CITATION: Steadman v. Corporation of the County of Lambton, 2015 ONSC 101
COURT FILE NO.: 5634/09 (Sarnia)
DATE: 20150116

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Joseph Maxwell Steadman, Evelyn Elizabeth Steadman Plaintiffs	Robert B. Gray, for the Plaintiffs
– and –	
The Corporation Of the County of Lambton Defendant	Jennifer S. Stirton, for the Defendant
	HEARD: April 22, 23, 24, 25, 28, 29, 30, May 1, 2, June 4, 5 and 16 2014

REASONS FOR JUDGMENT

CAREY J:

Overview

[1] The plaintiffs have brought an action in negligence and nuisance against the County of Lambton ("the County") for damage to the crops on their farm as a result of the defendant municipality's application of de-icing materials (road salt) during its winter road clearing operations. At trial, the claim in negligence has not been pursued. They allege that these materials contain sodium and chloride and that as a result of the road clearing of Nauvoo Rd. by the defendant, a private nuisance was created on the plaintiffs' land which has caused diminution of the value of the property and a stigma to them. They claim that the salting of the roads have caused the plaintiffs to suffer substantial and unreasonable interference with the use of their lands reducing their crop yields and burdening them with contaminated and hence stigmatized land, the value of which has been reduced.

[2] The County relies on the social utility of the salting. They were required to maintain the roads by legislation and road salt is necessary to keep the roads safe for all, including the plaintiffs. They maintain that the plaintiffs have not proven causation between the salting of the road and the damage to the plaintiffs' crops. They contest the accuracy of the salt tests performed on behalf of the plaintiffs and suggest that the real culprit is poor drainage on the property. They assert that the plaintiffs have failed to mitigate their damages if they were caused by the defendant salting, as they took no steps to fence the property and restrict the wind's distribution of the salt, no steps to improve the drainage and could have used gypsum to mediate the effects of salt on their land. The damages claimed by the plaintiffs are disputed. They argue that the plaintiffs' crops had been reduced by salt damage is flawed. They further dispute that there has been any significant reduction in the value of the Steadman's property by reason of stigma.

Review of the Causation Evidence

[3] Mr. Steadman and his wife have been married for approximately 43 years. He has been a full-time farmer for all of his adult life and his wife, Evelyn, is a retired nurse. They moved onto the subject property following their marriage and by 1979 had paid off the mortgage initially assumed in Mr. Steadman's father's name, and became the owners on title of the property.

[4] Mr. Steadman gave evidence about the history of his farming operations over more than 40 years, including the ending of cattle raising and an overview of the topography and drainage of the property. He indicated that he first observed suspected crop damage in the mid to late 1990s and testified as to the steps he took to investigate and record his observations, as the damage spread easterly. He gave evidence of his successful adoption of a 'no till' approach to cultivation of his crops.

[5] He reviewed salt test results and presented a large number of pictures, taken over several years, of his wheat and soya crops and the damage he observed. He attributes that damage to the road salt used by the municipality on the road adjacent to his property. He testified that the easterly spread of the salt damage was consistent with the prevailing winter winds.

[6] He also had entered as evidence a video shown to the court, which was a compilation of videos taken of his property beginning in September 2007 through dates in 2008. It includes a date in December in which he recorded traffic on the partially snow covered road. It shows a passing truck that kicked up some snow that landed in the vicinity of the edge of the road and the beginning of his property.

[7] The video further records on March 24, 2009, an area described as white and a damaged area around the ridge of the hay field. He records an area in the middle of the farm where he says the most damage was done and which he describes as "white with salt" where the video shows an area of white coloured ground. This video (Exhibit 6) continues with numerous dates in 2009. It includes his commentary which describes white areas as "salt" and includes comments that it has been tested by taste and that it tastes like salt.

[8] He acknowledged that it was recommended to him that he apply gypsum in large amounts to his affected fields to neutralize any sodium or sodium chloride. He indicated he did not use gypsum because he did not wish to "deep till" his soil as recommended as he was concerned about the loss of topsoil. He felt the topsoil would not be much more than six inches deep. He was further concerned about tearing up drain tiles. He also indicated he would have to rent a deep tilling machine and tractors. He testified that most of the information he read about the use of gypsum indicated that irrigation would be necessary.

[9] Mr. Steadman indicated that his farm was currently for sale, although he didn't particularly want to sell as he was in good health and still enjoying "his job". It was initially listed for $1.3 million but, after a number of reductions, is currently listed for $990,000. Since August 2013 he indicated it had been shown once. He understood that, at some point, he would be required to disclose any problems with salt on the property. He suggested the problems with the crops and his frustration over trying to resolve the problems, may have precipitated his decision to sell.

