COURT FILE NO.: 05/06SR
DATE: 2007-11-06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
BRIAN HALL and SHARON HALL	)	Tamar Agopian, for the Plaintiffs
	)	
	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
KAWARTHA KARPET & TILE COMPANY LIMITED and DAVID CROZIER	)	Robert W. Becker, for the Defendants
	)	
	)	
	)	
Defendants	)	
	)	
	)	
	)	

AND

COURT FILE NO.: 0063/06SR
DATE: 2007-11-06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
PHILLIP EDGAR	)	John Russel for the Plaintiff
	)	
	)	

	Plaintiffs	
- and -		
KAWARTHA KARPET & TILE CO.		Robert W. Becker, for the Defendant
	Defendant	
		Heard: October 17, 18, 19, 22, 23, and 24, 2007.

D. S. Ferguson J.:

THE NATURE OF THE TRIAL

[1] This is a trial of two proceedings brought under the Simplified Proceeding rules. The corporate defendant's name is misspelled in the second proceeding. Both claims seek to recover damages for property damaged in a fire. The Halls owned an outbuilding in which there was a fire. Mr. Edgar owned a vehicle which was in the garage part of the building. The vehicle was burned in the fire.

[2] Damages were agreed upon during the trial.

[3] The sole issue is whether the plaintiffs have proved on the balance of probabilities that the defendant Crozier caused the fire by his use of a seaming iron during the installation of carpet.

[4] The inherent deficiencies of the simplified rules regarding discovery contributed to making this an unnecessarily prolonged and complex trial. However, I note that the advocacy choices of counsel on both sides was a significant contributing factor. Nevertheless, I do not need to decide all the many subsidiary issues raised in the trial.

THE CRUCIAL ISSUES

[5] Mr. Crozier installed carpet in the apartment which was in part of the Halls' outbuilding which also housed a garage. He testified that he used a

seaming iron to heat the seaming tape applied to the underside of the carpet to join separate pieces of carpet.

[6] It is the theory of the plaintiffs that the iron caused the fire as the result of negligent operation or a malfunction in the iron. I note in passing that the two counsel for the plaintiffs took somewhat different positions as to what theory they relied on insofar as the presence of sawdust was necessary.

[7] Their common theory is that the fire started in the closet of a bedroom in the apartment. The original structure was built pursuant to a permit and inspected but it then contained only an unheated garage. After the initial construction the plaintiffs installed an oil furnace, built an apartment of several rooms which were drywalled, installed a bathroom and installed the related electrical work – all without any permit or inspection.

[8] There are a number of complicating features in the evidence of the history of the building including:

(a) Mr. and Mrs. Hall installed the drywall (and, I understood, also the framing) of the walls in the area of the closet of the apartment where the plaintiffs contend the fire originated. How they did this was not adduced in evidence.
(b) There is no evidence as to who installed the furnace or the duct work. Mrs. Hall said she did not know. Mr. Hall is a police officer and Mrs. Hall said he was not qualified to install a furnace. There was no evidence that any furnace professional had been involved in the installation of the furnace or the duct work.
(c) The electrical installations in the apartment area and the thermostat for the furnace were installed by the plaintiffs' son in law who Mrs. Hall said was a licensed electrician.
(d) The furnace had been operated 3 or 4 times a week by Mr. Hall when he used the garage before the fire but had never been left on over night until the evening before the fire was discovered.
(e) The plaintiffs did not call as witnesses any of the persons involved in constructing the building or apartment or who installed the furnace, ducts, insullation or electrical installations in the apartment.
(f) There is no evidence as to who put in the insullation in the walls or attic or as to whether this was done before or after the furance was installed.
(g) The evidence was that some of the electrical work was installed at the same time Mr. Crozier was present using the seaming iron

THE EXPERTS

[9] In proof of their theory the plaintiffs rely on the observations and opinions of two main witnesses. The first was Mr. Ronald Raymer, the assistant fire chief for the City of Kawartha Lakes. He investigates fires for the fire

department. The second was Mr. John Croull who works as a consultant in fire investigations and is a former staff member of the Ontario Fire Marshall's office.

