Case Name:

Condominium Corp. No. 7921945 v. Cochrane

Between
Condominium Corporation No. 7921945 and Sheila
Marie Picton, plaintiffs, and
Shane Cochrane, defendant

[2004] A.J. No. 16
2004 ABPC 4
Docket No.: P0390303459

Alberta Provincial Court
Edmonton, Alberta
Ingram Prov. Ct. J.

Heard: November 28, 2003.
Judgment: January 12, 2004.
(22 paras.)

Counsel:

Jeremy Taylor, for the plaintiffs.
Ian Gledhill, for the defendant.

REASONS FOR JUDGMENT

¶ 1 **INGRAM PROV. CT. J.**:— This is a claim by a condominium corporation and the owner of a unit for damages from a fire which was probably caused by a cigarette carelessly discarded either by the Defendant or by another person. The cause of the fire is the primary issue. Secondary is the issue as to whether the Defendant is an unnamed insured under a Plaintiff's property insurance policy.

Causation

¶ 2 The Defendant disposed of a cigarette in a manner and circumstances which could have caused the fire. A person other than the Defendant also disposed of a cigarette in a similar manner and circumstances which also could have caused the fire. Each party called an expert witness as to which cigarette was the probable cause: the Plaintiff's expert was of the opinion that the probable cause of the fire was the Defendant's cigarette, the Defendant's expert was of the opinion that it was more likely the other person's cigarette. It is probable that one cigarette or the other caused the fire; it is improbable that both cigarettes caused the fire.

¶ 3 The condo unit was a townhouse owned by the Plaintiff Picton located at 3291-142 Avenue, Edmonton. The Defendant was the boyfriend of Picton who lived with her in the unit. On May 18, 2001, the Defendant came to the unit after work and following dinner watched television. The Defendant smoked but not in the unit. Typically, he says, he would stand on the back steps to smoke and would then extinguish his cigarette on the step, take the butt in the house, run water over it and put it in the garbage. He recalls that he had his last cigarette on the back steps around midnight and, feeling lazy, he reached over to a planter which was hanging close to the wall beside the steps and pressed the lit end of the cigarette into the wood side of the planter. Believing that it was thereby extinguished, he then pushed it into the planter. On cross-examination, he admitted that he did not know for sure what was in the

planter although he had assumed it was dirt. Picton's son, Chris, also lived in the unit. The Defendant says he remembers that Chris came home sometime after the Defendant had his last cigarette. The Defendant believed that Chris came in through the front door on the other side of the unit and did not go out back after coming in. The Defendant strongly suspected that Chris smoked in May 2001. The Defendant left the unit to go to his own apartment after watching a movie at about 1:30 a.m.

¶ 4 Chris Picton was called as a witness by the Defendant. Chris said that on the evening of May 18, 2001, he returned home at about midnight to 12:30. He said that his mother was not then aware that he smoked but he did. He said that he came to the back of the unit and had a cigarette on the same steps earlier described by the Defendant. Chris said that he had stood on the steps facing the field to the back of the property and that he recalls that the wind was blowing "against me". When he had finished smoking he had "flicked" the butt in the air with his left hand without any regard for where it went and without any attempt whatever to extinguish it. He entered the condo through the back door, not the front; in this, the Defendant was mistaken. Chris had not discussed these events with anyone until about one month before the trial which is when he says he learned that the Defendant was being blamed for the fire.

¶ 5 Leslie Holzman, a Captain Investigator with the City of Edmonton Fire Department, attended at the scene at 8:45 a.m. May 19, 2001. His report indicated that the fire had been reported at 4:54 a.m. His investigation showed that a fire had originated in the area of a fireplace chase located at the rear of the unit beside the steps to the back door. An area of the wall of the chase was burned and portions had been removed in the course of extinguishing the fire. The fire had extended into the unit and set off a smoke alarm located on the upper floor. A barbecue which had been standing at the base of the chase had the free hanging portion of its cover burned off. Holzman interviewed the Plaintiff Picton and the Defendant. The Defendant was "very helpful, very straightforward" and told of smoking and disposing of his cigarette as set out above. Holzman says that either the Plaintiff or the Defendant told him the planter had contained peat-moss. Holzman determined that the planter had been hanging a short distance from the wall and he concluded that the cigarette had smoldered in the peat-moss and eventually caused the planter to fall to the ground, although he never identified any of the debris at the scene as having been part of the planter. His investigation had eliminated the other possible sources of ignition, such as the barbecue, electrical wiring, a gas pipe and meter, or other persons in the vicinity (he was told there were none). Holzman was satisfied that the Defendant's cigarette had caused the fire. He stated that it was an extremely dry spring and that he had seen over 20 fires that spring caused by cigarettes being put into peat-moss in planters. Holzman knew nothing of the presence or activity of Chris Picton on the preceding evening. His evidence was very positive as to the association between the Defendant's admitted cigarette and the fire. He was sure in his own mind that the fire started in the planter. However, he admitted that without the Defendant's statement, the cause of the fire would have been undetermined, but with the Defendant's statement, the cause was "self-evident"; the "information came together quickly".

