Citation: Nerbas v Manitoba, 2019 MBCA 85 Date: 20190821
Docket: AI18-30-09030

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

GENE ARTHUR NERBAS, CYNTHIA MARIE NERBAS, NERBAS BROS. INC., RICHARD WILLIAM KEAY, TRISTAN NEIL KOCHANOWSKI, CINDY KOCHANOWSKI, GARY KOCHANOWSKI, ROYSTON FARMS LTD., RONALD WITTY, KEAY FARMS LTD., ARRON NERBAS, AMBER NERBAS and SHANE NERBAS	)	***S. D. Boyd*** *and* ***J. R. Koch*** *for the Appellants/ Respondents by Cross Appeal*
(Plaintiffs) Respondents/Appellants by Cross Appeal	)	***K. T. Williams*** *and* ***E. J. B. Day*** *for the Respondents/ Appellants by Cross Appeal*
- and -	)	
THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA and THE PROVINCE OF MANITOBA	)	*Appeal heard:* ***April 24, 2019***
(Defendants) Appellants/Respondents by Cross Appeal	)	*Judgment delivered:* ***August 21, 2019***

On appeal from 2017 MBQB 206

MAINELLA JA

Introduction

[1] Seasonal flooding is a risk in the Assiniboine Valley. The Shellmouth Dam (the dam), located near the town of Russell, Manitoba, was

built to mitigate this flooding risk, but now also serves other interests. Litigation over the dam's operation gives rise in this appeal and cross appeal to a limitations issue and a question as to the calculation of damages when flooding was caused by both natural and man-made (i.e., artificial) reasons.

[2] The backdrop to the appeals is that, for many years, the plaintiffs have farmed low-lying lands near and downstream of the dam. Prior to 2006, with the exception of 1995, the plaintiffs suffered little flooding damage. In 2006 and 2007 and in 2010 and 2011, the plaintiffs' lands were flooded. While there was no flooding in 2008 and 2009, saturation of the ground from the 2006 and 2007 flooding affected farming operations.

[3] On May 25, 2011, an action in private nuisance was commenced for damages resulting from the flooding for the period from 2006 to 2011. The plaintiffs claimed the defendants had caused a continuing nuisance from the construction and operation of the dam (which includes all related structures—reservoir, spillways and conduits). In dispute was the extent to which the alleged nuisance exacerbated natural flooding conditions.

[4] After a lengthy trial, the judge found the defendants liable for a nuisance created by the operation of the dam from 2006 to 2011. She awarded damages in favour of Nerbas Bros. Inc. (Nerbas Bros.), Keay Farms Ltd. (Keay Farms) and Royston Farms Ltd. (Royston Farms) in an amount of approximately 20 per cent of what the plaintiffs claimed.

[5] In the defendants' appeal, it is alleged that the judge erred in not finding that damages claimed for 2006 to 2008 were statute barred by section 21(1) of *The Public Officers Act*, CCSM c P230 (the *POA*). In the plaintiffs' cross appeal, the damage award is challenged on the basis that,

because an allocation between damage caused by the operation of the dam and that which would have occurred naturally was, they argue, "not possible" in law, the defendants are responsible for the whole of the flooding damage.

[6] For the following reasons, I would dismiss the appeal and the cross appeal.

Background

[7] The dam and its approximately 60-kilometer-long reservoir have been in operation since 1971. The original purpose of the dam was flood control for Winnipeg after major flooding in 1950. Part of the spring snowmelt and rainfall from the watershed is diverted by the dam into the reservoir, stored there and then released later in the year back into the Assiniboine River in a controlled fashion when river flows have naturally subsided. This helps protect lands downstream from flood damage that might otherwise occur due to the natural consequences of the unregulated flow of the river.

[8] Over time, the operational purposes of the dam have been expanded to serve economic, environmental and social objectives beyond flood control (see sections 5.2(1)-5.2(2) of *The Water Resources Administration Act*, CCSM c W70 (the *WRAA*)). The *WRAA* has formalised a process of consultation with various stakeholders in the Assiniboine Valley to develop operating guidelines for the dam. These guidelines attempt to balance competing interests. Water is retained in the reservoir to support local businesses, to provide a supply for Brandon and vegetable growers near Portage la Prairie, to protect the fish habitat in the reservoir and to support the recreational needs of cottage owners. The consequence of keeping more water in the reservoir year-round is that the dam's effectiveness to flood control in

years of significantly wet climate conditions is lessened, thereby increasing flooding risks to vulnerable lands, such as those of the plaintiffs.

