

## Recent Court Decisions

**IN ORDER TO ESTABLISH NEGLIGENCE WHERE CARELESS SMOKING IS ALLEGED TO HAVE CAUSED A FIRE, THERE MUST BE EVIDENCE THAT SMOKING OCCURRED PROXIMATE TO THE TIME AND PLACE OF THE ORIGIN OF THE FIRE.**

### **Mohamed v. Banville**

The recent decision of *Mohamed v. Banville* is a sobering reminder that unless you can establish certain evidentiary requirements you will not succeed in your subrogated claim. In fact, the failure to do so could result in your case being struck out at an early stage of the proceeding on a motion for summary judgment.

The action arose from a fire that started at the Banville residence on June 20, 2002. The fire spread to a neighbouring property owned by the plaintiff, Showkatali Mohamed. Mr. Mohamed settled his property damage claim with his insurer. His insurer then brought a subrogated action to recover the sum of \$150,000 for damages to Mr. Mohamed's property.

On June 20, 2002, after returning home from work, Mr. Banville went out for the evening. He first visited his brother-in-law's home and then later, a nearby tavern. He consumed alcohol at both locations. He returned home at approximately 1:00 a.m. in an intoxicated state.

Mr. Banville, who smoked cigarettes, had run out of cigarettes by the time he returned home. He asked one of the tenants who resided in the plaintiff's residence whether he had cigarettes, but the tenant did not. Mr. Banville then fell asleep on the couch.

He awoke to the sound of a smoke detector and the smell of smoke. The couch he was lying on was neither hot nor was it on fire. He did not see any flames in the room at the time.

The Banville residence burned to the ground. Mr. Mohamed's property was significantly damaged by the fire. The fire marshal conducted an investigation which did not reveal the cause of the fire.

Mr. Mohamed's insurer retained a professional engineer to investigate the fire scene. He concluded that the most probable cause of the fire was careless smoking on the couch. Due to the extent of fire damage, other causes such as electrical failure or arson could not be eliminated but were found to be unlikely.

The facts which supported the engineer's careless smoking ignition scenario included: Mr. Banville was a smoker; he was impaired; he was asleep on the couch; he had been home for 1 ½ hours before the fire developed; he reported the house full of smoke when he discovered the fire; the destruction of the combustible components of the couch; and the burn pattern.

There was no evidence of smoker's materials found in the area of the couch.

On a motion by Mr. Banville for summary judgment, the judge held that in cases where smoking was alleged to have been the cause of the fire, the plaintiff is required to establish that the defendant

was smoking cigarettes just prior to the fire and that there was evidence of careless smoking. In this case, the judge found that the requirements necessary to prove negligence were not met: there was no evidence of the source of ignition and there was no evidence of smoker's materials having been found in the vicinity purported to be the origin of the fire. Without establishing the cause of the fire, the fire was deemed to be "accidental" and therefore the action was barred by virtue of section 76 of the *Fire Prevention and Protection Act*, S.O. 1997, c. 4.

This case illustrates the importance of ensuring that you have sufficient evidence when pursuing a subrogated action.

**Mohamed v. Banville (2009), 94 O.R. (3d) 709 (S.C.J.).**

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