CI96-01-96237

THE QUEEN'S BENCH

WINNIPEG CENTRE

BETWEEN:

EDDIE LIONEL CORMIER
and MARLENE L. CORMIER,

Plaintiffs,

- and -

PANTEL ENTERPRISES LTD., c.o.b. as
PROVENCHER APPLIANCES and the said
PROVENCHER APPLIANCES,

Defendants,

- and -

WADDELL APPLIANCE & PARTS COMPANY

Third parties.

REASONS FOR DECISION delivered by The Honourable Madam Justice Steel, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 25th day of June, 1999.

APPEARANCES:

MS. J. HOLMSTROM, for the Plaintiffs

MR. M. FINLAYSON, for the Defendants

EXCERPT FROM JUNE 25, 1999

THE COURT (Orally): Counsel, I have prepared written reasons and I will read them to you in a moment, but I prefer not to have you wait expectantly for 15 minutes until I get to the end of my reasons. So I will tell you right now that, Ms. Holmstrom, I believe you are very persuasive counsel, but you have not persuaded me on the balance of probabilities that the origin of the fire was at the floor level, and I have dismissed the plaintiff's claim.

Having said that, anticlimactic though it may be, let me now read you my decision.

This is a claim for fire loss by the plaintiff against the defendant arising out of a fire occurring in the kitchen of the plaintiffs' home on September 15th, 1994. Counsel have been able to agree to a statement of the relevant facts in this case and I will read them into the record.

On September 15th, 1994, the plaintiffs Cormier resided at 304 Edward Avenue East in Winnipeg, Manitoba together with their two grown children. There was a fire in the kitchen of the Cormier home on the morning of September 15th, 1994. No one was at home at the time of the fire loss except the Cormier's dog. As a result of the fire loss, the Cormier home and its contents sustained fire, smoke and water damage, and the Cormiers were required to move out of their home while repairs were effected.

Damages arising out of the fire loss have been agreed to in the amount of $48,144.77, plus pre-judgment interest, for a total amount of damages of $61,143.86.

The most extensive fire damage in the Cormier home appeared to be in the area where a counter, upon which a coffee maker sat, and the fridge were located. The contents of the fire, including the fridge and the coffee maker, were

inadvertently disposed of shortly after the fire loss.

On or about August 5th, 1994, the Cormiers hired Provencher Appliances to look at and repair their fridge. Provencher Appliances attended at the Cormier home but was unable to repair the Cormiers' fridge there, and so the fridge was taken to Provencher Appliance's shop. Provencher Appliances replaced the fridge's compressor while it was at the shop. The fridge was returned to the Cormier home on or about August 10th, '94, and the Cormiers paid Provencher Appliances for their services. There were no apparent difficulties with the fridge between August 10th, '94 and the fire loss.

The defendant first received notice of this claim in January '95, after the contents of the kitchen had already been disposed of.

As I indicated previously, this is primarily a factual case. I agree with the plaintiff that they need not prove with scientific precision the cause of the fire, but they do need to prove that their theory, i.e. that the fridge power cord was primarily the cause of the fire, is more probable than not.

We are agreed that there was a fire that started in the kitchen and, in particular, the fire seemed to be centred around the counter and the fridge. So the first question that must be asked is what was the origin of the fire?

Mr. Shirer, an expert called on behalf of the plaintiff, testified that based on the V-shaped burn pattern depicted by the pictures, the fire began on the floor near the fridge. I am not convinced. While at first blush an untrained eye, such as my own, might see a V-shaped pattern in picture 13 of tab 9, I am persuaded by the points made by Dr. Becker in his testimony:

First, that the base of the V could have been at

the countertop and not at the baseboard, and that there is crystallization there which is at the back, above the backsplash, which is indicative of very high heat at that point;

Second, that there is a four-foot vertical burn that could be consistent with melting plastic dripping down;

Third, that there were certainly other things on the counter, despite the evidence of the Cormiers that there was nothing else there. The experts do agree that the marks on the countertop indicate that something else was there. That added possibility of melting plastic could have added to the fire.

