

2006 CarswellOnt 4336,

2006 CarswellOnt 4336

Somerset Specialties Ltd. v. Keith Strub Construction Ltd.

Somerset Specialties Limited and Keith Strub Construction Ltd.

Ontario Superior Court of Justice

R.D. Reilly J.

Heard: March 2, 2006

Judgment: March 2, 2006

Docket: Kitchener 99-CV-179969-TT

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Proceedings: additional reasons at *Somerset Specialties Ltd. v. Keith Strub Construction Ltd.* (2006), 2006 CarswellOnt 3498 (Ont. S.C.J.)

Counsel: H. Poss, for Plaintiff

E. Kent, Ms M. Winterhalt, for Defendant

Subject: Torts; Evidence; Civil Practice and Procedure

Torts --- Negligence — Causation — Miscellaneous

Plaintiff, K Ltd., was landlord and one occupant of building, while defendant construction company, S Ltd., was tenant occupying other part of building — Stud wall separated S Ltd. from K Ltd. — Workers at both companies neglected to track down sources of noticeable burning odour and blue haze — After several hours, K Ltd. employee noticed flames and saw that there was fire in stud wall — Within 30 minutes, fire was well underway — Fire caused considerable damage to building — K Ltd. brought action against S Ltd. for negligence — Action allowed — Preponderance of evidence presented at trial established origin, cause and progress of fire — Fire originated near radial arm saw on premises of S Ltd. and was caused by ember resulting from use of saw, which ignited smouldering fire in sawdust below and nearby — Sawdust became fuel load and in fire smouldered for several hours until it came into contact with further fuel load of sheets of plywood leaning against stud wall — Fire then burst into active flame that began to involve wall — Evidence showed that copious amount of sawdust was left in area near saw — S Ltd. was negligent in not maintaining clean work place in area of radial arm saw — There was no preponderance of evidence pointing to alternate cause — Quantum of damages was \$1,000,000 — K Ltd.'s contributory negligence was assessed at 20 per cent — K Ltd. was therefore awarded \$800,000 in damages.

Torts --- Negligence — Contributory negligence — Proof of contributory negligence — Plaintiff's knowledge of

2006 CarswellOnt 4336,

danger — Explosion or fire

Plaintiff, K Ltd., was landlord and one occupant of building, while defendant construction company, S Ltd., was tenant occupying other part of building — Stud wall separated S Ltd. from K Ltd. — In morning, employees of K Ltd., including supervisor, noticed smoky odour and later, blue haze — They turned on exhaust fan and opened door, which seemed to clear air sufficiently — At 2:30 p.m., employee of K Ltd. noticed fire in stud wall — Fire caused considerable damage to building — K Ltd. brought action against S Ltd. for negligence — Action allowed — Fire originated on premises of S Ltd. and was caused by ember resulting from use of saw that ignited heap of sawdust — Although S Ltd. was mostly responsible for fire, K Ltd. was contributorily negligent — On basis that "if there is smoke there may well be fire," supervisory personnel of K Ltd. should have taken more active steps to detect cause of odour of smoke — Failure of K Ltd. supervisor to have investigated smoke constituted negligence and resulted in significant damage to building — K Ltd. did not give sufficient planning and forethought to safe evacuation of premises in emergency — K Ltd., through its agents, failed to take proper care of itself — Damage to property suffered by K Ltd. was reasonably foreseeable — Fact that initial proximate cause was negligence of S. Ltd. did not protect K Ltd. from liability for its own negligence, which was one of causes of actual harm suffered — Quantum of damages was \$1,000,000 — Contributory negligence was assessed at 20 per cent — K Ltd. was therefore awarded \$800,000.

Evidence --- Opinion — Experts — Weight of evidence — Conflicting expert evidence

Plaintiff, K Ltd., was landlord and one occupant of building, while defendant construction company, S Ltd., was tenant occupying other part of building — Premises were badly damaged by fire — Evidence showed that fire originated near radial arm saw on premises of S Ltd. and was caused by ember resulting from use of saw, which ignited smouldering fire in sawdust below and nearby — Sawdust became fuel load, resulting in fire that smouldered for several hours until it came into contact with further fuel load of sheets of plywood leaning against stud wall — Smouldering fire then burst into active flame — K Ltd. brought action against S Ltd. for negligence — Action allowed — Preponderance of evidence presented at trial established origin, cause and progress of fire — M, expert witness for S Ltd., had superior reputation to that of K Ltd.'s expert witness, B — B attended site and wrote report — M, who was hired chiefly to critique B's report, did not attend site — Principal frailty related to M's opinion was fact that he was not on site — M's assertion that he could base his opinion on observations of others and be in positive position to offer opinion was rejected — Nothing can replace advantage of experienced expert on site.

#### Cases considered by *R.D. Reilly J.*:

*Long v. McLaughlin* (1927), [1927] S.C.R. 303, [1927] 2 D.L.R. 186, 1927 CarswellNB 45 (S.C.C.) — followed

*Rockwood v. Noel's Motor & Transit Ltd.* (1997), 152 Nfld. & P.E.I.R. 277, 474 A.P.R. 277, 1997 CarswellNfld 114 (Nfld. T.D.) — considered

*Snell v. Farrell* (1990), 110 N.R. 200, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, 4 C.C.L.T. (2d) 229, (sub nom. *Farrell c. Snell*) [1990] R.R.A. 660, 1990 CarswellNB 82, 1990 CarswellNB 218 (S.C.C.) — followed

ACTION for damages for negligence brought by plaintiff landlord against defendant tenant.

#### *R.D. Reilly J. (orally):*

1 This trial involves a contest between the plaintiff, Somerset Specialties Limited, (referred to from time to time by the name by which they were on carrying on business at the time, Kitchener News) and Keith Strub Construction Limited as defendant. It was a contest to establish, if possible, the origin and cause of a fire that effectively consumed the building in which they both carried on business. The landlord was Somerset Specialties or Kitchener News at the

2006 CarswellOnt 4336,

time and the tenant was Strub Construction Limited. The total floor space was some twenty-four thousand square feet. Strub Construction occupied approximately three thousand square feet. Strub Construction had previously occupied four thousand square feet which space had been reduced prior to this fire to three thousand square feet by the movement of the wall that we've heard so much about, that is the two by six wood stud wall that separated the space occupied by Strub Construction and the so called drivers' room of Kitchener News. Those two areas were located on the south side of the building towards or at the west end.

2 The court observed during the course of trial, that we probably came to know that property about as well as we know our own homes as it was described by the many witnesses who testified.

3 The court is mindful this is not a criminal trial. There is no onus upon the prosecution to establish beyond a reasonable doubt the origin and cause of this fire, as in a criminal case or that it was of incendiary origin, set by an act of arson. This court must attempt to determine if possible, on a preponderance of the evidence, the origin and cause and to determine if cause be known whether it was as a result of negligence on the part of either the plaintiff or the defendant. The court is mindful that there is an alternate verdict that may be appropriate, specifically the verdict suggested by Dennis Merkley, a highly qualified witness called by the defendant corporation, that the fire was of undetermined origin and cause. That sometimes is the case, whether in a criminal prosecution or civil trial, usually when the result of the fire is what fire investigators sometimes refer to as a black hole, where it is impossible to determine origin and cause.

4 This court's responsibility therefore is, if it is possible on a preponderance of the evidence, to determine origin and cause and the court should not shirk in its duty to make such a finding if it is possible. Having carefully considered the evidence in this case, the testimony of all witnesses and the many exhibits that were filed, I conclude that it is indeed possible to determine both origin and cause on a preponderance of the evidence. On a significant preponderance of the evidence I conclude that the origin of the fire was as described by Mr. Robert DeBerardis, an expert witness called by the plaintiff, in an area just to the east of the radial arm saw at the east end of the Strub Construction property and that the cause of that fire, on a preponderance of the evidence was an ember as a result of the use of the saw that ignited initially a smoldering fire in the sawdust below and generally speaking to the east of the table saw which smoldering fire progressed to open flame. This open flame then invaded the wall between the two spaces and ultimately caused significant damage by actual flame and by smoke and soot to the overall property. The significant preponderance of the evidence leads me to that conclusion notwithstanding the doubts expressed by Dennis Merkley.

5 I have considered the physical evidence as it was described by Robert DeBerardis and by other witnesses and as well the eye witness testimony, and I don't mean to be facetious when I put it this way, the nose witness testimony of many of the witness who were called. Their observations are significant because they form the basis for a claim by the defendant alleging contributory negligence on the part of the plaintiff with respect to the ultimate damage that was suffered by both the plaintiff and the defendant. I don't intend to deal with the evidence of all the witnesses in great detail but it is necessary that I touch upon some aspects of the evidence of almost all of the witnesses.

