

2011 01G 0013 CP
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

HUGH GEORGE and BEN BELLOWS

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN
IN RIGHT OF
NEWFOUNDLAND AND LABRADOR

DEFENDANT

BROUGHT UNDER THE ***CLASS ACTIONS ACT***
BEFORE THE HONOURABLE MR. JUSTICE RICHARD
LEBLANC, CASE MANAGEMENT JUDGE

DEFENCE

1. The Defendant, (the Province), acknowledges paragraphs 1, 2, 4, 5, 6, and 7 of the Amended Statement of Claim. As to paragraph 3 of the Amended Statement of Claim the Province states that pursuant to the ***Proceedings Against the Crown Act***, RSNL1990, c. P-26, s.10, the correct reference for the Province in a style of cause is Her Majesty in Right of Newfoundland and Labrador.
2. As to paragraph 8 of the Amended Statement of Claim:
 - i) The Province states that it introduced 4-5 moose to the island in 1904 in order to provide a sustainable food source for the residents of the island of Newfoundland.

- ii) There was no highway system in 1904 therefore the Province denies that it introduced moose at a time when Newfoundland and Labrador had a highway system. The Province further denies that the potential for moose-vehicle collisions was apparent or foreseeable when moose were introduced to the island.
- iii) The Province further states that the decision to introduce moose to the island was a policy decision made by the Government of the time based on financial, political and social considerations and is therefore immune from judicial scrutiny and incapable of giving rise to a duty of care as understood in the law of negligence.
- iv) The Province further states that wolves, a natural predator of the moose, were present on the island of Newfoundland in 1904 and that it was not foreseeable at that time that these wolves would subsequently become extinct on the island.

3. The Province acknowledges that a collision between a vehicle and a moose can cause significant damage to person and property as outlined in paragraph 9 of the Amended Statement of Claim, but submits that this does not create a duty of care.

4. As to paragraph 10 of the Amended Statement of Claim:

- i) The Province understands that the moose population is currently within the range of 90,000-130,000 on the island.
- ii) The Province otherwise denies paragraph 10.

5. As to paragraph 11 of the Amended Statement of Claim:

- i) The Province admits that it has taken highway maintenance practices as outlined by the Plaintiff.

- ii) The Province denies that these measures are ineffective and unsupported by scientific research.

- 6. The Province has no knowledge of the facts outlined in paragraphs 12-14 of the Amended Statement of Claim.

- 7. As to paragraph 15 of the Amended Statement of Claim, the Province acknowledges that Mr. Bellows received respite work supplied by the Province. The Province otherwise has no knowledge of the facts outlined in paragraph 15.

- 8. The Province acknowledges paragraph 16 of the Amended Statement of Claim.

- 9. As to paragraph 17 of the Amended Statement of Claim:
 - i) The Province denies that it is strictly liable for the conduct of moose on the island of Newfoundland.
 - ii) The Province acknowledges that the Representative Plaintiffs have made a claim for personal injury as set out in the class definition and Statement of Claim.

- 10. The Province denies paragraph 18 of the Amended Statement of Claim and in particular:
 - i) Denies that the introduction of moose to the island of Newfoundland and the subsequent management of moose populations was/is motivated by the pursuit of profit.

- ii) The Province states that moose were brought to the island in 1904 to provide a sustainable food source for the people of the island of Newfoundland.

11. As to paragraph 19 of the Amended Statement of Claim the Province submits that:

- i) The traditional tort of strict liability as outlined in the case of ***Rylands v. Fletcher*** is not applicable to the fact situation in this action.
- ii) As *per* section 5 of the ***Works, Services and Transportation Act*** SNL 1995, c W-12, the Province is the owner of the highway system across the island of Newfoundland. Moose that wander onto the highway system are not *escaping* from Crown land but simply moving from one area of the Province to another.
- iii) The Province is not the keeper of the moose that inhabit the island of Newfoundland.
- iv) The Province denies that the so-called release of moose into the wilds of insular Newfoundland constitutes an *escape* from the Province's control. Moose that were *released* by the Province are, by definition, not *escaping* but are *ferae naturae*.

12. As to paragraph 20, while the Province admits that the principle of strict liability is not limited to actions between adjoining landowners, for the reasons outlined above in paragraph 11, the Province repeats that the principles of strict liability are inapplicable to the fact situation giving rise to this action.

13. As to paragraph 21 of the Amended Statement of Claim the Province acknowledges that when an interference exists to the unimpeded use of

the highway a public nuisance may occur but denies that a public nuisance has occurred in this case.

14. As to paragraph 22 of the Amended Statement of Claim the Province states that:

- i) In the tort of public nuisance, when the nuisance complained of is not the underlying act (the introduction of moose on the island) but an inadvertent result (moose obstructing the highway) of the underlying act no recovery can be made unless the underlying act is found to be negligent.
- ii) The Province denies that it was negligent in introducing moose to the island of Newfoundland.
- iii) The Province otherwise denies paragraph 22 of the Statement of Claim.

15. The Province denies paragraph 23 of the Amended Statement of Claim and in particular states:

- i) As to paragraph 23(a) the Province repeats that the potential for moose-vehicle collisions on the highway system of Newfoundland was not foreseeable at the time of the introduction of moose to the island.
- ii) As to paragraph 23(c) the Province states that while the effectiveness of the measures described therein remains unclear, a pilot project has been launched by the Province to test the effectiveness of certain measures, including fencing along portions of the highway.
- iii) As to paragraphs 23(i) and (j) the Province states that decisions concerning specific mitigation measures such as introducing a spring cull or driver awareness programs are policy decisions that are made based on the allocation of finite and limited resources and are therefore not open to judicial scrutiny.

