Where There’s Smoke, There are Two Claims - and One May Be Against You!

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The Facts

Just after midnight on January 18, 1994, when W and her husband were getting ready to go to bed, they discovered a fire in the addition to their house that they had purchased 9 years earlier. They and their daughter, who had also been upstairs, fled the house wearing only their pajamas. It was -18 degrees Celsius. Mr. W gave his slippers to his daughter to go for help and suffered serious frostbite to his feet for which he was hospitalized. He was thereafter confined to a wheelchair for a period of time.

The fire totally destroyed the W’s home and its contents, including their few valuable antiques, many items of sentimental value, and their three cats.

The origin of the fire was never discovered. The first persons to investigate the fire were the fire chief and firefighters called to the scene. The firefighters saw no evidence of arson and therefore they did not request the Fire Marshal’s office to investigate.
The Facts (continued)

- The insurer retained an experienced independent insurance adjuster, F, to investigate the loss. He inspected the site and interviewed the Ws, who freely acknowledged that they had both been unemployed and had financial difficulties.

- F determined that although the Ws’ mortgage payments were in arrears, refinancing was being arranged.

- The Insurer requested the Insurance Crime Prevention Bureau, a body set up by the insurance industry, to review the analysis of insurer’s investigator. By letter dated February 25, 1994, the Bureau reported that “we wouldn’t have a leg to stand on as far as declining the claim”.

- F noted that upon seeing the Ws unannounced and unexpected at the scene of the fire he found them sorting through the debris “trying to salvage anything that might have been left as a result of the fire”. He observed Mrs. W cleaning a small porcelain figure “with her fingers in an obvious attempt to salvage this item”.
The Facts (continued)

- The insurer’s expert, C, then received a letter dated May 4, 1994, from insurer’s trial counsel, which adverted to the arson theory: “One wonders whether the Ws, even if they did not set the fire, sat back and allowed it to achieve a level that was convenient to them. We need to be on top of this matter and to do it quickly. The other side has retained a lawyer and they are making noises of bad faith. The matter has to be revisited in its entirety, stripped down to the bare facts and rebuilt.”

- F was fired from the file. Later, the insurer’s new adjuster met with C, who persuaded C to have the fire reclassified as “suspicious, possibly incendiary”.

- At the time the insurer’s reporting letter concluded: “The bottom line is that we have moved considerably with the upcoming engineer’s report towards successfully denying this claim. We still need more evidence, but we moved significantly in the right direction on June 7th.”

- The Ws were allegedly involved in two previous fires. The first fire occurred in a cottage owned by the Ws’ son-in-law but rented out to a Mrs. T. The second fire was in another house previously occupied by Mrs. T.
The legal test

- There is an onus on the insurer to establish that defence on a balance of probabilities with cogent evidence that the fire was of incendiary origin, the insured had a sufficient motive to destroy his own property, and there was an opportunity available for the insured to do so.

- A party can still establish these allegations by introducing circumstantial evidence. Motive and opportunity to set the fire are obviously paramount in situations where no direct evidence exists as to who actually set the fire. Thus arson for profit is a classic type of fraud case, where circumstantial evidence, and therefore red flags, are going to be important.

- Circumstantial evidence which may serve to brand an insured as an arsonist falls into four categories:
  (i) evidence relating to the fire's nature and cause;
  (ii) motive;
  (iii) opportunity; and,
  (iv) credibility of the insured's version of events
Tunnel Vision

- insurer deliberately ignored the opinion and recommendations of F, an experienced adjuster it retained to investigate the fire loss. After receiving F’s strong recommendation to pay the claim, insurer replaced him.

- insurer never provided F’s reports to the experts that it later retained.

- insurer asked the Insurance Crime Prevention Bureau to investigate, but when the Bureau concluded that insurer had no defence to the claim, insurer ignored the Bureau’s conclusion.

- insurer deliberately ignored the opinion of its engineering expert C, who gave three reports that the fire was accidental; and then insurer refused to meet with C when he expressed concern that his opinion was being misunderstood.

- insurer admitted that the jury could reasonably infer that C’s later opinion reclassifying the fire as “suspicious, possibly incendiary,” was influenced by insurer’s legal counsel.
Tunnel Vision

- Insurer pressured its experts to provide opinions supporting an arson defence. Indeed, insurer deliberately withheld relevant information from its experts and, instead, provided them with misleading information to obtain opinions favourable to its arson theory.

- Insurer even admitted that the jury could reasonably conclude the two later expert opinions supporting an arson defence were influenced by insurer’s counsel.

- Insurer accepted as justified the trial judge’s comment that insurer’s counsel acted improperly in suggesting opinions to experts whose livelihood was earned by providing services exclusively to the insurance industry.