6 The first witness to testify for the plaintiff was Mr. Pat Cosgrove. His position at the time was regional sales manager. He was basically the person in charge of the facility on the day in question the 17<sup>th</sup> of July, that being a Thursday, in 1997. He, like all of the employees of the plaintiff company, arrived early in the morning at approximately 7:15 for a formal start time for his day of 7:30. He outlined the routine and breaks during the day, if I can call them that. The start time for work for everyone was 7:30 a.m. with a break from 9:15 to 9:30. Lunch was from 11:45 to 12:15. A further afternoon break occurred at 2:30 until 2:45 and the work day ending at 4:30 p.m. Those break times are significant in terms of the opportunity they provided various employees of the plaintiff company to observe, I'll put it this way, the progress of what I conclude, on a preponderance of the evidence, was a smoldering fire and then ultimately to view the open flame as it breached the wall between Strub Construction and Kitchener News. Mr. Cosgrove testified that his company employed approximately 30 employees at the time. Two thirds of them would have been working in the warehouse area, the rest would have been in the office which is found at the east end of the building. When he first arrived, because his operations manager was on holidays, that being Walter Twomey, he in

2006 CarswellOnt 4336,

fact performed the opening duties. He opened the building, disarmed the alarms, bid good morning to employees as they arrived and began their work day and basically took a tour of the premises, including the drivers' room, labelled on Exhibits Two and Five as the Publications Return Area, at the south central portion of the building but referred to commonly by the witnesses as the drivers' room, and I will use that terminology. Particularly in the drivers' room he noticed an odour of "burnt wood". He mentioned this to Mr. Herb Buckingham who was a tie line supervisor and whose duties primarily occupied him in the order processing area being in the north central part of the building directly north of the drivers' room. Those two areas, that is the drivers' room and the order processing area, were separated by a concrete block load bearing wall. Access between the two areas was gained by an overhead door that was kept open at the east end of that wall which permitted a person then to move from the order processing area or the tie line area into the drivers' room by passing through a further sliding door immediately beyond which was the so-called smoking area. This area did not play a role in the fire per se but was the attraction for a number of the witnesses to attend in the drivers' room permitting them to see smoke, smell smoke and ultimately to see the fire. Notwithstanding the odour of burnt wood sufficiently noticeable to cause him to mention it, on his evidence, to Mr. Herb Buckingham, Mr. Cosgrove took no further steps apart from opening the large overhead door on the south side of the drivers' room, at least opening it partially as well as the man door to the east. He said the smell was particularly strong that day although he was used to that smell, concluding it was as a result of wood being, as he put it, "cut on the bias" in the Strub Construction area. He told the court that he could frequently hear their table saw in operation and associated it with that smell, although, I repeat myself for emphasis, that smell was particularly strong on the day in question. He said when he opened the doors the smell dissipated a little bit. He then left for an appointment at approximately 11:45. He noted there was no odour except in the drivers' room. Before he left at 11:45 he told the court he probably did another tour of the building. His best recollection was that the odour that he originally noted of burnt wood was fainter at that time. His recollection, as well, was that the overhead door was still open approximately three feet. His recollection of smelling that odour on prior occasions was very specific. He told the court that he had discussed the issue with Mr. Keith Strub, who was the tenant, the principal of Strub Construction, the defendant corporation, and that Mr. Strub had explained to him that it was from cutting studs in the Strub Construction space. It may be of significance, and I'll return to this issue, that his best recollection was that a key to the Strub premises was in a large box of keys in the Kitchener News office. When Mr. Cosgrove returned, about three o'clock in the afternoon, the fire was well underway and was being tended to by fire fighters.

7 The next witness called by the plaintiff corporation was Mr. Terry Frey. Mr. Frey is an important witness who had significant observations to make. Mr. Frey was employed at the time as a strapper on the tie line. Specifically he was responsible for tying up the bundles of magazines after they had been put together by other workers on the tie line. He had been employed by Kitchener News for some ten years and was very familiar with the premises. He arrived, he testified, at 7:20 a.m. some ten minutes before the beginning of the work day and had a cigarette in the smoking area, I say again, which is found in the north east corner of the drivers' room. Before the shift started he testified he could hear a saw running from the Strub Construction premises. He could hear the saw when he was in the smoking area. He also smelled, as he described it, burning wood. He testified he was quite used to hearing the saw and smelling that same odour, he estimated one to three times a week. After the morning shift started he could still smell something burning, as he put it. The impression of something burning was so strong that at 8:00 a.m., well before the morning break, he told Herb Buckingham, his supervisor on the tie line, that his eyes hurt, that is Terry Frey's eyes hurt because of, as he described it, a haze in the air. On the evidence of Mr. Frey both he and Mr. Buckingham then attended in the drivers' room and they could see a "bluish haze" up near the ceiling. They observed no open flame, no actual burning at that time so they opened the overhead door fully and turned on an exhaust fan in the wall above the man door. Mr. Frey then went back to his duties in the order processing area on the tie line. He testified that he and Mr. Buckingham spent five to ten minutes in the drivers' room and that opening the door and turning on the fan seemed to improve the situation. He had a sandwich at the morning break, although it wasn't lunchtime yet, and then went to the smoking area, that being at about 9:30. He testified that both the haze and the smell were gone at that time. The overhead door was still open though he wasn't sure if the exhaust fan was still on. He had his lunch break, he said at 12 noon to 12:30, though the better evidence is that it was 11:45 to 12:15, and then returned for the afternoon shift. At 2:30 he took his afternoon break and repaired to the smoking area. It was then, as soon as he entered the area, that he saw actual flames through the open sliding door that opened on to the smoking area of the drivers' room. His observation of the fire was through this open sliding door and through the windows of a cube van which was parked in the drivers' room, that is he

2006 CarswellOnt 4336,

looked through the windows of the cube van to see the fire in the two by six stud wall between Strub Construction and Kitchener News. He testified that his view of the fire was obscured to some extent, not only by the van but also by the bunks, referred to technically as inner body loaders, that were used to load magazines and other material into the vans that effected delivery. His impression was the bottom of the flame was approximately three feet off the floor at that time. His view was improved when he went around the van. He told the court that the flames were, by his estimate, eight to ten feet south of the spine wall or the load bearing central wall running east and west through the building. He testified the flame was four to five feet wide but he was less than certain about the actual location of the bottom of the fire because his view was still obscured by the inner body loaders or bunks that were in that area. Under cross-examination by Mr. Kent he testified that earlier in the morning what was in the air was very noticeable by him. His eyes were actually burning and watering. His closest view of the fire was from perhaps ten feet. He also testified that along that wall, that is the wall separating Kitchener News from Strub Construction, there were a series of racks that were perhaps six to seven feet deep. Those racks were the same or similar to those which are pictured in Exhibit 7, two tiers of racks, and were described by a number of witnesses. They were used for storing, as we see in the photograph, magazine racks made of pressed wood, plywood or melamine which ultimately were consumed in the fire. Mr. Frey testified that he previously had seen a haze which he attributed to the sawing that went on in the early morning on occasion in the Strub Construction premises.

8 Mr. Paul Halley was involved in the educational department for the plaintiff company and worked in fact in the book store which is found directly to the east of the drivers' room. He noted nothing unusual prior to the 2:30 break though when pressed on the issue he said he thought there may have been an odour of some sort that he noted at the lunch break but that was nothing unusual. He had smelled that odour before. As he exited the bookstore, however, for the afternoon break through the sliding door, much like Mr. Frey, he saw flames coming, as he put it, "through the wall". They were flickering flames coming through the top and through some seams, that was the way he described it. The location was one third to one half way south from the central spine wall. He, wisely, never actually entered into the drivers' room.

9 Walter Twomey was not present prior to the fire on the day in question. In fact he was on holidays golfing in Guelph during the morning hours. In the normal course, he was the operations manager at the facility. Part of his duties were to open up in the morning and to ensure that all departments were up and running, as he put it. He oversaw the drivers and was involved in supervision of all personnel, scheduling and of maintenance. He reported directly to Mr. Pat Cosgrove, who was the senior person in charge of the building. He testified that he had on occasion entered the Strub premises using a key which was kept in a safe in the office area of the plaintiff corporation. He advised the court that he entered the Strub premises perhaps three or four times a year to attend to maintenance matters, plumbing or electrical issues. He testified that he had occasion to hear the saw in the early morning and rarely in the late afternoon. He'd actually seen the saw in operation when he made a circuit around the outside of the building and was able to look through the large open overhead door at the west end of the Strub premises. He said as a result of the sawing operation that there would on occasion be a smell of "burning wood" and its strength would vary. There had been an agreement, he testified, with Mr. Strub that Strub Construction would not use the saw during Kitchener News' business day because of the interference with the plaintiff's operations because of the sound. He said that there were on occasion violations of the agreement but nothing serious. Again he testified that the key to the Strub premises was kept in a safe in the office area of Kitchener News. He further clarified that on some occasions when he looked from the outside through the open overhead door in the Strub premises he had seen smoke as a result of sawing operations. For what it's worth, he further testified that the wall sheathing on the Kitchener News side of the two by six stud wall separating the two premises went up to the roof joists. These were webbed truss joists ultimately supporting the flat roof. He also believed there was a board cutting off access through the webbed joists and effectively separating, albeit not on an airtight basis obviously, the two premises.

