1993 **S.H. No. 93-4777**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

THE HALIFAX INSURANCE COMPANY

Plaintiff

- and -

DONALD T. MATHESON ENGINEERING LIMITED
and **MURRAY BARRETT**

Defendants

D E C I S I O N

HEARD: Before the Honourable Justice D.W. Gruchy in Halifax, Nova Scotia, on February 22, 23, 24 and March 27, 1995

DECISION: May 17, 1995

COUNSEL: Colin D. Bryson, Esq., Counsel for the plaintiff

George W. MacDonald, Esq., Q.C., Counsel for the defendants

GRUCHY, J.

Introduction

The Halifax Insurance Company issued a fire insurance policy to Craig and Christine Sanford for their residence at Cambridge Station, Nova Scotia. That policy covered loss of the property by fire, loss of personal property and living expenses. On February 14, 1991, a fire occurred in the Sanford residence and much damage ensued. The fire occurred when no one was at home.

After the fire certain investigators noticed what they considered to be unusual burn patterns and became suspicious that the fire was incendiary in origin, or deliberately set. Investigators, including the defendant Murray Barrett, went to the property.

The corporate defendant does business, inter alia, in the investigation of electrical causes of fires. Its employee Murray Barrett is an electrician. When Mr. Barrett went to the fire scene his task was to determine if there had been an electrical cause of the fire.

The attention of the investigators, including that of Mr. Barrett, centered for some time on the electric stove in the kitchen of the residence. A considerable amount of the fire had been centered around that appliance and there was a pot of cooking fat, covered with a lid, on the stove. Mr. Barrett looked at the stove and concluded the burner upon which the pot of fat was located was on low. He and the other investigators concluded the stove and fat were not a possible source of the fire. Mr. Barrett decided there were no possible electrical causes of the fire and he and the other investigators concluded the fire had been set.

Based on the advice received from the defendants and the other investigators, Halifax Insurance denied liability to Mr. and Mrs. Sanford. Mr. and Mrs. Sanford

commenced an action for the recovery of insurance proceeds. Halifax Insurance maintained a denial of liability on the basis of the report it had received. Halifax Insurance says that crucial to its decision to deny liability and an underlying assumption in all its reports was the defendant's conclusion that the stove and fat were not the cause of the fire.

From the outset, Mrs. Sanford maintained that the stove had been accidentally left on high and was therefore the probable cause of the fire.

As the matter neared trial, Mr. and Mrs. Sanford produced certain expert opinions. Their experts had examined the evidence available and concluded that the burner upon which the fat was located had been set on high and that prolonged heating at that temperature was a probable source of the fire. When Halifax Insurance, through its solicitor, received those reports and was faced with a potential bad faith claim it obtained certain further experts' reports. These reports agreed with those obtained by Mr. and Mrs. Sanford: the stove burner had been set on high and the fat was a probable source of the fire.

Halifax Insurance proceeded then to settle the Sanford action.

Halifax Insurance claims that by denying liability it incurred:

(a) Extra damages to Mr. and Mrs. Sanford consisting of living allowance;

(b) Sanfords' legal costs;

(c) Sanfords' experts' costs;

(d) Its own extra legal costs; and

(e) Its own extra experts' costs.

Halifax Insurance therefore commenced this action for the recovery of all the above.

The defendants have denied liability. They say the stove was in fact on low and the other witnesses were mistaken. In addition, they say that even if it is proven that the stove was on high, it was not negligent in coming to the opposite conclusion. It points to the fact that other experts had reached the same conclusion. It also says the stove setting was but one of the facts that led Halifax Insurance to deny liability.

Issues

1. Did the defendants owe a duty of care to Halifax Insurance and what was the scope of that duty?
2. Was there a breach of that duty?
3. What damages were caused by the breach of duty?

The Facts

Mr. Sanford had been at home in the early morning of the day of the fire with two of his three children. He had not been feeling well and was going to see his family doctor. The children were pre-school age. Mrs. Sanford had gone to work. Around 9:00 a.m. he readied the children to go with him. While doing so he had spilled a small amount of milk on the stove and wiped it up. A pot of cooking oil was on the stove. He and the two children left the family dog inside and after locking the residence securely, they left for their family doctor's office.

At about ten o'clock Mrs. Sanford was notified by a friend or neighbour that their house was on fire. She called Mr. Sanford at the doctor's office and they both returned separately to their house.

