

*Case Name:*

**Pennefather v. Pike Estate**

**Between**

**Nancy Pennefather and Douglas Pennefather, Douglas Parker and  
Senora Parker, plaintiffs, and  
Scott Pike, acting as Estate Executor of the Estate of Andrea  
Pike, deceased, defendant**

[2004] O.J. No. 271

128 A.C.W.S. (3d) 612

Court File No. 99-CV-182735CM

Ontario Superior Court of Justice

**J. Spence J.**

Heard: December 15-19, 2003.

Judgment: January 29, 2004.

(38 paras.)

[Editor's note: Supplementary reasons for judgment were released September 16, 2004. See [2004] O.J. No. 3754.]

*Torts -- Negligence -- Causation -- Evidence -- Defences -- Contributory negligence, particular cases -- Knowledge of defective or dangerous things.*

Action by Pennefather and Parker against Pike for damages for negligence arising out of a fire which destroyed their property. Pennefather's premises were destroyed by a fire. The fire allegedly started when a cardboard box which was on top of a stove in the basement of the premises hit a control knob and turned the stove element on. There was some dispute as to whether the box was already on the stove or was placed there by Pike. Pennefather stated that they never saw a box on the stove. Pike argued that the failure of Pike to ensure that the stove was preserved following the fire was a case of spoliation. She also argued that Pennefather was contributorily negligent by failing to ensure that the stove was unplugged or that there were fire extinguishers in the room.

HELD: Action allowed. Pike was ordered to pay damages based on the value of the contents less depreciation. Pike was negligent. There was no basis for a finding of contributory negligence. It was

probable that the fire started by Pike. There were no grounds for an adverse inference based on the doctrine of spoliation. A reasonable person would not have placed a box on a stove.

**Counsel:**

Martin P. Forget, for the plaintiffs.  
Lawrence Hansen, for the defendant.

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**1 J. SPENCE J.:**-- This is a claim for damages arising out of a fire which caused destruction and harm to the plaintiffs' property.

Background

**2** The following statements in the Amended Statement of Claim have been established:

Paragraphs 3, 4, 5, 6 (except that the defendant, Andrea Pike, is now deceased and this action is proceeding against Scott Pike as Estate Executor), 7, 8, 9 and 10. The statements which have been established concern the fire at the premises of the Pennefather plaintiffs at 150 Willow Lane, Newmarket, Ontario. The established facts include the following:

- (7) On or about June 26, 1997, the premises were destroyed by a fire which originated in the basement of the premises.
- (8) The fire caused significant structural damage to the entire premises along with considerable damage to the plaintiffs Nancy Pennefather and Douglas Pennefather's personal property.
- (9) The fire also caused significant structural damage to the Parker's premises along with considerable damage to the Parkers' personal property.
- (10) It was later determined that the fire was caused when a stove element was accidentally turned on igniting a cardboard box that had been placed directly on top of its elements.

Causation

**3** Ms. Pike spoke to Constable Telezyn between 7:33 p.m. and 8:21 p.m. on the night of the fire. The constable recorded in his note book that Ms. Pike told him she was visiting and "placed a cardboard box on stove, [which] accidentally hit control knob, turned on, box caught fire ..." etc. Mr. Telezyn confirmed that this is what Ms. Pike told him at the time.

**4** Mr. Benzie, the adjuster spoke to Ms. Pike the next day. She told him virtually the same story as to how this fire started. She said she put the box on the stove when she was searching for other things in the kitchen. His note as to the circumstances of the loss is consistent with his evidence. Mrs. Pennefather's evidence as to what she heard Ms. Pike say to Mr. Benzie was that Ms. Pike said she was moving some things from the wall of the kitchen opposite to the stove.

**5** There are some inaccuracies in the notes of each of the constable and the adjuster but the inaccuracies do not relate to the facts relevant to the cause of the fire. In view of the notes taken and the

evidence given by Mr. Telezyn and Mr. Benzie, it is clear that Ms. Pike's statement to each of them was that she put the box on the stove.

**6** The evidence is that Ms. Pike was a truthful person. The circumstances of her statements to the constable and to the adjuster do not indicate any reason she would have had to lie or to be mistaken.