10 Terry Watson was a worker on the tie line. Mr. Watson testified that he, as well, arrived at about 7:20 in the morning. When he arrived he went to the smoking area after leaving his lunch in the lunchroom. At that time he could hear the sound of a saw and he could smell "sawdust". He said that it smelled "like burning wood". Mr. Watson testified that through the day the smell seemed to be getting stronger and he was able to smell it all day long, specifically

2006 CarswellOnt 4336,

when he took his lunch break. He then repaired to the smoking area to have a cigarette and at the same time he said he could smell the "sawdust". At 2:30 he, like Mr. Frey, attended to the smoking area with the intention of having a cigarette and he said at that time he could see "the wall was on fire". He saw flames, as he described them, one third of the way from the spine wall and five feet from the floor. He described the flames as perhaps five feet wide and four to five feet high. The court is mindful, in terms of analysing the progress of the fire, that all of these witnesses had their view of the wall and obviously the flames somewhat obscured by magazine racks or other material that would have been stored in the two tiered shelving against the wall and as well by the inner body loaders that were in that area, to say nothing of the cube van that was parked more or less in the centre of that area. Under cross-examination by Mr. Kent he said that though he had smelled the odour on many other occasions, this day was different, because the burning smell got stronger through the day, although he never saw any smoke in the Kitchener News area. He said that the odour had never previously gotten worse through the day.

11 Mr. Buckingham, I've already referred to as the tie line supervisor. His evidence is interesting when compared with the evidence of Terry Frey because it demonstrates how two honest witnesses may well give different accounts of the same event, each of them telling the truth as he or she believes it to be but one of them being, perhaps both of them being, less than totally accurate. They simply differ based upon the vagaries of memory and perhaps their respective opportunities to make an observation. The same may be said, for instance, of the evidence of Mr. Keith Strub as compared with his son Ben Strub with respect to one detail of their testimony. Both of them, I am quite satisfied, are honest witnesses who did their best, as did all the witnesses in my view, to recount their observations as accurately as possible. Indeed, as I have observed on other occasions, if I hear two witnesses give absolutely identical accounts of the same event I strongly suspect that someone has memorized a script. In any event, Mr. Buckingham was supervising the tie line that morning. He described the bunks or inner body loaders as being some three and half feet wide and four feet high. When the bundles of magazines or other materials are put together on the tie line they are loaded into these bunks which are then rolled into the drivers' room for loading into the vans for purposes of ultimate delivery. I say again, there were some of these bunks located towards the dividing wall between Strub Construction and Kitchener News on the day in question obscuring in part the observation of those who testified to the flames. Mr. Buckingham told the court that he heard sawing sounds in the morning, that he had heard them on other occasions. He said that they were not heard, by his recollection, frequently, perhaps once a month. This evidence was different from the frequency as testified to by other witnesses. It is clear that the saws were used on that morning. Indeed the court heard evidence from the gentleman who actually used the saw, Mr. Terry Denstedt, whose evidence I shall touch upon presently. Mr. Buckingham said there was a slight odour. He described it initially as an odour of sawdust as though wood was burning. He had no recollection of the attendance that Terry Frey told us about, that is Mr. Frey and Mr. Buckingham as result of Mr. Frey's complaint to Mr. Buckingham, of going into the drivers' area at approximately eight o'clock in the morning. His recollection was that he attended with Mr. Frey at the 9:30 break in the drivers' area. They went there to get coffee from the mobile canteen that was in the habit of attending to satisfy the needs of the employees for their morning break. His recollection was that when they attended in the drivers' area he noticed a cloud of blue smoke. He said to Mr. Frey, he told the court, "it's pretty smoky in here we'd better open the door and turn on the fan." He said there was a cloud of smoke in the centre of the drivers' room under the lights. They then, consistent with the evidence of Mr. Frey, opened the door and turned on the fan. He said at lunch there was no smoke, no odours in that area. At 2:30 he, together with other witnesses, saw fire, as he described it, in the centre of wall, that is the dividing wall between Strub and Kitchener News. He said he couldn't see the bottom of the flame but estimated the flame was four to five feet high and four feet wide. He had told a driver to back out the cube van that was parked in that area and that was done. He clarified there were no overhead or ceiling fans in the drivers' area but there were four such fans in the order processing area, the area where the tie line was. He testified, and this was something of course that Mr. Kent would urge upon me to remember, that the smoke was not against the partition wall between Strub and Kitchener News but was more towards the sliding door area, more towards the centre of the room under the lights. It was a cloud that initially hovered there that may have been irregular but measured approximately eight feet by eight feet. He said he probably saw a little smoke on prior occasions but it was never so heavy. He confirmed that at lunch both the smoke and any odour had disappeared.

12 Mr. Schnarr also testified for the plaintiff. He had a number of duties; one of his principal duties was his re-

2006 CarswellOnt 4336,

sponsibility to ensure that the trucks were loaded and off on time. He was involved in book merchandising and he delivered books himself. He was a general handyman as well. He was perhaps one of the earliest employees to arrive, that being at 7:00 a.m. because he wanted to ensure the trucks were loaded and off in time and he also, being an avid baseball player, wanted to justify leaving early that day to play baseball. He was gone to make his own deliveries by 7:45. When he was in the drivers' room, however, prior to his departure he smelled, he described it as, "burning wood or hot metal, like cutting through a knot." He testified that he had observed the same odour every week to week and a half although the odour on prior occasions was "never quite that strong." He testified that he never saw smoke or haze that day or ever previously.

13 The next witness who testified, Darryl Fisher, had various duties, working on the tie line and on returns, though that day he was working on the tie line. He was a student who was on his third summer as a summer employee. Being younger and wiser than some of the other witnesses he wasn't a smoker. He couldn't remember going into the drivers' room, otherwise expressed, the smoking area. He could not recollect saw sounds or an odour but he did go at the break to the drivers' room to use the washroom which was in that area. As he got closer to the washroom he smelled a burning odour and he said it was the first time for that odour. I am mindful that he was a summer employee. At the luncheon break, between 11:45 and 12:15 he again attended the drivers' room to use the washroom and smelled the same odour, a burning smell although he saw no smoke or haze. At the afternoon break he again began to enter the drivers' room and that's when he saw flames on the far wall, the dividing wall between the two premises. He described the flames in a way that was similar to the observations of other witnesses. He said they were "a few feet" south of the spine wall and four to five feet wide. He immediately exited the premises. He had started his employment just a few weeks earlier in mid June and believed that once or twice he had heard sounds of saws.

14 Wayne Forwell's evidence is of significance basically for two reasons. It demonstrates the conscientious approach to maintenance adopted by the plaintiff. He also provides some evidence negating the chances of an accidental fire in the plaintiff's premises. Mr. Forwell is a qualified and experienced electrician who attended to any electrical problems or any electrical wiring needs of the plaintiff, Kitchener News. He testified that Kitchener News was "pretty much on top of things, that they didn't mind paying for service calls. They wanted maintenance when it was not really necessary." He attended after the fire and while the hydro had been shut off he made certain that there would be no problems. He locked all the disconnects off and he checked the fuses. He testified there were no fuses blown. There were two breakers tripped which he attributed to the water that was used to extinguish the flames. They were for two of the three banks of lights in the drivers' room. They were two 15 amp breakers. He found nothing unusual in that observation. He said he was confident that that was as a result of the use of water to extinguish the fire and had nothing to do with the cause of the fire. He confirmed, as did other witnesses, with two exceptions, that there was no electrical wiring in the partition wall between the Strub premises and the premises of Kitchener News. He described in some further detail the banks of fluorescent lights. He told the court that some years previously the lights had run the full length of both properties but those that were principally in the Strub Construction premises were disconnected from the banks in Kitchener News, for reasons of economy, that being done five to six years before the fire although it is clear that the banks that principally lit the drivers' room in Kitchener News premises did extend through the partition wall perhaps two feet into the Strub premises. Mr. Forwell confirmed he didn't do a thorough inspection. He described that what he did was a "quick walk through" but saw no evidence of arcing or beading.

15 I now turn to the evidence of witnesses on the other side of the partition, those associated with Strub Construction. I would touch first on the evidence of Mr. Keith Strub who effectively was at the time the principal responsible for Strub Construction. Strub Construction is principally in the business of concrete forming for foundations and other structural requests. The space which they rent from Kitchener News is used primarily for storing materials, equipment and tools. It is the meeting place early in the morning for Mr. Strub and his employees before they head off to various job sites and it's the place to which they return at the end of their work day. The inner space, which I have already described of approximately 3000 square feet, is part of the property which Strub Construction leased from Kitchener News. The other portion of the lease related to an exterior compound, where trucks and other equipment were stored. Mr. Strub gave some further description of the premises, the basic structure in the Strub Construction space being similar if not identical to that in the drivers' room at Kitchener News. He said the ceilings were some 15

