Horne v. Burrows, 2009 NSSM 47 (CanLII)

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Claim No: 301383

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Horne v. Burrows, 2009 NSSM 47

BETWEEN:

BRIAN HORNE and DOROTHY KENT

Claimants

- and -

KENNETH C. BURROWS and PETER RENOUF

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 12 and June 17, 2009

Decision rendered on September 10, 2009

APPEARANCES

For the Claimants Peter Coulthard
Counsel

For the Defendants Stephen R. Boyce
Counsel

BY THE COURT:

[1] The Claimants are a Husband and Wife who own a home sitting on a lovely several acre property in Lower Sackville, Nova Scotia. The Defendant Burrows also has a nice property in the area, where he lives with his wife and where he also carries on a consulting business. The two properties roughly abut back to back.

[2] The Defendant Renouf is a friend of the Defendant Burrows.

[3] The issue in this unusual case concerns some trees that the Defendant Renouf cut down on the Claimants' property, by mistake, while allegedly doing a favour for the Defendant Burrows.

[4] The Defendant Renouf does not live on or near either of these properties. He has worked in forestry all of his life, but is presently receiving a pension because of health problems. While no specifics were offered, it appears that Mr. Burrows has helped out his friend at times, and Mr. Renouf finally saw a chance to reciprocate. This was in late 2007 when Mr. Burrows noted that there were some trees near his garage that were damaged and should probably come down. Mr. Renouf offered to do it when the weather improved.

[5] That opportunity did not arise until early April 2008. At the time, Mr. and Mrs. Burrows were away in the United States attending to issues surrounding the death of Mr. Burrows's father. With fine weather upon him, Mr. Renouf came to the property and started clearing up the dead or damaged trees that had been pointed out to him by Mr. Burrows the previous fall.

[6] Working several hours a day, over several days, he expanded the project and worked his way up the property to the area where it bounded the Claimants' property, working with apparent energy and enthusiasm, taking down what he regarded as damaged or unhealthy trees as he went. At some point, he spotted a survey marker and began to suspect that he may have been cutting on the neighbour's property. With the help of one of the Burrows grown sons, he looked at a survey plan and confirmed that he had, indeed, strayed off the Burrows property. By then, he had felled some sixteen or seventeen mature, though in his opinion far from healthy trees, on property belonging to the

Claimants and, it appears, in one case on property belonging to another neighbour, Robert Arends. The diameters at the base of the trees ranged from 7 inches to as much as 20 inches. Many of them were 14 inches or so.

[7] The cutting activity was not obvious from the Claimants' home. Ms. Kent first heard from this same other neighbour, who had observed some of the activity, that some of her trees had apparently been taken down, and she was upset with what she saw. While these trees were not visible from their home, the Claimants testified that they enjoyed all parts of their property which they accessed via trails they had cleared.

[8] Later that day, when Mr. Horne found out from his wife what had occurred, he drove over to the Burrows property in a very upset state, and confronted one of the Burrows sons who had no idea why this irate man was there. This encounter did nothing positive, and led to an escalation of complaints and concerns going both ways. The RCMP was called and investigated. What might have started as an innocent misunderstanding ended up fomenting something of a feud with threats of peace bonds and a huge amount of mistrust between neighbours that has not dissipated over time.

[9] Efforts to settle the issue privately on Mr. Burrows's return from the US were ultimately unsuccessful. Equally unsuccessful for the Claimants was a claim which they lodged with their home insurer. The claim was ultimately denied, though not until after an investigation by an independent adjuster which yielded, if nothing else, some timely photographs of the affected trees and some witness statements.

Issues

[10] The issues as I see them are these:

A. Did the Defendant Renouf trespass on the lands of the Claimants?

B. Was the Defendant Burrows jointly or vicariously responsible for the actions of Mr. Renouf, either because he was "hired" by Burrows or because the two were involved in a joint enterprise?

C. If there is liability on either or both of the Defendants, what are the damages?

i. What value did the trees have?
ii. What would be the cost to remove the fallen trees and restore the land with new planting?

iii. Is there a risk that removal of the trees will damage the Claimants' septic field, and should the likely cost be added to the damages?

Did the Defendant Renouf trespass on the lands of the Claimants?

