

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: EVIDENCE DID NOT ESTABLISH ARSON ON A BALANCE OF PROBABILITIES

Insurance law – Property insurance – Arson; Evidence; Damages – Punitive damages – Mental distress

[Roy v. TD Home and Auto Insurance Co.](#)

The insureds successfully sued for indemnity after the insurer had denied liability on the basis of arson. While the evidence raised a real and viable concern about exclusive opportunity, the preponderance of the evidence did not establish arson on a balance of probabilities.

[2016] M.J. No. 3

2016 MBQB 9

Manitoba Court of Queen's Bench

January 8, 2016

K.I. Simonsen J.

The insureds' home was completely destroyed in a fire. The insureds subsequently brought an action for indemnity, punitive and mental distress damages after the insurer had denied liability on the basis of arson. According to the insured, an alarm woke them in the middle of the night. The insured went to investigate when a dark figure ran by them and out of the house. It was then discovered that three fires had been set in the basement of the home. The insureds were unable to extinguish the fires and the home was lost.

The insureds signed a non-waiver agreement and an authorization for an investigation of their financial records. The financial investigation revealed that one of the insureds had previously been suspended from the practice of law and declared bankruptcy. The other insured owned the home and a vacation home, mortgage free.

The insureds' evidence was that the home was locked and secure, except for a kitchen window that they believed was shut, but could only be fully locked with great difficulty. The screen to the window had been cut and the insureds believed that the intruder had entered through the window. Both the insureds and the insurer retained mechanical engineers to opine as to whether the window could have been opened from the outside. There were no visible signs of forced entry at the window.

The ultimate issue for the court was whether all of the evidence established arson on a balance of probabilities, with the chief inquiries being motive, opportunity and the credibility of the insureds. The court found that the evidence of motive was thin. As a couple, the insureds were in good financial health, the proof of loss exceeded the policy limits, and the fire had been set on a night where their son had been staying in the house. With respect to opportunity, the court found that there was no question, based on the expert evidence, that the gear mechanism would allow the window to be opened from the outside. However, the court was not completely satisfied that it would have been impossible to access the home from the outside. Demonstrations during the trial had shown that someone could have manipulated the gear mechanism from the outside. In regards to credibility, the court generally found the insureds to be frank and genuine. Ultimately, while the very limited opportunity for access to the house was reason for careful scrutiny, the court was satisfied that the test for arson had not been met.

The insureds' claim for punitive damages was denied on the basis that the evidence raised a real and viable concern about exclusive opportunity. The court also denied the claim for mental distress damages for breach of a peace of mind agreement as no medical evidence had been presented with respect to their emotional and psychological well-being.

This case was digested by [Michael J. Robinson](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at mrobinson@harpergrey.com or review his biography at <http://www.harpergrey.com>.