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BURNING DOWN THE HOUSE:
The Defence of Arson

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TABLE OF CONTENTS

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I. INTRODUCTION

The elements of the defence of arson to a fire loss claim under an insurance policy are deceptively simple:

1. the fire was incendiary in nature (i.e. the fire was deliberately set);
2. the insured had the opportunity to set the fire; and
3. the insured had a motive for setting the fire[1].

The Courts, however, have been notoriously reluctant to accept an insurer's defence of arson. This is, in part, based on the nature of the evidence on which the insurer seeks to rely to prove the defence. In virtually every case, the insurer does not have the luxury of an eyewitness to the setting of the fire. Instead, the defence must be proven through circumstantial evidence linking the insured, or someone acting on his or her behalf, to the deliberately set fire.

The insurer may be suspicious of a fire loss claim for any of a number of reasons. The following is only a partial list of the possibilities triggering such a suspicion:

- the presence of incendiary devices or accelerants at the fire scene;
- the fire had more than one point of origin;[2]
- several fires burned without a connection;[3]
- the fire quickly destroyed all, or a significant part, of the premises;
- the presence of a jerry can lid at the location of the fire[4];
- the fire occurred after hours, during a holiday, or on the weekend;
- prior fires associated with the premises or the insured;

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1 Johnson v. AXA Pacific Insurance Company, 2011 BCSC 305

2 Fort Qu' Appelle Sports Shop Ltd. v. Wawanesa Mutual Insurance Co. (1989) 38 C.C.L.I. 115 (Sask. Q.B.)

3 Arctic Star Lodge (N.W.T.) Ltd. v. New Hampshire Insurance Co. (1992) 7 C.C.L.I. (2d) 7 (N.W.T.S.C.); Northwinds Service Station & Restaurant Ltd. v. Northern Union Insurance Co. et al (1983) 1 C.C.L.I. 256 (Man. Q.B.)

4 Johnson, *supra*, at note 1

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

- fires burning in locations without electrical wiring or devices, such as in the centre of a room;
- open gas jets;[5]
- paper or other highly flammable material spread around;
- suspiciously located electrical appliances;
- closet fires;[6]
- damage to fuel lines or electrical wiring not caused by the fire;
- alarms or sprinklers failed to work, though no fire damage to the mechanism is detected;[7]
- no sign of forcible entry;[8]
- insurance was taken out, the amount of coverage was increased or endorsements were added in the recent past;[9]
- the fire occurred just before the policy of insurance expired;
- the insured contacted his agent to confirm the existence or extent of coverage just prior to the fire loss;
- the real or personal property for which the claim is made was over insured;
- the property had been up for sale without success;[10]
- the fire occurred shortly after the departure of the occupant;[11]
- the fire destroyed old or unusable buildings or equipment;
- the fire occurred after the insured had become aware of the possibility of condemnation, foreclosure or power of sale proceedings;[12]
- the insured was highly leveraged financially;

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5 Sun Valley Enterprises Ltd. v. Gibraltar General Insurance Co. (1985) 13 C.C.L.I. 208 (B.C.S.C.)

6 Lally v. Safeco Insurance Co. of America (1990) 49 C.C.L.I. 83 (B.C.S.C.)

7 Northwinds Service Station, *supra*, at note 3

8 Lally, *supra*, at note 6

9 McGibbon v. Elite Insurance Co. (1985) 14 C.C.L.I. 1 (B.C.S.C.); Travelers Indemnity of Canada v. Kehoe (1985) 10 C.C.L.I. 127 (N.S.C.A.)

10 Fairview Cycle Ltd. v. Gore Mutual Insurance Co. (1987) 26 C.C.L.I. 62 (Alta. Q.B.); affirmed on appeal (1987) 49 Alta. L.R. (2d) 395 (C.A.); Hanson & Russell v. Safeco (1991) 7 C.C.L.I. (2d) 104 (B.C.S.C.)

11 Cote et al v. Royal Insurance Co. (1987) 27 C.C.L.I. 176 (N.B.Q.B); Lally, *supra*, at note 4

12 Tofin et al v. General Accident Assurance Co. of Canada (1985) 16 C.C.L.I. 247 (Alta. Q.B.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

- the fire occurred during domestic strife;[13]
- significant items, such as clothing, furniture, personal effects of a sentimental nature, or money removed from the property by the insured prior to the fire;[14]
- misrepresentations or fabrications by the insured with respect to the application for insurance;[15]
- misrepresentations or fabrications with respect to the proofs of loss; [16]and
- No mechanism for fire ignition at the location where the fire started[17]

II. INVESTIGATING A FRAUD CLAIM

There are steps an insurer should consider taking in its investigations, particularly in fire and theft claims. These include:

- utilizing the services of the I.C.P.B.;
- obtaining police and fire department investigative reports;
- retaining a fire investigation or forensic evidence accountant;
- involving legal counsel as early as possible, to allow the lawyer to assist in the investigation and thereby "cloak" the contents of the file with solicitor-client privilege; and
- last, but by no means least, invoking its rights under sub-paragraphs (c) and (d) of the Statutory Conditions to demand a complete inventory of undamaged property, as well as books of account, warehouse receipts, stock lists, etc.

III. THE BURDEN OF PROOF

Suspicions alone are not enough to substantiate the defence of arson. In civil actions, the *standard of proof* to be met, whether proving a claim or a defence to a claim, is on the "balance of probabilities". The question to be answered, on the balance of probabilities, by the trier of fact is: is it more likely than not that the events took place as described by the plaintiff (or by the defendant with respect to proving the defence)?

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13 Arctic Star Lodge, *supra*, at note 3

14 Hanson & Russell, *supra*, at note 10, Prince v. Home Insurance Co. (1985) 11 C.C.L.I. 294 (N.B.Q.B.); Theriault v. Federation Insurance [1992] I.L.R. 1-2788 at page 1616

15 Barr v. Saskatchewan Government Insurance (1989) 38 C.C.L.I. 95 (Sask. Q.B.); Mohammed v. Elite Insurance Co. (1993) 16 C.C.L.I. 126 (B.C.S.C.)

