

*Case Name:*

**Galan v. Finch (Finch's Heating)**

**Between  
Garry Galan, Plaintiff, and  
Paul Finch, carrying on business as Finch's Heating, Defendant**

[2015] O.J. No. 2275

2015 ONSC 2455

Court File No.: CV-10-030

Ontario Superior Court of Justice

**E.J. Koke J.**

Heard: October 9, 10, 14-17, 2014; April 2, 2015.

Judgment: April 20, 2015.

(98 paras.)

*Damages -- For torts -- Affecting property -- Real property -- Fire -- Action by Galan for damages for negligent installation of a wood furnace allowed -- On Christmas day in 2008, a fire completely destroyed Galan's home -- The defendant Finch was a heating contractor who had installed a wood furnace in the basement of the Galan residence the previous July -- Finch denied any negligence -- However, on a balance of probabilities, the fire was caused by Finch's negligent installation of the furnace -- Galan was awarded \$810,016 in damages, which included \$611,986 for the reconstruction of the house and \$174,750 for the contents of the house.*

Action by Galan for damages for negligent installation of a wood furnace. On Christmas day in 2008, a fire completely destroyed Galan's home. The defendant Finch was a heating contractor who had installed a wood furnace in the basement of the Galan residence the previous July. Galan alleged that the fire occurred as a result of the negligent installation of the wood furnace. Finch denied any negligence and requested that the Court find that the cause of the fire could not be determined.

HELD: Action allowed. The plaintiff's expert provided a logical and coherent explanation for the cause of the fire, and that explanation was supported by photographic evidence. There was evidence that Finch failed to take the necessary steps to ensure the gas-tightness of a breech pipe, which made it possible for hot gases to escape into the wall cavity. That failure was logically connected to the

cause of the fire as explained by the expert. On a balance of probabilities, the fire was caused by Finch's negligent installation of the furnace. Galan was awarded \$810,016 in damages, which included \$611,986 for the reconstruction of the house and \$174,750 for the contents of the house.

**Counsel:**

Martin P. Forget, for the Plaintiff.

Jackie McGaughey-Ward, for the Defendant.

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**JUDGMENT**

E.J. KOKE J.:--

**INTRODUCTION**

1 On Christmas day, 2008 a fire completely destroyed the home owned by the Plaintiff, Garry Galan. Fortunately, Mr. Galan and his family were not at home at the time and no one was injured.

2 The previous July, the defendant heating contractor, Paul Finch had installed a wood furnace in the basement of the Galan residence. Mr. Galan alleges that the fire occurred as a result of the negligent installation of the wood furnace and he claims damages against Mr. Finch.

3 The defendant denies any negligence in the installation of the furnace and requests this court to find that the cause of the fire cannot be determined.

4 The parties agree that the onus is on the plaintiff to prove on the balance of probabilities that the fire resulted from Mr. Finch's negligence.

**PRELIMINARY ISSUE...SPOILIATION OF EVIDENCE**

5 To assist the court in establishing an origin and cause for the fire both parties retained experts who filed written reports and testified at the trial. The plaintiff retained Mr. Richard A. Lamoureux, a professional engineer and certified fire investigator. The defendant retained Mr. Michael Rowan who is also a certified fire investigator and a professional engineer. Both experts have extensive experience in fire investigations and are highly qualified in their field of expertise,

6 The defendant was put on notice of this claim approximately four months after the fire occurred. By this time, the house had been demolished. The defendant's expert, Michael Rowan therefore did not have the benefit of an on-site investigation.

7 The defendant raises a preliminary issue of spoliation in relation to the decision by the plaintiff to demolish the home. He points out that his expert was not in a position to make as complete an inspection of the premises as the plaintiff's expert because he did not have the opportunity to undertake an on-site inspection of the burned premises. He argues that the court should draw an adverse inference from the fact that the plaintiff chose to destroy this evidence.

8 Spoliation is a rule of evidence, based on the maxim *omnia praesumuntur contra spoliatores*. It has not been pleaded by the defendant but the parties agree that it does not need to be specifically pled in order for its resultant evidentiary inference to be relied upon.

