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HIGHLIGHTS

* The Manitoba Court of Appeal has held that a bankrupt, who had previously unsuccessfully applied to set aside a bankruptcy order on the ground that the creditor seeking bankruptcy had not applied for leave under The Family Farm Protection Act (Manitoba), could not apply to set aside the bankruptcy order because the bankrupt did not first comply with the conditions prescribed by the Farm Debt Review Act (Canada). The Court held that the bankrupt should have raised applicable of the Farm Debt Mediation Act at the first proceeding, that bringing a second proceeding violated the doctrine of res judicata, and that it was also an abuse of process. [Editor's note: Although the facts in this case are somewhat extreme, the Court's decision is in line with other decisions which require debtors who object to proceedings on the ground that the FDMA has not been complied with, to do so at an early stage in the proceedings.]. (MNP Ltd. v Desrochers, *CALN/2018-025*, *[2018] M.J. No. 249*, Manitoba Court of Appeal)

* A Justice of the Alberta Court of Queen's Bench has reviewed the law with respect to what a plaintiff must prove to obtain judgment for damages against the owner of domestic livestock, with respect to personal injuries sustained as a result of the acts or omissions of the livestock. The Court concluded that the mere presence of a bull on the plaintiff's land was insufficient to found a successful action in negligence. The Court concluded that although the owner of livestock could be liable for damages based on the common law tort of animal trespass, which is a "strict liability" tort which does not require proof of neglience, the plaintiff must nevertheless establish that the damages are not too remote. The plaintiff also has the burden of showing that domestic animals have a "dangerous or mischievous propensity" which was "known to the animal's keeper". In this case, the claim of a plaintiff farmer/rancher who sustained personal injuries after being struck by his neighbour's Reg Angus Charolais bull was dismissed because the plaintiff failed to show that his neighbour failed to exercise due care regarding fence maintenance and that the plaintiff failed to lead any evidence to establish a dangerous or mischievous propensity in the bull that was known to his neighbour. (Moulson v. Hejnar, *CALN/2018-026*, *[2018] A.J. No. 1169*, Court of Queen's Bench of Alberta)

NEW CASE LAW

MNP Ltd. v Desrochers;

Manitoba Court of Appeal,

M.M. Monnin, C.J. Mainella and J.A. Pfuetzner JJ.A,

October1, 2018.

CALN/2018-025
[2018] M.J. No. 249 | *2018 MBCA 97*

Farm Debt Mediation Act — Res Judicata and Abuse of Process — Loss of Right to Rely on FDMA Through Delay.

A bankrupt, Marcel Desrochers ("Desrochers") appealed to the Manitoba Court of Appeal from a decision of a bankruptcy judge who dismissed his application to declare his bankruptcy proceedings a nullity because the procedural requirements in the Farm Debt Mediation Act, *SC 1997, c. 21* (the "FDMA") had not been satisfied.

Desrochers had previously appealed to the Manitoba Court of Queen's Bench for an order declaring the bankruptcy proceedings a nulity because the provisions of the Family Farm Protection Act, *CCSM c F15* (the "FFPA") which required leave under s. 8 of the FFPA to commence proceedings, had not been met: Keystone Agri-Motive (2005) Inc. v. Desrochers, *2014 MBCA 109*, *[2014] M.J. No. 323*.

In the Keystone decision, Desrochers only raised the provisions of the FFPA. He did not invoke the FDMA.

In the Keystone decision, the Court of Appeal agreed with the bankruptcy judge that the FFPA was inapplicable given the definitions of farmer and farm land under the FFPA because Desrochers was not a farmer as defined under the FFPA, and because the farm land was not registered in his name - the farm land was registered in the name of Frenchie's Farm & Ranch Ltd., a corporation. Desrochers was the sole shareholder of this company.

In Keystone Desrochers relied on a decision of the Supreme Court of Canada in M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., *[1999] 2 SCR 961* in which a bankrupt was successful in obtaining a stay of proceedings on the ground that his creditor had failed to obtain leave to commence its proceedings under the Farm Debt Review Act, RSC 1985, c. 25 (2nd Supp), which is the predecessor to the FDMA.

Desrochers also relied on the M & D Farm decision in this appeal, with respect to the need to obtain leave under the FDMA, an issue which had not previously been dealt with by the Court in Keystone.

A preliminary issue before the Court of Appeal was whether this issue could be raised having regard to the principles of res judicata and/or abuse of process.

