NOVA SCOTIA COURT OF APPEAL

Citation: *Bidart Estate v. Portage La Prairie Mutual Insurance Company*, 2018 NSCA 52

Date: 20180615
Docket: CA 464753
Registry: Halifax

Between:

Stephen Bidart, Personal Representative of the Estate of Michael Bidart

Appellant

v.

The Portage La Prairie Mutual Insurance Company, a body corporate

Respondent

Judges:	Fichaud, Bourgeois and Derrick, JJ.A.
Appeal Heard:	May 9, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Fichaud and Derrick, JJ.A. concurring
Counsel:	Duncan H. MacEachern and Nicholas E. Burke, for the appellant Stephanie Myles, for the respondent

Reasons for judgment:

[1] On September 9, 2010, a fire caused extensive damage to the home of Michael Bidart. He made a claim to his insurance company, The Portage La Prairie Mutual Insurance Company (the "respondent"). After conducting an investigation, the respondent concluded the fire was intentionally set and denied coverage.

[2] Mr. Bidart commenced legal action, but sadly passed away shortly thereafter. His brother, Stephen Bidart, was appointed the personal representative of the estate and has maintained both the action and this appeal. Throughout this decision, Michael Bidart will be referenced as "Mr. Bidart". References to "the appellant" are intended to mean Stephen Bidart.

[3] The matter proceeded to trial before Justice Robin C. Gogan. Extensive evidence was called over eight days, and significant documentation was admitted by consent. Both parties adduced expert evidence relating to the origin and cause of the fire. The central issue at trial was whether the respondent established the defence of arson.

[4] In a lengthy decision (reported as 2017 NSSC 126) the trial judge concluded the defence of arson had been established and dismissed the appellant's claim. The appellant now challenges that decision, alleging numerous errors on the trial judge's part. For the reasons that follow, I would dismiss the appeal.

Background and Decision Under Appeal

[5] In her reasons, the trial judge set out the relevant factual background concerning the day of the fire, Mr. Bidart's personal circumstances at the time, and the investigations carried out thereafter. To put the issues and analysis in context, I note the following:

- Mr. Bidart's property, located at 32 School Street, Sydney, Nova Scotia, consisted of a home and contents, along with a garage attached by a breezeway;
- Mr. Bidart had lived in his home since February 1986;
- Mr. Bidart was a smoker. In the time frame leading up to the fire, his family members had concerns about the extent of his alcohol consumption;

- Mr. Bidart was at home alone on September 9, 2010 when the fire started. He had returned home around 5:00 p.m., entered the kitchen to retrieve beer, and proceeded to the garage to do some work. A short time later, he went back to the house to get more beer, and returned to the garage;

- Around 8:45 p.m., Mr. Bidart left the garage. The house was on fire at that point. He called 911 from his cell phone. The fire department arrived shortly thereafter, eventually extinguishing the fire;

- There was no dispute that the fire started somewhere in the stairwell leading from the kitchen area into the basement;

- Mr. Bidart notified the respondent of the fire the following day;

- Investigations regarding the cause of the fire started the day after the fire. Deputy Fire Marshall Vince Penny attended the scene, made observations and directed that a number of photographs be taken by the police officer with him;

- The respondent retained Mark Wentzell, P. Eng., to undertake an origin and cause investigation. He attended the scene on September 15, 2010. He also took a series of photographs in the course of his examination;

- On September 15, 2010, Mr. Bidart gave a recorded statement to Shane Walker, an adjuster assigned by the respondent;

- The respondent concluded that Mr. Bidart had set the fire, and advised him on March 18, 2011 that his claim was denied;

- On December 15, 2014, Mr. James O'Donnell, a fire investigator retained by the appellant, examined the fire scene; and

- The appellant also retained Mr. Wayne Chapdelaine to critique the other expert opinions and to offer an opinion as to the origin and cause of the fire.

[6] At this point, it is helpful to summarize the trial judge's conclusions. She identified the cause of the fire as the central issue for determination and, flowing therefrom, whether the respondent's defence of arson was established on the evidence.

