

CITATION: *SHIELDS & SHIELDS v HARBECK & HARBECK* [2009] NTMC 047

PARTIES: LAUREN SHIELDS &
NEVILLE SHIELDS
v
RON HARBECK &
KAY HARBECK

TITLE OF COURT: LOCAL COURT

JURISDICTION: SMALL CLAIMS

FILE NO(s): 20909523

DELIVERED ON: 19 OCTOBER 2009

DELIVERED AT: DARWIN

HEARING DATE(s): 25 AUGUST 2009

JUDGMENT OF: ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

EVIDENCE – Conflicting evidence unable to be resolved – plaintiff bears the onus to prove her case on the balance of probabilities – reasonable satisfaction

NEGLIGENCE – Contributory negligence – departure from the standard of care of the reasonable man – reduction in damages - what is just and equitable

Small Claims Act (NT), s 12

Law Reform (Miscellaneous Provisions) Act (NT), s 16(1)(b)

Briginshaw v Briginshaw (1938) 60 CLR 336

Pennington v Norris (1956) 96 CLR 10 at 16

REPRESENTATION:

Counsel:

Plaintiff: NA

Defendant: NA

Solicitors:

Plaintiff: Self Represented

Defendant: Self Represented

Judgment category classification: C

Judgment ID number: [2009] NTMC 047

Number of paragraphs: 24

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20909523

BETWEEN:

Lauren Shields
First Plaintiff

AND:

Neville Shields
Second Plaintiff

AND:

Ron Harbeck
First Defendant

AND:

Kay Harbeck
Second Defendant

REASONS FOR JUDGMENT

(Delivered 19 OCTOBER 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is a proceeding brought by the first and second plaintiffs in the small claims jurisdiction of the Local Court. The plaintiffs seeks damages and costs from the first and second defendants arising from damage caused to their property by falling fruit from the defendants' tree situated on the defendants' property adjoining land which was occupied by the first plaintiff.
2. Section 12 of the *Small Claims Act* (NT) provides that the Court is not bound by the rules of evidence and may inform itself in any manner it sees

fit. That does not mean that the Court will dispense with the rules of evidence altogether, but it does mean that the Court, in this jurisdiction, will tend to be considerably more flexible in relation to the manner and presentation of evidence, recognising that parties are commonly self represented. The rules of evidence have been developed in the Courts over a considerable period of time, they exist for good reason, namely they assist the decision maker in coming to a decision as to the facts of the matter.

3. Foremost amongst the rules of evidence in civil proceedings is that the party initiating a claim bears both the evidential and persuasive burdens on each and every material fact essential to the establishing of that claim. The civil standard of proof is generally expressed in terms of the balance of probabilities.
4. At hearing the plaintiffs were represented Ms Shields. Mr Harbeck, along with Mrs Harbeck, represented themselves. Both parties were sworn and gave evidence under oath.

The Plaintiffs' Evidence

5. The first plaintiff's sworn oral evidence was as follows:
 - (i) She was the resident tenant of a property situated at 9 Mullens Gardens, in the suburb of Alawa in Darwin, from April 2007 to June 2009.
 - (ii) On 3 January 2008 the first plaintiff's car and the second plaintiff's car were parked in the driveway and lawn of the first plaintiff's premises. The first plaintiff's car was parked in the paved driveway, the second plaintiff's car was parked in the grassed yard area in front of the first plaintiff's car. The first plaintiff had parked both cars. She was aware that an elephant fruit tree grew on the defendant's adjacent property, and that there was an over-hanging branch onto her property, however she paid little heed to the tree when parking the cars.

