

CANADA / JUDGMENT

# Amos v. New Brunswick Electric Power Commission

[1977] 1 SCR 500

## COURT

Supreme Court of Canada

## DECIDED

5 May 1976

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Amos v. New Brunswick Electric Power Commission

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Report

[1977] 1 SCR 500

## Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

New Brunswick

Subjects

Torts

Decision Content

Supreme Court of Canada

Amos v. New Brunswick Electric Power Commission, [1977] 1 S.C.R. 500

Date: 1976-05-05

Renald Amos, an infant, by his next friend, Jean Claude Amos, and Jean Claude Amos (Plaintiffs)  
Appellants;

and

New Brunswick Electric Power Commission (Defendant) Respondent.

1976: February 24; 1976: May 5.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

## ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Negligence—Standard of care—High-voltage line near tree—Boys climbing tree—Foreseeability of accident—Duty of power commission—Maintenance of precautions against injury resulting from high-voltage power lines.

Appellant, a nine year old boy, was seriously injured while climbing a poplar tree close to his uncle's home. The tree was in full leaf and this concealed a series of wires which ran through it. Uppermost of the series of wires were high voltage wires of the respondent Power Commission. The boy had climbed high in the tree when his weight caused the tree to sway and the trunk or one of the branches brushed against the high tension wires. The boy was struck by severe electric shock, knocked unconscious and was burning in the tree when rescued by a neighbour.

Held: The appeal should be allowed.

Per Laskin C.J. and Martland, Judson, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.: The respondent and others who erect electric lines carrying heavy charges have a duty to take proper precautions against injury resulting therefrom. As the trial judge noted the poplar is a fast growing tree. That fast growing tree stood directly beneath lines running along the top of poles and carrying up to 7,200 volts. The only evidence as to an attempt to keep the tree from these lines was that it was stated to be the practice of the power company to trim such trees every four to seven years and that so far as the company's inspector knew that practice had been kept up in reference to the particular tree. The wires were at least 30 ft. above the ground and any contact with them could have been avoided by the simple expedient of cutting off the top of the tree. It was left uncut and its mid-summer foliage concealed the presence of the wires from a boy carrying out the perfectly normal play activity of climbing a tree. The accident could have been foreseen and was almost inevitable given active boys and that the tree was directly in front of their home.

Per Ritchie J.: The accident was a reasonably foreseeable result of the proximity of the poplar tree, which appellant climbed, to the respondent's high tension wires.

[Moule v. N.B. Electric Power Commission (1960), 24 D.L.R. (2d) 305, 44 M.P.R. 317, 81 C.R.T.C. 265 distinguished; Gloster v. Toronto Electric Light Co. (1906), 38 S.C.R. 27; Buckland v. Guildford Gas Light & Coke Co., [1949] 1 K.B. 410 referred to.]

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], reversing the judgment of Léger J. at trial[2] awarding damages for personal injuries to the plaintiffs. Appeal allowed with costs, judgment at trial restored.

J.R.M. Gautreau, for the appellants.

David T. Hashey, for the respondent.

The judgment of Laskin C.J. and Martland, Judson, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ. was delivered by

SPENCE J.—This is an appeal by leave from the judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced March 31, 1975. By that judgment, the Appeal Division allowed an appeal from the judgment of Léger J. given after trial whereby he had allowed the appellants' claim and awarded damages of \$36,275.45 and costs.

The infant plaintiff, on July 1, 1970, then nine years old, was visiting his uncle at Kedgwick, New Brunswick, and that afternoon was engaged in play with two other boys Gilbert Le Bourque, age 13, and Léopold Simon, age 10. The uncle's home is located on the edge of a highway and about 25 to 30 feet therefrom. Along the edge of this high- way and within the limits of the highway, the respondent had erected a row of wooden poles carrying various wires, which shall be more particularly described hereafter.

Directly in front of the uncle's house and also on the highway right-of-way, grew a poplar tree. Of course, in July, the tree was in full leaf and made a perfect screen for the series of wires which ran through it. The lowest of those wires was a telephone cable and that cable was 21 feet above the ground. Some 40 inches farther up was one low voltage line carrying only 110 volts and then some 9 inches to a foot above that two more similar low voltage lines. Above that again, a neutral ground wire and uppermost and 48 inches higher than the neutral ground wire were wires carrying very heavy charges said to be of 7,200 volts. These last three wires were attached to the cross bar at the top of the pole.