16 Kelly et al v. Phoenix Insurance Co. of Canada (1984) 4 C.C.L.I. 172 (N.B.Q.B), affirmed on appeal (1985) 13 C.C.L.I. 235 (C.A.); Menard v. Wawanesa Mutual Insurance Company (1988) 32 C.C.L.I. 242 (Sask. Q.B.); Mohammed, *supra*, at note 15

17 Johnson, *supra*, at note 1

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

The following quote from F.H. v. McDougall[18] a decision of the Supreme Court of Canada sets out the burden of proof which an insurer must meet, where arson or fraud has been alleged:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

McDougall was a threshold case. For a long time, it was the case that the defence of arson was evaluated on a sliding scale of proof. This is no longer true, as reiterated by Sidhu v. Wawanesa Mutual Insurance Company[19]:

> Following the decision of the Supreme Court of Canada in F.H. v. McDougall, 2008 SCC 58, the balance of probabilities is the civil standard of proof at common law. The sliding scale of proof in the civil context that previously applied to circumstances such as the incendiary origin of a fire is no longer relevant.

Despite an agreement on the test to be applied by the Courts in cases of alleged arson, it is not easy to extract a coherent summary of when the insurer will succeed on the defence of arson. Each case turns on its own facts, with the outcome very often hinging on the court's view of the credibility of the insured. Thus, seemingly similar facts surrounding a fire can lead to very disparate decisions, resulting in a lack of certainty for insurers as to when to defend suspicious fire cases.

IV. THE ELEMENTS OF THE DEFENCE OF ARSON

A. WAS THE FIRE INCENDIARY IN ORIGIN?

The determination of whether a fire was incendiary in origin is largely dependent on the interpretation by expert witnesses of the physical evidence left by the fire. Often, there will be a "battle of the experts," as each side adduces expert opinion attributing the cause of the fire to very different sources.

While each case will inevitably turn on its own physical evidence, reviewing past decisions involving an allegation of arson can give an insurer an indication as to why one expert's opinion is preferred by the presiding judge over that of another expert.

The Court will usually pay a significant amount of attention to the observations of the firefighters who worked to put out the fire. These comments should be addressed in any opinion put forward by the insurer.

This reliance on the those who fought the disputed blaze can be seen in the decision of the Saskatchewan Caesar's Palace Ltd. v. Elite Insurance Co.[20] The Court found that it was significant that

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18 2008 SCC 53

19 2011 BCSC 1117

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

neither of the firefighters who attended at the scene noticed anything "unusual" or "suspicious" about the blaze. The insurer's contention that the fire deliberately set was not accepted, despite evidence before the Court to the contrary.

By contrast, in Kelly,[21] the firefighters encountered a wall of fire in the kitchen, which burned *downwards* to the basement, burning a hole in the floor, a phenomenon that they found to be contrary to their past experiences. This evidence persuaded the judge that, despite the lack of evidence as to the presence of an accelerant, the fire had been deliberately set.

How soon after the fire the expert visits the scene greatly influences the court's reception of the opinion presented. Recognizing that the fire scene can change with time, the courts have expressed a reluctance to accept an expert's opinion where he has not visited the scene within days of the fire.[22] Where an expert relies solely on photographs and sketches, the Courts are very reluctant to accept the opinion at all, as it suspected that photographs do not accurately reflect the true state of the fire scene.[23]

In theory, the Courts recognize that determining the precise cause of a fire can often be impossible. The expert witness' opinion should thoroughly rule out all possible accidental causes for the fire, particularly electrical causes. Unaddressed accidental causes too often allow the court an avenue to rule in favour of the insured.[24]

If any explosions are reported, the expert's report should address any potential causes.[25] Care should be taken to document suspicious smells detected immediately following the fire, and as many materials samples as possible should be taken to allow for an accelerant analysis.[26] As well, an accurately drawn sketch of the location of the exhibits found at the fire scene should be produced.

In most cases, regardless of the existence of overwhelming evidence as to motive and opportunity by the insured, the defence of arson will not succeed unless it can be conclusively shown by the insurer that the fire was started deliberately. In other words, evidence of motive and opportunity will rarely be enough to convince the court that a suspicious fire was actually a case of arson. Some cases suggest that the Court should not even consider the evidence as to motive and opportunity until satisfied that the fire was set deliberately.[27]

For example, in Nikka Developments Ltd. v. Maplex General Insurance Co.,[28] the trial judge held, largely based on his assessment of the credibility of the insured, that a suspicious fire in the insured's restaurant was not a case of arson. The restaurant closed early one evening due to a lack of business.

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20 (1987) 22 C.C.L.I. 120 (Sask. Q.B.)

21 *supra*, at note 16

22 Netzel v. Zurich Indemnity Company of Canada [1994] 9 W.W.R. 268 (Man. Q.B.)

23 Lally, *supra*, at note 6

24 Klassen et al v. Zurich Insurance Co. et al (1984) 5 C.C.L.I. 117 (B.C.S.C.)

25 Oystryk v. Canadian Indemnity Co. (1968) 1 D.L.R. (3d) 614 (Sask. Q.B.); (1970) 9 D.L.R. (3d) 275 (C.A.)

26 Ambrus et al v. Prudential Assurance Co. (1989) 41 C.C.L.I. 115 (B.C.S.C.); Prince v. Home Insurance Co. (1985) 11 C.C.L.I. 294 (N.B.C.A.)

27 United Helicopters Ltd. et al v. Commonwealth Insurance Co. (1985) 13 C.C.L.I. 144 (B.C.)

28 (1993) 14 C.C.L.I. (2d) 273 (B.C.S.C.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

The principal and two employees stayed on until the early hours of the morning, drinking and discussing how to improve the fortunes of the unprofitable business. The fire occurred after the three left the premises, locking all doors and setting the alarm. The insured adduced expert evidence that the fire originated in a garbage can containing grease and cigarette butts. The insurer was unable to conclusively prove the presence of accelerants.

The trial judge did note that the principal of the insured had a strong financial motive to set the fire, and, furthermore, had an opportunity to do so. He was not, however, prepared to accept that the fire was incendiary in origin in the absence of evidence as to the existence of accelerants at the fire scene.

While a Northwest Territories Supreme Court,[29] acknowledges that not all cases of arson involve an accelerant or an incendiary device, this is an exceptional decision as the Courts are usually reluctant to accept that the fire was deliberately set without evidence of the presence of either.