[7] In addressing the defence of arson, both parties submitted that this Court's decision in *Tait v. Royal Insurance Co. of Canada*, [1999] N.S.J. No. 164,

affirming the trial decision in [1997] N.S.J. No. 361, set out the relevant factors to be considered. The trial judge agreed.

[8] In her written reasons, the trial judge dealt with three preliminary matters, only two of which are relevant to this appeal. Firstly, the appellant had requested that the statement given by Mr. Bidart to adjuster Shane Walker be admitted into evidence for the truth of its contents. Although not contesting its admission, the respondent submitted the contents of the statement should not be accepted at face value; rather, they ought to be weighed against all of the evidence.

[9] The trial judge did admit the statement, but did not accept the entirety of the contents. After reviewing a number of concerns with the content, she concluded:

> [67] In the end, I conclude that certain aspects of Bidart's statement may be relied upon because they correspond with other accepted evidence, they constitute admissions or they are non-controversial. For example, Bidart admitted: (1) having financial difficulties, (2) his spouse had left him just weeks before the fire, (3) he was drinking beer in his garage on the night of the fire and went back and forth to his kitchen for more beer; (5) his front door was locked at the time of the fire; (6) his back doors were closed but not locked; (7) there were no recent electrical problems in the home; and (8) there was both an alarm and a smoke detector in the home but he had not turned the alarm on in three or four months.
>
> [68] Aside from these points, the version of events related in the statement raises credibility concerns and reliability issues. In my view, Bidart's evidence outside of those areas specifically excepted deserves very little weight in the overall assessment.

[10] The second preliminary determination relevant to this appeal concerned the purported existence of a shelf in the basement stairwell. One theory advanced by the appellant as to the cause of the fire was that combustible materials stored on the shelf either spontaneously combusted or were accidentally ignited. The trial judge concluded that a shelf did not exist in the alleged location at the time of the fire.

[11] The trial judge then proceeded to consider the expert evidence adduced by the parties. Of central importance were the opinions offered as to the origin and cause of the fire. The trial judge noted:

> [112] In my view, on a relative basis, this was not a complex fire investigation. Nevertheless, four experts examined the scene and came to differing conclusions on both origin and cause. All of the experts agreed that the standard for their investigations was the National Fire Protection Association, NFPA 921, "*Guide for Fire and Explosive Investigations*" as it existed at the time of their work. All

> purported to carry out their investigations in accordance with this standard, albeit with different interpretations as to how the standard applied to their investigations.

[12] Applying the NFPA 921, the appellant's experts, Messrs. O'Donnell and Chapdelaine, found that the cause of the fire was undetermined. Conversely, the respondent's expert, Mr. Wentzell, reached the conclusion that the fire originated in a small space in the basement stairwell under the steps leading from the first to second storey of the house, and that it was incendiary (deliberately set) in nature.

[13] The trial judge preferred and accepted the opinion of Mr. Wentzell. She found:

> [159] Having reviewed the conflicting opinions on this point, I find Wentzell's analysis of both origin and cause to be the most persuasive. His opinion was based upon his personal examination of the scene in the immediate aftermath of the fire loss. His investigation was in keeping with the appropriate standards and his factual conclusions were either in keeping with other evidence or a clearly explained part of his investigation, properly documented and demonstrated with clear photos taken at a time proximate to the loss. His experience, especially in the electrical field, deserves considerable weight. I accept his evidence without reservation.

[14] I will return to the expert evidence in due course.

[15] The trial judge also considered whether Mr. Bidart had the opportunity and a motive to set the fire. She concluded he had the opportunity and that the state of his financial affairs were sufficient to establish motive. The trial judge concluded that the respondent had established the defence of arson on a balance of probabilities. She dismissed the appellant's claim.

Issues

[16] In the Notice of Appeal, the appellant sets out 31 individual grounds of appeal categorized into four broad categories. These were set out in his factum as follows:

> Did the Honourable Justice Robin C. Gogan misapply the methodology required by the National Fire Protection Standard 921, thus contributing to palpable and overriding errors in the assessment of evidence in the application of law?

