

Case Name:

Bois v. Ron's Burner Services Ltd.

Between

**Edward Bois and Debbie Bois, and
Ron's Burner Services Ltd.**

And between

**TD Landscaping Inc., and
CGU Insurance Company of Canada, Select Insurance
Brokers Ltd., Bob Caition and Philomena Quinn**

[2004] O.J. No. 5788

Nos. 03-CV-2447842CM3 and 02-CV-2255575 CM3

Ontario Superior Court of Justice

N.L. Backhouse J.

Heard: December 2-5, 2003 and January 14-16, 21, 2004.

Judgment: February 2, 2004.

(66 paras.)

Damages -- For torts -- Affecting property -- Real property -- Torts -- Negligence -- Causation -- Evidence and proof.

This was an action brought by the plaintiff, Bois, for damages that occurred to their garage as a result of a fire. Bois alleged that the defendant, Ron's Burner Services Ltd. was liable for the damages. Bois' furnace was serviced by an employee of Ron's Burner, Newman. Newman had serviced Bois furnace on a number of occasions and had made necessary repairs. The Bois had their furnace serviced annually. In 2000, Newman noticed cracks and warping on the furnace. He did not believe this would cause any problems and did not warn Bois. In 2001 a call was made to arrange the 2001 servicing. Before the servicing took place, Bois' garage caught fire. On the evening before the fire, Bois was doing work that could create sparks, although he did not see any. He testified that he was working about eight feet from the furnace. Roess, a fire investigator conducted an inspection. He believed the origin of the fire was the furnace. He observed excessive residue inside parts of the furnace. He identified this as the probable cause of the fire. Additional experts examined the furnace and found cracks in the furnace. Other experts testified that the fire originated from the furnace and that the cause was the failure of the furnace due to maintenance issues. The amounts of residue in

the furnace had accumulated over two or three years and should not have been present if the furnace was being serviced annually. Ron's brought an expert to testify. He testified that the furnace was not the source of the fire. He submitted there were other possible causes for the fire.

HELD: The action was allowed. The origin of the fire was within the furnace. The cause of the fire was the excessive deposits of carbon and scale which prevented the fire from properly venting. The witnesses that testified on behalf of Bois viewed the site and had considerable experience as fire investigators. Ron's witness was not persuasive. His evidence was not impartial. Newman should have alerted Bois about the crack in the furnace and recommended that it be replaced. Had the furnace been properly serviced in 2000 accumulations would not have occurred to such an extent over the next year to clog the furnace and cause the fire. As a result of Newman's negligence, Ron's was responsible for paying damages to Bois.

Counsel:

Martin Forget for Edward and Debbie Bois

Chris Reain for CGU Insurance Company of Canada

H. Engell for Select Insurance Brokers Ltd., Bob Caition, Philomena Quinn

Peter Braund and O. Guillaume for Ron's Burner Services Ltd.

N.L. BACKHOUSE J.:--

Overview

1 The above two actions have been consolidated. The defendants other than Ron's Burner have settled the claims against them and seek by cross-claim and subrogation to recover from Ron's Burner the damages they agreed to pay. Damages have been agreed upon in the following amounts (plus interest and costs):

CGU Insurance - \$40,000

TD Landscaping - \$125,000

Edward and Debbie Bois - \$70,000.

2 The only issue is the liability of Ron's Burner for a fire which occurred in the plaintiffs' garage on February 22, 2001.

3 In order to determine whether Ron's Burner is liable, the following questions must be answered:

1. What caused the fire?
2. If the furnace caused the fire, whether Ron's Burner was negligent in failing to properly clean and maintain the furnace.
3. Whether the plaintiffs are contributorily negligent for failing to have the furnace serviced within one year of its last servicing.
4. Whether spoliation of the fire evidence occurred and if so, what sanction, if any, should be applied.

Background

4 Edward and Debbie Bois run a landscaping and snow removal company called TD Landscaping Inc. The Bois' live with their 3 children at 9162 Chinguacousy Drive, Brampton, Ontario, which they purchased in 1989 and out of which they operate their business. At the time of the fire, the home and garage each had an oil furnace which had been there when the Bois' purchased the property.