**9** The Supreme Court Canada case of *St Louis v. R.* (1896), 25 S.C.R. 649 is one of the leading Canadian cases on the issue of spoliation. In that case, the court concluded that spoliation occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation and on the facts, a reasonable inference may be drawn that the evidence was destroyed to somehow influence the outcome of the lawsuit. In such circumstances, a rebuttable presumption arises that the evidence would have been unhelpful to the party who destroyed it,

**10** The Alberta Court of Appeal decision in *McDougall v. Black & Decker Canada Inc.* 2008 ABCA 353 provides a comprehensive review of the law on spoliation in Canada. It sets out the criteria that must be met for the adverse inference to be drawn. There must be an intentional destruction of relevant evidence; the destruction occurred when litigation was existing or pending; and it is reasonable to draw the inference that the evidence was destroyed to influence the outcome of the litigation.

**11** In this case, in order for spoliation to apply the court must find that the plaintiff intentionally demolished the burned down house, and did so for the purpose of influencing the outcome of the litigation.

**12** Each case must be decided on its own unique facts. In this case, the plaintiffs expert attended at the site on January 5, 2009, eleven days after the fire. The plaintiff's insurance adjustor testified that by the next day the expert suspected that the fire was caused by Mr. Finch's negligent installation of the furnace.

**13** The Galan house was demolished on January 21, 2009, sixteen days after the plaintiffs expert undertook his inspection. The Plaintiff submits that the building was demolished for safety reasons.

**14** Clearly there existed an intention to demolish the house, and by doing so relevant evidence was destroyed. However, in the circumstances of this case I am not prepared to find that the house was demolished with the intention of influencing the outcome of this litigation.

**15** Although the plaintiff's expert formed a suspicion that the fire was caused by the defendant's negligence on the day he inspected the premises, there is no evidence before the court on which to base a finding that after conducting its inspection the plaintiff's insurer quickly made arrangements to have the house demolished for the purpose of preventing the defendant from conducting his own inspection.

**16** Although the plaintiff's expert suspected that Mr. Finch's negligence caused the fire almost immediately after conducting his inspection, I note his formal written report was not completed until April 14, 2009. Mr. Finch was put on notice 10 days later, on April 24, 2009. I accept that it would normally take an insurer a number of weeks before arriving at a decision to commence legal action against a third party. In this case, Mr. Finch was put on notice four months after the date of the fire. I do not find this to be an unreasonable delay.

**17** I also agree with the plaintiff that the house constituted a continuing hazard in its burned out state. There were other houses in close proximity to this burned out house and the house would have attracted the attention of curious neighbours, including children. I find that the decision to demolish it on January 21, 2009 was reasonable, in the circumstances.

**18** Finally, I am not convinced that the defendant's expert was seriously disadvantaged by his inability to carry out an on-site inspection. His report reveals that he had available to him a significant amount of information to assist him in his investigation. This information included the following:

1. Ontario Police-Occurrence Confirmation dated January 20, 2009;
2. East Ferris Fire department response dated December 25, 2008;
3. Statement from Frank Loeffen, fire chief;
4. *DFA* forensic engineering report dated April 4, 2009;
5. *DFA* engineering services letter of June 11, 2012;
6. *Trow* forensic engineering report issued on September 30, 2009;
7. *Trow* amendment to forensic report dated February 3, 2011

**19** The *DFA* reports referred to above were the reports prepared by Mr. Lamoureux on behalf of the plaintiff and the *Trow* reports were earlier reports prepared on behalf of the defendant, prior to the defendant retaining Mr. Rowan.

**20** In addition to the above documents, Mr. Rowan was also provided with a series of 75 photographs taken by the plaintiff's insurance adjustor, and a CD containing approximately 250 photographs taken by the plaintiff's expert, Mr. Lamoureux.

**21** In conclusion, I am not prepared to draw an adverse inference from the fact that the home was demolished before the defendant was put on notice of the claim.

## **CAUSE OF THE FIRE**

### **1. Theory of the Plaintiff Homeowner**

#### **The Furnace Installation**

**22** Mr. Galan contacted Mr. Finch in the spring of 2008 and inquired about replacing his existing basement wood burning stove with a new wood burning furnace. At the time his home was heated by electric baseboard heaters and two wood stoves, one of which was located in the basement of the home and a second one which was located in a workshop attached to the home.

