1994 **S.H. No. 101993**

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Economical Mutual Insurance Company v. Elliott, 1999 NSSC 93

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

PLAINTIFF

- and -

LAWRENCE KEVIN ELLIOTT

DEFENDANT

D E C I S I O N

HEARD BEFORE:	**The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia on June 9, 1999**
DECISION:	**June 14, 1999**
COUNSEL:	**John E. MacDonell and David Henley/law student - Solicitors for the Plaintiff**
	Michele J. Cleary, Solicitor for the Defendant

GOODFELLOW, J.

1. BACKGROUND

Lawrence Kevin Elliott, a Marine Engineer, on May 2nd, 1993 at Old Post Road, Sandy Cove, Digby County started a fire to burn some tall grass near a barn on the property owned by his common-law spouse.

The fire went out of control and the barn was destroyed.

Economical Mutual paid his common-law spouse, under her policy, $12,713.50 and now brings this action by way of subrogated right and pursuant to the **Insurance Act** alleging negligence on the part of Lawrence Kevin Elliott.

2. THE CLAIM

The claim is broken down building - $10,800.00; contents - $1,311.00; damage to main residence - $802.50, less a $200.00 deductible, a net claim of $12,713.50.

3. FORESTS ACT RSNS 1989 c.179 as amended

s.23(9) - Responsibilities of permit holder

> "The processor of a valid burning permit or any person acting on that person's behalf who ignites or causes a fire to be ignited shall take every reasonable precaution to prevent the fire from spreading and shall not leave the fire unattended until it is extinguished."

Regulations

2. (g) "**forest land"** means land bearing forest growth or land from which the forest has been removed but which shows surface

evidence of past forest occupancy and is not now in other use;

(k) **"woods"** means forest land and rock barren, brushland, dry march, bog or muskeg."

3. (3) "Except as provided in the **Act**, during the fire season as prescribed in subsections (1) and (2), no person shall set, start, kindle or maintain a fire in the woods or within one thousand feet of the woods without a valid permit to burn."

6. (1) "Except where the Department has prescribed or approved specific alternatives, every person in charge of an operation or **activity** conducted **in the woods or within one thousand feet of the woods** during the season shall provide and **maintain** fire fighting equipment."

4. CASE LAW - AUTHORITIES

Maritime Telegraph & Telephone Company Limited v. Joseph and Heim (1976), 50 N.S.R. (2d) 575. Joseph contracted Heim to demolish buildings and after the demolition Heim agreed to burn the debris, if Joseph accepted liability, which he did. The fire damaged telephone wires. Cowan, C.J. found the fire burned out of control by reason of the demolition creating a tunnel causing the material partly covered with fill to burn with great intensity.

Cowan, C.J. at p. 583, para. 21 stated:

> "I find, therefore, that the defendant, Lawrence Heim, was guilty of negligence in starting the fire, without taking adequate precautions to have men and equipment standing by in case it burned with greater intensity than he anticipated; that he should have foreseen that the fire might burn out of control, and that, in that event, damage might be caused to adjoining premises and property, including the cables of the plaintiff company. I find that he is liable for the damage which actually resulted. I also find that he was

> employed by the defendant, Neiff Joseph, personally, and that he was not an independent contractor."

The Law of Torts, Fleming 7th Edition, p.325:

> Negligence
>
> "Failing **Rylands v. Fletcher**, a plaintiff is remitted to proving negligence. Negligence can take many forms: it may consist in the manner or place of lighting a fire (for example close to highly inflammable materials) or in failing to watch it and prevent its getting out of control, or in just creating a situation conducive to spontaneous combustion."

5. FINDINGS OF FACT

1. Mr. Elliott obtained a permit under the **Forests Act**.

2. Mr. Elliott waited for a day without wind and started the fire after five o'clock, the time directed by the permit.

3. Mr. Elliott was a trained marine firefighter who had been to firefighting school in Waverley twice, the first time for a three week course in 1974. He had burned the grass on this particular property each of the three years prior to this occasion.

4. Mr. Elliott had available a spade or shovel, but no other equipment.

5. Mr. Elliott did not dampen down the barn structure in close proximity to where he started the fire.

6. Mr. Elliott did not have any means at hand such as a pail or two of water or other source of water to attack the igniting of the wooden structure. The only hose

available was on the other side of the house and the house itself, he said, was 200 feet away.

7. The intensity of the fire was of such magnitude that it caused some limited damage to the siding on the house.

8. Mr. Elliott lit the first fire within twenty-four to thirty-six inches from the barn.

9. Mr. Elliott did not rake or otherwise remove grass or brush in close proximity to the wooden structure.

10. Mr. Elliott left the first fire and walked on discovery he said fifteen feet and in his evidence today, eight to ten feet, where he bent down and lit a second fire and then made some movement and I find probably took some steps towards the lower part of the lot to light a third fire when he glanced and noticed the **corner** of the building was ablaze. On discovery he estimated the time lapse from leaving the first fire at one to two minutes and at trial to 30 seconds and I find that it was more likely closer to two minutes (if not longer) and it was during this time when he had turned his back on the first fire lit in close proximity to the wooden structure that ignition of the structure commenced. Mr. Elliott has been burning grass all his life since he was six or seven years of age but acknowledged on discovery in answer to the question:

> "Q. Did you, what did you do to prepare the area for the burning? Did you do anything to prepare the area, or did you just sort of go out and light it?
>
> "A. I just went out and lit it."