[9] In operating the dam, the minister responsible for the *WRAA* "must have regard to, but is not bound by, the guidelines" that have been approved (section 5.1(2) of the *WRAA*). Ultimately, the dam is to be operated in such fashion as is deemed "necessary or expedient in the public interest" (section 5(a) of the *WRAA*). Unlike as is the case in Saskatchewan, the *WRAA* lacks a statutory immunity provision for claims against the consequences of good-faith operation of the dam (see *Deren v SaskPower*, 2017 SKCA 104). To the contrary, the *WRAA* allows for persons affected by artificial flooding to have the option of seeking compensation from the government through either an administrative process or by commencing court proceedings (see *Her Majesty the Queen in Right of the Province of Manitoba v Kochanowski et al*, 2018 MBCA 2 at paras 5-6).

[10] Much of the trial was spent with hydraulic experts testifying about the timing, duration, magnitude and effects of the artificial flooding of the plaintiffs' lands as a result of the operation of the dam given the operating guidelines, climate conditions and topography. It is undisputed that 2006, 2007, 2010 and 2011 were years of significant natural flooding on the Assiniboine River. In particular, 2011 was exceptional and was described by one expert witness as a once in "a 300-year event".

[11] The term "artificial flooding" has a statutory definition in the *WRAA* (section 1) to mean, in effect, flooding of the Assiniboine River caused by operation of the dam whereby the river exceeds its unregulated level at the time of the event. It was alleged by the plaintiffs that the losses suffered by

the purported nuisance were more than just the duration of the artificial flooding on the plaintiffs' lands, but also the lasting effects of the flooding on the farming operations of Nerbas Bros., Keay Farms and Royston Farms.

[12] The judge determined that the flooding damage was caused by both natural flood conditions, such as climate, as well as artificially by the operation of the dam. She held the defendants liable in nuisance "for the incremental increase caused by artificial flooding" (at para 152). She stated that "[t]here existed a contribution [by the operation of the dam] to the experienced flooding and to the 'lingering wet'" (*ibid*) of sufficient substance and unreasonableness to be an actionable nuisance. Given the limitations of the expert evidence, she was not prepared to say precisely how much the "incremental increase" (at para 156) was other than to say the "period of artificial flooding would, in all likelihood, extend up to 14 days during certain flood events" (at para 135). She summarised her decision this way (at paras 155-56):

> I am satisfied that private nuisance has transpired in this case as damage has been occasioned by the operation of the dam despite other factors such as climatic conditions playing a role. Additionally, even though the operation of the dam is in the public's benefit, it would be unreasonable to require the plaintiffs to suffer the nuisance without compensation.
>
> I have concluded that the defendants are responsible for the incremental increase in damage that has been caused. Natural flood conditions were worsened, to a degree, by artificial flooding, albeit recognizing that the valley was, in some years, spared from more significant flood events by virtue of the operation of the dam.

[13] The judge's finding of nuisance and the basis on which it was made is not before this Court for consideration.

[14] The judge stated that damages for her nuisance finding should be calculated in the following way (at para 177):

> I am satisfied that damages should be awarded for the incremental flooding that would not have occurred but for the existence and operation of the dam. The losses that are attributable to natural or unregulated flooding are not compensable as those losses would have transpired in any event. Accordingly, it is necessary to determine and provide a damage amount for artificial flooding, or in the circumstances of enhanced saturation of lands in non-flood years (2008 and 2009).

[15] The judge was critical of the evidence put before her on the calculation of damages. She was of the view that the plaintiffs' approach simply calculated the loss suffered by a hypothetical of what may have occurred had there been no flooding with no recognition of the natural flooding and its lasting effects which, in the case of 2011, was so significant she said that it "would have eradicated, in all probability, any opportunity for productivity from the plaintiffs' lands with or without the operation of the dam" (at para 168). While the defendants did attempt to quantify the losses from the artificial flooding and its lasting effects, the approach was considered by the judge to be "unrealistic" (at para 177). It was imprecise; used figures from the overall operations of Nerbas Bros., Keay Farms and Royston Farms that were not relevant; and de-emphasised the consequences of artificial flooding in favour of the consequences of the natural flooding.

[16] Ultimately, the judge determined that, because of the challenges in valuing how much of the flooding damage was caused by natural flooding conditions as opposed to artificial flooding, damages would be awarded on a "'ballpark' basis" (at para 175) except in relation to 2011 where, as previously

stated, she was satisfied that the scale of the natural flooding was so significant that no farming production could have occurred regardless of the nuisance.