¶ 6 The Plaintiff also called as a witness Andy Chuchmuch, an insurance adjustor who attended the scene while Holzman was present. Chuchmuch obtained a statement from the Defendant to the same effect as outlined above and arranged for the repairs and other costs that are the damages claimed in this action, the amount of which do not appear to be in dispute. Chuchmuch took a number of photographs which show the unit and the areas damaged by the fire, including a photograph of the remains of the hanging basket, which Holzman had not seen. Chuchmuch said it was "straightforward"; it was "obvious" the fire started in the planter. Clearly, everyone on the scene on the morning of May 19, 2001, having heard the Defendant's statement, were satisfied the Defendant caused the fire by putting his cigarette into the planter. However, none of them knew what Chris had done until shortly before the trial of this action.

¶ 7 The Defendant called Brian Thicke to give opinion evidence concerning the cause of the fire and the investigation by Holzman. Thicke was retained only days before the trial obviously after the Defendant learned of the possible involvement of Chris Picton. Holzman has been a firefighter since 1974, a fire investigator since 1989, received extensive in-house training in investigation, related forensics, and court proceedings, and has been

qualified to give opinion evidence in a number of arson prosecutions. Thicke holds degrees in mechanical engineering and business administration and has practiced as a consulting engineer for at least the last 10 years in accident investigation and reconstruction relating to motor vehicle, personal injury, fire and explosion and other mechanical, industrial and structural claims. Both Holzman and Thicke were qualified to give opinion evidence relating to the determination of the causes of fires. Thicke was of the opinion that the fire most likely started on the ground at the exterior wall of the chimney chase, but he conceded that it was certainly possible that it started in the planter. Thicke outlined a number of lines of enquiry which in his view should have been followed up in order to demonstrate with reasonable certainty what the actual origin of the fire had been; enquiries and investigations which were not made in this case. Thicke's opinion was bolstered by evidence of combustible debris consisting of firewood, wood chips, and dried weeds which had accumulated at the base of the wall under the chimney chase. Chris Picton said the area was used to chop firewood and pointed out the remains of the axe in the photographs.

¶ 8 It is obvious that the Defendant owed a duty to the Plaintiffs to extinguish his cigarette in a manner which would not risk causing fire to the Plaintiffs' property, as did Chris Picton. The manner of disposition in each case was in breach of that duty and resulted in a risk that the plaintiffs' property would burn. Clearly, both were negligent. Fires do not start without some source of ignition, although in many cases the source or cause of any particular fire may not be known. In this case, the Defendant's, or Chris Picton's, cigarette butt could have caused the fire. As these are the only known sources of possible ignition, it is more probable than not, but by no means certain, that one or the other did.

¶ 9 In law, in order for one event to be held to be the cause of another event, it must be found that the second event would not have occurred "but for" the first event; or at least, that the first event "materially contributed" to the occurrence of the second. The Plaintiff says that, as a matter of law, the Plaintiff having shown that:

(a) the Defendant and another person owed a duty of care to the Plaintiff,

(b) by their conduct breached that duty,

(c) their conduct created a risk of harm to the Plaintiff, and,

(d) the damage to the Plaintiff occurred within the area of that risk,

then, there was a prima facie case against the Defendant (and the other person) and the onus was then on the Defendant (and the other person) to show that the Defendant's (or the other person's) conduct did not cause the damage, or,

an inference as to causation should be drawn against the Defendant (or the other person) notwithstanding that causation was not proven by positive evidence. The Plaintiffs say that the Defendant has not met that burden or overcome that inference. The Plaintiffs say that Cook v. Lewis [1951] S.C.R. 830 and the principles set out in McGhee v. National Coal Board [1973] 1 W.L.R. 1 and Wilsher v. Essex Area Health Authority [1987] 2 W.L.R. 425 apply. The Plaintiffs also referred to Powell v. Guttman [1978] 5 W.W.R. 228 , Dalpe v. City of Edmundston (1979) 51 A.P.R.102, Haag v. Marshall [1989] B.C.J. No. 1576 , Farrell v. Snell 72 D.L.R. (4th) 289 (S.C.Can 1990), and Linden Canadian Tort Law (6th ed.).

