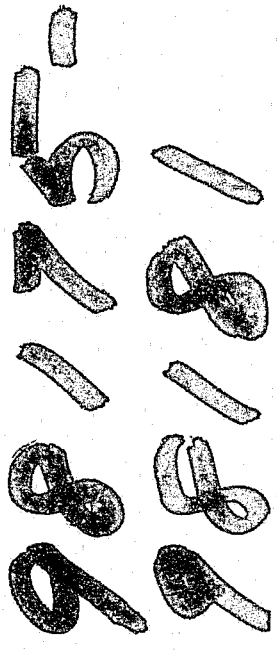
NEIGHBORHOOD BASED ARSON CONTROL:

Collected Papers

BATTELLE
Human Affairs Research Centers
Washington, D.C.

with the

Citizens Committe for Fire Protection
Washington, D.C.



June 1985

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NEIGHBORHOOD BASED ARSON CONTROL: COLLECTED PAPERS

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CHAPTER I

RESEARCH ON LEGAL AND ADMINISTRATIVE REMEDIES, AND INFORMATION DISSEMINATION NATIONAL CONFERENCES

I. INTRODUCTION

This report covers two arson prevention and control research projects funded through Ford Foundation grants to the Battelle Human Affairs Research Centers. The two efforts covered the period January 1984 through June 1985. Major research and technical assistance contributions were made by the Citizen's Committee for Fire Protection, a national advocacy organization headquartered in Washington, D.C.; and by two staff members of the Massachusetts Attorney General's Office, Joseph Murphy and Michael Friedland.

The material that follows addresses legal remedies that can be invoked in both pre- and post-fire situations by citizens acting as private parties, as well as by public officials acting in innovative ways to promote public safety. Papers contained in this collection also address the possibilities for self-representation by citizens in a number of administrative and regulatory proceedings, when legal assistance may either be unavailable or not required due to the informality of the proceedings in such forums as housing courts.

The value of the remedies covered by these two Battelle arson control projects lies in their preventive potential--they are designed to be invoked to ensure that intentionally set fires do not occur in the buildings in question. The range of pre- and post-fire remedies which were studied in an earlier Battelle project was broadened substantially in the latter two projects. Specifically, the list of remedies was expanded

by adding pre-fire actions, such as injunctions for so-called "nuisance suits." Nuisance remedies have been used traditionally to abate a variety of non-fire health and safety hazards, and have rarely been applied to the problems of fire and arson. This aspect of the research also explored strategies that community-based organizations might employ to encourage public officials, such as prosecutors and housing court judges, to select creative options with their broad discretionary powers in equity and other proceedings.

Project staff also explored the possibilities of community-based organizations working with public agencies, such as local prosecutors' offices, to encourage the use of injunctive powers in moving against hazardous pre-fire building conditions. The Citizens Committee for Fire Protection, serving as a project consultant, analyzed applications of nuisance law to neighborhood wide conditions that appear to be suitable for local prosecutor intervention. According to project findings, prosecutors should be able to obtain injunctions in certain nuisance-type situations where neighborhood wide (rather than individual building) hazards can be documented.

Overall, broader use of the prosecutor's power to bring civil actions against fire prone nuisances, coupled with citizen-initiated nuisance actions involving individual buildings, expands the deterrent and preventive impacts of remedies available in early stages of building disinvestment. Although project research stopped at the point of affirming the potential application of these remedies to fire and arson situations, it is clear that greater use of these remedies should prove

effective in stabilizing neighborhood housing conditions. Because these remedies are most appropriate in pre-fire situations, they offer hope that hazardous fire prone comditions can be abated before isolated "warning fires" have increased to the point where arson control becomes a goal that is more difficult, if not impossible, to achieve.

III. PROJECT DISSEMINATION CONFERENCES: 1984 and 1985

The research objective of the 1984 project was to identify and, where possible, expand the number of legal remedies suitable for use in pre-fire arson prevention situations, and to set forth strategies for employing them effectively. In order to determine whether the remedies and legal approaches would, in fact, be useful in practical situations that face community groups every day, the project sponsored a two day information exchange and technical assistance conference in Providence, Rhode Island, on April 18-19, 1984. The affair was hosted by the Providence housing group Stop Wasting Abandoned Property, also known as "SWAP".

The conference was held principally to share the results of project research with representatives of community-based arson control and legal advocacy organizations. In addition to the groups that had participated in the first project conference, which was held at Wave Hill in New York City in 1983, representatives from six Providence area organizations joined the other participants. Participants also attended from a number of anti-arson community organizations in Boston, New York, and other East Coast and Midwestern localities.

Project staff and consultants presented papers on their work and findings, and engaged the audience in a discussion of the usefulness of each strategy for the participating community and legal advocacy organizations. The discussion and consultant papers prepared for that conference are contained in the following collection.

At the Providence conference, Battelle staff and consultants focused heavily on identifying building and neighborhood disinvestment scenarios where each remedy might be most effective. The purpose of this approach was to encourage the development of legal precedents in demonstration situations--through legal actions--so that other community groups interested in employing each remedy could learn from the experience of the initiating organization. Unfortunately, the period of 1984 project activity did not provide ample time for follow-up analysis of these contemplated legal actions. However, it is anticipated that further developments will be reported on in a future project phase.

The 1985 project resulted in a series of four policy conferences which were held at the Washington Office of Battelle. Each conference dealt with a specific set of issues in the identification and dissemination of key issues in arson prevention and control. The goal of this series of conferences was to substantially expand the number of national research and membershnip organizations involved in arson control, and to use the findings from recent projects, sponsored by the Ford Foundation and other sources, to enhance the issue of arson control with respect to the agendas of each participating organization. The proceeding on March 22 dealth with arson control concerns of national neighborhood organizations,

including location of anti-arson funding. The March 28 conference addressed the state-of-the-art of arson prediction systems. That proceeding was coupled with one on March 29, dealing with intervention remedies based in large e part, on the intervention systems. Finally, Battelle sponsored a conference on April 3 to identify remaining research, technical assistance, and other needs so that they might be submitted to both interested national organizations and funding sources. The inventory of issues discussed on April 3 is being issued by Battelle as a separate publication.

IV. OVERVIEW OF PROJECT REPORTS AND CONSULTANTS PAPERS

Materials prepared during the 1984 and 1985 phases of the project consist of policy papers and technical assistance guides, as discussed above. The contents of the materials, which follow this section, may be summarized as follows:

- Civil Liability for Arson Fires, by Arthur Delibert, President, Citizens Committee for Fire Protection

  This overview summarizes, in non-legal language, the technical isues contained in the ""Suing Landlords" and "Nuisance Law" papers.

- Civil Liability for Arson Fires: The Case Against the Landlords, by Arthur Delibert.

  This report covers applications of tort law in post-fire situations where owners can be liable for allowing building conditions to deteriorate to hazardous levels.

- Using Nuisance Law to Control Arson-Prone Buildings, by Arthur Delibert.

  This report distinguishes between public and private nuisances, and covers the potential applications of injunctive actions under both types of suits in local courts.

- Developing Witness Skills in Arson Control Litigation, by Michael Friedland and Joseph Murphy, Commonwealth of Massachusetts, Department of the Attorney General

  This report addresses need for private citizens, who are representing themselves in arson control litigation and administrative actions, to develop expertise in preparing presentations. This approach is geared to formal proceedings in such bodies as housing courts and licensing bodies, where it is essential that citizens convince judges and other officials of the arson-prone situation in question.

- Negotiating Information Exchange Agreements with Insurance Companies, prepared with the assistance of Ron Hine, Flatbush Development Corporation

  This guide shows how one community-based arson control program successfully entered into an agreement with a major insurance company to exchange pertinent information on building and ownership conditions related to arson prevention. The formal protocal which resulted from this effort followed the requirements of the New York State insurance immunity law.

- Community Group Assistance to Criminal Investigations, by Joseph Murphy and Michael Friedland

  This paper discusses the critical role that community organizations can play in gathering, analyzing, and communicating arson information for use in criminal actions.

- Bibliography of Technical Assistance Materials, compiled by Clifford Karchmer, Battelle Memorial Institute

  Publications contained on this list reflect recent advances in arson prediction, prevention, and post-fire control remedies, and can be obtained easily from the publishing organization.

CHAPTER II

CIVIL LIABILITY FOR ARSON FIRES:
A PRIMER FOR COMMUNITY ACTIVISTS

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CIVIL LIABILITY FOR ARSON FIRES:

A Primer for Community Activists

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March 1985

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I. INTRODUCTION

This paper outlines legal strategies that inner-city residents can use to curtail the epidemic of arson ravaging their neighborhoods. We will show that slumlords can be held responsible for many arsons and other fires, even where it cannot be shown that they started the fire or hired someone else to start it.

Anti-arson activists have known for some years that most arson-prone buildings share certain characteristics. Many are vacant, dilapidated, and unsealed against intruders; others are partially occupied, but again are poorly secured and run-down.

These conditions make a serious fire almost inevitable. In some cases, the conditions point to a deliberate scheme of disinvestment, the final step of which is to burn the building to collect the insurance. In other cases, a landlord is harrassing tenants because he or she wants the building vacant. If conventional means don't work, this owner may turn to arson.

In still other cases, these conditions lead to "arson by neglect." Derelicts and junkies frequent the building and light fires to cook or keep warm. Children looking for excitement view the building as a place where no one cares what happens. Electrical and heating systems deteriorate, and remaining tenants begin using dangerous portable heaters.

The point is that because these conditions make a serious fire inevitable, and because a serious fire threatens the entire neighborhood, it is <u>negligence</u> for an owner to maintain a building in this condition, and the building itself is a <u>public and private nuisance</u>.

Using the recognized legal theories of negligence and nuisance, neighbors and tenants of the building, and in some cases community groups, can seek a court order directing the owner to correct the dangerous conditions, and can obtain a monetary award against the owner for the damage this eyesore has caused the neighborhood. After a serious fire, neighbors and tenants who suffered damages can also obtain a monetary award against the owner. And they may be entitled to substantial punitive damages, above and beyond their actual losses.

We emphasize at the outset that these lawsuits represent only one element in a wide range of strategies that community groups must have available to approach the problem of arson-prone buildings.

Many owners are well-meaning individuals caught in a web of economic circumstance. They will respond positively to a cooperative approach, and that is always to be preferred to a lawsuit.

Experience has shown, however, that some building owners care little for their tenants or the neighborhood. They will engage in negligent and even criminal behavior in their pursuit of profit. Furthermore, the old adage that "bad money drives out good" applies to inner-city real estate. Because the ruthless owners can make a substantial profit running a building into the ground, they may buy out or drive out the well-meaning ones.

The lawsuits described here are a useful means to curtail these activities, and to announce that the community has set a minimum standard of acceptable conduct by landlords.

II. NEGLIGENCE

In Ford v. Jeffries, 379 A.2d 111 (Pa. 1977), the Pennsylvania Supreme Court held that the owner of a run-down, vacant building was liable to his neighbor for losses caused when the vacant building burned and the fire damaged the neighbor's house. The Court said it was negligence to maintain a dilapidated vacant building, unsealed against intruders, because the condition of the building greatly increased the danger of a fire.

Ford provides a basis for holding property owners responsible for the natural consequences of neglect and disinvestment. There was no proof in the case that the owner had set the fire or hired someone else to set it. The owner's liability is based solely on the condition of the building before the fire and the common recognition of the dangers it presented.

The Ford case reflects a long-standing rule of law: A property owner is liable for damage caused to a neighbor by a fire starting on the owner's land, if the owner's negligence contributed to the start or spread of the fire. This rule can be found in the case law of almost every state, although only a few states have modern cases involving vacant, inner-city buildings. More typically, the principles are stated in turn-of-the-century cases involving a railroad's failure to clear brush from the right-of-way. Sparks from a passing locomotive set fire to the brush, and the fire spread to a neighbor's barn or farmhouse.

The Ford case is a milestone because it applies these ancient rules to the modern problem of vacant buildings in an urban setting, and provides legal recognition of the dangers inherent in these buildings. This section explores the potential for wider application of these rules to inner-city fire problems.

Elements of a Negligence Case

In order to recover for damage caused by another person's negligence, a plaintiff must prove four elements: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant violated that duty; (3) that plaintiff suffered damages; and (4) that the defendant's violation of his or her duty was the proximate cause of the damage.

Duty of Care

A variety of factors determine the defendant's duty of care in any given situation: Statutes and case law; public policy considerations; foreseeability of injury to another person; and the ease or difficulty of complying with the duty. The overwhelming weight of these factors proves that owners of vacant buildings violate a duty of care to their neighbors when they allow their buildings to fall into disrepair and leave them open to intruders.

Statutes: Violation of a statute or ordinance constitutes evidence of negligence if the plaintiff is within the zone of interests the legislature intended the statute to protect. In Fireman's Fund Insurance Co. v. Aalco Wrecking Co., 466 F.2d 179 (8th Cir. 1972), the court held that neighbors are clearly within the zone of interests of statutes enacted to protect against the danger of major fires.

Several urban jurisdictions have statutes or ordinances regulating the danger of vacant buildings. The New York City Administrative Code declares that "any vacant building not continuously guarded or not sealed and kept secure against unauthorized entry * * * shall be deemed dangerous and unsafe as a fire hazard." The courts have noted that the duty to secure or remove the offending building rests primarily on the owner, even where a statute also grants to the city the power to act.

Foreseeability and Case Law: Even without any statutory provision, it is foreseeable that an unsealed vacant building is a fire hazard. This is a matter of common experience, and is also supported by the fire statistics of many cities. In Dayton, Ohio, for example, it

was found that although only two percent of the buildings were vacant, they accounted for 20 percent of the city's fires and 30 percent of the serious fires.

Court cases from several states also describe the fire hazard created by vacant buildings. In Ford v. Jeffries, the Court held that a property owner can reasonably be expected to know "that the visible conditions of vacant property in a state of disrepair may attract * * * children or adults, who, having entered the property, might act, either negligently or intentionally, in a manner that would cause a fire." Such properties, the Court said, "are more likely to be targets for arsonists than are properties maintained in good repair."

In Aetna Insurance v. 3 Oaks Wrecking and Lumber Co., 382 NE2d 283 (Ill.App. 1978), the court held that the danger of fire in an unsealed building undergoing demolition was foreseeable. In this case, there was testimony that the wrecking company knew that the neighborhood was near a railroad yard and thus frequented by vagrants, who entered vacant buildings to sleep, smoke and cook. As an experienced wrecking company, they also knew that scavengers entered buildings under demolition to remove copper pipes and wiring. Under such circumstances, the court found that a fire was more than "a remote possibility," and that leaving the building unsecured when work was not in progress created an unreasonable risk of harm.

In Levy-Zentner Co. v. Southern Pacific Transportation Co., 142 Cal.Rptr. 1 (Dist.Ct.App. 1977), the court found that a railroad was negligent when it ignored evidence of itinerant activity around and under a wooden warehouse in its yards, and a fire resulted. In this case, the railroad's own rules pointed to the danger and instructed employees to follow up evidence of itinerant activity "to prevent fires being built in hazardous locations."

Each of these cases could be said to deal with some special situation that made intrusion and vandalism likely. In Ford, the building was in a visible state of disrepair, which might suggest to potential intruders that no one inspected the premises or cared what occurred there. In 3 Oaks and Levy-Zentner, the areas were known to be frequented by itinerants, and there was evidence of their presence before the fires occurred.

It would be a mistake, however, to interpret these cases so narrowly. There is no inner-city neighborhood today that is immune to vagrants and vandals. Most of our major cities now harbor

significant populations of homeless people. Many of these people either cannot find or do not want publicly provided shelter. They will naturally seek out vacant buildings, where they will be living, cooking, smoking, and attempting to keep warm under makeshift and hazardous conditions.

Furthermore, buildings under demolition are not the only targets of scavengers. Many vacant buildings in New York City, for example, bear the scars of amateur efforts to remove electric wiring and plumbing fixtures. In fact, it is often theorized that many vacant building fires are deliberately set by scavengers, who believe it will be easier to find and remove pipes and wiring once the building has been damaged by fire.

Further evidence that vacant buildings create a recognized fire hazard emerges from laws authorizing a city or state to act against such buildings. A Pennsylvania statute authorizes removal or repair of structures in "a dilapidated condition" or "a state of disrepair," as these may constitute a "fire menace" to neighboring property. Since these statutes merely authorize action by a public entity, it cannot be said that the owner violates them. But they provide a clear statement that the law recognizes the danger created by these buildings.

Public Policy Considerations: Several strong considerations of public policy also support the conclusion that it is negligence for an owner not to secure a vacant building against the danger of fire. First, there is a public policy that serviceable housing units be preserved. The New York City Housing Maintenance Code, for example, states that sound enforcement of minimum housing standards is essential "to preserve decent housing [and] to prevent adequate or salvageable housing from deteriorating to the point where it can no longer be reclaimed."

There is also a strong public policy in favor a preventing and containing fire. Fire hazards are public nuisances, subject to court orders that they be remedied or removed. Many pages of the statute books address the dangers of fire, and property owners may be put to considerable expense to remedy such dangers.

Burden of Compliance: The ease or difficulty of a defendant changing his or her behavior is also relevant to the question of whether he or she is acting negligently. The defendant's strongest argument on the burden of sealing vacant buildings against intruders would no doubt be that it is not customary in the real estate industry to seal them, at least in many neighborhoods.

The courts have addressed this argument in a variety of other fields, and have held that while the custom of an industry is relevant to the question of a defendant's duty of care, it is not decisive. Where the custom of an entire industry is dangerous, the jury is justified in finding that it does not meet the standards of due care. An industry cannot establish for itself a standard of care that falls short of what society expects and public safety requires.

The defendant may also argue that he or she did secure the building, but the seal was subsequently broken. In Beauchamp v. New York City Housing Authority, 240 NYS2d 15 (1963), the Court held that the duty to seal vacant buildings, at least as expressed in New York law, was not absolute.

It is unlikely, though, that defendant will have done enough. Beauchamp held that the duty to provide security was fulfilled where the doors and windows had been adequately secured to prevent access, and reasonable inspections were made to insure the maintenance of security. In many cities, none but the best owners are meeting this standard.

In short, the overwhelming weight of the factors indicates that property owners violate their duty of care to their neighbors when they maintain a vacant building in a dilapidated condition, unprotected from intruders.

Proximate Cause

In order to win a negligence case, plaintiff must prove not only that defendant acted negligently, but also that this negligence was a proximate cause of the plaintiff's injuries. The notion of proximate cause is often complex. For our purposes, it may be said to mean that the injury was a natural and probable consequence of the negligence; that the chain of causation between the negligence and the injury was not broken by any intervening, independent events which the defendant could not reasonably have anticipated; and that the injury was not too remote in time and place from the negligence.

It is here that negligent owners may feel they have their strongest defense. They argue that since the building was vacant, the fire must have been caused by the negligent or criminal act of an intruder. This act, they claim, intervened and broke the chain of causation between the defendant's negligence in leaving the building open, and the harm that ultimately befell the plaintiff.

Defendants routinely lose this argument in vacant building fire cases. It is a common principle of law that a person is not expected to foresee that another person will act in a negligent or criminal fashion. But the argument fails where the defendant's negligence consists precisely of his failure to guard against another person's likely misconduct.