After the fire was extinguished, the "suspicious burn patterns" were noticed on the kitchen floor and in one or two other locations. When this was reported to Halifax Insurance, they decided to obtain the services of Matheson Engineering and others. On February 15, 1991, Murray Barrett attended the scene with a member of the Royal Canadian Mounted Police, the local fire chief, a representative of I.C.P.B. and an adjuster. They noticed that there was extensive damage around the kitchen stove and the element upon which the fat was located was on. Mr. Barrett looked at the stove and concluded it was on low and was therefore not a source of the fire. He related that observation to the other investigators and says the investigators reached a consensus on that point. He examined the rest of the house and reported that electricity had not been a cause of the fire. He referred to the stove in his report to Halifax Insurance and in a notation beside a photograph of the burner element reported: "Rear element of kitchen stove which was on and set at the lowest setting possible. Pot on this burner would, at best, only stay warm."

The defendants have maintained that the above conclusion was correct and, further, that the fire was probably set by Mr. Sanford. I have concluded that the defendants are wrong in those conclusions.

David Miller, Q.C., was retained by Halifax Insurance to represent it in the action commenced by Mr. and Mrs. Sanford. He was given all the investigation reports prepared for and by Halifax Insurance employees and agents, including that of the defendants. His opinion was embodied in his letter of August 19, 1991, wherein he set forth the facts upon which he relied. On the underlying premise that the fire was not accidental (which in turn was premised on Barrett's conclusion that the stove was set on "low"), Mr. Miller maintained a denial of liability to the Sanfords.

The Sanford action proceeded in an ordinary fashion. Mr. and Mrs. Sanford, through their solicitor, Michael Coyle, obtained certain experts' reports concerning the origin of the fire. Those experts concluded that the stove burner had been left on high and the heated oil had vaporized, ultimately igniting explosively.

When Mr. Miller and Halifax Insurance reviewed the Sanford reports they decided they should review their own position carefully. Mr. Cliff Tyner of Nova Scotia Research Foundation Corporation had given his opinion that based on the assumption the stove burner was in its lowest setting, it was unlikely that it was the source of the fire. He was therefore asked to review the entire matter of the stove and fat as a possible source of the fire. As Mr. Tyner was to be out of the country for a period of time, his assistant, Harold David Porteous, was asked to undertake this investigation.

I was particularly impressed by the evidence of Mr. Porteous. He examined the photographic evidence of the stove and was able to determine the position of the burner control in question. He then obtained as much evidence as he was able to do concerning that particular make and model of range and obtained replacement parts for it. He concluded that the stove's burner under the fat had been on high. I accept the evidence of Mr. Porteous, including particularly his opinions and conclusions, in its entirety.

Halifax Insurance, through its solicitor, Mr. David Miller, then re-examined carefully their entire defence to the Sanford claim. They concluded that the defence was fatally flawed. Their other reports were based on the assumption that the stove had been on low and therefore the fat, or vapour from the fat, would not have ignited. Their evidence now was to the effect now that fat left on a high burner would produce vapour outside the pot which would ultimately ignite in an explosive manner.

The fact that the fat had been left on a high burner, by itself, did not explain the burn patterns on the kitchen floor. The reports submitted during this trial, however, strongly convinced me those patterns had been caused in the manner described in the Sanfords' experts' reports. That is, the lard stored in the cupboard above the stove had melted in the intense heat from the flaming fat vapour and had run out of the cupboard, onto the stove and thence onto the floor where it pooled and burned, thereby creating the burn patterns.

I note particularly when Mr. Miller received Mr. Porteous' report he contacted Mr. Donald Matheson. Mr. Miller in due course reported to Halifax Insurance that when Mr. Matheson heard of Porteous' conclusions he agreed with them. He did not expressly do so during trial. I accept the statement given by Mr. Miller in his report to Halifax Insurance on July 24, 1992. He said:

> We are all of the opinion that the evidence will indicate that the right rear burner of the Sanford stove was on "high" when examined subsequent to this fire. During our meeting we spoke with Harold Porteous of the Nova Scotia Research Foundation Corporation. Mr. Porteous confirmed that it is his definite opinion that the burner was set on "high". I have spoken with Don Matheson who also has verbally advised me that he agrees with this conclusion. I take it from Murray Barrett's recent report that he is also in agreement on that point. While Bill Wilson relied initially on Mr. Barrett's opinion, I have reviewed the details of the evidence with him and he agrees with the conclusion that the burner was set on "high".

Halifax Insurance, through its own staff and other investigating personnel, had set about the investigation of this fire with a considerable amount of zealousness. They seemed to make the assumption that if an accidental cause of the fire was not readily discerned, suspicions were aroused. It is a function of an expert to bring to bear a special discipline in an objective manner to offset the skew of zealousness. The defendants failed to do that.

Mr. William Cairns and Mr. W. Stephen Johnson, both of Halifax Insurance, gave evidence of the handling of the Sanford claim. They each told why the company initially decided to deny liability to Mr. and Mrs. Sanford. They each explained how in the investigation of any fire claim the company looks for the method of igniting the fire, the opportunity of the insured to set the fire and the motive of the insured. While I conclude these witnesses were stretching the facts they discovered and were reported to them to justify the denial of liability, it was still incumbent on the defendants to report the facts accurately and objectively. Some of the so-called expert investigators, including Mr. William

Wilson of the Insurance Crimes Prevention Bureau, when faced with evidence that Mr. Barrett's opinion was wrong, reluctantly changed their opinion of the origin of the fire from "incendiary" to "suspicious".