[10] When he began to have problems he said he contacted Mr. Steiginga, the County roads manager, and showed him the soil sample results. Mr. Steiginga said he would contact the County insurers. There were subsequent phone discussions with Mr. Calqhoun from the insurance company. He did not come for a visit or invite Mr. Steadman to his office. He indicated that on at least two occasions Mr. Calqhoun said he had to talk to his principal before calling back and denying liability on behalf of the County.

[11] He discussed his use on the farm of the "Round-up", an herbicide that kills weeds by shutting down their ability to produce chlorophyll.

[12] He gave evidence about information he provided Mr. Crowenberg who subsequently made the calculations related to the losses claimed from 1998 to 2013.

[13] In cross-examination he indicated that he owned 96 acres at this farm property site, with a maximum available planted tillable acreage being 80 acres including the 3 acre "diaper field" across Nauvoo Rd. He acknowledged that he once believed, as he said at his discovery, the tillable acreage to be 85 acres. The use of GPS technology revised his conclusion.

[14] Mr. Steadman impressed as an honest and knowledgeable farmer who was not particularly enthusiastic about being enmeshed in litigation with the County. He left the impression that he reluctantly brought this lawsuit as a result of his frustration with the continued denial by the County and its insurer of any involvement or responsibility for the salt contamination of his property. He has not publicized his land's salt issues. His estimates as to his loss per acre of both wheat and soya beans in the affected areas were given in a straightforward way. The pictures he took and the videos Mr. Steadman made all were helpful in showing the extent of the damage to his crops that he attributed to the salt. I accept that he was honestly attempting to be as accurate as possible.

[15] Sharon Byce has known Mr. Steadman for over 30 years. She is an avid gardener who lives in the Blue Point/Wyoming area of Lambton County. She had heard of Mr. Steadman's salt contamination issue and in the spring of 2010 she put together three pails of soil in which she planted soya beans. The first pail consisted of composted soil from her property, the second, uncontaminated soil from the Steadman property and the third, contaminated soil from the property. The soil from Mr. Steadman's farm was selected and brought to her by him. She cultivated the beans in each container with equal care of watering and sun. She exposed the pails to the southern exposure light and left them in the same place. No fertilizer was applied to the three containers. Her observations were related by her as well as pictures that she took of the progress. Her observations and photos provide a vivid illustration of the stark contrast between the first and second pails and the third pail of soya beans grown in the contaminated soil. I accept that she had no part in the selection of the soil and there are some limitations on the extent of the usefulness of her evidence. However, the photos and her observations were in my view effective demonstrative evidence of the effects of salt contaminated soil on soya bean growth.

The Expert Evidence

[16] Michael Duchene is an environmental engineer with a master's degree of applied science and civil engineering who practises in the fields of hydrology, hydro-geology and contaminated site assessments and remediation. He gave evidence and filed an extensive report prepared by himself and his colleague Tiffany-Ann Svensson. Ms. Svensson has a master's of science degree in hydrology.

[17] Mr. Duchene attended the Steadman farm in February 2013 and, in addition to his visual observations, took photographs that are included in his report. He concluded that the conditions he observed on the date of his visit to the site were "somewhat representative of conditions that would be encountered during a spring melt when the potential for salt laden runoff would be greatest." His report included an analysis of the wind data for the region, including a "wind rose" illustration and a review of the analytical data from the soil tests that Mr. Steadman had commissioned. He also reviewed the key findings in the report of Dr. Smythe. His responses effectively neutralized all of the significant conclusions Dr. Smythe made in his report for the defence. Mr. Duchene noted that the report from Peninsula Chemical Analysis Ltd. failed to reference "even one external document to support a statement."

[18] Among Mr. Duchene's conclusions were that the "elevated concentrations of sodium and chloride measured in 126 soil samples" from the Steadman farm resulted from the "application of salt 'sodium and chloride' on the adjacent Nauvoo road and the transport of the salt on to the farm fields." He confirmed that the transmission of the sodium and chloride to the damaged areas adjacent to the road allowance was through airborne mist, wind and surface runoff. He attributed the transmission of the salt to the farm lands to poor roadside drainage as well as the location of a drainage culvert under Nauvoo Road south of the Steadman farmhouse.

[19] He concludes that:

> Sodium and chloride that enters the shallow soils on the farm field will migrate downward over time. The rate of downward migration depends on several factors but overall there will be an additive effect from year to year. Excessive concentrations of sodium in the soil can result in breakdown of soil aggregates, decreased pore size and reduced permeability of the soil to air and water. This will reduce drainage and exacerbate the impacts.

WESA Final Report February 2013 (p. 6, para. 5).