**23** Mr. Finch agreed to replace the stove. Of the two wood furnace options suggested by Mr. Finch, Mr. Galan chose the more expensive "Caddy" wood furnace option. Mr. Finch also agreed to install duct work from the furnace to the upper floors of the house.

**24** Mr. Finch placed the new furnace in the same location as the wood stove which it replaced, against the north foundation wall of the basement and adjacent to a masonry chimney located on the outside of the foundation wall.

**25** Three existing walls separated the wood stove from the outside chimney. There was a brick firewall on the inside of the basement immediately adjacent to the furnace. This firewall was built against a two by four wooden stud wall, which was sandwiched between the firewall and the outside cinderblock foundation wall.

**26** Mr. Finch connected the new stove to the chimney by connecting the stainless steel flue pipe from the stove to an existing metal breech pipe which had been inserted through the three walls. The

breech pipe was designed to carry the stove gasses through the walls and into the chimney. The connection of the flue pipe to the breech pipe was at the outer face of the brick firewall. The breech pipe was encased in a concrete collar where it passed through the two by four stud wall, presumably to prevent this combustible wooden wall from being exposed to the heat from the breech pipe.

### **Mr. Lamoureux's Inspection**

#### **(a) Investigative steps**

**27** Mr. Lamoureux testified that he generally begins a fire investigation by walking around a burned building to look for damage and burn patterns. This is in accordance with established fire investigative practice. Mr. Lamoureux testified that bum patterns are indicators of the point of origin of a fire. They generally leave a 'U' or 'V' shaped pattern with the most intense burning at the lowest point of the pattern.

**28** After performing a walk-around of the exterior, he then enters the premises to locate the area of origin of the fire. Mr. Lamoureux explained that the area with the most fire damage, as illustrated by bum patterns, generally indicates the area of origin.

**29** Once he has determined the area of origin, he focuses on potential sources of ignition in that area in order to determine the cause of the fire. To this end, he typically meets with the occupant or the homeowner to determine what activities were occurring at the time of the fire. He also meets with and engages in discussions with members of the fire department to secure any observations that were made by them in response to the fire.

**30** Finally, it is his practice to sketch the floor plan and to take numerous photographs in the course of his investigation and to document all of his observations.

**31** Mr. Lamoureux followed this procedure in investigating the fire at the Galan residence. He spent approximately 8-10 hours on the scene. He was assisted by a contractor who helped him dig out some of the debris. He took approximately 250 photographs of the scene.

**32** Mr. Lamoureux reported that he also spoke with Mr. Galan and Mr. Loeffen, the fire chief at length in the course of conducting his investigation.

#### **(b) Observations and Findings**

**33** Mr. Lamoureux testified that at the outset of his investigation, he performed a walk-around of what remained of the Galan house. He concluded that the most extensive damage was located at the back of the house, referred to as the north side. Through this initial bum pattern analysis, he concluded that the fire likely originated on the north side of the house.

**34** Mr. Lamoureux reported that he detected 'U'-shaped bum patterns on the north side of the brick wall, centered at the chimney.

**35** In contrast to the damage observed on the north side, the south side of the house was not as seriously damaged. He noted that the bay windows and the front door were both mostly intact and not subject to the same extensive fire damage as that observed on the north side.

**36** Mr. Lamoureux testified that even before he entered the basement, it was clear to him, based on the burn patterns that the fire originated in the back or north side of the house at the basement level. Upon entering the basement, Mr. Lamoureux went to the north side where the most extensive exterior

damage had been observed. He proceeded to inspect the furnace which he knew was burning at the time the fire broke out and had recently been filled with wood by Mr. Galan,

**37** Mr. Lamoureux testified that he went on to remove the snow on top of the furnace and have the debris in front of the furnace dug out. He then continued his investigation by taking photographs of the connection between the flue pipe and the breech pipe.

**38** He reported that as he was wiping off the light snow on top of the flue pipe, the flue pipe disconnected from the breech pipe at the wall and the flue pipe simply fell to the ground. He stated that he was barely touching the pipe and not exerting any force.