2006 CarswellOnt 4336,

feet to the open web steel joists. He described the three banks of fluorescent lights protruding perhaps two feet into the Strub premises through the partition separating Strub and Kitchener News. He confirmed that his premises were serviced by a power supply of 550 volts, transformed to 220 and 110. He described the radial arm saw in question, which he had received as a gift from his father a few years previously. He described it as being a radial arm saw of 220 volts and 50 amp. We have also heard it described by other witnesses as being two horsepower. Material was filed as an exhibit at trial from the manufacturer that would appear to relate to a similar or identical saw. He clarified that the saw was plugged into a female outlet on the north wall, the spine wall separating Strub Construction from the Kitchener News shipping receiving and shredding area. It was plugged in by what was referred to as an extension cord by some witnesses but it might be more properly described simply as a cord. I adopt that terminology because an extension cord normally means an electrical conduit or cord that is added to an appliance with a male end on one end of the extension cord and a female end on the other. In this case the best evidence is that this particular cord was in fact wired directly into the wiring in the arm of the radial arm saw. It appears clear that the power cord for the radial arm saw was of relatively heavy gauge, perhaps 10 gauge whereas the wiring within the arm of the radial arm saw that powered the switch and the motor was of 12 or 14 gauge. There was nothing to suggest what the junction was or might have been between the power cord and the wiring within the arm of the saw itself. The power cord which as Mr. Strub testified came with the saw was of significant length, some 50 feet. Though it was found effectively in pieces on the floor under or amongst the debris that was caused by the fire I accept the evidence given by witnesses called by the defendant, including Mr. Strub, that in fact it was initially suspended on the partition wall at some considerable height, perhaps six feet above the floor. No-one was sure exactly on what it was suspended, possibly nails or spikes hammered into the studs, but it ran along that partition wall to the north where it was then coiled on a bracket on the north wall of the Strub space, that is the excess length was coiled on a bracket. That is evident from several photographs. The male end of the power cord was plugged into a female socket of 220 volts, providing power to the saw. Mr. Strub testified that it was used to cut two by fours, two by sixes, plywood, or to accommodate any other cutting needs that had to be done on the premises. He told the court how he'd modified the saw table. I need not go into that in great detail. Over the original table which we've seen in a number of photographs, he had affixed a new plywood table to enlarge the table to comfortably cut larger pieces of stock material. When I say he, I mean either Mr. Strub himself or personnel of Strub Construction. He had also affixed a new backstop or fence to the saw against which material would be placed for cutting. He said that this fence was clamped to the table top and was made up of several pieces of stock laminated together, perhaps secured with nails. That appears to be the case from the photographs of the partially fire consumed table top and fence that were introduced at trial.

16 I accept the evidence that the fence itself would not have had any role to play in the genesis of the fire. Reference was made to the possibility that a hot metal ember from the saw blade striking a nail was a possible cause. There appear to be nails in the fence but I am confident from the evidence that there was no interference with the saw blade created by the fence itself. Rather there was a notch or gap through which the blade was able to move freely.

17 Mr. Strub was remarkably candid, honest about the sawdust that was in the area of the saw. He testified that, as one can appreciate, when sawing operations took place sawdust was ejected to the rear, that is to the east of the radial arm saw. Periodically that sawdust was cleaned up with a shovel. He told the court that there was a piece of plywood, as he described it, nailed to the wall projecting out roughly perpendicular to the wall to deflect the sawdust or prevent it from falling to the north and east of the saw where it would be more difficult to clean up and to ensure that it was deflected directly to the east and perhaps slightly to the south of the saw. He said that the shop was swept perhaps once a week and the sawdust was cleaned regularly though it wasn't spick and span. He conceded there was perhaps half a five gallon pail of sawdust there on the day in question, that there was a collection of sawdust that was perhaps six inches deep. Otherwise expressed, there was a significant collection of sawdust to the east of the saw.

18 Dealing specifically with the events of the day, he testified that he attended at the premises at about 6:45 in the morning. All employees were there at that time or arrived within minutes. At 7:20 he left the shop together with all the employees except for his son Simon and Terry Denstedt. Between 10:00 and 10:30 he told the court that he returned to the shop to meet other employees, to unload a boom truck and then to leave again to go to another job. He testified that shortly after his arrival his son Ben, accompanied by Charles or Charlie and Matt Galton, arrived, that Charles Galton



2006 CarswellOnt 4336,

left soon thereafter but Ben and Matt helped Mr. Strub unload the boom truck in the compound. When I referred to a discrepancy or arguable conflict between the evidence of Mr. Strub and his son Ben, Ben Strub was very clear that while he had left at approximately 7:10 in the morning with Charlie and Matt Galton to attend at a job site, when he returned at 10:30 and indeed did help his father unload the truck in the compound, that Matt did not return with him and that Charlie was only there briefly. I say again, whether Matt was present and helped unload the boom truck is of no direct relevance but it's an interesting observation that father, Mr. Strub senior, and son, Ben Strub, have different recollections of who was physically present unloading the boom truck. There is another arguable difference in their recollection as to whether they attended together to do a walk around in the shop or whether Mr. Strub senior, Keith Strub, did that by himself. In any event, continuing with the evidence of Keith Strub, he said that he was at the shop mid morning for a maximum period of one hour. He noted a slight odour similar to hardwood as he described it. He had noted that odour quite often, that there would be a "burnt smell" on occasion from the Bauer Felt plant that was in the neighbourhood. After leaving the compound he attended with his son Ben at the interior of the Strub Construction premises. He took some concrete ties into the interior and he wanted to make certain that the odour he noted wasn't coming from the interior of his shop. Therefore he walked the perimeter of the open area but didn't pay any particular attention to the radial arm saw or the sawdust behind it. By his observation there was no smoke in the shop. Therefore he believed there was no danger and he closed up the shop. The evidence seems clear, considering the testimony of both Keith Strub and Ben Strub, that the overhead door was open for a good portion if not all of their attendance mid morning at the Strub Construction site. Their evidence is that the interior lights were not turned on in the Strub Construction premises. Therefore it makes sense that the light available to them, for the walk around for instance, would be coming in through the overhead door. Under cross-examination Keith Strub further particularized the sawdust deflector that was nailed to the partition wall. He described it as being perhaps 18 inches wide and six feet high. It was, as I have already described it, more or less to the north and east of the back of the saw to deflect sawdust to the south. It was roughly even with the north edge of the stand. During his examination for discovery he accepted the possibility of slurry or nails in wood that had been cut that morning. I would emphasise, however, that he was not present when the wood was cut and prefer the evidence of both Terry Denstedt and Simon Strub who were clear that the wood Mr. Denstedt used to make the boxes for concrete forming was clean, new plywood and would not have contained slurry or nails thereby eliminating, in my view on a preponderance of the evidence, the possibility of an ember of an aggregate nature or a metal nature created by the saw coming into contact with slurry or with a nail. He further described the odour which he noted that morning as being "like hardwood, like a burnt smell." He said that he never associated the odour which he smelled that morning with the use of the saw and he didn't discuss the odour or any concern that he might have had with personnel from Kitchener News. He could still smell a burnt smell when he left the premises. I found Mr. Strub to be an honest, intelligent and very persuasive witness as far as his evidence went. I want to make that very clear so that any findings I make with respect to liability on the part of the defendant corporation are not seen to reflect inappropriately on him or his character. I might say the same thing, with respect to both his sons Simon and Ben. They struck me as intelligent, honest young men who have achieved significantly in their lives already.

19 Simon was one of the two Strub employees it will be remembered who was the last to leave the shop. They were about to attend at a job site and Terry Denstedt was in the process of making some blockouts to be used to create a space in what otherwise would be a solid wall or foundation. Mr. Denstedt was going to make those blockouts out of three quarter inch plywood which plywood was supplied to him by Simon Strub. Simon testified that there was never a problem with the saw, that he'd never seen sparks created by the saw. He said that when the saw was used there was a "sawdusty, woody smell", that it was the "standard odour you get from using any saw cutting wood." He said the saw was in use for perhaps five minutes while he was loading the truck and the overhead door was open at that time. He described the sound of the saw as being loud and he said there was a "bit of a dusty, smoky film over it" which, as Mr. Poss would point out, is evidence of pyrolysis. Interestingly, as he put it, as a matter of curiosity, he examined the saw more closely at some point to see what horsepower it was and found that it was two horsepower. He didn't know why he checked the horsepower of the saw that morning. He said it was just a coincidence, he was just curious. He testified, as well, as to the buildup of sawdust on the floor to the east in the area of the radial arm saw. He testified the sawdust would have filled two five gallon pails.

20 Terry Denstedt was the young man who did the actual cutting that morning. Mr. Denstedt has left the business

2006 CarswellOnt 4336,

of concrete forming and is now a teacher. He, as well, impressed me as an honest and intelligent witness. He testified that he never saw any sparks as a result of his use of the saw on any prior occasions. Perhaps on some occasions there would be "a slight smoky smell". He was cutting the three quarter inch plywood to create blockouts, as I said, for concrete forming. He confirmed, as did his colleague Simon Strub, that it was new plywood, with no nails and no slurry. His recollection was that he was using the saw for perhaps two minutes. There was nothing unusual in his operation of the saw although he said it produced a "smoky odour". He confirmed that there may have been, as he put it, a cubic foot of sawdust to the east and behind the saw. He said the blade was dull and as a result there was "slight smoke coming from the wood". He went on to clarify that this smoke was not visible but it was "smoke you could smell".

