91 Manitoba Reports (2d) 118
(91 Man.R.(2d) 118)

John Halabura (plaintiff) v.
Fraserwood Fire Department, Local Government District of Armstrong
(defendants)
(Suit No. CI 88-01-31866)

Indexed As: Halabura v. Fraserwood Fire Department et al.

Manitoba Court of Queen's Bench
Winnipeg Centre
Krindle, J.
February 1, 1994.

Summary:

A property owner sued the fire department and its employer for damages arising from the destruction of his property. He alleged that the fire department failed to take reasonable care to extinguish a fire or, alternatively, was negligent in failing to inform him of an approaching fire.

The Manitoba Court of Queen's Bench dismissed the claim.

Damages - Topic 4214

Torts affecting land and buildings - Normal measure - Destruction of buildings or improvements - Fire destroyed the plaintiff's house, barn, outbuildings and contents, including an enormous accumulation of moveables picked up by the plaintiff in bulk lots at auctions, etc. - The defendant suggested valuation at farm auction prices - The Manitoba Court of Queen's Bench stated that ordinarily the property would be valued at replacement value less depreciation - The court would reject valuations where relevant factual information was withheld from the appraiser - Respecting the moveables, the court would arbitrarily assess a value between farm auction prices and replacement cost less depreciation to avoid unjustly benefitting or penalizing the plaintiff - See paragraphs 13 to 19.

Damages - Topic 4344

Torts affecting land and buildings - Cost of reinstatement - Where not applicable - [See

Damages - Topic 4214].

Torts - Topic 49.5

Negligence - Standard of care - Particular persons and relationships - Firefighters - The plaintiff alleged that a municipal fire department improperly extinguished a fire and that it reignited, spread to and completely destroyed his property - Alternatively, he alleged, although he was not at home on the day of the fire, negligence in not warning him of the approaching fire - Firefighters testified about their fire fighting procedures - The plaintiff's witness had not mentioned allegations of improper procedures until after his dispute with the municipality - The Manitoba Court of Queen's Bench found that the fire department took reasonable care in fighting the fire and its follow-up steps - See paragraphs 1 to 11.

Counsel:

R. Beamish and J. Jeffreys, for the plaintiff;
M. Finlayson, for the defendants.

This case was heard before Krindle, J., of the Manitoba Court of Queen's Bench, Winnipeg Centre, who delivered the following judgment on February 1, 1994.

[1] Krindle, J.: The plaintiff sues the Fraserwood Fire Department and its employer, the L.G.D. of Armstrong, for damages arising from the destruction by fire of the plaintiff's property on April 29, 1988. The plaintiff alleges that the fire spread onto his lands as a direct consequence of the failure of the Fraserwood Fire Department to take reasonable care to extinguish a fire in some willows which it had been fighting the previous evening and that it was this improperly extinguished which, the following day, re-ignited and spread north to engulf the plaintiff's property. In the alternative, the plaintiff argues that the defendant was negligent in failing to alert him to the approach of the fire thereby depriving him of the opportunity to save some of his possessions. A live issue exists as to the valuation of the plaintiff's loss.

[2] The fire in question was one of a number of fires which were burning in the general area of Fraserwood in the latter part of April of 1988. In that year spring set in early and was unusually hot and dry. In the early morning hours of April 28, 1988, the Fraserwood Fire Department was called out to two fires in the near vicinity to what I shall refer to as being "Section 1". At 12:28 a.m., the Department responded to a fire on some unoccupied property one section south of Section 1 - referred to during the trial as being the "Huseyin" fire. At 1:42 a.m. the Department responded to a call regarding another fire at some unoccupied property one section to the north-west of Section 1 - referred to as the "Pitura" fire. Then, at 3:15 that afternoon a further fire was reported. It had its origin on the Westman property, immediately adjacent to the Huseyin property. It crossed the road onto the Garrow property and spread from there north to Section 1. This third fire was referred to in the evidence as the "Westman-Garrow fire".

[3] There was no discernible cause for any of the three fires to which I have referred. The Fire Department classified the first two as being likely arsons and I am inclined to agree with their conclusion. As regards the third fire, the cause of its outbreak was listed as "unknown", but

certainly the cause of that fire was suspicious and it could well have been deliberately set.

[4] The Westman-Garrow fire, having crossed the road from Westman's property north to Section 1, proceeded to spread rapidly northward through Section 1, the spread being fueled by a strong southerly wind. The Fire Department was unable to extinguish the blaze. It limited its efforts to protecting the buildings on the Section and to attempting to prevent the spread of the fire from Section 1 to any of the lands adjacent to that Section. The attempt to contain the fire within Section 1 was achieved by backburning. The Department backburned along the eastern edge of Section 1 to prevent the fire from crossing the road to Section 6 to the east. Once that eastern backburn was complete, the Department began backburning along the northern limits of Section 1, proceeding in a westerly direction from the north east corner. The backburn had progressed some 150 yards west from the corner when it hit a bluff of spruce trees. Those immediately exploded, sending flames across the road to the north into Section 12. The flames from the spruce trees started fires in the marsh and in some willows along the south eastern limits of Section 12. It is in respect of the fires in the willows of Section 12 that the allegations of negligence are made.