Decision: Monnin, JA (Mainella & Pfuetzner, JA concurring) dismissed the appeal. Monnin, JA stated, at para. 20, that the issue with respect to the FDMA should have been raised at the initial proceeding, and that Desrochers was estopped from doing so, stating, at para. 22 and 23:

> [22] For our purposes, the issue of the applicability of the federal statute, the FDMA, was

not raised in the first proceeding before the bankruptcy judge challenging the validity of the bankruptcy order, nor before us on the appeal of that order. If the bankrupt wished that point to be considered, he should have raised it then. As noted, he had legal counsel who raised the provisions of the provincial statute for him, as well as on the appeal of that decision to this Court. In my view, the doctrine of issue estoppel clearly prevents the matters from being raised at this time. There may have been tactical reasons not to raise the federal statute given the differing definitions of farmer and creditor from the provincial statute. However, that is not before us.

[23] Another aspect of the doctrine of res judicata is preventing a collateral attack of a previously valid decision. Were the bankrupt able to challenge the validity of the entire bankruptcy proceedings at this late stage, it would amount to a collateral attack on the validity of the initial bankruptcy order which was properly made and upheld upon appeal. The decision he seeks would collaterally attack both the initial bankruptcy order and the subsequent appeal decision well after the time for appeals had passed. This would be contrary to the concept of finality ensconced in the doctrines of res judicata and abuse of process.

Moulson v. Hejnar;

Court of Queen's Bench of Alberta,

Michalyshyn, J,

October 3, 2018.

CALN/2018-026
[2018] A.J. No. 1169 | *2018 ABQB 837*

Owner's Liability for Personal Injuries Caused by Livestock — Negligence — Cattle Trespass.

The Plaintiff, William Moulson ("Moulson") sued the Defendant, Brian Hejnar ("Hejnar") for personal injuries sustained when Moulson was struck by Hejnar's Red Angus Charolais bull.

Moulsen is 72 years old. He operates a farm and ranch near Holden, Alberta.

Hejnar is Moulson's neighbour.

On June 22, 2010 four of Hejnar's bulls got into Moulson's land. Moulson alleged that the bulls got onto his land due to the failure to maintain the boundary fences between their land. The evidence established that Moulson had sustained injuries as a result of being struck by one of the bulls. Moulson based his claim in negligence and animal trespass.

Decision: Michalyshyn, J dismissed Moulson's claim [at para. 2 and 36].

Michalyshyn, J considered the following issues:

1. The claim in negligence

Michalyshyn, J concluded [at para. 3] that Moulson's allegation of negligence in failing to maintain the boundary fence was not proven on a balance of probabilities and that Hejnar's

cattle entered Moulson's land at a point where the barbed wire on the fence was sagging as a result of a tree having fallen on the fence from Moulson's property. Michalyshyn, J dismissed the action in negligence stating, at para. 8 and 9:

> [8] In argument, counsel for the plaintiff essentially conceded the cause of action of negligence could not succeed on the evidence. Whether conceded or not, I would have dismissed the action in negligence on account of an absence of evidence that the defendant failed to exercise the duty of care regarding fence maintenance that a reasonably prudent person would exercise in the circumstances.
>
> [9] The plaintiff's concession and my finding are in line with the outcome in Canadian Lynden Transport v Miller, 2006 APBC 65 per O'Ferrall J (as he then was): that the mere presence of cattle in that case on a highway - here on the plaintiff's lands - is insufficient to found a successful action in negligence. And even if the case of prima facie negligence might arise on the facts in this case (by analogy to Canadian Lynden, at para 10), I would find that the 'cattle keeper' here - the defendant - demonstrated more than due diligence by way of his evidence of fence maintenance, noted above, which I have accepted.

2. The claim for animal trespass.

Michalyshyn, J discussed the law with respect to the liability for claims in animal trespass at para. 10 to 23.

Michalyshyn, J observed [at para. 10 to 13] that the provisions of s. 5(a) and 6 of the Stray Animals Act *RSA 2000 c S-20*, which make the owners of livestock liable for "damage done to real or personal property caused by the trespass of livestock" unless the damage is "due wholly to the fault of the person suffering the damage or expense" do not clearly create statutory liability for damages for bodily injury, as distinct from damages to real or personal property caused by trespassing livestock.