For example in In Number 216 Holdings Ltd. v. Intact Insurance Co[30], the insurer tried to use the suspicious actions of an agent of the plaintiff company pre-and post- fire as evidence of arson bolstered by inconsistencies in the agent's evidence because the plaintiff's expert evidence could not show on a balance of probabilities that the fire was incendiary. The agent, Mr. Millns was an owner of the plaintiff company. The defendant presented the following facts indicating suspicious conduct: the Mr. Millns suddenly arrived at the property in Prince George from the Lower Mainland one week before the fire, the he turned off the power the day off and the day before the fire; that he paid for a room in a hotel for one of the residential tenant's in the building; that the fire occurred on a holiday when none of the commercial tenants in the building were operating; that Mr. Millns arrived at the property sometime after 7 p.m.; that the Prince George fire department received notice of the fire at 7:20 p.m.; and that after the fire Mr. Millns was out of contact with his wife until 12:30 a.m. that night and already on his way home.

Mr. Millns explained that he turned off the power due to an electrical problem, and that he was out of contact with his wife due to a problem with his phone. Despite these inconsistencies, the court found that the evidence indicating that he started the fire was equally consistent with the evidence that he was innocent of setting the fire. In the end, the evidence was not strong enough to show that it was more likely than not that Mr. Millns started the fire.

Furthermore, even where there is accelerant or incendiary device, if the insured or the occupant has any remotely plausible excuse for the presence of either, the Court will generally accept the insured's evidence, unless it has been concluded that the insured is not credible.

In Mazurek v. Saskatchewan Government Insurance,[31] the presence of petroleum solvent was detected at the point of origin of the house fire. The insured had been drinking at home when the fire started. The Court held that, as the insured could not, as a result of his intoxicated state, remember how the fire started, and the insurer had not adduced any evidence to contradict the possibility of the

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29 Arctic Star Lodge, *supra*, at note 3

30 2013 BCSC 1267

31 (1984) 6 C.C.L.I. 103 (Sask. Q.B.); affirmed on appeal (1986) 16 C.C.L.I. 312 (C.A.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

insured accidentally setting the fire while drunk, the suspicious nature of the fire was not enough to substantiate the defence:

> The defence is set up that the fire was caused by the wilful act or procurement and connivance of the plaintiff, but the defence fails to establish that fact. There are peculiar and perhaps suspicious circumstances connected with the fire, but a charge of this kind must be brought home more directly and conclusively than has been done here. It is true it is a difficult matter in such a case as this, and under the circumstances here, to do more than create a suspicion; and, however strong that suspicion may be, I cannot be governed by it. Innocence of the charge must be assumed until evidence of the guilt is more pronounced than it is here.[32]

In Theriault[33], a fire destroyed the insured's house while the family was away on an overnight trip. The insured had arranged for a friend to housesit. The friend slept on the floor, waking in the middle of the night because he was cold. The friend testified that he then decided to build a fire in the fireplace, using gasoline to help start the fire. On his second attempt to start the fire, an explosion occurred. The friend escaped uninjured.

The insurer adduced evidence which demonstrated, based on the widespread charring, that the fire had not originated in one spot. There was also reliable evidence that, in addition to containers of varnish and verathane in being found the living room, gasoline could be detected in a closet and on the comforter on which the friend had been sleeping. However, despite the presence of other inculpatory evidence (such as the removal of several boxes of goods, plus a table and chairs, for an overnight trip; the strained financial circumstances of the insured; the inquiries made by the insured as to declaring bankruptcy; the laced up boots of the friend who had not been expecting an explosion), which indicated that the insured had the motive to set the fire and opportunity to do so, by asking his friend to set the fire, the Court accepted that the fire had been accidental.

Contradictions between plaintiff and defence experts as to the origin of the fire are to be expected. Inconsistency between defence witnesses can be fatal to a successful defence. This is particularly true where the experts cannot agree on the presence of an accelerant at the fire scene or the number of "sets" to the fire. For example, in Caesar's Palace,[34] the insurer adduced five experts' reports. Unfortunately, there was no agreement between the various experts as to how the fire in question started. In fact, the opinions tended to contradict each other, leaving considerable doubt in the judge's mind as to the origin of the fire. The result was a ruling in favour of the insured.

B. OPPORTUNITY

There has been a fair amount of judicial debate over the degree of exclusivity of opportunity the insured, or someone acting on his behalf, must have had to set the fire before the Court will conclude that the fire, "more probably than not" was deliberately set.

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32 Patterson v. Central Can. Ins. Co. (1910) 15 W.L.R. 123 (Man. Q.B.), followed in Mazurek, *supra*, at note 31

33 *supra,* at note 14

34 *supra*, at note 20

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

The traditional test for opportunity was whether the evidence demonstrated that the insured had "exclusive" opportunity to set the fire:

> *Opportunity is the sine qua non of crime (i.e. crime cannot occur without opportunity), but it is not evidence of commission of the criminal act unless, it is exclusive opportunity.*[35]

Another test for opportunity was whether the insured had the "last" opportunity to set the fire. For example, in Valcourt et al v. Saskatchewan Government Insurance,[36] the fact that the insured had left the premises only ten minutes before the fire was detected allowed the insurer to rule out other possible suspects for setting the fire. A similar result was achieved in Fairview Cycle,[37] where there was a 25 minute gap between the departure of the principal of the insured company from the premises and the detection of the fire.

Unfortunately, the insurer is rarely presented with a "one person only could have set the fire" fact situation, such as that which occurred in Arctic Star Lodge.[38] At the time fires broke out in three lodge buildings, the principal of the insured company was alone at the lodge, which was located in a remote part of the Northwest Territories. The last guest had left the lodge and the principal had sent the staff members home, due to their "hung over" conditions. The three buildings were destroyed within a very short period of time. A pilot, who happened to be flying overhead at the time the fire, testified at trial that there was no visible path of fire between the buildings. He also noted that there was no wind on the day of the fire to promote the spread of the fire. Based on this evidence, the judge concluded that the fire was deliberately set and, given the remote location, only the principal had the opportunity to do so.

Usually, the disputed fire occurs in a more populated area, giving rise to a greater number of suspects with an opportunity to set the fire. It is not unusual for the insurer to be given the virtually impossible task of ruling out each person in the area as the arsonist. The spectre of the "pyromaniac" is often raised successfully by an insured, even where no pattern of unexplained fires has occurred in the neighbourhood. In more than one case, the Court has held that the mere "possibility" that a stranger could have walked in, and set the fire, meant that the insured did not have the "last" or "exclusive" opportunity required to link the insured to the fire. This reasoning has even been applied in cases where the insured had a very strong motive to set the fire.[39]

The Ontario Court of Appeal in Rizzo v. Hanover Insurance Co.[40] indicated that "exclusive" opportunity may no longer be the test where there is other inculpatory evidence which links the insured to the setting of the fire. This has been called, the "appropriate" opportunity test.