5 The Bois' used the garage to store clothing, sports equipment and other personal contents.

6 The Bois' began having their furnace serviced by Ron's Burner in the early 1990's. The evidence of Edward and Debbie Bois was that Ron's Burner called annually to arrange for service of their furnaces when a technician was going to be in the area.

7 Rick Newman, a furnace technician with Ron's Burner, serviced the Bois' home and garage furnaces for the first time in 1993. Mr. Newman replaced nozzles and oil filters on the Bois' furnaces and cleaned both furnaces in 1995. Other service technicians with Ron's Burner looked after the Bois' furnaces in 1996, 1997, 1998 and 1999. Invoices disclose that Mr. Newman serviced the Bois' furnaces again on February 9, 2000. He cleaned both furnaces, and replaced two nozzles and one fan belt. At trial, he had no specific recollection of what he did to the furnaces in 2000.

8 Mr. Newman took a 3 month part-time course at Mohawk College to get his oil burners technician certification in 1988. He went to work immediately for Ron's Burner as an oil burner technician for the winter months. In the warmer weather, he is a self-employed landscaper. He had not taken any upgrading up to the time of the fire (a refresher course is now mandatory.)

9 On his examination for discovery, Mr. Newman gave evidence that he was not aware of any guidelines or manuals which specifically set out what is required to be done on an annual furnace inspection.

10 At trial, Mr. Newman testified that he may not have understood the question at his discovery. He testified that there was only one office copy of the Technical Standards and Safety Authority rules for doing an annual furnace inspection and that he had lost his copy.

11 Mr. Newman was paid by Ron's Burner on the basis of how many furnaces he serviced.

12 Mr. Newman testified that he had seen cracks and warping on the top plate of the combustion chamber on the furnace in the Bois' garage when he attended to service it in the year 2000. He did not advise the Bois' because the crack was in the top corner, nowhere near the flame, and he did not believe that it would cause impingement. He testified that it was not his practice to clean combustion chambers because they could be very brittle after years of use and, on one occasion, he had damaged one during cleaning.

13 In early 2001, Ron White, the proprietor of Ron's Burner, telephoned the plaintiffs to arrange to have their furnace serviced. The date Mr. White proposed was not convenient for the plaintiffs and the servicing did not take place prior to the fire on February 27, 2001.

14 Mr. Bois' hobby was midget race cars. The evening before the fire, Mr. Bois in the company of several friends, was using a 4 inch electrical grinder at the front of the garage to grind paint off parts of a disassembled race car. The frame for the race car was approximately 8 feet from the furnace. Mr. Bois testified that he did not see any sparks from the grinding but acknowledged that grinding can cause sparks. The work in the garage ended at around 10:30 p.m. on February 27, 2001.

15 Edward Bois and his son, Dennis Bois, discovered the fire in the garage at 4 a.m. on February 27, 2001. The Fire Department attended and extinguished the fire.

16 Michael Roess, a Fire Investigator with the Fire Protection Office of the City of Brampton, was called by the District Fire Chief to conduct an origin and cause investigation. At the time Mr. Roess investigated this fire, he had investigated approximately 300-350 fires. He has worked for the Brampton Fire Department as a Fire Prevention Officer since 1995 and in the fire protection industry since 1982. He does not fight fires. He has taken many courses in fire investigation and has taught fire protection techniques for 4 years at Seneca College.

17 When Mr. Roess arrived at the scene, the roof of the garage was collapsing. The roof and debris had to be removed before an investigation could be conducted. Based on his visual observations, Mr. Roess suspected that the fire started in the furnace area. He instructed a friend of the Bois who was helping to clear the debris to remove with a backhoe everything up to 5 feet from the furnace, the suspected origin of the fire.