Mr. Barrett's investigation at the scene on February 15, 1991, was routine in that he appeared to eliminate electrical faults as a cause of the fire. His examination of the range, however, left much to be desired. He recognized that the burner control was in an on position. Indeed, that is obvious from the photographs exhibited to me. The knob in question was in the 1:00 o'clock - 7:00 o'clock attitude. Mr. Barrett concluded that attitude was low. He made no attempt to check that conclusion. He did not record the make or model of the range. He did not check to determine whether a knob pointing in the 1:00 o'clock position was on low or high. He seemed to have jumped to the conclusion that it was on low. He attempted to examine the broken glass which had surrounded the knob and upon which were certain marks but failed to check further. His duty was to bring objectivity to bear and to check carefully his conclusion. He did not do so.

Mr. Barrett's failures misled Halifax Insurance's other investigators. The absence of any probable accidental cause of the fire had the effect of blinding the investigators to innocent explanations for what they considered to be suspicious circumstances.

Halifax Insurance and the other investigators relied on the defendants' conclusion in the defence of the Sanford action.

Mr. Miller's representation of Halifax Insurance depended to a large extent on there being no probable accidental cause of the fire. When faced with the evidence that there was probably an accidental cause, Mr. Miller promptly advised his client of the likely consequences. Mr. Miller described in evidence the position Halifax Insurance found itself in, having determined that the burner was probably on high:

> Now I said that in my opinion the plaintiffs' theory failed if it was on low - that simply is referring back to Mr. Tyner's report in which he said that if the ... if the burner were on low there never would be a fire.
>
> My concern about our position if the burner was on high related to the fact that we had gone forward, at least in the time I had been involved in this case, we had gone forward with a certain theory of the cause of the fire. One of the essential elements of that was that the pot was on low and therefore it could not have caused the fire.
>
> And here we have a suggestion that the fact was the opposite, that the pot was on high. I was concerned that if the pot of fat was found to be on high, then I guess two things, firstly, I did not know if there were any possible explanation for the fire which would rule out an accidental cause if ... if the pot were on high. And bearing in mind the ... the circumstantial nature of the case and the burden of proof, I was very concerned about going forward to trial if there were a plausible accidental theory.
>
> Secondly, quite apart from that, we had ... as I say, our case had ... theory of the case, our preparation, the evidence to this point had proceeded on the basis of the pot being on low. Here we have a completely different fact. My concern from the trial point of view was that if we have to pull in our horns and acknowledge at this late date that what I regarded as a very important fact in the defence was wrong, it would be very difficult with any credibility to rehabilitate a new theory before the court.

Mr. Miller then proceeded to settle the case with Mr. and Mrs. Sanford. I conclude that he had little other choice. A settlement at that point was clearly the prudent course of action and the settlement then achieved appeared to be entirely reasonable.

In reaching the conclusions as I do, I have made certain findings of fact and credibility. I will set forth certain of those findings concisely.

1. Mr. Barrett, as the electrical expert, was under a duty to examine the electric range and determine whether the burner in question was on high or low.

2. Mr. Barrett failed to discharge that duty in as competent a manner as is required of an expert. He did not examine the stove with the care required of him.

3. Mr. Barrett related his opinion to the other investigators present and while they may have agreed with him, it was Mr. Barrett's duty and within Matheson's expertise to make his findings with as much professional certainty as reasonably possible.

4. Mr. Barrett did not impress me as a candid and reliable witness.

5. Halifax Insurance relied on the defendants' expertise and opinion.

6. The range in question was in fact left on high and on a balance of probabilities was the accidental cause of the fire.

7. Mr. Donald Matheson's evidence did not persuade me that Mr. Barrett was correct in his conclusions or that there was any sustainable evidence that the range was on low.

8. There was no evidence that convinced me that the burner setting had been tinkered with prior to the observations which led to the conclusion that it was on high.

The plaintiff has met its burden of proof. That burden was fully set forth in **Highland Fisheries Ltd. v. Lynk Electric Ltd.** (1989), 93 N.S.R. (2d) 165, by MacIntosh, J., in **Italian Village Limited v. J.A. Moulton and Son Limited et al** (1981), 47 N.S.R. (2d) 14 and Doull, J., in **F.G. Spencer Company Limited v. Irving Oil Company Limited** (1951), 28 M.P.R. 320.

The defendants failed to meet the standard of care which engineers must meet as described in **Ramsay and Penno v. The King** [1952] 2 D.L.R. 819 at p.823.