> Did the Honourable Justice Robin C. Gogan misapply the burden of proof by placing a burden upon the appellant to prove the existence of reasonable ignition sources with no other reasonable explanation as consistent with the facts?
>
> Did the Honourable Justice Robin C. Gogan misapply the law on issues of credibility, especially in relation to the statement of Michael Bidart?
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> Did the Honourable Justice Robin C. Gogan provide undue weight to the expert report of Mark Wentzell in the face of the unchallenged examination of any of the appellant's experts and thereby fail to provide a reasoned articulation as to why the Plaintiff's expert's evidence should be rejected in favour of the evidence of Mark Wentzell?

[17] Having heard the arguments of counsel, I would re-state the issues to be determined as follows:

1. Did the trial judge misapply the NFPA 921, resulting in her applying an incorrect burden of proof and flawed test for the defence of civil arson?
2. Did the trial judge err in her treatment of the statement of Michael Bidart?
3. Did the trial judge err in her treatment of the expert evidence?

Standard of Review

[18] The standard of review is not controversial. Errors of law attract a standard of correctness – the trial judge must get the law right. For findings of fact and inferences drawn therefrom, an error must be palpable and overriding to justify appellate intervention. A palpable error is one that is clear on the evidence. To justify this Court intervening, the error must also be overriding, meaning in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to the fact in question. Findings of mixed fact and law are also reviewed for palpable and overriding error unless there is an extractable error of law. (*Housen v. Nikolaisen*, 2002 SCC 33; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2011 NSCA 43.)

Analysis

Did the trial judge misapply the NFPA 921, resulting in her applying an incorrect burden of proof and flawed test for the defence of civil arson?

[19] Both in the court below and on appeal, the crux of the appellant's arguments concerned the interpretation and application of the NFPA 921. The appellant

submits the trial judge misunderstood the obligations placed upon her by the NFPA 921 in terms of the classification of the fire. This resulted in a flawed determination that the fire was incendiary.

[20] As noted earlier, the trial judge found that the NFPA 921 was considered by all the experts as being the recognized standard for fire origin and cause investigations. A great deal of the evidence before the trial judge was devoted to establishing the proper methodology set out in the NFPA 921 and whether the respondent's expert was compliant with it. The appellant expended considerable effort at trial in an attempt to discredit the opinion of the respondent's expert Mr. Wentzell. The appellant argued that, based upon a proper application of the scientific method dictated in the NFPA 921, the respondent's expert erred in classifying the fire as incendiary. The cause should rightfully have been classified as "undetermined".

[21] It is helpful to summarize the evidence provided by Messrs. Wentzell, O'Donnell, and Chapdelaine. All of the experts filed written reports in advance of trial in compliance with *Civil Procedure Rule* 55. As a result of a contested pre-trial motion, the trial judge permitted Mr. Wentzell to file a rebuttal report in relation to issues raised in the Chapdelaine report. That interlocutory decision was not appealed.

[22] The written reports were admitted into evidence. There appeared to be no dispute as to the authors' qualifications as fire origin and cause investigators. The respondent did not seek to cross-examine either of the appellant's experts. The appellant's counsel undertook a lengthy cross-examination of Mr. Wentzell during which his opinions were extensively challenged.

[23] In his evidence, Mr. Wentzell described his observations of the fire scene and the process of this investigation. He expressed the following opinions:

- The origin of the fire was in a small space in the basement stairwell underneath where the main floor stairs led to the second floor;
- It was improbable that there was a shelf adjacent to that location, containing materials which spontaneously combusted;
- It was improbable that a discarded cigarette butt would cause a fire at the point of origin;

- It was improbable that any natural cause, such as lightning strike, caused the fire to ignite;
- The correct classification of the cause of the fire pursuant to the NFPA 921 was incendiary.

[24] In his report, Mr. O'Donnell noted the following:

- He attended the scene and undertook an investigation on December 15, 2014;
- The fire originated in the basement stairwell, but he was unable to identify a point of origin;
- The NFPA 921 required him to eliminate all other possible causes before classifying a fire as incendiary;
- He could not definitively rule out electrical failure or discarded smoking materials as possible causes; therefore, he was obligated to classify the cause as undetermined.