18 Mr. Roess saw nothing abnormal with respect to the wiring or the electrical panel. He observed intensive burning in the neighbourhood of the left hand side of the furnace. There was a deep low down burn below the level of the fuel pump and below the electrical level. The only substance in that area was the furnace. He testified that the fire went straight up and that part of the wall was protected by a red tool box. The vent piping was removed from the furnace and set up on the lawn. He observed excessive residue inside the pipe which he identified as the probable cause of the fire.

19 Mr. Roess testified that he could deem the area of origin as the furnace but as he was not a furnace expert, he had to defer to someone with higher expertise to identify the ignition source inside the furnace. He testified that he had asked that the Technical Safety and Standards Authority, who had expertise when natural fuel involvement was suspected in the cause of a fire, be called, but that the request did not get forwarded. He testified that there was no reason to suspect the fire was caused by something electrical and therefore did not feel it was necessary to call the Electrical Safety Authority.

20 Mr. Roess returned to the site on March 1, 2001 with John Coull and John Butler. Mr. Coull is a fire investigator with Origin and Cause Inc. who was retained by CGU to investigate the origin and cause of the fire. Mr. Butler is also a fire investigator with Origin and Cause with an expertise in furnaces.

21 After looking at and documenting the furnace area, the wiring around the furnace area, the fuel lines and anything in the vicinity, Mr. Roess authorized the removal of the furnace to a warmer site.

22 The furnace was taken in a pick-up truck to Fire Station #4 where Mr. Butler inspected all the chambers, burner and internal combustion in the presence of Mr. Coull and Mr. Roess. Mr. Roess testified that upon dismantling the furnace, the combustion chamber was found to be cracked and to have slipped out of position. It was full of scale. He testified that after the inspection of the furnace was completed, he was satisfied that the fire had been caused by the furnace. In his opinion, there was no need to conduct further investigations.

23 Mr. Butler and Mr. Coull retained the fan motor and fuel pump for further testing. The rest of the furnace was returned to the site. Mr. Roess gave no instructions to retain the furnace as they had finished with it and he did not think that anyone else would be interested in looking at it. Mr. Roess testified that he was satisfied with Mr. Butler's expertise and that he did not consider that it was necessary to retain an engineer to examine the furnace.

24 John Coull is a fire and explosion investigator and has been employed by Origin and Cause since 1996. He previously worked for 7 1/2 years with the Ontario Fire Marshals Office. Since 1989, he has conducted approximately 1235 fire/explosion investigations including 430 investigations with the Ontario Fire Marshal's Office. He has been accepted as an expert witness on 23 occasions. He has taken many fire related courses, published articles on fire investigations and has presented lectures to the Ontario Fire College, Toronto Fire Academy, various police forces, fire departments and insurance companies.

25 Mr. Coull was retained by D. Runzo Property Adjusters Inc. on behalf of CGU to investigate and to prepare a report on the origin and cause of this fire. In his opinion, this fire originated within the furnace situated on the west wall of the garage and the cause of the fire was the failure of the furnace due to maintenance issues.

26 In the caption below one of the photographs that he took, Mr. Coull described an unusual amount of "soot". He testified that he was using this word loosely in the sense of "debris". He testified that he called in John Butler to examine the furnace because Mr. Butler is an expert on furnaces. Mr. Coull was present while Mr. Butler examined the furnace and observed that the furnace was largely undamaged. He relied upon Mr. Butler's opinion that the fire started inside the furnace.

27 Mr. Butler is a fire investigator with Origin and Cause Inc., primarily specializing in heat related fires. He is qualified to work on any oil fired appliance including large heating plants. He ran an oil burning service and installation business in Newfoundland for 10 years. He has inspected 6000-8000 oil furnaces. From 1973 to 1981, he was a fire investigator investigating the origin and cause of fires for the RCMP, the Newfoundland Fire Commissioner and the Newfoundland Constabulary. During this time, he investigated 600 fires. There is no gas heating in Newfoundland and 80% of the fires that he investigated for the RCMP involved oil fire heating equipment.

28 Mr. Butler testified that upon attending at the site, he completely documented the furnace area by photographing it. The furnace was a 1960-1961 Anthes furnace which he was very familiar with. He examined the sections of vent pipe which were on the ground. At Mr. Roess' direction, the furnace was then moved to a warmer location.