**39** This occurrence was witnessed by Mr. Galan. Mr. Lamoureux then observed a gap between the outer side of the breech pipe and the brick wall. Although the gap had been partially stuffed with fiberglass insulation, there was sufficient space between the breech pipe and the brick wall for gases to travel through the brick wall to the stud wall,

**40** Upon further investigation Mr. Lamoureux also found 3 indentations in the breech pipe where the screws from the flue pipe ought to have (but did not) perforate the breech pipe. He also discovered that there were cracks in the concrete collar in the area where it passed through the stud wall, which would have permitted smoke and gases to seep through to the wooden studs. When he examined the area behind the brick wall he noticed that the wood stud wall was completely consumed at the chimney. Wood studs were less consumed as one moved away from the chimney, leaving a distinct burn pattern inside the wall.

**41** Mr. Lamoureux explained that this difference in the damage of the wood studs behind the brick wall created a 'U'-shaped pattern inside the north wall, consistent with the burn patterns observed on the exterior of the residence. Based on these burn patterns, he concluded that the fire was more intense behind the brick wall at the chimney level. He opined that the wood studs behind the brick wall could not have been consumed by any fire originating inside the basement, as the brick wall would have shielded the wood studs from the damage caused by any such fire.

**42** When he was asked to compare the condition of the two by four studs located close to the chimney to the studs on the outer sides of the wall he stated that in his opinion:

...the fire traveled from the chimney area up and out. Also, it's telling me that there's a fire in that wall cavity. What I would have expected to see, had there been a fire started in the central part of the basement, is that that brick wall being noncombustible and not a good conductor of heat[,] shield that area and protect the wood that's in behind it, like we see, you know, further away from the - the chimney out near the corner...

**43** Mr. Lamoureux testified that his conclusion was confirmed by the fact that he discovered soot inside the brick wall, and that the insulation of a wire on top of the concrete breech collar was completely burnt off without any sign of arcing damage that would have been indicative of an electrical fire. Mr. Lamoureux explained that arcing occurs when a live wire touches a grounded surface and electricity flows or "arcs" from the live wire to the grounded object.

**44** The main floor of the house was laid on a double rim joist which was supported by the cinder block foundation wall, around the perimeter of the basement. Mr. Lamoureux testified that it was a significant factor in his investigation that he observed that the double rim joist behind the brick wall at

the chimney was completely consumed by the fire; he observed that this was the only location where the double rim joist was completely consumed. If the fire had started in the interior of the basement, the double rim joist would have been protected by the brick wall. Instead, the fact that damage was discovered behind the brick wall confirms that the fire originated behind the brick wall in the area of the two by four stud wall.

**45** Mr. Lamoureux also noted that a single rim joist at the chimney (located immediately above the double rim joist) was not consumed by fire. The fact that the double rim joist was completely consumed while the single joist was not completely consumed helped to confirm that the fire started from below and worked its way up from behind the brick wall where the breech pipe connection was located.

**46** Mr. Lamoureux explained that the installation of a wood furnace such as the one installed by Mr. Finch is governed by the Canadian Standards Association (CSA), B365-01; *Installation Code for Solid-Fuel-Burning Appliances and Equipment* (the "Code "). In his opinion Mr. Finch breached a number of provisions of the Code. He opined that Mr. Finch's failure to observe these provisions resulted in the escape of the hot gases which caused the fire. The contraventions of the Code included the following:

**47** Firstly, section 5.3.1 of the Code, which governs the installation of breech pipes provides as follows:

If used, a breech pipe shall

- (a) Have one male end extending at least 50 mm (2 in.) beyond the outer face of the chimney to allow for attachment of the flue pipe;
- (c) Be securely fastened to the chimney ;
- (d) Be made flush with the interior surface of the flue; and
- (e) Be properly sealed with the flue to prevent spillage of any flue gases

*Note; The bond between a breech pipe and either refractory cement or mortar is not considered to be securely fastened unless a bead or appropriate protrusions (not punctures) have been made on the pipe to key it into the mortar. The means of keying must be such that the gas-tightness of the breech pipe is maintained.*

**48** Mr. Lamoureux noted that his inspection revealed that the male end of the breech pipe extended only one inch from the face of the chimney, and not the two inches specified in the Code. This failure compromised the integrity of the connection between the flue pipe and the breech pipe, thereby contributing to the escape of gases into the wall.

**49** The code was also contravened by the fact that the breech pipe was not made flush with the interior of the flue, and the gap between the breech pipe and the interior of the flue permitted the escape of gases. The note in s. 5.3.1 specifically refers to the breech pipe being maintained to "gas-tightness" with cement or mortar by ensuring the bond between the pipe and the mortar is fastened by a "bead or appropriate protrusion".

