

Case Name:

T Lippa v. Zarrello

Between
Cesidio Lippa, plaintiff, and
Pasquale Zarrello and Ida Zarrello, defendant

[2004] O.J. No. 4254

Court File Nos. 49582/02 and 49582A/02

**Ontario Superior Court of Justice
Small Claims Court - Richmond Hill, Ontario
Gollom Deputy J.**

Heard: August 9, 2004.
Judgment: October 8, 2004.
(42 paras.)

Tort law — Negligence — Causation — Duty of care.

Action by the plaintiff, Lippa, against the defendant, Zarrello, for damages to personal belongings as a result of a fire in Lippa's residence. Zarrello counterclaimed for damages to his house. Lippa occupied a basement apartment unit in Zarrello's house. The fire started in Lippa's unit, as a result of an electrical problem. He was not home at the time. Zarrello, who lived on the main floor, smelled the smoke and called the fire department. The smoke detector had not been triggered. Zarrello alleged that the smoke detector's failure was because Lippa removed the batteries so he could smoke cigarettes. Lippa did not have his own insurance. He alleged that Zarrello failed to comply with fire and building codes, which resulted in his losses. An expert in fire investigation testified that the accidental fire started from a power bar in Lippa's unit that was used as a main power source for five items and had a spliced wire.

HELD: Action dismissed. Counterclaim allowed. Zarrello was entitled to judgment against Lippa in the amount of \$10,000. Lippa had not established on the evidence that the alleged breach of the fire and building codes caused the damage. Zarrello's evidence was accepted that Lippa removed the batteries from the smoke detector. Lippa's evidence on several points was inaccurate, such as insisting he had turned off his power bar on the day of the fire when the physical evidence suggested otherwise. To be successful Lippa had to establish that the malfunction of the smoke detector caused the fire to spread. As the fire was contained only in his unit and he had limited the landlord's access to his unit, there was no liability on the part of Zarrello. However, Lippa owed a duty of care to Zarrello to maintain his unit in a safe condition. Lippa created an unreasonable and foreseeable risk by using the spliced power cord, which was sufficient to establish negligence on his part.

Statutes, Regulations and Rules Cited:

Rules of the Small Claims Court, Rules 14.07, 18.02.

Counsel:

Faye Elmer, Agent for the plaintiff.

Mark W. Smyth, Solicitor for the defendants.

REASONS FOR JUDGMENT

¶ 1 **GOLLOM DEPUTY J.**— On March 9, 2003 sometime after 9:00 p.m. a fire started in a basement apartment at 169 Carville Road in Richmond Hill, Ontario. The plaintiff was the tenant and the defendants the landlords and owners of the house. The house is a single family dwelling containing three basement units for tenants.

¶ 2 Extensive damage occurred in the plaintiff's apartment as a result of the fire. The plaintiff claims for the damages to his personal belongings. The defendants issued a Defendants' Claim for the damage done to their home. This claim was brought by the defendants' insurer by way of subrogation.

¶ 3 The plaintiff brought a motion before Deputy Judge Shaul on April 19, 2004, whereby he sought an Order to strike the defence on the basis of non disclosure of evidence. The motion was dismissed and no order for production of additional evidence was granted. The date for this trial was set by Deputy Judge Shaul on April 19, 2004. A further motion was brought by the plaintiff seeking further disclosure, on August 6, 2004, the day before the trial. This motion was dismissed on the basis that the issue was res judicata.

FACTS

¶ 4 The fire at 169 Carville Road, Richmond Hill started during the evening when the defendants were eating dinner in the kitchen located on the first floor. The plaintiff was not home at the time. The defendants smelled smoke, immediately sought out the source, and called 911 for the Fire Department. The Richmond Hill Fire Department responded at 9:34 p.m. The last unit departed from the scene at 1:08 a.m. The time that the fire started is not known.

¶ 5 When the fire fighters entered the plaintiff's basement apartment glowing flames were observed in the northwest corner. A sprinkler head in the basement furnace room was activated prior to the arrival of the Fire Department. The fire was contained to the plaintiff's apartment. The Fire Department report referred to extensive fire damage in the northwest corner of the plaintiff's apartment where what appeared to be a desk with a computer was situated. The report stated "At this time the cause of the fire is undetermined." However, the report indicated that the cause was possibly electrical.

