

## Liability for Oil Spills

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In July 2017, Justice Charney released a comprehensive decision following a lengthy trial in *Gendron v. Thompson Fuels*, 2017 ONSC 4009. The case arose out of a residential oil leak in which over \$2 million in damages was claimed.

Brian Sunohara and Meryl Rodrigues of Rogers Partners LLP were trial counsel for the oil tank manufacturer, Granby. The plaintiff and Granby entered into a Pierringer Agreement approximately one week into the trial.

The decision emphasizes the importance of homeowners taking responsibility for the equipment at their houses, and also the responsibility of technicians who service equipment to do a competent job and provide advice to homeowners.

The case circumstances also illustrate the benefits associated with partial settlement agreements and the impact of such agreements on the litigation landscape.

### Facts

In November 2000, the plaintiff purchased two end-outlet oil tanks that were manufactured by Granby.

Instead of having a qualified technician install the tanks, the plaintiff and a friend installed the tanks in the plaintiff's basement.

In 2001, Thompson Fuels became the plaintiff's fuel oil supplier. Thompson Fuels was supposed to conduct a comprehensive inspection of the tanks to ensure that they were safe to fill. However, this was never done. Thompson Fuels continued to deliver fuel until December 18, 2008 because its computer system incorrectly indicated that an inspection had been conducted on February 27, 2002.

The plaintiff was required to have the oil tanks inspected on an annual basis. Thompson Fuels sent newsletters to its customers to advise of this obligation. There were some service calls by Thompson Fuels in 2006 and 2007, but the plaintiff did not have the required annual inspections.

The oil leak was discovered on December 18, 2008. The oil escaped through a crack in the plaintiff's basement and went under his house. Some of the oil made its way through a drainage system into a municipal culvert and into a lake.

The experts agreed that the cause of the leak was internal corrosion, specifically, microbiologically influenced corrosion. The corrosion was caused by the build-up of water and sludge inside of the tank, which, combined with microbes, resulted in the production of sulphur and organic acids within the tank. The key to preventing internal corrosion is to test for water inside of tanks and to remove any water if found.

Due to the contamination, the plaintiff's house was demolished and a new house was built. A great deal of contaminated soil was removed from the property. Further, the Ministry of the Environment required the plaintiff and subsequently the City of Kawartha Lakes to clean-up the public property, including the oil in the lake.

The off-site remediation costs were slightly over \$1.8 million. The cost of replacing the plaintiff's house was approximately \$545,000.

## Decision

Justice Charney apportioned liability 60% to the plaintiff and 40% to Thompson Fuels. Justice Charney did not find any liability on the tank manufacturer, Granby, or on the Technical Standards and Safety Authority (“TSSA”).

Justice Charney stated that the plaintiff was negligent for failing to have the oil tanks properly installed by a qualified technician. Further, the plaintiff did not follow the recommendations of Thompson Fuels to purchase a maintenance plan. The plaintiff took no steps to ensure that the tanks were regularly inspected. This fell below the standard of care expected of a homeowner. Moreover, there was evidence that the plaintiff occasionally filled the tanks with jerry cans of oil, which likely introduced water and microbes into the tanks. Justice Charney stated that this was negligent.

Further, Justice Charney found the plaintiff negligent for not promptly reporting the oil leak. The plaintiff contacted Thompson Fuels the day after discovering the leak instead of immediately.

Justice Charney found that Thompson Fuels was liable for failing to perform a comprehensive inspection. Further, Thompson Fuels should have checked for water inside of the tank. Moreover, the tanks did not have proper clearances and could not be properly inspected. As a result, Justice Charney found that Thompson Fuels should have ordered that the tanks be taken out of service until the problem was corrected.

Justice Charney dismissed the claim as against the tank manufacturer, Granby. In 2000, Granby became aware of issues involving an increased rate of internal corrosion in end-outlet tanks. Granby took steps to address this issue.

In 2001, Granby added warning stickers to its tanks regarding proper installation. In 2003, Granby included a manual with its tanks which provided instructions on proper installation and maintenance. In 2003, Granby began to provide seminars to people in the industry

regarding the dangers of improper installation and maintenance, as well as the importance of checking for water inside of tanks. Employees of Thompson Fuels attended these seminars.

In terms of the distribution of tanks, Justice Charney noted that Granby only sold to wholesalers. It did not sell to homeowners or to retailers, such as Home Depot. Any duty to warn on the part of Granby would have been a duty to warn the fuel distributors and installers who had direct contact with consumers. Granby accomplished these warnings through its education seminars and its manual. Justice Charney found that Granby appeared to be ahead of the curve.

The claim was also dismissed against the TSSA. The plaintiff argued that the TSSA failed to adequately ensure that the response to the oil spill was prompt and adequate. Justice Charney rejected this argument and further found that the TSSA does not have a private law duty to the property owner where a spill occurs.

There was only a modest reduction to the damages claimed. Justice Charney found that the remediation was necessary and largely reasonable.

Thompson Fuels has filed a Notice of Appeal and is also bringing a motion to vary or set aside the judgment based on alleged slips, omissions and errors by the trial judge.

### Summary

Homeowners are well-advised to follow recommendations regarding maintaining the equipment in their homes. Technicians need to keep up-to date with regulations and trends in the industry in order to provide competent service.

The case also demonstrates the benefits of Pierringer Agreements. In a Pierringer Agreement, the plaintiff settles with a defendant and agrees to pursue the non-settling defendants for only their several, not joint and several, liability. In other words, the non-

settling defendants are not responsible for any liability that may be found to rest on the settling defendant.

The settling defendant is extracted from the litigation. The plaintiff's focus shifts away from the settling defendant as the plaintiff wants as much liability as possible to be found on the non-settling defendants.

By entering into the Pierringer Agreement, Granby obtained certainty and avoided four additional weeks of trial time, as well as the pending appeal and post-trial motions.