[11] Of course, for Mr. Renouf's activities to amount to a trespass it would have to be proven that he entered onto land belonged to the Claimants and not to the Defendant Burrows. I am aware that there is a difference of opinion as to the precise location of the boundary line. I personally visited the land

at the request of the parties and note that there is a narrow area of unclear ownership, based on the available evidence, but it is also quite clear that on any view of it, Mr. Renouf was cutting trees on the Claimants' property. The precise number of trees is something that I will address later.

[12] By walking on the land belonging to the Claimants, Mr. Renouf trespassed in a technical sense. Cutting trees was the more serious trespass, because growing trees are like fixtures and form part of the land. Cutting trees potentially causes damage to the land itself. If trees are taken down without permission, that would clearly expose the trespasser to a claim for damages.

[13] I have no doubt that this was an honest though careless mistake on the part of Mr. Renouf. But trespass in law does not require any element of bad faith or improper purpose. Mr. Renouf is clearly liable for a trespass.

Was the Defendant Burrows jointly or vicariously responsible for the actions of Mr. Renouf, either because he was "hired" by Burrows or because the two were involved in a joint enterprise?

[14] Trespass is, of course, what the law calls a "tort" - i.e. a legal wrong. More than one person may be held responsible, in an appropriate case, for the same wrongful act. The Claimants are clearly not content to limit their recovery to the Defendant Renouf, at least in part because they fear he would not have assets to satisfy a judgment, and are asking that the court find the Defendant Burrows to be jointly liable.

[15] On all of the evidence, there is no basis to conclude that Mr. Renouf was a paid employee of Mr. Burrows. Nor was there any evidence that Mr. Burrows had any idea in advance that Mr. Renouf would be expanding his cutting to an area anywhere near the neighbours.

[16] So the question is, whether having given his blessing to the more limited enterprise undertaken by Mr. Renouf, Mr. Burrows became vicariously or jointly responsible when Mr. Renouf went on a "frolic of his own," as the old English cases so charmingly put it.

Vicarious liability

[17] Vicarious liability is "the term used to describe the law's imposition of responsibility on one person for the tort of another, even though the first person did not commit the act which constitutes a wrong. It is a form of liability imposed on one party for the misconduct of another.[1]„

[18] Vicarious liability is most often applied in the master and servant and agency contexts. In the master and servant (i.e. employee and employer) context, the rule (as stated in the CED title on Torts) is that:

> §70 A master is responsible for his or her servant's acts only if they were done in the course of the servant's employment. However, a plaintiff need not establish that the specific act complained of was specifically authorized by the employer, provided it meets the closely connected test in that it is so closely connected with authorized acts that it constitutes an improper mode of performing it.

> §71 In general, an employer is not vicariously liable for the acts of an independent contractor or the employees of that contractor. However, a person under certain positive duties may be held liable for failure of an independent contractor to perform them.

[19] In the case here, had the Claimants been able to prove that the Defendant Renouf was an employee of the Defendant Burrows, vicarious liability could well apply.

[20] I accept that there was no such relationship here. It was merely a case of one friend offering to perform a small gratuitous service, and expanding the scope of that service without the knowledge or assent of the other friend.

[21] Counsel for the Claimant has cited a case, *Barnstead v. Ramsay* 1996 CarswellBC 1014 [1996] B.C.W.L.D. 1528, which concerned a similar situation where trees were cut on the land of the Plaintiff by a contractor who was hired by the Defendant neighbour. The latter was held liable on the theory that there was a common enterprise:

> 16 I find in these circumstances the trespass was committed in furtherance of a common design between the defendant Ramsays and the defendant Westlee Contracting. Westlee was to log the trees and sell them, the proceeds of which were to be deducted from the cost of the work done. The Ramsays' intention was to take down all the large trees along the south side of their property to open it up for security reasons and to give them more light. Westlee was to make a profit from the enterprise: the Ramsays were to benefit from the sale of the logs. The defendant Westlee committed a tort that was done in furtherance of a common design with the defendant Ramsays and so the defendant Ramsays are also liable.
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> 17 In reaching this conclusion, I have applied the reasoning of Shaw J. in Horseshoe Bay Retirement Society v. S.I.F. Development Corp. (1990), 66 D.L.R. (4th) 42 at 45 (B.C. S.C.):
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> In Petrie v. Lamont (1841), Car. & M. 93 at p. 96, 174 E.R. 424 at p. 426, Tindal C.J. said: "all persons in trespass who aid or counsel, direct, or join, are joint trespassers."
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> In The "Koursk", [1924] P. 140 (C.A.) at pp. 151 2, Bankes L.J. said by way of dicta:
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> The learned authors of Clerk and Lindsell on Torts 7th ed., p. 59, say this: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design," and they cite a dictum of Tindal C.J. in Petrie v. Lamont in support of their statement. Later they say "there must be concerted actions towards a common end."
>
> The "Koursk" was followed in Brooke v. Bool, [1928] 2 K.B. 578, in a case of negligence where the court found there was a joint enterprise for a concerted purpose: see Salter J. at pp. 585 6.
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> In British Columbia both The "Koursk" and Brooke v. Bool were applied in a case of negligence: see Dawes v. Scoular, [1950] 1 D.L.R. 643, [1950] 1 W.W.R. 15 (C.A.). O'Halloran J.A. said, at p. 645:
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> They were engaged in the co operative and joint operation of getting the two cars across the street, in the course of which and in furtherance of that common design, one of them at least committed an act of negligence, for which their joint control of the operation makes

them jointly liable. The negligence of one was then the negligence of both.

[22] I have been unable to find a case anywhere in Canada which has followed this authority.

[23] There are many other cases which hold that there can be joint liability for the tort committed by another, where the two are engaged in an inherently illegal "joint enterprise." In the case of *Newcastle (Town) v. Mattatall* (1987) 37 D.L.R. (4th) 528, 78 N.B.R. (2d) 236, the New Brunswick Court of Queen's Bench dealt with a case where three young persons had broken into an arena for the purpose of stealing things, and one of them accidentally started a fire. They were all held equally responsible, in part in reliance on American authority:

> 77 I have also been referred to a very interesting American decision concerning joint responsibility. In American Family Mutual Ins. Co. v. Grim, 440 P. 2d 621 (Kansas Sup. Ct., 1968) a fact situation was presented that is very similar to that in the instant case. In Grim , four children, ages 13 and 14, broke and entered a church for the purpose of stealing soft drinks from a pop machine they knew was on the premises. Three of the children went into the attic and while there lit paper which they found in order to have a torch to see what they were doing. The other youngster had no knowledge that these fires were lit. Before leaving the attic, the children thought that all flames were extinguished. In fact, a fire resulted later in the evening in that area of the church and the Court found that it was caused by the torches lit by the children. The defendant Grim was the child who participated in the trespass but had no knowledge of the fires lit in the attic. He was found to be equally liable with his co trespassers.
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> 78 O'Connor J. held at p. 625 of the decision: "The rule of joint and several liability also prevails where tort feasors act in concert in the execution of a common purpose." He goes on to cite with approval the principle of law stated in 52 Am. Jur., Torts 116:
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> > The general rule is that two or more persons engaged in a common enterprise are jointly liable for wrongful acts done in connection with the enterprise, at least where the enterprise is an unlawful one, in which case all are answerable for any injury done by any one of them, although the damage was greater than was foreseen, or the particular act done was not contemplated or intended by them. ...
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> 79 I am satisfied that a review of the case law in the area of joint liability supports the conclusion I have reached with respect to the facts and circumstances of the case before me to the effect that each of the defendants Mattatall, Porter and Harris should be held jointly and severally liable to an equal extent for the negligent acts of Mattatall done in connection with the common enterprise of break, enter and intent to commit theft at the Newcastle town rink.

[24] The rationale in these cases is that if the joint enterprise is in itself unlawful, any consequences of the unlawful enterprise, however unintended, will be the joint responsibility of all of those who put in motion the enterprise and created the risk of unintended consequences.

[25] This is clearly not such a case. Mr. Burrows was clearly part of a joint enterprise to remove a few damaged trees from his own property, which was a fully lawful enterprise. There was no reasonable foreseeability that Mr. Renouf would stray so far from the area discussed that a neighbour's property might be breached.

