CITATION: D.M. Drugs Ltd. *et al* v. Bywater, ONSC 4547
COURT FILE NO.: C6889/02, C6890/02, C6891/02, C7054/02 and 7323/03
DATE: July 27th, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

D.M. DRUGS LTD. c.o.b. Harris Guardian Drugs

Plaintiff

-and-

BARRY EDWARD BYWATER c.o.b. PARKVIEW HOTEL

Defendant

AND BETWEEN:

TREVOR BYWATER INC.

Plaintiff

-and-

BARRY EDWARD BYWATER c.o.b. PARKVIEW HOTEL

Defendant

AND BETWEEN:

DIANE PIOTROWSKI

Plaintiff

-and-

BARRY EDWARD BYWATER c.o.b. PARKVIEW HOTEL

Defendant

AND BETWEEN:

MAURICE BOSSELLE and JOYCE BOSSELLE
Operating at Joyce's Lingerie Shoppe

Plaintiff

-and-

BARRY EDWARD BYWATER c.o.b. PARKVIEW HOTEL

Defendant

AND BETWEEN:

JACK LAVERY JEWELLERS LTD.

Plaintiff

-and-

BARRY EDWARD BYWATER c.o.b. PARKVIEW HOTEL

Defendant

COUNSEL: Lightle, H. and Nolin, R., for the Plaintiffs
Dooley, D. and Lucenti, S., for the Defendant

HEARD: February 7th to 11th, 14th to 18th, 22nd and 23rd, 2011

THE HONOURABLE MR. JUSTICE DAVID NADEAU

REASONS FOR JUDGMENT

OVERVIEW

[1] A major fire occurred in the downtown core area of the city of North Bay on February 5th, 2002. There is no question at this point of whether the Plaintiffs have suffered damages, since the trial of this action proceeded on the threshold issue of liability alone as a result of the bifurcation ruling made on consent at the outset of the trial.

BACKGROUND

[2] The Parkview Hotel was open for business operating as a tavern on February 5th, 2002. The building was constructed many years earlier by what is commonly referred to as a "balloon frame" construction; the wall studs ran continuously from the basement to the second floor with no intervening fire stops. Such unobstructed vertical channels provide for rapid undetected vertical fire spread. As outlined in the *Guide for Fire and Explosion Investigations* issued by the National Fire Protection Association, "Rapid fire spread and horizontal extension is further enhanced by the open connections of the floor joists to the vertical channels. Fire can spread upward to other floors or attic spaces and horizontally through floor spaces. Balloon frame construction will also allow fall down from above to ignite lower levels. Fire originating on lower levels can extend into the open vertical channels and may break out in one or more floors above where the fire originated. There can be more extensive burning at the upper level than where the fire originated."

[3] On the day in question at the Parkview Hotel, Barry Bywater noticed the smell of smoke and called 911 at 1:00 p.m. The first response team of the North Bay Fire Department arrived at the Hotel by 1:02 p.m. Fire was first noted in the basement furnace room beside the chimney. That fire was extinguished, and the firefighters continued their search for fire upward to the main floor. The fire being observed in the ceiling of the building above the firefighters led to their interior evacuation of the Parkview Hotel at 1:28 p.m. Defensive exterior efforts by the Fire Department were then undertaken, however much of the second floor and main floor of the Parkview Hotel were destroyed by the fire.

[4] Counsel for the Defendant submits that Barry Bywater is entitled to the protection of the Fire Protection and Prevention Act unless it is proven that negligence by the Defendant caused the fire. The burden is on the Plaintiffs to establish the origin of this fire and the cause of this fire. The Plaintiffs must also prove that negligence by the Defendant was a reasonable proximate cause of any damages suffered by the Plaintiffs. It is submitted that if the origin or cause of this fire remains a mystery, then the Plaintiffs have not satisfied their burden of proof and the Defendant is not liable to them. I am mindful in a case such as here that the Plaintiffs must prove the origin and cause of this fire, and also connect the conduct of the Defendant with any resulting damage from this fire.