- Insurer used the bad faith claim against the Whitens to refer to evidence of previous fires — evidence it later conceded was irrelevant and inadmissible --- in order to convince the Whitens’ counsel that a trial was risky.

- At every stage insurer considered that it could safely deny the claim because the Ws would not refuse an offer in the future.

- When the Ws had lost everything in the fire and when they were unemployed and on welfare, insurer terminated the rent payments on their rented cottage. It did so without telling them before getting the evidence of experts that supported such actions, and which actions suggested not only a premature conclusion to the investigation but a certain vindictiveness, personal animus, or bias in the process.
Funnel Vision

- Weigh Red Flags and Green lights

- Rather than decide what happened and then seek to add red flags and eliminate green lights from your report
GREEN LIGHTS

- In the house, suffered serious personal injuries
- The fire destroyed their few valuable antiques and many items of sentimental value and their three cats.
- The firefighters saw no evidence of arson and therefore they did not request the Fire Marshal’s office to investigate.
- The Ws’ mortgage payments were being re-financed
- The Insurer requested the Insurance Crime Prevention Bureau, a body set up by the insurance industry, to review the analysis of insurer’s investigator. By letter dated February 25, 1994, the Bureau reported that “we wouldn’t have a leg to stand on as far as declining the claim”.
- Mrs. W cleaning a small porcelain figure “with her fingers in an obvious attempt to salvage this item”.

mcmillan
RED FLAGS

- The fire totally destroyed the Ws’ home and its contents.
- The origin of the fire was never discovered.
- The Ws were both been unemployed and had financial difficulties.
- The Ws mortgage payments were in arrears.
- The Ws were allegedly involved in 2 previous fires:
  1. in a cottage owed by Ws’ son-in-law, but rented to Mrs. T; and,
  2. in another house occupied by Mrs. T at the time.
Red flags of bad faith

- The insurer’s expert, C, then received a letter dated May 4, 1994 from insurer’s trial counsel, which adverted to the arson theory: “*One wonders whether the Whitens, even if they did not set the fire, sat back and allowed it to achieve a level that was convenient to them. We need to be on top of this matter and to do it quickly. The other side has retained a lawyer and they are making noises of bad faith. The matter has to be revisited in its entirety, stripped down to the bare facts and rebuilt.*”

- F was fired from the file, Later, the insurer’s s new adjuster met with Carter, who persuaded C to have the fire reclassified as “*suspicious, possibly incendiary*”.

- At the time the insurer’s reporting letter concluded: “*The bottom line is that we have moved considerably with the upcoming engineer’s report towards successfully denying this claim. We still need more evidence, but we moved significantly in the right direction on June 7th.*”
(a) The fire was of an incendiary origin

- The problem in the area has been the result of accepted myths in the field which have later been proven scientifically unsound. The so-called “heat triangle” of heat, oxygen, and fuel often results in a fire starting at a single location, and then expanding as the heat rises, leading experienced investigators to locate the start of the fire at a single burn location at the bottom of the “V”. Where fire spreads, sparks may fall down and create several points of ignition which obscure the original source. Further, “flashover” may result in an accidental fire burning the ceiling and walls first, resulting in pattern on the floor of a room that mimics several sources of ignition, one of the indicia of a set fire in so called “burn pattern analysis”. The National Academy of Sciences reported that most of so-called “cause and origin” testimony was flawed:

- “[M]uch more research is needed on the natural variability of burn patterns and damage characteristics and how they are affected by the presence of various accelerants. Despite the paucity of research, some arson investigators continue to make determinations about whether a particular fire was set. However … many of the rules of thumb that are typically assumed to indicate that an accelerant was used… have been shown not to be true. Experiments should be designed to put arson investigation on a more scientific footing”.
(b) That the plaintiff had sufficient motive

- In arson cases, as in others, the forensic accountant may be accused of being biased because of reports by one of the other experts in the case, or by the client.

- For example, the accountant may be told that the fire investigation has already concluded it was arson, and therefore all that is needed is proof of a profit motive--- the arson expert may be told that the profit motive has already been confirmed by the forensic accountant, and all that is needed is confirmation of deliberate fire setting.

- Such cross-contamination of expertise has been known to affect experts in other fields, who are more likely to find the “desired” matches or conclusions if they are told about confessions, polygraph results, or other expert’s findings. This is called “biasing” by “contextual factors,” being sources of information that are independent of the evidence itself.
(c) That the plaintiff had an opportunity to commit arson

- It is not necessary to prove exclusive opportunity to start the fire to establish a successful arson defence, where there is other inculpatory evidence linking the insured to the arson.

- The proper inquiry should be whether, on all of the evidence inculpatory of the insured, including motive and opportunity, the insurer has proven the defence of arson according to the standard of proof appropriate to the establishment of that defence in a civil case. Something less than "exclusive opportunity" will suffice if there is other evidence that is sufficiently cogent to meet the standard of proof.

