter caused or contributed to water incursion. There was some force to Mr. McCarthy's point that having an overlap makes the shingles more vulnerable to breaking under windy conditions.

[69] I accept the Claimant's argument, supported by the photos, that some of the water or water stains in the attic point to water entering from outside, and not simply from condensation. Whether this water entered through the felt paper, as the Claimant contends, or because of ice damming (which I believe to be more likely), in either case the Defendant bears responsibility. The fact that the Claimant first became aware of water leaking (in January 2013) after a windstorm, supports the view that at least some of the water was entering from the outside. January in Nova Scotia is a notorious time for ice build-up, freeze and melt, snow and rain - i.e. precisely the conditions where ice damming and melting could cause water to enter, and when wind driven rain can get through. There is no logical reason to believe that a winter windstorm would precipitate further condensation in the attic.

[70] I accept that there are some likely causes for the leaking that are simply unknown. Roofs can become damaged by the elements over eight years. However, a very significant portion of the blame can be traced to the errors and omissions of the Defendant. The Claimant herself did nothing, either by commission or omission, that contributed to the problem. Indeed, she appears to have done all of the right things at every turn.

[71] The only arguable failing on the part of the Claimant was not to get the Defendant involved in assessing and remediating the problem. It is suggested that by not reporting to the Defendant, the Claimant failed to mitigate her damages.

[72] Her explanation was that she found the Defendant unresponsive to her complaints in 2012. There is some basis for her conclusion that the Defendant would not offer much by way of assistance. However, it should be recalled that it

became obvious very early on that there was a mould problem, which would have required experts in remediating mould. Also, her insurance company was involved, and it was urgent to get an expert assessment done. All in all, I find her actions to have been reasonable and do not find there to have been any failure to mitigate.

[73] In short, I find that the actions of the Defendant caused or contributed to the failure of the roof and the damage to the attic space in the Claimant's home, necessitating the replacement of the roof and the remediation of the attic.

Damages

[74] The Claimant seeks damages consisting of the following items (her descriptions):

1	Halifax Regional Municipality Building Permit Fee	$66.00
2	Central Roofing Cost to Remove Roof and Insulation	$13,340.00
3	Inspections & Quality Assurance	$402.50
4	EnviroBate Inc. to treat attic space contaminated with mould	$805.00
5	Paramount Electric Limited to check wires in attic in preparation for spraying Icynene on attic floor. Required to meet building code	$258.76
6	Brown Ventilation Systems to install new flex ventilation piping in attic destroyed by wet environment and construction demolition	$862.50
7	Bluenose Inn & Suites required to stay for 1-night as house had to be evacuated 24 hours after spraying Icynene on attic floor because off off-gassing	$114.40

8	Maritime Insulators Ltd. to spray foam Icynene close cell R-12 (2") on attic floor for the purpose of creating a vapour barrier required by building code.	$4,976.84
		$20,826.00

[75] The Defendant denied liability entirely, as already mentioned, but also had some submissions about damages, assuming I were to award any.

[76] Generally, counsel submitted that the damages claimed are disproportionate to the original roofing job, which was for $4,100.00 plus tax. He submits that the Claimant did not mitigate her damages by allowing the Defendant to be a part of the roof replacement. Also, he submits that there would be an element of “betterment,” assuming these damages were awarded, as the Claimant would be getting both a new and in some respects better roof. The “better” roof refers to the higher level of insulation in her attic that is now present, namely R-50 instead of the previous R-10. Also, counsel suggested that the electrical work was an upgrade.

[77] Counsel conceded that there were some deficiencies, but that they were not the cause of the catastrophic failure and, as such, could only give rise to nominal damages.

[78] I have already found that the Defendant’s inadequate roofing job substantially caused or contributed to the roof failure. Were this a case where the Claimant herself was partly responsible, or another Defendant shared in the responsibility, I would be in a position to apportion liability. It is well established that the *Contributory Negligence Act* applies not just to tort, but also to contract actions: see *MacDonald v. Wedderburn*, 1999 CanLII 951 (NS SC) and cases cited therein. The applicable section of that Act is 3(1):

> 3 (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

[79] Where the Defendant is the only at fault party, it does not excuse him that there are other (non-fault) factors that contributed*: Anderson v. Queen Elizabeth II Health Sciences Centre*, 2012 NSSC 360 (CanLII). In that case, the following statements are important:

> [65] As a final matter relating to causation, *Resurfice*, supra in re-affirming the primary "but for" test of causation did not, vary from the principle enunciated in *Athey v. Leonati* 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, that a plaintiff need not establish that a defendant's tortious act was the sole cause of their injury. Justice Major writes at para.17:
>
> > "It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> [66] And further at paras. 19 and 20:
>
> > 19. The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: Fleming, supra, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co., [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, affirmed, [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, Personal Injury Damages in Canada (2nd ed. 1996), at p. 748.
>
> > 20. This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment

> between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[80] I believe the same principles apply in a contract case as they would in a tort case.

Measure of damages

[81] As stated in *MacDonald* (above):

> The measure of damages for breach of contract is that the plaintiff be placed in the same position, so far as it can be done by money, as he would have been in had the contract been performed, subject to the rule against recovering damages which are too remote or not reasonably foreseeable ....

[82] I find that all of the damages claimed were reasonably foreseeable, and none are too remote.

[83] Placing the Claimant in the position she would have been, had the contract been properly performed, dovetails with the issue of betterment. As of 2013 when the problems started, had the contract been properly performed in 2005, the Claimant would have an 8-year old roof performing adequately. How does the court place her in that position, given all that actually occurred? This is a tricky exercise.

[84] At some point in the future - perhaps in 2025 or 2030 - the shingles would have reached the end of their useful life and a roof replacement would have been necessary.

[85] However, under that scenario there is no reason to assume that the Claimant would face the same catastrophic failure, with a wet and mould-ridden attic and ruined insulation.

[86] It therefore follows that much of what the Claimant spent is not betterment. There is no reason to believe that (in 2025 or 2030) her attic would have become so wet or mouldy that she would have to go to the lengths she did to remedy it.

[87] There is a touch of validity to the argument that the new roof is better than the old one, because of the added R value to the insulation, but the Claimant testified that she was only bringing the insulation up to current Building Code requirements. I do not find any betterment in the electrical work, which was simply necessary because of the risk that the wet conditions had compromised the wiring in the attic.

[88] Giving credit for betterment is not an exact science. It involves a certain amount of estimating and prognosticating. I will approach it by finding that the Claimant has postponed her need for a (further) new roof by approximately ten years, and has come out of this exercise with a better insulated attic. I find that the value to her of these benefits should be fixed at $5,000.00. This takes into account the fact that the 2005 roofing job was $4,100.00. A simple roofing job in the future would undoubtedly be that amount, plus inflation, and perhaps more. I

also have to take into account that such future saving must be converted into a present value. All of this I estimate to be $5,000.00.

[89] I give no effect to the argument that the Claimant did not mitigate her damages, as already stated. I believe that the Claimant acted reasonably and did not spend any more on this project than she felt was reasonably necessary, taking the advice of people whom she reasonably trusted were acting in her best interest.

[90] I accordingly assess and award damages of $20,826.00 - $5,000.00, for a total of $15,826.00.

[91] The Claimant is also entitled to her costs of $160.00, as claimed, for a grand total judgment of $15,986.00.

Eric K. Slone, Adjudicator