ISSUES

[5] From the ruling on bifurcation made on consent February 7th, 2011, this trial dealt only with the question of liability of the Defendant for this fire on February 5th, 2002. Therefore, the only issues to be determined at this point are as follows:

1) Where did this fire originate?

2) What was the cause of this fire?

3) If the Plaintiffs establish the origin and cause of this fire, was negligence by the Defendant a reasonable proximate cause of their provable damages?

EVIDENCE RELATING TO THE ISSUES

[6] During this trial over 12 days, I have been left to consider the testimony of 16 witnesses and the 87 exhibits presented. My function is to consider the whole of this evidence, and to find facts if at all possible. In this matter, I must decide whether the party with the burden of proof has or has not established a certain set of facts to the requisite standard. These reasons, viewed in the context of this trial record and the submissions of Counsel on the live issues in this case, seek to explain why this decision was reached; by establishing a logical connection between the evidence and the law on the one hand, and my conclusion on the other.

[7] My experience has been that witnesses are sometime able to deliberately deceive, and they may also be unreliable for any number of reasons. I have therefore assessed the credibility of each witness presented in this trial for any such deception but also for their reliability on the larger set of issues that may have affected their testimony, stemming from inaccurate observations or even difficulties with memory or their recall. And although fact-finding does not always depend upon conclusions regarding the credibility or the reliability of certain witnesses, this particular decision does. In order for me to determine what happened with this fire on February 5th, 2002, it was necessary to decide whom to believe and how much to believe from certain witnesses of their varying accounts of these events surrounding and following this fire. The particular challenge in this trial was primarily the diverse testimony from the expert witnesses presented for each side. These reasons seek to explain how my credibility or reliability concerns were resolved, and why this version of these events was preferred over others presented.

[8] As such, this trial became another classic "battle of the experts". On the basis of all the expert evidence in this trial, I am left with extremely divergent and conflicting expert opinions as to the potential origins of this fire at the Parkview Hotel. With such conflicting expert evidence, my role is to determine which, if either or any, of the experts to accept. However, of great significance for my determination was the testimony provided by the firefighters and to some extent by other non-expert witnesses.

[9] As is often the case, chronology is important. For many of the years before the fire in question, Barry Bywater essentially was the owner-operator of the Parkview Hotel. Even according to him, the second hand boiler for the Hotel had not been regularly maintained; repairs were only conducted on an 'as needed' basis. Nor did he ensure that the boiler was periodically inspected. Almost 10 years before the fire, Fire Prevention Officer Randy Vezina had identified breaches affecting the integrity of fire resistance rating and damage to fire separations such that he issued the order to "repair in an approved manner all breaches in ceiling of furnace room". Two subsequent attendances during that same year revealed that these breaches in the furnace room ceiling had not been repaired by Mr. Bywater.

[10] Although there were a few minor inconsistencies in the evidence from the six firefighters called during this trial describing the events of February 5th, 2002, their essential testimony was relatively uniform and can be summarized as follows. The first response team all indicated that there was no sign of smoke or fire as they entered the main floor of the Parkview Hotel upon their arrival at 1:02 p.m. They were directed to the basement level where smoke was first observed. Captain Gerry Rivet located "a nice little fire" in the basement ceiling of the furnace room near the chimney. There were three areas of flame intensity in that general location. There appeared to be a "draw" of the fire and smoke upward into the wooden balloon frame structure of the walls. The flames in the basement were extinguished relatively quickly by the application of water. There was no cogent evidence that the fire was somehow being pressurized down into the basement from the above floors. The firefighters proceeded to "chase" the fire upstairs.

[11] Although a gyproc product was torn from the ceiling on the perimeter of the fire by the firefighters, I am satisfied on all of the evidence that there was no such fire resistant material in the ceiling area where the flame was first located. There were exposed joists in the basement ceiling, including at that area of the deepest charring.