¶ 10 Cook v. Lewis is authority for the proposition that if the trier of fact cannot ascertain which negligent defendant caused the Plaintiff's loss, all negligent defendants are liable, Cartwright, J., for the majority; or, for the

proposition that in such cases each defendant has the onus to exculpate himself, Rand, J. The principle of Cook v. Lewis is based on the manifest injustice which would result if both wrongdoers were discharged from responsibility because their negligent conduct made it impossible to decide which negligent wrongdoer caused the innocent plaintiff's loss. The decision in Cook v. Lewis was the result of a perverse verdict of that sacred cow of British jurisprudence: the jury. In the result, the case was sent back for retrial. The majority judgments make it clear that a finder of fact has a duty "to determine the facts from the evidence laid before them as best they could on the balance of probabilities, and it could not be evaded in the face of such divergent testimony either because of a tender regard for distasteful implications or for any other reason" , Rand, J. Cartwright, J., for the majority held that a new trial was necessary and that the jury "should have been able to decide which one of the defendants fired the shot which struck the plaintiff". The jury had found that one of the defendants had shot the plaintiff but they could not decide which one and also found that the plaintiff's injury was not caused by the negligence of either of the defendants. Clearly, the jury's verdict was perverse because the finding that one of the defendants had shot the plaintiff contradicted the finding that neither had. In the result, the finder of fact failed in its duty to decide the essential facts of the case and then made a perverse finding.

¶ 11 In McGhee, the House of Lords decided that where the plaintiff proved that the defendant created a risk of harm and the plaintiff's damages occurred within the area of the risk, there was an onus on the defendant to prove that his conduct did not cause the plaintiff's damages; that there was no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself. Wilsher held that this was a matter of inference only and not a reversal of the onus of proof, which remained on the plaintiff. In McGhee and Wilsher, and even in cases involving multiple or alternative wrongdoers, as in Fairchild v. Glenhaven Funeral services Ltd. [2002] 3 All E. R. 305, the House of Lords referred with approval to the decision of the Supreme Court in Cook v. Lewis and relaxed the standard of causation where the normal standard would work an injustice. The law in this area has demonstrated considerable flexibility due to its application to "hard cases", primarily in the areas of industrial and environmental injuries and medical malpractice claims, partly due to the complexity and uncertainty of scientific theory and evidence and partly due to situations where the facts lie within the knowledge of the defendant.

¶ 12 The issues are the proper application of Cook v. Lewis and whether, in the present state of the law in Canada, it is sufficient for a plaintiff to show that a negligent defendant's conduct created a risk of harm and that the plaintiff's damages occurred within the area of that risk; or, is it necessary that a plaintiff show on the balance of probabilities that the plaintiff's damages would not have occurred but for the negligent defendant's conduct, or at least that the defendant's conduct materially contributed to the plaintiff's damages. As to the state of the law in Canada, I believe that I am best guided by the most recent decisions of the Supreme Court of which I am aware.

¶ 13 In Snell v. Farrell, Sopinka, J., for the court, referred to Cook v. Lewis and noted that the court would alter the ultimate burden of proof even on the issue of causation if "it could not be determined" which negligent defendant caused (in the traditional sense) the plaintiff's injury. He reviewed the McGhee and Wilsher decisions and considered whether the traditional approach to causation was satisfactory or whether plaintiffs (in malpractice cases) were being deprived of compensation because they could not prove causation where it in fact existed. His Lordship then stated:

> "[paragraph] 26 Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation? I have examined the alternatives arising out of the McGhee case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that

defendants who have a substantial connection to [page327] the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent. Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone. "

This amounts to a clear rejection of the reversal of the burden of proof or the drawing of an inference of causation in the absence of a finding that the conduct of the defendant met the "but for" or "material contribution" test, that is, that the Defendant's conduct and the Plaintiff's damage have a substantial connection.