¶ 6 A smoke detector located in the plaintiff's apartment was not triggered by the smoke. The Fire Department report indicated that very little smoke spread from the plaintiff's apartment. It is not known whether enough smoke exited from the plaintiff's apartment to trigger any other basement smoke detectors. The report stated that the basement apartment where the fire originated did not appear to have any working smoke alarms in place. No reference is made to testing any other basement smoke detectors. A tenant in another basement apartment advised that his smoke detector did not trigger.

¶ 7 The plaintiff was not home at the when the fire started. His personal belongings were destroyed by the fire. Unfortunately, the plaintiff chose not to maintain any insurance. His claim against the defendants is based on allegations that the premises did not comply with the Ontario Fire and the Building Codes. It is alleged that failure to comply with the Codes resulted in the substantial losses sustained by the plaintiff. The primary evidence regarding the cause of the fire was provided by the Richmond Hill Fire Department report, and by Jason A. D'Ornellas, an electrical engineer with special training in fire investigation. Mr. D'Ornellas co-authored an expert's report with Vincent Rochon (referred to as the "Rochon report"). A copy of the Rochon report was provided to the plaintiff in May 2003.

¶ 8 Mr. D'Ornellas attended at 169 Carville Road on March 12, 2002 to investigate the fire scene.

Ninety colour photographs were taken, all of which were included in the report. Self-heating and self-ignition; careless misuse of smoker's material; the building electrical system; and arson were all eliminated as the cause. It was determined, as confirmed by the Richmond Hill Fire Department, that the fire originated in the northwest corner of the plaintiff's unit.

¶ 9 Mr. D'Ornellas' investigation of the northwest corner observed that a desk with a CPU tower, a computer monitor, a clock radio/phone, and a power supply device were present at this location. An oscilloscope had been on the desk prior to the fire but no trace of it could be found. The only failure found was an arcing failure along the length of the power cord located near to the power supply unit. The power supply cord was a three conductor 18 AWG cord, which was spliced in the middle section.

¶ 10 An arcing failure results from arcs in temperature ranges of several thousand degrees that heat up the copper wire to the extent that the copper turns molten and emits minute molten beads. Mr. D'Ornellas opined that the arcing failure was likely the result of mechanical damage or wear and tear to the power cord.

¶ 11 The power supply unit was a six outlet model 55-2BF manufactured by Master Craft. It was rated for 1275 watts at 15 amps and 125 volts. It was found in the "on" position and the breaker in the bar was found tripped. The bar was plugged into the receptacle located within the north wall of the apartment. Five of its six outlets of the unit were occupied when the fire occurred. Examination of all of the electrical devices within the apartment, with the exception of the power supply unit, were tested and determined neither to have malfunctioned nor to have sustained a failure. The fuse in the power supply unit melted from the fire but did not "blow". Heavy arcing was found along the length of the power cord near the power supply unit. There was no evidence of failure of the power bar.

¶ 12 During direct examination, the plaintiff testified that the power supply unit was plugged in, turned off, and not connected to the computer equipment. This evidence does not accord with the Rochon report, which stated, "The power bar switch was found in the on position and the breaker located within the power bar had been tripped ... All of the electrical items located on the desk within the northwest corner of the apartment were plugged into this power bar".

¶ 13 The plaintiff purchased both the power supply unit and the oscilloscope in 1994 when he was attending Devry to obtain a diploma as an electrical engineering technician. It is not disputed that both the power supply unit and oscilloscope were in used condition when purchased and that the power supply unit cord contained a splice. Examination of the power cord by Mr. D'Ornellas revealed the splice along the middle section.

¶ 14 The arcing failures are depicted in photographs numbered 88 and 89 in the Rochon report. The splice is depicted in photograph 87. The insulation on the wire depicted in photographs 88 and 89 is gone which supports the high temperature level of the copper when it became molten. The burn pattern is depicted in photograph number 56. Mr. D'Ornellas testified that the burn pattern, smoke patterns, and fire damage confirmed that the fire originated in the northwest corner. He testified that the only cause of the fire was the arcing that caused the spattering of the molten copper.