In Rizzo the insured was one of at least two people with a key to the restaurant premises. An employee had locked up on the evening of the fire. The burning premises were found locked and it was

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35 Smith v. Royal Insurance Co. [1983] 3 W.W.R. 577 (Alta. C.A.), followed in Netzel, *supra*, at note 20

36 (1986) 18 C.C.L.I. 189 (Sask. Q.B.)

37 *supra*, at note 10

38 *supra*, at note 3

39 Ambrus, *supra*, at note 26, Klassen, *supra*, at note 24

40 (1993) 18 C.C.L.I. (2d) 199 (Ont. C.A.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

the opinion of an investigator that the fire was set by an insider. It was clear that the fire had been deliberately set: eighteen plastic jugs of gasoline were found in the basement with paper towels and the company's records spread around to promote the spread of the fire. A trail of gasoline had been created to allow the fire to be set from a safe position.

It was the plaintiff's contention that the evidence failed to demonstrate, to the requisite degree of probability, that the insured had the "last" or "exclusive" opportunity to set the fire, a fact conceded by the insurer in light of the evidence that the insured had not been around when the restaurant was closed. The insurer argued that only an "appropriate" opportunity to set the fire need be shown where the insured had a motive for the fire.

This case enables the insurer to adduce evidence to rule out the "reasonable" suspects in the circumstances of the case. This is done by comparing the opportunities and motives of any other likely candidates for setting the fire. Potentially, the insurer could still be confronted by the suggestion of a "pyromaniac" but, based on the reasoning in Rizzo, the Court may be less likely to accept the existence of such a person, in the absence of evidence that there had been a rash of such fires in the area.

The B.C. Supreme Court has followed Rizzo on a number of occasions. In Johnson[41], for example, the court expressly cited the "appropriate test" as the test to be applied. On the facts, the plaintiff was the last person known to be in the house. He testified that he left the house to go to home depot, and that he left the kitchen door open for his dog on his way out. The evidence showed that the fire started in three distinct locations within the home, two of which were in self-contained suites. The plaintiff was the only individual who had keys to all of the suites. The court could not accept, on a balance of probabilities that another person was in the area with a can of gas and was able to access the house and the additional suites without a key. The court held that it was probable that the plaintiff left his front door open to allow him and his dog a straightforward exit after he started the fire and that there was no rational alternative to Mr. Johnson being the probable fire-setter.

However, it is still not always clear what test for opportunity courts are applying. Since McDougall[42] some courts have started using the language of balance of probabilities in coming to their determination of opportunity. In Sidhu v. Wawanesa Mutual Insurance Co.[43] a fire started in the master bedroom of the insured's home. The insurer argued that the plaintiff had the exclusive opportunity to start the fire. The insurer argued that this was supported by the fact that the plaintiff's baby and children were all in the living room instead of their beds at the time of the fire. The insurer argued that the plaintiff must have been in the bedroom where the fire started at the time of the fire and could have been the only person with opportunity.

While court acknowledged that there was a level of uncertainty in the plaintiff's evidence, the court found that the defendant had not proven on the balance of probabilities that the insured set the fire. Although he was alone in the bedroom immediately before the fire started, the Court accepted that the insured was not in the room when the fire started and therefore he did not have the opportunity to set the fire. The defendant's evidence further did not satisfy the court on a balance of probabilities that

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41 *supra*, at note 1

42 *supra*, at note 18

43 *supra*, at not 19

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

the source of the accelerant in the bedroom was not from a person outside the house as there was evidence that it may have from someone outside the window throwing accelerant into the bedroom.

In another example, Rolston v. Canadian Northern Shield Insurance Co.[44], the court reviewed a number of factors that led them to the conclusion that the insured had, on a balance of probabilities, opportunity to cause the fire. In that case, there were no signs of forced entry, and the keys to the padlocked gate were hanging inside the building that was damaged by the fire. The gate could only be opened by someone with a spare key, something which only the insureds had. Therefore the fire could only have been started by someone with access to the building. The court held that it was more likely than not that the only people who could have accessed the building were the insureds.

C. MOTIVE

In most cases of arson, the motive is a financial one. Courts have held that a degree of financial strain makes the acquisition of money important at the time of a fire and provides evidence of motive for arson[45]. The more dire the financial situation, the more likely the Court is to find that the insured had a motive to set the fire.

The Court, however, will usually link the existence of financial strain to the existence of adequate insurance. In other words, the fire must put the insured in a better position financially than if the fire had not taken place.[46]

For example, in McGibbon,[47] though the insured acknowledged that his financial situation was poor at the time of the fire, the Court found that no motive to set the fire had been proven by the insurer, in light of the fact that the insurance coverage taken out by the insured was inadequate to cover the loss of the contents of the trailer.

In Dandy Duds Ltd. v. Commercial Union Assurance Co. of Canada et al,[48] the insurer alleged that the principal of the insured company had set the fire to avoid the expense of tearing down an unwanted building. The insurer however failed to adduce evidence at trial as to what the cost of removing the building would have been and how the insured would have profited financially from such a scenario. The Court held that the evidence adduced, which showed no financial strain on the part of the insured, tended to show that the insured had *no* motive for setting the fire. The Court noted further that, if proven, a lack of motive may, in fact, rebut other evidence of criminal activity.

Similarly, in Tumber's Video Ltd. v. INA Insurance Co. of Canada,[49] a weak motive in a clear case of a deliberate fire resulted in a finding that the insured did not conspire to set the fire (the insured's claim was, however, dismissed on other grounds). The principal of the insured company operated a video store which was doing well financially, with no significant debts. The principal testified that he intended to rebuild on the same site but was not given permission to do so in light of his rentals of xxx-

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44 2014 BCSC 1275

45 Lally, *supra*, at note

46 Caesar's Palace, *supra*, at note 20

47 *supra*, at note 3

48 (1988) 31 C.C.L.I. 192 (P.E.I.C.A.)

49 (1989) 40 C.C.L.I. 262 (B.C.S.C.); affirmed on other grounds (1991) 4 C.C.L.I. (2d) 200 C.A.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

rated tapes. The insurance for the business only covered depreciated value and the principal was aware that the business was underinsured. Despite the existence of some evidence that a friend had set the fire and the Court's adverse view of the principal's credibility, the absence of any financial motive persuaded the judge that the insured did not conspire to set the fire.