[20] He further concluded that the salt management plan for Lambton County (which recommends an application rate between 135 kilograms and 200 kilograms per two lane kilometre) is at the high range, as it is 54 percent greater than the recommended rates from the Ontario Ministry of Transportation. He comments that "it is possible that the County of Lambton is over applying road salt."

[21] Jack Legge of SGS Laboratories (formerly Agri Food Laboratories) was called by the plaintiff to give evidence about the soil and plant tissue analysis that he conducted for Mr. Steadman. He gave knowledgeable and confident evidence about the critical effect of sodium chloride on Mr. Steadman's crops and how it would negatively affect the soil's ability to supply important nutrients to the crops.

[22] Dr. Richard Smythe (Peninsula Chemical Analysis Ltd.) was qualified by the defence as an expert in analytical chemistry. His report was filed. It was his opinion that it was difficult to confirm where any salt in the Steadman fields came from because he did not know what salt was deposited from other means, including horses and cattle. His position was that it can't be assumed that the sodium and chloride in the land comes from the salt trucks' deposits over the period of winter maintenance because there was "no way to trace its history". He questioned the likelihood that salt from the road would travel airborne very far past the roadside. He suggested that the use of "Round-up" might have contributed to the salt content of the soil.

[23] Mr. Rob Steiginga, the Lambton county roads manager, testified as to the attempts the County has made since 1997 to reduce the amount of salt used on their roads in winter. The County Salt Management Plan was filed. These efforts have been over time and appear to have been maximized around the time that this lawsuit was started. He was frank about past practices. He expressed "shock" at how much salt was being used in 1997. He acknowledged that some of the road salt operators were "old school" and slow to adopt some of the new standards and reduce the amount of salt. He said that since 2009 his drivers are all compliant with the new guidelines. He indicated new equipment was brought in more laterally. He suggested that there was a learning curve going on with the County but that the current use of salt is one half of the 1997 amount. He acknowledged that drainage is important but did not comment on the effect of salt on drainage. Despite

all the evidence of the County's efforts to reduce its salt use he indicated he was "not sure it is hazardous" and said it was not regarded as a contaminant.

Factual Findings

[24] The case for causation was based on the evidence of Mr. Steadman and of the various witnesses from the local co-op. It was bolstered by the analysis of WESA and the evidence of its Mr. Michael Duchene. The report and the analysis done was thorough. The evidence given by Mr. Duchene was credible and supported by the soil analysis and a number of studies pertaining to the dispersal, spreading and infiltration of road salts into soils. In contrast, I had difficulties with the evidence of Dr. Smyth for the defence. He did not attend at the property and his expertise was as a chemist. He had no background in soils or as an agronomist. Much of his evidence as to the likely source of the sodium and chloride found in the plaintiffs' land, for example cows, horses, or natural deposits, was entirely speculative and bore little relation to the agricultural history of the Steadman property. Unlike Mr. Duchene whose conclusions referenced authoritative literature in the area of road salt use and winter road maintenance, his statements were not supported by other studies. There was no study to support the comment that "Round-up" use throughout the farm property could have led to elevated salt levels.

[25] I have concluded on all of the evidence that the pattern of salt dispersal on the Steadman farm is consistent with the plaintiff's engineering opinion that the higher levels of salt contamination are found closest to the road. The only reasonable, logical inference is that the salt is coming from spray and off the road itself.

[26] I have been persuaded by the plaintiffs on the balance of probabilities that the dispersion of road salt by the defendant along a portion of their property that bordered with Nauvoo Road was the cause of damage from about 1999 to the present, to their land and to their soya and wheat crops.

The Law Relating to Nuisance

[27] In Allen Linden & Bruce Feldthusen's *Canadian Tort Law*, 9th ed. (Canada: LexisNexis, 2011) at 578-579, the authors write of private nuisance:

> Private nuisance may be defined as an unreasonable interference with the use and enjoyment of land. This may come about by physical damage to the land, interference with the exercise of an easement, or with mineral rights *profit à prendre* or other similar right, or injury to the health, comfort or convenience of the occupier. In short, it is an environmental tort. The use of the term "unreasonable" indicates that the interference must be such as would not be tolerated by the ordinary occupier. The court need not, therefore, be concerned with the effect of the defendant's conduct on any other members of the community, other than the occupier.

[28] The leading case in Ontario considering whether the application of salt upon a farmer's property constitutes a nuisance remains *Schenck v. The Queen*; *Rokeby v. The Queen* (1981), 34 O.R. (2d) 595, 131 D.L.R. (3d) 310 (High Ct.), aff'd (1984), 49 O.R. (2d) 556, 15 D.L.R. (4th) 320 (ONCA), aff'd [1987] 2 S.C.R. 289 (SCC).

