

# Appeal Dismissed: There Was No Other Explanation for the Fire, but There Was Also No Expert Evidence...

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One would expect, when hiring a plumber, that the plumber will not cause a fire when using a blowtorch and solder. If a fire breaks out shortly after the plumber used a blowtorch and solder, in the vicinity of his/her work area, one might assume that the fire was caused by the plumber's work. However, this assumption alone will not suffice to establish negligence.

In *Metropolitan Toronto Condominium Corporation No. 1100 v. A. & G. Shanks Plumbing & Heating Limited* ("**MTCC 1100**"),<sup>[i]</sup> a fire destroyed a historic mansion, which was part of a condominium development. The fire was detected shortly after a plumber employed by A. & G. Shanks Plumbing & Heating Limited ("**Shanks**") had repaired a leaking pipe in the basement ceiling, using a blowtorch and solder. The plumber finished his work at around 2:45 p.m., conducted a fire watch until 3:15 p.m., and then left at 3:20 p.m. Half an hour later, at 3:51 p.m., a 9-1-1 call was made reporting a fire at the mansion. It was determined that the fire originated in the ceiling, near the location of the plumber's work. The condominium corporation ("**MTCC 1100**") sued Shanks in negligence for close to \$5.5 million in damages.

MTCC 1100 adduced expert evidence that the fire was caused by the flame of the plumber's torch coming into contact with combustible materials in the work area – a fairly confined space between the basement ceiling and the floor above, where the leaking pipe was located. The trial judge had some difficulty with this expert evidence. One of MTCC 1100's experts opined that the combustible materials located above the work area must have been ignited by an open flame directed upwards. However, the parties had admitted, in an agreed statement of facts, that the plumber pointed his blowtorch downwards towards the ground when he was doing the soldering work. Hence, the factual foundation for the expert opinion (an upward open flame) was contradicted by the evidence (a downward open flame). MTCC 1100 unsuccessfully argued that there was no other explanation for the fire. The trial judge wrote:

*"While the evidence is somewhat problematic, in that [the plumber] was the only one working in the immediate vicinity of the location where the fire originated, and in that soon after his work a fire started, there was no evidence that anything he did caused the fire."*<sup>[ii]</sup>

The trial judge also took issue with the lack of evidence on the applicable standard of care. At the commencement of trial, MTCC 1100's counsel stated "that no expert on a plumber's standard of care would give evidence as it was obvious that [the plumber's conduct] fell below the necessary standard of care."<sup>[iii]</sup> MTCC 1100 argued that the plumber's conduct was "egregious", such that expert evidence on the standard of care was not necessary. MTCC 1100 relied on *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*,<sup>[iv]</sup> in which the Court of Appeal discussed "two exceptions to the general rule that it is not possible to determine professional negligence without the benefit of expert evidence":<sup>[v]</sup>

1. in nontechnical matters within the knowledge and experience of the ordinary person;
2. where the impugned actions are so egregious that it is obvious that the defendant's conduct has fallen short of the standard of care without even knowing precisely the parameters of the standard of care.<sup>[vi]</sup>

The trial judge disagreed that the plumber's conduct was "egregious". The plumber testified at trial about the numerous precautions he had taken while doing his work. He also testified that he pointed the flame of the blowtorch in a downward direction and away from the wood structures above him. The trial judge found his testimony credible.

MTCC 1100 suggested that the plumber could have used a rigid fire shield or a heat barrier spray. The difficulty, however, is that no expert testified that the plumber should indeed have taken such precautions. MTCC 1100 tendered some evidence on the standard of care by reference to the *National Fire Code of Canada 2005* and the *Fire Code*, O. Reg. 213/07. The trial judge refused to consider the *National Fire Code of Canada 2005*, as there was no expert evidence that it formed part of the standard of care applicable to plumbers in Ontario in 2009. As for the *Fire Code*, O. Reg. 213/07, it did not include soldering as part of its "Hot Works" regulations at the time of the fire, and was therefore inapplicable. The trial judge held:

*"There was a debate not only as to what regulatory standards applied in 2009 but also as to how those standards should have been applied by [the plumber]. In my view it was incumbent upon the plaintiffs to lead expert evidence to establish the appropriate standard of care in order for the court to find that it had been breached. They did not do so and because of this their claims must be dismissed."*<sup>[vii]</sup>

MTCC 1100 appealed from the decision, and argued that the trial judge should have drawn inferences of a breach of the standard of care and of causation based on the circumstantial evidence, namely, "that a fire occurred under the plumber's watch, with no alternate explanation for how the fire occurred."<sup>[viii]</sup> While the Court of Appeal agreed that such inferences could be drawn, it noted that they can also be rebutted by the defendant, including by pointing out to other non-negligent causes of the fire or adducing evidence that supports the exercise of reasonable care. The Court of Appeal held that "the trial judge was entitled to conclude that, considering all the direct and circumstantial evidence, [MTCC 1100] had failed to discharge their burden of proving a breach of the standard of care."<sup>[ix]</sup>

Whether a plumber should use a rigid fire shield or a heat barrier spray is technical in nature and not within the knowledge of the ordinary person. Thus, this called for expert evidence. Also, it does not appear that the conduct of the plumber was "egregious" in any way. As noted by the Court of Appeal in *Barclay*: "Dictionary definitions of 'egregious' include synonyms such as shocking, appalling, terrible, awful, horrendous, frightful, atrocious, abominable, abhorrent, and outrageous."<sup>[x]</sup> Absent any negligent conduct that clearly falls within that definition, a plaintiff should consider adducing expert opinion on the applicable standard of care of a tradesperson or professional. Otherwise, the Court may not be able to determine whether the conduct was negligent under the circumstances.

<sup>[i]</sup> 2017 ONSC 7237, affirmed by 2020 ONCA 67 [*"MTCC No. 1100"*].

<sup>[ii]</sup> *MTCC No. 1100*, 2017 ONSC 7237, at para. 149.

<sup>[iii]</sup> *Ibid.* at para. 7.

<sup>[iv]</sup> 2016 ONCA 656 [*"Barclay"*].

<sup>[v]</sup> *Ibid.* at para. 57.

<sup>[vi]</sup> *Id.*

<sup>[vii]</sup> *MTCC No. 1100*, 2017 ONSC 7237, at para. 160.

[\[viii\]](#) MTCC No. 1100, 2020 ONCA 67, at para. 11.

[\[ix\]](#) *Ibid.* at paras. 18-19.

[\[x\]](#) *Barclay*, at para. 82.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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