[10] The defendants relied on the observations, tests and opinions of Mr. Vincent Rochon, an engineer with extensive training and qualifications in fire investigations.

[11] Much of the trial was focused on the expertise of those three witnesses, the adequacy of their investigations and the validity of their opinions. I do not find it necessary to address all those issues except for a few observations.

[12] In my opinion Mr. Rochon is the most qualified of the three because he has knowledge and experience relating to a broader range of relevant considerations including the scientific method, fire patterns and combustion. In my opinion his knowledge was more sophisticated than that of the other two experts.

[13] Mr. Raymer is the only one who is independent of the parties' interests. He is also the only witness with personal experience in installing furnaces. I should add that in my view Mr. Rochon was well-qualified to give opinions on the adequacy of the installation of chimney flus and the issue of whether the installation met code requirements.

[14] I have taken into consideration that Mr. Raymer and Mr. Croull visited the scene and Mr. Rochon did not.

[15] I observed as a matter of logic and common sense, and accept a number of Mr. Rochon's comments as to, the lack of logic and science underlying some of the opinions of Mr. Raymer and Mr. Croull. In my view a number of the explanations they gave constituted backward reasoning. For example, they said that certain features were not indicative of the origin of the fire because they had already formed the opinion that it originated in the closet.

[16] Further, Mr. Croull said that his general approach was that if he was not 100% certain of a conclusion as to a fire's source he labeled the fire "undetermined". He said he reached 100% certainty in 75% of his cases and did so here. In my view, the fact that he claims he reached a conclusion which was certain despite the fact that he assumed certain crucial facts (eg. He did not verify that the iron was capable of generating enough heat or that the chimney flu had been properly in place before the fire) indicates that he lacks understanding of probability and the requirements of scientific proof. As judges tell juries all the time, virtually nothing is certain. A conclusion which cannot be scientifically verified by evidence is not certain. His lack of appreciation of these matters undermines the reliability on issues such as whether he made adequate observations and conducted a rational analysis of the available evidence.

[17] I accept much of Mr. Rochon's opinion as to the inadequacies of the investigations conducted by Mr. Raymer and Mr. Croull. I accept Mr. Rochon's opinion that it appears that some of the analysis, conclusions and lack of investigation on the part of Mr. Raymer and Mr. Croull were driven by their hasty conclusion as to the place of origin and source of the fire. It is telling that they had no direct evidence and made no enquiry to verify when or how a seaming iron had been used or if a seaming iron was capable of being the cause of the fire. It is also telling that neither of them made any note of the make and model of the iron or even took a clear close-up photograph of it. Nor did they secure it. It is akin to looking at the suspected murder weapon and making no close analysis of it or preservation of it.

[18] I should add that I accept the plaintiffs' counsels' contention that despite his continuous emphasis on the need for a scientific and exhaustive analysis, Mr. Rochon failed to follow that approach consistently himself. His failure to test the iron at any setting higher than that he was told was used by Mr. Crozier was telling evidence of his partiality. His failure to test the iron allegedly involved or a similar one (rather than a household iron) is not consistent with an objective, scientific analysis.

ANALYSIS OF THE PLAINTIFF'S THEORY

[19] The plaintiffs' case depends entirely on two propositions. First, that the place of origin of the fire was in the bedroom closet where they believed the seaming iron was used. Second, that the seaming iron was operated negligently or malfunctioned.

[20] Unless they can prove those two propositions on the balance of probabilities they cannot establish causation.

[21] There are problems with the evidence advanced in support of each proposition.

[22] The only issue I have to decide is whether on all the evidence the plaintiffs have proved on a balance of probability that Mr. Crozier caused the fire. For the previous reasons above and following I conclude they have not.

The evidence concerning the seaming iron

[23] There is no direct evidence of a malfunction of the iron. The iron which was tested (and which the plaintiffs dispute was proved to be the one used) showed no evidence of malfunction or failure. The uncontradicted evidence of Mr. Crozier indicated there was neither.