29 Mr. Butler examined the interior of the combustion chamber and removed and examined the burner. He observed a crack in the upper right hand chamber. The chamber base was full of scale and debris and the wall of the chamber was raised above the base by the large deposit of this scale and debris.

30 The front exterior firebrick portion of the chamber was coated in powdered soot. The interior of the chamber was burned clean of soot with a large deposit of scale and carbon remaining. There were very heavy deposits of soot throughout the flue gas passages. There was no external fire damage to the blast tube, end cone, burner fan, burner housing or burner motor and wiring at the burner.

31 The fuel pump had the back melted which, in Mr. Butler's opinion, was due to external fire from the leaking oil line. The ignition transformer had all of the tar melted and the RA816 relay on the furnace was not damaged. The fan and limit switch had slight melting of the wiring insulation. The ignition assembly was fire damaged back through the blast tube. The oil burner nozzle was partly plugged which would have contributed to the sooting problem, according to Mr. Butler.

32 Mr. Butler's opinion was that the fire originated within the furnace and was the result of the ignition of uncleaned debris within the furnace. In his opinion, the clean burn of the chamber only and the vent pipe beyond the barometric damper is inconsistent with the fire starting outside the furnace. The fact that there was no damage to the fan motor, drive belt, burner motor and wiring is also inconsistent with the fire starting outside the furnace. In his opinion, the fire originating within the furnace and the blow torch effect created beyond the barometric damper explained the difference in oxidation of the vent pipe beyond the damper as opposed to before the damper.

33 In Mr. Butler's opinion, the large deposits of scale and carbon inside the combustion chamber and within the vent pipes would take at least two to three years to accumulate and should not have been present if the furnace was being serviced annually.

34 Mr. Butler testified that normal soot accumulation in one year would be 1/16th of an inch and there would normally be no carbon or scale. In this furnace the vent pipes were almost plugged. There was 1/2 to 2 inches of scale at the bottom of the combustion chamber. Scale had built up behind the chamber to 4 inches which he estimated would be a five year accumulation.

35 The accumulation of scale was so great that it raised the walls of the combustion chamber off its base. Mr. Butler testified that this was one of the worst accumulations of carbon he had seen in his 30 years of experience of working on oil furnaces. He testified that if this furnace had been inspected within the last two years, the scale would have been visible in the combustion chamber. In his opinion, the deposits of scale and carbon did not allow the fire to vent, causing it to back up and seek an escape through the gasket at the bottom left of the burner. He testified that with just one year's accumulation of soot, the fire would not have escaped the combustion chamber.

36 In Mr. Butler's opinion, a crack in a combustion chamber causes all kinds of problems including a smoky burn which causes soot and carbon. He testified that whatever caused there to be an uncontrolled fire in the combustion chamber, it would have stayed within the confines of the furnace if the flue passages had not been plugged. This caused the uncontrolled fire to seek oxygen and escape out of the furnace around the end of the blast tube. The fire then went up the wall to the storage area above which caused the collapse of the roof.

37 Michael Rochon is a professional engineer who has worked in the fire investigation area since 1990. He estimated that he has investigated approximately 2000 fires, 20% of which involved oil heating appliances. He has been qualified as an expert in court on 6 occasions. He was retained on February 27, 2002 by the insurance company for Ron's Burner.

38 Mr. Rochon prepared a report dated July 31, 2002 headed "Engineering Evaluation of Material Relating to a Fire at 9162 Chinguacousy Road, in Brampton, Ontario." He prepared an Addendum

to his July 30, 2002 Report to comment on the Brampton Fire and Emergency Services Fire Investigations and Report of Mr. Roess.

39 Mr. Rochon's first Report states that Rochon Engineering Inc. was retained to review all available material pertinent to a fire loss. The material available for review included the reports of Mr. Butler, Mr. Coull and Mr. Roess. These reports had 42, 44 and 48 photos appended respectively. He examined the furnace parts retained by Mr. Coull, a statement made by Mr. White of Ron's Burner and Ron's Burner invoices. He met with Mr. White, Terry Lott and Randy Newman, service technicians with Ron's Burner.

