

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Cite as: Tipping v. Howard E. Little Excavating Ltd., 2013 NSSM 5**

**BETWEEN**

**Jeffrey Tipping**

**CLAIMANT**

**-and-**

**Howard E. Little Excavating Ltd.**

**DEFENDANT**

**Heard: October 22, 2012**  
**Decision on Preliminary Point: October 23, 2012**  
**Continuation of Hearing: January 15, 2013**  
**Decision: January 23, 2013**

**Adjudicator: David TR Parker**

**Counsel: Sean MacDonald represented the Claimant**

**Robert Stewart QC represented the Defendant**

1. This matter came before the Small Claims Court and was heard by adjudicator Myra L Jerome on November 2, 2011. A decision of adjudicator Jerome was filed with the court on November 23, 2011. The conclusion reached by adjudicator Jerome stated at paragraph 62 "I find there was no evidence of negligent on Little's part [the defendant] and therefore nothing to compensate. If I had found such negligence, I would have found the damage to be minimal and already covered in the

claimant's settlement with Wawanessa." The adjudicator then went on to Order that the "claimant's statement of claim is dismissed. Nothing is to be paid by the defendant."

2. The claimant on December 20, 2011 appealed adjudicator Jerome's decision.
3. Justice Suzanne M. Hood of the Supreme Court of Nova Scotia on hearing the appeal made the following Order:
4. "1. That the appeal herein be allowed and referred back to the Small Claims Court for rehearing before a different adjudicator on the following three issues:
  - 1.] Whether the respondent [defendant] has proven the claim is included in the settlement with the insurer;
  - 2.] The amount of damages; and
  - 3.] With respect to hearsay evidence, to apply the relaxed necessity and reliability test."
5. I requested counsel deal with the first issue the Supreme Court of Nova Scotia asked this court to consider and that I would make a determination on that issue.
6. The following is a determination of that issue only.
7. Based on the testimony of Karl J Mahoney, the report of Karl J Mahoney, the testimony of Valerie Ward and correspondence from W. Dale Dunlop I have reached the conclusion that the claim respecting the foundation of the claimant's building that was destroyed by fire was not part of a payout by the insurer respecting the damage to the insured's property. In other

words the claim which Justice Hood was referring to was not included in the settlement between the claimant and the insurer.

8. The original claim between these two parties was a result of the claimant claiming the defendant caused damage to the claimant's property, in this case the foundation of the claimant's home, when the defendant was removing the superstructure of the defendant's home that was destroyed by fire.
9. The adjudicator of first instance determined that there was no evidence of negligence. The adjudicator went on to say if she would have found negligence she would have found the damage to be minimal and already covered in the claimant settlement with the insurer.
10. It would appear from Justice Hood's Order that negligence of the defendant was determined by the appeal court. I draw this conclusion where the Order stated that the adjudicator in this case myself should deal with the issue concerning "the amount of damages." Counsel for the claimant has said in essence that obviously the appeal court, that is the Supreme Court of Nova Scotia that listens to appeals from the Small Claims Court, determined there was negligence of the defendant as that was the reason for the appeal in the first place. Further counsel MacDonald suggests that the judge was clear in her decision that the defendant was negligent and caused damage to the foundation and a cost ultimately exceeding \$25,000.00.
11. Unfortunately the Order is not clear. It is not clear whether this court is supposed to accept the fact that the damage to the entire foundation was caused by the defendant's negligence or whether the defendant only caused minimal damage as suggested in the adjudicator's Order and as suggested by counsel Robert Stewart QC or whether there was

negligence at all determined by the Supreme Court of Nova Scotia on appeal.

12. The problem as I view it would be twofold. One was there negligence of the defendant as determined by the Supreme Court of Nova Scotia and if so what damage is the Supreme Court referring to or did it refer to any damage with respect to the foundation. In order to determine damages it is necessary for this court to be satisfied that the defendant was negligent either through a rehearing as counsel for the defendant suggested, in essence a trial de novo or by being satisfied that the Supreme Court of Nova Scotia determined the defendant was negligent. Secondly or next, to determine what damage was caused by the defendant's negligent and thereafter making an evidentiary determination of the damages resulting from the damage that occurred through the defendant's negligence. I cannot lay it out any simpler than that.

13. During the hearing counsel for the claimant provided a brief that was provided to the Supreme Court for purposes of the appeal and the suggestion was that the brief and the decision of the Supreme Court allows the only conclusion that the defendant was negligent and all that was necessary was a determination of damages pursuant to the Order of the Supreme Court of Nova Scotia. Counsel for the claimant while concerned with the cost of getting a transcript of the decision of Justice Hood said that he would provide or attempt to provide same if it were necessary. In my view it is certainly necessary to determine whether Justice Hood reversed the decision of adjudicator Jerome, found negligence on the part of the defendant and determine what was the resulting kinds of or amount of damage caused by the negligence. It would require of course a factual determination to have been made or to be made as apparently was done by the adjudicator of first instance. I would require that information in order to determine damages as indicated previously.

14. The question is where does that leave us at this stage. I have made a determination that the amount paid out by the insurer did not include an amount associated with the homes foundation. In order for the claimant to succeed a determination of negligence would be required. If the Supreme Court of Nova Scotia did that then that information would have to be provided to this court. Counsel for the claimant said the transcript of the decision of Justice Hood would reveal that the defendant was negligent and caused the resulting damage to the foundation requiring it to be replaced. While Justice Hood is noted for dotting her I's and crossing her T's at this stage there is no proof before this court that the Supreme Court of Nova Scotia determined there was negligence on part of the defendant and the extent of damage or injury flowing from the defendant's actions. If the defendant during the next court date can show that to be the case then I can deal with damages. If counsel is unable to do that then I can only see two avenues to follow. Return to the Supreme Court of Nova Scotia and obtain clarification on the Order or do as the Order suggests carry-on with the claim and provide evidence of negligence and what damage that negligence caused in order for this court to make a determination on issue number two that is the amount of damages.

