

*Indexed as:*

**Whelan v. Beothic General Insurance Co.**

**Between**

**Patrick Whelan and Brenda Whelan, Plaintiffs, and  
Beothic General Insurance Company Limited, Defendant**

[1992] N.J. No. 336

1991 St. J. No. 3931

Newfoundland Supreme Court - Trial Division

**Wells J.**

Heard: November 12, 1992

Judgment: November 25, 1992

(22 pp.)

Edward Shortall, for the Plaintiffs.

Raymond Whelan and Valerie Marshall, for the Defendant.

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**WELLS J.**-- On August 14th, 1991, the Plaintiffs' dwelling house was badly damaged by fire. They carried fire insurance with the Defendant, but it refused to indemnify the Plaintiffs under the policy, because of a false statement by Mr. Whelan, which it alleged was in breach of the statutory conditions.

The circumstances were as follows. On August 14th at 5:30 p.m. the Plaintiffs' 14 year old daughter Elaine, was at home with a visiting cousin. Patrick Whelan was outside in the driveway working on a truck with Leonard Condon, and Brenda Whelan had gone on some errands. The only other person in the house was an invalid, who was in his bedroom.

Elaine Whelan decided to cook french fries, and in preparation placed a pot of cooking fat on

the electric stove in the kitchen, and turned the burner on full. The girls then went downstairs where they started fixing their hair, and they forgot all about the stove. When Elaine came upstairs some ten or fifteen minutes later, the stove and the cooking pot were on fire.

Her first action was to run outside screaming to her father. Messrs. Whelan and Condon rushed inside, and Mr. Whelan applied a fire extinguisher to the blaze while Mr. Condon threw salt on it. Together they succeeded in quelling the flames, and when they went outside for fresh air they believed that they had extinguished the fire.

When he recovered from the fumes, Mr. Whelan stepped inside the door and dialed 911. He reported that there had been a fat fire, which he believed they had extinguished. Nevertheless he felt that the fire department should come to the scene.

When he went outside, he met a neighbour at the back door. She said something to the effect that "if it is a fat fire, your insurance won't cover it". The neighbour's remark alarmed Mr. Whelan. He went back into the house, took the cooking pot from the stove and put it in the garage. Shortly after when he went back into the house, he heard what he described as a rushing sound. He opened the cupboard above the stove, at which time flames engulfed the area. At the same moment he heard the sirens of the approaching fire trucks. The fire was beyond his control and his main concern was to rescue the invalid who was inside.

By the time the firefighters extinguished the fire, it had destroyed the kitchen and burnt through the side of the house and into the ceiling and attic above the kitchen. The result was that fire, smoke and water damage rendered the house uninhabitable, and ruined most of the contents.

On the evening of August 14th, police and fire officials interviewed Mr. Whelan. He told them that he did not know the cause of the fire, but that he had put on an electric kettle for a cup of tea, and when he went back into the house he found a fire on the stove. He implied that the fire must have been the result of an electrical fault.

On Friday, August 16th, Mr. Whelan gave a similar account to Mr. Tobin who was Beothic's adjuster. Over Saturday and Sunday Mr. Whelan became worried because of his false statements. He discussed it with his wife who until then did not know what he had done. During the weekend Mr. Whelan decided that he must correct the statement on Monday morning.

On Monday the 19th, at 10:00 a.m., he telephoned Mr. Tobin but was not able to speak to him until sometime in the afternoon. At that time he told him the whole truth, and later that evening confirmed it in a written statement.

I am satisfied that the facts which I have found are indeed the whole truth, and I think that that is agreed by all concerned.

Unknown to Mr. Whelan, the police and fire officials were suspicious about his story because

the burn pattern did not indicate an electrical fire, but in fact was more like the burn pattern of a fat fire. However they had not seen any cooking utensil from which it could have originated, and they were puzzled. They also knew that the reporting telephone call had referred to a "fat fire".

These mysteries were cleared up for everyone by Mr. Whelan's statement of August 19th.

Mr. Whelan's explanation of his actions is that he was so alarmed by his neighbour's comment about "non-coverage" that he panicked and lied, and told a story which he thought would ensure coverage. However he says that when he calmed down and came to his senses, he realized that he must tell the truth as in fact he later did. In the meantime he had learned from Mr. Tobin that fat fires were covered by the policy, but on the evidence I am unable to say how much if any effect that knowledge may have had on his decision to tell the truth on August 19th.