However the Stray Animals Act does not exclude common law liability for animal trespass. At para. 14 and 15, Michalyshyn, J observed:

> [14] .there is ample authority that liability may follow for bodily injuries caused by trespassing livestock.
>
> [15] The common law cause of action in animal trespass is one of strict liability. No negligence need be proven. There is, however, an element of remoteness.

citing Reid v Allen, 1950 DLR 363 at 365 (Alberta Supreme Court); Cox v Burbridge (1863), 143 E.R. 171; Bradley v Wallace Ltd. [1913] 3 K.B. 629; Whalley v Vandergrand, *[1918] S.J. No. 109*; Acker v Kerr *(1974), 2 O.R. (2d) 270*; Gallant v Murray, *2017 NBQB 13*, *[2017] N.B.J. No. 6*.

At paragraphs 21 to 23 Michalyshyn, J concluded that although animal trespass is a strict liability tort, it is nevertheless necessary for a plaintiff to show that domestic animals have a "dangerous or mischievous propensity" known to the defendant before the defendant will be liable, stating at para. 21 to 23:

> [21] All of these authorities raise the possibility that the doctrine of scienter will apply. In that regard I was referred to the decision of McBain J in Laws v Wright, *2000 ABQB 49*, *[2000] A.J. No. 127* at paras 89-104. That decision and the many authorities mentioned in

it confirm that the first requirement for scienter doctrine - assuming one is dealing with a domesticated versus a wild animal - is whether the animals is of a dangerous or mischievous propensity. McBain J cites Fridman The Law of Torts in Canada, 1989 - Vol. 1, pp. 211-12:

> If the animal is mansuetae naturae, that is, one which ordinarily did not cause the kind of harm that is involved, the common law requires that the particular animal concerned have the dangerous or mischievous propensity to commit the harm or damages that it inflicted, and that the defendant knew of such propensity or characteristic of othe individual animal.

[22] McBain J also relied on Gill v. McDoanld, 80 D.L.R. 21 at 22 for the proposition that:

> .liability for a harmless animal's acts only arise if it has an abnormal dangerous characteristic which must be known to its keeper, and in the absence of these circumstances liaibility will depend upon the ordinary law of negligenhce.

[23] The burden of showing 'dangerous or mischievous propensity' which was 'known to the animal's keeper' is on the plaintiff.

Michalyshyn, J reviewed Moulson's evidence at para. 24 to 32. Moulson testified that after observing 5 of Hejnar's cattle, including 4 bulls (one of which was the bull in question), on his land, he drove his quad to the location of the animals, opened gates exiting his property and successfully chased 3 of the 4 bulls back to Hejnar's land. He then chased the 4th bull through a grove of trees not far from the fence line, dismounted his quad and approached the bull on foot. The bull did not move. He picked up a small branch and threw it at the bull. All of a sudden the bull charged him, and hit him to the ground. The bull then ran off. The bull did not seem agitated or act defensively in response to being chased. It did not paw the ground or shake its head in any kind of aggressive fashion.

Michalyshyn, J concluded, at para. 33 to 35:

> [33] .In my view the claim in strict liability founders on the question of propensity, around which there is no evidence whatsoever.
>
> [34] To paraphrase the rule stated in Cox v Burbridge, strict liability will not apply if the animal in question does something that is quite contrary to its ordinary nature, something which the owner has no reason to expect. And as stated in Laws v Wright, it is the plaintiff's burden to show that the defendant's bull - which no one says is a wild animal in law - had a dangerous or mischievous propensity. It is the plaintiff's further burden to shown that the defendant was aware of any such propensity.

[35] There was no evidence at trial regarding the propensity of bulls, or the impugned bull in particular, to charge at persons. Indeed, the only evidence at trial pointed away from any dangerous or mischievous propensity. It was the plaintiff's own evidence that the animal in question did not seem agitated even after being chased around the plainitff's lands by the plaintiff riding his motorized quad. Nor was the animal acting aggressively, for example by pawing the ground or shaking its head. It just wasn't moving. On the plaintiff's own evidence, the bull just charged at him. Immediately after, the plaintiff "heaved" a branch at the animal. Not surprisingly, counsel for the defendant argues that the plaintiff was the author of his own misfortune for antagonizing the bull by heaving a branch at it. That well may be - whether or not the branch actually struck the animal - but given the absence of evidence already noted, it is unnecessary to speculate about the effect on the bull of having a branch heaved in its

direction, because that evidence certainly creates no new path of liability adverse to the defendant.

CREDITS

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