15. I have set aside January 15, 2012 to deal with the continuation of this matter. In the event that date is not suitable I would ask that counsel organize a date along with the clerk of the Small Claims Court.

**Continuation of Hearing: January 15, 2013**

16. One of the issues before this court was exactly what the Supreme Court of Nova Scotia decided on appeal from the initial decision of adjudicator of the Small Claims Court of Nova Scotia. Counsel for the claimant Sean MacDonald was able provide the court with transcript from the hearing of Justice Susanne M. Hood's, which hearing occurred on May 7, 2010. The

transcript not only contains submissions of counsel it also contains the decision Justice Hood. It is clear that Justice Hood overturned the adjudicator's decision and came to the conclusion that there was negligence on behalf of the defendant in this case.

17. At page 35 the transcript Justice Hood in responding to claimant counsel said in part **“well it would seem to me that, perhaps, one way to resolve this is to make the--- again, I am going to get to you Mr. Stewart[counsel for the defendant]-- would be to conclude that there was negligence and then perhaps remitted back for a decision on what the amount of the damages arising from it is and somebody-- a different adjudicator I would say, could then determine, based upon the evidence, the evidence at that hearing which would be basically a new hearing on that narrow issue, what the amount of damage was-- presuming Mr. Frost would testify again and the court would have to decide whether or not they believed that-- the Small Claims Court Adjudicator would have to decide whether or not they believe that the entire foundation needed to be removed or whether the adjudicator would except Mr. Frost assessment that it was only minimal damage and maybe amount the would be that \$4000.00 for \$5000.00 that seems to be in here.”**

18. Then at page 49 Justice Hood in her decision stated **“I conclude that the adjudicator was in error in concluding there was no negligence. Therefore, the appeal is granted. The matter is to be sent back to the Small Claims Court for hearing before another adjudicator on the following issues. Whether the claim was included in the settlement reached with the appellant's insurer and there's no onus on the appellant to prove it was not included. Secondly, the amount of the damages, and thirdly if there is hearsay evidence at the rehearing, if**

**that evidence is tendered, the adjudicator is to apply the relaxed necessity and reliability tests with respect to admission of hearsay evidence.”**

19. Therefore it is abundantly clear I must decide at this stage what damage resulted from the defendant's negligence and what were the ensuing damages or the quantitative amount associated with that damage.
20. Counsel for the claimant made a couple of points which he asked the court to consider and which I did consider in my analysis. One issue related to whether or not Archie Frost a professional engineer should be qualified as an expert. The reason being that his report was a result of being hired by the insurer of the plaintiff's property and therefore could not be considered an independent report.
21. The second issue which was raised in summation was that the law is different when you're dealing with negligent demolition.
22. Counsel provided the case **Tooley et al. v. Arthurs**, 2002 NBQB 32. The case dealt with a bulldozer that was grading close to a stone foundation and damage occurred to the property. The question being was the damage reasonably foreseeable. In this particular case the bulldozer scraped a large stone wall and as a result small rocks fell from the top of the inside of the foundation wall. One of the small rocks fell and broke a brass valve from the bottom of oil tank. The oil tank gauge was reading empty nevertheless a small quantity of furnace oil in the tank escaped and went down the drain. The oil spill was discovered the following day. The case referenced a Supreme Court of Canada decision and stated: "Also in a recent decision of the Supreme Court of Canada, **Bow Valley Husky v. Saint John Shipbuilding**, [1997] 3 S.C.R. 1210, at para 76, page 1255, McLachlin J. summarized foreseeability in these words: "It was not necessary ... to foresee the precise type of damage or sequence of events

that would result from its negligence:...". Applying those principles to this case, it was not necessary for anyone to have been able to foresee the extent, precise type, sequence of events or manner of incidence of the resulting damage. All that had to be foreseeable was that the dozer could physically damage the stone foundation. In my opinion that was reasonably foreseeable. "

23. The court concluded in the Tooley decision: "Mr. Arthurs graded with his dozer too close to the stone foundation. The homeowners relied on him and did not assume the risk. Mr. Arthurs breached a duty of care he owed to the homeowners and negligently damaged the foundation of their home. The doctrine of remoteness does not apply. The foreseeable damage that could result from such negligence was physical damage to the foundation. Such physical damage occurred. It is not necessary to show that the precise nature of the resulting damages was foreseeable.
24. The Tooley case does not change the law with respect to negligence and resulting damage caused by tortfeasor.
25. In the case before this court it is not necessary to rely on the expert opinion of Mr. Frost. In this particular case I relied on the facts as contained in the report of Mr. Frost plus his testimony along with the testimony of the adjuster Karl J. Mahoney both hired by the insurer of the plaintiffs property both of whom visited the property shortly after fire damage to the home as well as several months later. It is clear that there were cracks in the foundation that preexisted fire to the claimant's home. The defendant did cause two small areas of minor demolition damage to the claimant's home. While the claimant went and had the foundation



removed and a new foundation put in to build a new home, the evidence and reports that the cost to repair and clean up the particular minor damage caused by the defendant would be in the vicinity \$4000.00.

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

\$4000.00  
\$ 91.47 court costs  
\$4091.47 total

Dated at Halifax this 23<sup>rd</sup> day of January 2013