21 The last eye witness I would refer to was Ben Strub. Having left the premises early in the morning to attend at a job site at 7:10, he then returned at about 10:30 a.m. being driven to the shop by Charles Galton. His father was with the boom truck or crane truck in the compound and he, Ben, helped his father unload that truck. They worked for about 20 minutes in the compound. Then they unloaded some pins or ties into the shop through the man door. Contrary to the evidence of his father, he believed the overhead door was closed. I prefer his father's evidence for this simple reason, that Keith Strub was able to see with sufficient clarity in the interior of the shop without turning on the overhead lights. He, Keith Strub, was very clear about that. There were no windows in the premises. There were some small windows, as I recollect, in the overhead door but for there to be sufficient natural light, to have any reasonable visibility of the interior, in my view, the door overhead almost certainly was open as Keith Strub testified. The light would be very dim indeed if the overhead door was closed. Returning to the evidence of Ben Strub, he noticed an odour of burnt wood as well and he reported the smell to his father. It is of some significance that with respect to a number of these witnesses it wasn't just a matter that they themselves noted a smell of burnt wood or a smoky odour, however they described it, but it was sufficiently noticeable that they commented on it to other persons present. When he reported this odour to his father he said that his father replied that it was "probably from guys cutting wood in the morning." Though I'm mindful of Keith Strub himself testifying that he did not associate the odour with the saw, I simply note in passing, without suggesting that he is other than an honest witness, that Ben Strub also testified that he believed the radial arm saw was plugged into a female receptacle, on the stud wall just north of the saw. That clearly is not the case on the evidence.

22 It then remains for me to put that eye witness testimony into context with the evidence given by expert witnesses, Mr. Robert DeBerardis, Mr. Dennis Merkley and to the extent that he added to expert testimony, Mr. Dominic Marano.

23 This seems to be an appropriate time for a morning recess. I will return in 15 minutes.

### **Recess**

24 UPON RESUMING

25 Mr Robert DeBerardis was retained by the plaintiff corporation, or more properly by the plaintiff corporation's insurance company or insurance adjuster, Mr. Brian Pilkington, on the 18<sup>th</sup> of July, '97 to investigate and if possible determine the origin and cause of the fire that effectively destroyed the building. The court is mindful of the thorough and quite proper cross-examination effected by Mr. Kent with respect to his qualifications as an expert witness and any limitations that might apply thereto. The court is also mindful that that cross-examination and the answers given by Mr. DeBerardis impact not only on the threshold determination by the court as to whether he was entitled to express expert opinion and I found him so qualified, but also the probative value, the weight to be given to his testimony. Notwithstanding the frailties that would be pointed out by Mr. Kent with respect to his qualifications, I found him to be eminently qualified and obviously, as will be seen, give considerable weight to his investigation and the opinions he expressed as a result thereof. I am mindful that some of his qualifications or indeed official certification took place after his investigation of this fire. Specifically, as an example, he was certified by the National Association of Fire Investigators as a fire and explosion investigator after taking a course of one week in the fall of '98, over a year after

2006 CarswellOnt 4336,

this particular investigation. For what it's worth I might make this observation, that his formal qualifications are not equivalent to the formal qualifications of Dennis Merkley, the expert witness called essentially to critique the report, and the evidence, provided by Mr. DeBerardis and to provide his own opinion as to origin and cause. Mr. Merkley is, I think I can fairly say, internationally renowned as a fire and explosions investigator. I will have much more to say about Mr. Merkley's evidence presently.

26 Mr. DeBerardis conducted the majority of his investigation, specifically his on site investigation, between the 18<sup>th</sup> of July, '97 and the 28<sup>th</sup> of July, '97, taking the Saturday and Sunday off but continuing throughout the following week. It was several days before he and his colleagues were able to actually attend the interior of the site. They had to wait until the building was rendered safe for entry. When he attended on the 18<sup>th</sup>, he met with Mr. Anthony Krimmer, the City of Waterloo building inspector and also with Mr. Dale Maheu the chief fire inspector. On that day, the 18<sup>th</sup>, he just did a general exterior survey of the building. He also joined forces, on his evidence, with Mr. Adam Antczak, a fire investigator employed with a company called Origin and Cause who were retained apparently by the defendant's insurance company. Mr. Maheu and Mr. Krimmer asked Mr. Antczak and Mr. DeBerardis to effectively conduct a joint investigation, to cooperate with each other. On Mr. DeBerardis' evidence that's exactly what they did. Mr. Antczak was not called as a witness either by the plaintiff or the defendant. No reason was given for not calling him and I draw no inference negative to the defendant, or to the plaintiff for that matter, from the fact that he didn't testify. He may have been unavailable. The bottom line is, I'm left with the opinion of, the result of the investigation of, Robert DeBerardis which is neither augmented by nor contradicted by, any observations made by Mr. Antczak. Mr. DeBerardis' evidence, I emphasize, must be considered very carefully in light of the critique of his investigation and his opinions expressed by Mr. Dennis Merkley. Mr. Antczak is simply a non issue. I note in passing as well that while Mr. Poss quite properly asked me to draw an inference negative to the defence from the apparent disappearance of the saw blade which appears to have played a role in this fire, I don't draw any such inference. It is simply gone, it's missing. Absent some evidence that it was purposefully made unavailable by the defendant, and there is no such evidence, I simply consider it as a non issue as well. In any event, Mr. DeBerardis, on his evidence, in cooperation with Mr. Antczak, determined that their plan was to proceed along what had been the dividing wall between Kitchener News and Strub Construction on the Kitchener News side proceeding north along that wall to the interior spine wall which ran east and west and then to proceed back down in a southerly direction along that same partition wall or what had been a partition wall on the Strub Construction side. This inside investigation began on the 24<sup>th</sup> of July. That was when access to the interior of the building was first obtained, when the structure of the building had been rendered safe. We heard evidence from Mr. DeBerardis about why he focussed on that area. Basically the reasons were twofold. In part because above that area was what we came to call the big hole or the large hole, the area of major damage, indeed total destruction, of a portion of the roof which appeared to suggest the major concentration of heat directly below that area which would be roughly consistent with the area of the partition wall or dividing wall. The other area of total roof destruction, the small hole, was some distance away towards the east end of the drivers' room in an area where, on Mr. DeBerardis' evidence as a result of his observations and questioning of witnesses, there had been material stored against the wall which when the fire spread to that area would have caused a major concentration of heat in that area, once again causing a collapse of the roof. However his focus was originally drawn to the area, as I say, of the partition wall. That gross observation, the impression I had from his evidence, was less important than what he further relied upon and that is the eye witness testimony of a number of employees, particularly of Kitchener News. Their evidence I have summarized to some extent already in this judgment. Otherwise expressed that's the area where the fire was first seen, in the dividing wall. That is what I conclude principally attracted Mr. DeBerardis' attention to that location. I am satisfied, from his careful observations, that he made a sound decision. That was indeed the area which was the origin of the fire. Mr. DeBerardis and Mr. Antczak carefully excavated, I will use that term, the area on both sides of the wall, removing fire debris until they were able to get down to essentially, in some places, bare concrete and the charred sill plates that formed the base for what had been the dividing wall.

27 I don't intend to deal with the many photographs that form Exhibit Eight, introduced at trial, taken by Mr. DeBerardis, that show the course of their investigation and form the basis for some of the conclusions that were proffered at trial by Mr. DeBerardis. They substantiate, in my view, to an overwhelming degree, certainly on a preponderance of the evidence, the opinions which he expressed as to origin and cause. He testified, by his observations,