[5] There is no allegation of negligence regarding the manner in which the Fire Department fought the fire in Section 1. There is no suggestion that the backburning along the northern limits of Section 1 should not have been done or alternately that it should have been done in some way other than the way it was done. There is no allegation that the spread of the fire from Section 1 to Section 12 was as a result of the negligence of the Fire Department. What is alleged to have been negligent relates solely to the Department's efforts to extinguish the fire in the willows in Section 12. It is alleged that as a result of that negligence the fire in Section 12 re-ignited sometime around noon on the 29th and spread northward through Sections 12, 13, 24 and 25, fanned on by the heat and strong southerly winds of the day. The plaintiff's property was located on Section 25, in the path of that fire, and was totally destroyed by it in the late afternoon of the 29th. There is no allegation of negligence relating to the manner in which the fire was fought on the 29th.

[6] The alleged negligence of the Fire Department then relates to an extremely limited, narrow event - the steps taken by the Fire Department during the evening of April 28th to extinguish the fire which had crossed the road to Section 12 and which had ignited some marsh and a clump of willows. Lest there be some confusion as to what is meant when reference is made to "the willows", the clump in question was about waist high and was described by some as occupying a space approximately 1' x 3', by others as being about 1' in diameter. Whatever size it was, we are not talking about anything that might be described as being "bush". The willows was a small clump of shrubbery at best. The fire in the marsh was quickly extinguished. This case turns on whether the Fire Department failed to use reasonable care to extinguish the fire in the small willow clump.

[7] The evidence as to what steps were taken to put out the fire in the willow clump differs substantially between that given by Doug Paluk for the plaintiff and that given by the members of the Fire Department. The plaintiff himself did not witness any of these events. He relies for his case in negligence on the testimony of Doug Paluk, an individual from Gimli who saw the smoke, came to the area in question, volunteered his services and, there is no question, was of considerable assistance in fighting the fires. I was impressed by the demeanour of Mr. Paluk in his

testimony in chief. There was nothing about what he had to say or the manner in which he said it which caused me concern. In cross-examination, certain discrepancies and errors were brought to his attention. They were not of moment and did not reduce the impact of his testimony. However, in cross-examination, it was also brought out that it was not until some five years after the event that Mr. Paluk apparently told anyone of the events which he now says occurred in connection with the fire in the willows and give rise to the only evidence capable of amounting to evidence of negligence. Mr. Paluk spoke to an independent investigator acting for the plaintiff fairly shortly after the fire and made no mention whatever of the deficiencies which he now claims he noticed in the firefighting efforts of the evening of the 28th. He explained his silence in that regard by saying that he had not been asked about the 28th, only about the 29th. That response gave me some cause for concern. More significantly, it was then brought out in cross-examination that not only had there been a five year delay prior to Mr. Paluk's coming forward with his version of events of the 28th, but that he did not come forward with this version until the Municipal Council of the defendant Local Government District refused his application to it concerning an unrelated matter. The Council meeting in question took place on April 13, 1993. April 28, 1993 was the first time Mr. Paluk gave a statement to anyone concerning his purported observations regarding the fire in the willows. No evidence was tendered by the plaintiff to rebut the allegation of recent fabrication of Mr. Paluk's testimony and to rebut the suggestion that the first time Mr. Paluk spoke of the alleged deficiencies in firefighting on the 28th was after the Council meeting in question.

[8] The entire argument as to the negligent handling of the fire in the willows hinges on Mr. Paluk's testimony. That testimony is materially contradicted by the testimony of three members of the Fire Department. I found the members of the Department generally to be credible witnesses. There is no question that a fair amount of their testimony was based on attempts at reconstructing events. I am certain that there is a basic sameness to fighting brush fires and the events have a tendency to blend together because of that sameness. I am also quite certain that these men must have been exhausted and that their exhaustion would contribute to a degree of uncertainty as to some details. But the explosion of the fire from the bluff of spruce trees into Section 12 was a highly significant event and a potentially ruinous occurrence. It does not seem odd to me that two members would stop what they were doing and stand on the road to observe the efforts to extinguish the fire on Section 12 before it could spread. The event was that important. All efforts to contain the fire within Section 1 would have been undone by its successful spread into Section 12.

