

ONTARIO
SUPERIOR COURT OF JUSTICE
TORONTO SMALL CLAIMS

BETWEEN:

DOUGLAS COOMBY

Plaintiff

-and-

C-TOW MARINE ASSISTANCE LTD. carrying on business as C-TOW
TORONTO and MICHAEL McROBB



Heard: October 1, 2018

Judgment Released: NOV 30 2018

Court file No. SC-17-536-00

Counsel: Marek Z. Tufman LL.B, C.S. for the Plaintiff

Don Schofield Legal Representative for the Defendants

JUDGMENT

[1] **C.M. BUIE DJ** - On August 20, 2016, Douglas Coomby purchased a second hand motor boat, a 1989 Sunstation Rocket 2400, (VIN SP 47323J8989) for the sum of \$15,000.00

[2] Mr. Coomby and his family on the day of purchase decided to motor about Lake Ontario. Unfortunately, during their outing, the motor boat was damaged when it was driven into a floating log.

PLEADINGS

[3] Douglas Coomby seeks the sum of \$25,000 and alleges the following:

1. he retained the defendants to collect the motor boat which was beached on the shore;
2. the defendants undertook to tow the motor boat to a marina during which the motor boat sank.

3. the defendants are negligent:

- a. "they failed to properly secure the boat";
- b. "they failed to safely tow the boat";
- c. "they failed to make certain the boat would not sink";
- d. "they failed to exercise proper skill and judgment in the area of their purported expertise" and
- e. "they failed to advise the plaintiff that they lacked such knowledge of expertise"

4. the defendants breached its contract with the plaintiff.

5. the defendants "outrageously abandoned the plaintiff although they knew that the plaintiff relied upon their advertised skill and expertise. Such outrage ought to be penalized by this Honourable Court by an award in favour of the plaintiff of punitive or exemplary damages."

[4] The defendants position is as follows:

1. the boat was not salvageable;
2. the defendants were not negligent;
3. the boat had to be removed from the shore line pursuant to the regulations of the City of Toronto and the Coast Guard Environmental Response.

TESTIMONY & FACTS

Douglas Coomby's Testimony

[5] Mr. Coomby's testimony is set out in the following paragraphs.

[6] He is 58 years of age and has his Ontario Boating Licence. He paid the sum of \$15,000 for the motor boat.¹

[7] During the first outing with his new motor boat, the drive shaft was damaged when the motor boat was driven into a floating log.

[8] Rather than waiting for the marine harbor police, he and his family decided to paddle the motor boat to the Scarborough Bluffs, beached it and tied it to a log. He does not believe that the boat had any holes nor was it taking on water.

[9] After doing so, not only did the marine police unit arrive, but also the regular police, the fire department and the paramedics.

¹ Exhibit 1

[10] He and his family were told that they could not remain on the beach with their motor boat and were assisted and escorted to the top of the bluff.

[11] The marine unit recommended and provided him with the defendants' telephone number.

[12] During the evening the weather turned from being a lovely sunny summer day to an evening of severe weather.

[13] It was not possible to retrieve the boat from the shore line that day. He and his wife returned to their home. The next morning, Sunday, as often happens with the passing of summer storms, it was a beautiful sunny day. He and his wife returned to the bluffs where they observed and filmed Michael McRobb² and his assistant readying the boat for transport.

[14] After he and his wife arrived at the Marina, he received a telephone call from Michael McRobb informing him that during the transport, the tow line had to be cut and that his motor boat had 'sunk'.

[15] The defendants did not return his phone calls regarding the "loss of his motor boat".

Michael McRobb's Testimony

[16] He has 10 years in marine towing and salvage. He is called upon by the Marine Police Unit.

[17] Whilst he was on Lake Ontario assisting other boaters who were in trouble, he received a telephone call and believes it was from a person associated with the marine unit who explained that a motor boat had been taking on water and was now beached upon the shore line.

[18] The normal procedure is that boaters remain with their boat until the marine unit arrives. However, in this case, the motor boat had been paddled to the rocky shore line by the Coombys. Beaching a motor boat on a rocky shore line may result in damage to the motor boat due to wave action.

[19] He indicated to Mr. Coomby that he would try to remove and tow it to the closest marina.

[20] It was a busy day on the water and he was unable to send Darren, his employee, until later that evening. He was concerned about damage being done to the boat if it was left exposed to the elements and the waves. However, the weather had deteriorated, a storm had moved into the area and waves were crashing onto the shore making it impossible, not only to remove the boat, but even swim to the shore line to properly secure the motor boat.

[21] The motor boat was required to be moved from the shore line pursuant to government regulations.

² Exhibit 2 - video recording

[22] He recalls advising Mr. Coomby as to the cost of removing the motor boat and that Mr. Coomby was required to remove the motor boat from the shore line as quickly as possible. He recalls Mr. Coomby speaking against the amount.

[23] He and his employee returned on Sunday. He and his employee discovered holes in the boat. He informed Mr. Coomby that it could take a second day to remove the boat and the price would reflect the amount of work. His rates are posted on his website. An agreement was not reached as to price, but he recalls that Mr. Coomby wanted it removed.

[24] Motor boats built since 1974 generally do not sink due to the construction of the ballast unless the ballast has been damaged.

[25] He and Darren "parcel wrapped" the motor boat with the floatation airbags. His tow boat has a pump with a generator which is designed to remove water so as to keep the boat afloat. But given the design of the motor boat, the only place to secure the line, was to the drive shaft.