In the vacant building fire situation, the defendant's negligence lay in maintaining the structure in a condition likely to attract itinerants, children, and arsonists. Once this negligent conduct is established, he or she can no longer claim an inability to foresee their presence or their misconduct.

Much of the rest of the concept of proximate cause is subsumed in the issue of whether the injury was a reasonably foreseeable consequence of the negligence. This question has been considered above, in connection with defendant's duty, and will not be discussed again here.

Thus, the plaintiff has established the necessary elements of the negligence case. The defendant breached a duty of care that he or she owed the plaintiff, and that breach was the proximate cause of the plaintiff's injuries.

Occupied and Partially Occupied Buildings

Fires set in occupied and partially occupied buildings present an extreme threat to life. Much of what has been said above about vacant buildings applies as well to these structures. Unfortunately, the application of negligence principles to these fires is often more difficult than with vacant building fires, although it is possible in particular situations.

A landlord owes a duty to tenants to exercise reasonable care against foreseeable dangers, at least with respect to that portion of the building that remains under his or her control. This principle suggests two possible ways to hold a landlord responsible for a fire in an occupied or partly occupied building.

First, in neighborhoods where crime is a foreseeable occurrence, an owner has a duty to provide reasonable security in the form of operating door locks and other devices. If it can be shown that building security was poor, that the landlord knew or should have known of the problem, and that a fire was set by an intruder, the landlord may be held liable for injury and damage to tenants.

Note that in these cases, it is generally necessary to prove the cause of the fire. In a vacant building case, most of the normal causes of residential fires are not present, and the court can easily accept that an intruder caused the fire. But when the building is at least partially occupied, it is necessary to show that an intruder caused the fire.

The owner may also be liable to tenants if his or her negligence contributed to the spread of the fire within the building, regardless of why the fire started. It has been held that the hazards of fire are a matter of common knowledge. Thus, the landlord must exercise reasonable care with respect to the potential for spread of fire, even if the plaintiff cannot point to any specific source of ignition that should have concerned the landlord.

Many of the precautions necessary to curtail the rapid growth of fire in an occupied building are specified by statutes and ordinances. These enactments place specific duties upon the owners for the benefit of the tenants. Violation is thus negligence per se -- that is, the court will regard it as negligence without any further proof of surrounding factors and circumstances.

A growing number of cases focus on the landlord's failure to provide smoke detectors. Most of these have resulted in out-of-court settlements, so they have no value as precedent for future cases. But the size of the settlements strongly suggests that the landlords' attorneys were quite uneasy about defending these cases. Cases have been brought both where the law required installation of detectors and where it did not.

Finally, a jury in New Britain, Connecticut, recently found a landlord guilty of criminally negligent homicide because he had failed to install smoke detectors as the law required, and a fire killed three tenants.

This case is a landmark because the jury apparently accepted the causal connection between the failure to provide smoke detectors and the deaths of the tenants. Previous manslaughter convictions related to fire deaths have been limited to situations in which the landlord's negligence caused the fire or clearly prevented the occupants' escape, as where the exits were illegally barred.

III. NUISANCE

The ancient common law of nuisance provides a second approach to the problem of vacant building fires. In fact, the nuisance doctrine offers a better chance to proceed against the owners of these buildings before a serious fire occurs.

There are two distinct types of nuisance. A public nuisance is an unreasonable interference with a right common to the general public. A private nuisance is an unreasonable interference with the use or enjoyment of private property. A particular activity or condition may also be a "mixed nuisance," that is, actionable under either theory.

Public Nuisance

To prove that a dilapidated vacant building constitutes a public nuisance, the plaintiff has to articulate a right common to the general public, and show that the defendant's actions constitute an unreasonable interference with that right.

The public has a right to be free of the danger of a conflagration. This right is reflected in numerous statutes and public actions. Most major cities, for example, guard against conflagration by establishing a "fire zone" in densely populated areas, where all building exteriors must be of brick or stone. The width of many public streets and the capacity of the water systems were also established with the danger of conflagration in mind.

The reasons for such expensive precautions are abundantly clear. Conflagrations cause widespread and unpredictable destruction, threaten death and serious injury, and disrupt homes, jobs, and neighborhoods. These fires place an extreme burden on the fire service, endangering other neighborhoods. They also burden the water service, public housing, sanitation, and welfare services.

We assume that the danger of a conflagration exists in a city whenever fire takes complete control of a substantial building. Such fires deposit sparks and flaming brands over a wide area. Radiated heat from the structure may set fire to buildings across the street, while heat radiated from the plume of smoke and hot gases can ignite rooftops a block away.

Vacant buildings present this danger of a major fire. For all the reasons discussed in the previous section, there is a vastly greater danger that fire will begin in a vacant building than in an occupied one.

Once a fire begins in a vacant building, there is also a greater chance it will grow to major proportions. In fact, since many of these fires are the result of arson, and since the common motive for arson is destruction of property, the arsonist may take steps to ensure a large fire. And whatever the cause, a fire in a vacant building usually will not be reported as early as would a fire in an occupied structure.

Furthermore, as vacant buildings fall into disrepair, the structural elements that normally contain a fire may deteriorate. Plaster breaks down, exposing wooden structural elements and hidden pathways of fire spread. Holes appear between floors, promoting rapid vertical fire spread. Party walls between adjoining buildings may deteriorate to the point they are no longer effective at containing the horizontal spread of the fire.

In short, the maintenance of an unsealed vacant building in a state of disrepair interferes with the public's right to be free of the danger of a major fire or conflagration.

Unreasonableness: Once it has been shown that the defendant's conduct interferes with a right common to the general public, the plaintiff still must prove that the interference is unreasonable. This is determined by weighing the gravity of the harm against the social utility of the defendant's conduct.

We have noted above the extreme seriousness of the harm threatened by a major fire hazard. Furthermore, the harm is essentially permanent. No amount of money damages will restore the vitality of a fire-gutted neighborhood, or revitalize its businesses and community institutions.

On the opposite side of the balance is the social utility of abandoning a building. While the owners of these buildings might advance various economic arguments to justify their actions, this activity has no value to society as a whole.

An important factor in determining the reasonableness of a particular activity is the character of the neighborhood. A noisy factory, for example, would be a nuisance in a quiet residential neighborhood, but not a nuisance in an area of similar industries.

The owner of a hazardous vacant building might advance this argument in a nuisance case by pointing out that a large number of other buildings in the neighborhood are equally vacant and dangerous. This argument should not prevail. Courts look at the character of a neighborhood in nuisance cases because they recognize that there

must be places in which offensive, but socially useful, activities can be carried out. It perverts this doctrine to use it as a justification for activities that have no social utility whatever.

Another factor is whether the offensive conduct or condition is prohibited by statute or ordinance. We have noted earlier that ordinances in several areas declare vacant buildings unlawful when they are left open to intruders.

Thus, a derelict building is a public nuisance because it clearly presents an unreasonable interference with the public's right to be free of the dangers of conflagration.

Private Nuisance

A substantial fire hazard is also a private nuisance to those who live in the zone of immediate danger. A private nuisance is a non-trespassory invasion of another person's interest in the use or enjoyment of property. To establish the defendant's liability for a private nuisance, plaintiff must show that the invasion is either intentional and unreasonable; or unintentional but otherwise actionable under the principles governing negligent, reckless or ultrahazardous conduct.

The invasion of the neighbors' interest caused by the abandonment of a building or the maintenance of a vacant building open to intruders is intentional. The law regards an invasion as intentional if the actor knows that it is resulting or is substantially certain to result from his or her conduct. The terrible experience of many urban areas in the past 20 years with fires beginning in vacant structures has become a matter of widespread public knowledge. It is certainly well known to the owners of derelict buildings; in fact, their observation that this phenomenon is occurring in the neighborhood may be a major factor encouraging them to abandon their buildings in the first place.

The plaintiff must also establish that the invasion of his or her interest is unreasonable. The analysis of this question is the same as that used above to show that a public nuisance is unreasonable.

As an alternative to the above approach, the plaintiff may show that the invasion is unintenticnal, but actionable under the legal principles governing negligent, reckless, or ultrahazardous conduct. The negligence of leaving a vacant building open to intruders has already been discussed in Section II.

Finally, it should be emphasized that although we have concentrated here on the fire hazard of derelict buildings, there are other grounds on which such structures can be ruled a public or private nuisance. They may be so dilapidated as to endanger passers-by. They may provide a breeding ground for rats or vermin, or they may be a haven for undesireables and a focal point for criminal activity.

The plaintiff should allege as many of these factors as may appear in a given situation. They all tend to show the extreme unreasonableness of the defendant's conduct.

IV. DAMAGES, COURT ORDERS, AND STANDING TO SUE

Any person who suffers foreseeable injury or damage may bring a case based on negligence. A private nuisance action can be brought by anyone injured in the use or enjoyment of a property right. In either case, the plaintiff may seek compensation for actual losses, consequential damages (i.e., medical or moving expenses), pain and suffering, and punitive damages.

The plaintiff in a nuisance case may also obtain a court order directing the defendant to remedy the nuisance. This is very important in vacant building cases because it allows the plaintiff to force corrective action before a major fire occurs. Violation of the court order constitutes contempt of court, subjecting the defendant to a potential fine and/or jail sentence.

Public nuisance is a bit more complicated. Public nuisance is a crime, subject to prosecution by the district attorney. The district attorney and, in some cases, the municipality may also seek a court order that the nuisance be corrected. In many jurisdictions, the law also allows the municipality to take direct action against the nuisance -- as by tearing down or sealing a vacant building -- and to bill the owner for the costs.

The law limits the number of private individuals who can sue for public nuisance. This is said to be an effort to protect the defendant from potentially unlimited liability, since public nuisance is the violation of a right common to everyone.

A private individual can sue for public nuisance only if he or she can prove "special damages" -- that is, an injury different in kind from that suffered by the public at large. Courts and

commentators are often careful to note that injuries which are merely different in degree from those suffered by the general public are not sufficient to allege special damages.

With respect to the threat of a major fire, the courts do not seem to have ruled whether a next-door neighbor to the dangerous building suffers a risk that is different in kind or merely different in degree from that suffered by the rest of the city. Recalling that a conflagration causes both physical destruction and a vast burden on public services, it might be argued that those who live in the shadow of almost certain physical destruction suffer a different kind of injury than the public at large.

This problem disappears when a fire actually occurs. The law is clear that those who suffer physical damage from a public nuisance have sustained "special damages" sufficient to bring a case.

The problem may also be eliminated by statute. In Rhode Island, the law allows "any citizen" to bring an action to abate a nuisance. (The statute does not authorize an action for damages, however.) In Illinois, a statute permits any owner or tenant of property within 400 yards of a building maintained in substantial violation of the building codes to bring an action to restrain, correct or abate the violation.

Punitive Damages: Plaintiffs' lawyers should give careful attention to the prospect of punitive damages in derelict building fire cases. Punitive damages are a monetary award to the plaintiff, above and beyond his or her actual injury, intended to punish the defendant for extreme misconduct and dissuade others who might be inclined to act in a similar fashion.

Courts may award punitive damages where the defendant's conduct is intentional and outrageous. There is little doubt that the action of many building owners in walking away from inner-city buildings or leaving them open to intruders is indeed intentional. It is also outrageous in the sense that it is totally lacking in societal justification.

A court may also be persuaded to extract punitive damages by a showing that the defendant's conduct represents a growing problem with dire social consequences if it is not stopped. The epidemic of building abandonment seems an ideal topic for such a showing.

Community Group Standing to Sue: Many more significant cases could be brought in the areas of housing, fire prevention, and community preservation if community groups could sue on behalf of

their members. Successful groups are often aggressive and ready to challenge the most brutal or indifferent property owners. They are reasonably well funded, or at least could gain access to adequate funds if they faced an important legal struggle.

There is a reasonable chance that the courts will allow community group standing to sue in at least some nuisance cases. Group standing, however, raises significant legal problems. The group and its members are separate "persons" in the eyes of the law. Consequently, to allow community group standing is to allow one person to assert the claims or rights of another, and this is rarely permitted.

When an organization seeks to sue solely or primarily as a representative of its members, the courts look to a variety of factors to determine the propriety of such a suit: Will organizational standing reduce the likelihood a multiple suits by individual members of the group? Will the pooling of resources allow a more thorough presentation of the issues? Does the organization truly represent the community or the interests it seeks to represent? Is the alleged injury common to the members, or is it highly individualized?

Very important for our purposes is the fact that several courts have allowed representational standing in zoning cases. These courts recognize that community organizations typically do represent the broad interests of the residents in these matters; and that the impact on the community of a new development or a new land use may be considerably more important in the aggregate than it is to any one individual.

The zoning cases are important because zoning is essentially a legislative effort to deal with a number of issues that used to be dealt with piecemeal through nuisance cases, i.e., the compatibility of different activities and forms of land use. These cases thus provide an important indication that the courts would grant organizational standing in a nuisance case also.

Even so, it is important to realize certain limitations to the organization's case. The courts are far more willing to allow group standing in injunctive cases than they are in cases seeking monetary damages, since it is much clearer in the injunctive cases that the relief requested would benefit the community at large.

There are other means by which a community group might obtain standing to sue. The Rhode Island statute, mentioned above, which

authorizes "any citizen" to bring a case to abate a nuisance presumably would allow a corporation to bring such a case. Again, note that the action is for a court order, not for damages.

Some courts have allowed representational standing when the individual members of the group have good reason to be afraid to sue in their own names. This approach could be important in light of recent revelations that some landlords are renting apartments to drug dealers as a way to force legitimate tenants out of the building. Tenants who complain of this practice are subjected to violence and intimidation. Once again, however, this would be most useful in obtaining an injunction; it would be difficult for tenants to obtain damages without individuals coming forward to testify to their particular injuries or losses.

One should not underestimate these cases simply because they are limited to injunctions. Once the case is filed, the owner must be very careful that a fire does not occur in the building, lest he prove the case against himself. And if the building suffers a major fire at any time after the court rules it a nuisance, tenants and neighbors who suffer damages will have a very easy case, at least in some states. In New York and several other jurisdictions, the injured parties can file an action in which they take advantage of the ruling in the earlier case, even if they were not parties to it. In other words, they go into court already armed with a finding that the building was a nuisance and need only prove their damages in order to collect. One suspects that in a case like that, the court would also be very generous with punitive damages.

CHAPTER III

CIVIL LIABILITY FOR ARSON FIRES:

THE CASE AGAINST THE OWNERS

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"Civil Liability for Arson Fires: The Case Against the Owners"

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Executive Summary

This paper explores the civil liability of building owners for fires that begin on their property and ultimately cause injury or damage to other people. It focuses initially on fires that begin in the run-down, vacant buildings that are now so common in inner-city neighborhoods. It then applies the principles developed to the problem of fires in occupied and partially occupied buildings.

Our most important finding is that a fire victim can often sue a building owner successfully even though the cause of the fire is not known with precision. In fact, the case can be brought even where the fire is known to have been set by an intruder who has no connection to the owner.

This finding has enormous practical significance for the urban fire problem. Many of the fires that plague inner-city neighborhoods nowadays start in vacant or partially occupied buildings that are poorly secured, and then spread to neighboring buildings. When vacant buildings suffer serious fires, it is rarely possible to determine the cause beyond the assumption that it likely involved intruders: arsonists, vandals, itinerants or mischievous children.

Under the legal theories developed in this paper, the owner could be liable for the damage caused by such a fire, even though he has no direct connection with the person who started it. It is enough that the owner left the building vacant and not properly sealed against intruders, substantially increasing the likelihood of a fire. That alone constitutes actionable negligence.

With regard to proximate cause, the paper explores whether the courts are likely to regard the act of the intruder in setting the fire, as a "superceding cause." If so, the building owner would not be liable for the damage caused by the fire. We find that the courts are not likely to hold that the intruder's actions are a superceding cause, since they are a foreseeable consequence of the owner's negligence in leaving the building unsecured.

We also explore the potential for overturning New York's "one-building rule." Under this rule, an owner is liable for damages if a fire that begins on his property due to his negligence spreads directly to another person's property; but when the fire spreads from the second property to a third or fourth, he is not liable for the damage to the subsequent properties. We believe the rationale underlying this rule is outdated, and the prospects for overturning it are good.

From the fire victim's perspective, of course, the approaches outlined here have one significant drawback: They come into play only after the fire. The damage has already been done, and even a generous monetary judgment will not fully compensate for the anguish, disruption and personal injury caused by the fire. Nor does compensation to individuals repair the damage that serious fires do to the fabric of neighborhoods.

Nevertheless, these cases will greatly reduce the chance that others will suffer such losses in the future. If fire victims begin to display an awareness of their legal rights and a willingness to use them, then a landlord's careless abandonment of a building or disregard of the fire laws will become a very costly proposition. When that happens, even the most callous owners will be encouraged to change their ways.

CIVIL LIABILITY FOR ARSON FIRES: THE CASE AGAINST THE OWNERS

Arthur Delibert*

Introduction

American cities today are gripped by an epidemic of housing abandonment, disinvestment, and arson. In the past two decades, fire has destroyed uncounted thousands of dwelling units and ruined whole neighborhoods.

Thousands of residents, both tenants and property owners, have suffered terribly from this epidemic. Fire-related injury and death are not uncommon in these neighborhoods. Many who can least afford it have lost their homes and belongings, often more than once.

The law of negligence has played a relatively small role in the fight to stop this problem. This is surprising. The common law is quite flexible, and many times in the past it has adapted to meet new and severe social situations.

In fact, negligence law holds great promise for meeting the inner-city fire epidemic. The conditions that breed fires often develop because they are profitable for someone. In the case of inner-city building fires, that person is usually the owner. But if the victims of these fires can threaten the owner with loss of his profits and more, then he will change his methods of business. Negligence law empowers the victims to raise such a threat.

This paper outlines the legal arguments that could be used to affix the owner's responsibility in a very common urban fire situation: The fire begins in a vacant building, which was not sealed or guarded against intruders. It spreads and causes injury and property damage to neighbors. The cause of the fire cannot be determined precisely; or, alternatively, arson is suspected or even proven, but there is no proof that the owner played any role in setting the fire.

The owner can be held liable for the damage caused by this fire. His negligence consists of maintaining a vacant building open to intruders, since he has thereby created a situation in which a serious fire is foreseeable, in fact, almost inevitable.

The paper then applies the principles developed to other common inner-city arson problems, notably fires in occupied and partially occupied residential buildings. Again, there is often a strong basis for holding the owner liable for damages in a civil suit.

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Negligence Law and Fires, Generally

It has long been the law that a property owner is liable for damage caused to a neighbor by a fire starting on the owner's land, if the owner's negligence contributed to the start or spread of the fire.1/ It is important to emphasize here that some negligent act or omission by the owner (or his agents) must be found or implied. His liability does not spring from the simple fact that there was a fire, nor that it began on his property.2/

In a few states, this principle of an owner's liability has already been applied to modern cases involving arson and vacant, inner-city buildings.3/ In other states, such as New York, the principle is clear enough,4/ but there are no significant modern cases that apply it. In these states, the law has developed very little beyond the turn-of-the-century cases in which railroads were held responsible because sparks from a passing locomotive ignited brush which they had negligently allowed to accumulate by the tracks, and the resulting fire destroyed a neighbor's buildings.5/

Nevertheless, the law of New York does contain all of the principles on which a modern case could be built. In order to recover for damage caused by another person's negligence, a plaintiff must prove that the defendant violated a duty he owed to the plaintiff, and that this violation, this negligence, was the proximate cause of the injury plaintiff suffered.6/ We analyze below the law as to both negligence and proximate cause involving fires originating in vacant buildings.