**50** Secondly, section 5.4.7 of the Code provides that:

Joints in flue pipes, including the connection at the appliance and the chimney, shall

- (a) Have at least 30 mm (1 3/16 in.) overlap;
- (b) Be made mechanically secure with at least three screws or an equivalent mechanical means, except for the expansion joint in a vertical flue pipe installation that lacks an elbow; and
- (c) Be made tight in accordance with good practice.

**51** Mr. Lamoureux pointed out since the breech pipe only protruded one inch from the face of the brick wall the requirement of a 1 3/16 overlap could not be met. More significantly, although an attempt had been made to insert three screws through the flue pipe and into the breech pipe, the screws did not penetrate the breech pipe but instead caused indentations in the breech pipe which permitted gases to escape into the cavity leading to the wooden stud wall.

**52** When asked about the timing of the fire, Mr. Lamoureux opined that extremely hot gases escaping from the breech pipe connection can spontaneously ignite combustible materials, including wood. Such spontaneous combustion could occur within days, weeks or months of the installation. Accordingly, it was not surprising to him that the fire at the house occurred as a result of escaping gases after the furnace had been in use for approximately two months.

**53** Mr. Lamoureux also explained that since the gases were escaping into and behind the brick wall, the residents of the house would not have been able to smell the escaping gases over the smell of the burning wood in the furnace.

### (c) Conclusions

**54** Based on these observations, it was Mr. Lamoureux's opinion that the hot gases escaping from the breech pipe connection travelled through the brick wall and escaped into the cavity which contained the two by four stud wall, spontaneously igniting the wood studs behind the brick wall. He stated his conclusion as follows:

My conclusion is that this fire originated at the chimney at the north end of the house at a location corresponding to this wood fire furnace. That this fire was ignited when hot combustions gases leaking from an improper connection heated up combustible material, in this case a two-by-four stud wall, to the point of ignition.

## 2. Theory of the Defendant

### Mr. Rowans Inspection

#### i. Levels of Charring and Charring Patterns

**55** In conducting his investigations, Mr. Rowan places considerable weight on the different levels of charring which are observable at the scene of a fire and on charring patterns.



**56** He testified that the location of the lowest level of intense charring is a tool used by fire investigators to determine a probable fire origin. Based on his review of the photographic evidence of the Galan house, he concluded that the lowest levels of intense charring occurred throughout the basement. Accordingly, it is impossible to circumscribe a precise fire origin within the basement, based on charring patterns.

**57** Mr. Rowan also looks at charring patterns to ascertain the direction of fire propagation and thereby determine the area of origin. He noted that charring patterns were not present near the window opening located next to the wood-burning furnace, nor in the stairwell leading from the basement to the back yard. He opined that had the fire started near the back wall, it would have quickly broken the window and vented through this opening. The absence of charring patterns near the opening to the back of the house suggests that the fire could not have started near the back wall.

**58** In response to Mr. Rowan's findings that the low levels of charring throughout the entire basement makes it impossible to determine the source of fire the plaintiff maintains that the presence of such a finding does not negate the significance of the U-shaped bum patterns at the back of the basement in the vicinity of the wood stove and chimney.. these bum patterns can still be relied upon.

#### **ii. Wire behind the Brick Wall**

**59** Mr. Rowan noted that the photographs taken by Mr. Lamoureux reveal that there was a wire located above the concrete collar behind the brick wall which did not reveal any evidence of arcing. He opined that since live wires arc when they lose their insulation and they arc in the vicinity where they are first exposed to heat, the absence of any arcing makes it is unlikely that the fire started in the area identified by Mr. Lamoureux as the origin of the fire.

**60** The plaintiff responds to this argument by pointing out that both experts agreed that the electrical system in the house was too damaged to allow for an arc mapping analysis of the origin of the fire. Furthermore, there is reason to believe that the wire was not even a live wire, Mr. Lamoureux reports that when he attempted to trace the wire to its origin or destination, he discovered that it was "orphaned".