[26] As the boat was being towed, the drive shaft 'dis attached' and the straps which were attached at the stern slid forward. In order to prevent his tow boat not being dragged to the bottom of the lake, he had to detach the line. Upon doing so, despite the floatation air bags, the motor boat sunk.

[27] Given his conversations with Mr. Coomby, he did not expect to be paid, thus he did not send an invoice.

DISPOSITION

[28] There are no grounds for bringing an action against Michael McRobb. The claim against Mr. McRobb is dismissed. However, since Mr. McRobb had to be present in court, as he is the President of defendant C-Tow Marine Assistance Ltd., I shall not award costs.

[29] The burden of proof is on Mr. Coomby.

[30] It is up to the parties to create their own contract. If the parties have no express or implied agreement on the essential elements/terms of the contract, then I must conclude that there is no contract. The court should not create a contract for the parties.

[31] There was no evidence as to consideration. Furthermore, there was no evidence before me of an implied or explicit term that the defendants would safely deliver the motor boat to the marina and the consequences, if the same did not occur.

[32] I dismiss the contractual aspect of this case.

[33] It is clear from the evidence that the defendants were unable to collect the motor boat prior to night fall due to prior commitments. The defendants were further prevented from doing so after night fall due to weather conditions.

[34] I accept that the plaintiff was very displeased with the service which he was receiving as he anxiously waited for his motor boat to be towed to a marina, but, he chose not to hire another company to rescue/tow his motor boat.

[35] Counsel for the Plaintiff provided me with case of Browne v Dunn³. I find that the same does not apply.

[36] While I accept that is very clear that Mr. Coomby and Mr. McRobb have differing versions of what occurred and that their emotions are involved, to wit, the Coombys belief and accusation that Mr. McRobb's employee was stealing from their motor boat, a belief, which was not verified by Exhibit 2, my decision must be based in law.

[37] Having found that there was not a contract between the parties, I now turn to whether the a claim in negligence has been established.

[38] The legal elements are:

1. Did the defendant owe a duty of care to the plaintiff?
2. What is the standard of care which was owed?
3. Did the defendant breach that duty?
4. If so, did the plaintiff suffer any damage resulting from the breach of the duty?
5. How to I determine the monetary amount?

[39] Mr. Coomby and his wife, who also testified, stated that there were no holes in the motor boat. However, they did not explain, given Mr. Coomby's boating training, why they did not follow the cardinal rule which is stay with the boat and wait for assistance from other boaters or the marine unit if the boat was not taking on water.

[40] Neither of the Coomby's were able to visually examine the motor boat following the storm thus they would not know the state of the motor boat having been battered about by waves during the storm. However, Mr. McRobb did examine those parts of the motor boat which were visible to his naked eye given that the boat was beached.

[41] Mr. McRobb testified that based upon his visual inspection he felt it was transportable, but, out of caution decided to wrap the boat in a floating device/airbag. Given that the day was sunny, the water was calm and that the motor boat needed to be removed he made the decision to tow the motor boat.

[42] I do find that Mr. McRobb owed a duty of care to the plaintiff. He undertook to transport the boat and was responsible for "wrapping" the floating device/airbag around the boat.

[43] However, there was no evidence provided by the plaintiff, Mr. Coomby, to question, let alone prove that Mr. McRobb breached his duty. The only un-contradicted evidence was that of

³ 1893 Court of Appeal

Mr. McRobb. Mr. Comby did not provide any evidence, whether it be an expert's report or the testimony of an expert to counter the testimony of Mr. McRobb and to prove that Mr. McRobb's actions or lack of actions caused the motor boat to sink.

[44] Even if I had found that the defendant C-Tow Marine Assistance Ltd. (C-Tow Toronto) was liable, the plaintiff failed to provide evidence on how damages could be calculated. Given that the motor boat was unable to stay afloat, to wit, it was unable to displace water, suggests that repairs were definitely needed. The motor boat was taking on water, thus more than the drive shaft had been damaged. The cost of those repairs or even the nature of those repairs was not dealt with by the plaintiff. Frankly, his \$15,000 motor boat was no longer worth \$15,000. The drive shaft was broken, the motor boat was taking on water to the extent that the floatation airbags were insufficient to keep the motor boat afloat.

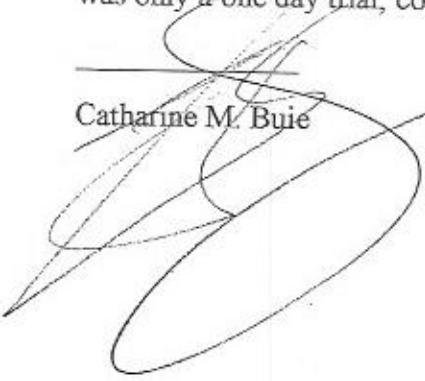
[45] Based on the evidence, I definitely do not find that this case merits an award of punitive or exemplary damages.

[46] I dismiss the plaintiff's action as against C-Tow Marine Assistance Ltd. (C-Tow Toronto) with costs.

COSTS

[47] I am not aware of whether any Offers to Settle were served by the defendant C-Tow Marine Assistance Ltd. (C-Tow Toronto). But, even if the same had been served, given that this was only a one day trial, costs are fixed at \$3,750 plus disbursements of \$200.00

Catharine M. Buie



NOV 30 2018