[17] The figures the judge arrived at—$275,000 for Nerbas Bros., $45,000 for Keay Farms and $58,000 for Royston Farms—were based on her assessment of all of the evidence as to what was the most "fair and reasonable approach to the damage claim on a foundational basis, less the monies received from assistance programs" (at para 181). She stated (at para 185):

> As indicated, the damage awards are premised on losses attributed only to artificial flooding. There are many variables that will negatively affect the growing of crops in any given year such as those relating to climate and insect infestation. The damages as awarded reflect losses attributable to artificial flooding and recognize the enhancement of saturation that may have transpired, as well as the timing factor for flood inundation.

Limitations Issue—Defendants' Appeal

Introduction

[18] The law of limitations is governed by *The Limitation of Actions Act*, CCSM c L150 (the *LAA*). Unless a defendant can establish that the period within which an action must be commenced is subject to a separate statutory scheme, such as section 21(1) of the *POA*, the rules set by the *LAA* apply (see section 4 of the *LAA*). The defendants agree that, if section 21(1) of the *POA* does not apply, none of the plaintiffs' claim is statute barred.

[19] Section 21(1) of the *POA* provides:

> **Limitation of actions against public officials**
> **21(1)** No action, prosecution, or other proceedings lies or shall be instituted against a person for an act done in pursuance or

> execution or intended execution of a statute or of a rule or regulation made thereunder, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of the statute, rule, regulation, duty, or authority, unless it is commenced within two years next after the act, neglect, or default complained of, or in case of continuance of injury or damage, within two years next after the ceasing thereof.

[20] Two limitations arguments were raised with the judge. The first issue was a threshold question of whether, by virtue of section 4(4) of *The Proceedings Against the Crown Act*, CCSM c P140, the Crown itself can rely on section 21(1) of the *POA*. The second issue was whether, even if section 21(1) were available to the defendants, were its strict requirements met? The judge found that section 21(1) of the *POA* did not apply (at para 190):

> I am satisfied, after a review of the authorities, that a six-year limitation period is applicable. While the evaluation of the claim may be through the vehicle of valuating the loss of crops that the lands would otherwise have produced, the character of the claim has not been altered. The nuisance constituted an interference with the plaintiffs' use of their lands that was both substantial and unreasonable. Further, in this instance, the "chattels" were never realized because of flooding to the plaintiffs' properties.

Standard of Review

[21] The only issue that must be decided to dispose of the defendants' appeal is whether section 21(1) of the *POA* applies where there is a "continuance of injury or damage" but the action is commenced prior to the cessation thereof. Because this is purely a legal issue that can be readily extricated from the factual context, the standard of review is correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 31, 36).

Discussion and Conclusion

[22] Section 21 of the *POA* is an example of the anachronistic and complicated nature of the current state of limitations law in Manitoba. The provision is of considerable antiquity as it is based on a Victorian statute (*Public Authorities Protection Act 1893* (UK), 56 & 57 Vict, c 61, section 1(a) (the *PAPA 1893*)), that was, after some modification in 1939 (*Limitation Act 1939* (UK), 2 & 3 Geo VI, c 21, section 2(1)), ultimately repealed in 1954 (*Law Reform (Limitation of Actions, &c) Act 1954* (UK), 2 & 3 Eliz II, c 36, section 1). This English law has been described as having "a somewhat inglorious life" because it gave what was perceived as an unfair advantage to public authorities to avoid liability, which private defendants could not also enjoy, and the arcane language of the law made it difficult to apply in practice (*Durity v Attorney General of Trinidad and Tobago (Trinidad and Tobago)*, [2002] UKPC 20 at para 20).

[23] The Legislative Assembly enacted the equivalent of section 1(a) of the *PAPA 1893* in 1934 (*An Act to amend "The Manitoba Public Officers Act"*, SM 1934, c 36, section 1). The wording of the Manitoba law essentially mirrored the key parts of section 1(a) of the *PAPA 1893*. The only change of significance since 1934 has been to raise the period from the original six months to the current two years under section 21(1) of the *POA*.

[24] A public officer may rely on section 21(1) of the *POA* in two situations: (1) where the plaintiff fails to commence the proceeding "within two years next after the act, neglect, or default complained of"; or (2) in the case of "continuance of injury or damage", where the plaintiff fails to commence the proceeding "within two years next after the ceasing thereof."