[24] There was no direct evidence of negligent use. The scenarios relied on by the plaintiffs were that it may have ignited sawdust left on the concrete floor from the construction of the apartment or that the iron may have been used at a high setting which would produce a much higher temperature than that required for seaming and that this ignited the tape, underpad, carpet, tack strip or baseboard. Again, the uncontradicted testimony of Mr. Crozier and his assistant, Scott Spencer, was to the opposite effect. Mr. Crozier said there was no sawdust because they cleaned the floor. Mr. Crozier said he used the iron at the proper setting and checked it during the operation. Neither he nor Mr. Simpson observed any tell-tale signs of overheating.

[25] I would add that both Mr. Crozier and Mr. Spencer struck me as entirely honest witnesses who frequently acknowledged lack of memory or uncertainty on issues which would favour their position. I found them entirely credible.

[26] The testimony of both Mr. Crozier and Mr. Spencer that over their combined decades of experience they had never even heard of a seaming iron causing a fire tends to show that this is most unlikely.

The evidence concerning the place of origin of the fire

[27] Since there is no direct evidence that the iron caused the fire, the only basis for a finding of negligence would be an inference based on the use of a seaming iron in the bedroom closet combined with proof that the place of origin of the fire was the floor area of the bedroom closet.

[28] I am satisfied by a review of their testimony as to their investigation, their lack of contemporaneous notes and their failure to address several features identified by Mr. Rochon in the photographs they had showing the scene as they found it, that Mr. Raymer and Mr. Croull failed to adequately examine the areas and extent of fire damage, the furnace, the furnace flue and related framing or the electrical installation. I conclude their investigation was insufficient to rule out other sources of ignition and other possible places of origin.

[29] Mr. Rochon's testimony raised numerous questions about the plaintiffs' evidence and raised new factual issues such as whether the size of the collar on the chimney flu met code requirements. Mr. Raymer and Mr. Crouch were not re-called to answer the questions or to rebut the new evidence.

[30] For example, Mr. Rochon raised an issue as to whether the fire damage in the ceiling and roof structure was as great or greater than that in the closet area. He opined that it was and pointed to features of the photographs which the other witnesses had not addressed. The photographs of Mr. Raymer and Mr. Crouch could not clearly establish this but seemed to support Mr. Rochon's view that it

was. Mr. Raymer and Mr. Croull were not recalled to provide any detailed observations and explanations of what was shown in the photographs.

[31] Another example. The opinion of Mr. Rochon concerning the photographs called into question the layout and condition of the duct system before and after the fire. Neither Mr. Raymer nor Mr. Croull were re-called to clear up the doubt on this issue.

[32] A further example. Mr. Rochon gave a specific opinion that the flu collar did not meet code. He said the burned timbers above and in the area of the flue showed the fire had completely consumed timbers in that area. The photos showed that the collar was lying at the bottom of the flu and that there appeared to be no framing left above or around the flu.

[33] Mr. Raymer had previously given only a brief, mostly conclusory, opinion concerning the adequacy of the chimney flu installation. He made no mention of any code requirements and he made no enquiry as to how the framing around the flu was installed. He said of the shield, "I assume they were in their proper place" and "from what I could see it was ok." The flu collar does not appear to be blackened. One wonders if it was ever even in place at the top of the flu.

[34] Further, Mr. Raymer said the joists were "burned a bit". The photos show that in fact they were burned right through.

[35] Mr. Croull said that if the collar of the flu were installed before the fire the collar would have ensured that the clearance was correct. He assumed they were in place. He did not seem to even consider if the collar was the correct size. He did not make any mention of code requirements for the collar.

[36] He also testified that there was no evidence of fire damage to the furnace or above the furnace. This is contradicted by his own photographs which show the ceiling strapping above the furnace to be completely consumed (photos 12 and 26). He later seemed to qualify this observation but the fact that he made the first statement left me in doubt as to the reliability of his investigation and of his opinion which was based on that investigation.

[37] I note three further aspects of the conflicting testimony of the three experts.