[12] The fire in the basement had been extinguished by the time the second response team entered the Parkview Hotel at approximately 1:14 p.m. Two firefighters of this team believed that they may have seen light smoke on the main floor, but there was no longer any flame in the basement at that time. There was already extensive charring of the floor joists in the furnace room ceiling above the vent pipe connector for the boiler, and charring was also observed by the firefighters vertically between studs as far up as they could see. Their search for fire moved up to the main floor and, within 14 minutes of this second team entering the building, the fire had spread upward to the ceiling above the firefighters prompting a command for evacuation at 1:28 p.m. It was obvious from the testimony of these firefighters who entered the Parkview Hotel that their duties were rendered much more difficult by the rapid fire spread upward through its "balloon frame" construction. Although their response appeared quite appropriate, the flame of this fire spread rapidly.

[13] All of the eyewitnesses that testified about this fire confirmed that it was contained to the Parkview Hotel until it spread to the other buildings on Main Street. The Platoon Chief estimates that realistically such spread took place 5 minutes after 2:07 p.m., at approximately 2:12 p.m. As a result, even with the best efforts of the fire department, this fire caused considerable damage. Mercifully, there was no loss of life involved.

[14] The ensuing investigation by the Office of the Fire Marshall focussed on the furnace room in the basement, and particularly in the area where the charring was most pronounced around the vent pipe connector from the boiler beside the chimney. It was acknowledged that it is difficult to establish when the charring occurred, although I also have the testimony that firefighters noticed such charring before their evacuation order. An OFM engineer was specifically called in to assist in the examination of the boiler, and enough interest was directed at the vent pipe that it was measured for clearance from the ceiling joists. The vent pipe did not have a minimum clearance of 6 inches from a

combustible source, and testing was proposed to determine whether the inadequate clearance could be a factor in this fire. The Office of the Fire Marshall seized the boiler and its piping in order to conduct such testing, however these never occurred due to OFM funding limitations for such a fire. Although an electrical fire originating in the basement was eliminated, an electrical fire originating on the main floor or on the second floor could not be eliminated, or for that matter even appropriately confirmed. As such, it was decided by the Office of the Fire Marshall that this fire was of undetermined cause.

[15] Including the numerous reports marked as Exhibits by each side, the expert testimony can be briefly summarized as follows. Vince Rochon opines that the vent pipe was between 2 and 4 inches to the wooden ceiling joists in the basement furnace room, and there was evidence of internal and external heat damage to the vent pipe. Also, there are holes in the seam where the hot water tank piping joins the boiler's piping, with apparent heat damage around these holes. His theory is that these joists were exposed to a heat source sufficiently for pyrolysis to have occurred. Pyrolysis, defined as the chemical decomposition of a compound (in this case wood) into one or more substances by heat alone, often precedes combustion. Simply stated, the degradation of the wood from the gradual and cumulative application of heat to that wood over time can ignite the wood. Essentially, burning carbon deposits could escape through breaches in the vent pipe connections. Combine that with the malfunctioning boiler creating sufficient heat for pyrolysis of the joists, and with a subsequent ignition source, resulted in the wooden ceiling joists catching fire in that area above the vent pipe connector. Vince Rochon explained that, from there, the flame proceeded rapidly upward in the "balloon frame" constructed building.

[16] David Scott provided his expert opinion that this fire is of undetermined origin and cause, apparently because in his view no hypothesis presented can withstand an examination by deductive reasoning. He presented five competing theories as to origin, ignition sequence, cause, fire spread or responsibility. First, an electrical fire in the attic/second floor that migrated downward. Second, fire from a building on Main Street abutting the Parkview Hotel. Third, a smouldering cigarette theory. Fourth, the ever-present sceptre of arson. Fifth, the vent pipe theory espoused by Vince Rochon.