11. Mr. Elliott promptly called the fire department and assistance arrived in approximately ten minutes. The firemen almost had the fire out when they ran out of water and by the time they returned the fire had spread and consumed the building and its contents.

12. Mr. Elliott's witness, Weldon O'Neil, from the volunteer fire department was one of the firemen who responded and they arrived within eight to ten minutes with a pumper and tanker and I accept his evidence that the fire was pretty much extinguished when they ran out of water. His evidence confirms that the fire was at the back **corner**. He stated it was contained back in the corner and spread out each wall.

13. I do not accept the suggestion of the adjustor, called by the plaintiff, that photograph number 4 shows shingles down to the level of the ground on the sides of the barn. As can be seen in photograph number 5, no shingles are on that side and I prefer the evidence of Mr. Elliott that the shingles were merely debris, probably from the roof.

14. That is not uncommon in dealing with grass fires to light more than one fire at a time and have them burn towards each other. Whether or not such is appropriate depends entirely on the prevailing circumstances in each case.

15. When Mr. Elliott first noticed the fire, he described it as being the corner of the barn being on fire. Mr. Elliott knew that fire could spread quickly.

16. Mr. Elliott suggests the barn had a foundation below the cement floor and the term foundation is an erroneous description of what I find existed. In photograph number 5 it appears that for most, if not all, of that side of the barn the base wood was on the cement floor or on the ground and no foundation of any kind is indicated. In photograph 6, there is some indication of rocks under the cement

floor and this is simply to compensate for the drop-off in the land which varies in accordance with the typography. I have serious reservations that there is anywhere near two to three feet of rock at the back and find that such did not exist in the position where Mr. Elliott lit his first fire which was not really at the back, but at the corner of the barn. In any event, quite probably grass and brush existed right up to the building and Mr. Elliott took no steps to rake, cut or address the clearly foreseeable spread of fire to the building itself.

17. Economical Mutual Insurance Company paid Mr. Elliott's common-law spouse under the policy $12,713.50 and this is acknowledged to be the amount of loss.

6. EXPERTS

Each party engaged and called an expert. I concluded that a determination of whether or not Lawrence Kevin Elliott was negligent in the circumstances could be made on the factual evidence before the court without the assistance of any expert opinion by the application of common sense.

7. CONCLUSION

The ordinary principles of negligence law apply. This is not a case for application of **Rylands v. Fletcher**. This is not a prosecution under the **Forests Act** or its Regulations. The permit required and obtained under the **Forests Act** does not determine the standard of care required of a person who starts a burn. This fire was of the backyard nature and would not require in these circumstances more than one person to be in attendance or the presence of the fire department. The duty expressed in s.23(9) of the **Forests Act** is to take every reasonable precaution to prevent the fire from spreading and this is an expression of the common-law duty upon one who lights a fire. The duty is that expected of a reasonable ordinary person and there is no heavier

duty under the **Motor Vehicle Act** because the licensed person happens to be a race car driver, nor is there a heavier duty upon Mr. Elliott by virtue of the fact that he has had training as a firefighter.

The fact Mr. Elliott obtained a permit before lighting the fire does not serve to waive or excuse any negligence that Mutual establishes by credible evidence tested by the onus upon Mutual of satisfying the court on a balance of probabilities that Mr. Elliott has been negligent and his negligence has caused the damages claimed.

Mutual notes the permit obtained by Mr. Elliott expressly directs the permit holder to comply with the **Forests Act and Regulations** in carrying out any burning activity. I conclude no cause of action exists or is established with respect to the Regulations. The definition which brings into play specific duties as to the prerequisite fire fighting equipment, number of personnel, etcetera, do not apply to a backyard burning.

After careful review of the evidence and having had the opportunity of observing the witnesses, I have no difficulty in coming to the conclusion that Mutual has established very clearly negligence on the part of Mr. Elliott and specifically that he lit a fire in grass, the lighting of which is and he knew to be inherently dangerous, particularly so where there was a very limited distant between the place of lighting the fire and the building. Mr. Elliott ought to have taken precautions of having available some means such as a hose or even a pail or two of water to put out any ignition of the barn. In addition, Mr. Elliott was negligent in turning his back on the fire he lit in close proximity to the barn. He knew that fire would spread rapidly and to turn his back on the fire he lit in these circumstances for two minutes or more is more than ample time for the fire to get out of control. Possibly, if he had remained to monitor the initial fire, he might well have been able to put it out or control it with a shovel but his leaving the initial fire unattended rendered even the inadequate preparation; i.e., having a shovel on hand, redundant.

As I indicated, I had no difficulty coming to this conclusion based on common sense and without reference to the experts' evidence and after having reached that conclusion, my weighing of the expert evidence is that it simply confirms my own conclusion in the result the plaintiff is entitled to reimbursement by Lawrence Kevin Elliott of its insurance payout in the amount of $12,713.50.

8. PRE-JUDGEMENT INTEREST

I have frequently held that there is no authority for compound pre-judgment interest. **Thomas-Canning v. Juteau** (1993), 122 N.S.R. (2d) 23 and **Cashen v. Donovan** (1997), 173 N.S.R. (2d) 87 no evidentiary basis exists in any event for its consideration. If counsel are unable to agree on the rate of simple interest, then I am prepared to hold a brief telephone conference to finalize this issue.

The majority of the insured's claim was paid by July 26th, 1993. There has been no satisfactory reason given for the delay in this matter and therefore, pre-judgment interest will be limited to four years.

9. COSTS

Counsel are entitled to be heard on costs and if they are unable to agree, they should file and exchange representations on or before the 23rd of June, 1999.

J.