- (iii) At about 3pm on 3 January 2008 the first plaintiff was inside her house when she heard a number of crashing noises. She described them as something hitting metal. There was a tin shed roof of a building on the neighbour's land adjacent to the drive way. Falling fruit from the tree would often hit that roof.
- (iv) The first plaintiff went outside to her drive way and saw approximately nine elephant fruit. Most were on the ground, one was on the windscreen of the second plaintiff's car. She observed a dent in her car and a number of dents in the second plaintiff's car.
- (v) She recognised the fruit as the type of fruit which grew on the defendants' elephant fruit tree. The tree grew on the defendants' property close to the fence line. She had not noticed the fruit on the ground in the vicinity of the cars before. She had previously washed both cars a few days earlier and had not noticed the dents before.
- (vi) The fruit came from the tree which grew on the adjoining property owned by the defendants. There was a branch overhanging the boundary and it had fruit on it. The first plaintiff had seen fruit on the tree previously and fruit often fell into her yard.
- (vii) The tree fruited in the wet seasons, and the first fruit began falling in October 2007. She used to rake up piles of fruit which fell into her yard from the defendant's property. Prior to the date in question she did not speak to the defendants or raise any concerns about the fruit falling into her yard.
- (viii) After seeing the fruit on the ground around the cars the first plaintiff looked up to see where the fruit had come from. She saw some fruit left on the defendants' tree.
- (ix) A week later she tried to speak with the first defendant who she saw taking a walk. He didn't want to hear about the falling fruit and just

walked away. Subsequently there has been bad blood between the neighbours with accusations of trespass by the defendants against the plaintiff.

- (x) Prior to damage to the cars the first defendant had not spoken to the defendants about the fruit falling into her yard.
- (xi) The first plaintiff approached her landlord, Territory Housing, in relation to the issue in September 2008. She raised concerns in relation to the risk of injury from the falling fruit and advised Territory housing that her car had been dented. She was told there was nothing they could do about the damage to the cars.
- (xii) In mid September a meeting was held between the first plaintiff's Tenancy Manager, the Property Manager of Territory Housing and the defendants to discuss the issue of the falling fruit. Permission was granted by the defendants to prune the tree.
- (xiii) Territory Housing eventually attended in late September 2008 and the overhanging branch was pruned.
- (xiv) However, after September 2008, that is, after the over hanging branch was pruned, fruit continued to fall from the tree into the first plaintiff's yard. She took a number of photographs in October 2008 of the fruit *in situ* after they had fallen. Territory Housing could not assist further.
- (xv) In February 2008 the first plaintiff bought a car port cover, the type which is erected with poles and covered by plastic type sheeting. In October 2008, about a month after the tree had been pruned, she noticed an elephant fruit on the left side of the drive way and a t-shaped rip mark in the top of the car port cover.
- (xvi) Photographs of the tree, the damage, as at October 2008 were tendered in evidence. The photographs can be described thus:

- Top photograph attachment B is a brown fruit at the edge of the car port.
 - Bottom photograph attachment B is a green fruit on the first plaintiff's lawn.
 - Photographs at attachments C, D, F (no E) are photographs of damage to the cars and car port.
 - Top photograph attachment G shows a small green fruit at the edge of the car port, taken in September/October 2008.
 - Other photographs in attachment G show a green fruit on the lawn and near the car port after September 2008, in about November 2008.
6. On the plaintiffs' photographic evidence there would appear to be fruit potentially falling from the tree as late as November 2008. There is no photographic evidence of fruit on the tree in either January 2008 or January 2009. However, an inference can be drawn that notwithstanding the pruning in September 2008, fruit continued falling from the defendants' tree into the plaintiff's yard. There was no evidence that the first plaintiff brought the issue of fruit continuing to fall to the defendants, or any one else's attention, after October or September 2008.
7. The second plaintiff did not give evidence. No other witnesses were called by the first defendant. In particular, there were no witnesses called to support her claim that there was fruit on the tree in January 2008.

The Defendant's Evidence

8. The first defendants' sworn oral evidence was as follows:
- (i) He and the second defendant are the registered proprietors of 7 Mullens Garden, Alawa. The first defendant had lived at 7 Mullens Garden since 1969.

- (ii) In 1976 the first defendant planted an elephant tree in their garden. The edge of the tree was approximately 1.8m from the edge of the neighbour's fence. As at January 2008 one limb of the tree did over hang the neighbour's property by about 1m on an angle of 85 to 90 degrees from the horizontal.
- (iii) The tree fruits from year to year. In about August every year the tree generally loses its leaves. In about October to December the tree begins to flower. In about May the first fruit matures. The fruit falls to the ground normally in ones or twos. The fruit is heavy, about 800-900 grams, it is not easily blown by the wind, it falls straight down unless it strikes something else. The tree normally produces a lot of fruit, but it can depend on the season.
- (iv) On 3 January 2008 he was at home preparing for Cyclone Helen.
- (v) There was no fruit on the tree in January 2008. At that time there would have been unformed fruit on the tree, that is, the flowers would have been closing up to form fruit.
- (vi) Photographs of the tree in question were tendered showing the tree with fruit as at July 2009. Further photographs of the same species of tree on The Esplanade Darwin with fruit as at late May 2009 were tendered.
- (vii) The defendants kept their gutters and roofs clean.
- (viii) The defendants had an extension ladder and the first defendant could climb into the tree to remove the fruit, but he had chosen not to because he did not have good neighbours. The first defendant had been living at the property for 40 years and would remove fruit for neighbours. Sometimes fruit would fall over the fence, either by bouncing off the roof or after hitting a tree limb.