**7** Mrs. Pennefather said she never saw a box on the stove and never put a box on the stove. Janet Pennefather said the same of herself. Douglas Pennefather said the same of himself. Each of them was credible witness.

**8** Subsequently Ms. Pike told her husband that the box was already on the stove and she sought to pull some wire baskets out of it. The time when she told this to Mr. Pike was not identified. Ms. Pike told this version of the story of the fire to Mr. Benchtrit on October 20, 1997 when he interviewed her on behalf of her liability insurer.

**9** This version is materially different from the statements she gave at the time of the accident to the police and the insurance adjuster. If it is accurate, it would raise the question how the box came to be on the stove. The evidence of the Pennefathers is contrary to any of them having put it there. No other likely explanation is available.

**10** Ms. Pike expressed throughout a sense that she was responsible for the fire. It is understandable that with the passage of time, she might have come to reflect on the events in a way that would minimize her responsibility.

**11** It appears on the first version, the heat in the stove would have had more time to build up before igniting. On the second version, by comparison, the fire would have broken out after the box was on the stove for a period probably considerably less than two minutes after the knob was turned.

**12** There was a range hood above the stove. From its apparent height of about 2.5 to 3 feet above the stove in the photo at page 70 of Tab 7 of Exhibit I the hood could have made it difficult to deal with a barbecue box on the stove that was likely at least 2 feet high above the stove surface with baskets on top of it of 1 to 1.5 feet in height.

**13** The above two considerations might well not be material by themselves and are in any event quite secondary to the factors mentioned earlier but they contribute to the credibility of the first version.

**14** Based on the evidence, it is more probable that the fire started in the way Ms. Pike told the police constable, by her putting the box on the stove and the control knob being turned on accidentally as a result.

#### Spoliation

**15** The defendant submits that the failure of the plaintiffs to ensure the preservation of the stove is a case of spoliation. Spoliation occurs when there is a destruction of evidence or a failure to preserve evidence for another's use for reasonably foreseeable litigation. It was apparent from the day after the fire, when Mr. Benzie advised Ms. Pike that she should put her insurer on notice, that a claim would likely be made against her. No steps were taken to preserve the stove or to advise the defendant's insurer that it would be disposed of.

**16** Where spoliation occurs, the court may make an inference that the evidence that was destroyed would have been damaging to the case of the party responsible. Here, the defendant submits

that the destruction of the stove has deprived the defendant of evidence, including evidence as to whether the box was on the stove or not. As to the particular point whether the box was on the stove or not, there would seem not to be any issue because even on the version of events that the defendant advances, the box was on the stove. The issue is as to how the box came to be on the stove. There is no basis offered for an inference that an examination of the stove would assist in the determination.

**17** Ms. Pike did not advise her insurer until a few weeks after the fire. The insurer did not take any action in response until September.

**18** Mr. Benchetrit for the defendant's insurer said that he had a concern whether the fire had been caused in some way other than the box being moved in a way that turned the control knob. He mentioned the possibility of an electrical short circuit. There was no evidence that such an occurrence was a likely explanation or as to how an examination of the stove could have helped to determine whether a short circuit occurred.

**19** For the above reasons, there are no grounds for an adverse inference based on the doctrine of spoliation.

#### Negligence

**20** Negligence is properly defined as conduct which falls below the standard of care reasonably expected for the protection of others against unreasonable risk of harm.

**21** The defendant submitted that Ms. Pike saw the box when it was already on the stove and her conduct afterwards could not be considered unreasonable. The defendant did not make a submission as to whether it would have been negligent to place the box on the stove.

**22** Each of the Pennfather witnesses said that if they had seen a box on the stove they would have removed it. Ms. Pike, from all the evidence, considered that she was responsible for the fire and she felt extremely remorseful about it. There is no evidence to suggest that it would have been reasonable for Ms. Pike to suppose that the stove was not plugged in. Considering the possible risk of fire, a reasonably careful person would not place an article like a cardboard box on a stove without ensuring that it was safe to do so. It is quite possible that Ms. Pike thought, when she put the box on the stove, that she had acted with adequate care. Her reaction after the fire is consistent with her own assessment at that time being that she realized at that time that she had not exercised adequate care. Perhaps she judged herself unduly harshly but we have no way of knowing about that. On the evidence, and without the benefit of other evidence, the conclusion must be that the conduct of Ms. Pike was negligent.