[29] Robins J. (as he then was) found in that case that the properties contamination by salt spray originating from the QEW in one case, and Highway No. 73 in the other, was proven on the balance of probabilities:

> This is the only conclusion that can be reached on any reasonable balance of probabilities and has long been manifest. The government, from its own files, must be taken as having known, probably from the mid-1960s, certainly the early 1970's that salt operated as a contaminate affecting growth and production of peach and apple trees and that the continued heavy application of salt to the QEW and Highway No. 73 would inevitably impair the plaintiffs' trees and cause significant economic harm.

[30] In that case, the learned trial judge found that the suggestion by the defendant government that the damage was caused by diesel fumes, exhaust gases or the like was not supported by the evidence.

[31] At para. 27, in addressing the balancing of interests that must be done in an environmental nuisance case, Robins J. said as follows:

> I do not agree that the plaintiffs' property interests may be infringed with impunity. Giving full recognition to the importance of proper highway maintenance to the public at large, in my opinion the plaintiffs are entitled to vindication in damages against the continuing intrusion on their lands. The interference with the use and enjoyment in the present circumstances is sufficiently peculiar, sufficiently direct and of sufficient magnitude to support an action for nuisance. On a balancing of the conflicting interests appropriate to this department of the law, it would be unreasonable to compel these plaintiffs to continue to suffer this interference for an indeterminate time, as the government would have it, without compensation. In reality, their injury is a cost of highway maintenance and the harm suffered by them is greater than they should be required to bear in the circumstances, at least without compensation. Fairness between the citizen and the state demands that the burden imposed be borne by the public generally and not by the plaintiff fruit farmers alone.

[32] The defendants have argued that the law as stated in *Schenck* is dated and the case should not be followed. I disagree. The case was upheld on appeal to the Ontario Court of Appeal and the Supreme Court of Canada with both courts adopting the trial judge's reasons. Those reasons remain persuasive and have been quoted with approval

subsequently in the Ontario Court of Appeal and the Supreme Court of Canada, most recently in *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13, 355 D.L.R. (4th) 666. It is also cited in Jamie Benidickson, *Environmental Law*, 3d ed. (Toronto: Irwin Law, 2009) at p. 102.

[33] Neither the social utility of the conduct or lack of negligence on the defendant's part will excuse liability. As stated in G.H.L. Fridman, Q.C., *The Law of Torts in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2010) at pg. 152: "This liability is strict. That is to say, it is independent of the manner in which it occurs or is caused. Once damage is shown, the plaintiff may also be able to recover for loss of the use of his property, inconvenience and even the insult he incurred as a result of the defendant's conduct."

[34] The issue in a nuisance suit is whether there is substantial interference with plaintiff's reasonable use of his land: see *Environmental Law*, quoting J.P.S. McLaren, "Annotation" (1976) 1 C.C.L.T. 29, at p.101:

> [I]t is the impact of the defendant's activity on the plaintiff's interest which is the focus of attention and not the nature of the defendant's conduct. The interference must be unreasonable in the sense that the plaintiff should not be required to suffer it, not that the defendant failed to take appropriate care. By the same token, if the level of interference is unreasonable, it is irrelevant that the defendant was taking all possible care. Furthermore, it makes no difference that in his mind he was making reasonable use of his land, or that his operation was beneficial to the community. The plaintiff satisfies the substantive requirement of the tort if he can point to tangible damage resulting from the defendant's activity or a significant degree of discomfort or inconvenience.

Application of Law to Facts

[35] Here I conclude that the damage caused by the salt to the Steadman farm was a significant harm which amounted to unreasonable interference with the plaintiffs' property for which they are entitled to be compensated.

[36] I have concluded that approximately 15 percent of the plaintiffs' farm was significantly damaged by the road salt. I accept as persuasive the evidence given by the plaintiff and his witnesses as to the calculation of the damages to the crop.

Review of Damages Evidence

[37] The plaintiffs seek damages under three headings:

i) Crop losses from the years 1998 to 2013;

ii) The costs of soil and plant tissue analysis;

iii) The diminished value of their farm as a consequence of salt contamination and the stigma associated with that contamination.

Damages were claimed but no evidence called in respect of the cost of remediating the salt contamination on the Steadman farm. The claim was not pursued at trial.

i) **Crop losses: 1998 to 2013**

[38] In the course of the trial I ruled that Mr. John Couwenberg, a certified crop specialist with Growmark could give evidence of calculations that he made based on his review of the grain delivery receipts. He made calculations to determine the amount of dry bushels of soy beans and wheat. He was offered, not as an expert, to put forward calculations he made based on information provided to him by Mr. Steadman. His evidence consisted of mathematical calculations that he made based on the information he was provided. I ruled that his evidence was not in the nature of expert evidence and that the objections of the defence would go to the weight that I put on his evidence given the origin of the facts and assumptions that his calculations were based on.

