



SUBROGATION IN FIRE CASES WITH NO KNOWN CAUSE – NOT JUST BLOWING SMOKE!

Pamela D. Pengelley • 416.361.3200 • ppengelley@cozen.com

INTRODUCTION

The immediate investigation of loss sites, especially those involving fires, enhances subrogation recognition and maximizes recovery. With respect to the investigation of fire losses, recovery opportunities may be sought, not *just* from third parties responsible for causing a fire, but also from those who may have failed to contain and/or prevent the spread of a fire. These claims can be pursued in tandem with actions against third parties responsible for causing the fire, or as separate claims when the cause of the fire is undetermined.

“Fire Spread”: Is there a reason the fire caused more damage than it otherwise should have?

Even where the origin or cause of a fire cannot be determined, recovery may be possible if, because of carelessness, the fire damage was exacerbated or fire was able to spread to property that might not have been damaged. In such situations, the original cause of the fire is not at issue. Rather, the issue is why the damage was enhanced and/or why the fire was able to spread, increasing the severity and extent of the fire damage.

In order to succeed in a damage enhancement/fire spread case, a plaintiff will need to prove the following:

1. **Defect:** There was a defective system or condition with respect to the building materials or design, fire detection or prevention systems, or fire suppression efforts.
2. **Causation:** The extent/severity of the fire damage was exacerbated by the defect or unsafe condition. This can be established, for example, by proving that if the defect had not existed, the fire would have been detected, contained or extinguished sooner.

3. **Damages:** Damages must be shown to be quantifiably more severe than if the defect had not allowed the fire to spread. Qualified damages experts, working in conjunction with a fire modeling experts, frequently, are essential in fire spread cases in order to demonstrate the value, in dollars, of the extent to which the fire damage occurred by virtue of the spread means.

In such cases, liability may rest with a variety of third parties, including contractors, consultants, municipal building inspectors, building departments and fire departments, among others. Consider the following questions:

- **Was the building designed and constructed in accordance with applicable fire code requirements?**

Many building codes require passive fire protection features, such as fire walls, that prevent the spread of fires, and compartmentalization which is designed to contain a fire. Even where a building has been constructed in accordance with an applicable fire code, there may have been subsequent changes in the use of the building, or additions or retrofits that could have contributed to the fire spread. Among the matters to be investigated are the possible additions of wires, pipes or other utilities following the building's initial construction. Such “improvements” may have left gaps or openings that allowed a fire to spread.

- **Did the fire suppression systems, fire alarms, smoke detectors and security systems function as intended?**

Regardless of whether a fire's origin and cause is ascertainable, it is essential for the investigator to carefully inspect all aspects of the structure's fire protection features in order to evaluate whether they performed as intended. Specifically, an investigator must consider whether (1) the systems' specifications, design,

installation and maintenance was appropriate for the existing use, and (2) dangerous conditions (such as a high fuel load) existed that could have enhanced the extent of the fire's and resulting damage. In many instances, we have found that a building's original fire suppression systems were inadequate in respect to the building's later, more volatile, uses.

At the same time, it is critical in such situations to immediately obtain copies of alarm reports, video footage and the like. These systems typically contain critical information that may be overwritten within a short period of time following a fire.

- **Did the fire department respond in a timely manner and take appropriate measures to put out the fire?**

In certain Canadian provinces (as will be discussed below) municipalities can be held liable for the negligence of their fire departments. In evaluating municipal negligence, courts in those provinces have held that residents can reasonably expect a high level of service, consistent with the resources the community has made available for fire protection. These resources include the quality and amount of equipment, the number of staff, and the quality of their training. Moreover, while constituents obviously cannot expect perfection from their municipal service providers, they are entitled to expect that members of their fire department will do the best job they can with the resources available. Hence, if there had been a long delay in the time it took a fire department to respond to a fire, or if the fire department's efforts to extinguish the fire fell below reasonable standards, it may be possible to hold the municipality responsible, as illustrated by the following case from British Columbia:

Bayus v. Coquitlam (City), [1993] BCJ No. 1751 (B.C.S.C.)

The plaintiffs were tenants in a duplex. They discovered a fire in the carport of their unit and called 911, however a direct 911 connection to emergency services was not available. The plaintiffs then dialed the operator and asked to be connected to the fire department, but gave an incomplete address that caused some confusion about which municipality the property was located in. This led to a 25 minute delay before the fire department was actually notified of the fire.