[25] In his report, Mr. Chapdelaine undertook a review of the NFPA 921 and his interpretation of the scientific method mandated by it. He criticized Mr. Wentzell's classification of the fire as incendiary, submitting that a proper application of the NFPA 921 could not lead to such a conclusion. With respect to the origin and cause of the fire, Mr. Chapdelaine's opinion was expressed as follows:

> Upon completion of my review of the provided documents, photographs and a review of the technical literature I am unable to determine a specific origin other than I concur that the origin was in the general area of the basement stairwell. As a result of not being able to conclusively state the location of the origin, the material first ignited, the ignition source or the sequence of events I am compelled by the provisions of the NFPA 921 to classify the cause of the fire as undetermined at this time.

[26] At the time of writing his report, Mr. Chapdelaine had not visited the fire scene.

[27] The trial judge found that the respondent's expert, Mr. Wentzell, applied the proper investigative methodology. She accepted his evidence that the fire was not caused by accidental sources. She agreed with his view that the fire was incendiary in nature.

[28] Before this Court, the appellant argues that the trial judge, misled by Mr. Wentzell's faulty application of the NFPA 921, failed to apply key sections of the guide which mandated that "elimination of potential ignition sources … are required to be definite". The appellant submits that the trial judge overlooked this requirement, and that the evidence before her did not definitively exclude electrical ignition, spontaneous combustion, or accidental ignition by a discarded cigarette butt. The appellant says that, based upon a proper application of the NFPA 921, the trial judge was required to find the cause of the fire as being "undetermined" and, as such, the defence of arson had to fail.

[29] The appellant also argues that the above error led the trial judge to apply an incorrect burden of proof to her assessment of the evidence. He says the trial judge incorrectly applied the civil burden applicable to negligence claims, as opposed to the more stringent standard requiring the "definitive" exclusion of other potential ignition sources. The appellant submits the trial judge required him to establish the cause of the fire was accidental, thus inappropriately reversing the burden of proof.

[30] In response to the above, the respondent says that the appellant is improperly elevating the NFPA 921 to a legal standard. It is a standard for fire investigation and, although it is a helpful tool for judges to assess the weight of an expert's opinion, it has not replaced or modified the common law test for establishing the defence of arson. The respondent further submits that the trial judge did not misapply the burden of proof, nor reverse it.

[31] In light of the arguments advanced, a consideration of both the proper civil burden of proof and the test to establish the defence of arson is in order.

The burden of proof

[32] There is only one civil burden of proof – proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada brought to an end a longstanding debate as to the existence of variable standards, dependent on the nature of the dispute. Various earlier decisions had recognized a heightened civil burden in those instances where the matter involved criminal or morally blameworthy conduct. Writing for the Court, Rothstein, J. set out the previous approaches, and subsequently explained why they ought not be followed:

> [39] I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

> (1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;
>
> (2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;
>
> (3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;
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> (4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and
>
> (5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.
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> The Approach Canadian Courts Should Now Adopt
>
> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

[33] With respect to approaches 3 and 4, Justice Rothstein did not "reject" them outright; rather, he made clear that such considerations were not confined to a particular class of civil cases:

> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
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> [46] **Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency**. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence

> was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. (Emphasis added)

He concludes:

> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. **In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.** (Emphasis added)

[34] At this juncture, a word of caution is warranted. Because case authorities prior to 2008 may have applied a higher burden of civil proof than that now conclusively directed in *F.H.*, prudence in assessing their precedential value is wise. By way of example, the trial judge in *Tait*, when considering the burden of proof, adopted the reasoning that there may be "degrees of probability … commensurate with the occasion". He also noted:

> [25] … The court must be satisfied on a balance of probabilities; and the balance must be found on clear and cogent evidence which makes it reasonably probable that the crime was perpetrated, **and there is no other reasonable inference**. (Emphasis added)

[35] In my view, the words bolded above are reflective of a heightened civil burden. In any given factual scenario, there may be several "reasonable" inferences which could be drawn on the evidence accepted, with varying degrees of probability. In order to accept one, the trial judge does not have to eliminate the others. Rather, where several inferences are possible, the trial judge can accept the one that he or she finds to be the most probable on all the evidence, provided that it meets the overall burden on the balance of probabilities; simply, that it is more likely than not.