On the other hand, in Johnson[50], there were a number of pieces of evidence that the plaintiff was experiencing financial strain, including:

- He was not paying utility bills;
- His wife was advancing a claim in the order of $200,000;
- He had recently separated from his partner who had been contributing to the mortgage;
- He had been off work due to injury
- He was 10 days in arrears on his mortgage payments
- He confirmed to the RCMP that he was having financial difficulties.

Taken together the court held that the plaintiff was in sufficient financial difficulty and risk that he needed money at the time of the fire. He therefore had the requisite motive to start a fire that would result in a substantial gain to him.

Occasionally the Court will find that a motive for the fire is not a significant factor in its decision to disallow the insured's claim for indemnity. In Sandhu v. Insurance Corporation of Ireland Ltd.[51] the insured's business was operating at a loss. The insurer claimed that the insured was motivated to burn the store so as to derive the insurance proceeds and construct a new store. The Court was not satisfied, based on the evidence, that a motive to set the fire existed. MacKinnon J. noted that even if a motive existed, "*motivation can never of itself be of sufficient probative value to disallow a claim*."

> *Motives are indeed very unreliable and they cannot be classified as an accurate determining cause of human deeds, which they too often influence in different ways. Taken alone, and not coupled with other extraneous evidence, they have very little probative value …*[52]

D. CREDIBILITY

As previously mentioned, a finding of arson often revolves around the court's view of the credibility of the insured, assessed by the presiding judge based on the insured's testimony in court. And it is because the trial judge's decision almost invariably revolves around credibility that appeals courts will rarely overturn a finding at trial in favour of the insured. A favourable view of credibility

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50 *supra*, at note 1

51 (1987) 24 C.C.L.I. 30 (B.C.S.C.)

52 New York Life Ins. Co. v. Schlitt [1945] 2 D.L.R. 209 (S.C.C.), followed in Sandhu, *supra*, at note 43

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

almost inevitably leads to a finding for the insured, as the Court will tend to accept the insured's view of events.

Without the benefit of seeing the insured in question testify, it is difficult to determine from written reasons alone when an insured is likely to be believed. However, it clear from the case law that the more forthright the testimony of the insured, even with respect to potentially damaging evidence, the more likely the judge will be to comment favourably on the insured's credibility.

Although it appeared in McGibbon[53] that the insured had clear opportunity to set the fire, given that he was home alone at the time, the judge's favourable view of the insured's credibility enabled the insured to recover. The judge noted that the insured answered all questions without hesitation, and that he believed that the insured had no idea as to how the fire started in the mobile home. This was despite the fact that the fire chief, upon arriving at the scene, noted that the fire was burning principally at the other end of the trailer than he had initially been told by the insured.

By contrast, in Valcourt,[54] the Court noted that the insured answered questions in very general terms or even evasively, about matters that should have been within his knowledge. Furthermore, the insured was inconsistent in his testimony as to matters of amounts, distances and dates. The Court also noted that, although all witnesses are, not surprisingly nervous, the insured seemed exceptionally so. These factors led to the Court's finding that the insured lacked credibility. The insured's claim was dismissed.

Similarly in Johnson,[55] the plaintiff's evidence was punctuated by allegations that the insurance adjuster and the RCMP were trying to frame him. Mr. Johnson went so far as to create a website suggesting that there was a fraud being perpetrated against him. However, he offered no tangible evidence that the parties had any motive other than fairly investigate the suspicious fire. As a result Mr. Johnson's credibility was adversely affected on issue of the incendiary nature of the fire.

Sometimes it is the fact that the insured has been dishonest or less than forthright with others that influence the Court's determination that an insured is not be believed. For example, in Arctic Star Lodge,[56] the principal shareholder of the insured company advised his banker that the property was about to be sold. He withheld the true state of the company's finances, as well as his own finances, in order to try to convince the bank to lend him more money. He had also cheated one of his fellow shareholders. The Court specifically commented on the principal's unwillingness to concede inconsistencies in his story as to how the fire occurred.

Conversely, a court's belief in the credibility of the insured can take what appears to be clear-cut case of arson by the insured on the facts and reduce it to merely another suspicious fire. In Gannon and Associates Ltd. c.o.b. Barnacle Pete's v. Advocate General Insurance Co. of Canada,[57] it was agreed by the parties that the fire in the insured's restaurant business was deliberately set. The fire occurred only five months after the business opened. All doors were locked on closing, with the principal of the

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53 *supra*, at note 9

54 *supra*, at note 36

55 *supra*, at note 1

56 *supra*, at note 3

57 (1984) 12 C.C.L.I. 61 (Man. Q.B.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

insured having one of only three keys to the premises. The building was found with two doors open; there was, however, no sign of a forcible entry. At the time of the fire, the business was operating at a break-even level, but the insured did not have the money to exercise the option to purchase the premises. There was some evidence that the liquor supplies had been low prior to the fire. The restaurant's cook claimed that he had set the fire on the principal's request.

Using the following information, the insurer attempted to attack the credibility of the insured's principal:

- the principal had failed to disclose security interests in certain equipment in the proofs of loss;
- the principal had failed to pay sales taxes;
- the principal had failed to remit income taxes withheld from employees' incomes; and
- the principal purchased alcohol from illegal sources.

Despite this body of seemingly damning evidence, the Court noted that the principal withstood cross-examination, offering explanations for the problems referred to above, and testifying that he intended to carry on with the business, despite the setback caused by fire. By contrast, the Court refused to accept the evidence of the cook, as his testimony was gained through a plea bargain. The Court ruled in favour of the insured, stating that the evidence failed to link the insured to the fire.

Occasionally, the Court's view of the insured's credibility may be sufficiently poor to result in finding that the insured employed another to set the fire. In Scrivanos v. IMG Insurance Management Group Ltd. et al,[58] the Court accepted that the insured was not even in the country when a fire destroyed his unprofitable restaurant business. It was not disputed that the fire was set deliberately. The insured merely stated that he lacked exclusive opportunity to set the fire. The Court determined, based on the facts that the premises were found locked, and only three people had keys to open the restaurant, and the dog on the premises did not bark, that the fire must have been an inside job. It was held that the insured had a significant financial motive to set the fire. With respect to credibility, it was noted that the insured claimed not to be able to remember whenever he was asked tough questions, and lied when he confronted with evidence that his former broker had cancelled his insurance when the latter became concerned that the insured presented an arson risk.