¶ 14 Sopinka, J., did not reject the principle of Cook v. Lewis but His Lordship's comments highlight two features present in Cook v. Lewis but not in this case. In Cook v. Lewis the Defendants' tortious conduct destroyed the means of proof at the plaintiff's disposal. This is a reference to the observations of Rand, J., that the defendants in Cook v. Lewis knew or ought to have known that the circumstances were such that it would be difficult if not impossible to prove the possible damaging results of their acts so as to "in effect, [destroy] the victim's power of proof". In Cook v. Lewis the hunters knew of each other's presence, in this case the smokers did not; there is no tortious conduct affecting the Plaintiffs' power of proof. In addition, the damage in Cook v. Lewis very definitely came from one gun or the other. Here the fire may well have been due to some factor other than either of the cigarettes. Sopinka,J., was clearly applying the traditional approach to proof of causation in further stating:

"[paragraph] 32 These references speak of the shifting of the secondary or evidential burden of proof or the burden of adducing evidence. I find it preferable to explain the process without using the term secondary or evidential burden. It is not strictly accurate [page330] to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See Cross, op. cit., at p. 129. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.

[paragraph] 33 The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in Wilsher when he referred to a "robust and pragmatic approach to the ... facts" (p. 569). "

The precept of Lord Mansfield being; "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the other to have contradicted".

¶ 15 The Supreme Court considered causation again in Athey v. Leonati [1996] 3 S.C.R. 458, where Major, J.,

set out the general principles in these terms:

> "[paragraph] 13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: Snell v. Farrell, [1990] 2 S.C.R. 311 ; McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.).
>
> [paragraph] 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: Horsley v. MacLaren, [1972] S.C.R. 441 .
>
> [paragraph] 15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: Myers v. Peel County Board of Education; [1981] 2 S.C.R. 21 , Bonnington Castings, Ltd. v. Wardlaw, [1956] 1 All E.R. 615 (H.L.); McGhee v. National Coal Board, supra. A contributing factor is material if it falls outside the de minimis range: Bonnington Castings, Ltd. v. Wardlaw, supra; see also R. v. Pinske (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979 .
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> [paragraph] 16 In Snell v. Farrell, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof."

His Lordship then dealt with the question as to how the facts in a negligence case must be dealt with, contrasting facts (past events) with hypothetical events, as follows:

> "[paragraph] 28 By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: Mallett v. McMonagle, supra; Malec v. J. C. Hutton Proprietary Ltd., supra, Cooper-Stephenson, supra, at pp. 67-81".

The Court then dealt with the issue of "competing causes", stating the principles as follows:

> "[paragraph] 41 The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:

1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.

2. If it was necessary to have both the accidents and the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.

3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether the defendant's negligence materially contributed to the injury."

(emphasis added)

¶ 16 Even more recently, the Supreme Court considered causation in relation to the complex issues raised by the "tainted blood scandal". In Walker Estate v. York Finch General Hospital [2001] 1 S.C.R. 647, Major, J., again for the Court, stated,

> "The law of torts may, from time to time, reflect policy considerations which can impact, in part, on the burden of proof in a negligence action." (paragraph 86)
>
> "The general test for causation in cases where a single cause can be attributed to a harm is the "but-for" test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm." (paragraph 87)
>
> "Thus, the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the "but-for" test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant's negligence "materially contributed" to the occurrence of the injury. In the present case, it is clear that it did. "A contributing factor is material if it falls outside the de minimis range" (see Athey v. Leonati, [1996] 3 S.C.R. 458 , at para. 15). As such, the plaintiff retains the burden of proving that the failure of the CRCS to screen donors with tainted blood materially contributed to Walker contracting HIV from the tainted blood. (paragraph 88)
>
> "As stated above, the proper test for causation in negligent donor screening cases is whether the defendant's negligence materially contributed to the plaintiffs harm. "(paragraph 97)
>
> "The Court of Appeal erred in this case by imposing liability on the basis of an inference of causation." (paragraph 98)

His Lordship then went on to adopt and quote the reasoning of Sopinka,J., in Snell v. Farrell, quoted above in paragraph 13 of these reasons.

¶ 17 From the foregoing authorities, I conclude that:

- triers of fact have a duty to determine the facts as best they can,

- causation must be proven by meeting the "but for" or "material contribution" test,

- causation may not be established merely by showing that the defendant's conduct created a risk of harm and that the plaintiff's damages came within the area of that risk,

- liability does not arise from creating risks unless the risk causes damage, and

- a reversal of the onus of proof is justified only where the trier of fact cannot determine causation on a balance of probabilities.