1/ Van Fleet v. N.Y.,C.& H.R.R.Co., 7 NYS 636 (Superior Ct. of Buffalo 1889).

2/ O'Brien Bros. v. City of New York, 36 F.2d 102 (E.D.N.Y. 1928), affd. per curiam, 36 F.2d 103 (2d Cir. 1929).

3/ Ford v. Jeffries, 379 A.2d 111 (Pa. 1977).

4/ Van Fleet, above.

5/ See, e.g., O'Neill v. N.Y.,O.& W. Ry.Co., 22 NE 217 (NY 1889).

6/ DeSessa v. City of White Plains, 219 NYS2d 190 (Sup. Ct. 1961).

Negligent Maintenance of a Vacant Building

It is negligence to maintain a vacant building unsealed and unguarded. Such buildings are, in and of themselves, fire hazards, because they are far more likely than other buildings to attract strangers who may cause a fire, either negligently or deliberately. This conclusion is supported by statute, case law, public policy and common experience.

Statutes: The New York City Administrative Code provides that "any vacant building not continuously guarded or not sealed and kept secure against unauthorized entry * * * shall be deemed dangerous and unsafe as a fire hazard * * * ." 7/ The same Section of the Code directs that "any structure * * * that * * * may at any time become dangerous or unsafe, structurally or as a fire hazard, * * * shall be taken down and removed or made safe and secure."

Violation of a statute or odinance, depending on its terms, may be either negligence per se or mere evidence of negligence.8/ If the enactment creates a new and specific duty that did not exist at common law, and if that duty is for the benefit of a defined group rather than for the public at large, violation is negligence per se;9/ otherwise, violation is only evidence of negligence. Violation of the same statute may be evidence of negligence in one situation and negligence per se in another.10/ In either event, plaintiff must show that he is within the zone of interests the Legislature intended the statute to protect.11/

7/ Administrative Code of the City of New York, Section C26-80.0.

8/ Schmidt v. Merchants Despatch Transp. Co., 200 NE 824 (NY 1936). Negligence per se means that the defendant's conduct is considered negligent without any argument or proof of surrounding circumstances, either because it violates a clear statutory command or because it is so bad that it would be unacceptable under any circumstances. A plaintiff who establishes negligence per se must still prove that the negligent act was the proximate cause of his injuries.

9/ Beauchamp v. New York City Housing Authority, 240 NYS2d 15 (1963).

10/ Chotapeg v. Bullowa, 50 NE2d 548 (NY 1943).

11/ DiCaprio v. N.Y.C.R.Co., 131 NE 746 (NY 1921).

Violation of Administrative Code Section C26-80.0 by failing to seal or remove a vacant building is at least evidence of negligence.12/ The duty to secure or remove the offending structure rests primarily upon the owner, although the Code also assigns to the City the power and the duty to take these steps.13/ Neighbors are clearly within the protected zone of statutes and ordinances enacted to protect against fire.14/

In the case of a vacant building fire, violation of Section C26-80.0 may also constitute negligence per se, although the argument would go against some existing precedent. This Section seems to create a new liability. Although fire hazards may have been recognized as nuisances at common law,15/ for which there would be liability, there seem to be no cases pre-dating this Section which declare vacant, unsealed buildings to be fire hazards.

Futhermore, this Section, as it relates to the fire hazard of a vacant building, does protect a particular group of people to a far greater degree than it protects the public at large. The specially protected group of people are those who live adjacent to the vacant building. They are the ones most likely to suffer harm from a fire in the vacant building that spreads to other premises.

In Beauchamp, the Court of Appeals held that violation of Section C26-193.0 (the predecessor to Section C26-80.0) was mere evidence of negligence. Beauchamp is distinguishable, though, because it deals with an injury caused by a structural problem rather than by a fire hazard. With respect to structural problems, the Section creates a duty to the public at large, rather than to a special group, since anyone might enter a vacant building.

12/ Beauchamp, above, discussing the predecessor Section C26-193.0.

13/ See Mazelis v. Wallerstein, 378 NYS2d 750 (App. Div. 1976) (City was liable to fireman injured in collapse of a building that should have been removed pursuant to this Section; but City was entitled to full indemnification from owner, as his negligence was the basic cause of the injuries sustained).

14/ Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179, 183 (8th Cir. 1972), cert. denied, 410 U.S. 930 (1973).

15/ County of San Diego v. Carlstrom, 16 Cal. Rptr. 667 (Dist. Ct. App. 1961).

In Raylite Electric Corp. v. City of New York,16/ the court applied Beauchamp in the context of a fire and held that violation of Section C26-80.0 does not result in liability per se. The court does not seem to have considered this application in any depth, however, as there were numerous other defects in the plaintiff's case.17/ Specifically, there is no indication the court considered any of the arguments outlined here. The Court of Appeals' affirmance is quite brief, and likewise gives no indication of the arguments considered.

Foreseeability and Case Law: Even without any statutory provision, it is reasonably foreseeable that an unsealed vacant building is a fire hazard. The fire records of New York and many other cities could yield up thousands of cases each year proving that this is true. These fires occur in structures lacking electric and gas service, domestic heat, and the normal activities of legal occupants. In other words, the fires almost always result from the negligent or malicious acts of intruders (assuming, of course, that the owner had no direct role).

Cases from states other than New York set forth clearly the fire hazard created by vacant buildings. In Ford v. Jeffries, the Pennsylvania Supreme Court held that a property owner can reasonably be expected to know "that the visible conditions of vacant property in a state of disrepair may attract * * * children or adults, who, having entered the property, might act, either negligently or intentionally, in a manner that would cause a fire."18/ Such properties, the Court said, "are more likely to be targets for arsonists than are properties maintained in good repair."19/

The Court buttressed its conclusion with reference to a statutory provision authorizing removal or repair of structures in "a dilapidated condition" or "a state of disrepair," as these may constitute a "fire menace" to neighboring property.20/

16/ 289 NYS2d 673 (App. Div. 1968), affirmed, 300 NYS2d 574 (1969).

17/ In fact, plaintiff and defendant were suing each other, each claiming the fire had begun on the other's property. See 269 NYS2d 926.

18/ 379 A.2d 111, 113 (Pa. 1977). See also Torrack v. Corpamerica, 144 A.2d 703 (Superior Ct. of Del. 1958).

19/ Ford at 113.

20/ Ford at 114.

In Aetna Insurance v. 3 Oaks Wrecking and Lumber Co.,21/ the court held that the danger of fire in an unsealed building undergoing demolition was foreseeable. In this case, there was testimony that the wrecking company knew that the neighborhood was near a railroad yard and thus frequented by vagrants, who entered vacant buildings to sleep, smoke and cook. As an experienced wrecking company, they also knew that scavengers entered buildings under demolition to remove copper pipes and wire. Under such circumstances, the court found that a fire was more than "a remote possibility," and that leaving the building unsecured when work was not in progress created an unreasonable risk of harm.22/

In Levy-Zentner Co. v. Southern Pacific Transportation Co.,23/ the court found that a railroad was negligent when it ignored evidence of itinerant activity around and under a wooden warehouse in its yards, and a fire resulted. In this case, the railroad's own rules pointed to the danger and instructed employees to follow up evidence of itinerant activity "to prevent fires being built in hazardous locations."24/

Each of these cases could be said to deal with some special situation that made intrusion and vandalism likely. In Ford, the building was in a visible state of disrepair, which might suggest to potential intruders that no one inspected the premises or cared what occurred there. In 3 Oaks and Levy-Zentner, the areas were known to be frequented by itinerants, and there was evidence of their presence before the fires occurred.

It would be a mistake, however, to interpret these cases so narrowly. There is no inner-city neighborhood today that is immune to vagrants and vandals. Most of our major cities now harbor significant populations of homeless people.25/ Many of these people either cannot find or do not want publicly provided

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21/ 382 NE2d 283 (Ill. App. 1978).

22/ Id. at 287.

23/ 142 Cal. Rptr. 1 (Dist. Ct. App. 1977).

24/ The court's dismay with the railroad was increased by the fact that, despite ample evidence of danger, the chain of authority within the corporation for addressing the danger was never clarified.

25/ See Peterson, "Warm Season Masks But Doesn't End Problem of the Homeless," New York Times, June 3, 1983, p. A-16.

shelter.26/ They will naturally seek out vacant buildings, where they will be living, cooking, smoking and attempting to keep warm under makeshift and hazardous conditions.

Furthermore, buildings under demolition are not the only targets of scavengers. Many vacant buildings in New York City bear the scars of amateur efforts to remove electric wiring and plumbing fixtures. In fact, it is often theorized that many vacant building fires are deliberately set by scavengers, who believe it will be easier to find and remove pipes and wiring once the building has been damaged by fire.

Public Policy Considerations: Several strong considerations of public policy support the conclusion that it is negligence for an owner not to secure a vacant building against the danger of fire.27/

First, there is a public policy that serviceable housing units be preserved. The New York City Housing Maintenance Code 28/ states that sound enforcement of minimum housing standards is essential "to preserve decent housing [and] to prevent adequate or salvageable housing from deteriorating to the point where it can no longer be reclaimed."29/

Several provisions of State and City law provide for non-payment of rent in cases of egregious and continuing violations of the Housing Codes;30/ or for payment of rent to a receiver who is authorized to use the money for repairs.31/ The purpose of these statutes is "to restore the property to habitable

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26/ See Field, "City Denies Crisis of Homelessness," Washington Post, Dec. 30, 1982, p. B-5.

27/ Public policy considerations are an important factor in determining whether defendant owed a duty to the plaintiff. Donohue v. Copaigue U. Free Sch. District, 407 NYS2d 874 (App.Div.1978), affirmed, 418 NYS2d 375 (1979).

28/ Administrative Code, Section D26-1.01 et seq.

29/ Id. at D26-1.03.

30/ Real Property Actions and Proceedings Law, Section 755; Multiple Dwelling Law, Section 302, Subd. 1(a).

31/ RPAPL, Section 769 et seq.; Multiple Dwelling Law, Section 309; New York City Administrative Code, Article 55.

conditions."32/ In several cases, courts given a choice between ordering that a declining building be vacated or appointing a receiver to maintain and improve it, have chosen the latter on the grounds that the housing laws favor preservation.33/

In one such case, the court noted that the block on which the subject building was located did not yet have any abandoned buildings, and the neighborhood as a whole had very few. "It would be most unwise and inappropriate for this court itself to take a step which might initiate such a trend [toward abandonment]."34/

There is also a strong public policy in favor of preventing and containing fire. Fire hazards are public nuisances,35/ subject to court orders that they be remedied or removed. Many pages of the statute books address the dangers of fire, and property owners may be put to considerable expense to remedy such dangers.36/ Indeed, the public policy on fire is so strong that it is one of the very few areas in which the government actually maintains squads of men and women constantly at the ready, just in case there is an incident.

It bears emphasis here that the plaintiff can bring this negligence case even if he cannot specify the precise cause of the fire. In 3-Oaks and Levy-Zentner, the courts relied on circumstantial evidence as to the cause of the fire. They noted that there was evidence of prior access by itinerants to the area where the fire started, and evidence that the area was equally accessible on the day of the fire. From this, a jury could reasonably conclude that intinerants started the fires in question.

32/ 176 E. 123 Street Corp. v. Frangen, 323 NYS2d 737 (NY Civ.Ct. 1971); Torres v. Ragonesi, 370 NYS2d 779 (NY Civ. Ct. 1975).

33/ Torres, above; Amanuensis, Ltd. v. Brown, 318 NYS2d 11 (NY Civ. Ct. 1971).

34/ Torres, at 782.

35/ County of San Diego v. Carlstrom, above.

36/ McCallin v. Walsh, 407 NYS2d 852 (App. Div. 1978), affirmed without opinion, 413 NYS2d 922 (1978) (Law that requires extensive and costly improvements in fire-safety of high-rise buildings held a reasonable exercise of the police power and therefore constitutional).

In Ford, the court simply declined to speculate on the cause. Instead, they relied on the legal principle that when the defendant creates a situation in which a certain kind of harm to others is likely (e.g., a fire hazard), the defendant is liable if the harm occurs, even if it does not occur in exactly the manner one would have expected.

Meeting the Likely Defenses

A variety of defenses are likely in the case of a landlord's negligence for leaving a vacant building unsealed and unguarded. By and large, these are straightforward and easily dealt with.

Lack of Duty: The defendant may argue that he is under no duty to guard or seal the vacant building. To sustain this argument, he would have to prevail on the issue of whether violation of the New York City Administrative Code provisions on sealing vacant buildings is negligence per se or merely evidence of negligence (addressed above). He would also have to make a credible argument that either the injury is not reasonably foreseeable or the burden of sealing buildings is too great.37/

The defendant's strongest argument on the burden of sealing buildings would no doubt be that it is not customary in the New York real estate industry to seal vacant structures, at least in many neighborhoods.38/ Even a cursory tour of many city neighborhoods confirms this fact.

Although custom is relevant, it is not decisive. Where the custom of an entire industry is dangerous, the jury is justified in finding that it does not meet the standard of due care. An industry cannot establish for itself a standard of care that falls short of what society expects and public safety requires.39/

37/ The ease or difficulty of defendant changing his behavior is relevant to the question of whether or not he acted negligently. Galanis v. Mercury Int'l Insurance Underwriters, 55 Cal.Rptr. 890 (Dist.Ct.App. 1967).

38/ Evidence of custom or general usage is admissible in certain cases to establish a standard of care. Colon v. Bridge Plaza Rental Corp., 360 NYS2d 896 (App. Div. 1974).

39/ Marsh Wood Products Co. v. Babcock & Wilcox Co., 240 NW 392 (Wisc. 1932); The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

Defendant complied with duty: Alternatively, the defendant may argue that he took certain steps to secure the building, and thereby fulfilled his duty to the neighbors. In Beauchamp v. New York City Housing Authority, the Court held that the duty to seal vacant buildings is not absolute.40/

It is unlikely, though, that defendant will have done enough. Beauchamp holds that the duty to provide security is fulfilled if the doors and windows have been adequately secured to prevent access, and reasonable inspections made to insure the maintenance of security.41/ In many city neighborhoods, none but the best owners of vacant buildings are meeting this standard.

It is also possible that with respect to security, the courts are more lenient toward the Housing Authority than they would be toward a private owner. The Authority's holdings are vast, and many of its holdings are essentially unsolicited charity cases. The court may thus feel that no useful purpose would be served by applying a very high standard to the Housing Authority. But with private owners, many of whom have been quite lax about security, the courts may feel no such hesitation.

Comparative negligence: The defendant may argue that the plaintiff contributed to his own injury by living next door to a vacant and dilapidated structure which, he should have realized, was a fire hazard; and that the award of damages should be reduced accordingly.42/

The general rule is that a plaintiff is not contributorily negligent merely because he continues to live near a fire

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40/ 240 NYS2d at 22.

41/ Ibid.

42/ In many states, a plaintiff is barred from recovery if his own negligence contributed substantially to his injury. However, a growing number of states, including New York, now apply the concept of comparative negligence. Where the plaintiff is partly responsible, his award is reduced by the proportion that his culpable conduct bears to the total culpable conduct. CPLR Section 1411. The cases on contributory negligence are still relevant, as they illustrate the sort of conduct on plaintiff's part that is considered culpable.

hazard.43/ This is true even where the plaintiff clearly knows of the hazard.44/

There is divided authority over whether a plaintiff is contributorily negligent when he fails to maintain a safe condition on his own land. The U.S. Supreme Court has held it was not contributorily negligent for a landowner to store combustible flax alongside a railroad track.45/ But the Tennessee Supreme Court has found contributory negligence where a plaintiff was aware that an adjoining railroad had allowed brush to accumulate along the right-of-way, and yet plaintiff allowed brush also to accumulate on his own property.46/ The court found the plaintiff guilty of "identical, mutual, concurring and contemporaneous negligence."

These two cases can be reconciled by noting that in Leroy Fibre, the plaintiff's conduct in storing flax was incidental to a normal and profitable use of its land. But in Nashville, C.& St.L.R., the plaintiff's conduct in allowing brush to accumulate was probably the result of mere neglect. Thus, there was a public policy to be served in encouraging one and discouraging the other.

In the modern situation, it seems very unlikely that a plaintiff would be held contributorily negligent for living near a vacant and unsealed structure. Plaintiff is making an ordinary and normal use of his property, and one that is to be encouraged. Holding otherwise would have disastrous results. It would suggest that when one vacant, unsealed building appears, adjoining owners and tenants should bail out as quickly as

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43/ See Atlas Assurance v. State, 229 P.2d 13 (Cal.Dist.Ct.App. 1951). " * * * a landowner may make any lawful use of his land and * * * it is not contributory negligence to neglect to take precautions to avoid future injury which can only occur as the result of another's negligence." Id. at 19.

44/ Friedman v. Pacific Outdoor Advertising Co., 170 P.2d 67 (Cal. Dist. Ct. App. 1946); Levy-Zentner, above.

45/ Leroy Fibre Co. v. Chicago, M.& St.P.Ry.Co., 232 U.S. 340 (1914).

46/ Nashville, C.& St.L.R. v. Nants, 65 SW2d 189 (Tenn. 1933).

possible. Vacancy would thus spread through the neighborhood like a wave.47/

Furthermore, many plaintiffs do not have complete freedom of choice about whether or not to move away when a hazardous structure appears. Those residents who own their dwellings may risk great financial loss by selling. Poorer residents may not be able to move at all and, in any event, may well face the same hazards in their new home.

Abandonment: In cases involving the inner-city, where many property owners have apparently walked away from their buildings, a defendant may argue that he has long since abandoned the subject building, seeks and receives no income from it, and disclaims all responsibility for it.

This argument is easily countered. New York law does not recognize abandonment of real property. Title vested in an owner cannot be affected by his act in departing from the land and leaving it unoccupied, or otherwise ceasing to exercise dominion over it.48/

Lack of Knowledge: Defendant may also argue that he had no knowledge of the condition of the property. For a defendant to be liable for a breach of duty, it must be shown that he knew or should have known about the condition which caused the breach.49/

Here again, it is unlikely that defendant could prevail in the typical vacant building case. Where he has abandoned the building without sealing it, he has caused the condition which led to the injury. In such a situation, he could hardly argue that he was not aware of it.50/

Alternatively, he may have sealed the building in good faith, but the seal has turned out to be ineffective in practice or has long ago been breached. Defendant will be held to constructive knowledge of a condition of long standing, whether

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47/ For a case in which a court declined to order a building vacated, lest it begin a trend toward abandonment in the neighborhood, see Torres v. Ragonesi, 370 NYS2d 779 (NY Civ.Ct. 1975).

48/ 1 NY Jur. "Abandoned and Escheated Property," Section 3.

49/ Taylor v. Bankers Trust Co., 439 NYS2d 138, 141 (App.Div. 1981).

50/ Cook v. Rezende, 347 NYS2d 57 (1973).

or not he actually knew about it.51/ Precisely how often an owner must inspect for violation of the seals is unclear.

Testimony of neighbors can be very helpful here to establish that the condition was a long-standing one. In fact, neighborhood organizations might establish a policy of notifying the owner by registered letter as soon as they observe the seal on a building to be broken. Such notice might bring forth repairs from a conscientious owner, and would certainly preclude any future argument about lack of knowledge.