#### **iii. Cracking in the concrete collar caused by fire**

**61** According to Mr. Rowan, the cracks in the concrete collar which was supposed to protect the stud wall did not necessarily predate the fire but could also have been caused by the fire. The plaintiff points to the U-shaped bum patterns in the two by four wall as evidence that the fire started in the vicinity of the collar,

#### **iv. Fallouts as a Cause of the fire behind the Brick Wall**

**62** Mr. Rowan submitted that the extensive fire damage in the area of the stud wall could have been caused by burning debris falling down from above. The plaintiff responded to this submission by arguing that fires tend to burn upwards and outwards, and even if burning debris had fallen onto this area, this would not explain the U-shaped bum pattern which appeared in the area immediately behind the stove.

#### **v. The Baseboard Heaters as a Possible Cause**

**63** The defendant points out that Mr. Loeffen, the Fire chief who attended the scene initially opined that the cause of the fire was likely one of the two basement heaters, which were located on the south side of the basement. The defendant criticizes the plaintiff for not taking any photographs of the inside of the baseboard heater's high limit thermostats. Although the defendant does not submit that the baseboard heaters necessarily caused the fire, he argues that the failure to take photographs of the high limits components of the heaters means that the heaters cannot be ruled out as a cause of the fire.

**64** The plaintiff responds to this argument by pointing out that Mr. Loeffen admitted that he was not an expert in fire investigations. He also confirmed that (i) Mr. Loeffen's evidence was based on his initial observations during the events of December 25, 2008 and some photographs taken on the following day; and that (ii) unlike Mr. Lamoureux, he did not conduct a fulsome investigation of the Galan fire following the incident.

**65** In addition, the plaintiff argues that Mr. Lamoureux did not ignore the heaters. He points out that Mr. Lamoureux testified that he retrieved one baseboard heater (which was in Mr. Loeffen's possession following the fire) on his way to the scene on January 5, 2009, Mr. Lamoureux's inspection of this heater (as depicted in several of his photographs) along with the other heater he found in the basement, did not find any damage or other indicators consistent with the heaters having caused the fire.

**66** Also, the defendant argues that Mr. Galan had no reason to have the basement heaters turned on since the family was not using the basement, which was unfinished. In addition, there was no reason to be using the heaters in the basement when the purpose of purchasing a wood furnace was to reduce heating costs, and the furnace had been stoked and tended to less than an hour before the fire broke out.

#### **vi. The Washer and Dryer as a Possible Cause**

**67** The defendant also criticizes the plaintiff for not preserving or carrying out a more thorough inspection of the washer and dryer, and argues that this is another possible source of the fire which has not been effectively ruled out.

**68** The plaintiff responds to this argument by pointing out that Mr. Lamoureux specifically ruled out the washer and dryer as possible causes of the fire, as neither could have caused the bum patterns left by the wood stud wall and the double rimmed joist. Furthermore, these appliances were relatively new (they were purchased the previous summer) and his inspection revealed that they had intact rubber and plastic hoses connected to the wall. Mr. Lamoureux attributed this lack of damage behind these appliances in the basement to the heat-shadowing created by the appliances which protected these hoses.

#### **vii. The Water Heater as a Possible Cause**

**69** The defendant also argues that the water heater was not effectively ruled out as a source of the fire.

**70** The plaintiff argues that Mr. Lamoureux inspected the water heater and ruled it out as a cause of the fire noting that its damage was "unremarkable". He also took photographs of the heater which were made available to the defendant's expert.

#### **viii. Electrical System...Lights, Switches, Receptacles as a Cause of the Fire**

**71** The defendant argues that the damage was so extensive it was impossible to conduct an arc mapping analysis, and therefore this cause cannot be ruled out. The plaintiff's response to this argument is that Mr. Lamoureux did inspect the electrical system. He concluded that the fire was not electrical in nature as an electrical fire was not consistent either with the bum patterns on the exterior of the house, nor those inside of the brick wall. Further, while Mr. Lamoureux agreed that the electrical system was too damaged to conduct an arc mapping analysis, his inspection did not observe any electrical failure, either in the electrical wires or in the electrical panel, consistent with this fire being electrical in nature.

### **ix. Observations of Firefighters**

**72** Mr Rowan points out that the firefighters reported that they observed flames coming out of the front window on the east side of the house when they arrived on the scene; they did not report flames coming out of the rear window. In his view, if the fire had started on the north side or the northwest corner of the basement the flames would have fractured the window at the rear of the house and propagated to the exterior of the house. The plaintiff responds by pointing out that there is an open spiral staircase from the basement to the main floor of the house adjacent to the window through which the firefighters saw the flames, and flames would have been drawn to this corner of the house because of the ready supply of oxygen.