Four, on the fridge there is a significant degree of verticality below the countertop, and it fans out after it hits the countertop level.

Five, a point that concerns me particularly is that the picture 13, the one that both experts seemed to focus on to indicate the V-shaped burn pattern, is in reality a re-creation. The counter was put back. Overhead cabinets seemed to have been in place before the fire -- they were taken out after the fire and are not present in the picture. There was some burning on the stove, but the stove is not placed back in picture 13. There were significant changes, and it is difficult to determine what the burn pattern really looked like originally.

In passing, I should point out that this is a battle between the experts, and much was said about the various credibility of the experts. I did not find Dr. Becker argumentative. I believe that both Mr. Shirer and Dr. Becker had expertise and significant expertise in fire loss, and I did qualify both of them. It is true that Dr. Becker's degree is not in chemical engineering but in civil engineering, and Mr. Shirer's degree is in chemical engineering. But both of them have expertise in fires

originating in fridges.

Dr. Becker has investigated all reported fires involving a number of different makes of fridges for the last five years in Ontario, Quebec and Manitoba, and Mr. Shirer also investigated a number of fires dealing with Inglis fridges, as well as coffee makers.

I believe the defendant has put forward an equally consistent theory that the origin of the fire may have been at the countertop level, perhaps in the coffee maker.

First, I have to repeat, as I said during argument, that I do not put much weight on the exemplar test conducted by Mr. Shirer. There are a number of reasons:

The conditions were different: the fact that it was outside, the different countertop used, the different adhesive used, the different height of the fridge.

The power was tripped at seven minutes. Mr. Shirer indicated that in the Cormier home it could have been tripped earlier or later. That would have had a different result on the degree of residue of the coffee maker.

The question of the carafe. In the exemplar test a carafe was present. We don't know if a carafe was in the coffee maker in the Cormier house.

Other things on the counter of melting plastic could have contributed to a different type of result in the Cormier fire. There was nothing else on the counter in the exemplar test.

The location of the coffee maker on the counter; not so much the horizontal position, although that is also questioned, but even the fact that in the exemplar test it was close to the stove, whereas in the Cormier house it may or may not have been closer to the fridge.

Most importantly, Dr. Becker testified that there are other ways that a coffee maker could catch on fire. He mentioned two of them: the toggle switch, and a leak in a

plastic tubing, which would have resulted in a different melting pattern, both with respect to the laminate and with a different pattern resulting on the coffee maker itself. While in the Shirer report, on page 23, he states, " The only way" that a coffee maker can cause a fire is through a malfunction such as the one that he attempted to show in the exemplar test. He says that, We do know that the fire started in that area, and there was only a coffee maker and a fridge and that it was not a coffee maker, and that's how he gets to his result. Well, I'm not convinced that it couldn't have been a coffee maker. We also don't know what caused damage to the stove. We don't know if anything was plugged into the stove.

So although I am satisfied, based on the evidence in front of me, that the two most probable origins of the fire is either the floor level or the countertop level, I do not find that the evidence is more consistent with a floor level fire origin, i.e. the fridge, than a countertop fire origin in the coffee maker.

Even if I accept that the origin of the fire was at the floor, I have difficulty with the question of the cause of the fire.

The source of the ignition: The plaintiff argues that the only source of ignition down there would be a damaged power cord. Well, in order to conclude that it's probable a damaged fridge cord could have caused the fire, I have to assume two other things. I have to assume that there was some sort of combustible at the back of the fridge that acted as a sort of kindling in addition to simply the wood of the counter. A significant fuel source must have been present according to the experts.

There was no evidence of anything like that. It's a fairly large assumption to assume that oil had poured down, Kleenex, dog hair, or some sort of source of ignition,

as opposed to the countertop level where we know that plastic was present and represents a known fuel source. I also have to assume that the cord was directly against the counter baseboard, touching the wood. In addition, I have to assume that the power cord was damaged by the defendants.