Res Ipsa Loquitor

The doctrine of res ipsa loquitor (literally, "the thing speaks for itself") provides the plaintiff an alternative means of establishing negligence. According to this doctrine, the plaintiff makes out a case of negligence strong enough to warrant jury consideration if he shows (1) that the accident was the sort of thing that does not generally happen without negligence on somebody's part, and (2) that the instrumentality which caused the harm was in the exclusive control of the defendant.52/ Once the plaintiff has made such a showing, it is incumbent on the defendant to come forward with an explanation.53/

The res ipsa doctrine has been applied to fire cases in a number of states.54/ In New York, there are several decided cases in which plaintiff has attempted to use it, but in each instance it was held not to apply on the facts of the case.55/

51/ A defendant is held to constructive knowledge of a defective condition where that condition results from his own defective repairs. Princiotto v. Materdomini, 358 NYS2d 13 (App.Div. 1974).

52/ Galbraith v. Busch, 196 NE 36, 38 (NY 1935).

53/ Note that the defendant's failure to give a satisfactory explanation does not guarantee a finding of negligence. With or without his explanation, the matter will go to the jury. Geo. Foltis, Inc. v. New York, 38 NE2d 455 (NY 1941).

54/ See "Res Ipsa Loquitor in Actions Against Owner or Occupant of Premises for Personal Injury, Death, or Property Damage Caused by Fire," 8 ALR3d 974.

55/ See, e.g., Liberty Ins. Co. v. Vermont Central R. Co., 46 NYS 576 (App. Div. 1897); Atlas Supply Co. v. Colgate

(footnote continued)

Specifically, the courts have noted the wide range of possible causes for a fire, and have declined to say that fire is the sort of thing that usually does not happen without negligence on somebody's part.

By the same token, however, the New York courts have not rejected the doctrine out of hand for fire cases. The door is still open for its application to an appropriate fact situation.

Vacant building fires seem to present the appropriate facts. Fire in a vacant structure is exactly the sort of thing that generally does not occur without negligence on somebody's part. Typically, all of the common causes of fire are absent. There is no electric or gas service, no domestic heating or cooking and no smoking. In 3 Oaks, the court even noted that the fire had occurred on a clear, dry day, presumeably to dispel any notion that lightning may have caused the fire.56/

Furthermore, in the eyes of the law, these buildings are in the exclusive control of the owner. Many of these buildings, of course, are open at the doors and windows and frequented by vagrants and other intruders. However, this apparently makes no difference to the notion of exclusive control. As used in the doctrine of res ipsa, "control" refers to the power of exclusive control.57/ The owner of the vacant building could exercise such control if he chose to.

Thus, in Levy-Zentner, the court found that the railroad was in exclusive control of an area frequented by vagrants.58/ It was the railroad's property, the railroad was responsible for policing and maintaining it, and they acknowledged a duty to maintain screens that might have kept transients out.

Although not stated in so many words, a similar conclusion is implied in 3 Oaks. The court there applied the res ipsa doctrine to a fire in a building that the demolition company could and should have secured against derelicts and vandals, but did not secure.59/

55/ (footnote continued) Contracting, Inc., 187 NYS2d 383 (App. Div. 1959); Board of Education v. Herb's Dodge Sales, 435 NYS2d 179 (App. Div. 1981).

56/ 382 NE2d at 288.

57/ Robinson v. Atlantic & Pacific Tea Co., 54 NYS2d 42 (App.Term 1945), affd, 59 NYS2d 290 (App.Div. 1945).

58/ 142 Cal. Rptr. at 13.

59/ 382 NE2d at 288.

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June 6, 1985

Dear Sir or Madam:

Battelle is pleased to announce publication of the enclosed document, Neighborhood Based Arson Control: Collected Papers. The material was prepared under a Ford Foundation grant, and one of our responsiblities is to seek the widest dissemination possible.

With that in mind, I hope that you will bring notice of the availability this material to your readership and members. Any questions about obtaining additional copies of the report should be directed to:

Battelle Human Affairs Research Centers
Attn: Clifford L. Karchmer
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Thank you very much.

Sincerely yours,

Clifford L. Karchmer
Research Scientist
Project Director

Enclosure

Again, note that the plaintiff need not be able to prove the exact cause of the fire. It is sufficient if he can eliminate those causes that relate to something other than the owner's negligence.

Proximate Cause

In order to win a negligence case, plaintiff must prove not only that defendant acted negligently, but that this negligence was a proximate cause of the plaintiff's injuries.60/ The notion of proximate cause is often complex. For our purposes, it may be said to mean that the injury was a natural and probable consequence of the negligence;61/ that the chain of causation between the negligence and the injury was not broken by any intervening, independent events which defendant could not reasonably have anticipated;62/ and that the injury was not too remote in time and place from the negligence.63/

It will be seen that much of the concept of proximate cause is subsumed in the issue of whether the injury was a reasonably foreseeable consequence of the negligence. This question has been considered at length in connection with defendant's duty, above, and will not be discussed here.

Fire damage to neighboring properties, of course, involves the spread of fire. In cases concerning negligence in the start of a fire, courts rarely hesitate over the question of spread to adjoining property. That is, they seem to regard it as quite natural and probable that a fire, once begun, will grow. Plaintiff should nevertheless demonstrate the conditions that made it apparent that the fire would spread to his property -- that his building was very close to or adjoining the defendant's, 64/ and/or that defendant's land was heavily loaded with combustibles.65/

60/ Prudential Soc. v. Ray, 202 NYS 614 (App. Div. 1924), affirmed, 239 NY 600.

61/ Bird v. St. Paul F & M Ins. Co., 120 NE 86 (NY 1918).

62/ Duscio v. Hart, 138 NYS2d 830 (Mun.Ct.of City of NY 1955).

63/ Bird, above.

64/ Ford v. Jeffries, above.

65/ Homac Corp. v. Sun Oil Co., 244 NYS 51 (Sup. Ct. 1930), affd. without opinion, 251 NYS 877 (App.Div. 1931), affd, 258 NY 462 (1932).

In order to prove that defendant's negligence caused fire damage to plaintiff's property, plaintiff need not show that the mechanism was the obvious one. There are many ways that a fire can communicate from one property to another. These include spread across a common roof, ignition by flying brands or radiant heat, direct impingement of flames, and communication through openings or defects in a common wall. If a defendant creates conditions that are ripe for a particular kind of injury, he is responsible when that injury comes about, even if no one could have predicted the exact manner and mechanism of occurrence.66/

Superceding cause: Defendants in vacant building fire cases routinely raise the issue of superceding cause. Defendants argue that since the building was vacant, the fire must have been caused by the negligent or criminal act of an intruder. This act, they argue, intervened and broke the chain of causation between the defendant's negligence in leaving the building vacant and unsealed, and the harm that ultimately befell the plaintiff.

Defendants routinely lose this argument in vacant building fire cases. It is a common principle of law that a person is not required or expected to foresee that another person will act in a negligent or criminal fashion.67/ But the argument fails where the defendant's negligence consists precisely of his failure to guard against another person's likely misconduct.68/

In the vacant building fire situation, the defendant's negligence lay in maintaining the structure in a condition likely to attract itinerants, children and arsonists. Once this negligent conduct is established, he can no longer claim that he could not foresee their presence or their misconduct.

Remoteness: A defendant whose negligence causes a fire could theoretically be liable for unlimited damages as the fire spreads from one building to another. Courts in some states, including New York, have placed an arbitrary limit on the extent of such damages.

In New York, defendant is liable when the fire communicates directly from his property to that of the plaintiff.69/ (There may be more than one person able to assert such a claim.)

66/ Derdiarian v. Felix Contracting Corp., 434 NYS2d 166 (1980).

67/ Benenson v. National Surety Co., 183 NE 505 (NY 1932).

68/ Klein v. Sura Jewelry Mfring. Corp., 385 NYS2d 363 (App. Div. 1976); Derdiarian, above.

69/ Hoffman v. King, 55 NE 401 (NY 1899).

Defendant is not liable when fire spreads first to the property of another, and from there to the plaintiff's land. 70/

This rule is said to be based on both logic and compassion. As to logic, the courts contend that the defendant should not be required to foresee that the owner of the intervening land would maintain it in such a negligent way that it would contribute to the spread of fire.71/ As to compassion, the courts simply feel that it is unfair to hold a person to unlimited and unpredictable liability for a single negligent act.72/

This rule seems out of date. It arose in a rural setting, where fire spread from one property to another primarily because of the accumulation of dry leaves and brush. In that circumstance, it may have been appropriate to hold that a defendant need not foresee that others would allow such accumulations on their property.

The modern urban setting is quite different. When fire spreads along a row of buildings, it is not necessarily because the owner of each successive building has maintained his property in a negligent fashion. Rather, it is because, in the natural course of affairs, urban buildings are closely spaced, if not actually adjoining, and contain many combustible elements as part of their intended make-up and furnishing.73/ It does not seem unreasonable to hold a defendant to recognize these factors.

So, too, with the argument of compassion, which seems sadly misplaced. The burden of a fire loss does not magically disappear if it is not placed on the defendant. It is borne by someone. And in the typical inner-city fire scenario, those who bear these losses are the ones least able to.

70/ Ibid.

71/ Ibid.

72/ Ibid.

73/ In a broader sense, it may be argued that the municipality is negligent if it does not require fire-resistant separations between buildings or does not maintain a fire service or water supply adequate to the anticipated fire situation. Such policy matters are rarely open for discussion in the typical negligence case, however, and usually must be taken as given.

Indeed, we have moved beyond this limitation in other areas of the law. In the modern-day products liability setting, defendants frequently suffer substantial judgments to an entire class of plaintiffs. In one recent case, a large manufacturer filed for bankruptcy under the burden of 25,000 claims stemming from a product it made and distributed in years past. Compassion is always a virtue, but as applied to fire cases it seems oddly out of character with the legal system.

Compassion might also be appropriate in fire cases if the defendant's carelessness were but a momentary lapse of the sort to which we are all prone. But in vacant building cases it is rarely that. Rather, it is typically a situation that has developed and existed over a long period, with the defendant having full knowledge and opportunity to consider the consequences.

Liability for the Spread of Fire

A defendant is also liable if his negligence contributes substantially to the spread of a fire.74/ This is true even though his negligence did not cause the fire,75/ and even where the cause of the fire is unknown.76/

It is well established that certain activities and conditions on defendant's property will result in such liability. Defendant will be liable where he has allowed the accumulation of combustible debris, such as sawdust 77/ and oily rags.78/ He will also be liable where he has stored hazardous materials (typically, flammable liquids, such as oil and gasoline) in a careless fashion.79/ However, the courts recognize that many ordinary business pursuits involve the storage, transport and use of such materials. Thus, defendant will not be liable where he

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74/ Eighme v. Rome, W.& O.R.Co., 10 NYS 600 (Gen.Term 1890).

75/ Ibid.

76/ Chicago, M.St.P.& P.R.Co. v. Poarch, 292 F.2d 449 (9th Cir. 1961).

77/ Ibid.

78/ Menth v. Breeze Corp., 73 A.2d 183 (N.J. 1950).

79/ Van Fleet v. N.Y.,C.& H.R.R.Co., 7 NYS 636 (Superior Ct. of Buffalo 1889).

stores or uses them in accordance with law or with sound practice.80/

It is also negligence for the owner to delay unreasonably in calling the fire department once a fire is discovered. If the fire grows to enormous size because of such delay, the owner will be liable for damages caused by its spread to adjacent lands. He may cause this delay either directly, such as by trying to fight the fire alone when he clearly should have called professional help;81/ or indirectly, as by failing to have a watchman for a large vacant premise, so that the fire is not discovered until it is well advanced.82/

Under certain circumstances, it may be negligence for the defendant to fail to maintain various automatic or structural safeguards against the growth of fire, such as sprinklers, alarms and fire doors. The courts imply that there would be liability where the defendant knowingly maintains unusually hazardous premises. However, this is by negative inference; the only cases found are those where the courts do not hold the defendant liable for not having a sprinkler, and say none was needed because the premises were not especially hazardous.83/

These principles can have important applications to certain recurring arson problems. Large, vacant commercial and industrial structures dot many of the older cities, especially in the North and Northeast. In some areas, they are mixed in among residential buildings.

From a fire perspective, these buildings threaten the entire neighborhood in which they sit. They are frequently the targets of arsonists and vandals, or the playground of mischievous children. Because of their vast size, and because their internal construction is often of heavy timber, fire can grow to enormous proportions in a short time. These fires can generate enough heat to ignite other nearby structures, and thus can easily touch off a conflagration.

80/ Moore's Trucking Co. v. Gulf Tire & Supply Co., 87 A.2d 441 (NJ A.D. 1952).

81/ Levy-Zentner, above.

82/ Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179 (8th Cir. 1972), cert. denied, 410 U.S. 930 (1973).

83/ Zaritsky v. Thrifty 381 Stores, Inc., 324 NYS2d 476 (App. Div. 1971); Singer Co. v. Stott & Davis Motor Exp., Inc., 436 NYS2d 508 (App.Div. 1981); Little v. Lynn & Marblehead Real Estate Co., 16 NE2d 688 (Mass. 1938).

When such a fire occurs, the owner of the building may be liable for having maintained the property in a condition that contributed to the spread of the fire.84/ It is not uncommon in such buildings to find that the automatic sprinkler system or automatic fire doors are inoperative due to age or lack of maintenance.

Liability for spread of a fire is much more difficult to apply in the case of a fire that begins in a tenement or rowhouse and spreads to its neighbors. One very common condition that may result in liability is the accumulation of excessive amounts of trash composed of ordinary combustibles -- wood, paper, cloth, etc. Overall, though, the courts have been fairly conservative in their willingness to recognize conditions that contribute to the spread of fire. And the list of readily accepted conditions, described above, has little that would apply to most residential buildings.

Plaintiffs will thus have to be somewhat creative in this area. They will also have to be prepared to put on witnesses expert in fire engineering, who can testify as to why a given condition contributed to the excessive spread of a fire. One such condition might be large, interconnected voids behind walls or ceilings, that are not properly fire-stopped. Another could be holes in the plaster that allow fire easy access to the wooden frame of the building.85/ Both of these conditions allow rapid spread of a fire.

Statutes in New York prohibit certain structural features in tenements which would contribute to the rapid spread of fire within the building. One such law is Section 238 of the Multiple Dwelling Law, which requires that stairways in most tenements be of fire-retardant construction. This law was clearly intended to protect the occupants. It is not clear whether tenants in neighboring buildings are also within the zone of protection; as to them, violation may be only evidence of negligence.

With respect to proximate cause, liability for spread of a fire involves the same issues as does liability for start of a vacant building fire. Defendants frequently argue that someone else's negligent or malicious act caused the fire to start, and

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84/ The owner may also be liable for having failed to secure the building against intruders, as discussed earlier.

85/ See Harvey v. Hammer, 249 NYS2d 1012 (Sup.Ct. 1964) (Landlord liable for rat bite where he kept hallways in unclean condition and allowed holes in plaster walls, thus attracting rats).

constitutes a superceding cause which relieves the defendant of liability.

Again, defendants routinely lose this argument. The courts hold that ignition from some source is a reasonably foreseeable event, thus placing on landlords the duty to guard against the spread of fire. Most importantly, the holding that ignition from some source is reasonably foreseeable is not limited to cases of ramshackle vacant properties frequented by vagrants. It has been applied as well in cases of fully occupied tenements.86/

Occupied and Partially Occupied Buildings

Another common aspect of the arson problem involves fires set in occupied or partially occupied residential buildings. This is in many ways the most serious facet of the problem. These fires are often set in common areas such as hallways, or escape into such areas, placing the occupants in great danger.

Some of these fires are clearly set by the owners. Where this can be proven, there is, of course, no difficulty sustaining a damage action against the owner. It should be noted that such cases may be possible even where there has been no indictment or criminal conviction of the landlord. A criminal conviction requires proof of guilt beyond a reasonable doubt; but a civil damage action requires proof only by a preponderance of the evidence.

Many other fires in occupied or partially occupied buildings are set by intruders. The owner has no direct role. Just as in vacant buildings, though, he may be liable where it can be shown that his negligence contributed substantially to the start or spread of the fire.

In this case, the owner's liability stems from his duty to the tenants to exercise reasonable care against foreseeable dangers, at least with respect to that portion of the building that remains under his control.87/ Lease provisions that supposedly limit the landlord's liability for injury to tenants caused through the landlord's negligence are void and unenforceable.88/

86/ Ellis v. Caprice, 233 A.2d 654, 658 (NJ A.D. 1967).

87/ Curry v. New York City Housing Authority, 430 NYS2d 305 (App.Div. 1980); Zamzock v. 650 Park Ave. Corp., 363 NYS2d 868 (Sup.Ct. 1974).

88/ General Obligations Law, Section 5-321.

The owner may be liable for the start of a fire set by an intruder where the owner has been negligent about building security. Several recent cases in New York have held owners liable for crimes committed against tenants where the owner had notice that the door lock on the building was defective, and that crime was prevalent in the neighborhood.89/ In one recent case, it was held unnecessary for plaintiff to show that crime was prevalent because, the court said, it is a matter of common knowledge that crime is a frequent and foreseeable occurrence throughout the city.90/

Apparently, only one New York landlord/tenant case on inadequate security has involved a fire. In Meizlik v. Benderson Development Co.,91/ it was held that an owner of commercial property could be liable for fire damage to tenants, where he had not adequately secured a shed adjoining the leased premises. A fire began in the shed and spread to the tenants' areas. There was evidence that children playing in the shed had caused the fire, and that defendant had previously been advised of children starting fires there.

One difficulty that arises in these cases is the need to prove the cause of the fire. With vacant buildings, this is not often a problem, since most of the usual causes of residential fires are absent, and there is often evidence of prior activity by vagrants or other intruders.

With respect to fires in occupied buildings, there are numerous potential causes, and plaintiff will have to offer greater proof linking the fire to the landlord's negligence. The easiest case, of course, is the one in which the arsonist has been caught and convicted. Far more commonly, however, plaintiff will have to show (1) that the fire was caused by arson; (2) that the fire originated in an area frequented by intruders (or that

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89/ Sherman v. Concourse Realty Corp., 365 NYS2d 239 (App. Div. 1975).

90/ Dick v. Great South Bay Co., 435 NYS2d 240 (N.Y. Civ. Ct. 1981), mod. on other grounds, 442 NYS2d 348 (App. Term 1981).

91/ 378 NYS2d 533 (App. Div. 1976). See also King v. Exchange National Bank, 381 NE2d 356 (Ill. App. 1978) (fire is a foreseeable occurrence where intruders frequently loitered and smoked around an old couch in a stairwell); and Lopez v. Shamor-Repman, 25 ATLA L.Rep. 272 (PA, Phila. Cty Ct. of Com. Pleas, No. 1589, 1981) (settlement for injuries stemming from arson fire; plaintiff alleged landlord was negligent in not repairing broken lock when there had already been several previous fires set in the building).

an intruder was present at or about the time the fire occurred); and (3) that this intruder gained entrance because of the landlord's negligence in maintaining building security.

The owner may also be liable to tenants if his negligence contributed to the spread of the fire within the building, regardless of why the fire started. Many of the precautions necessary to curtail the rapid growth of fire in an occupied building are specified by statutes and ordinances.92/ These enactments place specific duties upon the owner93/ for the benefit of the tenants. Violation is thus negligence per se, in the case of a tenant who suffers damage as a result.