The defence of arson

[36] In their written pre-trial submissions, both parties submitted to the trial judge that *Tait* set out the appropriate three-part test for establishing the defence of arson in the context of an insurance claim. The trial judge agreed. Notwithstanding the concerns expressed earlier regarding the heightened civil burden appearing to have been applied in that case, the three elements remain relevant. In the trial decision, the court in *Tait* noted:

> 26 In determining whether the defendant has met the onus, in respect to maintaining a defence of arson, there has generally been applied a three-fold test, namely:
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> 1.Was the fire incendiary in nature?;
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> 2.Was there opportunity on the part of the plaintiff to set the fire?;
>
> 3.Did the plaintiff have a motive?

[37] In articulating the above, the trial judge adopted the reasoning of the Ontario Court of Appeal in *Rizzo v. Hanover*, [1993] O.J. No. 1352, quoting Catzman, J.A.:

> 18. … the proper inquiry should be whether, **on all the evidence inculpatory of the insured, including motive and opportunity**, the insurer has proven the defence of arson according to the standard of proof appropriate to the establishment of that defence in a civil case. (Emphasis added)

[38] The Ontario Court of Appeal repeated the above direction in *Bezdziecki v. Allstate Insurance Co. of Canada*, [1998] O.J. No. 4853.

[39] Before this Court, the appellant argues that the approach set out in *Tait* must now be read and modified in light of the NFPA 921. In short, a judge can only find a fire to be incendiary if such a fact is established in accordance with the scientific method directed therein. This is not the first time that such an argument has been advanced.

[40] In *Lancer Enterprises Ltd. v. Saskatchewan Government Insurance (c.o.b. SGI CANADA)*, 2008 SKQB 346, an insured plaintiff criticized a fire investigator's opinion as to the cause of a fire, submitting it was not compliant with the NFPA 921. The trial judge noted:

> 15 Although Mr. Lloyd's report was prepared in furtherance of the statutory function of the fire commissioner's office, the plaintiff takes exception to the use of the word "suspicious". National Fire Prevention Association (NFPA) guidelines (as distinct from standards), which were recognized in Saskatchewan at the time, do not include the reporting of a fire as suspicious. To comply with the NFPA guidelines the cause of a fire is to be categorized as natural, accidental, incendiary or undetermined. By implication a report prepared in accordance with the guidelines would have to describe the causation of the Race Trac gas fire as undetermined even though the statutory report form includes the word "suspicious" as an available description of what action or inaction caused the fire. I do not share the plaintiff's concern in this regard. The trier of fact may find the opinion of the expert witness helpful or not helpful. Obviously it is not appropriate for the trier of fact to found conclusions on suspicions, let alone on

> the suspicions of a witness. On the other hand the fact that Mr. Lloyd found the cause of the fire to be suspicious does not detract from the value of Mr. Lloyd's opinion as expressed in his statutory report as to the origin of the fire or from the value of his *viva voce* testimony in that regard. **The use of the description "undetermined" by NFPA in the technical realm of fire investigation does not impose that categorization framework adopted by NFPA on the Court or inhibit the Court in carrying out its function to try to identify a cause or the cause of a fire utilizing normal fact-finding processes. The decision of the Court must be based on the trial evidence as a whole, both within and beyond the scope of the fire investigators' parameters, although respectful of them.** (Emphasis added)

[41] In upholding the trial decision, the Court of Appeal was called upon to resolve the proper test in the case of civil arson (2011 SKCA 28). Writing for the Court, Lane, J.A. set out the two competing views:

> 6 As the Appellant argues, the threshold issue is whether the trial judge correctly applied the test as to what an insurer must prove where it raises arson as a defence. The Appellant contends the insurer must first prove on a balance of probabilities the fire was incendiary, that is, deliberately set. The Appellant argues the insurer must eliminate all possible accidental or natural causes and, if it fails to do so, its case fails. It argues the Court is only permitted to consider evidence tending to establish motive, opportunity and credibility if the insurer has first eliminated natural and accidental causes of the fire. In other words, it is not until the insurer has eliminated the reasonable possibility of a natural or accidental fire before the evidence of motive, opportunity and credibility can be considered ... .
>
> 7 The Respondent contends that, in considering whether the insurer has proven on a balance of probabilities the fire was intentionally set or arranged to be set by the insured, the trial judge must look at the totality of the evidence and may draw the inference the incendiary origin of the fire from inculpatory evidence linking, in this case, Buxton to the fire … .