Now, Cormier testified that the fridge was most recently handled by the defendants, but it's not a necessary inference that thereby it was handled negligently or negligence occurred. The cord may have been damaged previously by other means; damage may not have been visible. Mr. Shirer said that pyrolysis could take years and the cord could have been damaged years ago, by someone else moving it, by some other source. There is no evidence of negligence here.

Before I can draw an adverse inference from the defendants' failure to call evidence as to their treatment of the power cord, the plaintiff has to prove a prima facie case of negligence.

In Fontaine and British Columbia [1998] 1 S.C.R. 424, the Supreme Court of Canada held that:

> The circumstantial evidence that the maximum of res ipsa loquitur attempted to deal with is more sensibly dealt with by the trier of fact who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established, on a balance of probabilities, a prima facie case of negligence against the defendant. It's only if such a case is established that the

> plaintiff will succeed unless the defendant presents evidence negating that of the plaintiff.

So in that case, for example, the prima facie case was not even established because the car, in the Fontaine case, could have gone off the road through negligent means or through non-negligent means.

Again, in the case of Attorney General and Clorey [1998] P.E.I.J. No. 50, at page 3, I note that the facts in that case indicate that the court could find that negligence occurred here. On page 3 the court states:

> Clorey performed the cutting operation, an inherently dangerous activity, in an indisputably negligent manner, in an area of the wharf where cellulosic debris could and had been known to gather. Witnesses testified to seeing smoke coming from that very area within an hour after he ceased cutting. That was within the time-frame that it might take for a fire to break out if it began from smoldering in cellulosic material.

And the court goes on to describe a situation where an inference of negligence is very probable, as compared to our situation where there was some repair done to a fridge five weeks ago but no other evidence indicating negligence.

Again, in the case of Marchuk and Swede Creek Contracting [1998] B.C.J., at page 2:

> We find once again the trial judge found, based on the expert evidence, that ignition of the fire was caused by a spark igniting oil or wood debris underneath the cab of the skitter. The spark could have smoldered for a maximum of three hours before ignition.

And the trial judge found that the defendant's employees replaced the skitter door within that period, between 6:00 and 6:30, and furthermore, the trial judge concluded that no one else was near the skitter in the three-hour period.

Once again, in the Lorefice case, there's a stronger inference of negligence. The court is able to conclude that,

> "The defendant probably left open the sliding inner door of the burner access opening."

And again, at page 8 of the Lorefice and Consumers Gas Co. case [1998] O.J. No. 2832, the court is able to conclude, at page 8, that,

> "... the defendant's failure to close the inner door and ensure the cover was in place, elements which constituted part of the design of the heater and which were probably intended to protect external combustibles from flame rollout, was negligence."

There is no act that I can point to in the evidence, no act by the defendant that necessarily constituted negligence.

I point to the case of Hildebrand, tab 6 of the defendants' materials, at page 477, that indicates that fires can occur without negligence on anyone's part.

And finally, to the case of Hinds and Rogues Gallery Ltd. [1987] N.S.J. No. 166, at page 3, where the court, quoting from passage in F.J. Spencer Co. Ltd. and Irving Oil (1951) 28 M.P.R. 320, at 363, states:

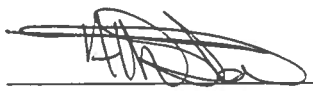
> In civil cases it is usually sufficient that as between the parties the plaintiff prove his case by a preponderance of evidence. In applying this rule to cases which depend upon inference from facts, the plaintiff must show that the inference which his case depends is a reasonable inference, and in order to turn the scale, he must be prepared to weigh that inference against any other suggested explanation and show that his explanation is more reasonable. If it appears that some contrary explanation is equally reasonable, the plaintiff must fail.

For these reasons, I find that there is a contrary explanation which is equally reasonable and I dismiss the plaintiffs' action.

(EXCERPT CONCLUDED)

CERTIFICATE OF REASONS

These are my reasons for judgment in the case of Eddie Lionel Cormier and Marlene L. Cormier v. Pantel Enterprises Ltd., COB as Provencher Appliances and the said Provencher Appliances, and Waddell Appliance & Parts Company.



STEEL, J.