¶ 15 Mr. D'Ornellas testified that you do not necessarily observe the most burn damage at the location where the fire started due to the fact that the molten copper sputters minute beads of molten copper into the surrounding area. The molten beads then ignite nearby combustible material thus initiating the fire. The photographs demonstrate a burn pattern consistent with this evidence. He stated that the arcing failure was a parallel arcing failure that resulted from mechanical damage or wear and tear to the power cord. The Rochon report concluded that the fire was accidental thus eliminating either arson or any other intentional cause.

¶ 16 The plaintiff called, Giovanni Vespiar, a licensed electrician to give evidence as to the cause of

the fire. Mr. Vespiar acknowledged that he did not attend at the site, and that he did not possess any expertise regarding power supply units. He referred to various photographs, including photographs 27 and 28, contained Rochon report. He testified that the wire depicted in photographs 88, 89, and 90 appeared to be in good condition. He stated that wires usually appear black after a fire. Mr. Vespiar did not address the fact that on arcing the copper wire becomes molten. This would destroy the insulation thus leaving exposed copper, as depicted in these photographs. The wires depicted in photographs 27 and 28 were black. Mr. D'Ornellas testified that the damage observed in these photographs was consistent with the upward and outward advance of the fire. These wires did not initiate the fire.

¶ 17 Mr. Zarrello testified that he installed and tried to maintain the plaintiff's smoke alarm but the plaintiff removed the battery so that it would not trigger from the cigarette smoke. The plaintiff confirmed that he smokes cigarettes but denied that he removed the battery from his smoke alarm. It is not disputed that the defendants never entered the plaintiff's apartment without the plaintiff's consent. Mrs. Zarrello testified that she never saw the plaintiff remove the smoke detector battery. She did not enter his apartment as a sign on his apartment door said, "Do Not Disturb".

¶ 18 The plaintiff testified that he never left electrical devices on when he was away from the apartment but acknowledged that he left the TV on occasionally. His sister sometimes visited his apartment to turn electrical devices off.

ISSUES

¶ 19 The issues to be determined in this Claim and Defendants' Claim are:

1. What caused the fire?
2. To determine whether the defendants or the plaintiff are liable for damages.
3. To determine the damages.

ANALYSIS

¶ 20 The evidence presented by Mr. D'Ornellas was contained in the Rochon report. A copy was provided to the plaintiff in May 2003 thus providing the plaintiff with more than one year to study and garner evidence to counter its findings and conclusions. The plaintiff's primary response to the Rochon report was to call Mr. Vespiar and to submit a letter dated, April 13, 2004, authored by Michael Whitehouse, a fire chief with the Toronto Fire Department. The letter was not a written statement as prescribed by Rule 18.02 of the Rules of the Small Claims Court. The plaintiff chose not to call Mr. Whitehouse to give viva voce evidence. As the letter did not comply with Rule 18.02(3) there was no onus upon the defendants to put Mr. Whitehouse under subpoena pursuant to Rule 18.02(4) to require his attendance for cross-examination. Mr. Whitehouse did not attend at the scene. His comments were based upon his review of the Rochon report. He stated that it appeared that the power supply may have shorted out but that this could have occurred after the fire started at the base of the desk. No explanation was provided for this assumption.

¶ 21 The plaintiff submitted that the defendants' failure to comply with the Ontario Fire and Building Codes should impose liability upon them for the fire and the ensuing damage to his belongings. No evidence was called to establish that the fire extinguishers were not in working order or to establish that if they were in working order that it would have made a difference. The failure of the plaintiff's smoke detector to sound may have resulted in an earlier call to the Richmond Hill Fire Department but the evidence to establish this premise was lacking. No direct evidence was presented regarding either when the fire started or what effect the failure of the smoke alarms may have had on

the development and spread of the fire.