[26] The rule set out in *Barnstead* (above) seems on first blush to be a broader one, however, it appears to be central to the finding in that case that the Defendant landowners were not careful in their selection of the contractor, knew they were cutting close to the line, and took no proper precautions to ensure that the cutting stayed on their land only. In my view, the unifying principle in these cases is that there is a degree of blameworthiness which causes liability to attach. It can be because the enterprise was itself unlawful, or because there was neglect on the part of one of the parties which created a foreseeable risk of harm.

[27] I cannot find any element of blameworthiness here on the part of Mr. Burrows. It would not matter whether he supplied the chainsaw or the gas. He could not have foreseen that Mr. Renouf would do what he did and should not incur any legal responsibility.

If there is liability on either or both of the Defendants, what are the damages?

[28] The Claimant seeks damages under a variety of heads.

[29] For my purposes, I begin with the premise that 17 trees in the immediate area were cut down. On the evidence there is real doubt that two of them were on the Claimants' land at all, but I find that the other 15 clearly were on the land of the Claimants.

What value did the trees have?

[30] There is no evidence that all but perhaps one of the trees were in danger of falling or posed any hazard. However, I do accept that the only reason Mr. Renouf cut them at all was because he regarded them as unhealthy.

[31] The trees in question were not ornamental trees. They were mature, native trees, and while not dead, probably not all that healthy. However, even trees that are less than healthy can stand for many years and continue to contribute to the aesthetic value of wooded land. Removing them can fundamentally alter the feel of the land.

[32] I must also take into account the fact that the trees were at the far edge of the Claimants' land and not part of their "view" from the house. They would only have seen the trees by walking into the forested part of the property.

[33] In arriving at a value, I am not prepared to consider what value such trees would have as timber, which is an approach that the Defendants have argued. That would be something like killing a prized bull and offering to pay the price of beef. These trees were not being grown for their timber value and this is not a wood lot; it is a treed residential lot.

[34] Although it is theoretically possible to transplant fairly large trees, this is very expensive and difficult, and to compensate the Claimants on this basis would be unrealistic. The likelihood is that once the felled trees are removed and the land cleaned up, they will plant smaller trees.

[35] The Claimants produced an estimate from Terra Nova Landscaping, offering to supply and plant 17 trees, including 4 Austrian Pines, 4 Norway Spruce, 3 Silver Fir, 4 Hemlock and 2 Emerald Queen

Maples. All but the last maples would be 125 cm, or about 4 feet, while the two maples would be 300 cm, or about 10 feet. The total estimate is $9,290.00 plus HST. This averages out to approximately $550.00 per tree.

[36] The Defendants produced a quote from a landscaper offering to plant 12 trees as replacements for the removed ones for $50.00. It can only be presumed from the quote that the replacement trees would be seedlings which cost next to nothing.

[37] I find both quotes to be unrealistic. The Claimants are asking for trees which include trees that are not native, but are ornamental. The Defendants are proposing saplings which will take years to reach even knee high.

[38] In the absence of any more balanced estimate, I am obliged to arrive at a figure that is more reasonable. In my view, the Claimants should receive $250.00 for each of the fifteen trees, for a total of $3,750.00.

What would be the cost to remove the fallen trees and restore the land in order to accommodate new planting? Is there a risk that removal of the trees will damage the Claimants' septic field, and should the likely cost be added to the damages?

[39] The Claimants produced at trial two estimates for removal of the felled trees, both of which were for $5,500.00 plus HST. There is an additional quote for $1,975.00 plus HST for repairs to the Claimants' septic field, anticipated to be caused by the four-wheeler removing trees and debris.

[40] Dealing with the last item first, I accept based on the evidence and on my first-hand observations that it would be awkward getting in and out of the affected area without potentially crossing a part of the septic field, but the challenge will be to use smaller equipment or human power only, to ensure that no such damage occurs.

[41] Several weeks following the trial, the Claimants took it upon themselves to cut up some of the logs into manageable sized pieces and move them out of the way to partially clear a trail. Despite an effort to keep the logs on their own property, given the uncertainty about the boundary, it is possible that some of them are actually on the Burrows property. Despite the friction that this has caused, it may actually simplify things a bit for the Claimants as the Defendant Burrows can look after removing all of the logs that are sitting in this area of uncertain ownership.