[39] I have concluded his comparisons between the other farms tilled by Mr. Steadman that were not at his home location were appropriately received in evidence as the farms were of similar soil types, were farmed with similar tillage and planted with similar types of grain. These farms were not affected by the road salt contamination. He assumed that the "target yields" for wheat and soya crop were not achieved on the home farm because of the road salt contamination.

[40] The defence called Sean Colville who gave evidence about the condition of Mr. Steadman's soil and the size of tillable acres of his farm and also critiqued Mr. Couwenberg's calculations. He concluded from reviewing aerial photos of the farm that the areas of low productivity that were allegedly contaminated by salt were areas with poor drainage. He did not comment on any connection between salt contamination and poor drainage.

[41] I prefer the evidence of Mr. Couwenberg and Mr. Steadman. Mr. Couwenberg corrected some of his calculations when giving evidence and reduced his figures accordingly. I prefer Mr. Steadman's evidence about his farm and its size and condition. I accept his knowledge about the soil conditions on the other properties that he farmed. Mr. Colville came to his conclusions by reviewing aerial photographs and did not visit the farm. I prefer Mr. Steadman's intimate knowledge of the condition and drainage of his fields over Mr. Colville's paper analysis. I do not accept that a proper assessment of the farm fields can be done accurately by looking at photographs without a first-hand review of the soil conditions and the contours of the property. He criticised the plaintiffs' evidence for assuming that productivity of the lands compared would be similar absent any salt contamination. He did no analysis that would contradict Mr. Steadman's evidence that the soil conditions and his farming methods were similar on the properties farmed. I accept Mr. Steadman's evidence as honestly given and based on first-hand knowledge of all of the farms he cultivated.

[42] I accept Mr. Couwenberg's calculations. An appropriate figure for the total crop loss from 1998 to 2013 is $45,000.

ii) Costs of Soil and Tissue Analysis

[43] The submitted receipts for the soil tests and tissue analysis were not disputed and are accepted by the court in the amount of $5,652. I accept these as necessary expenses incurred by the plaintiffs in investigating and confirming the salt contamination as opposed to litigation costs: see *Nor-Video Services Ltd. v. Ontario Hydro* (1978), 19 O.R. (2d) 107, 84 D.L.R. (3d) 221.

iii) Diminished Value of the Farm

Expert Appraisal Evidence

[44] The plaintiffs relied on Larry Rosevear and Dan Laven's (Valco) evidence, appraisal and report while the defendant produced Mr. Les Otto's (Otto and Company) calculations and evidence and his accompanying appraisal report.

[45] The first Valco appraisal puts the value of the Steadman farm at $920,000 excluding the 3 acre diaper field. A subsequent appraisal of the 3 acre site concluded its value was $65,000. The first Otto appraisal of December 17, 2012 assessed the property at $975,000 excluding the approximate 3 acre site. The subsequent Otto report of April 2014 confirmed the main farm (92.09 acres) at $975,000 with the diaper field (3.08 acres) assessed at $45,000. The major difference was in the calculation of the stigma effect of the salt contamination on the property.

[46] At p. 59 of the first Valco report (December 17, 2012) the authors Larry Rosevear and Dan Laven state:

> In real estate a stigmatised property is a property which buyers or tenants may shun for reasons that are unrelated to its physical condition or features. Types of stigma could include a property or area that have a reputation, positive or negative that impacts its marketability. Stigma is the effect that lingers on after the cure.

[47] The authors conclude with the following valuation analysis:

> In estimating the 'As Is' Current Market Value as Contaminated, with a Highest and Best Use as a continuation for its use as a cash crop farm the following is considered.
>
> Based on information received and reviewed, the assumption has been made that there would be remediation efforts made by the County of Lambton, to stop future road salt applications from spreading onto the subject lands. No attempt has been made by the authors of this report to determine what this may be or at what cost. It is not known whether planting a dense row of some type of evergreen trees along the road would

> alleviate the problem or not. Theoretically the damaged soil could be removed and replaced but the cost would probably be prohibitive and even if were to be done the on-going winter road salting activities would still be prevalent. However, if future information provides that remedial methods would not be practicable, then a review of the final value reported herein would be required.
>
> In recapping considerations that may impact its value are as follows:
>
> - possibility of a stigma being attached to the property;
> - possible difficulty in obtaining insurance (building or liability);
> - possible difficulties in obtaining financing;
> - the likelihood that the contaminated acreage will become larger even if remedial efforts are completed.
>
> These factors above could have impact on the value of the subject property. In most instances in the Illustrations, the impaired value was a blend of numerous factors. Therefore, my conclusions do not isolate each particular impact concern but were based on a blended impact.
>
> Having analyzed and considered the various illustrations as presented in this report, it is concluded that a negative impact on value would be in the order of 15% to 25%. For purposes of this report 20% has been selected. Based on a 'clean site' value of $920,000, the diminution in value would be $184,000.