2006 CarswellOnt 4336,

to the area of principal damage to the wall as being more or less directly behind or to the east of the radial arm saw. He testified how, as one moved to the north the damage to the wall was less severe. His photographs amply demonstrate the observations he made as an eye witness. Indeed the wall, except for portions of the sill plate, was completely destroyed in the area immediately behind the saw. Some portions of the studs and the plywood affixed to the Kitchener News side remain standing, I use that term advisedly, to the north as one approaches and then arrives at the east/west spine wall in the centre of the building. The damage is consistent with the spread of flames as described by Mr. DeBerardis. He seized two pieces of debris, one of them being an old tee shirt in the area of the saw, another being a piece of cardboard and sent them off for analysis to test for the presence of hydrocarbons, seeking to determine if there was the possibility of an accelerant used; otherwise expressed to see if this fire might have been of incendiary origin. Those tests proved to be negative. Mr. DeBerardis testified as well that by his gross examination there was no olfactory evidence of an accelerant having been used in any of the debris he examined. Having located what appeared to be, and which I'm satisfied on a preponderance of the evidence, was the origin of the fire, he attempted to determine the cause of the fire, if possible. To some extent, as both he and Mr. Merkley would agree, the determination of cause involves a careful analysis and determination by exclusion. Mr. DeBerardis initially considered the possibility of this fire having been started by an electrical malfunction, or more specifically expressed, the arcing of a wire. Amongst the material collected were the remains of the power cord for the radial arm saw which was found, as I have already noted, in pieces on the floor and under debris. The pieces of the power cord clearly showed arcing and beading. I will touch upon that evidence again presently. He also seized the wiring inside the arm of the radial arm saw which appears to have been joined to the power cord originally though separation occurred almost certainly as a result of the fire. Mr. DeBerardis in my view testified accurately, that the greatest area of charring and burning was directly east of the radial arm saw behind the saw. His opinion was that the origin was at floor level on the Strub side of the partition wall, that there was a smoldering fire initially in what he estimated would have been at least three inches of sawdust to the east and slightly to the north and south of the radial arm saw, behind that the saw. He concluded that this smoldering fire spread in an eastward direction spreading out from the saw until it reached material that was affixed to or leaning against the partition wall on the Strub Construction side. Debris in the area suggested that there was a door leaning against the wall and more than one piece of particle board or plywood. One of those pieces almost certainly was the sawdust deflector that Keith Strub told us about. Mr. DeBerardis opined that as the smoldering fire reached this material affixed to or leaning against the partition wall, using this material as a fuel load, the smoldering fire burst into active flame, worked its way up this material and ultimately involved the partition wall itself at some distance above the floor. Once it had breached the wall the fire would spread rapidly. Mr. DeBerardis' evidence was that once the smoldering fire burst into flame in the material that was in contact with the partition wall it would have taken approximately fifteen minutes for this open flame to have involved and breached the partition wall itself. The flames were then seen by employees of Kitchener News when they attended for their afternoon break in or near the smoking area. Part of the evidence he relied upon to demonstrate that this had been a smoldering compartment fire, as he described it, was the amount of soot and evidence of smoke that was found in the Strub premises. He described the difference between a clean burn where effectively, as a result of intense heat and direct contact with flame, there is little evidence of soot per se on walls or other material and areas where there was significant soot deposit on walls or equipment as a result of the smoke from a smoldering fire. He investigated other possible sources of the fire and testified to, what he called, the "spatter arcing" seen on the inside of the arm of the radial arm saw. However, he concluded that this arcing was the result and not the cause of the fire. He testified that notwithstanding that the last use of the saw was prior to eight o'clock in the morning and the first actual flames were observed at 2:30 in the afternoon, that these two pieces of evidence are consistent, the one with the other, that it's quite possible that the fire indeed did smolder for that period of time before breaking into active flame. As to cause, his strongest opinion, with which I agree, on a preponderance of the evidence was that a hot ember from a binding or dull saw blade cutting through wood ignited the smoldering fire in the sawdust that was immediately behind the saw. Mr. DeBerardis described the sawdust as an ideal fuel load for a smoldering fire because of its porosity. Fire, whether of the smoldering sort or one that involves active flames, requires a fuel load and requires oxygen. If a fuel load and oxygen are present then all that is required is an ignition source of sufficient energy to begin the process of a smoldering fire. The fine sawdust, some of which remained intact more or less, examined by Mr. DeBerardis to the east of the saw would constitute such a perfect fuel load for a smoldering fire in his opinion. He originally considered the possibility that the hot ember may have come from an aggregate source, that is the saw blade cutting into wood which was contaminated by slurry from concrete or from a nail in the wood. However I am satisfied, as he was as well, from the evidence of Terry Denstedt

2006 CarswellOnt 4336,

and Simon Strub that the wood that was cut that morning was clean and new and would not have been contaminated either by a nail or any other metal object or by slurry. However, it is on Mr. DeBerardis' evidence quite probable that the cause of the fire was an ember of considerable heat that was ejected from the cutting operation itself, otherwise expressed, a wood ember, igniting a smoldering fire. In the Strub premises, as I have already noted, he saw heavy deposits of soot which suggested long slow burning. Otherwise expressed, a smoldering fire. In his opinion the racks on the Kitchener News side would not have been the source of the fire because of his observations of the smoldering in the sawdust immediately to the east of the radial arm saw on the Strub Construction side of the wall. That would be, as he said, quite consistent with the observations of the various witnesses whom he interviewed and who testified at trial as well. The sawdust which he examined varied from a fine ash, that is sawdust that had been completely consumed by burning, to charred sawdust to completely unburnt sawdust thereby demonstrating the pattern of spread of the fire. As I said, I don't intend to make significant reference to the many, many photographs which he took but would note, for instance in Exhibit Eight, book 18 or tab 18, photographs six and nine, together with other photographs that are of a similar sort, that demonstrate the spread of the smoldering fire from the area directly east of the saw over to the partition wall. Those photographs and others show the area of maximum charring of the sill plate and demonstrate clearly, in my view, that the source of the fire was on the Strub Construction side. That is the area of maximum charring. I would note also the debris from the fuel load, the particle board, plywood or door that were leaning against the partition wall, the remains of which are shown in some of those photographs.

28 I have carefully considered the persuasive submissions of Mr. Kent and the evidence of Mr. Merkley with respect to the possibility that the observations made by Mr. DeBerardis were simply the result of a rekindled fire. There is no question the fire was rekindled on the 18<sup>th</sup> of July, the day after the fire was thought to be extinguished by Waterloo Fire Fighters. Indeed the Fire Service was at the scene again extinguishing a rekindled fire when Mr. DeBerardis arrived. Mr. Merkley opined and Mr. Kent urged upon me the consideration of whether the observations made by Mr. DeBerardis which were, in his view, consistent with a smoldering fire in the sawdust might not simply be the result of a rekindled fire and a drop fire that ignited that same sawdust. I, however, accept Mr. DeBerardis' evidence and his opinion that there may well have been a rekindled fire in some of the material or debris on site but that would have been above the floor level. It would have been impossible for the sawdust to have been ignited by a rekindled fire because of the amount of water that existed on the 17<sup>th</sup>, 18<sup>th</sup> and for some days. I am mindful that more water would have been added by the efforts to extinguish the rekindled fire by firefighters on the 18<sup>th</sup>. However, I am satisfied that Mr. DeBerardis' observation and his opinion are accurate, that as a result of firefighting efforts on the 17<sup>th</sup> the sawdust on the floor in its ash, charred or intact state would not have been ignited by a rekindled fire. It was wet or under water and not capable of being a fuel load. His opinion was that there were three sheets of plywood or plywood like material and one door in contact with the wall to the east of the radial arm saw that constituted the principal fuel load permitting the smoldering fire to burst into active flame and then to involve the wall. He, as did Dennis Merkley, described the process of pyrolysis which is effectively a decomposition of an element or a compound into its component parts. In this case it involves the heating of a solid by friction, by the action of cutting with the saw blade, to convert it to a liquid and then to a gas at which point combustion can occur. The water content of any wood product is capable of being converted to steam at 212 degrees Fahrenheit. Friction caused by the saw blade and particularly a dull saw blade is clearly capable of creating the action of pyrolysis and creating the appearance, the smoky film, that Simon Strub testified he saw directly in the area of the saw when Mr. Denstedt was doing his cutting. This process would result in an ember or embers, they being tiny pieces of sawdust, being ejected on to the copious amount of sawdust that was on the floor, with sufficient heat energy to ignite the sawdust on the floor and constitute the genesis of the smoldering fire. He said that the temperature of such an ember would be several hundreds of degrees.

29 Mr. DeBerardis went on to testify in cross-examination that although sawdust can ignite spontaneously, in his view, there would have been no spontaneous combustion here because basically you require a large pile. Mr. Merkley would agree with him, I believe, on that point. The sawdust was much more likely to have been ignited by an ember. On the site and then later at Origin and Cause, Mr. Antczak's company, in company with Mr. Dominic Marano, another expert witness retained by the plaintiff whose expertise focusses particularly on matters electrical, he examined the power cord for the saw which was in pieces and showed significant evidence of arcing and beading. Arcing, can result in extreme temperatures, 2500 to 3000 degrees Fahrenheit, roughly the temperature produced by a welder's

2006 CarswellOnt 4336,

torch. Depending upon the circumstances, depending upon the other evidence, such arcing can easily be the source of a fire. But not so in this case. I am satisfied that the opinion expressed by Mr. DeBerardis is an accurate one, that the evidence of arcing in that wire, that power cord and elsewhere, for instance in the wiring that served the lights, that such arcing was the result of the fire and not the cause of the fire.