40 Prior to delivering his first Report, Mr. Rochon reviewed and requested copies of a series of further photos taken by Mr. Coull which were not appended to Mr. Coull's Report. Mr. Rochon received copies of the photos in September, 2002, after he had delivered his two Reports. He did not interview the Bois. He did not have an opportunity to investigate the site or examine the furnace other than the parts which had been retained by Mr. Coull.

41 Mr. Rochon concluded in his reports that the Coull, Butler and Roess investigations were not in accordance with the NFPA 921 Guide for Fire and Explosion Investigations and were substandard and unscientific.

42 Mr. Rochon's opinion was that Origin and Cause Inc. failed to consider or eliminate an arcing failure observed on a branch circuit running through the area of fire origin which was a competent source of ignition for a fire. He opined that combustibles stored too close to the vent pipe could have caused ignition and the damage through drop down burning of debris falling from the loft. Other possible sources of ignition identified by Mr. Rochon were careless smoking, self-heating and self-ignition, failure or malfunction of appliances, equipment or the ignition of flammables and combustible liquids.

43 Mr. Rochon concluded that Ron's Burner was not negligent and that the plaintiffs negligently failed to service the furnace in accordance with the manufacturer's recommendations. He gave no opinion in his Reports as to the origin and cause of the fire.

44 Mr. Rochon was present during the presentation of the plaintiffs' case. Leave was sought on behalf of the defendant for Mr. Rochon to express an opinion as to the origin and cause of the fire on the basis of the evidence he had heard at trial. Objection was strenuously taken to this on behalf of the plaintiffs on the grounds that the opinions should have been expressed in Mr. Rochon's two reports and that to permit the evidence was trial by ambush.

45 I permitted Mr. Rochon to expand on and amplify what was in his Reports and allowed him to give his opinion on the origin and cause of the fire, while reserving on whether it was admissible.

46 Mr. Rochon purported to be able to identify the origin of the fire as the north interior wall of the garage and not the west wall as was identified in the expert Reports relied on by the plaintiffs. Mr. Rochon came to this opinion based on the pictures and Mr. Bois' testimony that when he first discovered the fire, he saw flames "going really well along the north wall." Mr. Rochon testified that this was supported by the fact that the roof over the furnace was intact while the roof over the north wall was extensively damaged. He opined that the burning on the west wall was due to drop down burning of debris falling from the loft.

Findings

47 I am satisfied that the origin of the fire was within the combustion chamber of the furnace with fire escaping from the gasket at the bottom left of the burner and igniting the west wall of the garage.

48 While the exact malfunction of the furnace which ignited the fire was not identifiable, I find that the cause of the fire and damage to the garage was the excessive deposits of carbon and scale in the furnace which prevented the fire from properly venting.

49 I prefer the evidence of Mr. Roess, Coull and Butler to that of Mr. Rochon. They had the opportunity to attend at the site. Mr. Roess, as a fire investigator for the City of Brampton, had no interest in a particular outcome of the fire investigation. At the time Mr. Coull and Mr. Butler delivered their reports, they had no knowledge as to when the Bois' had last had the furnace serviced. I found the evidence of Mr. Roess, Coull and Butler to be balanced and persuasive.

50 I accept the evidence of Mr. Butler that the carbon and soot which he observed in the furnace and documented in his photos could not have built up since the last servicing of the furnace done in February, 2000 if the furnace had been properly cleaned at that time.

51 Mr. Butler had extensive experience both in servicing oil furnaces and in fire investigations involving oil appliances. He was very familiar with the Anthes furnace which was the type of furnace in the Bois' garage. I accept his evidence that a defective nozzle could not have caused the carbon and scale to accumulate from the date of the last servicing.

52 Mr. Rochon did not have experience as an oil service technician. He was not as familiar with the Anthes furnace as Mr. Butler.