[17] Jim Roberts provided his opinion from expertise in boiler design, installation, operation and maintenance, including the particular boiler at issue here. He was not qualified to provide opinion evidence on origin or cause of this fire, although he did time and time again. He was intransigent with his opinion that this boiler was in good condition, that he saw no evidence of malfunction, and that the boiler in his view was working properly on the day of the fire. He acceded to Vince Rochon conducting the disassembly of the boiler in 2010, and conducted his own temperature testing apparently aimed at dismissing the vent pipe theory. Much of his testimony seemed directed at expressly rejecting the theory of origin and cause as outlined to this Court by Vince Rochon.

[18] Michael Learmonth provided his expert opinion on the origin and cause of this fire. He stated that chronology is important, and that timelines matter. Based on the documents, photographs and evidence that he chose to review and accept, his view was that this fire

originated in the attic caused by an electrical source. He substantially relied upon David Scott's interpretation of the electrical panel and the tripped breakers and that there were two distinct isolated areas of fire in the basement ceiling joists, and also from his understanding of the timelines of smoke and fire observed by the firefighters. Furthermore, he demonstrated exuberant criticism of Vince Rochon and his opinion as to the origin and cause in this matter, as well as in other "fire origin" cases.

ANALYSIS

The point of origin and cause of this fire

[19] Particularly when I contrast Barry Bywater's testimony with his interview on February 7th, 2002 by John Montgomery from the Office of the Fire Marshall, I have great difficulty with the evidence from Mr. Bywater. In the very least, he was inconsistent and confused regarding the sequence of events on the day of the fire, the location from which the smell of smoke emanated, and then suddenly remembering that he saw "wafts of smoke" at eye-level on the main floor before calling 911. Otherwise, even considering his age, he presented as having a very poor recollection of these events. From his difficulties specifying detail in support of his contention that someone had posed a complete seal of drywall to the ceiling of the furnace room, and his also not recalling the reason that the boiler's venting system was not properly capped or closed, as well as by his faulty memory of whether the 'old' gas-fired hot water heater was operative or not, I am therefore unable to rely on much of his testimony. In essence, his version of events is at odds not only with the testimony of Randy Vezina but also with the testimony from the firefighters. I prefer their evidence over that from Mr. Bywater.

[20] In concluding that the potential role of this boiler in the cause of this fire could not be determined at that time, the Engineering Report on Fire Investigation dated May 10, 2002 and prepared by Qadeer Choudry of the Office of the Fire Marshall indicated:

> "An examination of the exhaust duct installation revealed that the four inch clearance to the basement ceiling joists did not meet the installation clearance requirements of 6 inches to combustibles. Improper clearances to combustibles can result in sufficient heat transfer to cause the ignition of combustibles. In order to determine if the temperatures generated by the exhaust duct were capable of igniting the ceiling joists additional testing of the boiler would need to be conducted."

[21] This Court does not have the benefit of such additional testing of this boiler. As indicated from the testimony of Qadeer Choudry such testing may be the best evidence to arrive at a scientific conclusion that temperatures generated by the exhaust duct was sufficient to cause ignition of the wood joists. However, on the basis of the evidence presented to this Court regarding pyrolysis along with other supporting physical evidence such as this exhibited charring, I have been satisfied that this malfunctioning boiler with these holes in its piping at that location was capable of producing temperatures sufficient for pyrolysis to occur and to cause ignition of the wood joists.

[22] This trial then essentially became a debate among the well-qualified experts who testified. In taking stock of each of these expert witnesses, I have assessed their credibility by considering their qualifications for the testimony each proffered as well as their partiality, advocacy and candour. I recognize however that their reliability is a more useful analytical tool for weighing evidence. Therefore I have also assessed what each expert witness reviewed or overlooked in arriving at their opinion. Is their opinion consistent with the facts that I have been able to accept? Is their opinion internally consistent? As always, the expert evidence is only as useful as the assumptions and the information relied upon by the respective expert witness. In my determination of the conflicting expert evidence, I have identified the significant differences in their opinions and their perspectives, assessed the reliability of their conflicting assumptions, and have applied the onus of proof as well as common sense to my overall assessment of this expert testimony. I also kept in mind that it is now the duty of any expert witness to provide opinion evidence that is "fair, objective and non-partisan".