Regardless of statute, though, the landlord is under a common law duty to exercise reasonable care with respect to foreseeable hazards.94/ It has been held that the hazards of fire are a matter of common knowledge.95/ Thus, the landlord must exercise reasonable care with respect to the potential for the spread of fire, even if the plaintiff cannot point to any specific source of ignition that should have concerned the landlord.

92/ See, e.g., Multiple Dwelling Law, Article 7, "Tenements," Title 2, "Fire Protection." See also Multiple Dwelling Law Section 78, which imposes upon owners a duty to keep every multiple dwelling "and every part thereof and the lot upon which it is situated * * * in good repair."

93/ Morris v. City of New York, 261 NYS 228 (Mun. Ct. 1933).

94/ Curry, above.

95/ Buckingham v. Donarry Realty Corp., 268 NYS2d 755 (App. Div. 1966); Ellis v. Caprice, 233 A.2d 654 (NJ A.D. 1967).

CHAPTER IV

APPLICATION OF NUISANCE LAW TO ABANDONED BUILDINGS AND OTHER MAJOR FIRE HAZARDS

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APPLICATION OF NUISANCE LAW TO ABANDONED BUILDINGS AND OTHER MAJOR FIRE HAZARDS

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May 1984

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Executive Summary

The law of nuisance offers considerable promise for attacking the problem of abandoned and poorly maintained buildings in urban areas. These buildings present a substantial danger of major fires, and hence may be considered both public and private nuisances.

Nuisance law offers a wide range of remedies against this problem. A private plaintiff may obtain a court order directing the owner to correct the problem, and may also sue for compensatory and punitive damages. The public prosecutor may also seek a corrective order and can prosecute the owner for the crime of public nuisance. In many areas municipal authorities can seal up or demolish the nuisance building, at the owner's expense.

In states that recognize the non-mutual use of collateral estoppel, such as New York, the public and private plaintiffs can work in concert to exert a powerful leverage over the owners. In these states, when an owner is faced simultaneously with a public action for injunction and a private action for monetary damages, he or she is likely to settle the injunctive action quickly. A trial on that case risks adverse findings of fact that could cripple the owner's defense to the private action -- where large amounts of money are at stake.

In short, prosecutors should be able to get court orders requiring owners to clean up their properties, with very little expenditure of time and effort.

Finally, it appears the courts may allow community groups standing to sue on behalf of their members in at least some nuisance cases. The question of representational standing is addressed on a case-by-case basis. But the New York courts and some others have already allowed community group standing in zoning cases, which are closely analogous to nuisance in that they deal with community-wide impact of land-use decisions.

Introduction

This paper explores the application of nuisance law to serious fire hazards, and especially to vacant and abandoned buildings in urban areas. It is an effort to identify legal theories that inner-city residents and community groups can use to control these buildings before a major fire occurs.

Nuisance law holds considerable promise as a means to attack the problem of derelict buildings. It provides a basis for criminal prosecution of the owners; injunctive actions ordering them to clean up and secure the property; and private actions for both compensatory and punitive damages. In some states, prosecutors and private plaintiffs, working together, can apply tremendous pressure through nuisance law for prompt action to improve the safety of these properties.

There are two kinds of nuisance, public and private. A public nuisance is an unreasonable interference with a right common to the general public. Obstruction of a public street is the most frequently cited example of a public nuisance. As we shall see, though, activities which create a danger of conflagration are also public nuisances.

Public nuisance is typically a crime, subject to prosecution. The prosecutor or the local municipal authorities usually are empowered also to seek an injunction to correct the problem; and the municipal authorities often may correct it themselves and charge the cost to the owner. An individual who suffers "special damages" by virtue of a public nuisance can also seek an injunction and can ask compensation for his or her injuries.

A private nuisance is an unjustified interference with the use or enjoyment of private property. Again, a serious fire hazard on a neighborhing property may fall within this definition. Anyone whose present possessory interest in property is being interfered with, including a tenant, may file an action for damages and/or injunction.

A key issue in both public and private nuisance cases is whether the interference is "unreasonable." Typically, this determination involves weighing the social utility of the conduct or condition against the gravity of the harm it is causing. Where the activity complained of has no social utility -- as in the case of an abandoned building -- even a slight harm may tip the balance in the plaintiff's favor.

Nuisance has been a part of the law for centuries. It has found diminished use in recent years because of the growth of zoning and other land-use controls. Nevertheless, the doctrines of nuisance retain their vitality, and have been used recently to attack the modern problems of air and water pollution.

As urban neighborhoods struggle with problems of self-preservation and renewal, nuisance law will find other modern applications -- against property owners callously indifferent to the consequences of their actions and the aspirations of local residents. In fact, it is not only derelict buildings and other fire hazards to which nuisance law might apply. Whenever community residents encounter conditions that they find patently offensive and highly deleterious to the neighborhood, they should consider the possibility of a nuisance action.

Fire Hazards as Public Nuisances

To prove a public nuisance, a plaintiff must establish two points: a right common to the general public, and an unreasonable interference with that right. A severe fire hazard is a public nuisance, because it interferes unreasonably with the right of the public to be free from the danger of conflagrations.

The general public does have a right to be free of the danger of a conflagration.(1) To state the obvious, a conflagration causes widespread and unpredictable destruction of property; loss of numerous homes and jobs; disruption of neighborhoods; and a danger of personal injury or death.

A conflagration also burdens public services, sometimes to the breaking point. When large segments of the fire department are engaged in fighting a major fire, there is increased danger throughout the city. Many neighborhoods will have only skeleton fire crews, or none at all, during these periods. Response times to other fires increases, and the ability to save lives and property decreases. (2) Housing, welfare, unemployment, water, and sanitation services may also be overloaded by a conflagration.

The right of the public to be free of this danger is reflected in many diverse statutes and regulations. In many cities, the law establishes a "fire zone" in the built-up downtown area. (3) In these zones, all structures must have brick, stone or concrete exteriors, precisely to guard against conflagrations. The law also restricts the storage and shipment of hazardous materials for the same reason, among others. (4)

Further evidence of the concern over conflagrations is provided by statutes in some areas requiring that demolition of buildings must proceed in a certain order. (5) The build-up of large amounts of wooden debris, together with the creation of new and unprotected vertical openings, creates an extreme danger of a major fire.

In fact, the right to be free of the danger of conflagration is so great that some court cases have said that a municipality has the pwer to act against serious fire hazards even if the municipal charter does not specifically grant this power. (6) And the Supreme Court has granted fire investigators a limited exception to the constitutional requirement for a search warrant.(7) Part of the Court's rationale was that investigators need to learn the cause of a fire as soon as possible, in order to prevent a recurrence. (8)

We assume that the danger of conflagration exists whenever there is a reasonable possibility that fire will gain possession of a building in a built-up area, despite the fire department's best efforts. Conditions are then ripe for a major fire, as radiant heat, flaming brands and direct communication of flames ignite other buildings in the vicinity. Measured against this standard, vacant buildings present a serious danger of conflagrations, especially if they are not properly sealed against intruders.

The fire hazard of vacant buildings is well documented, although many fire departments have not analyzed their records in manner that would make the full extent of the problem clear. Fire is more likely to begin in a vacant building than in an occupied one. A 1974 study in Dayton, Ohio, found that although only two percent of the buildings in that city were vacant, these buildings accounted for 20 percent of the fires and 30 percent of the serious fires. (9)

The reasons for this greater likelihood of fire are diverse. The building may be vacant precisely because the owner is engaged in a program of disinvestment; the final stage of such a scheme is often to burn the building to collect the insurance.

If, as is so often the case, the building is not properly sealed, it is a ready target for pyromaniacs, vandals and mischievous children. Such buildings often become homes for derelicts, who may smoke, cook, and use fire to keep warrm, often under hazardous conditions. Junkies and others may deliberately

set fire to a vacant building to make it easier to strip the plumbing and electrical wiring.

The Dayton statistics also reflect that fires in vacant buildings are more likely to grow to serious proportions than are fires in occupied buildings. Again, the reasons are several. Arson fires are typically intended to be large, and the arsonist may use flammable liquids or prepare vertical openings to hasten the fire's development.

Common architectural features intended to retard the growth of fire may be damaged or missing. Particularly dangerous is the large old industrial building that no longer has adequate separation between the floors. Several times in recent years, fires beginning in such buildings have caused conflagrations, destroying the entire neighborhood. (10)

Even missing plaster is important, since plaster helps confine a fire to the room of origin. When there are holes in the plaster, fire enters the walls and ceilings, and may spread undetected throughout the structure.

Finally, a fire may go unnoticed in a vacant building during its initial stages, and thus grow larger before the fire department arrives. This is especially true in the winter, when neighbors are more likely to be inside their own houses with the doors and windows closed.

In short, there is a much greater possibility that fire will begin in a vacant structure and, once it begins, that it will take possession of the building despite the efforts of the fire department.

Unreasonable interference: To prove that a derelict building or some other fire hazard is a public nuisance, it is also necessary to show that the interference it causes with a public right is "unreasonable." Typically, this is shown by balancing the gravity of the harm against the social utility of the activity or condition. (11)

The derelict building's potential to cause great harm has already been discussed. Against this danger, the vacant building has no social utility whatever. It has no present use as a dwelling or business, and in fact, the owner may be deliberately withholding it from such uses in hopes that the market will improve in the future.

If the building is essentially a derelict, open to intruders and the elements, the very features that make it useful are probably deteriorating to the point of no return. Vandals may have removed the plumbing and electrical wiring; and the constant assault of rain and cold will eventually collapse the plaster and rot the structural elements.

The owner of a derelict building may argue that it has a social utility established by economics -- that abandonment allows the owner to direct his money and effort into more profitable channels, all to the betterment of society in general. But we do not contend that a building owner may not turn his or her attention to more profitable activities; simply that the way he or she goes about it must show due regard for the safety of tenants, neighbors and the public at large. This is apparent from the fact that it is not against the law of any jurisdiction to leave a building vacant; but it is against the law in many places to leave a vacant building wide open to intruders. (12)

Another important factor in determining whether an alleged nuisance is unreasonable is the permanence of the harm it causes. (13) The harm caused by a derelict building is essentially permanent. It can often be remedied by restoring or demolishing the structure, but this is essentially different from, say, an offensive construction project that will last for a discrete length of time and then be complete.

The owner of a derelict building usually will not remedy the harm unless the court requires it. And if the building causes a major fire in the meantime, the harm is probably beyond any remedy.

Another factor is whether the offensive conduct or condition is prohibited by statute or ordinance. (14) Several ordinances declare derelict buildings unlawful when they are left open to intruders. The New York City Administrative Code declares that any vacant structure left unguarded and open at the doors and windows is dangerous and unlawful as a fire hazard. (15) Massachusetts law allows city officials to declare a "dangerous" building to be a public nuisance, subject to demolition. (16)

Yet another factor is the character of the neighborhood in which the activity or condition is found. (17) Obviously, a noisy industrial operation may be a nuisance in a quiet residential area but would not be a nuisance in an area filled with similar industries. The difficult cases are those in between: At what point in the deterioration of a neighborhood does its "character" change?

In addressing this question in the context of a derelict building case, or indeed any significant fire hazard case, the law should err on the side of the one who is complaining of the danger. Where the building presents a danger of conflagration, the danger is not confined to a particular neighborhood. As discussed above, the hazard of a conflagration extends beyond the immediate neighborhood. The extent of the spread of the

fire is unpredictable; and a conflagration puts a severe strain on the public fire service, thereby increasing the danger from other fires throughout the city. Where the complainant is a particular individual -- for example, someone who lives next door to the alleged nuisance -- his or her complaint should not be devalued simply because there are other dangers in the neighborhood.

In any event, the character-of-the-neighborhood doctrine seems inappropriate to the case of the derelict building. The primary purpose of the doctrine is to allow a place in which socially useful activities can go on even though they may be offensive or incompatible with other uses. It is a perversion of this rationale to use the doctrine as a justification for activities that are morally reprehensible or even blatantly illegal.

It should be emphasized that the relative wealth or poverty of an area is not a factor to be considered in the character of the neighborhood. (18) The homes of the poor may be modest, but they have the same legal right to enjoy them as does everyone else.

This point is important because of the widespread occurrence of abandoned buildings in poor and marginal areas. In upper middle class and wealthy neighborhoods, property values are usually high enough that buildings do not remain vacant very long, and the true derelict building is certainly a rarity in such areas.

Finally, it appears that the maintenance of a derelict building in an urban area was always considered a public nuisance at common law. (19) In addition to providing valuable precedent for the private damage action, cases holding this may be important to criminal prosecution. Some states prosecute the crime of public nuisance under a general statute that does not list the specific activities or conditions that are considered nuisances. (20) These statutes may be open to challenge on the ground that they are so vague in what they prohibit as to be unconstitutional.

The prosecution can survive such a challenge by showing that, although the statute may not be clear in all of its prohibitions, there is certain "core conduct" that everyone knows is prohibited. (21) One important element in such a showing is that the conduct was considered wrong at common law.

Fire Hazards as Private Nuisances

A substantial fire hazard is also a private nuisance to those who live in the zone of immediate danger. A private nuisance is a (non-trespassory) invasion of another's interest in the use or enjoyment of land. (22) To establish the defendant's liability for a private nuisance, plaintiff must show that the invasion is either intentional and unreasonable; or unintentional but otherwise actionable under principles governing negligent, reckless, or ultrahazardous conduct. (23)

It is clear that the threat of future physical harm, as opposed to harm that is presently occurring, is a sufficient invasion to be a nuisance. (24) This is important because a court is likely to conceptualize a fire hazard as being a threat of future harm. It is possible to argue that a fire hazard also represents present harm, because it instills fear and discomfort, and thus diminishes the enjoyment of life.

The invasion of the neighbors' interest caused by the abandonment of a building or the maintenance of a vacant building open to intruders, is intentional. The law regards an invasion as intentional if the actor knows that it is resulting or is substantially certain to result from his or her conduct. (25) The terrible experience of many urban areas in the past 20 years with fires beginning in vacant structures has become a matter of widespread public knowledge. It is certainly well known to the owners of derelict buildings; indeed, their observation that this phenomenon is occurring in the neighborhood may be a major factor encouraging them to abandon their building in the first place.

The plaintiff must also establish that the invasion of his or her interest is unreasonable. (26) The analysis of this question is the same as that used above to show that a public nuisance is unreasonable.

As an alternative to the above approach, the plaintiff may show that the invasion is unintentional, but actionable under the principles governing negligent, reckless or ultrahazardous conduct. (27) The negligence of leaving a vacant building open to intruders has been discussed extensively in a previous paper by this author. (28)

Finally, it should be emphasized that although we have concentrated here on the fire hazard of derelict buildings, there are other grounds on which such structures can be ruled a public or private nuisance. They may be so dilapidated as to endanger passers-by. (29) They may provide a breeding ground for rats or vermin, (30) or they may be a haven for undesireables and a focal point for criminal activity. (31) The plaintiff should allege as many of these factors as may appear in a given situation. They all tend to show the extreme unreasonableness of the defendant's conduct.

Distinguishing the Turn-of-the-Century Cases

Those who allege that fire hazards are legal nuisances must overcome a certain amount of adverse precedent, most of it from the period 1870 to 1930. In a number of cases during this period, the courts held that various fire hazards were not nuisances. (32) A careful examination of these cases and the context in which they were brought will distinguish them from the modern problem.

Many socially useful activities entail some degree of fire hazard. Every new building increases the fire danger to the buildings around it, and may cause the owners to have to pay higher fire insurance premiums. Likewise, almost every industrial or commercial enterprise carries with it some distinct fire hazard.

In the late Nineteenth and early Twentieth Centuries, the urban areas of the northeast were expanding at a rapid pace. Industrialization was increasing, and there were numerous conflicts resulting from incompatible uses of adjacent lands. Many cases were brought in which plaintiffs, usually homeowners, tried to block nearby commercial or industrial development. Frequently, these cases alleged that the new enterprise was a nuisance because it entailed an added risk of fire and increased the plaintiff's fire insurance rates. (33)

The courts typically rejected these claims, and as a result, commentators tended to overstate the difficulty of proving that a fire hazard is a public or private nuisance. (34)

In fact, the results of these cases are not surprising. The new enterprises and buildings under challenge were typically viewed as having great social utility. Weighing this against the

rather ordinary hazards they presented, the courts were unable to find that defendants' activities were "unreasonable," a prime requisite of nuisance law.

Indeed, if the courts had ruled these activities nuisances, they would have been hard-pressed to turn down any future nuisance claims. The allegation that a properly-constructed new building is a nuisance because it presents additional fire hazard to its neighbors is just an allegation that every new building with some proximity to existing buildings is a nuisance.

Accordingly, we should not read too much into these old cases. The issue of whether an activity or condition is unreasonable applies to the case of a fire hazard just as to any other alleged nuisance.

Damages

The individual plaintiff in a nuisance action can obtain damages for his or her actual injury and for emotional distress. (35) He or she may also seek punitive damages when the defendant's conduct is intentional and outrageous. (36) The plaintiff can seek these forms of monetary relief by alleging either a private nuisance or "special damages" in the case of a public nuisance.

Special damages: The concept of special damages is somewhat problematic as applied to fire hazards. Because public nuisance is defined as an unreasonable interference with a right common to the general public, the category of victims includes the entire public. To limit the potential number of cases that might result from a single act, the courts devised the notion of special damages: A private party may sue on a public nuisance only where he or she suffers injury different in kind from that suffered by the public at large. (37)

Many cases attempt to distinguish between damage that is different in kind and that which is of the same kind but different in degree. (38)The problem arises when someone who lives next to door to a fire hazard sues the owner, alleging a public nuisance. The owner may respond that the neighbor has no right to sue, because his or her danger is no different in kind from that suffered by the public at large, but only different in degree.

It is clear that if the plaintiff suffers physical injury, that is sufficient to allege special damages. (39) Thus, if defendant digs a ditch across a public street, members of the public may not collect damages for this violation of their general and common right to use the street. But if a person falls into the ditch and is injured, he or she has suffered special damages.(40)

The analogy of this to fire hazards is obvious. The general public apparently may not seek compensation because a particular building somewhere in town presents the danger of a conflagration, But if a fire occurs, those who experience injury or property loss thereby have suffered special damages.

In other cases, the application of the principles of special damage are not so clear. If the defendant obstructs a public street, and that street provides a primary means of access to plaintiff's property, the plaintiff has suffered special damages. (41) It is difficult to see exactly how this plaintiff's injury is different in kind from that suffered by the general public; it seems merely different in degree.

These cases suggest that the issue of special damages may be a matter of helping the courts draw a line around the category of possible plaintiffs; i.e., helping them answer the question: If this person can sue, why can't everyone sue? In this formulation, a difference in degree of injury might be an acceptable basis on which to predicate special damages, provided there is a quantum difference between the degree of injury suffered by the would-be plaintiff and the public at large -- that is, an obvious place to draw the line..

As applied to fire hazards, this concept would confer standing on those whose property is virtually certain to suffer damage from a serious fire in the defendant's building, as opposed to those for whom injury is merely a possibility. Such a distinction already has some basis in the law of at least one state, New York.