[42] The most efficient way to dispose of the rest of the trees would have been to obtain access via the Burrows property, thus avoiding any risk to the Claimants' septic field. It appears that Mr. Burrows would be willing to arrange for that, and thus save the Claimants the expense and risk. However, neighbourly relations are such that the Claimants do not want the task of removing the logs to be entrusted to Mr. Burrows, out of a concern (well founded or not) of how the land will be left. As to having people hired by the Claimants accessing the land through the Burrows property, this is not something that I can order be done. Nor am I certain that Mr. Burrows would be content to allow that to happen, there being a concern for what might be done to his property during such an exercise.

[43] On the evidence available to me, I cannot say that the Claimants' concerns about what Mr. Burrows

would do have any foundation in fact. However, it is their land and if they do not trust the Defendant Burrows, nothing I can say or do is going to change that.

[44] Nonetheless, a party that has suffered damages has an obligation to mitigate those damages by all reasonable means. In my view, the reasonable course of action would be to take advantage of any assistance that might be forthcoming from Mr. Burrows, either by allowing him to arrange for the work or negotiating for access. Failing a willingness to accept and/or seek such assistance, the Claimants cannot expect to use the most expensive solution and be fully compensated for doing so.

[45] Again I do not have a quote for tree removal that I am willing to accept at face value. The $5,500.00 quotes involve more trees than currently need to be removed, and I regard the quote for damage to the septic field to be highly speculative. Furthermore, I regard the unwillingness of the Claimants to accept the assistance offered by Mr. Burrows to represent a failure to mitigate.

[46] Given all of the factors at play, I allow the Claimants a further $2,000.00 for tree removal and all possible expenses associated with it.

Counterclaim

[47] There was also a Counterclaim filed in this matter, though not seriously pursued at the trial. The Defendant Burrows sought damages for the allegedly reckless behaviour of Mr. Horne when he first went to the Burrows property and confronted the Burrows sons. Suffice it to say for my purposes that I believe the claim was largely an emotional reaction to being sued, and the fact that it was not seriously pursued speaks to the fact that counsel became involved in the file and cooler heads prevailed. There are no out of pocket costs, which means that the claim is essentially one for general damages. The limits of this court's jurisdiction restrict such claims to $100.00.

[48] One of the problems with such a claim is that, even if Mr. Horne's behaviour caused any upset, it would have been to the Burrows sons and not to either of the named Defendants, because they were not present at the time of the incident.

[49] As such, I do not consider the Counterclaim to have been established and it will be dismissed.

Conclusions

[50] To summarize, I am dismissing the Counterclaim and allowing the action against the Defendant Renouf only and award damages against him in the amounts of $3,750.00 for tree replacement and a further $2,000.00 for tree removal, for a total in damages of $5,750.00.

[51] As for costs, the Claimants are entitled to their costs of $174.13 for the issuance of the claim, plus $100.00 for service of the claim on the two Defendants. These are incontestable.

[52] In addition, the Claimants have asked for a further amount for service of subpoenas on a number of other individuals. The amounts that have been documented and filed include the following amounts:

service of subpoena on Andrew Helpard	$84.75
service of subpoena on Peter Renouf, Peter Hawkins and Constable Dowling (plus travel)	$314.50
service of subpoena on Robert Arends (plus travel)	$129.59
service of subpoena on Valerie Quinlan	$84.75
service of subpoena on Chris Poole	$84.75
service of subpoena on Trevor Chisholm and Mike D elude (plus travel)	$262.43
	$960.77

[53] There appears also to have been some witness fees provided to some of the witnesses, although full details were not provided.

[54] At first blush, it appears that the disbursements expended on this case are high, if not actually excessive. I have some difficulty understanding why it was thought necessary to subpoena the Defendant Renouf. Some of the other minor witnesses were only marginally helpful. Having said that, however, I am willing to allow the costs as submitted, on the basis that the case was a large one, and it had been met with a large Counterclaim which, though not seriously pursued, was nonetheless hanging over the heads of the Claimants as they prepared for the trial.

[55] In summary then, the Claimants are allowed their costs in the amount of $1,234.90 in addition to the damages of $5,750.00, as against the Defendant Renouf. The claim against the Defendant Burrows is dismissed.

Eric K. Slone, Adjudicator

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[1] CED Torts §66