### **3. Analysis**

**73** The parties agree that the cause of the fire which destroyed the Galen home cannot be determined with complete certainty. This is not the test however. The test is whether the plaintiff has established on the balance of probabilities that the fire resulted from the negligent installation of the wood furnace.

**74** In my view, the plaintiff's expert provides a logical and coherent explanation for the cause of the fire, an explanation which is supported by photographic evidence which confirms the existence of "U" or "V" shaped bum patterns. The evidence supports a finding that the defendant breached a number of Code provisions when he attempted to connect the flue pipe to the breech pipe and there is also evidence that he failed to take the necessary steps to ensure the gas-tightness of the breech pipe. I accept the evidence of the plaintiff's expert that this improper installation made it possible for hot gases to escape into the wall cavity. These breaches and the consequences resulting therefrom are logically connected to the cause of the fire as explained by Mr. Lamoureux.

**75** In my view, the plaintiff has also provided logical and reasonable responses to those questions and concerns raised by the defendant which challenge the findings of Mr. Lamoureux.

**76** Although the defendant raises the possibility that there exist other possible causes, such as malfunctioning baseboard heaters or appliances, I view these other causes more as possibilities than probabilities.

**77** I therefore find, on the balance of probabilities that the fire was caused by the defendant's negligent installation of the furnace.

### **DAMAGES**

#### **1. Cost of Rebuilding the House**

**78** After he determined that insurance proceeds would be available to rebuild the house, Mr. Finch's insurance adjustor, Mr. Heindl obtained a quote from Paul Davis Systems to rebuild the

house. Mr. Galan obtained a competing quote from Rochon Construction. The quotes from these two contractors were very similar and Mr. Galan decided to retain Rochon Construction to rebuild the house.

**79** Mr. Heindl testified that the new house was of similar kind, size and quality as the residence destroyed by the fire. In this regard, both contractors who provided quotes to rebuild the home were given real estate documents, which included photographs of the interior finished home and displayed the dimensions of the home. They also had discussions with Mr. Galan to determine the interior finishes of the home to ensure that their quote was for a home of similar size and quality. The total cost to rebuild the home with materials of similar kind and quality was \$611,000.

**80** I am satisfied the replacement house was of similar size, kind and quality to the house which was destroyed in the fire, and I accept that the sum of \$611,000 is a reasonable assessment of the cost of rebuilding the house,

**81** The defendant argues the assessment should be reduced to reflect the principle of betterment. Clearly, the new house was an improvement over the pre-existing house. It was built to newer updated codes and was free of wear and tear. However, in my view, Mr. Galan is entitled to the full cost of rebuilding his house. To decide otherwise would effectively require Mr. Galan to go into the marketplace and borrow money to rebuild a house which had been destroyed through no fault of his own.

**82** In deciding that principle of betterment should not be applied to reduce the property damage assessment in the circumstances of this case I rely on the decision of the British Columbia Court of Appeal in *Nan v. Black Pine Manufacturing Ltd.*, [1991] B.C.J. No. 910 (B.C.C.A.) where the court: (i) awarded the plaintiff his complete costs of rebuilding a new home after his home was destroyed by fire as a result of the negligent installation of a heater by the defendant; and (ii) rejected the defendant's argument that the plaintiff's damages ought to be reduced to factor in an element of "betterment".

**83** Specifically, the Court of Appeal in *Nan* agreed with the trial judge's finding that the proper measure of damages was the full cost of rebuilding the house following the fire. In determining that there should be no deduction for betterment, the court stated as follows:

What then is reasonable in the case where a family home has been destroyed through the negligence of a third party? Even assuming that the evidence in this case had established a "betterment" of \$32,000 to the respondent, by reason of the full reinstatement of his home, could it be said that it would be reasonable to reduce his damages by that amount, leaving him and his family to finance that portion of the reinstatement on their own? I think not. (*Nan* at page 5)

**84** I refer as well to the Ontario Court of Appeal decision in *James Street Hardware and Furniture Co. v. Spizziri*, [1987] O.J. No. 1022 where the court affirmed the longstanding principle that "as a general starting point, the measure of damages will be to put the plaintiff in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation" (par. 54). The Court of Appeal's reasoning in *James Street Hardware* is consistent with the court's reasoning in *Nan* where, as noted above, it was held that in the case of damage to property, the starting point for the measure of damages was the full cost of repair.