[48] Mr. Otto, in assessing the current market value of the Steadman farm notes at p. 8 of his first report that in the immediate district "economic growth has been modest, with little or no increase in the population over the past 5 to 8 years. Many farms are consolidating into larger units, and the rural districts have experienced the slight decline in population."

[49] When Mr. Otto looked at recent sales of farm properties in the immediate area of the Steadman farm he found prices in a "range of $5,955 to $7,864 per acre (incl. buildings)", but notes:

> Market research did not reveal any sales with *unique calibre of characteristics* as the subject, and all of the data was regarded to be inferior to various degrees. Consequently, the concluded adjusted pricing developed a range above the data, between *$10,000 to $10,800* per acre (incl. buildings). (Page 37.) [Emphasis added.]

[50] Mr. Otto approaches what he calls the "estimate of loss in value" from a different perspective than Messrs. Rosevear and Laven. At p. 41 of the October 1, 2013 report he says:

> The reader will immediately appreciate that as the percentage of lands utilized for crops, versus that utilized for pasture or marginal lands (non-income generating), the price per acre declines. In the case of the subject, the 15 acres assumed to be contaminated, would be relegated to a more marginal status until it could be remediated; and, the inherent price per acre would be more towards $4,000 to $4,500 per acre, than the previously estimated rate of $7,000 per acre (as if vacant), for good quality farm land.

[51] Based on that assumption he concludes that the difference between 15 acres at $7,000 per acre ($105,000) and 15 acres at $4,500 per acre ($67,500) equals the loss in value by salt contamination to the Steadman farm. That is $37,500 (or a 35 percent reduction). He concludes:

> There is no material or quantifiable loss or diminution of value to the balance of the subject farm, as those lands are not apparently impacted by reduced crop production. Also, the subject has no substantial farm buildings that base their existence on a minimum land base. Consequently, the foregoing calculated amount pertains only to the 15 acres, and there is no further value or loss considerations required for the balance of the owner's lands and buildings.

[52] On p. 42, he explains his rationale for this conclusion:

> Knowledgeable buyers in the rural farm marketplace, understand the impact and the potentials for remediation, and form their pricing opinions accordingly, when considering a purchase of this type of property. However, a prudent farmer will also be cognisant that remediation is possible, and that the impact of the salt stray is not a sterilization of lands, nor permanent issue or stigma that limits the use of these lands. Consequently, the estimated pricing difference is more closely related to the reduced crop production, and its relationship to the inherent value of the 15 acres as more marginal land, such as pasture, low-yield crop lands, or say wood-lot.

[53] Clearly the experts differ in their approach on the impact the salt contamination would have on a perspective buyer of the property. Mr. Otto states that a prudent farmer will know that the property can be remediated and is not sterilised and that the impact of the salt is not a permanent issue or a stigma that limits the use of the lands. I accept that conclusion. The Valco report relies on a list of assumptions, possibilities and likelihoods that all amount to speculation. There is no factual foundation for his conclusion that the entire property's value be reduced by a set percentage (15%-25%).

[54] I find that the preferable calculation method for the diminution of this property's value is that used by Mr. Otto. I do not, however, accept his starting point for the diminished value of the land. Rather than use the average acreage price ($10,000 - $10,800) for the Steadman farm as a whole, he starts with a discounted value as vacant and then applies a formula to discount the land because of the salt contamination. In my view, by distinguishing the damaged acreage value from the overall value per acre of the farm, Mr. Otto has ignored the reality that this is one farm and likely to be sold as such. His starting point for valuing the diminution thus already diminishes the value of the salt damaged property.

[55] I prefer Mr. Otto's opinion that there be a reduction of the value of the salt contaminated 15 acres but would begin the reduction with the average per acreage price at $10,800. Extracting a 35 percent reduction, the diminution would be $3,780 per acre, for a total of $56,700 (15 x $3,780).