[23] For these reasons, I prefer the evidence from Vince Rochon and from the firefighters over that from David Scott, Jim Roberts and Michael Learmonth. At first blush, the evidence from Vince Rochon and David Scott appears to be in complete conflict. However, after the skilful cross-examination of David Scott, their testimony can be reconciled as follows. Having carefully observed their examinations and cross-examinations and assessing their evidence in light of the other evidence at trial, I find that David Scott was in error on many of the fundamental factual underpinnings supporting his various theories leading to his conclusion that this fire is of undetermined origin and cause. To name a few of these fundamental facts, David Scott eventually acknowledged that flame was first discovered by the firefighters immediately upon their entry into the basement, that the holes in the seams of the piping in fact faced upward, that the breakers could not reliably correspond to the directory for the electrical panel, that fire had not breached the roof of the Parkview Hotel when fire was first discovered in the basement (and for sometime thereafter), and as well that the corrosion in the vent pipe from the boiler resulted from heat damage. Eventually, two distinct isolated areas of fire in the basement ceiling joists is also acknowledged by David Scott to be incorrect; there was only one. In sharp contrast, the evidence from Vince Rochon applies these factual findings in support of his vent pipe theory.

[24] With respect to the five competing theories presented by David Scott, I find there is no evidence to support either a smouldering cigarette theory or arson. Even if Michael Learmonth attempted to redress the theories of an electrical cause in the attic or that this fire came from another building on Main Street, there is overwhelming evidence from the firefighters that this fire was in no way pressurized to migrate downward and also that this fire in fact spread to the other buildings on Main Street only at approximately 2:12 p.m.

[25] When I consider and assess the evidence from Jim Roberts and Michael Learmonth in conjunction with that of David Scott, I find that the standard applied by him for concluding that this fire is of undetermined origin and cause was rigidly and unfairly

interpreted by David Scott against the remaining vent pipe theory. As such, I have not been satisfied from their testimony that pyrolysis and the vent pipe theory has been properly negated or dismissed as the probable origin and cause of this fire. My determination is that their testimony stresses the absence of evidence in an effort to distract from the actual evidence supporting this vent pipe theory.

[26] I must further comment on the testimony of both Jim Roberts and Michael Learmonth. From their apparent lack of objectivity and 'tunnel vision', both of these expert witnesses heightened my concern regarding the independence of experts. This Court requires that an expert witness provide independent assistance to the decision-maker by way of objective unbiased opinion in relation to matters within their expertise. An expert witness should never assume the role of an advocate, as did Jim Roberts for the Defendant. Jim Roberts demonstrated little respect for differing views, and he would absolutely not concede in his opinion even when confronted in cross-examination with evidence clearly contradicting his testimony; such as the frequent activation of the boiler's high temperature limit switch and the leak in the gas valve discovered upon Vince Rochon's disassembly of the boiler in his presence. His cross-examination is replete of examples showing his reluctance to answer even the most direct questions without a rambling partisan reply. He quite simply would not consider material facts which would detract from his concluded opinion that this boiler was in good condition and was functioning properly on the day of the fire.

[27] Although an expert witness should decline to provide an opinion on matters beyond their expertise, Jim Roberts did not refrain from extrapolating into the origin and cause of this fire. Despite his earlier indication of the irrelevance of testing this boiler, he conducted simulated temperature testing on the eve of the trial in such a manner as to persuade this Court of a fundamental flaw in the origin and cause opinion of Vince Rochon. His testimony, particularly when I consider all of the other evidence of the condition of this second hand boiler from Vince Rochon and others, is not at all persuasive. For these and other reasons which I need no longer take the time to outline, I conclude that the testimony from Jim Roberts is very unreliable and I attach it no weight.