The fire department was eventually dispatched, but the maps available to the dispatcher and the fire department were out of date and did not indicate that the duplex was on a dead-end street. As a result, the fire department arrived three to four minutes later than it should have; approximately nine minutes elapsed between the time of the fire department's initial notification and the time when water was first applied to the fire. Expert evidence demonstrated that a proper response time would have been five minutes.

The court held the fire department owed a duty of care to the plaintiffs that included maintaining accurate maps, ensuring firefighters were knowledgeable of the area, and maintaining technical standards of firefighting.

Notwithstanding the initial 25 minute delay before the fire department was dispatched to the fire was the fault of the plaintiffs, and even though the delay in getting effective water on the fire was only four minutes, the court held the delay came at a very critical time when the fire was spreading rapidly. Had the firefighters commenced putting water on the fire four minutes earlier, there would have been "somewhat less" damage. The court found that 15 percent of the damage was attributable to the fire department's delay.

As detailed below, some, but not all, provinces permit such lawsuits against fire departments:

In **British Columbia, Ontario, the Northwest Territories and Nunavut**, there are no statutory prohibitions against suing municipalities for the negligence of their fire departments, although individual firefighters and volunteer firefighters have certain statutory protections from liability.

In **Manitoba**, in considering whether the action or inaction of municipal fire department amounts to negligence, a court is expressly required by statute to consider "all relevant factors" that might reasonably have affected the ability of the municipality to provide the fire protection services, including but not limited to (a) the population density of the municipality; (b) geographic limitations to the provision of the service; (c) whether the service provided is volunteer or partly volunteer; (d) the amount of the total municipal assessment against which taxes may be imposed; and (e) any other criteria specified by the minister by regulation.

Conversely, in **Alberta, Saskatchewan** and **New Brunswick**, municipalities have statutory immunity for loss, injury or damage caused by the action or inaction of their fire departments so long as they were acting in **good faith**.

In **Nova Scotia, Newfoundland** and **Labrador**, fire departments, emergency service providers and their municipalities are granted immunity from an act or omission in providing, or failing to provide, emergency services unless they are **grossly negligent**.

Strict notice requirements and short limitation periods also may be applicable, so quick action is imperative. For example, in Quebec, notice of a potential claim against a municipality must be provided within 15 days, and the claim is subject to a limitation period of only six months.

“Bailment”: If the claim is for fire damage to the insured’s goods/equipment, was it damaged while in the possession of a third party?

If property was damaged while in the possession of someone other than the insured, there may be a **bailment in place**. A “bailment” is a legal relationship that arises when a person, the “bailee” agrees to hold property belonging to another, the “bailor”, for a certain period of time and then return the property to the owner once that time has elapsed.). When a person accepts payment for holding another’s property, they are held to a higher standard of care than a “gratuitous bailee” who holds property for another without benefit. A bailee who accepts payment is required to take the same care of the property in his or her possession as would a reasonable and prudent owner and will be responsible for any damage to the property caused by his or her negligence. Still, a bailee is not an insurer of property in his/her possession.

The existence of a bailor-bailee arrangement could have a dramatic impact on a subrogation claim, particularly when it comes to the burden of proof. In a typical negligence action, the plaintiff must prove on a balance of probabilities that the defendant was negligent. Conversely, where there has been a bailment, the burden of proof shifts to the defendant, who must demonstrate that the fire was not caused by his/her own negligence – a difficult proposition if the cause of the fire cannot be determined. In most provinces, if a defendant cannot demonstrate that his/her negligence did not cause the fire, he/she may be held liable for the full amount of damages.

CONCLUSION

A fire loss can present excellent recovery opportunities even where the fire’s cause is unknown. With persistence and creativity, a subrogation professional can turn a questionable recovery claim into a significant settlement. Moreover, in bailment situations, and contrary to intuition, a fire with an unknown cause can actually work to a plaintiff’s strategic advantage.

Equally critical to recovery prospects, subrogation professionals always must keep in mind that fire losses typically involve limited timeframes in which to obtain and assemble critical evidence and place potentially culpable on notice. As such, the prompt retention of qualified subrogation counsel can be crucial to the investigation and, ultimately recovery. These cases give credence to the old adage that he/she who hesitates is lost. And so too may your subrogation recovery prospects.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Pamela D. Pengelley at ppengelley@cozen.com or 416.361.3200.