

1979 CarswellOnt 1588
Ontario Court of Appeal

Scarborough (Borough) v. **R.E.F. Homes** Ltd.

1979 CarswellOnt 1588, [1979] 1 A.C.W.S. 391,
[1979] O.J. No. 78, 10 C.E.L.R. 40, 9 M.P.L.R. 255

Corporation of the Borough of
Scarborough v. **R.E.F. Homes** Ltd.

Dubin J.A., Lacourciere J.A., Blair J.A.

Heard: April 4, 1979
Oral reasons: April 12, 1979
Docket: None given.

Counsel: H. Margles, for plaintiff - appellant
No **One** appearing, for defendant - respondent

Subject: Public; Environmental

Lacourciere J.A. (orally):

1 This is an appeal by the Corporation of the Borough of **Scarborough** from a judgment given in the County Court of the Judicial District of York whereby the appellant, as plaintiff, recovered the sum of \$900.00 as damages for the loss of three trees. On December 31, 1976, the respondent company, which was in the business of building **homes**, cut down three silver maple trees on a road allowance in the borough. Two of the trees had a diameter of 36 inches and the third tree had a diameter of 18 inches. The trial Judge drew the inference that the destruction of the trees was completely inadvertent, and indeed, the statement of claim alleged that the trees were cut down negligently.

2 No **one** appeared for the defendant company at the trial which proceeded as an assessment of damages, and although served with notice, it was not represented on the appeal. The plaintiff's evidence, supported by a survey, was that these very old trees were located within the road allowance of the Borough of **Scarborough**, but very close to the defendant's lot line and within a fence which encroached on the road allowance.

3 The normal measure of damages for a trespass causing physical harm to the land, such as felling grown trees, has traditionally been the diminution in the value of the land which is often calculated as the cost of replacing it to its

previous state. (See, McGregor on Damages (13th ed.) c. 32.) Admittedly, proving the diminution in the value of a road allowance by reason of the loss of trees is a very difficult task. The plaintiff's expert witnesses relied on a booklet entitled "Shade Tree Evaluation" prepared by "International Shade Tree Conference Incorporated" (June 1970 Revision) which provides a flexible formula for the evaluation of monetary loss based on the consideration of many factors such as size, kind, condition and location of the tree. The plaintiff's experts arrived at a total claim of \$12,069.60 based on an intrinsic value of \$10.00 per square inch of trunk cross-section with percentage allowances made for the different factors previously mentioned. The learned County Court Judge properly refused to accept the formula as a correct basis for calculating the appellant borough's damage in this case. He assessed the compensation awarded at \$300.00 per tree for the total loss of \$900.00.

4 We are all of the view that the state of the record was quite unsatisfactory and left the trial Judge with an extremely difficult appraisal of damages. The evidence with respect to the replacement cost was not seriously pursued. The only evidence in this regard, given by the borough's Assistant Director of Parks and Development, was that the cost of replacement would be probably \$400.00 for similar trees which would take considerable time to mature to be comparable in size to the trees destroyed. No doubt expert opinion evidence should have been called, in an attempt to translate into monetary loss the diminution of value of the road allowance. The fact that the appellant was content to claim its loss on the basis of the formula which it uses to compensate owners for trees standing on land expropriated for a road allowance should not limit the appellant to a nominal loss.

5 In our judgment, the municipality is, in a broad general sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large. While the diminution in value of the road allowance stands on a different footing than that of private land deprived of ornamental or shade trees, it is nevertheless a real and substantial loss. The appellant borough, as a responsible local government, spent a great deal of money in nurturing these trees to maturity, pruning and taking care of them over the years. No doubt, the restoration process will be long and costly. In the meantime, the road allowance has been reduced in monetary as well as aesthetic value. Although the evaluation method is said to be intended for use in evaluating trees in landscape designs as well as street planting, the criteria in the formula for the

compensation of private owners suffering loss of trees cannot be adopted in this case because the loss to a municipality is quite different. The diminution in value of a road allowance, which normally is not marketable land, must necessarily differ from that of privately owned, landscaped property, even if the trees on both properties are intrinsically similar. No such distinction is made by the horticultural experts who prepared the formula, or by the experts at trial whose opinion was based on it. No argument was addressed to us as to how **one** assesses damages for the loss to a municipality of the intrinsic or environmental value of trees which have been destroyed; therefore consideration of the compensability or calculation of that element of damage must be left to be determined in an appropriate case.

6 We are satisfied that the learned trial Judge correctly rejected the formula which may be appropriate,

when supported by expert evidence, in the calculation of the loss of ornamental shade trees on private residential, commercial or industrial property. In our view, however, the appellant has suffered a greater loss than the mere replacement value which appears to have been assessed at trial. The difficulty presented in the appraisal of such damages should not preclude a Court from attempting it, even though the record is unsatisfactory. On the evidence before us, we assess the damages of the appellant at \$1,500.00 for the loss of each of the two larger trees and \$1,000.00 for the 18 inch tree, for a total assessment of \$4,000.00. The appeal should be allowed and the judgment below set aside. Judgment is entered in favour of the plaintiff for the sum of \$4,000.00 and costs. The appellant should recover the costs of the appeal.

7 *Appeal allowed; order accordingly.*