#### Contributory Negligence

**23** The defendant submits that the occupiers had created a firetrap in the kitchen and there is nothing that Ms. Pike could have done about it.

**24** The stove was plugged in. It would have been easy to unplug it, which would presumably have eliminated any danger. It seems no one in the household was using the stove.

**25** There were boxes stored in the kitchen against the wall opposite the stove. Some boxes were also on the floor close to the stove.

**26** There was no fire extinguisher in the kitchen. There were two fire extinguishers, each in a nearby room. The one that was used in the early stage of the fire did not work adequately.

**27** Ms. Pike, in her interview with Mr. Benchetrit, answered questions he raised as to the presence of chemicals or paints in the kitchen. She said, after an initial expression of uncertainty, that she thought there were aerosol-type cans which may have been spray paint but these did not accelerate the fire because she had taken off the baskets which had the paint things in them.

**28** None of these factual considerations either separately or together would make it probable, without more evidence, that these circumstances amounted to a condition that was likely to cause a fire. There is no evidence that any of the particular circumstances contributed to the ignition or spread of the fire. For these reasons, and in view of the finding above that the fire was started by Ms. Pike's placing the box on the stove, there is no basis for any finding of contributory negligence against the occupants.

#### Liability

**29** For the reasons given above the defendant is liable for the damage which resulted from the fire.

#### Damages - The Pennefather Plaintiffs

**30** The Pennefather plaintiffs' materials on damages are set out in Exhibit 1. The summary at Tab 1 states that the total claim is for \$255,419.14.

**31** The plaintiffs made submissions that there was no reason to apply the doctrine of betterment as a basis for a reduction in the amount of the damages. Their submissions have prima facie merit. The defendant did not make submissions to the contrary.

**32** The parties made submissions concerning the application of a factor for depreciation in respect of the contents. The defendant invokes the doctrine of spoliation. It did not appear that the plaintiffs proceeded in a precipitous manner with the cleaning and replacement of contents. It is not clear what one would reasonably consider the plaintiffs ought to have done for the reasonable protection of the defendant's interest in respect of the determination of the amount of the liability beyond the advice given by Mr. Benzie to Ms. Pike that she should contact her insurer. She did so but the insurer did not decide to enquire into the matter for some considerable period of time afterwards.

**33** The implicit suggestion that the plaintiffs and their insurers behaved in a cavalier fashion disregards the admonitions given by Mr. Benzie, the fact that there is no evidence that the plaintiffs knew the identity of Ms. Pike's insurer and the time it took her insurer to act. It also disregards the fact that the plaintiffs' insurers had their own interest, separate from the plaintiffs, to see that the cleaning, repairs and replacement did not proceed in a way that would yield an excessive amount on the coverage claim on the plaintiffs' insurance. There is nothing to suggest that the plaintiffs' insurer was in a position to be confident that it could achieve effective recovery against third parties for the amount that it would pay out.

**34** It is reasonable enough to allow a percentage reduction in respect of the contents for depreciation. There is no scientific basis available to determine the appropriate percentage. Based on the submissions and on the cases referred to by counsel, it would be reasonable to apply a factor of 15% against the replacement amount of \$136,471.00. Subject to that deduction, the amounts set out in the Summary of Damages are satisfactory.

#### Damages - The Parker Plaintiffs

**35** The Parker plaintiffs' brief of damages is set out at Exhibit 6. The summary is set out in Tab 1 of the Exhibit. The total amount shown is \$61,145.69.

**36** Based on the submissions for the plaintiffs the claim in the amount shown is reasonable. The defendant made no submissions to the contrary. Accordingly, the amount claimed is satisfactory.

Conclusion

**37** For the reasons set out above, judgment to go in favour of the plaintiffs on the basis and in the amounts approved above.

**38** Counsel may consult me about costs if necessary.

J. SPENCE J.

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