In their play, the three boys devised a contest to determine which one of the three could climb the tree the farthest and the fastest. The plaintiff, although only nine, appears to have been the most agile of the three and he climbed the highest on the tree. He climbed high enough in the tree so that his weight would cause the tree to sway or bend and either the trunk of the tree itself or one of the branches of the tree brushed against these high tension wires. The boy was immediately struck by severe electric shock, knocked unconscious and was actually burning in the tree. A neighbour, at what both Courts below noted was great personal risk, took a chain saw and cut the tree down, so that it fell on the road and the badly injured plaintiff was then taken first to a hospital in nearby St. Quentin and thereafter transferred to a hospital in Montreal.

No issue as to the quantum of damage arose in either the Appeal Division or in this Court, and we are simply concerned with the issue of liability.

In the first place, it may be noted that the power lines and tree were on a public highway and the question of trespass does not arise.

This Court and other courts have, from time to time, stressed the duty of those who erect electric lines carrying heavy charges to take proper precautions against injury resulting therefrom. It was said, and well said, in this Court some seventy years ago in *Gloster v. Toronto Electric Light Company*[3], decided on November 23, 1906, by Sir Louis Davies:

The defendant company transmitting such a dangerous element as electricity through their wires thus strung along a public highway fall short of being insurers, but are bound to exercise the greatest possible care and to use every possible precaution for the protection of the public.

That principle has been repeated in many cases and was again stated in this Court in *Moule v. New Brunswick Electric Power Commission*[4], where Ritchie J. said at p. 309:

That high voltage wires are dangerous goes without saying, and the fact that children are likely to climb trees is certainly a foreseeable circumstance and that it is one to which power companies should give heed in placing their wires so that young climbers will not come unexpectedly on a live wire concealed by the branches of a tree is shown by the case of *Buckland v. Guildford Gas Light & Coke Co.*, [1949] 1 K.B. 410.

In the present case, the learned trial judge said:

After having considered all of the evidence I have concluded that the tree in combination with the wires constituted an invitation and an allurement for small boys imbued with the natural instinct to climb as high as their strength and energy would permit; that in permitting the power lines to remain without insulation and in failing to maintain the particular tree properly trimmed in proximity to the power lines where the branches or the infant plaintiff could come in contact with them constituted a concealed danger in the nature of a trap for such small infants. The defendant ought reasonably to have foreseen the danger and they must be deemed to have had knowledge of it and ought to have taken the necessary steps to obviate it. Their failure to accomplish this constituted negligence on their part.

With respect, apart from the learned trial judge's reference to lack of insulation, I agree with him. Bugold J.A. giving judgment for the Appeal Division was, in my opinion, ready to accept the law as outlined by the learned trial judge but was of the opinion that the particular facts in the present case could not result in liability for the respondent because the respondent could not have reasonably foreseen the accident which did occur, and, again, in my opinion, felt that the matter was foreclosed by the decision of this Court in *Moule v. New Brunswick Electric Power Commission*, *supra*.

A rather careful analysis of the circumstances in *Moule* and in this case is necessary in order to determine whether that decision does, in fact, govern the present appeal.

In Moule, the power commission had been granted permission to run a power line through a part of the National Defence Armed Services Station at Camp Gagetown and for that purpose had cleared a path through a wood so as to give lateral clearance of 3'2" between wires and any trees. At the place where the accident occurred, a maple tree stood about five feet from a pole bearing the line. The tree was, however, really an intertwining of two maples and at a height of 33'6" its trunk was still the required 3'2" away from the wire that had been accepted as the standard for the clearing of the line. All the branches of the maple tree on the side next to the wire had been cleared to a height of about 40 feet but the branches on the other side of the tree had been left undisturbed. A few feet further away from the pole stood a spruce which had been cleared of limbs to a height of approximately thirteen feet from the ground but some unknown person had attached boards to the trunk of the spruce tree so that they formed a sort of ladder permitting a child to climb up to the lowest branch of the spruce tree. On those lowest branches had been constructed a platform, a typical tree house in every child's experience. Then, from that platform, a board and some straps had been nailed which made it possible to cross from the spruce tree to the maple tree and into the limbs of it which were furthest away from the wires. Moule, the infant plaintiff, ten and a half years of age, climbed the spruce tree, crossed on the platform to the maple tree, and then climbed higher in the maple tree. Unfortunately, he put his weight on a dead branch. The dead branch broke and he fell in such a fashion that his body touched at the same time the wire carrying the heavy charge and the trunk of the maple tree so that he received very grave injuries from electric shock. Ritchie J., in giving judgment for this Court, said at p. 308:

With the greatest respect for the views of the learned trial Judge, I am nonetheless of the opinion that when this circumstance is considered in conjunction with the presence of the cleats on both trees, the platform between them, the unusual height to which the boy climbed and the fact that he had the misfortune to put his weight on a rotten branch, it discloses a sequence of events which was so fortuitous as to be beyond the range of the foreseeable results which a reasonable man would anticipate as a probable consequence of the presence of the high tension wires, isolated as they were from normal human contact, in the area in question.