- (ix) There was no fruit on the tree in October 2008 and the damage to the car port was due to wear and tear from ultra violet radiation.
9. It was the defendants' case that they disputed, categorically, that fruit from their tree could have caused the damage to the plaintiffs' cars. That was on the basis that there was no fruit on the tree on the date in question and therefore no damage was caused by falling fruit. The defendants' explanation for how fruit came to be scattered around the plaintiffs' cars was that the first defendant had "planted it", that is, she had fabricated the evidence. The first defendants, I assume, would have me believe that damage was done to the plaintiffs' vehicles (in some unknown manner) then in order to blame the defendants, the first plaintiff scattered fruit which she had stored for some months and then blamed the defendants. It was then some one or so year later that the plaintiff's decided to sue the defendants. No motivation was attributed to this allegation other than there had been other disputes between the plaintiffs and defendants.
10. The defendants called one witness, Mr Tim West, Environmental Development Officer with the Northern Territory Agricultural and Horticultural Association. Mr West possessed a Diploma in Horticulture and was familiar with the species of tree in question. He gave evidence via the telephone.
11. Mr West's evidence was as follows:
- (i) He used to work for Tropicus Nursery in Coconut Grove, who first introduced the species of tree to Darwin for shade and their large scented flowers.
 - (ii) The Elephant Apple tree, scientifically known as *Dillenia Indica*, flowers at the end of the wet season and fruits in the dry season. The first fruit begins to drop from about July to August. The last of the fruit would be expected off the tree by the end of August.

- (iii) In relation to my question as to whether there should be fruit on the tree in January, Mr West answered that January is the start of flowering and buds. To his knowledge the trees do not fruit at that time of year. Further he stated that there is unlikely to be fruit remaining on the tree even in December as the first of the wet seasons storms are likely to bring down any remaining fruit.
 - (iv) In response to my question as to whether the elephant fruit was capable of being easily blown by the wind, it was his evidence that the trees generally bore large fruit which was unlikely to be blown easily by the wind. Fruit was more likely to drop straight down.
 - (v) In relation to my question concerning whether it was possible for fruit to remain on the tree longer than normal, Mr West responded that the fruit would normally begin rotting, that germination takes place inside the fruit followed by a second stage of germination. That is, the fruit would generally rot on the branch and fall, if it did not fall sooner.
 - (vi) Mr West stated that he had seen the tree in question about 2 or 3 months prior to the hearing (in about May 2009) and that there was no fruit on the tree then.
12. Mr West had not seen the defendants' tree in January 2008 and therefore was able only to give evidence in relation to his knowledge of the species in general. He was not able to rule out the possibility of fruit on the tree in January 2008, however to the best of his knowledge fruit would not be expected in January 2008. His evidence, namely that the last of the fruit would be expected off the tree by the end of August was somewhat inconsistent with the plaintiff's photographic evidence which showed fruit continuing to fall into her yard in September, October and November.