[42] In rejecting the approach advanced by the appellant, Lane, J.A. referenced both *Rizzo, supra*, and the Supreme Court of Canada's decision in a criminal arson case, *R. v. Monteleone*, [1987] 2 S.C.R. 154.

[43] In *Monteleone*, the appellant was acquitted of arson by way of directed verdict. The evidence advanced by the Crown through the opinion of a fire investigator was that the cause of the fire was "unexplained". The trial judge concluded that without proof the fire was incendiary, there was no evidence to support a conviction and the directed verdict followed. On appeal, the acquittal was set aside and a new trial ordered. The Supreme Court dismissed the appeal.

[44] In *Monteleone*, McIntyre, J. framed the issue for determination as follows:

> 9 … As I understand the principal argument advanced for the appellant, it is that there was no evidence as to the cause of the fire. It is asserted that the evidence of fire inspector McLean does not afford the basis for any finding that the fire was of an incendiary origin. The most that can be made of it is that the cause of the fire is unexplained. This proposition is vital to the appellant's argument and, in his view, is decisive. If there is no evidence of an incendiary origin for the fire, there is no evidence of the commission of a crime. Other matters may be shown in evidence, there may be evidence of opportunity or of motive, or of financial problems, or of hope of profit from the fire, and there may be other suspicious factors but, in the absence of evidence of the commission of a crime, they relate to no criminal conduct and are themselves no evidence of criminal conduct. It was said to be error on the part of the Court of Appeal to consider what could be suspicious circumstances in the absence of a finding of evidence of the commission of a crime.
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> 10 Lacourcière J.A. acknowledged that the expert evidence of the fire inspector alone did not afford evidence of the unlawful setting of a fire. He said: "taken by themselves, the findings of Inspector MacLean [*sic*] could at best support the conclusion that the origin of the fire was unexplained" (p. 492). However, later he said (at p. 493):
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> > In most prosecutions for arson, the Crown must depend on circumstantial evidence. The circumstances must be sufficient to exclude every reasonable hypothesis other than a wilful and intentional burning in order to rebut the presumption that the burning was of accidental or natural origin. However, the facts and circumstances which tend to prove the incendiary origin of a fire are often inter-woven, as in the present case, with other facts and circumstances which tend to connect the accused with the crime such as the presence of a motive, and the clear opportunity of the accused together with his subsequent incriminatory statements.
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> . . .
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> 12 As has already been mentioned, the appellant argued that there was no evidence as to the nature of the fire and, therefore, the commission of a crime. Evidence on other questions which would ordinarily be relevant has no evidentiary value and provides no evidence in the absence of proof of the incendiary nature of the fire. It is true, of course, that neither the trial judge nor the Court of Appeal considered that the evidence of the fire investigation, by itself, offered any evidence as to the nature of the fire. At best, it was considered by the Court of Appeal to leave the nature or cause of the fire unexplained. May then evidence of other matters -- motive, opportunity, financial difficulty and possibility of gain -- be considered as evidence going to prove the crime of arson?
>
> 13 **The position of the Court of Appeal is supported in the authorities. The courts have frequently recognized the fact that the *corpus delicti*, that is,**

> **the act which constitutes the crime, in this case the setting of the fire, may be proved by circumstantial evidence. …**
>
> **I am therefore of the opinion that the Court of Appeal was correct in holding that the incendiary origin of the fire could be inferred from other inculpatory circumstances which could link the accused to the fire.** (Emphasis added)

[45] After considering the above, the Lane, J.A. in *Lancer* concluded:

> 15 *Monteleone* makes it clear that, in a criminal case of arson, evidence tending to establish identity, such as motive and opportunity, can be considered as evidence going to prove the incendiary nature of the fire when arson cannot be proved by direct evidence. The question then is, as stated above, does *Monteleone* apply in the civil context?