[9] I have no reason to disbelieve the basic truth of the testimony of the members of the defendant Department as to the manner in which the fire in the willows was extinguished. I have serious reason to question the testimony of Mr. Paluk. Based on that assessment of credibility, the entirety of the claim in negligence relating to the spread of the fire must fail. According to the expert testimony the steps which the Department says that it took to extinguish the fire and to see that it was extinguished were reasonable, prudent steps. The follow-up checks on that location that evening and the next morning were equally prudent. There is no evidence that the department was in any way careless in its firefighting procedures or in its follow-up steps.

[10] The evidence is clear that in the early afternoon of April 29, 1988, a fire began in the southern portion of Section 12 and, with the heat of the day and the strong southerly winds, the

fire moved rapidly northward destroying much in its wake including, tragically, Mr. Halabura's property. No one witnessed the actual outbreak of the fire in Section 12 that afternoon. With the prevailing winds coming as strongly as they were from the south, and with the successful backburn the previous day of all combustible material along the northern edge of Section 1, immediately to the south of Section 12, I consider the only reasonable inference to be that the fire on the 29th began along southern limits of Section 12. The fire may well have been smouldering in the roots of the willows despite the reasonable efforts of the Department the night previous to ensure that such an eventuality did not occur. It may also have been deliberately started at the southern limits of Section 12. Three unexplained fires had commenced in that vicinity on the 28th. Two more fires - both suspected arsons - broke out on the 29th. Either explanation is reasonable. But whichever is in fact the case, I am satisfied that the Department was not careless in its efforts to extinguish the fire in the willows on the 28th and that it took reasonable steps to check the site during the morning of the 29th to see to it that the fire appeared to be out.

[11] The second claim of negligence relates to the fact that no one, on the 29th, attempted to phone Mr. Halabura to tell him about the fires and the direction in which it was headed in order that he might try to save some of his moveable property. I do not intend to rule in the abstract on the issue whether the staff of a volunteer fire department have an obligation to try to phone people. The fact was that Mr. Halabura was not home. He left his property early that morning to go into Winnipeg. No one was at his property to receive such a phone call even if it had been made. Mr. Halabura's step-father, Mr. Dzidz, lives not far to the north-west of Mr. Halabura's property. Had he been called and alerted to the fact that fire was heading toward Mr. Halabura's property, he might have been able to go to Mr. Halabura's farm and to save some things. I do not consider there to be an affirmative duty on the part of the Fire Department to try to locate relatives in the circumstances which pertained here. The R.C.M.P. were involved and were trying to keep ahead of the fire to see to it that there was no loss of life or personal injury involved. They pounded on the doors of Mr. Halabura's house at some risk to themselves and their own safety just ahead of the fire. The firefighters themselves were totally pre-occupied attempting to contain the fire and to limit its destruction. I dismiss the alternate claim in negligence as well.

[12] The defendant has alleged that the plaintiff was contributorily negligent in certain respects. Because the basic claim of the plaintiff was dismissed, the allegations of contributory negligence are academic. However, those allegations are based upon facts which were in dispute at trial and I am obliged to deal with those facts. I find that it is more probable than not that the grass in the plaintiff's yardsite had been cut within a day or two of the fire and that long grass in the plaintiff's yard was not a contributing factor to the spread of the fire to the buildings. The plaintiff said that he cut the grass the day before the fire. The R.C.M.P. officers noted long cut grass around the house. No one from among the defence witnesses can state that at the time of the fire there remained long grass standing in the near vicinity of the buildings. If I were required to do so, I would dismiss the claim of contributory negligence regarding the length of the grass in the yardsite. I would also dismiss the claim of contributory negligence relating to the plaintiff's decision to leave the property and go into Winnipeg for the day knowing, as he did, of the high risk of an outbreak of fire in the neighborhood. I do not find his leaving the area to be contributorily negligent, but I also do not find that he can complain about the failure of the Fire Department to contact him to warn him of the approach of the fire toward his property when he

was not present to be warned.

[13] I stated at the outset that a live issue existed in this case as to the valuation of the plaintiff's property. I agree that ordinarily property would be valued on a replacement cost basis - i.e., what it would cost on the date of the loss to replace the item, less an allowance for depreciation. In other words, I accept the approach used by the plaintiff's expert. I do not accept the approach used by the defendant's expert. The defendant's expert was a farm auctioneer. His expertise lay in the area of what goods would likely sell for at farm auction. Farm auctions are not sales wherein a willing seller and a willing buyer sit down and agree upon the value of an item. They are sales where everything must be liquidated. The vendor has no input as to the value for which an individual item is sold. Everything is sold on an "as is" basis with no opportunity for purchasers to test the property. People go to auctions to obtain "bargains". I do not believe that bargain prices obtained in sales in which the vendor has no bargaining power are a fit criterion for the measurement of damages to be awarded by a court. Used clothing, for example, would bring nothing at a farm auction. Used clothing has a very real value to the owner who is required, by virtue of the loss, to replace it, even allowing for the fact that its value is depreciated by its use.