Application of the Law to the Damage Evidence

i) **Mitigation**

[56] As set out in Jamie Cassels & Elizabeth Adjin-Tetty, *Remedies: The Law of Damages*, 3rd ed. (Toronto: Irwin Law, 2014) at p. 430:

> The objective of the rule of mitigation is to give the plaintiff an incentive to take steps to minimize the total costs of the tort or breach of contract, and to avoid unduly burdening the defendant with avoidable losses. The plaintiff is disbarred from recovering losses that could *reasonably* be avoided. What is reasonable is a question of fact, not law, and the burden of proof is upon the defendant to demonstrate that the plaintiff could reasonably have avoided a loss or was unreasonable in her conduct.

[57] The defendant County argues that if the road salt was the cause of the damage to the plaintiffs' crop and property, that the plaintiffs had a positive duty to take steps to reduce the effects of the damage. These steps include: a) digging irrigation ditches; b) erecting fencing to stop the wind from carrying the salt across the fields; and c) tilling gypsum into their soil.

[58] The digging of ditches has historically been the municipality's responsibility. It is expensive and requires engineering expertise and equipment that the plaintiffs cannot be expected to have. Further, the construction of ditches would have had to have been based on knowledge of factors beyond the control of the plaintiffs including the amount and patterns of distribution of the road salt.

[59] Similarly, the erection of snow fencing would only be effective if it was coordinated with the County road maintenance department in terms of the distribution patterns of the County use of the road salt. It is clear from Mr. Steiginga's evidence that the use and distribution of the salt was very much a decision of the individual operators at the time and varied from application to application.

[60] To accept the County's submission regarding the plaintiffs' duty to consider crop rotation or applying gypsum into the soil would, in my view, impose an unreasonable burden upon the plaintiffs. The County was applying a contaminant on a basis and a pattern known only to them. They continued to use the salt based de-icing and when confronted by the plaintiffs' complaints, denied responsibility for any damage to the plaintiffs' crops and property. Subsequently, any efforts of the plaintiffs to reduce the harm to their property would, in my view, have been futile and ineffective as long as the County continued its pattern of use and distribution of the road salt. The County was clearly aware of the toxicity of the salt to vegetation and were making efforts through their salt management plant to reduce their reliance on it. None of this was conveyed or communicated to the plaintiffs who would have no expectation that any efforts or changes on their property would not be undone by the application of the salt the following winter.

[61] The defendant has not persuaded me that there has been any failure to mitigate the damage caused by the defendant's use of the road salt on the Nauvoo Road adjacent to the plaintiff's property. The contamination could not have been reasonably avoided by the plaintiffs.

ii) Stigma

[62] Although not referred to by either counsel in argument, the seminal case on stigma in Ontario is the decision in *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 57 O.R. (3d) 503, 154 O.A.C. 1 (C.A.). In this case, involving a gasoline spill from a service station onto an adjacent property in Ottawa, the trial judge had found that there would be a $350,000 reduction in the value of the property due to the stigma associated with the contamination even after the property was restored "to a pristine condition". The appeal court concluded in disallowing the stigma damage that ". . . there is no support for the trial judge's conclusion that there is a residual reduction of value in a pristine site caused by the knowledge that it was once polluted."

[63] The *Tridan* case is important for the fact that a Canadian appellate court recognized that there may be a calculation of a reduction in a property's value based on the concept of stigma attaching to it, notwithstanding that the court disallowed stigma damages in that case.

[64] The ramifications of the *Tridan* decision were discussed in a paper written for *The Advocates' Society Journal* by Katherine M. van Rensberg (prior to her appointment to the Superior Court of Justice and subsequently to the Ontario Court of Appeal) entitled: "Deconstructing Tridan: A litigator's perspective", (Spring 2006) 24 Advocates' Soc. J. No. 4, 16-27. The author reviews the common law principles concerning measuring damages for contaminated property and challenges for assessing damages for environmental harm. This case comment reviews aspects of the trial and appellate decisions in *Tridan* including the debate about the availability and measure of stigma damages, and ". . . the ability of the courts (and their reluctance in Tridan) to fashion creative remedies that do justice to the parties and to the public interest."

[65] The author concludes that the Court of Appeal ruling:

> [S]uggests that claims for stigma damages will have to be based on *compelling and persuasive expert evidence* and that the courts may greet such claims with skepticism, especially in the absence of evidence of residual contamination at the property. Finally, the recognition of stigma as a head of damages must recognize that contaminated lands carry risk and liability, as well as post-remediation value. (p. 15) [Emphasis added.]

