IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Berry v. Nickerson (Heavy Weather Fisheries),* 2018 NSSM 89

Claim: SY No. 478324
Registry: Yarmouth

Between:

Robert Berry

CLAIMANT

And

Jeff Nickerson (Heavy Weather Fisheries)

DEFENDANT

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: October 11, 2018

Decision: October 31, 2018

Appearances: The Claimant self represented
Kiel Mercer for the Defendant,

DECISION

Quick Judgment

[1] At the outset of the hearing I advised the parties that there was before me an application for quick judgment filed on August 22, 2018 which I had tentatively granted but which had not been delivered to the parties. The defence was filed on October 10, 2018. I heard argument from the parties. I was satisfied that the Defendant had a bona fide intention to defend throughout and that the delay was caused as a result of difficulties in contacting his counsel and then his counsel being away. I consider the factors set out in my decision in, Wilson Equipment Limited v. Simpson, 2018 NSSM 16, and was satisfied that the Defendant minimally met the criteria. The quick judgment was set aside and the hearing proceeded.

Facts

[2] Robert Berry, the Claimant, testified that he had moored his fishing boat at the Chegoggin wharf in December 2016. It was moored such a manner as there was one boat tied to the inside of his vessel and one boat tied to the outside, He received a phone call

from another fisherman indicating that the Defendant had left work that morning and had not properly shortened the lines in the customary manner so that the Claimant's vessel would be safely moored after his departure.

[3] Mr. Berry arrived at the wharf shortly thereafter to find that his vessel had in effect smashed against the wharf and damaged the stern portion. He says that he spoke with the Defendant on the same day and was told by the Defendant to get it fixed and the Defendant would reimburse him.

[4] Subsequently the Claimant obtained a text between and the third-party fisherman and the Defendant which reads:

> "You were there twice and never asked my plan. I should not have to call everyone at the wharf when they are tied outside of me. The buying station.
>
> That happened when we pulled out of there his stern fetched up in the wharf, I was planning on calling him.
>
> My phone dropped the call or something, anyway I talked to teen it is between me and him I am not sure... "

[5] The Claimant testified that he tried to get it fixed and qualified workmen were not available and he was only able to get it fixed in July 2018. He did testify however that he understood that Mr. Shane Deveau could repair it in September 2017 but that he bought a herring license in September 2017 and chose to go fishing during that period of time.

[6] On June 30, 2017 Mr. Berry sent a text indicating to Mr. Nickerson the problems he was having finding a boat shop to repair the vessel and asking Mr. Nickerson if he knew of any boat shop that was available.

[7] The Claimant claims the sum of $3485.65 for the repair, $1867.15 for the haul up charges at a boat yard and $420.28 for the fuel to transport the vessel to the boat yard. The Claimant presented invoices supporting these amounts which were not contested by the Defendant.

[8] In cross-examination the Claimant admitted that he did not see the Defendant leave the wharf and would have arrived around eight or nine in the morning.

[9] Shane Deveau operates a business of repairing vessels. Mr. Deveau testified that he was called to look at the damage to the Claimant's vessel. He determined that the back rail near the stern was wobbling and loose but also that the vessel was not in an unsafe condition to be used for fishing. He advised that he was unable to repair the vessel at that time due to other commitments. He acknowledged in cross-examination that wear and tear could cause some damage but this observation was that the vessel had pushed against something.

[10] The Defendant, Jeff Nickerson, testified that he has been fishing for 10 years on his own and had been the captain for three years working for others. He says in the second week of December 2016 he left the wharf at approximately 2:58 AM in the morning. He says that he had discussed with his crew how they were going to leave the wharf and that nothing happened to his knowledge. He says that he could see that his crew were handling the lines and that nothing was unusual.

[11] The Defendant acknowledged that he had sent the text referred to above. He says that he did speak with Robert Berry and that Mr. Berry was very upset he said that he told Mr. Berry he would go and look at the damage. He says that he could not understand what they did and that he would never do anything on purpose and was adamant that he did not commit to pay. He says that his crew would have told him if something was out of the way and that he definitely never hit anyone.