[14] Having accepted in principal the basis for valuation used by the plaintiff's expert - replacement cost less depreciation - I reject in many instances the value arrived at by the plaintiff's expert in applying that criterion. In certain cases, I find that the expert was not given the correct factual information upon which to base his opinion. The dimensions of the house, for example, were not as great as the expert was led to believe. Similarly the house was not fully connected to water and plumbing, a fact of which the expert was unaware. Nor was the interior of the house fully finished. All of those facts affected the opinion as to value of the house given by the plaintiff's expert. I find as well that the outbuildings - save for the garage - were grossly overvalued, particularly in respect of the log buildings. I do not question the expert's opinion as to the cost of their replacement. But I do find that these buildings were ancient and virtually falling apart. There is a point where depreciation must be almost total. The municipal tax assessors valued two of them at zero for assessment purposes some years prior to the loss. There is no question that they were of some value to the plaintiff. He was using them as structures in which to keep things. However, I would however attribute a purely nominal value to many of them. The plaintiff himself paid only $11,000 in 1972 for three quarter-sections of land and those same outbuildings.

[15] I value building number 1 at $40,000, because it was only 768 square feet, because it did not have an operating bathroom and because construction of the interior was not complete. I value building number 2 at $13,000 to allow for depreciation. The garage was considerably older than was assumed by the plaintiff's expert. On the other hand, testimony put it as being insulated which was not shown in the tax assessors' valuation. I award $3,000 for the barn. It was a very old building. However, the assessors attributed value to it and the mere fact that it was of the size it was makes it valuable if only as a roof over stored items to protect them from the elements. For each of buildings 4, and 7 I allow the sum of $500. Building 5 had a new roof and was serviced by electricity. I would allow $1,500. Building 6 was valued at $6,400. The plaintiff's expert was not aware, in coming to that figure, that the building was 60 years old. The tax assessors place its actual value at $2,046 for their purposes. I allow a figure of $3,500. Building 8 I allow at $2,000

because of the relatively new roof which could not have been contemplated by the tax assessors.

[16] The plaintiff's moveables present a greater problem. I do not disbelieve the plaintiff as to the quantity of the items which he had accumulated. The plaintiff was a collector of things that might come in handy some day or that might have some value some day. As mind boggling as his itemized list of possessions was, I believe he possessed them. What anyone would do with 700 odd used railroad ties; 40 hydro poles; $5,000 worth of assorted bearings; 30 odd commercial fishing nets (the plaintiff did not do commercial fishing); four electric razors; horse harnesses etc., just to name a very few of the items lost is difficult to imagine. But there are people who cannot resist the acquisition of an apparently "good deal" and who cannot divest themselves of anything that might some day come in handy for some thing. The plaintiff, I find, was just such an individual. Very few of his acquisitions were purchased at any traditional retail sale. He haunted auction sales; he picked things up in bulk lots from dealers who picked things up in even larger bulk lots on bankruptcy liquidations; he hauled up railroad tracks and got to keep the ties as part of his arrangement with the contractor.

[17] I am not troubled by the fact that the plaintiff's taxable income could never have allowed him to purchase at replacement cost what he purported to own. He did not purchase these items, or a goodly portion of them, at anything near retail replacement cost. And I expect that his taxable income does not reflect his cash flow. I expect that a variety of his transactions - such as re-building and re-selling wrecked cars - generated cash but didn't quite make it into his tax returns. Certainly in the returns which have been filed there is no mention of that income generating sideline.

[18] To award the plaintiff replacement value less depreciation for a great deal of this stuff would be to improperly enrich the plaintiff at the expense of the defendant. On the other hand, to award the plaintiff the defendant's suggestion of farm auction prices would be to give him far less than he could have obtained for most of those items had he chosen to arrange individual sales of them. Insofar as the personalty is concerned, I, rather arbitrarily, would take the figures given by the auctioneer and the figures given by the plaintiff's appraiser and I would split them down the middle. I acknowledge the arbitrariness of that approach.

[19] Had I found liability in favour of the plaintiff, it was my intention to articulate in my reasons for decision the approach to be used for the calculation of the value of the loss. I would have referred the actual calculation back to counsel and made myself available to them should there be any dispute. I intend to do the same in this situation. If this case is going to appeal, then final figures as to moveables will have to be sorted out in advance of its being appealed. If this case is not going to be appealed, it would seem to me to be advisable that no further costs be incurred by the parties in the actual calculation of what has been rendered academic.

[20] I leave my reasons at this point with leave to either party to bring this matter back on before me to finalize the calculations as to damages and/or to deal with the matter of costs, which issue was not spoken to at the time of closing arguments.

Action dismissed.

Editor: Janette Blue/sg