**85** In rejecting the defendant's argument that damages ought to be reduced on account of betterment, the Court in *James Street Hardware* held as follows:

In the present case there was no satisfactory evidence on the life expectancy of the building, either before the fire or what it would have been after being repaired - nor was there any evidence as to the amount of the increase in value, if any, after the fire.

Having regard to the principle that in cases of doubt it is for the defendant to prove the value of an alleged improvement, we think that the trial judge erred in making this deduction, (paras 65-66)

**86** In the result, the Court reversed the trial judge's deduction for betterment.

## **2. Contents**

**87** The plaintiffs insurer retained an independent adjuster to assist the Galens in itemizing their contents and determining a value for these contents. The replacement value of the contents was assessed at \$205,589.92. I accept this as a fair and reasonable assessment. The plaintiff submits that this assessment does not include all the items which were destroyed and asks the court to increase the assessment to \$230,000. No evidence was led as to what comprises these other items and in the circumstances I am not prepared to increase the assessment to an amount over and above the assessment which was completed by the adjuster.

**88** Unlike the property claim, I find that the contents claim must be reduced to take into consideration depreciation of these items.

**89** In *Pennefather v. Pike Estate* [2004] O.J. No. 271 (S.C.J.) the Court was required to assess the proper measure of damages for a loss of contents claim following a total loss fire. Following his review of the relevant authorities, Spence, J. held that the proper measure of damages for lost contents was the replacement cost less 15% for depreciation.

**90** In my view, a 15% depreciation rate is a reasonable rate to use in the circumstances of this case. This rate is not only consistent with the court's analysis in *Pennefather* but also reflects the fact that Mr. Galan and his spouse were a young couple who had only recently just started their lives together, and whose belongings were relatively new. Applying the 15% depreciation to the \$205,589.92 as the replacement cost figure referenced above brings the plaintiff's total contents claim to \$174,750.

## **3. Costs of Demolition**

**91** The costs of demolition are fairly assessed at \$8,400.

## **4. Landscaping**

**92** The plaintiff requests \$5000 for landscaping costs. In my view, this is a valid claim to include as part of the cost of restoring the premises and \$5000 is a reasonable assessment.

## **5. Additional Living Expenses and Fire-Related Fees.**

**93** Additional living expenses incurred by Mr. Galan and Ms. Lamothe following the fire have been agreed upon by the parties. These expenses total \$9,800.

## **6. Adjuster's Services.**

**94** Given the extent of the loss, e-djuster's services were required in this case. The plaintiff claims the cost of \$7,823.11 incurred for the preparation of the e-djuster's report on the basis that this was a foreseeable consequence of the damage caused by the fire.

**95** The plaintiff argues that since this case involved a total loss fire, the plaintiff's use of an independent adjuster was also a foreseeable consequence of the fire, and he claims costs of \$11,574.75 incurred on account of the services of the adjuster who was retained to adjust the fire loss in this case, are therefore also recoverable.

**96** I am not prepared to order that the costs of the adjusters be paid by the defendant. These were costs sustained by the plaintiff's insurer, not by the plaintiff personally, and the insurer is not a party to these proceedings.

**TOTAL DAMAGES**

1. Accordingly, the plaintiffs damages in this case total \$850,164.61, broken down as follows:
  1. Reconstruction of the house \$611,986.75
  2. Contents (subject to a 15% reduction) \$174,750.00
  3. Demolition Costs \$8,400.00
  4. Landscaping Costs \$5,000.00
  5. Additional Living Expenses (Agreed) \$9,880.00

**TOTAL \$810,016.75**

**97** For the above reasons, the plaintiff is to have judgment against the defendant in the amount of \$810,016.75, together with interest thereon.

**COSTS**

**98** If the parties cannot agree on costs, they are to file written submissions in relation thereto within 20 days of the release of this decision. Such submissions are to be no more than 4 pages in length, not including attachments. After service of these submissions, they have 15 days to file their replies.

E.J. KOKE J.