¶ 18 I find that the Defendant's negligence created a risk of harm and that the plaintiff's damages came within the area of that risk in the sense that the Defendant created a risk of fire and a fire occurred. However, weighing all the evidence I find that it is more probable that the fire was caused by the conduct of Chris Picton than by the Defendant. After hearing all of the evidence, I am satisfied that the investigation by Holzman was superficial, hasty and perfunctory. There was no effective forensic examination of the physical evidence at the scene of the fire. Holzman did not even see the remains of the planter shown in the photograph taken by the adjustor. Holzman did not examine the boards that had been removed by the firemen, or any or the other debris, to attempt to reconstruct the progress of the fire. The evidence does not satisfy me, on a balance of probabilities, that there was peat moss in the planter. Holzman thinks he was told there was by either the Plaintiff, who did not give evidence, or the Defendant, whose evidence was that he thought there was dirt in the planter. Holzman's examination effectively ended when the Defendant volunteered the information concerning the preceding evening. It is more probable that a lit cigarette discarded by flicking it in the air would start a fire than a cigarette attempted, at least, to be extinguished it by grinding into a board. There was at least as much combustible material on the ground at the base of the fireplace chase as there was in the planter. It is more probable that the second incident started the fire than the first. A person in the presence of a fire, even smouldering peat moss, would likely smell smoke. In the result, I find that the Plaintiffs have not shown, on a balance of probabilities, that the Defendant caused the fire.

Whether the Defendant is an un-named insured

¶ 19 It was admitted that the Plaintiffs in this action were insured under property insurance policies and that the insurers have paid the losses to their insureds. This action is a claim on behalf of the insurers under their rights of subrogation. There is no reason that the condominium corporation's insurer could not subrogate against the Defendant in respect of its claim of $11,044.81. An insurer cannot subrogate against its own insured. The Plaintiff Picton's insurer cannot subrogate against the Defendant in respect of the claim for $13,640.86 if the Defendant was an un-named insured under her policy. A copy of her policy was entered as Exhibit 2. The policy Coverage Summary showed Sheila Picton as the insured. Under the definitions contained in Section 1 Property Coverages, it is provided:

> "Insured means the person(s) named as insured on the Coverage Summary page and, while living in the same household:
>
> his or her husband or wife
>
> the relatives of either

any person under 21 in their care

Husband and wife includes a man and woman who are living together as husband and wife and have so lived together continuously for a period of 2 years or, if a child was born of their union, for a period of 1 year."

¶ 20 The Defendant alleges that he was an included person under this term in the policy. The evidence and argument was based entirely on this issue. The Defendant's evidence was that the Plaintiff Picton had been his girlfriend since 1997; they were very close, he said. They were not married nor "officially engaged" and no child was born of their union. The Defendant had resided in Penticton for a period of 1 year and returned to Edmonton October 31, 1999, at which time he moved in with the Plaintiff Picton in the property in question. The Defendant and the Plaintiff Picton had lived together continuously from October 31, 1999 until May, 2001. Shortly before the fire the Defendant rented an apartment for his own occupation, separate from the Plaintiff Picton as, he said, her father had moved in with them and the condominium was too small for the Plaintiff Picton, her two sons, her father and the Defendant. The night of the fire, the Defendant had eaten his dinner at the condominium but had slept at his new apartment. The Plaintiff Picton and the Defendant each had their separate cars and bank accounts. Their assets, liabilities and financial affairs generally were separate and not joint. In my view, there was no intention of any long-term commitment between them and, notwithstanding their domestic arrangement, I find they were not living as husband and wife. The Defendant was not an un-named insured under the Plaintiff Picton's property insurance policy.

¶ 21 Had I found that the Defendant's cigarette caused the fire, I would have allowed the claim in the total amount of $24,685.67. In the result, the within action is dismissed.

¶ 22 As there may be circumstances of which I am not aware which might impact on the proper disposition of costs in this case, I will make no costs direction for 14 days from the date of this judgment to give the parties an opportunity to make any submissions as to costs that either may deem appropriate. In order to do so, either party may contact the office of the Clerk of the court and arrange for a telephone conference call. If the court has not been contacted within 14 days, I will make an order in respect of the costs.

INGRAM PROV. CT. J.

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QUICKCITE

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Reported at:
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