[12] John Surette has fished for 37 years and has worked for the Defendant for two seasons. He testified that he recalled leaving the wharf in early December 2016 between 2 and 3 AM. He says that the boats were arranged with Nickerson's vessel being next to the wharf, then Berry's vessel and a third-party vessel on the outside. He says that they loosened the lines on the Berry vessel, brought them behind the wheel house of the Nickerson vessel and after the Nickerson vessel had moved out he and his fellow crew

member retied the lines. He said that his partner would have moved the stern lines and he handled the bow line of the Berry vessel. He said that the vessel looked okay and he saw no damage as they left the wharf.

Issues

[13] Was the Defendant negligent in the manner in which he left the Claimant's vessel after leaving the wharf?

If so what damages are payable?

Law and analysis

[14] It is undisputed that the Defendant owed a duty of care to the Claimant in the manner in which he left the wharf and in the manner in which he left the Defendants vessel. The Defendant is an experienced fisherman. I am satisfied that the standard of care is that which a prudent vessel owner would exercise in the re-mooring of a vessel. I am further satisfied that this standard involves re-tying the lines in such a manner as that no damage would be caused to the other vessels at the wharf. I am also satisfied that this is an exercise which is performed regularly and it is a manoeuver that experienced fisherman have no difficulty in performing.

[15] I am satisfied that none of the witnesses intentionally tried to mislead the court and on the surface of it the Defendant appeared to genuinely believe that he had not caused harm. However, these events occurred almost 2 years ago and it is difficult for me to believe that either of the Defendant's witnesses can precisely recall the specific events. I believe that as they sat in the witness box the Defendant's witnesses likely believed that they had caused no harm.

[16] However, their story is not consistent with the text sent by the Defendant shortly after the event. It is striking that that text specifically refers to "his stern fetched up in the wharf' which is precisely the nature of the damage which occurred. He also states that he

was planning on calling Mr. Berry. This statement specifically shows an awareness of responsibility and awareness of the nature of the damage.

[17] I am faced with the difference between the Claimant and Defendant as to the phone call which they both acknowledged occurred. Mr. Berry says that Mr. Nickerson acknowledged responsibility and told him to get it repaired and that he would pay for it. Mr. Nickerson says that he did not make that commitment. I must make a decision as to which version is more likely.

[18] In *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253 Justice Margaret Stewart succinctly summarized the law as follows:

> [20] ***Credibility.*** This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M.*, 2008 SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 1 7, that "[a]ssessing credibility is not a science" and that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon* at para. 20, cited in *R.E.M.* at para. 28).
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> The Chief Justice went on to say, at para. 49:
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> > While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.
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> [21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O'Halloran J. said, for the majority, at para 11:
>
> > The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject

> his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind. **[My emphasis**]

> [22] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to "believe a witness's testimony in whole, in part, or not at all": *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the viva voce and documentary evidence in conjunction with counsel's submissions and the relevant law.

[19] As pointed out by Justice Stewart it is often difficult to articulate precisely one's reasoning and all of the factors which lead to a conclusion on credibility. The Defendant, in my view, did in fact acknowledge in his text that the damage occurred as a result of his interaction with Mr. Berry's vessel and the fact that the text was a contemporaneous statement, impresses me that Mr. Nickerson likely did acknowledge responsibility to Mr. Berry and offer to pay for the damage. The text, which the Defendant acknowledged was his, is inconsistent with the Defendant's assertion at trial that he was unaware of anything happening to the Claimant's vessel. It must be remembered that the test that I am applying is the "harmony with the preponderance of the probabilities" when considering all of the evidence.

[20] A court can never determine absolute truth. I must determine what is more likely than not. That an admission was made in the telephone call is conclusion that is most consistent with the evidence. I must weigh it in light of the whole of the evidence. I am satisfied on a balance of probabilities that Mr. Nickerson and/or his crew, for who he is

responsible, failed to meet the standard of care required of them and that Mr. Nickerson is liable to Mr. Berry for the damages which he seeks.

[21] Mr. Mercer argues that I should deduct something for wear and tear. Having examined the photographs provided to me I am not satisfied that the repair involved would necessarily have occurred and by virtue in whole or in part of wear and tear.

[22] I will therefore grant judgment to the Claimant in the amount of $5,773.08 together with costs of $99.70.

Dated at Yarmouth this 31st day of October 2018.

Andrew S. Nickerson Q.C., Adjudicator