It is not only the credibility of the insured that is scrutinized by the Courts. There is a general reluctance to accept the evidence of third parties who come forward claiming that they set the fire at the insured's request or, at least, were approached by the insured to do so. It is appears that this is largely because such persons, not surprisingly, often have prior criminal records.

In Mohammed,[59] the Court held that the defence of arson raised by Elite succeeded. The Court, however, refused to accept the evidence of a tenant of the insured property that she had been approached by the insured to set the fire. Her criminal record and drinking problem gave her little credibility as a witness.

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[58] (1987) 25 C.C.L.I. 286 (Ont. S.C.

[59] *supra*, at note 15

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

Similarly, in an unrelated decision,[60] the court refused to accept the out-of-court statements of a third party to the effect that the insured had retained him to set the fire. These statements were later repudiated in court by the third party. The judge accepted that the third party had indeed set the fire, but said the evidence was insufficient to link the insured to the arson.

In order to be able to effectively assess and, if necessary, challenge the insured's credibility, it is important for the insurer to get a written statement from the insured as early as possible. Examinations for discovery should be extensive and detailed, as it is often the discrepancies between the insured's testimony at the examination and trial which will convince the trial judge that the insured is not to be believed. In particular, to determine whether the defence of arson should be pursued, the insured's ability to address potentially damaging evidence should be assessed by the insurer.

V. INNOCENT CO-INSUREDS

A. THE PROBLEM

Because it is common for more than one party to have an interest in a piece of property, most fire insurance policies cover more than one insured, whether they are expressly listed or included as un-named additional insureds. Avoiding multiple fire policies for the same property is efficient for both the insureds and insurer but the practice presents two basic dilemmas. Since it only takes one insured party to commit arson, to what extent are other insureds accountable? How can the innocent insureds be justly compensated without rewarding the arsonist?

These questions are difficult because of the way the law regards certain groups that own property and the ways property can be owned and used. The parties insuring a particular piece of property are usually part of a legally recognized unit, such as a family, partnership or corporation. In certain circumstances, the act of one member is regarded in law as an act of the unit as a whole. The courts have grappled with the issue as to whether some or all acts of arson by one or more members can taint the entire group such that the innocent members cannot collect the insurance proceeds. Even if they are not tainted, the fact that the innocent and the guilty have interests in the destroyed property makes it difficult to compensate one without at least indirectly benefitting the other.

B. TRADITIONAL APPROACH- THE POLICY WORDING

By examining the policy wording, the courts tried to determine whether there was an agreement that the rights and obligations of the insureds under the policy were joint (the acts of one insured affect the rights and obligations of another) or several (the acts of one insured do *not* affect the rights and obligations of another). The presumption was that coverage was several and the reason for this was pointed out in the early American case of Hoyt v. New Hampshire Ins. Co.,[61] which became a keystone for the "new rule" cases of the 1970's and 1980's in the United States.[62] The Court in Hoyt stated:

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60 Mohammed v. Canadian Northern Shield Insurance Co. (1992) 10 C.C.L.I. (2d) 118 (B.C.S.C.)

61 29 A.2d 121 (N.H. 1942)

62 see Howell v. Ohio Casualty Ins. Co., 130 N.J. Super. 350, 327 A.2d 240 (N.J. 1970); Steigler v. Ins. Co. of N. Amer., 384 A.2d 398 (Del. 1978); Hidebrand v. Holyoke Mut. Fire Ins. Co., 386 A.2d 329 (Me 1978); Economy Fire & Casualty Co. v. Warren, 390 N.E. 2d 361 (Ill. 1979); Auto-Owners Ins. Co. v. Eddinger, 366

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

> "The ordinary person owning an undivided interest in property, not versed in the nice distinctions of insurance law, would naturally suppose that his individual interest in the property was covered by a policy which named him without qualification as one of the persons insured. And the fact that under such circumstances the insurance company may have had good reasons for preferring to issue a joint policy ... is unimportant unless those reasons were disclosed ... If the [insurers] intended the policies in question to be joint, that intention should have been clearly expressed."

In scrutinizing various policies, American courts have singled out certain qualifying words attached to the term "insured" as a guide to whether coverage under a policy is joint or several.[63] Many courts have found that policies with conditions and exclusions applicable to "the insured" are ambiguous in that the phrase could refer to all insureds under to policy or just to the one seeking recovery. Applying the rule in Hoyt that any intention to provide joint coverage must be clearly expressed and the general rule that ambiguity in a policy must be interpreted in the manner most favourable to the insured, many American courts have ruled that the coverage provided by policies using "the insured" is several.

The Canadian courts then began to follow the approach in Hoyt. In Rankin et al v. North Waterloo Farmers Mutual Insurance Co.,[64] the home of the named insured parents was burned by their 16-year-old son. The insurer refused to honour the parents' claim. The exclusion clause in the policy covering the home stated:

> "This policy does not cover:
>
> ...
>
> (d) loss or damage caused by a criminal or wilful act or omission of the Insured or of any person whose property is insured hereunder...
>
> "Insured" was defined as,
>
> The unqualified word 'Insured' includes
> (1) The Named Insured
> (2) If residents of his household, his spouse, the relatives of either, and any other person under the age of 21 in the care of an Insured; ...".

The Court found that the parents' insured interest in the home was separate from the son's insured interest in his personal property. This would remove the bar to recovery. On the policy wording, the Court noted that the son fell within the extended definition of "Insured" and therefore only the portion of the exclusion clause that referred to "the Insured" applied. The portion dealing with "other persons insured hereunder" was irrelevant. The Court did not say "the Insured" was ambiguous but followed exactly the reasoning of the American courts which analyzed policies using that phrase.

So. 2d 123 (Fla. 1979); Amer. Economy Ins. Co. v. Liggett, 426 N.E. 2d 136 (Ind. 1981); Hedtcke v. Sentry Ins. Co., 109 Wis 2d 461, 326 N.W. 2d 727 (Wis. 1982)

63 R.A. Hobgood and F. Anthony Lamb, *"Recovery by an Innocent Co-Insured"* in For the Defense, July, 1983, p. 3 at 6-9

64 (1980) 100 D.L.R. (3d) 564 (Ont. C.A.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167
(CWA34624.2)

The Court ruled that when there was more than one person insured under the policy, "the Insured" referred only to the person who was making the claim. Although the court did not say it, this meant that coverage was several. The parents' claim was not affected by the son's act.