Having regard to the proximity of this wooded area to houses occupied by the families of military personnel, it was to be expected that children would play there, and although the respondent was not the owner or the occupier of the land and the pole had been installed by the New Brunswick Telephone Co., the wires were nonetheless a dangerous agency which had been brought into the area by the respondent and it was, therefore, under a duty to take precautions but only against any foreseeable consequence of the presence of that danger which could be said to involve a reasonable probability of causing harm.

Let us contrast those circumstances and the conduct of the power company in that case with the circumstances of the present case and the conduct of the power company in the present appeal.

The poplar, as noted by the learned trial judge, is a fast growing tree. That fast growing tree stood directly beneath lines running along the top of the poles and carrying up to 7,200 volts. Yet, the only evidence as to an attempt to keep the tree away from those heavily charged wires was almost

casual the inspector of the power company saying it was the practice to trim such trees every four to seven years and so far as he knew that practice had been kept up in reference to this poplar tree. That such practice was indeed insufficient is illustrated by the fact that the accident occurred because it did occur when the tree swayed sufficiently to have the trunk or a branch touch the high tension wires. Those wires were at least 30 feet above the ground and any contact with those high tension wires could have been avoided by the simple expedient of cutting off the top of the poplar tree. It was left uncut and this heavily leafed tree in mid-summer adequately concealed the presence of the wires from a boy carrying out the perfectly normal play of an active little fellow in climbing the tree.

In *Moule*, in order to get himself injured, the boy had to climb one tree and then across from it to the maple which had been protected in the fashion I have outlined and then only came in contact with the wire when he stepped on a dead branch and fell. In this appeal, the boy, by climbing what seemed to be a normal poplar tree, caused the tree to bend so that it contacted high tension wires which it should not even have been near. As Ritchie J. pointed out in *Moule*, that children are likely to climb trees is certainly a foreseeable circumstance. *Morris J.* said in *Buckland v. Guildford*[5], at p. 419:

It required no vivid imagination on the part of anyone traversing the route of the wires to appreciate the great peril of having the wires above a tree that could be easily climbed, and whose foliage, being dense in the month of June, would obscure the wires. If anyone did climb the tree he would with every step approach a hidden peril of the direst kind. The facts of the present case show all too dramatically the nature of the peril. It was, in my judgment, easily foreseeable that someone might climb the tree and so might become in close proximity to an unseen deadly peril.

I am of the opinion that those words are particularly applicable to the present appeal.

Although the long series of circumstances which, added together, resulted in the accident in the *Moule* case, could not have been foreseen, I am of the opinion that the accident in the present case was one which could be foreseen and which was almost inevitable when given active boys and a poplar tree running up through and hiding high tension wires, especially when that tree was directly in front of their home.

For these reasons, I am of the opinion that *Moule v. New Brunswick Electric Power Commission* does not apply in the present circumstances and that the respondent was liable for the damage caused to the infant plaintiff.

I would allow the appeal, set aside the judgment of the Appeal Division and restore the judgment at trial. The appellants are entitled to costs throughout.

RITCHIE J.—I agree with my brother Spence that the circumstances of the present case differ materially from those which gave rise to the judgment of this Court in *Moule v. New Brunswick Electric Power Commission*[6], and that the accident which caused the injury to the infant appellant was a reasonably foreseeable result of the proximity of the poplar tree which he was climbing to the respondent's high tension wires.

I would accordingly dispose of this appeal in the manner proposed by my brother Spence.

Appeal allowed with costs, judgment at trial restored.

Solicitors for the appellants: Wentzell, Gautreau & Roine, Ottawa.

Solicitors for the respondent: Hanson, Gilbert & Hashey, Fredericton.

[1] (1975), 10 N.B.R. (2d) 644.

[2] (1974), 9 N.B.R. (2d) 358.

[3] (1906), 38 S.C.R. 27.

[4] (1960), 24 D.L.R. (2d) 305.

[5] [1949] 1 K.B. 410.

[6] (1960), 24 D.L.R. (2d) 305.

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