- There must be evidence on all elements that will meet the standard of proof when looked at as a whole. Some factors to be considered in this case are: security of the premises, consideration of possible suspects, familiarity with the premises and techniques for committing this particular form of arson, and alibi evidence. The evidence may implicate the plaintiff as the arsonist, or that he was complicit with a named or unknown arsonist, for this criteria to be satisfied. The plaintiff or an accomplice had motive or opportunity is only as probative as that motive or opportunity is exclusive to them ---- if they are merely two of a cast of thousands with motive and opportunity, it is hardly probative at all.
RED FLAGS
Bad Faith By Insurer

- wait extended period of time to deny claim after fire was determined incendiary by insurer;
- no written reason for claim being denied in the denial letter;
- investigation was not conclusive or complete;
- insurer not produce strong, credible, admissible evidence that could prove insured started the fire;
- insurer took adversarial position to the insured at the outset;
- insurer hired expert after denial letter was sent out; and
- denied coverage first and sought to justify their decision later.
RED FLAGS
Bad Faith By Investigator

- co-insured’s claim was handled arbitrarily and classed the same as the primary insured-no separate analysis;
- no motive identified;
- formed opinion too soon; and
- opinion was intuitive, rather than on relevant literature and admissible evidence.
<table>
<thead>
<tr>
<th>Ambiguity effect</th>
<th>Anchoring</th>
<th>Attentional Bias</th>
<th>Availability heuristic</th>
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<tr>
<td>The tendency to over-emphasize the reliability of evidence to create false certainty e.g. witness who supports hasty conclusion is credible, and the one who does not support it is “unreliable”.</td>
<td>The tendency to rely too heavily, or &quot;anchor,&quot; on a past opinion in the face of new evidence (also called &quot;insufficient adjustment&quot;). Weighing all incoming evidence against the evidence already weighed, instead of leaving the weighing of evidence to the end of the process.</td>
<td>The tendency of emotionally dominant stimuli in one's environment to preferentially draw and hold attention and to neglect relevant data when making judgments of a correlation or association e.g. to give undue weight to red flags like impoverishment as a motive, and then focussing on that factor.</td>
<td>Estimating what is more likely by what is more available relying on the low hanging fruit rather than all of the evidence - including evidence procured during the litigation process.</td>
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## Litmus tests for bad faith

<table>
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<tr>
<th>Bias Type</th>
<th>Description</th>
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<td><strong>Confirmation bias</strong></td>
<td>the tendency to search for, or interpret, information in a way that confirms one's preconceptions.</td>
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<td><strong>Conservatism (Bayesian)</strong></td>
<td>the tendency to belief update insufficiently as a result of new evidence (estimates of conditional probabilities are conservative)— the discounting of evidence provided after one has reached a conclusion (the investigation is NEVER ending)</td>
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<td><strong>Contrast effect</strong></td>
<td>the enhancement or diminishing of a weight or other measurement when compared with a recently observed contrasting object</td>
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<td><strong>Curse of knowledge</strong></td>
<td>when knowledge of a topic diminishes one's ability to think about it from a less-informed perspective. To a carpenter every protrusion is a nail in need of a hammer— to every arson investigator, every case becomes an arson case.</td>
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<td><strong>Expectation bias</strong></td>
<td>the tendency for experimenters to believe, certify, and publish data that agree with their expectations for the outcome of an experiment, and to disbelieve, discard, or downgrade the corresponding weightings for data that appear to conflict with those expectations.</td>
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<td><strong>Framing effect / Presentation bias</strong></td>
<td>using the order and emphasis in the presentation of evidence in order for the recipient to draw the “right” conclusion from the evidence.</td>
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Investigator as Lie Detector (anchoring effect)

Fraud Indicating Behaviours System (FIBS)

- How reliable is the technique?
- How qualified are you in the technique?
FIBS-Forensic Psychology for Dummies

- **Reaction**—What is the claimant’s reaction to the event?
- How emotional was his reaction?
- Does his reaction seem unusual?
- Did he carry out his own investigation?
FIBS-What sort of details does the claimant give about the event?

- Are there gaps in the time of his account?
- Does he put the event in context?
- Is irrelevant information offered?
- Does his account have an obvious chronological sequence?
- Is there possible corroboration?
FIBS-Style-How does the Claimant communicate the information?

- Does he avoid answering?
- Are his answers consistent?
- Are his answers hesitant?
- How co-operative is he?
- How inquisitive is he about what he’s being asked?
- Does he spontaneously correct what he’s saying?
How much of your investigation is science, and how much pseudo-science and hunch?

- Peer review?
- Supported by the literature?
- Supported by the forensic tests acknowledged by the courts?
- Why didn’t you photograph or audio/videotape?
- How much do we have to trust YOU?