The New York courts have long held that when a property owner's negligence causes a fire, and the fire spreads from his or her property directly to another property, the negligent owner is liable for damage to the other. But if the fire spreads to a second property, and from there to a third, the negligent owner is not liable for damage to the third property. (42)

The rationale for this rule is said to be two-fold: First, that the spread of fire to the third property may depend on the condition of the second property, and the negligent party should not be required to foresee those conditions. Second, that a person should should not face vast and unpredictable liability for a single negligent act.(43) Although we have sharply criticized this rule elsewhere, (44) it may have some beneficial application in helping to define those who suffer special damages from a major fire hazard.

Plaintiff may, of course, bypass the issue of special damages by alleging that the fire hazard is a private nuisance. The law recognizes many instances of the so-called "mixed nuisance," one that is both public and private. (45) As noted above, there are important similarities in the issues that must be proven in the two types of cases.

Nevertheless, there are certain advantages to pleading public nuisance. Laches and the statute of limitations do not apply to private actions based on public nuisance. (46) Also, as will be discussed below, the plaintiff can derive great advantage in some states by filing a public nuisance claim while the prosecutor pursues a public nuisance case against the same defendant.

Punitive damages: Plaintiff in a nuisance case can win punitive damages by showing that the defendant's injurious conduct was both intentional and outrageous. Punitive damages are a monetary award above and beyond plaintiff's actual injury, intended to punish the defendant for his or her misconduct and deter others from similar behavior. The prospect of punitive damages usually causes defendants great concern, because the very evidence that convinces the jury that the conduct is outrageous usually also convinces them that the amount should be very large. Punitive damages are therefore important to community groups and others who see these cases as a means of altering the behavior of landlords as a group.

Vacant building nuisance cases seem quite appropriate for punitive damages. We have already outlined the sense in which the defendant's conduct in causing the plaintiff injury is intentional. It is also clear from the discussion of unreasonableness that defendant's conduct is outrageous, in the sense that it is totally lacking in societal justification. The defendant has taken whatever profit he or she could from the building, and has now simply walked away from it, leaving tenants, neighbors and public officials to cope as best they can.

It is important to emphasize that a punitive damage claim never stands by itself. One has to allege and prove an actual injury along with it.

Collateral Estoppel in Nuisance Cases: A Potential Breakthrough in Housing Law

The fact that both the public prosecutor and private citizens can sue the owner of a derelict building gives rise to a potentially powerful combination: separate but simultaneous actions, one seeking an injunction, the other damages. In states that allow the non-mutual use of collateral estoppel, such combined actions could break the log-jam in housing court and force many owners to clean up their properties very quickly.

Collateral estoppel simply means that when a person has a full and fair opportunity to litigate an issue in one case, and that issue is resolved against that person, he or she is prohibited, or "estopped," from raising the same issue in another case. "Mutual" collateral estoppel means that both parties in the second case are equally bound by the results of the first; "non-mutual" means that one party is bound but the other is not.

To understand the importance of non-mutual collateral estoppel, consider the following situation: A prosecutor sues the owner of a derelict building and wins a judgment that the building is a public nuisance. Then a neighbor sues the owner, alleging special damages. If the state recognizes non-mutual collateral estoppel, the neighbor need not prove that the building is a nuisance; that was already proven against the owner in the first case, and he or she is estopped from raising the issue again. The private plaintiff need only prove the amount of damages the nuisance has caused.

This use of collateral estoppel is non-mutual because the two parties to the second case are not equally bound by the results of the first case. If the prosecutor wins the first case, the plaintiff in the second case can use that result against the owner, because the owner had a full and fair opportunity in the first case to litigate the issues. But if the prosecutor loses the first case, the owner cannot invoke that result against the plaintiff in the second action. The second plaintiff was not involved in the first case, and so did not have a full and fair opportunity to litigate these claims.

The power of this approach becomes clear when we realize that most owners are much more afraid of the private damage action than of anything the prosecutor is likely to do to them. The prosecutor may want only a court order directing the owner to clean up and secure the property; the private plaintiff, on the other hand, probably is asking a sizable monetary award.

In this situation, the major threat to the owner is that the first case will go to trial and produce findings of fact that will cripple his or her defense in the second case. The owner is therefore well-advised to settle the first case, accepting a court decree that contains a clean-up order but no findings of fact. This pressure to settle is precisely what has happened in other areas of the law when such public/private "squeeze plays" have been brought against a defendant. (47)

The result is essentially the one we want: Owners of derelict buildings, instead of opting for a trial, will clean up their properties under court order. Prosecutors will become much more willing to file these cases because the ratio of benefit to cost will rise dramatically. At present, many prosecutors may be reluctant to proceed against the owners of derelict buildings because the effort of a trial is usually out of all proportion to the possible benefit of cleaning up a single property.

Unfortunately, not all states allow the non-mutual use of collateral estoppel. New York clearly does allow it. (48) Massachusetts does not. (49) Rhode Island does not allow it, (50) but has not reconsidered the issue since the U.S. Supreme Court's landmark decision in the area, Parklane Hosiery v. Shore. (51) Ohio does not allow it in general, but does recognize exceptions in specific cases where it seems clearly justified. (52)

Where non-mutual collateral estoppel is allowed, plaintiffs must still be careful to abide by certain elemental rules of "fair play." In fact, it appears that some courts resist non-mutual collateral estoppel precisely because it strikes them as somehow unfair.

Various courts have discussed the following factors as bearing on the appropriateness of allowing non-mutual collateral estoppel in a particular case:

* Whether the plaintiff in the second case could have joined in the first case if he or she had wished. (53) The courts are apparently dismayed by the spectacle of a party sitting out the first case, ready to take advantage of a victory but avoiding the risk of a loss. In some jurisdictions, private parties may be prohibited by law from joining a case brought by the public prosecutor. (54)

* Whether the defendant in the second case had a full and fair opportunity in the first case to litigate the issue.(55) A question about this might arise if, for example, the defendant claims that his or her lawyer in the first case was incompetent.

* Whether the defendant, in the course of the first case, was aware of the second case, or at least was aware of the potential for a major damage action. (56) Here,

the courts are simply acknowledging that parties often make strategic decisions, based on the perceived cost of losing, about how hard to fight a case, whether to appeal, and whether to accept a settlement document that contains potentially damaging statements of fact.

* Whether new evidence has come to light since the first case, or whether the second case would be governed by different procedural rules that could significantly change the outcome. (57)

Obviously, those who contemplate filing damage actions on the heels of the prosecutor's case do not control all of these factors. But they are well advised to heed them to the extent they can.

Community Groups' Standing to Sue

Many more significant cases would be brought in the areas of housing, fire prevention and community preservation if community groups could sue on behalf of their members. There is a reasonable chance that the courts will allow community group standing in some nuisance cases.

Many individuals who have good claims do not bring them for a variety of reasons. They may be afraid of a landlord with a reputation for brutality. They may be concerned that litigation would cost too much, and that their resources are no match for the owner's. Or they may simply not have exercised their own power as human beings for so long that their sense of it has atrophied.

These problems could be largely resolved if community groups had standing to sue on their members' behalf. Successful groups are often aggressive and ready to challenge the most brutal owners; and they are reasonably well funded, or at least could gain access to adequate funds if they faced an important legal struggle.

Such community group standing, however, raises important legal issues. The group and its members are separate "persons" in the eyes of the law. Consequently, to allow community group standing is to allow one person to assert the claims or rights of another.

There is an ancient common law principle that one cannot assign a claim -- i.e., give it to another, who then files suit as if he or she was the victim of the alleged wrong. (58) Although there are clear exceptions to this in the business world (e.g., bill collection and subrogation of insurance claims), it remains the general rule, and important questions persist: Should the owner be forced to defend against such an "interloper," a person against whom the owner has committed no wrong? If the group loses, has the owner won his or her peace? That is, are the individual members bound by the loss, or could each of them sue on his or her own? If we allow the community group to raise the claims of neighborhood residents, could other people, totally foreign to the situation, also assert a right to raise those claims?

Despite these issues, the courts do allow organizational standing in some cases. The obvious ones are those in which the organization itself is harmed, (59) or where the organization claims on behalf of its members that the defendant's action threaters their ties to the organization. (60)

Where the organization seeks to act solely or primarily as a representative of its members, the courts look at certain factors:

* Will organizational standing reduce the likelihood of multiple suits by individual members?(61) If so, allowing a single suit by the group will promote judicial efficiency and may actually contribute to the defendant's peace of mind. It is important to bear in mind, though, that if the group loses such a suit, the members lose their individual claims. They stand in a sufficiently close relationship to the group that they are estopped by the result of the group's action.

* Will the pooling of resources allow a more thorough presentation of the issues? (62) This is important where the issues are complex and would require analysis by experts. It is also important where the impact of the defendant's conduct on any single individual is not large enough to warrant his or her sustaining the burden of a lawsuit, but the overall impact on the community is significant.

* Does the organization truly represent the community or the interests it seeks to present? (63)

* Is the alleged injury common to the members, or is it highly individualized? (64) This is a variant of the question about a multiplicity of suits. The easiest way

to visualize the issue is to consider a mass-casualty incident, like an airplane crash. If the airline's liability is an issue, this is likely to be a complex and time-consuming part of the overall trial. All the claims may be joined on this issue, so it is tried only once. But if the airline's liability is admitted, the major remaining issue is the amount of damages suffered by each claimant; since this issue is different from one person to another, there is no common element, and no reason to try the cases together.

* Is the plaintiff organization seeking monetary damages or an injunction? (65) The courts will grant organizational standing much more readily in an injunctive action, since there is then no question that the relief requested benefits the entire community.

Given the variety of these factors, the courts are proceeding somewhat piecemeal in the area of representational standing. Very important for our purposes, though, is the fact that several courts have allowed representational standing in zoning cases. (66) These courts recognize that community organizations typically do represent the broad interests of the residents in these matters; and that the impact on the community of a new development or a new land use may be considerably more important in the aggregate that it is to any one individual. And the group is usually seeking an injunction.

The zoning cases are important here because zoning is essentially a legislative effort to deal with a number of issues that used to be addressed piecemeal through nuisance cases, i.e., the compatibility of different activities and forms of land use. These cases thus provide an important indication that the courts would grant organizational standing in a nuisance case.

Even so, it is important to realize certain limits to the organization's case. We have earlier discussed the possibility that the prosecutor and the private plaintiffs might bring simultaneous actions to force the defendant to agree to clean up the property. The community group probably could not usefully bring the action on behalf of the individual private plaintiffs.

There are two reasons for this. First, as indicated, the courts are more likely to allow representational standing in an injunctive case than in a damage action. But in the strategy of simultaneous public and private cases, the private case is a damage action.

Second, the private plaintiffs are expected to benefit from collateral use of the findings in the prosecutor's case, specifically the finding that the activity in question constitutes a nuisance. But once that is proven, the major issue that the various members of the community group had in common is removed from the second case. The matter is akin to the case about the plane crash in which the airline's liability is admitted. The major remaining issue is the amount of damages due each person. Since this is highly individualized, much of the value of group representation is lost.

There are other means by which a community group might obtain standing. In Rhode Island, a statute allows the attorney general or "any citizen of the state" to bring an action to abate a nuisance. (68) Although there are no community group cases to date, there is presumably no reason why they could not be brought. Note that the action is for an order to correct the nuisance, not for damages.

Some courts have indicated a willingness to allow representational standing when the individual members have good reason to be afraid to sue in their own names. (69) This rationale might allow group standing not only for an injunctive case, but also for a damage action (although it is difficult to see how the damages due individual members could be proven without naming each one). This approach could be important in light of recent evidence that some landlords are renting apartments to drug dealers as a way to force legitimate tenants out of the building. Tenants who complain of this practice are subjected to violence and intimidation.

NOTES

1. American Law Institute, Restatement of Torts, Second, Vol.4, page 92 (1979).

2. For a discussion of the burden placed on the public fire service by the occurrence of numerous major fires, see R. Wallace, "Fire Service Productivity and the New York City Fire Crisis: 1968-1979," Human Ecology, Vol 9, No. 4, page 433 (1981).

3. See, e.g., District of Columbia Municipal Regulations, Title 12, Section 300, "Fire Limits and Provisions."

4. See, e.g., District of Columbia Municipal Regulations, Title 25, Chapters 10, 11, 12, 15, 16, 18 and 20.

5. New York City Administrative Code, Sections C26-1901.3 and 1905.4. See also the discussion in Aetna Insurance Co. v. 3-Oaks Wrecking and Lumber Co., 382 NE2d 283, 289-90 (Ill. App. 1978).

6. Harris v. Poulton, 127 S.E. 647, 649 (WVa 1925).

7. Michigan v. Tyler, 436 U.S. 499 (1978).

8. Id. at 510.

9. Hemmeter, "Vacant Buildings Lead to Arson, Undue Demands on Fire Service," Fire Engineering, Vol. 128, No. 9, page 42 (Sept. 1975).

10. "Bushwick is Burning," WNYF, Third Issue, 1978.

11. Stevens v. Rockport Granite Co., 104 NE 371 (Mass. 1914); Copart Industries v. Consolidated Edison Co., 362 NE2d 968 (NY 1977); Antonik v. Chamberlain, 78 NE2d 752 (Ohio App. 1947.)

12. See, e.g., New York City Administrative Code, Section C26-80.0.

13. American Law Institute, Restatement of Torts, Second, Section 827, comment c.

14. Id., Section 821-B(2)(b).

15. New York City Administrative Code, Section C26-80.0.

16. Mass. Gen. Laws Ann., Ch. 139, Section 1.

17. Tortorella v. H. Traiser & Co., 188 NE 254 (Mass. 1933); State v. Waterloo Stock Car Raceway, Inc., 409 NYS2d 40 (Sup. 1978); Kennedy v. Frechette, 123 A.146 (RI 1924).

18. Kosich v. Poultrymen's Service Corp., 43 A.2d 15 (N.J.Ch. 1945).

19. Beauchamp v. New York City Housing Authority, 240 NYS2d 15 (NY 1963)(dictum; vacant building, unguarded or open at doors and windows is a public nuisance); Harvey v. Derwoody, 18 Ark. 252 (unoccupied building, which had become a haven for tramps and other persons who smoked therein was a public nuisance. The building was close to other structures, which were thereby exposed to imminent danger from fire).

20. McKinney's Consol. Laws of New York, Penal Code, Section 240.45.

21. Broadrick v. Oklahoma, 431 U.S. 601 (1973).

22. Restatement of Torts, Second, Section 821-D.

23. Id., Section 822.

24. Kurtigan v. City of Worcester, 203 NE2d 692 (Mass. 1965); Copart Industries v. Consolidated Edison Co., 394 NYS2d 169 (1979); Wood v. Picillo, 443 A.2d 1244 (RI 1982). But see State v. Wright Hepburn Webster Gallery, Ltd., 314 NYS2d 661 (Sup. 1970), which states that to establish a public nuisance, it is essential to prove the injury as an accomplished fact. The holding is clearly wrong, and the case the court cites to support its proposition says nothing of the sort. The holding may be explained by the fact that the case arose under bizarre circumstances, and the court may have been seeking a plausible way to dispose of it.

25. Smith v. Morse, 19 NE 393 (1889); Copart Industries, above.

26. Restatement of Torts, Second, Section 822(a).

27. Seavey, "Nuisance: Contributory Negligence and Other Mysteries," 65 Harv.L.Rev. 984 (April, 1952).

28. Delibert, "Civil Liability for Arson Fires: The Case Against the Owners," in Neighborhood Based Arson Control, Karchmer, ed. (Battelle Human Affairs Research Centers 1983).

29. Uggla v. Brokaw, 102 NYS 857 (App.Div. 1907); Cummings v. Lobsitz, 142 P. 993 (Okla. 1914).

30. Fort Smith v. Western Hide & Fur Co., 153 Ark. 99 (1922).

31. McKinney's Consol. Laws of New York, Penal Law, Section 240.45.

32. Gallagher v. Flury, 57 A. 672 (Md. 1904)(increased danger of fire by the erection of a neighboring lawful building not grounds for injunctive relief against erection of the building).

33. City of Baltimore v. Radecke, 49 Md. 217 (1878)(steam engine has great commercial value and therefore may be used in the city, even though there is some danger).

34. Wood, A Practical Treatise on the Law of Nuisances, pages 192-196 (1893).

35. Harrison v. Textron Corp., 328 NE2d 838 (Mass. 1975); Mandell v. Pasquaretto, 350 NYS2d 561 (Sup. 1973); Dixon v. New York Trap Rock Corp., 58 NE2d 517 (NY 1945).

36. See Litwin, "Punitive Damages in Action Based on Nuisance," 31 ALR3d 1346 (1970).

37. Steere v. Tucker, 99 A. 583 (RI 1917).

38. McClellan v. Thompson, 333 A.2d 424 (RI 1975); Gibbons v. Hoffman, 115 NYS2d 632 (Sup. 1952); Clabaugh v. Harris, 273 NE2d 923 (Ohio 1971).

39. Saari v. State, 125 NYS2d 507 (App. Div. 1953).

40. Downes v. Silva, 190 A. 42 (RI 1937).

41. Trafton v. Downey, 151 A. 4 (RI 1930).

42. Hoffman v. King, 55 NE 401 (NY 1899).

43. Ibid.

44. Delibert, above.

45. McGuffey v. Pierce-Fordyce Oil Assn., 211 SW 335 (Texas Civ. App. 1919)(large oil and gas tanks on a public street in a thickly-settled portion of city held to be public and private nuisance).

46. Bremer v. Manhattan Rwy. Co., 84 NE 59 (NY 1908); Prijatel v. Safeco Industries, 353 NE2d 923 (Ohio Misc. 1974). The term "laches" refers to the doctrine that a plaintiff who delays too long in exercising his or her right to equitable relief may lose the right. It is comparable to the statute of limitations in its effect, but is imposed as a matter of fairness rather than by statute.

47. This author was a staff attorney at the U.S. Securities and Exchange Commission at the time of the Supreme Court's landmark decision in Parklane Hosiery v. Shore, 439 U.S. 322 (1979), and observed a very marked increase in the number of defendants desiring to settle SEC cases without a trial, and without any findings of fact.

48. B.R.DeWitt, Inc. v. Hall, 225 NE2d 195 (NY 1967). Because of a defect in the system of legal citations, some of the lower courts in New York still do not realize that the Court of Appeals recognizes non-mutuality. But DeWitt leaves little doubt: "To recapitulate, we are saying that 'the doctrine of mutuality' is a dead letter." 225 NE2d at 198.

49. Manuel F. Spencer & Son v. Commonwealth, 450 NE2d 1105 (Mass. App. 1983); Com. v. Cerveny, 439 NE2d 754 (Mass. 1982); Rudow v. Fogel, 382 NE2d 1046 (Mass. 1978).

50. Armstrong v. Armstrong, 362 A.2d 147 (RI 1976).

51. 439 U.S. 322 (1979).

52. Goodson v. McDonough Power Equipment Inc., 443 NE2d 978 (Ohio 1983).

53. Parklane Hosiery at 331. This is apparently not a consideration in New York. In the seminal New York case of DeWitt, above, plaintiff could easily have joined in the earlier proceeding, but apparently chose not to. Yet the Court of Appeals makes no mention of this fact.

54. For example, consolidation of a private action with one brought by the U.S. SEC requires SEC consent. 15 U.S.C. Section 78u(g).