16. In the alternative, with respect to paragraph 23 of the Amended Statement of Claim, if the Province was found negligent, the Province submits that to varying degrees, the individual Plaintiffs, through their own negligence, contributed to the cause of their injuries, the details of which would need to be determined on an individual basis, but would include, *inter alia*:

- i) Failure to keep a proper lookout while operating a motor vehicle.
- ii) Failure to exercise due care and attention while operating a motor vehicle.
- iii) Failure to maintain a speed appropriate for the circumstances which would allow a motorist to stop or manoeuvre their motor vehicle upon seeing a moose.
- iv) Failure to properly secure seatbelts.
- v) Failure to comply with the statutory rules imposed by the **Highway Traffic Act**, RSNL 1990, c. H-3.
- vi) Any other contributory negligence on the part of the Plaintiffs that is revealed in evidence.

17. The Province denies paragraph 24 of the Amended Statement of Claim. In particular the Province states that:

- i) The decisions surrounding moose management (including the decision to introduce moose to the island in 1904) are pure policy decisions based on the allocation of finite and limited resources.
- ii) Decisions of policy such as these are not subject to judicial review and cannot give rise to a duty of care as understood in the law of negligence.
- iii) The Province denies that these policies were in any way made in bad faith or are so patently unreasonable as to exceed proper governmental discretion.

- iv) Under a model first adopted in the 1950s, moose populations in the Province are managed on the principle of maximum sustainable yield; the maximum number at which a population can be harvested without undue long-term damage to the population.
- v) This management strategy is carried out using careful scientific data because of the significant economic and social importance of moose to thousands of residents who rely on the moose for sustenance and/or commercial livelihood.
- vi) As for the issue of moose-vehicle collisions, the Province is committed to helping prevent these accidents through initiatives such as:
 - a) Public awareness campaigns including radio advertisements, billboards, Moose Alert radio hotline, television advertisements such as NTV's Be Moose Aware Advertisements, placemats distributed through restaurants along the Trans Canada Highway and other print media advertisements.
 - b) Enhanced signage along the highway.
 - c) Increased brush clearing, which increases drivers' ability to spot objects coming close to the highway, including but not limited to moose.
 - d) Population monitoring.
 - e) Improved reporting and evaluation including cross jurisdictional scans on the effectiveness of certain mitigative measures.
 - f) Increased new resident hunting licenses, the introduction of Sunday hunting and an extension of the hunting season on the island.
 - g) Supporting the Federal Government's decision to reduce the number of moose in Federal parks within the Province.

- vii) The Province states that these initiatives show a commitment from the Province to addressing the issue of moose-vehicle collisions.
- viii) The Province further states that these initiatives are policy decisions based on the allocation of finite and limited resources that cannot give rise to private liability in tort.
- ix) In the alternative, if any of the decisions concerning the introduction of moose to the island of Newfoundland or subsequent management decisions regarding the moose are found to be operational (as defined in law) the Province denies that it was negligent in carrying out these decisions.

18. As to paragraph 25 of the Amended Statement of Claim, the Province denies that moose-vehicle collisions are acts of government and further denies that it is responsible for the damage caused to the Plaintiffs.

19. The Province acknowledges paragraphs 26 of the Amended Statement of Claim.

20. The Province acknowledges that this class action is taken on behalf of close family members who have suffered a loss of care, guidance and companionship but denies that it is responsible for this loss.

21. The Province denies paragraph 28 of the Amended Statement of Claim.

22. The Province acknowledges paragraph 29 of the Amended Statement of Claim.
23. The Province denies paragraph 30 of the Amended Statement of Claim.
24. The Province further denies that the Plaintiffs are entitled to the relief sought under paragraph 31 of the Amended Statement of Claim.
25. The Province pleads and relies, *inter alia*, upon the provisions and regulations of:
 - i) The **Limitations Act** SNL 1995, c L-16.1;
 - ii) The **Contributory Negligence Act** RSNL 1990, c C-33;
 - iii) The **Proceedings Against the Crown Act** RSNL 1990, c P-26; and,
 - iv) The **Highway Traffic Act** RSNL 1990, c. H-3.
25. As to the Amended Statement of Claim as a whole the Province states:
 - i) The Province introduced 4-5 moose to the island in 1904 in order to provide a sustainable food source for the residents of the island of Newfoundland. There was no highway system in 1904 and the potential for moose-vehicle collisions was not apparent or foreseeable.
 - ii) The traditional tort of strict liability as outlined in the case of **Rylands v. Fletcher** is not applicable to the fact situation in this action.
 - iii) In the tort of public nuisance, when the nuisance complained of is not the underlying act (the introduction of moose on the island) but an inadvertent result (moose obstructing the

highway) of the underlying act no recovery can be made unless the underlying act is found to be negligent.

- iv) The decisions surrounding moose management (including the decision to introduce moose to the island) are pure policy decisions based on the allocation of finite and limited resources and cannot give rise to a duty of care as understood in the law of negligence.
- v) The Province denies that these policies were in any way made in bad faith or are so patently unreasonable as to exceed proper governmental discretion.
- vi) In the alternative, if any of the decisions concerning the introduction of moose to the island of Newfoundland, or subsequent management decisions regarding the moose, are found to be operational (as defined in law) the Province denies that it is/was negligent in carrying out these decisions.
- vii) In the further alternative if the Province was found negligent, the Province submits that to varying degrees, the individual Plaintiffs, through their own negligence, contributed to the cause of their injuries.

26. The Province seeks the dismissal of this Claim with costs and such other relief as this Honorable Court deems just.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador,
this 20th day of October, 2011.



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