53 I do not find Mr. Rochon's evidence as to other possible causes of the fire persuasive. While the grinding which took place in the garage the evening before the fire raised questions and required investigating, the evidence satisfies me that the origin of the fire was not near where the grinding took place. There was no evidence of smoking. I am satisfied that the investigators on the site sufficiently investigated other possible causes.

54 Mr. Rochon's explanation for the debris on the bottom of the combustion chamber and in the vent pipes was improbable. He testified that the material could have fallen from elsewhere when the furnace was moved. However, the testimony and the photos satisfy me that this material had nowhere to fall from and was welded to the bottom of the combustion chamber and was welded in place, holding the piping together.

55 I was not impressed with Mr. Newman's evidence as to the procedures he followed to clean a furnace. He had no specific recollection of cleaning this furnace.

56 I do not agree with Mr. Rochon that the Roess, Coull and Butler investigations were substandard and unscientific. The NFPA 921 is a guide only. Each case is unique. Mr. Rochon conceded on cross-examination that his own investigation did not conform to NFPA 921.

57 I found Mr. Rochon both in his Reports and in his evidence to be more of an advocate for the defendant than an impartial expert. The most obvious example of this was his reliance on the statements of Ron's Burner employees, who clearly had an interest in the outcome, to conclude that the carbon and scale had accumulated since February, 2000 when the furnace was last serviced and that Ron's Burner was not negligent.

58 The evidence that Mr. Rochon testified enabled him to reach an opinion as to the origin and cause of the fire was available to him well prior to trial and could have been presented in a report prior to trial.

59 Even if leave was granted to allow Mr. Rochon to give an opinion that the origin of the fire was the north wall, I do not find his opinion on this point persuasive. I am satisfied by the evidence of Mr. Roess that the fire first breached the roof along the west wall of the garage which is consistent with the origin of the fire being the west wall. This was what the firefighters observed who first attended at the site. I find on the evidence that what appeared in some of the photos to be part of the roof remaining over the west wall was actually eavestrough which extended beyond the roof.

60 I find on the evidence that the explanation for the greater fire damage to the north wall was the result of the loft and roof collapsing inward from the east and west walls onto the floor which protected the west wall to some extent and exposed the north wall to flame.

61 I accept Mr. Butler's evidence that in a 40 year old furnace, it is quite probable that the asbestos gasket would have deteriorated sufficiently to provide an opening through which fire could escape.

62 I find that the cracked combustion chamber which Mr. Newman confirmed he observed and Mr. Butler found in his investigation, may well have contributed to the build up of carbon and scale. In my view, Mr. Newman should have alerted the plaintiffs to the cracked combustion chamber and recommended that it be replaced.

Contributory Negligence

63 Mr. Rochon interpreted the annual requirement to service an oil burner as a strict requirement that the servicing take place by the 365th day. I do not accept his opinion that the plaintiffs negligently failed to service the furnace in accordance with the manufacturer's recommendations by having waited slightly longer than 12 months. Had the furnace been properly serviced in February, 2000, carbon and scale could not have accumulated in a 13 month period to such an extent as to clog the furnace and cause the fire.

Spoliation

64 While retention of the entire furnace might have averted a trial, I accept Mr. Butler's opinion that the photos and furnace parts which were retained sufficiently documented the fire to enable an expert to give an opinion as to the origin and cause of the fire. Had I found that spoliation occurred, the evidence establishes that the fire site was under the control of Mr. Roess and not Mr. Butler and Coull. Accordingly, I would not have considered it appropriate to apply sanctions to the plaintiffs.

Conclusion

65 In the result, I find that the fire originated inside the furnace with fire escaping and igniting the west wall of the garage. The cause of the fire was the negligent servicing of the furnace which allowed deposits of carbon and scale to clog the vents. I find that the plaintiffs were not contributorily negligent for not having the furnace cleaned within one year of its last servicing. I find that spoliation of the fire evidence did not occur. Judgment shall issue against Ron's Burner for the agreed upon damages.

66 If the parties are unable to agree on costs, brief written submissions may be made.

N.L. BACKHOUSE J.

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