In, Higgens v. Orion Insurance Company et al,[65] the Ontario Court of Appeal applied the rule from Hoyt. In that case, one partner sued his insurer to recover the value of partnership property destroyed in a fire. The fire, which destroyed a building as well as stock and equipment, was set by an employee of the partnership on the instructions of another partner who was subsequently convicted of arson. The stock and equipment was insured under a commercial property floater which excluded "loss or damage resulting from any dishonest act on the part of the insured or other party of interest". While "*the* insured" may have been ambiguous, it was clear that the fire was caused by a "party of interest" and thus this portion of the loss could not be recovered.

The building was not subject to the same exclusion but the insurer argued that there was an implied exclusion in any insurance policy for deliberate destruction of property by an insured. The Court of Appeal agreed that a deliberate act was not "fortuitous" and thus could not be an accident under the policy. Nevertheless, such an implied exclusion did not specify whether coverage was joint or several as among the insureds. The insurer argued that the manner in which the insureds were named in the policy showed that the intention was that the partners were covered jointly. The Court of Appeal disagreed, finding the policy was ambiguous as to joint or several coverage. In the face of the ambiguity, it followed the *contra preferentum* rule and found that the coverage was several, the interpretation most favourable to the innocent insured partner.

The issue came before the Supreme Court of Canada in 1988 in Scott v. Wawanesa[66]. In the Scott case, the facts were almost identical to those in Rankin before the Ontario Court of Appeal. In Scott, the plaintiff's parents' home was burned by their fifteen year old son. The policy covering the home contained the following exclusion:

> "This policy does not insure:
>
> ...
>
> (d) loss or damage caused by a criminal or wilful act or omission of the Insured or of any person whose property is insured hereunder, ..."
>
> The policy defined insured as follows:
>
> "The unqualified word 'insured' includes
> (1) The Named Insured
> (2) If residents of his household, his spouse, the relatives of either, and any other person under the age of 21 in the care of an Insured; ..."

The parents relied upon the Higgens case and argued that the court should interpret the policy as insuring their interests separately from those of their son.

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65 [1985] I.L.R. 1-866, p. 7245; (1985), 10 C.C.L.I. 139 (Ont. C.A.)

66 [1989] I.L.R. 1-2462; (1989) 9 C.C.L.I. (2d) 268 (S.C.C.)

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

Mr. Justice La Forest spoke for the dissenting judges. Like the courts in Higgens and Bauer, he found the word "the" qualified the word "Insured" in the exclusion clause and rendered the clause ambiguous. He ruled that where there was more than one insured, the words "the Insured" in the exclusion clause referred to the person who was making a claim under the policy. The coverage was thus several as amongst the insureds in Scott and the parents were entitled to recover their losses.

Madame Justice L'Heureux-Dube, speaking for the majority of the Supreme Court, ruled the parents could not recover. Unlike Mr. Justice La Forest, Madame Justice L'Heureux-Dube found no ambiguity in the exclusion clause but did not address La Forest J.'s concerns surrounding the words "the Insured".

In her decision, Madame Justice L'Heureux-Dube agreed with the Court of Appeal judge that, because the wording was clear, there was no need to touch upon the issue of whether the indemnification obligation upon the insurer was joint or several, a question that arises when using the new rule. Although she did not find it necessary to address the issue as to whether the insurer's obligation to indemnify was joint or several, by deciding that the exclusion wording meant the acts of the son affected the rights of the parents, she in effect ruled that the coverage was joint.

In Riordan v. Lombard Insurance Co.,[67] the plaintiff family suffered fire loss of their home that was was caused by the intentional and wilful act of their foster child (age 13 at the time of the fire). The foster child was "occupying" the Riordan's residence at the time of the fire loss. The defendant denied the Riordan's claim on the basis that the loss was an excluded loss pursuant to the standard intentional acts exclusion clause. The clause stated:

> We do not insure loss or damage resulting from any intentional or criminal act or failure to act by:
>
> a. Any person insured by this policy; or
>
> b. Any other person at the direction of any person insured by this policy

The policy did not provide any definition of "insured". In its decision, the Court of Appeal overturned the ruling of the court below, and held:

> "In my opinion, [the foster child] is clearly "a person insured by this policy" and the exclusionary clause operates to exclude coverage to the respondents. I can see no ambiguity or uncertainty with the provisions of this policy insofar as they pertain to this case which could lead to an ambiguity which would engage the principle of contra proferentem or any other principle of interpretation that could lead to the exclusionary clause not being applicable."

The Court, therefore, allowed the appeal, holding the by the wording of the exclusion clause included intentional acts of a foster child.

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[67] 2003 BCCA 267

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

The analysis in Riordan was similarly followed in Torchia v. Royal & Sun Alliance Insurance Co. of Canada.[68] Here the plaintiff home was destroyed by a fire. Andrea Torchia was the sole owner of the house. Her husband, Angelo Torchia, was convicted of arson with intent to defraud the insurer on February 28, 2000. No evidence suggests that Andrea Torchia had anything to do with her husband's actions. Andrea Torchia commenced this action because RSA Insurance denied her claim under her homeowner's policy, relying on the exclusion clause in the property damage section of the policy because the loss resulted from the intentional or criminal act of her husband who was a person insured by the policy. The issue is whether Angelo Torchia was insured by the policy. The exclusion clause stated that:

> We do not insure loss or damage:
>
> …
>
> 3. resulting from the intentional or criminal acts of, or the failure to act by,
>
> a) any person insured by this policy, or
>
> b) any other person at the direction of any person insured by this policy

The policy further held that:

> You and your mean the person(s) named as Insured on the Coverage Summary page and, while living in the same household:
>
> His or her wife or husband

Ms. Torchia argued that there was an ambiguity in the exclusion clause which must be interpreted against the insurer. Ms. Torchia argued that the clause could exclude either the loss of any insured resulting from the intentional acts of a person insured, or only the loss suffered by the person who committed the act. Effectively, Ms. Torchia was arguing that in light of the ambiguity, the rule in Hoyt should apply, and the exclusion clause should operate severally against only Mr. Torchia's interest.