[25] The term "continuance of injury or damage" means continuance of the act which caused the damage as opposed to merely continuance of the damage itself (see *Carey v Metropolitan Borough of Bermondsey* (1903), 20 TLR 2 at 3 (CA (Eng)); *Freeborn v Leeming* (1925), [1926] 1 KB 160 (CA (Eng)); and *Joyce et al v Government of Manitoba*, 2018 MBCA 80 at paras 67-70, leave to appeal to SCC refused, 38363 (28 March 2019)).

[26] Where the act, neglect or default continues, then section 21(1) of the *POA* does not bar a claim until "two years next after the ceasing thereof" (see *Huyton and Roby Gas Company v Liverpool Corporation* (1925), [1926] 1 KB 146 at 153, 155, 157-58 (CA (Eng)); *Ihnat v Jenkins* (1972), 29 DLR (3d) 137 at 140-41 (Ont CA); and *Fire v Longtin*, 1989 CarswellOnt 376 at paras 59-60 (SC H Ct J)).

[27] The judge's reasons are brief on the limitations issue and do not explain why section 21(1) of the *POA* did not apply and "a six-year limitation period [was] applicable" (at para 190). Nevertheless, she came to the correct result. It is undisputed that the act that created the nuisance, the operation of the dam, was not a discrete event; it continued. The defendants put forward no argument or authority that satisfies me that the plaintiffs' nuisance claim would not be a "case of continuance of injury or damage" within the meaning of section 21(1) of the *POA*. The nuisance went on for five years and was never abated right up until when the action was commenced.

[28] Simply put, section 21(1) of the *POA* does not apply here because the plaintiffs' action was commenced before the ceasing of the continuing act (see *Harrington (Earl of) v Derby Corporation* (1904), [1905] 1 ChD 205 at 227-28 (Eng); *Barber v Calvert* (1971), 17 DLR (3d) 695 at 703 (Man CA);

and *Schenck v The Queen in Right of Ontario (No 2)* (1982), 142 DLR (3d) 261 at 266 (Ont H Ct J), aff'd (1984), 15 DLR (4th) 320 (Ont CA), aff'd [1987] 2 SCR 289).

[29] I would be remiss not to make one final comment before turning to the cross appeal. Undoubtedly, the law of limitations is a core feature of a healthy and properly functioning civil justice system. It regulates how the values of fairness and finality should be rationally reconciled. Such laws require clear and careful drafting so that they are comprehensible, not just by the legally trained, but by the public generally. This is particularly important to ensure accountability where litigation involves an allegation that damage has been caused by a wrongful act or omission of a public servant.

[30] In 1940, the language of section 1(a) of the *PAPA 1893* was described by legal commentators of the day as "notoriously unsatisfactory" (CHS Preston & GH Newsom, *Limitation of Actions* (London, UK: Solicitors' Law Stationery Society, 1940) at 297). Estey J, in *Berardinelli v Ontario Housing Corp*, [1979] 1 SCR 275, echoed those comments when he said of the similarly worded Ontario version of the law, "There is little doubt about the presence of ambiguity and uncertainty of meaning in the section" (at p 280). Ontario did away with the law as of January 1, 2004 (see the *Limitations Act, 2002*, SO 2002, c 24, Schedule B, section 25).

[31] Unfortunately, Manitoba continues, because of section 21(1) of the *POA*, to be one of a dwindling number of jurisdictions where the torturous language of section 1(a) of the *PAPA 1893* lives on to cause mischief to the fair and proportional administration of civil justice. Section 21(1) is difficult to understand, difficult to apply uniformly in practice and is based on a

controversial premise of different rules existing for claims involving the same legal injury. Like other aspects of the law of limitations in this province, section 21(1) of the *POA* is outdated and "cries out for reform" (*St Boniface General Hospital v PCL Constructors of Canada Inc et al*, 2019 MBCA 57 at para 41).

Damages Issue—Plaintiffs' Cross Appeal

Introduction

[32] The cross appeal turns on the reasonableness of the judge's application of the principle that, where a defendant contributes to flooding damage, even if some damage was naturally inevitable, the defendant is liable for the whole of the damage suffered unless the defendant can establish that there is a basis for apportionment (see *Kelley v Canadian Northern Railway Co*, [1950] 2 DLR 760 at 771 (BC CA); *Brown v Morden* (1958), 12 DLR (2d) 576 at 586 (Man QB); *Lee et al v Rural Municipality of Arthur* (1964), 46 DLR (2d) 448 at 468 (Man QB), rev'd on other grounds, (1965), 52 DLR (2d) 263 (Man CA); and *Bjarnarson v Manitoba*, 1984 CarswellMan 97 at para 46 (QB), aff'd 1985 CarswellMan 449 at para 51 (CA)).