Beothic when it became aware of what had happened, took the position that Mr. Whelan's initial untruthfulness was a breach of statutory conditions 6 and 7 of the insurance policy. By letter of September 6th, 1991, Beothic in effect denied in advance any claim which the Whelans might make under the policy, and forwarded to them a copy of the applicable statutory conditions, and in due course a proof of loss form.

On September 10th the Whelans submitted the completed proof of loss through their solicitor, and on September 16th Beothic rejected the proof of loss and formally denied the claim. Its grounds were that there had been a breach of the statutory conditions, together with fraud and bad faith.

I will now deal with that issue.

The Defendant justifies denial of the claim on the basis of the Plaintiffs' failure to comply with statutory conditions 6 and 7. Statutory condition 6 says:

"6.(1) Upon the occurrence of any loss or damage to the insured property, the insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11.

- (a) forthwith give notice thereof in writing to the insurer
- b) deliver as soon as practicable to the insurer a proof of loss verified by statutory declaration
  - (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,
  - (ii) stating when and how the loss occurred and if caused by fire or explosion due to ignition, how the fire or explosion

originated so far as the insured knows or believes,

- (iii) stating that the loss did not occur through any wilful act or neglect or the procurements, means or convenience of the insured,
  - (iv) showing the amount of other insurances and the names of other insurers,
  - (v) showing the interest of the insured and all others in the property with the particulars of all liens, encumbrances and other charges upon the property,
  - (vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,
  - (vii) showing the place where the property insured was at the time of loss
- (c) if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;
  - (d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration and furnish a copy of the written portion of any other contract;
- (2) the evidence furnished under clauses (c) and (d) of subparagraph (1) of this condition shall not be considered proofs of loss within the meaning of conditions 12 and 13."

The proof of loss was verified by statutory declaration on September 10, 1991 and forwarded to the insurer by the Plaintiffs' solicitor. In it Mr. Whelan said among other things, 'A loss occurred on the 14th day of August, 1991 at 5:45 p.m. caused by a fat fire on the stove'. It is undeniable that Mr. Whelan's statutory declaration was truthful and did not mislead in any way.

Statutory condition 7 says:

"Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration."

Counsel for the Defendant argued that these words should be read to the effect that any fraud vitiates the claim, and as well, that any wilfully false statement in a statutory declaration, vitiates the claim.

On a careful reading of statutory condition 7, I cannot agree with counsel's interpretation that the two concepts are separable. In my view the words mean, 'any fraud or wilfully false statement in a statutory declaration'. In other words, both the fraud and the wilfully false statement must be in the statutory declaration. I agree with the view of Dickson, J. in *Lindsey v. General Accident Assurance Company of Canada* (1981) CILR, p. 293. In that case, an insured gave a false statement shortly after a motor vehicle accident had occurred, and some two months later, filed a proof of loss in which she told the truth and corrected the previous false statement. Dickson, J. said at page 294:

"I cannot see that the provisions of s. 229(1) can in the circumstances avail the defendant as a defence to the plaintiff's claim. The type of false statement which, under that action, will render a claim invalid is a "false statement in respect of a claim under the contract". The plaintiff here claimed under the contract only when in October she filed her proof of loss. There is nothing in the evidence to suggest that her earlier statements were made in respect of any claim or that they were made other than in merely reporting the accident."

In my view, the above reasoning is equally applicable to this case.

The Defendant in its argument relies on a line of cases in which, unlike this case, the claimants advanced false claims and persisted with them throughout. These claims were advanced in statements and statutory declarations, none of which were corrected by the makers. Noteworthy examples are *Fitzgerald v. Casualty Company of Canada*, 31 Nfld. & P.E.I.R. at p. 521, and 87 A.P.R. and *Borden v. Co-operators General Insurance Company* (1984) 63 N.S.R. (2d) p. 375.

Likewise in *Magnussen v. Insurance Corporation of British Columbia* (1978) 88 D.L.R. (3d) 474 (B.C. Co. Ct.); and *Inland Kenworth Ltd. et al v. Commonwealth Insurance Co.* (1989) 1 L.R. 1-2415 (1990) 72 D.L.R. (4th) 594; and *Lazy K & T Cattle Enterprises Limited v. British America Assurance Company* (1977) I.L.R. p. 638; there was fraudulent intent which was persisted in by the claimants, with the intent to deceive. In my opinion such cases must be distinguished from the present case and the *Lindsey* case, in which the initial false statement was not made in connection with a claim, was later corrected, and was not made in a statutory declaration.

Even if there was in Mr. Whelan's mind, an initial plan to defraud, he abandoned that plan and corrected his statement so quickly that there was neither fraud upon, nor prejudice to, the insurer.