The Issues

13. Although not pleaded directly, which is not unusual for self represented litigants in the small claims jurisdiction, the plaintiffs' claim is in negligence. That is, the plaintiffs claim that the defendants, were negligent in allowing a tree bearing heavy fruit, which had a known propensity to drop such fruit, to grow near and over the neighbours land where there was a foreseeable risk that the fruit, when it dropped, might cause damage to property or persons.
14. In order to succeed in proving liability in negligence the plaintiffs must prove that the defendants owed them a duty of care, that the duty of care was breached and that damages were caused as a result.
15. As the occupier of land, upon which trees were growing, I have no doubt that, given the nature of the tree with its known propensity to grow heavy hard fruit which drops to the ground, and its proximity to the property boundary, the defendants' owed a duty of care to the occupiers of or persons on an adjacent property.
16. The discharge of that duty of care would have required reasonable precautions to be taken to avoid the foreseeability of risk of injury to neighbours or damage to their property. Reasonable precautions may have required felling or pruning the tree. Alternatively, offending fruit could have been picked before it matured or at least before it was likely to drop. Reasonable precautions would not have required detailed and extensive investigations to have been undertaken to determine whether a tree was safe, however if a tree exhibited signs, which were observable without significant investigation, that it posed a foreseeable risk (ie. eaten by termites, branches constantly falling, looked inherently unsafe or was a species prone to dropping branches or fruit) then a reasonable precaution would require removal of the risk by pruning or otherwise dealing with the tree.

17. In this matter liability in respect to the damage to the cars, and car port, rests upon whether the branch overhanging the defendants' property, or the tree itself, had fruit on it, such that a foreseeable risk existed. The defendants say there was no fruit on the tree on either of the dates in question. The plaintiffs say, there was fruit on the tree on the dates in question and the damage to their property was a result of the falling fruit.
18. The matter is further complicated by the evidence which indicates that the first plaintiff had knowledge that fruit could fall from the tree into her yard. The plaintiff had lived in the premises since April 2007, some 9 months before alleged damage to the cars. Assuming fruit was dropping into the yard in September, October and November 2008, as is the evidence, it would have similarly been dropping into the yard during April 2007 to January 2008. The first plaintiff would have been aware of that. Further, it was the first plaintiff's evidence that, prior to January 2008, she had seen fruit on the tree previously and fruit often fell into her yard. Yet she chose to park both cars in the vicinity of the tree where fruit had previously fallen, or was likely to fall. The act of parking the vehicles where she did, in January 2008, was a departure from the standard of care of the reasonable man or person, that is, a reasonable man or person would not have parked there in the circumstances.

Decision

19. As stated above, this is the plaintiff's claim and she bears the burden of proving it on the balance of probabilities. In order to find for the plaintiff I must, to use the words of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pages 361-2, be reasonably satisfied that the facts as she has alleged are proven.
20. In relation to the claim for damage to the plaintiffs' cars, on the basis of the evidence I am reasonably satisfied that there was fruit on the defendants' tree in January 2008, and that such fruit fell from the

defendants' tree and struck the plaintiffs' cars causing damage. The defendants grew a large tree close to their property boundary. The defendants were aware that their tree bore fruit, heavy fruit, which fell to the ground and in certain instances would fall across onto their neighbour's property. They owed the plaintiffs a duty of care and breached that duty. They failed to take reasonable precautions in relation to their tree to reduce the risk of harm by falling fruit. I reject the defendants' assertion that the first plaintiff had fabricated her claim and the proceeding was vexatious.

21. However, I find that the plaintiffs' claim should be reduced on the basis of contributory negligence. Section 16(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* allows reduction of damages to the extent the "court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". In assessing what is just and equitable the Court has a wide discretion and will compare the culpability of the plaintiff and defendant (see *Pennington v Norris* (1956) 96 CLR 10 at 16). In this matter an apportionment of 50:50 for the damages is just and equitable.
22. In relation to the claim for damage to the car port. There was evidence which supports the claim that fruit was falling as late as October 2008. Such fruit was falling into the plaintiff's yard despite an overhanging branch being pruned. However I am not satisfied that the damage to the car port was caused by a falling fruit. It is possible that such damage was caused, but without further evidence I am not reasonably satisfied that the damage was so caused. The plaintiffs' claim in that respect much therefore fail and I dismiss it.
23. I therefore find for the first and second plaintiffs in relation to that part of their claim which relates to the damage to their cars. In relation to the plaintiffs' claim for the damage to the car port, that part of the claim is dismissed.

24. My orders therefore are:

1. Judgment for the first and second plaintiffs against the first and second defendants, in relation to the claim relating to damage to the cars. Liability on the quantum of the damages, on the basis of the plaintiffs' contributory negligence, is reduced by 50%. Damages are to be assessed at an assessment of damages hearing.
2. The first plaintiffs claim against the first and second defendant in relation to the claim for damage to the car port is dismissed.

Dated this 19th day of October 2009

CRAIG SMYTH
ACTING JUDICIAL REGISTRAR