[66] While cases involving oil contamination to commercial or residential properties are decidedly different from the case here of salt damage to a farmer's field and crops (where there has been no plan or request for remediation), the case and the case comment are instructive. Subsequent to *Tridan*, the principles set out in the trial court decision and confirmed in the Court of Appeal were followed in *618369 Alberta Ltd. v. Canadian Turbo (1993) Inc.*, 2004 ABQB 283, [2004] A.J. No. 480, an Alberta trial decision. In that case, also involving contamination of property by leakage from a service station, the court awarded $20,000 in damages for diminution of the plaintiff's land despite the fact that the defendants had paid the cost of remediation. It also assessed damages for loss of profits during a period of time when the plaintiff was deprived of the ability to move or use the land to secure financing.

[67] More recently, in Ontario, Pattillo J. reviewed the law of stigma application in *McClean v. Manorgate Estates Inc.*, 2010 ONSC 949, 88 C.L.R. (3d) 237. That case involved the defendants damaging the foundation of the plaintiffs' home while excavating to build on the adjacent property. While the trial judge rejected the plaintiffs' evidence as to the value by which the property had diminished, he awarded the plaintiffs a "nominal amount of $25,000" on the basis that the plaintiffs' house "will not be completely restored to the way it was before the damage occurred resulting in some minor diminution in the value of the Property."

[68] It must be remembered that this farm is in a small rural community where word of Mr. Steadman's difficulty with the road salt has no doubt spread. A lawsuit has, according to the evidence, never been brought against the County for road salt damage to crops. It would not be surprising that the facts of this case and the findings here would become well known in the community. I accept that any real estate broker would be ethically bound to disclose the salt contamination. The question, of course, is what effect would this knowledge have on the market?

[69] The case law contains no comparable cases for stigma damages arising from reversible damages to annual crops. The damages in the road salt cases of *Schenck* and *Rokeby* (see para. 28) were for the damage to and replacement costs associated with the plaintiff's fruit orchards. The concept of stigma was not raised in those cases.

[70] After reviewing the stigma adjustment factors set out on pages 58-59 of the Valco report, including difficulties in obtaining insurance, building permits and financing, I have

concluded that none of them apply in this case. The salt contamination poses no human safety concern. I do accept that currently the highest and best use of the property is cash crop farming. It is not clear to me that given the trend noted by Mr. Otto (which I accept) that many farms are consolidating into larger units, that the continued unsevered use of the farm house and its other assorted out buildings is a likelihood. The value of the home and the assorted out buildings are unaffected directly by the salt's effect on a portion of the farm. I have also taken into account that the "diaper field" parcel of approximately three acres on the other side of Nauvoo Rd. is severable and that its highest and best use as either a residential site or continued agricultural site is unaffected by the salt.

[71] I conclude that, on the evidence in this case, the plaintiff has not satisfied me that there should be a separate damage award for stigma. On the definition of stigma found in the Valco report (para. 46) as there has been no "cure" there is no method to measure the lingering effect.

iii) Diminution of Value

[72] I find it is reasonable to conclude that a potential purchaser would see the farm as a whole as less desirable even if their intention was to apply for a severance of the arable farm land from the residence and its buildings or to rent out the farm to another farmer. Either scenario is likely to require some additional expenditure of money or labour in comparison to a similar property where no salt damage has been identified. It is common sense that those cost calculations would reduce the property's value to prospective purchasers.

[73] The conundrum around the appropriate assessing of damages in nuisance cases was addressed by Robins J. in *Nor-Video Services Ltd.* at p. 15:

> The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect his may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in value of the land.

[74] Quantifying the diminution of value to a potential purchaser is the appropriate manner to calculate those damages beyond the damage to the Steadmans' crops. For a number of reasons neither side has attempted remediation or explored the costs of remediation of this property. For reasons that I reviewed when evaluating mitigation, I have concluded that the County is in the best position to determine and bring about remediation of the road salt contamination to the Steadman's property and measures to reduce or eliminate

further damage. I would think it reasonable to conclude that their failure to do so could have further ramifications.

Conclusion

[75] I find that the following damages have been made out:

i) Crop losses from the years 1998 to 2013: $45,000;

ii) The costs of soil and plant tissue analysis, DNA multiscans and soya testing: $5,652 as necessary to the investigation of the claim;

iii) $56,700 for diminution of value of property.

[76] If the parties cannot agree to costs, I will receive the plaintiffs' written submissions within 15 days and defendant's within 15 days thereafter.

Thomas J. Carey
Justice

Released: January 16, 2015

CITATION: Steadman v. Corporation of the County of Lambton, 2015 ONSC 101
COURT FILE NO.: 5634/09 (Sarnia)
DATE: 20150116

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Joseph Maxwell Steadman, Evelyn Elizabeth Steadman

Plaintiffs

– and –

The Corporation Of the County of Lambton

Defendant

REASONS FOR JUDGMENT

Carey J.

Released: January 16, 2015