[46] The Court concluded that if direct evidence of the incendiary nature of the fire was not required in cases involving the criminal burden of proof, then the same must be true when considering evidence on the balance of probabilities. After considering *Rizzo*, the Court stated:

> 22 *Rizzo* therefore stands for these related propositions: firstly, if proof of a particular issue is not necessary to prove arson in the criminal context, the same must be true in the civil context. Secondly, there is no threshold requirement the insurer must prove an incendiary fire before the Court may proceed to consider evidence relating to opportunity, motive and credibility. **Rather, the defence of arson will be proved when the totality of the evidence establishes arson on a balance of probabilities.** (Emphasis added)

[47] The approach set out in *Lancer* has been adopted by the New Brunswick Court of Appeal. In *Richardson v. Smith*, 2012 NBCA 75, Green, J.A. wrote:

> 28 **In conclusion, the standard of proof in civil arson cases does not require that the insurer establish each of the three elements, namely incendiary origin, opportunity, and motive on a balance of probabilities.** Instead, the proper test is to assess all of the evidence, and then make the determination as to whether it has been established on a balance of probabilities that the insured set the fire or caused the fire to be set. (Emphasis added)

[48] To summarize, the test for the civil defence of arson is as follows:

(a) Once an insured has established the existence of a policy of insurance providing coverage, the burden switches to an insurer to establish on the balance of probabilities the defence of arson;

(b) As per *Rizzo*, *Tait*, *Lancer*, and *Richardson*, a trial judge should consider all of the inculpatory and exculpatory evidence, including:

a. Whether the fire was incendiary, that is, deliberately set, not the result of accident or natural causes;

b. Whether whoever is alleged to have deliberately set the fire had the opportunity to do so; and

c. Whether there was motive on the part of the insured, or someone on their behalf, to set the fire.

(c) The analysis should not be undertaken with any particular aspect of the evidence considered in isolation; rather, all the evidence should be considered holistically to assess whether it is more likely than not that an insured set the fire, or caused it to be set. In particular, the incendiary nature of the fire need not be determined in isolation; rather, based upon a consideration of all the evidence.

[49] The appellant's contention that this Court should intervene because the trial judge misapplied the NFPA 921, resulting in a faulty determination that the fire was incendiary, must fail. The trial judge was not obligated to apply it, nor was she obligated to adhere to the scientific method outlined therein. She was obligated to comply with the legal test outlined above, and to apply the civil burden of proof. She was entitled to consider all of the evidence. A finding that a fire was classified as undetermined in accordance with the NFPA 921 would not prevent a trial judge from concluding it was incendiary based upon all of the evidence.

[50] The trial judge's conclusions that the fire was not caused by either spontaneous combustion, electrical failure, or a discarded cigarette butt were all available to her on the evidence she accepted. Further, the trial judge's conclusions regarding Mr. Bidart's opportunity to set the fire, and the existence of a financial motive for him to do so, were findings available to her on the record and which could be used to support the finding that the fire was incendiary.

[51] I am also unconvinced by the appellant's assertion that the trial judge improperly placed an obligation on him to prove the fire was accidental. In her reasons, she clearly noted the burden of establishing that the fire was deliberately set rested with the respondent. Nothing in her reasons or treatment of the evidence suggests she varied from that.

[52] In my view, the trial judge's determination that the respondent had met the burden of establishing the defence of arson discloses no error.

Did the trial judge err in her treatment of the statement of Michael Bidart?

[53] As noted earlier, Mr. Bidart provided a statement six days after the fire to an insurance adjuster. At trial, the appellant asked that the statement be admitted into evidence. The trial judge did so. Before this Court, the appellant does not take issue with the admission of the statement *per se*, rather the weight the trial judge afforded to certain aspects of it.

[54] The statement was recorded and the trial judge had both the audio recording and a transcribed version for her consideration. The statement contained a description of Mr. Bidart's activities on the day of the fire and his various observations. At trial, the respondent called two witnesses, neighbours of Mr. Bidart, whose evidence differed from his statement in regard to the timing of events surrounding the fire and some of his activities.

[55] As noted earlier, the trial judge used Mr. Bidart's statement to make some findings of fact, but rejected other assertions contained in it, preferring the evidence of the two witnesses. The discrepancies between the statement and the testimony of the witnesses caused the trial judge to question Mr. Bidart's credibility.