55. Parklane Hosiery, above.

56. Parklane Hosiery at 332.

57. Id.

58. Hospital Service Corp. v. Pennsylvania Insurance Co., 227 A.2d 105 (RI 1967).

59. Warth v. Seldin, 422 U.S. 490 (1975).

60. NAACP v. Alabama, 357 U.S. 449 (1958).

61. Mass. Assn. of Independent Insurance Agents and Brokers v. Com'r of Insurance, 367 NE2d 796, 802 (Mass. 1977).

62. Douglaston Civic Assn. v. Galvin, 364 NYS2d 830, 834 (1974).

63. National Organization for Women v. State Div'n of Human Rights, 358 NYS2d 124 (1974).

64. Huertas v. East River Housing Corp., 81 FRD 641 (SDNY 1979).

65. Warth v. Seldin, above, at 515.

66. Douglaston, above.

67. Annot. Laws of Rhode Island, Title 10, Section 10-1-1.

68. Legal Aid Society v. Assn. of Legal Aid Attorneys, 554 F.Supp. 758, 765 (SDNY 1982).

CHAPTER V

COMMUNITY GROUP ASSISTANCE TO CRIMINAL INVESTIGATIONS

98179

Community Group Assistance to Criminal Investigations

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I. Introduction

A few years ago, a member of a newly formed community group went to Boston City Hall to find out who owned the apartment house he lived in. He was frightened because the buildings on either side of his home had recently suffered some fires and he was concerned that his might be next. He was not sure why there were so many fires on his street or who might be responsible for them.

He went to the assessors office and asked a clerk how he could find out the ownership of his building and of others on the street. The clerk gave him a start and then directed him to the registry of deeds for more information.

The fires on the street continued, some were accidental but the majority were not. Day after day he researched the ownership of these fire ravaged buildings and a pattern began to emerge. Finally, he and his community group met with law enforcement officials concerning the fire problem and presented their research into why they believed these fires were taking place. The information the community group provided to these law enforcement officials lead to the indictment of thirty-three individuals involved in burning these buildings for financial profit.

This example demonstrates that community action organizations and law enforcement can work together in a cooperative effort to combat fires and arson in a neighborhood. Law enforcement agencies are fact gatherers and community groups have invaluable insight into the social and economic changes in their neighborhood as well as specific information concerning an actual or potential fire or arson problem.

We offer this paper to assist grassroot community organizations in understanding the interplay necessary to establish lasting working relationships with law enforcement officials to prevent arson in their neighborhood.

II. Law Enforcement and Arson Prevention

Fire and police departments generally investigate all suspicious fires. The goal of an arson investigation is the conviction of the firesetter and accomplices. Professional arsonists are paid for the fires they set. Many arsonists are not professionals and set fires for other reasons. Often arsonists have psychological problems and set fires out of a need for gratification. In addition to these habitual fire-setters, others commit arson to vent their anger or jealousy.

Not all fires are intentionally set. The first task of an arson investigator is to determine whether a fire is intentionally set or due to some other cause. Only where an arson investigator can show that a fire has been intentionally set will a fire be considered a crime. Physical evidence gathered showing how the fire started and testimony of witnesses must prove beyond a reasonable doubt both that an arson has occurred and that a particular person was responsible.

Once a fire is determined to be arson, the investigator then looks for the motive for the fire and who had an opportunity to set it. Witnesses are located who have firsthand knowledge of the circumstances surrounding the arson including people connected with the building where the fires occurred. Ideally, investigators are looking for witnesses who saw the

crime committed. Often there are no eyewitnesses to the setting of the fire, and the events leading up to the fire must be recreated by interviewing these other individuals.

While the interviewing process is taking place, the ownership and physical condition of the building is researched to determine whether a financial motive was present and who could benefit from the fire.

Identifying suspects without an eyewitness to the fire is a time-consuming process. An individual needs only a match to commit the crime of arson. Often arson fires take place where the general public has access. There are many possible suspects until motive and opportunity are determined. Even though an individual is suspected of setting the fire, there must be sufficent evidence to present at trial which will lead to a criminal conviction. Once all the evidence is gathered, the actual events surrounding the fire may not be as they originally appeared when the investigation was begun.

Not long ago, an arson occured in a three-unit apartment house. For several reasons, the investigation of this fire initially focused on the owner. He and the individual who loaned the owner money to purchase the property had a history of fires in their buildings. Some tenants in the building owed considerable back rent and there were rumors that the owner was about the be sued to bring the building up to code. During the course of the investigation it was found that the tenant on the first floor where the fire originated was having personal financial difficulties. He had recently taken out fire insurance on his belongings. Initially it appeared that the building's owner had the most to gain by this fire, but further investigation revealed that the tenant had set the fire to collect on his insurance. He confessed to setting the fire when he was confronted with the evidence developed by investigators.

When facts concerning arson have been uncovered, witnesses and circumstantial evidence can be presented to a grand jury which will decide whether the state has obtained sufficient evidence to charge an individual for setting or conspiring to set a specific fire. If the individual is indicted by the grand jury, his guilt or innocence will then be determined at a trial either by judge or jury.

The following are common misunderstandings the public often has concerning the arson investigative process:

- Ongoing criminal investigations are confidential. Evidence developed on specific fires will not generally be divulged while an investigation is in process. The confidentiality both prevents the investigation from being jeapordized and protects the safety and reputations of innocent individuals.

- An individual is never guilty by association. To prove a conspiracy among individuals to commit arson requires evidence that this individual did in fact agree to commit the crime.

- Individual arson events require separate trials. An individual owner who has suffered a number of arsons in his buildings cannot be tried at once on all of these crimes if a common link cannot be shown to exist between the crimes. The amount of evidence obtained concerning each fire usually varies and only a limited number of arsons may be sufficiently provable.

- Many jurisdictions do not assign investigators to exclusively investigate arson cases. Investigators generally have numerous cases in various stages of completion and continually receive new assignments. This requires that some cases be given priority over others. These priorities are usually affected by manpower and resource limitations, not an unwillingness to investigate specific fires referred by interested members of the community.

III. Community Group Assistance to Criminal Investigations

Information is the lifeblood of all investigations. A conscientious investigator is always receptive to new data that will lead to solving a case. Therefore, community group members should offer information they obtain to appropriate law enforcement officials. Often people who are reluctant to voluntarily speak to an arson investigator will relate what they know to other members of the community. A concerned community group can bridge this gap, and perform the role of an honest broker, by encouraging witnesses to speak to investigators or arranging for them to meet. Even rumors and unsubstantiated information should be forwarded to law enforcement officials who are in a position to verify the information and determine which rumors may have substance. However, discretion must be used to limit calls with unsubstantiated information so that the caller is not perceived as a nuisance to the investigation but as a contributor to its success.

Arson investigators are particularly interested in:

- Names and addresses of anyone who witnessed the fire before the fire department arrived.
- Names and addresses of individuals who are familiar with the building's condition and events which occurred leading to the time of the fire.
- Addresses of buildings where circumstances appear where fire is likely to occur, particularly an arson fire.
- Results of public record research concerning the building ownership, code violations and legal action being taken against either the owner or the tenants.

Without information provided by members of the community, investigators may have to rely on informants, who are often involved in other crimes. A community resident will generally be viewed as a more reliable witness when the case goes to trial because his credibility is not affected by a criminal record or implication that he is only testifying because a deal was made.

Community group members are often more aware than law enforcement officials about changes in safety, tenancy, and related issues in a building. They probably know in which buildings there are disputes between tenants and landlords and among the tenants themselves, about serious physical deterioration, increases in vacant units, and drug related or other crimes. These factors are often associated with buildings that suffer an arson fire. Law enforcement agencies may be unaware of these problems before a fire occurs and should be advised of their existence.

Arson investigators are usually interested in the documented ownership and the financial history of a building that has suffered a non-accidental fire. Community group members can become proficient at property research, conducted at local, city and county registries. Groups should consider this research as an important activity in any arson prevention project.

Researching ownership of properties that have burned should disclose other buildings owned by the same individuals. Fire department incident reports should be reviewed to determine whether any of these other buildings have also suffered fires. Often, fire department incident reports reveal common traits in the fires plaguing a particular neighborhood.

Some common neighborhood fire patterns are fires in vacant or partially vacant buildings, absentee-owned buildings or buildings of a certain type of occupancy. Fires on back porches, front steps, and fires occurring during the rehabilitation of a building may also be a pattern. In research, always look for commonalities either in the condition of the buildings, the types of fires, and both ownership and tenancy.

By organizing and documenting the researched data, patterns should begin to develop that reveal the characteristics of each community's fire problem. Once the problem is understood, time can be used constructively to address solutions to the problems.

Property research must be presented in an organized and thorough manner. By documenting this research, its presentation becomes more credible. Fire patterns will illustrate the existence of a problem. This research can be a starting point for an official investigation. Each fire has to be completely investigated before any court action can be taken.

The following are some suggestions to aid you in working with law enforcement agencies.

- Seek the assistance of the law enforcement agency you want to participate in your arson prevention project. Support by the executive office of police and fire departments may be necessary to allocate the resources needed to successfully implement an arson prevention project.
- Be openminded and cooperative with law enforcement officials. Investigations are time consuming and difficult. Investigators are not at liberty to disclose investigative developments. Unless a relationship of trust develops, do not expect be advised of the investigation's progress.
- Assume that law enforcement officials may not have information or patterns developed and researched. Crucial data may be missed if you assume that investigators possess all the information you discover.

- When establishing a working relationship with law enforcement agencies, mutually agree on lines of communication and ground rules. This will avoid many potential misunderstandings.

- Direct situations to the propoer law enforcement agency. Many neighborhood problems that can result in arson fires are the responsibilities of government agencies other than those of the fire department and police, such as building inspection, tax collection, housing and rent control boards and community development departments.

- Determine which tasks each group is best equipped to complete and are the most valuable to law enforcement. Always complete the tasks that are promised.

- Never accuse an individual of being an arsonist. Accusations such as these expose one to legal liability and diminish the credibility of the spokesperson and group.

- Remember that the goal is to stop fires, not promote a political position. There is no place for politics in arson investigations.

- Be aware that some investigations, no matter how well done, do not lead to indictments. This is not the fault of either investigators or prosecuters. Investigations end because there is a lack of proof.

- Do not confuse the roles of investigators and community activists. Only a cooperative effort with each doing their own job will lead to an effective result.

CHAPTER VI

DEVELOPING WITNESS SKILLS FOR ARSON CONTROL LITIGATION

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DEVELOPING WITNESS SKILLS FOR ARSON CONTROL LITIGATION

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Preface

The process we describe in the following paper is designed to help a citizen become a community arson control specialist. This specialist can prepare and present evidence in support of arson prevention actions in a number of official forums, such as housing courts and code enforcement agencies, but the principle thrust of our approach entails civil litigation.

Community members can employ their arson control expertise in a number of ways. For example, they can offer assistance, support, and information to local government agencies. However, when government efforts are either severely restricted or absent, the information gathering and evidence development processes will permit the community to take steps to reduce the risk of arson and fires by initiating their own legal actions.

We should emphasize that civil litigation, whether initiated by government agencies or community reprsentatives, will increase the financial stress on the problem building. Since this financial stress was likely a cause, if not the cause, of the building being identified as a risk, every effort must be made to monitor the building from the instant litigation becomes a possibility. If the risk of a fire or arson is imminent, establishing a fire watch and coordinating with law enforcement agencies is essential to protect the occupants of the building.

We realize that community efforts, including civil litigation, have become necessary due to an arson problem that continues without a viable solution. We support these innovative approaches to reduce the occurrence of arson fires and its resulting injuries and damage. As our efforts and expertise increase, so will the means to control this problem.

Michael Friedland
Joseph Murphy

I. Introduction

Only when the reasons for a community's arson or fire problem are isolated can we identify and argue persuasively for an appropriate solution. In this regard, information gathered by arson early warning programs is used to single out buildings that constitute a fire risk. Therefore, an arson early warning system is a useful basic tool for identifying buildings for which litigation represents an effective preventive tool or post-fire remedy.

Much data obtained in the course of community anti-arson efforts can be used as evidence in arson control litigation. In order to do use this information in a legal action, we first need community arson control specialists to gather and analyze this data.

An arson early warning system is a useful tool to identify buildings for which litigation is the only means of controlling an arson or fire problem. Only after the reason for the arson/fire problem is identified can an appropriate solution be determined. Although community efforts have usually been directed toward the prediction and prevention of arson fires, we address herein the causes and reduction of all fires that occur in a particular neighborhood. This approach has the strategic advantage of not requiring that an individual first be labeled an "arsonist" before taking action against him to reduce a fire-prone situation through persuasion or litigation. The following material outlines the development of the community arson specialist and the evidence he will need, to prepare and present, in arson control litigation.

II. Courts and Witnesses

In a court of law, a witness is someone who is called upon to testify to what he or she knows first hand about the issues before the court. This type of witness is seldom, if ever, allowed to state his own opinion or draw any conclusions during his testimony. In litigation brought to prevent a fire or as a result of a fire, witnesses will generally be tenants, neighborhood residents, and occasionally members of local community organizations, and probably none will be permitted to relate any information other than his or her own direct observations.

An expert is a person who has knowledge of a particular subject that is not normally available to the general public. An expert witness is one who can state his opinion and draw conclusions based upon factual evidence presented by himself or others. Where an expert witness is called upon, parties to the suit must first agree that the individual is qualified as an expert before he testifies. When the litigating parties do not agree to an expert, the judge will determine the court's acceptance of his status based on the witness's knowledge and experience.

Until you become a court qualified expert in arson prevention, you can be a very credible witness based on the thoroughness of the information you present. Unlike an expert witness, you do not need to have the court qualify you before you testify. However, it is important that you base your testimony on concrete facts and rely on the general knowledge and experiences of the judge and jury (or government regulatory agency) in order that they may reach the inferences supported by your evidence.

Presently, there are very few expert witnesses in the field of arson control simply because this whole concept represents such a new development. As a community arson control specialist, you may be called upon to testify about information you have gathered and analyzed concerning a particular building or person contributing to a fire problem, or to make written presentations with the same objective. The court's acceptance of your information as a specialist will be determined by your credibility as a witness and testimony that is relevant to the issues before the court. Consequently, your goal should be to present the facts you have collected in such a way that the audience (judge, jury, or government agency) will reach your conclusion regarding arson risk or arson prone behavior.

The long term goal of an arson prevention specialist should be becoming an expert, accepted by the courts, in the field of arson control litigation. To achieve this goal one must gain experience and familiarity in subjects related to arson prevention. These include fire safety, housing, and insurance and real estate practices.

It will be difficult for a defense attorney to dispute or challenge your testimony if it is factual and well documented and leads to reasonable inferences that you do not have to state as conclusions yourself. You should present your material in a manner that will educate the judge or jury on a subject that may well not be familiar to them, so that they can make a reasonable decision in the case, based on the evidence before them.

III. Presentation of Your Findings.

Your first task is to decide the official action that you seek from your audience before presenting your research or investigative results to them. When presenting your findings either to a court of law or to other interested parties (such as code enforcement officials) tailor the presentation to the general level of knowledge of your audience. The presentation should be concise, objective, and factual. Oral information should be substantiated by an easy-to-follow written report stating the sources of your information. Remember, much of your data (and particularly statistical arson risk data) will be unfamiliar to your audience. Therefore, guide the audience step by step through your reasoning process so that they will understand how and why you reached the conclusion you did. As a rule of thumb, always assume that your audience is not as well informed as you are regarding the fire or arson problem being addressed, and the relationship of housing, financial, and other data to fire and arson problems.

Identify yourself and the organization you represent when presenting your information. Relate all of your experience in arson prevention and related fields (including your rate of successfully predicting where arsons will occur), then document the sources of information and procedures by which you analyzed it. Establish your credibility through your experience and quality of your evidence, and use photographs and certified documents whenever possible.

Finally, recommend creative ways by which your audience can help solve the arson problem. For example, the so-called Beacon Chambers case, which is

included as an Appendix to this report, represents an important innovation worth considering in your locality. Available solutions often depend on the cooperation of your audience. In general, make recommendations that are designed to stop imminent fires while you develop long term solutions to the underlying causes of the fires. Criminal indictments are not the only solution to arson/fire problems; innovative civil legal action can also address the root causes of a neighborhood's fire problem.

IV. The Arson Control Specialist

The arson control specialist should be a person with knowledge and experience in the various aspects of arson prevention and building preservation. At minimum, the duties and responsibilities of the specialist should include:

1. Determining the factors that have contributed to the occurrence and severity of fires in the past;
2. Determining the responsibility for injuries and damage resulting from particular fires; and
3. Gathering and analyzing data to make the above determinations.

Much of the data necessary for civil arson control litigation can be obtained from public records: fire reports, deeds and mortgages, and court papers. Indeed, much of this information may already be in the possession of an arson prevention group which uses it for their early warning system. In writing up the results of your investigation for a civil suit, document the chronological history of the building at risk, incorporating all of the various data gathered. This method of organizing your information is essential in that it helps to build a cause and effect relationship among various fire-related elements that otherwise may appear to be unrelated.

There are certain precautions that a building owner is expected to take to prevent a fire and diminish the likelihood of injury and damage from a fire. Although they may vary somewhat according to local code requirements, the precautions usually include installation of smoke detectors and emergency lights, proper maintenance and repair of stairs,

fire escapes, exits, and heating equipment and other building services. The arson specialist should document the condition of a building from housing inspection records, tenant interviews, and his own observations.

Remember that determining the responsibility for a fire is not the same task as discovering who set the fire. As used here, responsibility includes failure to provide adequate maintenance, and especially maintenance designed to eliminate fire causing conditions. Responsibility for a fire may lie with the building owner, mortgagee, tenants or others. The person responsible for the conditions leading to a fire will, most likely, be the person you will sue in a civil action.

When you analyze the data collected from previous fires, look for common factors. These include ownership, tenancy, vacancy, upkeep, security,and although it may be difficult to obtain information on cash flow, make an effort to do so. Risk patterns usually emerge that are unique to a particular neighborhood or owner and identify the fire or arson problem.

The need for litigation may be indicated by a series of factors. The more factors that are present, the more likely a fire is to occur. These are some factors that were closely associated with arson fires in the Boston metropolitan area:

Prior Fires - A building owner with a history of previous fires in his buildings is more likely to suffer future fires than an owner without a history of fires. In our experience, prior fire history is a very reliable indicator of an owner whose buildings evidence a high risk of suffering future fires.

Vacancy - A vacant building is the type of structure most attractive to firesetters, for it provides the greatest opportunity to set a fire undetected. In some neighborhoods the large number of vacant buildings makes it impossible to predict which one of them will be the next to burn. Partially vacant buildings are a lesser risk. However, they are still more likely to be set on fire then a fully occupied structure. Document the occupany history of all buildings surveyed. Fire department records will indicate whether a building was vacant or occupied at the time of a fire.

Ownership - Absentee owners, particularly those owning two or more buildings, are more likely to suffer fires in their buildings than owner-occupants. One easy method to determine the type of ownership is to ask the tenants to whom they pay their rent. Buildings owned by resident landlords are the most difficult to predict as fire risks. They are generally more stable and in better condition than those absentee-owned. Consequently, information on risk factors is less evident and thus can not be predicted with reliable frequency. Here, the owner-occupant is as likely to suffer a loss from fires as his tenants. Therefore, he generally takes action before the building becomes a serious risk.