[38] The counsel for the defendant failed to comply with the so-called rule in *Browne v. Dunn*. He never asked Mr. Raymer or Mr. Croull about a number of factual observations and opinions of Mr. Rochon which cried out for an explanation by the first two witnesses. I have taken this into account.

[39] However, I also note that although Mr. Croull sat through virtually all of Mr. Rochon testimony, and therefore was aware of these unanswered observations and opinions, the plaintiffs' counsel did not recall Mr. Croull to address them. That leaves Mr. Rochon's testimony uncontradicted on a number of important points.

[40] Thirdly, I note that Mr. Rochon repeatedly backed up his opinions as to various issues such as fire patterns by reference to an acknowledged reference work and the content of that reference work contradicted the opinions or the underpinnings of the opinions of Mr. Raymer and Mr. Croull.

[41] Great emphasis was placed on signs indicating the place of origin of the fire..

[42] One of the primary bases of the analysis of Mr. Raymer and Mr. Croull was their conclusion that the consumption of two studs and the deep charring of the floor plate in the area where those studs were installed in the closet wall was the area of deepest or most extensive burning and therefore indicated the place of origin of the fire. I should add that I find it probable that there were two studs originally in that location which Mr. Rochon would not accept as likely which, again, tended to show his lack of impartiality.

[43] There are three serious deficiencies in the reasoning of Mr. Raymer and Mr. Croull about the extent of burning.

[44] The entire consumption of wood is more indicative of extensive burning than deep charring. Second, as Mr. Rochon pointed out, there are several areas of the ceiling and the attic timbers where there are completely consumed timbers which could constitute just as extensive and intense burning as what they pointed to in the closet area. The testimony of Mr. Raymer and Mr. Croull left me with the impression that they had not adequately examined or considered those other areas.

[45] I find the opinions of Mr. Rochon as to the nature of burning and smoke patterns and the interpretation of the scene evidence as to those issues to be convincing. Again, he backed up his opinions with examples from the reference work. I find that the opinions of Mr. Raymer and Mr. Croull were inconsistent with the diagrams and explanations in the reference work.

[46] Mr. Rochon gave the opinion that the protection of the metal collar for the chimney flue did not meet the applicable code requirement. This was simply not answered by Mr. Raymer or Mr. Croull except by a conclusory statement. Mr. Rochon may not be an expert on furnace installation but he is an expert in reading and apply code standards and I accept his opinion.

[47] In the result, I conclude that the evidence does not show that it is more likely than not that the place of origin of the fire was in the closet or that that the source of the fire was more likely than not the seaming iron as opposed to other possibilities such as the inadequately protected chimney flue.

CONCLUSION

[48] In the result the plaintiffs have failed to prove on the balance of probabilities that the operation of the seaming iron was the cause of the fire. They have also failed to prove any lack of care or breach of contract on the part of the defendants.

[49] Consequently, the plaintiffs failed to prove any negligence or fault on the part of the defendants.

[50] The action is therefore dismissed.

[51] As the parties agreed that the name of the corporate defendant was misspelled in the titles of proceedings I order that it be corrected to "Kawartha" and have so amended the titles of proceedings.

COSTS

[52] Counsel shall make submissions on costs by sending a cost outline and written submission to me at Whitby as follows:

(a) Submissions from the defendants by November 16.
(b) Submissions by the plaintiffs by November 23.
(c) Any reply submissions by the defendants by November 30.

[53] The written submissions shall not exceed 4 pages double spaced in 12 point type in addition to the cost outline.

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Released: November 6, 2007

COURT FILE NO.: 05/06SR and 0063/06SR
DATE: 2007-11-06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BRIAN HALL and SHARON HALL

Plaintiffs

- and –

KAWARTHA KARPET & TILE COMPANY LIMITED and DAVID CROZIER

Defendants

And

BETWEEN:

PHILLIP EDGAR

Plaintiff

- and -

KAWARTHA KARPET & TILE CO.

Defendant

REASONS FOR JUDGMENT

D. S. Ferguson J.

Released: November 6, 2007