[56] In argument before this Court, the appellant confirms that his complaint relates to the weight the trial judge afforded to certain aspects of Mr. Bidart's statement. In particular, the appellant says the trial judge overlooked several facts: that the statement was taken by an adjuster who was untrained in statement taking; it was not followed up by a more thorough interview; and that Mr. Bidart's suggestion that his recollection of the details of the night in question may have been imprecise due to his consumption of beer. In short, the appellant argues the trial judge should not have held Mr. Bidart to certain aspects of his statement, nor used them to influence her assessment of his credibility.

[57] With respect, I am not persuaded by the appellant's argument. The trial judge, at the appellant's request, admitted the statement into evidence. The appellant asserted it ought to be accepted "for the truth of its contents". The trial judge was not fettered by the appellant's assertion that Mr. Bidart's statement was true. She was entitled to assess its credibility and reliability in the context of all the evidence before her.

[58] In my view, the trial judge's treatment of the statement does not give rise to an error justifying intervention. She accepted certain facts arising from the contents and rejected others where they were inconsistent with testimony she accepted. She found certain assertions made by Mr. Bidart were not accurate, and this negatively impacted his credibility. Such determinations are squarely the prerogative of a trial judge to make.

Did the trial judge err in her treatment of the expert evidence?

[59] The appellant says the trial judge erred in preferring the opinion evidence of Mr. Wentzell over that of Messrs. Chapdelaine and O'Donnell. In addition to the concerns raised regarding the NFPA 921 canvassed earlier, the appellant says the trial judge made other critical errors in her consideration of the expert evidence. It is submitted that she ought not to have placed weight on Mr. Wentzell's training as an electrical engineer, or his overall opinion given the weaknesses the appellant asserts are to be found in his evidence; she should have accepted the expert opinions of Messrs. Chapdelaine and O'Donnell because they were "unchallenged", and she failed to explain why she accepted the expert evidence tendered by the respondent over that of the appellant's expert.

[60] With respect, the appellant's complaints amount to a request for this Court to reconsider and re-weigh the evidence before the trial judge. That is not our function.

[61] The trial judge accepted the opinion of Mr. Wentzell on the point of origin and his evidence as to the potential causes of the fire. Given that one theory advanced at trial was that the fire was caused by electrical failure, the trial judge's acceptance of the relevance of his training as an electrical engineer is entirely reasonable. As disclosed in her reasons, this was one of many factors she weighed in assessing and ultimately accepting his conclusions.

[62] It is apparent that the appellant still questions the reliability of Mr. Wentzell's evidence, notably the accuracy of his opinions, and his credibility. However, the trial judge found his evidence to be credible, reliable, and his opinions consistent with the other facts she accepted. She found that Mr. Wentzell's opinion withstood the vigorous cross-examination by the appellant's counsel. Again, it is not our role to second guess the trial judge's view of Mr. Wentzell's evidence.

[63] Further, the trial judge was not obligated to place more weight on the opinions of the appellant's experts because they were not cross-examined. I disagree with the assertion that their opinions were "unchallenged" – the evidence of Mr. Wentzell squarely and clearly challenged the opinions of Messrs. Chapdelaine and O'Donnell. There is no obligation on a trial judge to place greater weight on a written report whose author is not cross-examined than one who is. The admissible evidence, in its various forms, was hers to weigh, not ours.

[64] Finally, the appellant's criticism of the sufficiency of the trial judge's reasons lacks merit. It is clear from her reasons why she preferred the expert opinion of Mr. Wentzell over that of the appellant's experts. She reviewed and analyzed the opinions, and clearly stated why she declined to accept those of Messrs. Chapdelaine and O'Donnell (see trial decision paras. [135] to [165]), and preferred that of Mr. Wentzell.

[65] There is nothing in the trial judge's treatment of the expert evidence that justifies intervention by this Court.

Conclusion

[66] I find that in concluding the defence of arson had been made out, the trial judge correctly applied the law and made reasonable and supportable factual findings.

[67] I would dismiss the appeal. In the event they were successful, both parties suggested this Court should award costs equivalent to 40% of those awarded below. In my view, costs of $16,000.00, inclusive of disbursements, payable by the appellant to the respondent, are appropriate.

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Derrick, J.A.