¶ 22 If the defendants committed a statutory breach then the next issue is to determine whether or not the breach gives rise to a civil cause of action. This issue was canvassed in *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [143 D.L.R. \(3d\) 9](#), where Dickson J, stated at page 13:

The uncertainty and confusion in relation between breach of statute and a civil cause of action for damages arising from the breach is of long standing. The commentators have little but harsh words for the unhappy state of affairs, but arriving at a solution, from the disarray of cases, is extraordinarily difficult. It is doubtful that any general principle or rationale can be found in the authorities to resolve all of the issues or even those which are transcendent.

There does seem to be general agreement that the breach of a statutory provision which causes damage to an individual should in some way be pertinent to recovery of compensation for the damage ...

¶ 23 At page 24 he stated the following:

... Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, i.e., principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of negligence on the part of the defendant.

¶ 24 The view that a statutory breach gives rise to damages upon mere proof of a breach cannot be accepted. If proof is adduced that the statutory breach caused the damages then such breach may provide evidence of negligence.

¶ 25 A fire inspection report, dated September 11, 1998, contained in the plaintiff's evidence book stated that the 3 basement units were in general compliance with the Fire Code. A letter from the Town of Richmond Hill dated August 17, 1998, advised that the smoke alarms and fire extinguishers in the 3 basement units were satisfactory. No evidence was adduced by the plaintiff to establish that the house failed to comply with the Ontario Building Code.

¶ 26 On the facts of this case and having regard to the statutory obligations imposed by the Ontario Fire and Ontario Building Codes the plaintiff has not established that the alleged breach of these statutes caused damage. The smoke detectors in the basement were not triggered by the smoke. Mr. Zarrello testified that the plaintiff removed the batteries from his smoke detector to prevent it from being triggered by his cigarette smoke. The plaintiff testified that he did not remove the batteries. The defendants' house was repaired with the cost covered by their insurer, State Farm Insurance. Mr. Zarrello had no reason to lie about the removal of the batteries. I accept Mr. Zarrello's evidence on this issue. The plaintiff's evidence on several issues was clearly inaccurate. As stated above, he testified that the power supply was turned off the day of the fire notwithstanding that the physical evidence contradicted his testimony.

¶ 27 The smoke detector did not trigger in another basement apartment. This could be due to the

fact that the smoke did not spread, as indicated in the Richmond Hill Fire Department report, or it could be due to the failure to maintain this particular smoke detector.

¶ 28 The evidence of Mr. D'Ornellas was that the molten copper was extremely hot. On arrival the fire men observed glowing flames in the northwest corner of the plaintiff's apartment. The fire was contained within the plaintiff's unit. No direct evidence was presented to establish when the fire started. Based upon the molten state of the copper it can be inferred that the fire ignited quickly but no inference can be made as to when it started in relation to the time that it was discovered.

¶ 29 As discussed in *AXA Insurance (Canada) v. Brunetti* [1998] O.J. No. 2009, a malfunctioning smoke alarm can impose liability. In order to establish that the defendants' were negligent with respect to the smoke detector the plaintiff needs to prove that the defendants failed to inspect the smoke detectors on a regular basis; that the smoke detectors did not function properly on March 9, 2002; and that the malfunction of the smoke detectors allowed the fire to spread. Since I found that the plaintiff removed the battery, and maintained a "Do Not Disturb" sign on his door I need only consider the third issue.

¶ 30 The damage was confined to the plaintiff's apartment. The failure of his smoke alarm to trigger was due to his own failure to properly maintain the alarm, and the fact that access by the landlord to his apartment was limited by him. There was no clear evidence before me with respect to when the fire started, and as to whether the triggering of the smoke detector would have made a difference. I conclude that the plaintiff has not established that negligence of the defendants caused or contributed to the fire loss in his apartment.

¶ 31 The Richmond Hill Fire Department report concluded that the cause of the fire was undetermined. The Fire Department did not conduct an expert inspection and investigation of the premises. The report did state that the fire started in the northwest corner of the plaintiff's unit; that the fire was contained to the unit; that very little smoke spread from the unit; and that the damage to the northwest corner was extensive.

¶ 32 The Court concludes that the fire started as a result of the parallel arcing in the power cord that supplied the power unit located in the northwest corner of the plaintiff's apartment. The defendant's are therefore not liable to the plaintiff for the losses sustained by him as a result of the fire.