Standard of Review

[33] The standard of review of a damages award was described this way in *Dansereau v The City of Winnipeg*, 2014 MBCA 18 (at para 6):

> Deference is owed to a judge's award of damages absent the judge making an error in law or principle, coming to a conclusion without evidence, or making an award that was wholly erroneous by being either inordinately low or inordinately high in the circumstances (*Woelk et al. v. Halvorson*, [1980] 2 S.C.R. 430 at

> 435-36). In arriving at a damages award, a judge's assessment of the evidence, or proportioning of damages, is a question of fact that cannot be set aside on appeal absent demonstration of palpable and overriding error (*K.L.B. v. British Columbia*, 2003 SCC 51 at para. 62, [2003] 2 S.C.R. 403; and *M.B. v. British Columbia*, 2003 SCC 53 at para. 54, [2003] 2 S.C.R. 477).

See also *Lantin et al v Seven Oaks General Hospital*, 2018 MBCA 57 at paras 18-20.

Discussion and Conclusion

[34] Calculation of damage awards in flooding cases is challenging; however, as Scott CJM noted in *Marynowsky v Stuartburn (District)*, 1994 CarswellMan 93 (CA), "the court must do the best it can and at times, of necessity, be somewhat arbitrary in its conclusion" (at para 19). See also *Vickar v MJ Roofing & Supply Ltd*, 2016 MBCA 77 at paras 52-53.

[35] The principle discussed in *Kelley* and subsequent cases arises where it is impossible for a trial judge to apportion between natural and artificial flood damage because of the absence of evidence to do so, not merely where the evidence makes apportionment difficult (see *Nixon v Rural Municipality of Griffin, No 66*, 1978 CarswellSask 435 at paras 33-34 (CA)). Care must be taken in not too quickly excusing a plaintiff from proving damages or compensating in excess of the actual loss suffered as a result of the tortious conduct.

[36] The plaintiffs' submission that the judge was unable to "make an allocation as between artificial flooding and unregulated flooding" and could not "make a determination of the percentage to be attributed to each" is unpersuasive. She found that the operation of the dam did not cause all of the

flooding; rather, the artificial flooding caused by the nuisance extended flood events by "up to 14 days" (at para 135). This aggravated saturation of the land. In the case of 2011, she concluded no compensation for artificial flooding was appropriate because no farming operations, for which complaint is made, could have occurred in that year given the natural flooding. While these findings do not have mathematical qualities, conceptually, they provide a reasonable and logical basis to approximate from, even if the judge had to engage in a degree of guesswork with her ultimate figures (see *Penvidic v International Nickel*, [1976] 1 SCR 267 at 279-80; and *Mellco Developments Ltd v Portage la Prairie (City)*, 2002 MBCA 125 at para 107).

[37] This is not a case like *Bjarnarson*, where Philp JA noted that the trial judge's finding was that the defendant "led no evidence quantifying the damage that could be attributed to it" (at para 51). Likewise, in *Kelley*, the operator of a dam put forward no evidence to attempt to apportion the damages flooding caused to the plaintiff's lands between climate conditions and the operation of a dam; rather, it tried to avoid liability altogether, claiming the flooding was, in general, "an act of God" (at p 768).

[38] Here, the judge heard extensive evidence on a number of issues which she highlighted in her reasons, such as the operation of the dam; whether the flooding might have been avoidable; the magnitude and duration of the flooding; what the duration would have been but for the artificial flooding; the farming operations and financial losses of Nerbas Bros., Keay Farms and Royston Farms; how the flooding of the land and the resulting drying periods impacted farming operations and crop selection in each year; the risks associated with growing certain crops on a flood plain; and non-flood risks associated with various crops.

[39] Ultimately, the judge did not come to the conclusion that valuing losses caused by the nuisance was impossible; she said it was "exceedingly difficult" (at para 175). That is a finding of fact which she was reasonably entitled to come to given the extensive record. Her damages award was admittedly an approximation, but she did the best she could in a reasoned way after giving thoughtful consideration to all of the relevant aforementioned factors arising from the evidence and the parties' submissions. This is the correct approach in a situation of an uncertainty of the measure of damages.

[40] In my view, there was an evidentiary basis for the judge to apportion damages in the way she did between the different causes of the flooding. I have not been convinced she made a palpable and overriding error and, therefore, her damage award should not be disturbed.

Disposition

[41] In the result, I would dismiss the appeal and the cross appeal, both without costs.

Mainella JA

I agree: Burnett JA

I agree: Pfuetzner JA