The Court held that there was no ambiguity in the clause; it excluded losses suffered by any person insured by the policy which results from the intentional acts of an insured person. Therefore it was clear that Mr. Torchia was an insured under the contract, and it was clear that Mr. Torchia intentionally committed the criminal act of arson. The exclusion clause could be relied upon by the defendants

Finally, in Ryan v. Canadian Farm Insurance Corp. et al[69], the plaintiff owned a farmhouse. The farmhouse was jointly owned with his estranged spouse. Noel's estranged spouse left him to return to Ireland in 2007. Shortly thereafter, the plaintiff met an 18 year old girl, Rebecca Yvon, who moved in with him after a few months. In August of 2008, the plaintiff went on a work trip to The Pas while Ms. Yvon stayed at the home. On September 13, 2008, Ms. Yvon contacted Noel and told him that the

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68 [2004] O.J. No. 2316

69 2013 MBQB 271

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

property had been broken into and vandalized. Later that day Ms. Yvon and a friend attended at the property and Ms. Yvon set fire to the home.

The defendant denied the claim on the basis that the fire was set intentionally by an unnamed insured under their policy. The policy stated:

> Whenever used in this policy:
>
> 1. "You" and "Your" means the person(s) named in the Declarations and while living in the same household, his or her spouse, the relative of either or any person under 21 in their care. This also includes any full time student at college or university who is dependent on the named insured or spouse of the named insured. Spouse includes two people who are living together as husband and wife and have so lived together continuously for a period of 3 years or, if a child was born of their union, for a period of one year. Only the person(s) named in the Declarations may take legal action against us.
>
> …
>
> We Do Not Insure Loss or Damage:
> …
> 22. resulting from any intentional or criminal act or failure to act by:
> (a) any person insured by this policy; or
> (b) any other person at the direction of any person insured by this policy.

The issue before the court was whether or not Ms. Yvon was "a person under 21 in the care" of Mr. Ryan, such that the intentional and criminal acts exclusion clause could apply. The court explored what it might to be "in someone's care". Factors going towards Ms. Yvon not being in the plaintiff's care include:

- The plaintiff had no legal responsibility for her care and nurture.
- She was not financially dependent on him. She had a job and he was not giving her money.
- He had no supervisory or disciplinary responsibility for her and exercised none. He was not in the home most of the time prior to the fire while she was living there.
- She had only moved in recently and there was no permanent arrangement.
- She was legally an adult.
- She had a part-time job.

After considering these factors the Court ultimately concluded that the plaintiff established a prima facie case that the exclusion does not apply. Therefore, on a summary trial basis, the court held that the defendant was legally liable to indemnify the plaintiff for the loss caused by the fire.

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

C. RECENT LEGISLATIVE CHANGES

The law regarding innocent co-insureds changed with the introduction of the *Insurance Amendment Act*, 2009. The British Columbia *Insurance Act* now ensures that innocent co-insureds are protected. Section 35 of the Insurance Act states:

> **35** (1) Despite section 5, if a contract contains a term or condition excluding coverage for loss or damage to property caused by a criminal or intentional act or omission of an insured or any other person, the exclusion applies only to the claim of a person
>
> a. whose act or omission caused the loss or damage,
>
> b. who abetted or colluded in the act or omission,
>
> c. who
>
> i. consented to the act or omission, and
>
> ii. knew or ought to have known that the act or omission would cause the loss or damage, or
>
> d. who is in a class prescribed by regulation.
>
> (2) Nothing in subsection (1) allows a person whose property is insured under the contract to recover more than their proportionate interest in the lost or damaged property.
>
> (3) A person whose coverage under a contract would be excluded but for subsection (1) must comply with any requirements prescribed by regulation.

Section 7 of the *Insurance Regulation* places obligations on the co-insured to cooperate with the insurer's investigation

> **7** (1) For the purposes of section 35 (1) (d) [recovery by innocent persons] of the Act, all classes of persons other than natural persons are prescribed.
>
> (2) For the purposes of section 35 (3), a person described by that provision must co-operate with the insurer in respect of the investigation of the loss, including, without limitation,
>
> a. by submitting to an examination under oath, if requested by the insurer, and
>
> b. by producing for examination at a reasonable time and place designated by the insurer, documents specified by the insurer that relate to the loss.

These new sections provide that exclusions apply only to deny the claim of the actual wrongdoer and cannot be used against an innocent co-insured. The innocent co-insured is then still able to recover for their losses proportionate to their share of the damaged property.

R. Glen Boswall, T. 604.643.3125
Andrew Dixon, T. 604.643.3167

The regulations, however, do not include a definition of proportionate which leaves some ambiguity concerning its meaning. Does the interest of the innocent co-insured have to be a legal interest in the property or can it include a beneficial interest, such the interest of a spouse who has contributed to the maintenance or finance of the property but is not legally on title?

While there is increased protection for non-culpable parties, the new provision does not allow the claim of a person who has abetted or colluded in the wrongful acts or omission, consented to them being done or who ought to have known that the acts or omission could have caused damage. These are factual issues that must be fully investigated prior to making a decision about coverage.

In exchange for receiving the benefits of this protective legislation, the innocent co-insured must cooperate with the insurer's investigation of the loss. This assistance includes submitting to an examination under oath on request of the insurer and producing relevant documents specified by the insurer. The extent of the innocent co-insured's cooperation and the practical consequences that arise from it are currently unknown.

VI. CONCLUSIONS

Arson remains a difficult defence for insurers to prove. While the reasoning of the Ontario Court of Appeal in Rizzo[70] and the Supreme Court of Canada in McDougall[71] appears to have eased the test to be met with respect to the element of opportunity and the applicable burden of proof, a review of the case law dealing arson reveals that, in most cases, it is the credibility of the insured which determines the success or failure of the defence.

When an insurer is preparing a case to be defended on the basis of arson, care should be taken to thoroughly investigate and prepare the evidence to substantiate each element of the defence. The Court will begin its assessment of each case with a presumption against criminal activity on the part of the insured. As a result, failure to prove any one of the elements of the defence will likely result in a ruling that favours the insured.

With respect to the innocent co-insured, legislative changes in B.C. have ensured protections for the innocent party and a greater likelihood of coverage. However it also places a number of responsibilities on the innocent party to cooperate with the insurer. Further, it is unclear exactly how the statute will be applied going forward.

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Burning Down the House:

CWA34624.2

[70] *supra*, at note 36

[71] *supra*, at note 18