Damages

Halifax Insurance unquestionably incurred costs and expenses as a result of the defendants' negligence. The Sanfords' claim ought to have been settled quickly and expeditiously and without incurring the costs involved in the defence of the Sanfords' action, including the costs of various experts. Halifax Insurance claims that the following costs were incurred by its reliance on the defendants' findings:

David Miller	- $ 13,375.00
Nova Scotia Research	- $ 12,728.04
Mac Williams	- $ 6,710.21
	- $ 2,531.34
Marsh Adjustment	- $ 1,558.10
Sanfords' costs and disbursements	- $ 43,921.23
Matheson invoice	- $ 1,059.83

I will address each of these items of damage.

1. Had Halifax Insurance been properly advised at the outset by the defendants, Mr. Miller would not have been retained at all. Mr. Miller's total costs, plus interest, will be allowed as an item of damage.

2. Nova Scotia Research Foundation Corporation submitted an account to Mr. Miller for its services rendered in the amount of $12,728.04. The earliest of the services rendered covered by that account was on October 17, 1991. The services rendered by that Corporation and covered by this particular invoice were all necessitated by the defence of the Sanford action and brought about by the lack of competent advice by the defendants. That amount, together with interest, will be allowed as an item of damages.

3. Mac Williams Engineering Limited was retained to give an opinion on the

general condition of the structure of the Sanford house and to provide an estimate of costs or repairs to restore the building to a similar condition prior to the fire. Halifax Insurance says that Mac Williams was retained to give this opinion in order to determine whether there was a financial motive for the Sanfords to have destroyed their own house.

I have reviewed the report supplied by Mac Williams. That report does in fact deal with the condition of the house prior to the fire, but also appears to me to deal with the question of the damages incurred by the fire. That opinion would likely have been obtained in any event. I therefore disallow the claim for the Mac Williams account.

4. Marsh Adjustment Bureau Limited was appointed initially to investigate the fire and Halifax Insurance has made no claim for that initial investigation. The company has submitted an account in the amount of $1,558.10 for all services rendered in the further investigation necessitated by the defendants' negligence. That amount, together with interest, will be allowed as an item of damages.

5. Halifax Insurance has claimed that additional Sanford costs and disbursements amount to $43,921.23 plus interest. Included in that amount are the following:

(a) Additional Living Expenses - $ 6,000.00 - That figure is entirely reasonable. That amount was paid to Mr. and Mrs. Sanford, apparently without receipts, for the additional living expenses incurred by them while awaiting settlement. Given the period of time involved and the fact that they have young children to care for, the figure is entirely acceptable.

(b) Solicitor-client costs were paid to the Sanford solicitors in the amount of $6,000.00. That figure is entirely acceptable. Disbursements were paid in the amount of $30,921.23. The defendants, in part, take the position that at least some of those expenses were incurred by so-called experts who essentially did not have the expertise required. That may have been the case had the experts been required to give evidence in court, but that

did not materialize. The experts' reports obtained by the Sanfords appear to be well considered and well reasoned. I make no comment on the degree of expertise of the authors. The amounts expended by Mr. and Mrs. Sanford for these experts' reports were entirely reasonable and acceptable. An additional sum of $1,000 was paid to Mr. and Mrs. Sanford, presumably as a gesture of goodwill on the part of Halifax Insurance. That figure, as well, appears to have been entirely reasonable.

I will therefore allow this item of damages in the amount of $43,921.23 plus interest.

6. The defendants billed and were paid the amount of $1,059.83 for the services they rendered in this matter. The defendants were retained to do a competent professional job and failed completely to do so. I will therefore allow this item of damages plus interest.

The plaintiff has set forth in summary form the claim which, for the purposes of this decision I adopt, with the exception of the Mac Williams' account. The damages are therefore, in summary, allowed as follows:

Claim	Amount	Date Incurred	Days to Mar.15/95	Amount
David Miller	$8,730.42	Feb. 3/92	1,135	$ 1,628.05
	2,386.86	July 22/92	966	378.83
	506.91	Nov. 9/92	856	71.22
	13,375.00	Dec. 30/92	804	1,766.80
Nova Scotia Research	12,728.04	Oct. 7/92	899	1,859.09
Marsh Adjustment	1,558.10	Aug. 28/92	929	176.77
Sanford costs and disbursements	43,921.23	Sept. 3/92	923	6,660.61
Matheson Invoice	1,059.83	Mar.30/92	1,080	188.06
TOTAL:	$ 84,265.89			$ 12,729,43

The plaintiff's claim is therefore allowed in the amount of $84,265.89 plus interest in the amount of $12,729.43. The amount involved in this action is therefore $97,000 and costs will be on the basis of Scale 3. I will hear counsel further on the matter of costs, if necessary.

J.

Halifax, N.S.