[28] The lack of objectivity by Michael Learmonth was demonstrated quite differently. Initially I found it rather odd that Michael Learmonth had ordered a transcript of Vince Rochon's testimony from a recent trial, in preparation for this trial. I have noticed in other "fire origin" determinations by different trial judges that some of the same expert witnesses appear frequently in our Courts. Upon observing the passionate explanation of Michael Learmonth that, in his view, Vince Rochon attributed fire origin and cause to "invisible leprechauns" at times, it became obvious that this "battle of the experts" was becoming quite personal for Michael Learmonth. However, more important for my purposes than his apparent disdain and unsubstantiated criticism of Vince Rochon in this trial, is that the testimony of Michael Learmonth does not enlighten my determination as to the origin and cause of this fire. Clearly he overlooked many important considerations and much of the evidence in arriving at his opinion, for example the absence of smoke detectors. His chronology of events and his timelines do not make sense in light of the testimony from the firefighters. His opinion obviously relied upon a factual foundation

and assumptions outlined by David Scott that are not in accordance with the facts as found by this Court. As examples, there was only one area of fire in the basement ceiling joists, and the directory of the electrical panel cannot be relied upon. Overall, I did not find his testimony to be fair, objective and non-partisan. As a result, I cannot rely upon the testimony of Michael Learmonth as to the origin and cause of this fire.

[29] In comparison, I accept the fair, honest and cogent testimony of Vince Rochon and find that his objective competent evidence, as supported by that of the firefighters, details a much more trustworthy and probable determination of the origin and cause of this fire. His opinion is consistent with the facts that I accept and determine.

The alleged negligence of the Defendant

[30] Barry Bywater did not conduct regular maintenance of the second hand boiler at the Parkview Hotel, and it was not periodically inspected. After considering the testimony from the firefighters, John Montgomery, Qadeer Choudry and Randy Vezina, I cannot accept that there was fire resistant material in the ceiling area of the basement furnace room where the fire was first located. I cannot understand why the boiler's venting system was not capped or closed as required; whether the 'old' gas-fired hot water heater was operative or not on the day of the fire. Accepting the testimony of Vince Rochon over that of Jim Roberts, I find that this boiler was malfunctioning at that time, and that regular inspections and proper maintenance could have detected it as well as perhaps revealing that its vent pipe was too close to the combustible wood joists. I do not accept the explanation provided by the Defendant that there was no negligence here. In my determination, the negligent conduct of the Defendant is connected to the resulting damage from this fire.

CONCLUSION

[31] I have determined that the balance of probabilities favour the point of origin of this fire to be in the area of the deeply charred wood joists above the vent pipe connector for the boiler in the basement furnace room ceiling of the Parkview Hotel. I have also determined that the balance of probabilities favour the cause of this fire to be ignition of the wood joists either by flame, sparks or embers from the vent pipe or by high level heating of the vent pipe from the poorly maintained functioning boiler. I have also been satisfied on a balance of probabilities that there is proven reasonable evidence of negligence by the Defendant in the failure to maintain and inspect the boiler, and in allowing its vent pipe to be too close to the combustible source wood joists contrary to legal and manufacturer's requirements, and for having breaches in its venting system such that it was not closed as required, and for failing to have proper fire resistant material in the immediate area above the vent pipe connector in question. Therefore, I find that the negligence of the Defendant is the reasonable proximate cause of any damages suffered by the Plaintiffs. The Defendant was negligent, and that negligence caused this fire. The Defendant is therefore liable for the provable damages resulting from this fire.

[32] As ruled at the outset, I remain available to preside over the balance of this trial, namely the damages issue. If the parties cannot agree on the issue of costs for this trial to date, this Court will entertain written submissions dealing with all aspects of the award of costs. Any party claiming costs shall serve and file written submissions and a bill of costs no later than 30 days from the date of this Order. Any responding submissions shall be served and filed within 30 days thereafter.

The Honourable Mr. Justice David Nadeau

RELEASED: July 27th, 2011