¶ 33 Is the plaintiff liable to the defendants' for the fire damage to their house? The fire was classified as accidental by both the Richmond Hill Fire Department and Mr. D'Ornellas. What is an accidental fire? In *Filliter v. Phippard* (1847), 11 Q.B. 347, Chief Justice Denman determined that an "accidental fire" does not include a fire which had its origin in negligence, but is confined to a fire "produced by mere chance, incapable of being traced to any cause". This view is universally accepted. Beven on Negligence, 4th ed., page 626 stated, "The effect of the statute may be stated as changing the onus, and limiting the class of acts importing legal wrong, or as a declension from the highest degree of diligence to that required of a prudent man in the provident conduct of his business." and at page 624: "The effect of this decision is to require the plaintiff affirmatively to shew negligence before he can recover; unless indeed the facts are such as to raise an inference of negligence." The Accidental Fires Act was repealed in 1997 but the cases decided under the Act assist in understanding the interpretation of the term "accident".

¶ 34 In this case the cause of the fire was established to be the parallel arcing in the power cord attached to the power unit. The plaintiff purchased the power unit and the oscilloscope in used condition in 1994, while attending Devry. The plaintiff is a trained electrical engineering technician and accordingly, possesses a higher level of knowledge than the general population with respect to electricity and electrical devices. When the plaintiff purchased these items he knew that they were in used condition, and that the power unit contained a power cord that was spliced. No evidence was

presented by the plaintiff to suggest that he ever inspected the splice to determine whether it was properly maintained to prevent parallel arcing. It is therefore assumed that no inspection was ever conducted by the plaintiff.

¶ 35 The plaintiff owed the defendants a duty of care to ensure that he was not using unsafe electrical devices in his apartment. In *Linden*, *Canadian Tort Law*, at p. 258 the author under the heading *The Neighbour Principle*, said this:

The impetus came from the prophetic dictum of Lord Atkin when he sought, in the case of *Donoghue v. Stevenson*, to outline a "general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances." He declared:

The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

¶ 36 In Canada this the principle is stated by the "two-stage" test of duty which was set out by Madam Justice Wilson in *Kamloops v. Nielsen*, [\[1984\] 2 S.C.R. 2](#):

1. Is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person?
2. If so, are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

¶ 37 In this case the two-stage test results in a finding that the plaintiff owed the defendants a duty of care as an occupant of their house to maintain his unit in a safe condition. The parties relationship was that of landlord and tenant thus there is a sufficient relationship of proximity of neighbourhood so that the plaintiff reasonably knew that carelessness on his part would likely cause damage to defendants' property.

¶ 38 In this case, the danger of using a spliced power cord to supply a power unit is an obvious risk. It cannot be argued that some unknown or unpredictable intervening cause initiated the parallel arcing. The plaintiff created an unreasonable and foreseeable risk by using the spliced power cord. At all times, the power unit was under the care and control of the plaintiff.

¶ 39 Taking all the circumstances into consideration, I think the facts proved are consistent with negligence on the part of the plaintiff. I think there is sufficient evidence of negligence to enable the defendants to recover.

¶ 40 State Farm Insurance, the defendants' subrogated fire insurer commenced a Defendants' Claim against the plaintiff for the sum of \$10,000.00, the monetary limit of the Small Claims Court. Brian Currie was called by the defendants to provide evidence on damages. A damage brief was filed which

established that State Farm paid \$99,364.52 on the fire loss. The plaintiff did not cross-examine Mr. Currie. The defendants waived the balance to bring the Defendant's claim within the jurisdiction of the Small Claims Court.

CONCLUSION

¶ 41 The plaintiff's claim is dismissed. The defendants' claim is granted for the sum of \$10,000.00. The defendants are entitled to Judgment against the plaintiff in the amount of \$10,000.00. Prejudgment interest on this amount is payable from October 8, 2003 at the rate of 5 per cent per year. I calculate the amount at \$500.00.

¶ 42 The defendants are entitled to costs which are fixed at \$300.00 plus disbursements. If an offer to settle was presented by the defendants, which complies with the provisions of Rule 14.07 then the costs shall be doubled.

GOLLOM DEPUTY J.

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