30 Mr. DeBerardis described the progress of the fire in a way that is consistent with the observations of the witnesses as a whole. The smoldering fire, as a result of the use of the radial arm saw, the genesis of the fire, occurred in the early morning at the time the saw was being used by Mr. Denstedt. As a result of the creation of a hot ember from his use of the saw which found its way into the sawdust on the floor behind the saw, that sawdust became a fuel load, resulting in a smoldering fire that continued to smolder for several hours as it slowly worked its way to the east of the saw until the smoldering fire came into contact with the further fuel load of the sheets of plywood or plywood like material and the door leaning against the dividing walls. Using that fuel load the smoldering fire then burst into active flame working up the material leaning against the wall and then involving the wall. The smoldering fire would create smoke. It was that smoke that was smelled by virtually all of the employees who worked at Kitchener News and who testified at trial. Smoke was indeed seen by Terry Frey and Herb Buckingham in the early to mid morning. The question remains, and it is a matter that I have considered very carefully, why was that smoke not seen by Mr. Keith Strub or his son Ben when they attended at mid morning at the Strub premises. I repeat myself for emphasis, I found both witnesses to be honest, intelligent and observant. Both of them noted the odour. It became a matter of mild concern, I'll put it no stronger than that, to at least cause Mr. Keith Strub to do a walk around to attempt to detect the source of the odour, otherwise expressed, to see if there was a fire on his premises. Satisfied he could find nothing, he left. Why didn't he, why wouldn't he, have seen smoke? The smoke did not stop being produced. I am satisfied that the testimony, given by Mr. DeBerardis, does explain that arguable anomaly. The fire would have been smoldering at that time but the light was not the best. There was little or no assistance from artificial light in the interior of the premises of Strub Construction. I am mindful that the three banks of fluorescent fixtures, which extended some two feet into the Strub premises from the Kitchener News side that would have provided some illumination. I accept Mr. Keith Strub's evidence that his own interior illumination was not activated. I conclude that his evidence is preferable to that of his son, that the overhead door was indeed open providing some light. But light and smoke can be illusory. We have all had the common experience, for instance, of entering a room where persons have been smoking. We may detect the odour of second hand smoke but we can see nothing until we look towards an open window where a ray of sunlight is streaming in. The smoke is clearly visible in the beam of sunlight. We have also seen that same effect created by artificial lighting. That is one reason why Mr. Buckingham had the impression of a cloud of smoke hovering near the ceiling but under the fluorescent lights when he and Mr. Frey went into the drivers' room. Mr. DeBerardis' evidence is that the smoke would have risen in the Strub Construction premises but would not have been necessarily visible unless Mr. Strub or Ben were looking directly at it, and perhaps if they had a flashlight or other source of light. Otherwise expressed the smoke may have been invisible to the observer unless the observer particularly focussed on it as it hovered near the ceiling. Mr. DeBerardis testified that one would have to consider the open overhead door in the Strub premises and the open overhead door and perhaps an evacuating fan in the Kitchener News premises. On that day, the 17<sup>th</sup> of July, the wind was out of the west, that is blowing from the west directly towards, and through the overhead door on the west end of the Strub Construction premises. It was blowing at some 25 to 27 kilometres per hour. That would have effectively created a draught from the Strub Construction premises into the premises of Kitchener News which would explain the evacuation of smoke from the Strub Construction premises and the appearance of smoke in the Kitchener News premises as detected both by smell and by sight by Mr. Frey, Mr. Buckingham and by other witnesses as well. There would be a stream of air, a draught of air, however slight, from the Strub premises through and over the wall and through gaps in the wall. There would be gaps, for instance, inter alia to permit the fluorescent light fixture to protrude through. This stream of air would carry smoke into the Kitchener News premises and then probably out the overhead door or to be evacuated in part by the fan. It would only have been when that smoldering fire reached the further fuel load of the material leaning against the partition wall it then burst into open flame and became an active fire.

31 Mr. Marano whose expertise focusses principally on matters electrical, as I have already noted, attended on September the 10<sup>th</sup> to specifically investigate the power cord that had provided power to the saw. He testified as to the

2006 CarswellOnt 4336,

evidence of arcing and beading and confirmed Mr. DeBerardis' evidence previously given that probably as a result of the fire and the collapse of the wall there would have been damage to the insulation of the power cord which would have caused arcing. It would have occurred first farthest down stream. The cord would remain energised because it was still plugged in. As further damage occurred to insulation then there would be further arcing upstream resulting in the pieces that were found on the floor amongst the debris. I conclude, as did Mr. DeBerardis, that there was only the slightest possibility of an electrical fault or arcing being the cause of this fire. The preponderance of the evidence overwhelmingly supports the conclusion that the fire was caused by a hot ember ejected from the saw falling into a ready fuel load, the significant amount of sawdust that was left on the floor under and to the east of the saw.

32 I come then to the evidence of Mr. Dennis Merkley who was called by the defendant. I need not go into his qualifications. They are impressive indeed. I'll say quite candidly as far as qualifications go, meaning no disrespect to Mr. DeBerardis, they are more impressive than those of Mr. DeBerardis. Mr. Merkley was retained in June of 2005 by the defendant. In July of 2005 he produced a report based largely on the observations and the report originally provided by Mr. DeBerardis. Mr. Merkley's evidence is twofold. He provides a critique of the opinion and report of Mr. DeBerardis and also provides his own independent opinion as to origin and cause. At the risk of overly summarizing his position in that regard he suggests to the court that the evidence is insufficiently clear to permit the court to come to any conclusion as to origin and cause and that the court should ultimately be left with only one reasonable conclusion, that the fire was of undetermined origin and cause. With respect I disagree with him. Though he assured the court that he was in as positive a position to provide opinion evidence as to origin and cause or absence of evidence of origin and cause as if he had attended at the site because he could base his opinion on observations made by others, with the utmost of respect I disagree. As far as his assistance to the court is concerned, that is the principal frailty related to his opinion, he wasn't on site. He didn't have the opportunity that Mr. DeBerardis did to observe first hand, to touch, to feel, the site of the fire. Although the pictures taken by Mr. DeBerardis are excellent and provide some basis for the opinions expressed by Mr. Merkley, in my view, nothing can replace the advantage of an experienced expert attending on site. Mr. Merkley began his evidence with a discussion of the scientific method. That is the process of inductive reasoning whereby one develops an hypothesis and re-examines that hypothesis, tests that hypothesis, to determine the origin of a fire. He doesn't disagree with the burn pattern per se in the sawdust as testified to by Mr. DeBerardis, but he opined that such burn pattern does not necessarily indicate that the fire started there. He believes the fire could have originated in or on the wall separating the two premises and then, as a result of dropped embers into the sawdust, there could have developed the same burn pattern in the sawdust. I don't disagree with that observation as such. The problem is, that there is no evidence of any cause for a fire starting in or on the wall. There was no wiring in the wall and nothing to suggest an ignition source that would have begun at the wall with the wall as a fuel load. Mr. Merkley also focussed on the possibility of the rekindled fire on the 18<sup>th</sup> of July as being the source of the burn pattern in the sawdust. I have already noted that in my view that would not be possible. Although there was clearly a rekindled fire of some material it wouldn't have been the sawdust. On the 18<sup>th</sup>, the sawdust was soaked with water or indeed under water. Mr. Merkley didn't fully understand the evidence. That again is one of the results of his inability to have been on the spot as was Mr. DeBerardis. Mr. Merkley testified at one point that he would have expected, if the origin of the fire was in the sawdust, that it would have ignited the wall, the partition wall, from the base and that flames would have appeared at the base of the wall first. He didn't seem to appreciate the explanation given by Mr. DeBerardis that the fire began to involve the wall part way up, consistent with the evidence of the various eye witnesses, because the first fuel load was the plywood or other material and the door leaning against the wall. As the active fire burned up and through that material it then involved the wall several feet from the floor. He expressed an opinion with respect to what I have referred to as the anomaly of the smoke not being seen in the Strub premises when Mr. Keith Strub and his son Ben attended at mid morning. Mr. Merkley testified that smoke certainly would have been generated by 11:00 a.m. if there had been a smoldering fire at that time and it would have been seen. I accept the explanation of Robert DeBerardis however that though there would have been smoke it would not necessarily have been seen by Mr. Strub for the reasons I have already covered. Under cross-examination Mr. Merkley declined to agree with Mr. Poss that there would be any advantage to his having attended at the scene. The evidence was, as he put it, "well documented". Therefore he didn't need an examination of the site and he would not agree that Mr. DeBerardis would have any advantage over him by reason of his attendance on the site. I disagree as I have already noted. He declined to express any opinion as to the auto ignition temperature of sawdust. He was sceptical of Mr. DeBerardis' opinion that the sawdust could have been and was ignited by an ember of sawdust. He said that the temperature necessary to ignite the

2006 CarswellOnt 4336,

sawdust as a fuel load on the floor would have been very short lived and he said the use of the saw was not capable of producing an ember with sufficient heat energy to ignite the sawdust. He entered into a discussion with Mr. Poss with respect to the relative value of a fuel load which depends on the ratio of area to mass. That is why sawdust is such an excellent fuel load. Another area where he did not appear to fully understand the evidence as a result of his inability to have attended on site shortly after the fire and his lack of appreciation of the detailed observations provided by the eye witnesses relates to the shelving in the drivers' room. It was clear when he testified that he believed the shelves on the Kitchener News side of the partition wall were hanging shelves attached to the wall. He took that into account in expressing his opinion as to the dynamics of the burning wall; the way it would have fallen. It is clear on the evidence that those shelves were not attached to the wall. They were free standing and wouldn't have had a direct impact necessarily on the wall. I am very mindful that as the magazine racks stored on those shelves were consumed they may well have toppled and caused burning embers from the wall or from the shelves themselves to fly in any number of directions.

33 Mr. Merkley testified, and I quote, "that weird and wonderful things happen in fires." That may be true but I am quite satisfied that Mr. DeBerardis' careful examination persuasively demonstrates on a preponderance of the evidence both the origin and cause of this fire. In sum Mr. Merkley urged upon the court to simply conclude that this was a fire of undetermined cause and undetermined origin though he doesn't discount the general area of the partition wall as being the origin of that fire.