In summary therefore, Mr. Whelan quickly and voluntarily corrected his misstatement. From the making of the misstatement to its correction, three days elapsed, two of which namely Saturday

and Sunday, were non-business days.

Finding as I do, that the claim is not vitiated by reason of breaches of statutory conditions 6 and 7, and that the contract of insurance is not vitiated by reason of a material misrepresentation by the insured, I next turn to Section 22 of The Insurance Contracts Act, which says:

"22. Where, in the case of a contract of fire insurance, there has been imperfect compliance with the statutory condition as to proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to a loss insured against and consequent forfeiture or avoidance of the insurance in all or in part, and the court considers it inequitable that the insurance be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on those terms that it considers just."

Even if I had found that Mr. Whelan's initial statement had contravened statutory conditions 6 and 7, I would have, because he quickly corrected it, exercised the power granted by Section 22, on the grounds that forfeiture would have been inequitable in the circumstances.

I find therefore that the initial false statement of Mr. Whelan did not vitiate the contract of insurance, and that the insurer is liable to indemnify under the contract.

Having dealt with that issue, I will now determine the amount of the indemnity to which the Plaintiffs are entitled, beginning with the cost of repairs to the house.

After the fire, the Plaintiffs engaged Mr. Gerald O'Neill of O'Neill's Contracting, to assess the damage and estimate the cost of repairs. Mr. O'Neill's estimate was \$67,677.50, which is what the Plaintiffs claimed under that heading in their proof of loss.

The Defendant engaged the services of Frank Murphy & Sons (1990) Ltd. and Breton Construction Ltd., which companies also prepared repair estimates.

I am satisfied that all three contractors are competent in the construction field, and could have done the necessary repairs at the time. The Murphy bid was \$48,971.44 and the Breton bid was \$56,633.95.

Though there is a substantial difference in the bids, they are not as far apart as might first appear. The three contractors did not assess the damage in the same way, and therefore quoted on different things in some instances, and on lesser or greater quantities in others. It is particularly interesting to compare the Murphy and Breton estimates. In Murphy, the total "job cost" was \$39,445.07, in Breton the total of "material and labour" was \$41,397.70, a difference in the cost of doing the work of only \$1,952.63. It is their subsequent calculations of overhead, profit and taxes that caused the total difference to become so large.

Generally under a fire insurance contract, an insurer is entitled to indemnify the insured on the basis of the lowest available repair bid, where the bidder is capable and qualified to restore the building to its original condition, for that price.

In this case the house was relatively new, adequately built and well maintained. It is impossible now for Murphy to do the work at the bid price, because of the elapsed time and because the Plaintiffs between the time of the denial of their claim and the trial, have done repairs to the extent of \$21,000.00, so that they could move back into the property. Though Murphy cannot perform the work now, I will use his bid of \$48,971.44 as a starting point, and will increase the amount when appropriate, to allow for items and quantities some of which by his own admission he forgot to include.

The first of these items was a window which Murphy did not include, but which obviously needed replacement. Judging from the other bids, the window together with installation would have cost about \$350.00, which I will add to his price.

Murphy did not include sufficient vinyl flooring in areas where it was required, and I will add the sum of \$150.00 to his price in respect of further supply and installation.

Murphy allowed for replacement of about half of the insulation in the walls and ceiling. On the evidence, I am satisfied that smoke and heat and water damage were such that the remaining insulation must have been affected, and thus rendered suspect, and therefore should be replaced. Under that head I will allow the further sum of \$600.00 for materials and labour.

Murphy allowed \$99.95 for replacement of the range hood. The evidence is that the range hood was a stainless steel model, and it was completely destroyed. The replacement cost would have been at least \$400.00, and I am adding the sum of \$300.00 for that item.

There was considerable argument over other damage, particularly as to whether the vinyl siding on the house should be entirely replaced, even though more than half of it was undamaged. This problem arose because the siding was pale blue, and had faded slightly over the three year life of the house. Murphy and Breton felt that one side of the house and the front should be replaced with the identical product, but not the other side and the back.

I know that not replacing all the siding will result in a slight colour difference, at least for a while, but not such as would require all the siding to be replaced. The extra cost would be of the order of \$2,500.00 plus taxes and labour. If it were to be installed it would add nothing to utility, and little to appearance. I decline therefore to add any sum in respect of additional siding.