Lack of Security - Security should always be a factor to consider in assessing a building's fire potential. A building open to trespassers is an open invitation to firesetters, regardless of their motive. No one should be able to gain access to a building undetected, unless he has a key. One remedy to seek in arson control litigation is improved security of the risk building. In many jurisdictions, faulty and improper locks on the exterior doors of buildings, and interior entry doors to apartments,

are violations of the health and safety codes. This means that violations can be corrected by code enforcement or court action. Check all doors and windows that would permit access to the building and keep them locked. In vacant buildings, front doors should have adequate locks and all other doors and windows should be covered with wood or metal to prevent entry. When a fire has occurred in a building, review the fire report to learn whether the firefighters had to force their way into the building to fight the fire.

Economic and Social Changes in a Neighborhood - In general, an economically and socially stable neighborhood suffers fewer fires than an area that is in transition. Proposed developments or urban renewal projects generally have a marked impact on property values. Fires often result when the land to be developed is more valuable without buildings standing on it. Buildings that are scheduled for demolition should always be closely monitored if there is community opposition to that action. Buildings that are designated landmarks or are located in historic districts should be targeted when they are purchased by developers who might find their development value limited by zoning practices tjHe sold. Underlying causes of decreasing property value fires are failures to obtain financing for needed repairs which result in fire hazard conditions or lead to an owner's belief that all legitimate options are unabailable. Every arson prevention effort should monitor trends in real estate values

and municipal development plans and use them as predictive factors for potential fire risk areas.

Building and Housing Code Violations - The number and seriousness of code violations indicates whether an owner has stopped investing in his building. This can be due to a lack of funds available to the owner, or his intentional "milking" of the property and investing the income generated in other areas. Correcting code violations is often expensive, so pressure brought on an owner to eliminate these violations may motivate him to destroy the building--unless this situation is approached and monitored carefully. You should always determine the reason a building is not being maintained and whether the owner can afford repairs, before moving to enforce code violations or initiating a suit against the owner.

An owner who is being cited for code violations resulting from his disinvestment (milking) may transfer property title to someone else in order to avoid legal action by code enforcement agencies or courts. The courts generally allow a period of time for a new owner to effect repairs before taking further action. In some states, it is a violation of law to transfer a building to avoid code enforcement, and legal action can be taken to void the property tranfer and break this cycle of delaying repairs through these frequent sham "sales".

Cash Flow - A building that is losing money is more likely to burn than a profitable one. Information to reconstruct, approximately, a building's cash flow can be obtained by the arson control specialist. Speak to tenants to learn rent levels, numbers of vacant units in the building, rent strikes or rent withholding actions, and recent repairs.

Land (or similar) court records will indicate any recent mortgages, liens or attachments that indicate nonpayment of bills and expenses. Attachments or liens filed by merchants and contractors may show a cash flow problem, in that work and goods are not being paid for, and this may develop into a distinct pattern. By determining the rental income and subtracting estimated mortgage, taxes and payments to workers, you can determine the cash flow, and thus whether the building is being milked or just poorly managed. A fully occupied building generating market level rents should be profitable and well-maintained.

Insurance - Information on insurance coverage and claim amounts is often difficult to obtain. In some jurisdictions, insurance information is listed with housing or other municipal agencies; in others, these records can only be obtained by law enforcement officials and sometimes occupants of a building. If you can obtain insurance information, note prior claims made at the building or by its owner at other locations, amounts paid on those claims, policy expiration dates, and recent increases or decreases in the amount of insurance coverage. During the course of litigation, insurance records may often be subpoenaed in the process of "discovery". Any false information given on the application for insurance or changes in an insured property's condition may be grounds for the insurer cancelling the policy or refusing to pay a claim. Most policies provide that a claim will not be paid if the building was vacant for a specified period of time prior to the fire loss. Monitoring factors showing vacancy, changes in conditions that increase a building's chance of suffering damage, or other changes may be useful in later notifying an insurance company of a potential claim.

V. Developing Testimony and Written Presentations.

The objective of arson control litigation is to change or eliminate the conditions that make other buildings a fire risk. Therefore, evidence must be developed that will establish that certain conditions contribute to the occurrence of fire. The existence of these conditions in a specific building can then be shown to qualify that building as a risk that should be reduced or eliminated.

After arson risks have been identified, pre-fire intervention litigation may be initiated to reduce the risk of those fires when other means have not proved to be fruitful. During the process of accumulating data from prior fires for use in arson prediction models, some fires may have been identified that are suitable candidates for negligence actions. Parties that can be identified as contributing to fire-prone conditions can thus be made accountable for allowing those conditions to endure and worsen.

Data on previous fires, ownership, code violations, occupancy, building use, and location all are potential forms of evidence if the supporting documents are available. All records that were gathered as data for arson prediction programs should be obtained by the arson control specialist for probable use in court later. Also, obtain any photographs of the risk building taken by community anti-arson groups. If photographs are not already available, survey the building yourself and take photographs of visible conditions that make the building a fire risk.

Arson prevention programs should provide you with statistical information on the reliability of their prediction model over some specified period of

time. This means including data on predicted fires that occurred because they were not, or could not be, prevented.

Review fire reports for data on fires that have occurred in buildings similar to the at risk building. Record the location, owner, occupancy rate, and use of these buildings. Pay particular attention to information on the cause of the fire, the area of origin, all conditions listed as having contributed to the fire cause or its spread, and any recommendations the fire department noted on reports that would reduce fires or injuries in the building in question.

Although your primary focus is the prevention of arson fires, note information on reported fires of all causes--not only the suspicious and incendiary designations. This will enable you to identify the conditions that lead to electrical, mechanical, and "accidental" fires, as well as those caused by vandals, careless workers and improper storage of combustible material. Many of these contributing conditions will be same indicators as those present in arson-prone buildings. By addressing all fire-contributing conditions, you avoid accusing a building owner of planning an arson, while maintaining that he is responsible for eliminating these arson/fire causing conditions.

Also note any factors that have been determined to be unreliable predictors of fires. A careful assessment of these statistics will give you an indication of which factors to use in support of your testimony in an arson control case, and can help prepare you for challenges from defense attorneys and judges.

Fire departments usually state on fire reports the condition of a building at the time they arrive at a fire scene. Many conditions they report as existing at the time of arrival were present before the fire, and may be grounds for negligence if they contributed significantly to the fire origin or spread. Examples include unsecured doors and windows, accumulations of combustibles (trash, paint cans, cleaners), structural defects, and the lack of smoke detectors and sprinklers.

Before considering court action you must first determine who will be the potential victims of a future fire or who were the actual victims of a previous fire. In addition to the occupants of the building, neighbors, passersby, and firefighters can suffer injuries and property loss due to the fire. Information on fire victims who have been injured, suffered property damage, or were forced to move is usually listed on fire reports.

Once you have demonstrated that certain conditions that lead to fires are evident in your target building, you must present evidence that those conditions exist in the building identified as an arson or fire risk. Begin this evidence by reporting on the observations you made yourself and show photographs of all the objective, documented conditions making the building fire-prone. Using the inspection reports of the building and housing inspection departments, document the history of code violations and the fact that governmental efforts thus far have been unsuccessful in correcting those problems. Whether your planned legal action is aimed at eliminating fire-prone conditions or attaching responsibility for them after a fire, you must show that the building owner, or another responsible party, was aware of these conditions. Notices sent to the

owner citing code violations, and legal actions filed previously regarding those conditions, can be presented as evidence of the owner's knowledge and failure to correct those conditions.

The information from these sources will form the basis of factual testimony and documenting presentations. Data developed on cash flow, insurance, tax arrearages, prior fires and building violations will help establish the motives for past fires, and this should create a foundation for a judge or jury to conclude that these factors are indicators of future fires. Whether or not a person is prosecuted criminally for arson, he may still be liable for those actions or inactions contributing to a fire. Whenever possible, information should be reviewed from criminal prosecutions and added to the factual data developed for a civil trial.

VI. Report of Arson/Fire Building Risk

The major points in arson control testimony or evidence should be outlined first in a written report. An example of such a report follows this section as an Appendix. By reviewing this report, you can determine whether your presentation clearly demonstrates that a particular building is a fire/arson risk by showing that:

1. The conditions alleged to exist in this building have contributed to a number of actual fires in the past;
2. These fire-prone conditions do in fact exist in the building at risk (or did exist at the time a fire occurred there); and
3. The owner or other responsible person knew or should have known of the existence of these conditions, and failed to act to rectify them.

Begin this report by stating your premise: that a specific building is (or was) a fire risk due to particular conditions and that some identified individual is (or was) responsible for remedying those conditions. Second, follow this section with a detailed summary of the evidence of these conditions that are present at the building. Refer to any documentation that supports your evidence and identify photographs you will present. Second, list the factors that you have documented and determined to contribute to fires, including references to these sources that should follow your summary report in an appendix. Mention any documented recommendations made by the fire department or code inspectors, and whether each of those conditions was corrected.

The third section of the report should discuss how the existing conditions have contributed to past fires in the subject and other buildings. Cite

instances where these situations should have been corrected, in the opinion of the fire service or building department, and identify a person who is or was responsible for taking remedial action.

Your review of this report should aid you in determining whether your testimony will accomplish your objectives or whether you need additional data or preparation. Obtain further information to support any premise that you do not feel can be strongly supported, based on the evidence you have gathered and presented. Modify any premise that is not fully supported by your evidence to a premise that the evidence does support. For example, well documented code violations and nonpayment of taxes, originally intended to evidence a motive for an arson, may alternatively show that tenancies are jeopardized by health and safety hazards, and that foreclosure by the city for tax arrearage is imminent. Accordingly, your premise can be modified from one alleging that these conditions lead to fires, to a simpler tenant-consumer protection orientation in an effort to correct those conditions by an alternative court approach. In general, consider using civil rights, housing, landlord-tenant, real estate, or other laws as alternatives for which you may have obtained enough supporting evidence through your arson control research.

In addition to making your planned testimony and its defense more polished, a written report can be given to parties initially reluctant to meet with you or your group to discuss a potential fire problem. You can also send your report to government agencies to demonstrate that in support of the action you request, you have identified the problem and its possible solutions.

The written report can also be presented to a private attorney who may need this background in order to accept your group as a client and to take appropriate legal action. Because many attorneys are unfamiliar with arson control litigation--including those who are active on tenant and housing issues--the report will provide the attorney with a clear understanding of the problem you want addressed and the evidence that has been developed for potential litigation.

Prior to seeking litigation to remedy a potential fire problem, an effort should be made to discuss the problem with the building owner. This serves to provide the owner with the opportunity to initiate corrective measures with the support of the community and the building occupants. This may reduce the risk of a fire without the expense of money and time that would result from a court suit. Here, the arson/fire risk report is useful in demonstrating that problems in a specific building have been identified and all preparations have been made (short of filing a law suit) to see that action was taken to reduce the risk.

A building is a valuable asset to its owner and the owner should be approached with this in mind. It is not good business practice for an owner to refuse to address situations that can be demonstrated to destroy his property--his business asset--particularly when his refusal can later be brought to the attention of a bank holding a mortgage on the property or an insurance company covering the property.

In our experience, we have yet to speak to a building owner who was willing to say he was not interested in protecting his property against arsons or fires. If litigation still becomes necessary, be sure to

document in the testimony you present in court your efforts to give the owner a chance to voluntarily correct the problem.

The following is an example of a written report that could be prepared in support or testimony or for submission to a housing court or other official body.

Appendix:

Arson/Fire Risk Report

I. Premises

123 Main Street, a three-story wooden apartment building, is owned by John Jones. Jones is an absentee landlord and his failure to correct building code violations and pay real estate taxes and water charges has created a situation making this building likely to suffer a fire.

II. Evidence

1. 123 Main Street is owned by John Jones, who purchased it on 1/2/82 for $50,000. He granted a $40,000 mortgage to City Savings Bank at the time of purchase (see deed: Bk. 1111, Pg. 12 to Pg. 14). On 2/1/82, Jones granted a $50,000 second mortgage to Charles Green, Jones' sometimes business partner (see deed Bk. 1122, Pg. 10; business certificate: J&G Painters).

2. As of 3/1/82, 123 Main Street has been insured by ABC Insurance Co., for $100,000 (see City Housing Dept. report, dated 3/15/82 for 123 Main Street).

3. As of today, front exterior door lock is broken (photo #1); stairs to second floor are damaged (photo #2); electrical wiring is exposed in apartment no. 7 (photo #3). Due to lack of heat, tenants are using 13 amp space heaters to heat their rooms (photos #'s 4, 5 and 6); trash is piled

up under rear stairs (photo #7); and lead paint is chipping off walls throughout building (see report of Lead Paint Poisoning Project dated 12/2/83; photos #'s 8, 9 and 10).

4. The city housing department cited the following code violations on 6/1/83 (see report): lead paint, defective door lock, stairs in need of repair, exposed wiring, lack of heat, inadequate electric service (15 amps per unit).

5. Jones was notified of housing code violations and failed to make repairs (see letter from housing inspector Harry to Jones dated 6/2/83, 9/2/83, and Harry's report of 10/10/83).

6. City has filed court action to force owner to rectify code violations (see docket of civil action 83-9872).

7. Real estate taxes and water charges have not been paid since June 1982 (see municipal tax lien no 4243).

III. Relationship of Fire Risk Situation in this Building to Citywide Data

1. During the past year, city fire records report 1000 fires; 300 were of electrical origin and 111 were due to exposed wiring (see Annual Report of the City Fire Department and Downtown Neighborhood Arson Stoppers data).

2. Two hundred fires, caused by vandals, were reported in the past year by the City Fire Department; 175 of these fires were found to have been set in buildings with front doors unlocked (see Fire Department reports).

3. The State Fire Marshal reported 350 fires in 1983 due to improper or overheated use of electric space heaters; 200 fires originating in rubbish left in buildings. Of these rubbish fires, 100 were listed as due to a suspicious cause.

4. Fifty percent of all building fires in the city that were listed as suspicious or incendiary (and not set by vandals) had taxes in arrears over one year; 35 percent of these fires were in buildings with second mortgages over 15 percent of the original mortgage amount; 60 percent of all these fires had insurance coverage in excess of the purchase price by at least $15,000.

5. In 25 fires in the city in which occupants were injured, the fire department recommended, prior to these fires, that stairs be repaired and cleared of obstacles to reduce future injuries (see fire reports).

IV. Discussion

1. Electrical Risk. 123 Main Street has exposed wiring in one apartment: inadequate electrical service to which several electric space heaters are connected. City fire records attribute over 450 fires last year to these two conditions found in this building.

2. Building Security. The front door of 123 Main Street has a broken lock and cannot be secured. This condition violates the state building code and permitted 175 fires to be set by vandals inside buildings last year.

3. Overinsurance and Second Mortgage. 123 Main Street was purchased for $50,000 and within one month it was mortgaged for $90,000 and insured at $100,000. Sixty percent of all suspicious and incediary fires in the city last year had the same overinsurance situation as this building and similar mortgage circumstances were found in 35 percent of those fires.

4. Lack of Maintenance and Heat. Due to a lack of maintenance, the stairs need repair, wiring needs to be fixed, and lack of heat has caused the tenants to use electric space heaters to keep warm. All of these conditions have not been corrected and are known to be contributing factors to fires.

5. Responsibility of John Jones. Jones has been notified of the conditions that both violate the state building code and lead to fires. However, despite being notified by the housing inspection department and the courts, he has failed to take any action to reduce the risk of fire at 123 Main Street by correcting any of these conditions.

V. Recommendations [optional; not for court testimony]

1. Order that Jones repair the conditions cited by the housing inspector, bring his tax and water accounts current, and install smoke detectors and remove accumulated trash.

2. If within 30 days these conditions have not been remedied, file complaints against Jones in the Superior Court for failure to provide safe housing conditions and ask that all rents be applied to the repair of the building and the city foreclose the property for unpaid taxes.

CHAPTER VII

NEGOTIATING INFORMATION EXCHANGE AGREEMENTS WITH INSURANCE COMPANIES

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Negotiating Information Exchange Agreements with Insurance Companies

Prepared with the Assistance of:

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Brooklyn, New York

Negotiating Information Exchange Agreements with Insurance Companies

In response to the growth of arson as a nationwide problem, many states have enacted laws to protect insurance companies, law enforcement agencies, and others with a "need to know" so that they can exchange information on arson-related insurance claims without making themselves liable for legal damages. Known as "insurance immunity laws" these provisions formally indemnify one or both parties involved in the communication of policy and claims related information that grows out of a suspicious or incendiary fire.

Insurance immunity laws are especially important in both pre- and post-fire situation, where the identity of the insurer of a property in question is sought. While most insurance immunity laws indemnify insurance companies and law enforcement agencies in the exchange of policy related information, community groups and individual residents do not usually benefit from these protections. In many situations where a community group maintains an arson early warning system that identifies high risk buildings, the next step of notifying the insurer becomes obstructed by the reluctance or refusal of a company to provide such information without legal protection.

In Brooklyn, the Flatbush Development Corporation administers an arson prevention program that has successfully negotiated an agreement with one of the largest insurers in the Flatbush neighborhood area. The

particulars of that agreement should help other community groups in considering some type of information exchange as an effective fire and arson prevention strategy.

The Flatbush arrangement provides that the group will utilize a computerized arson early warning system to develop profile information on high risk buildings, and that certain types of information in summary form will be communicated to the participating insurer. The main features of the program are as follows:

- Addresses of properties that are insured by the participating company, and which are identified as "at risk" to arson one of the arson risk prediction index scores, are sent periodically to the insurer;

- Based upon a request by the insurance company, Flatbush provides copies of property reports for any locations where claims have been filed or where there is a pending application for insurance coverage. The property reports cover such matters as the tax arrearage situation of the property, code violations, prior fires and their severity, legal actions involving the building, sales history, and vacancy rate;

- Flatbush prepares periodic updates on at risk properties and provides them to the insurer--usually on a quarterly basis.

The agreement between Flatbush and the insurer provides for the insurance company to reciprocate by either providing the following information to Flatbush, or taking the following actions:

- Conduct an on-site inspection of all at-risk properties that are identified as such by Flatbush, according to their arson risk prediction index;
- Report to Flatbush on actions taken as a result of the insurance inspection;
- Notify Flatbush of fire insurance claims involving any properties on the at-risk list;
- Identify multiple dwellings insured by the company that are not currently on the at-risk list prepared by Flatbush;
- Notify Flatbush of new policies issued on properties that lie within the geographic area covered by the Flatbush group. This information includes policy number and amount of coverage.

In order to streamline communication of the above information, the

insurance company set forth some explicit ground rules for Flatbush to follow. These rules were prepared on the advice of the insurer's legal counsel, and may be expected to vary with other insurers. The ground rules are:

- All communications between Flatbush and the insurer will be with one of two people designated by the manager of the insurance company;

- Communications and transfer of information should be limited to factual matters rather than opinions;

- Communications between parties shall not enter the subjective area of whether or not any particular individual or property should be insured; and

- Communications should be in writing or backed up by written confirmation.

For further information on the specifics of the above arrangements, and for a report on its progress to date, inquiries should be directed to: Ron Hine, Project Director, Flatbush Development Corporation, 1418 Cortelyou Road, Brooklyn, New York, 11226; telephone (718) 469-8990.

CHAPTER VIII

RESOURCE BIBLIOGRAPHY:

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Resource Bibliography:
Arson Early Warning Strategies

Resource Bibliography: Arson Early Warning Strategies

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