34 I am mindful of the persuasive final submissions of Mr. Kent. Specifically this court doesn't simply have to seize upon some evidence and make a determination of origin and cause. I can, quite properly, if the evidence does not support on a preponderance of that evidence a finding as to origin and cause simply find that this was a fire of undetermined origin and cause. It may well have started without negligence on anyone's part. It might have been simply an accidental fire. Mr. Kent urged those conclusions upon me based largely on the evidence of Mr. Merkley who he submitted was the most qualified expert who testified.

35 I think somewhat tongue in cheek and although obviously a healthy individual himself Mr. Kent suggested that the smoke seen by Mr. Buckingham and Mr. Frey may have been cigarette smoke. That suggestion is not consistent with the evidence. In sum I find that the origin of the fire was in the sawdust directly to the east behind the radial arm saw. The fire was caused by that sawdust being ignited by a hot sawdust ember ejected from the saw during its use in the early morning by an employee of Strub Construction. I find that there was negligence on the part of Strub Construction; that negligence being, in my view, limited to the failure of Strub Construction to maintain a clean work place in the area of the radial arm saw. It is clear from the candid evidence of Mr. Keith Strub and from other employees that there was a copious amount of sawdust, a prime fuel load that was left in the area of the saw. I do not find negligence, as urged upon me by Mr. Poss, in the failure to have a dust or sawdust collection system, either a vacuum system or some other system affixed to the radial arm saw. In my view, that is not necessary given the limited use of this radial arm saw within the context of the construction business of Strub Construction. However, if they are not going to have a sawdust collection system to aspirate the sawdust into a collection drum, or something of that sort, then in my view, in order to maintain a safe workplace to avoid the possibility of fire, the sawdust that would accumulate from time to time had to be removed. Neither do I find that the use of a dull blade in the circumstances of this case would constitute negligence per se. I have considered what was arguably less than a thorough examination of the premises by Mr. Keith Strub prior to leaving at mid-morning. However I accept when he detected an odour of something burning, he did a check before leaving the premises. The principal negligence, to repeat myself, is the willingness of the defendant corporation to allow a significant accumulation, of sawdust in the area of the saw which would form a prime fuel load waiting to be ignited by an ignition source. In this case, I say again, I am satisfied on a preponderance of the evidence that ignition source was a hot sawdust ember ejected from the saw first thing in the morning. In theory, it could have been a cigarette dropped by an irresponsible employee. I appreciate the evidence that Mr. Strub enacted and enforced a no smoking policy on the premises. However when he was not there if his son or Mr. Denstedt were smokers, then with the boss away they might well have been disposed to light up and conceivably drop a cigarette that could have landed in the sawdust and provided an ignition source. I don't want the record to be unclear. I am not suggesting that that may have happened in this case. There is no evidence of such. I am simply pointing out that leaving the sawdust



2006 CarswellOnt 4336,

there in that fashion creates a host of dangerous possibilities over and above what would have been seen as a slight possibility of ignition from use of the saw itself.

36 I now turn to the issue of contributory negligence. I agree with Mr. Kent that there was contributory negligence on the part of the plaintiff. Though there was the Workwell Plan in effect which assisted, according to the evidence of Mr. Cosgrove in the safe evacuation of the premises once the open fire was detected, in my view, there wasn't sufficient forethought and planning given to dealing with an emergency of this sort. Specifically we know that according to the evidence of Mr. Twomey, who was the operations manager, there was a key to the Strub premises, he believes, in the safe. He wasn't there that day. Mr. Pat Cosgrove who was in charge of the premises believed that there was a key to the Strub premises in a box of keys in the office. Had a passerby, someone cutting through the property, detected smoke coming out around the overhead door for instance in the Strub premises it would have taken some time and effort to gain access unless one simply used force. Of perhaps lesser moment, I cannot help but observe what I find to be negligence on the part of a number of employees, agents of the plaintiff corporation, in failing to use their common sense and to take appropriate steps to deal with the fire when it was still at a smoldering stage. Careful investigation would have detected what was happening, would have detected the smoldering fire when it could have been safely extinguished without perhaps significant damage to the property either of Strub Construction or of Kitchener News. It may well be that employees of Kitchener News were not unused to smelling an odour consistent with the use of the radial arm saw but when, virtually without exception, they testified that the odour was stronger that day and of longer duration that day, that should have triggered a greater concern and some more active steps taken by supervisory personnel to further investigate and detect the cause of that odour. When actual smoke haze was seen by both Terry Frey and Herb Buckingham early in the morning, without wishing to be unduly critical of those two gentlemen, I find it disturbing that having seen smoke they didn't immediately consider the possibility of a fire and take further steps to investigate. When you walk into a room and smoke of undetermined origin is present, you take reasonable steps to find out why it's there. To quote the old saying, where there's smoke there's fire. It may well have been a smoldering fire in this case but fire there clearly was. Not to take further steps to investigate the cause of the fire, in my view, constitutes negligence. Mr. Buckingham was the tie line supervisor. He could have and should have done more. Failure to do so constitutes negligence and resulted ultimately in significant damage to the building owned by the corporate plaintiff. That's not the principal cause and that's not the principal negligence I hasten to add. The principal cause was the smoldering fire in the sawdust that was present as a result of the negligence of the defendant company. However Mr. Buckingham specifically was in a position to do something about that.

37 I am going to rise briefly counsel. I left something upstairs.

### Recess

38 UPON RESUMING

39 In finding contributory negligence on the part of the plaintiff, I am mindful of the wisdom of Mr. Justice Green of the Supreme Court of Newfoundland (Trial Division) in a case cited by counsel [Rockwood v. Noel's Motor & Transit Ltd.](#). That case is reported in [\[1997\] N.J. No. 155](#) (Nfld. T.D.). The facts in the case as counsel will recollect are curious, I might say bizarre. Counsel will remember that it involved a service station attendant pumping gas into a motor home through an electrical outlet as opposed to into the gas tank itself. The plaintiff owner and driver of the motor home was found not to have been guilty of contributory negligence. Mr. Justice Green first made reference to Chief Justice England's famous decision in 1927 in the case of [Long v. McLaughlin](#) reported in [\[1927\] S.C.R. 303](#) (S.C.C.). The Chief Justice expressed the requirement for contributory negligence as follows, and I quote, (at p.310);

In order to constitute contributory negligence it does not suffice that there should be some fault on the part of the plaintiff without which the injury that he complains would not have been suffered; a cause which is merely a sine qua non is not adequate. As in a case of primary negligence charged against a defendant, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was a proximate, in the sense of an effective, cause of such injury.

2006 CarswellOnt 4336,

Having considered that wisdom Mr. Justice Green went on to say, and I quote at p.7 of the decision in *Rockwood and Knowles Motor and Transit Limited*.

To constitute a proximate cause it must be shown that the plaintiff was injured by the type of risk to which he or she was exposed by the failure to take care of himself or herself. If the injury is outside the scope of foreseeable risk the conduct will not be considered to be its proximate cause.

In this case I am satisfied that the plaintiff corporation, through its agents failed to take proper care of itself. Otherwise expressed it failed to act reasonably or responsibly in response to the evidence of danger which, in my view, was clearly presented by the smoke in the drivers' room. The injury subsequently suffered, that is damage to the property, was not outside the scope of the foreseeable risk i.e. if there is smoke there may well be fire. It's as simple as that. Agents of the plaintiff corporation having detected the smoke which should have signalled the possibility of fire failed to take proper care of themselves. The fact that the initial proximate cause was the negligence of the defendants does not serve to protect the plaintiff from liability for its own negligence which was one of the causes of the ultimate harm actually suffered.

40 Having carefully weighed the matter I assess contributory negligence at twenty percent. That is the plaintiff is twenty percent liable for the damages that were suffered on the premises.

41 In sum then I might say that I am mindful of the wisdom of the Supreme Court of Canada in the oft cited case of *Snell v. Farrell* a 1990 case reported in (1990), 72 D.L.R. (4th) 289 (S.C.C.) . This is another wise decision of Mr. Justice Sopinka. The facts in the *Snell v. Farrell* case are quite different from the facts in the case at bar. Indeed it was a case involving an allegation of medical malpractice or negligence in the performance of ocular surgery. However, the principles enunciated by the court are applicable. The concern of the court, a concern raised by the defendants was whether negligence could be found if such negligence could not be proven to a scientific certainty. The court said that such an onus was unnecessary even though medical science likes to speak of mathematical certainty.

42 At page 301 Mr. Justice Sopinka stated and I quote, after having referred to considerable jurisprudence.

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 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.

His Lordship continues in the next paragraph.

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.'

Citing page 569. His Lordship goes on to explain that medical experts often insist upon or rely upon causation expressed in terms of certainties whereas a lesser standard is demanded by the law.

2006 CarswellOnt 4336,

43 A preponderance of the evidence demonstrates to me, indeed a considerable preponderance of the evidence, that both the origin and the cause of the fire are as I have described.

44 Mr. Poss you therefore move for judgment. I believe the quantum was agreed at a round figure of one million dollars.

MR. POSS: Yes Your Honour.

THE COURT: I grant judgment in favour of the plaintiff then for \$800,000. You'd seek pre-judgment interest as well.

MR. POSS: That was agreed on as well at four percent per annum from the date of the fire, July 17<sup>th</sup>, 1997.

THE COURT: Very well.

*Action allowed.*

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