Another contentious point is the cost of oak kitchen cupboards. The Murphy estimate was \$4,800.00, the Breton estimate was \$5,500.00, and the O'Neill estimate was \$9,200.00 which included installation and vanity top. I am of the opinion that the vanity top can be reused, however it is doubtful in my mind whether Murphy could in fact obtain cabinets of equal quality for

\$4,800.00. I will therefore use the Breton estimate of \$5,500.00 which I believe more truly reflects the actual cost. That \$700.00 I will add to the Murphy estimate.

With respect to carpet, I think that Murphy was overly optimistic vis a vis the extent to which it could be cleaned, as opposed to being replaced. If the work had been done at that time, his approach might have been effective, but I have doubts about it. In any event the delay was brought about by the insurer, and to compensate the Whelans for what I consider to be a low estimate by Murphy, I will add a further \$1,000.00 to his figure.

In all therefore these extra amounts total \$3,100.00. That sum when added to the Murphy job cost estimate, brings it to \$42,545.07.

Added also must be a figure for overhead and profit, which at 20% is \$8,509.01, for a project cost of \$51,054.08. Furthermore GST on labour, overhead and profit must be added, for a final rounded figure of \$52,730.00, which amount I allow for repairs to the dwelling house.

Items not included in the Murphy repair estimate but which must be replaced, are the range top, oven, and dishwasher, for which in total I award the sum of \$3,000.00 including applicable taxes.

The Plaintiffs submitted a schedule of loss which covered the cost of clothing, furniture and personal effects which were destroyed or rendered useless by fire, smoke or water. In the schedule the Plaintiffs provided their best estimates as to both the original and replacement costs of the various items. Mr. Tobin admitted that the figures were reasonable.

Mr. Tobin applied a 40% depreciation rate to the original cost figures, because he did not have replacement costs when he did his calculations. The reason he did not do a depreciation calculation on the replacement cost, was because the insurer had declined to accept the claim, and he could not proceed further. In any event I do not accept the 40% depreciation figure which Mr. Tobin used. Instead I will take the replacement cost figure of \$29,527.00, which I think is reasonable, and depreciate it by 25% to \$22,145.25, which after adding GST and RST I will round to \$26,575.00. I am awarding that amount in respect of the contents.

The next claim is for living expenses. The Plaintiffs have claimed \$400.00 per month as rental expenses to Mr. Whelan, Sr. The claim is for the eleven months between the date of the fire and the date when they were able to return to the house after partial repairs, which was in July 1992.

Damages must of course be mitigated, and under Canadian law the courts have in general held that plaintiffs claiming for breach of contract must mitigate their damages, even though because of impecuniosity they may not be able to do so. See *R.G. McLean Ltd. v. Can Vickers Ltd.* (1971) 1 O.R. 207 C.A.

Though there has been some softening of the view taken in *McLean*, I am of the opinion that

this is not a proper case in which to derogate from the established principle. It was made known to the Plaintiffs very soon after the fire that their claim was being denied. It is reasonable to expect that they could have engaged Mr. O'Neill to do partial repairs on account, in September 1991 as well as in June 1992. The evidence is that the repairs could have been completed in a maximum of three months. I am therefore prepared to allow the sum of \$1,200.00 toward the cost of the family's rent under the arrangement which Mr. Whelan had with his father.

The Plaintiffs have also claimed general damages in respect of the continued deterioration of the residence over the period of delay in effecting repairs. In that regard my observations on the matter of mitigation, apply. There may indeed have been further deterioration, but steps to reduce such loss was the responsibility of the Plaintiffs, and I make no award in respect of it.

Likewise I made no award for mental stress and inconvenience. I am sure that the entire Whelan family experienced considerable mental stress from August 14, 1991 to the present. However it must be recognized that the primary cause of the prolonged stress was not the fire, but Mr. Whelan's initial false statement, which, even though it was quickly corrected, had serious repercussions.

The insurer had a right not to waive the 60 day waiting period prior to the issue of the statement of claim. It also had a right to dispute the claim, which it did. Though I have found that Beothic was not entitled to succeed, nevertheless it was entitled to have the matter adjudicated, and should not be penalized on that account for mental stress caused to the Plaintiffs.

In summary therefore, I find that the total indemnity payable by the Defendant to the Plaintiffs is:

a) repairs to the dwelling -	\$52,730.00
b) built-in kitchen appliances -	3,000.00
c) contents -	26,575.00
d) living expenses -	1,200.00
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Total	\$83,505.00

I find also that the Plaintiffs are entitled to interest under The Judgment Interest Act from the date of presentation of the proofs of loss, to the date of judgment.

The Plaintiffs will have their costs to be taxed.

WELLS J.