Date: 20171218
Docket: CI 12-01-80910
(Winnipeg Centre)
Indexed as: 3310680 Manitoba Ltd. v. Fontaine et al.
Cited as: 2017 MBQB 214

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

3310680 MANITOBA LTD.,	)	Counsel:
	)	
plaintiff,	)	GORDON A. McKINNON
	)	ANDREW D.F. SAIN
- and -	)	ALYSSA M. MARIANI
	)	for the plaintiff
DONNA ROSE FONTAINE, ANTHONY BURTON,	)	
DONNA JEAN COMEAU, and MICHELLE LANG,	)	MICHAEL G. FINLAYSON
	)	GABRIELLE LISI
defendants.	)	for Anthony Burton
	)	
	)	No appearance by or on
	)	behalf of Donna Rose
	)	Fontaine, Donna Jean
	)	Comeau or Michelle Lang
	)	
	)	JUDGMENT DELIVERED:
	)	December 18, 2017

GRAMMOND J.

INTRODUCTION

[1] On the night of March 26, 2012, a fire broke out at an apartment building owned by the plaintiff in Ste. Anne, Manitoba, resulting in a total loss of the building. It is agreed that the fire originated on the wooden, unenclosed balcony of unit 204 (the "**Unit**"), and that the defendant Donna Rose Fontaine

("**Ms. Fontaine**"), a smoker, was the tenant in occupation of the Unit, together with her teenage son and two young grandchildren.

[2] During the evening preceding the fire, Ms. Fontaine hosted as guests in the Unit the remaining defendants: her daughter Donna Jean Comeau ("**Ms. Comeau**"), her son Anthony Burton ("**Mr. Burton**"), and his partner Michelle Lang ("**Ms. Lang**"), all of whom were smokers. The plaintiff seeks to recover damages arising from the loss, on the basis that all of the defendants were smoking carelessly and caused the fire.

BACKGROUND INFORMATION

[3] The plaintiff did not permit smoking in the building. Accordingly, if tenants or their guests wished to smoke, they had to do so outside. The plaintiff had no rule against smoking on the balconies. The plaintiff did not warn tenants regarding the disposal of cigarette butts on the balcony.

[4] There was a plastic planter on the floor of the balcony of the Unit, near the building on the east side of the balcony, into which Ms. Fontaine deposited her cigarette butts on a regular basis. She emptied the planter of cigarette butts every couple of days, including the day before the fire. During the March 26, 2012 visit, all of the defendants used the planter to dispose of their cigarette butts.

[5] The planter had previously contained a strawberry plant that Ms. Fontaine obtained from her friend Ron Friesen ("**Mr. Friesen**") two to three years earlier. Prior to the fire, Ms. Fontaine believed that the planter contained dirt.

[6] Mr. Friesen testified that the planter in fact contained peat moss cut with sheep manure, which Mr. Friesen compiled, such that it contained approximately 80 percent peat moss and 20 percent dried sheep manure.

[7] The plaintiff had no rule prohibiting tenants from having plants on their balconies. If, however, tenants inquired of the plaintiff regarding the placement of plants on their balconies, they were advised that the planter must contain soil. There is no evidence that Ms. Fontaine made such an inquiry, and she was not otherwise advised that she could not have peat moss on her balcony.

[8] It is trite law that a successful action in negligence requires that the plaintiff demonstrate:

(a) that the defendant owed it a duty of care;

(b) that the defendant's behaviour breached the standard of care;

(c) that the plaintiff suffered damage; and

(d) that the damage was caused, in fact and in law, by the defendant's breach.

(***Mustapha v. Culligan of Canada Ltd.***, 2008 SCC 27 at paragraph 3, [2008] 2 S.C.R. 114)

[9] Mr. Burton admitted that he had a duty to take reasonable care not to damage the Unit or the building. The remaining three defendants did not defend the action, and were noted in default on October 19, 2015.

[10] The plaintiff put forward evidence of damages incurred in the amount of $838,989.75, which by agreement with Mr. Burton have been reduced to the principal sum of $820,000.00, plus costs, disbursements and interest from January 14, 2015. The plaintiff provided supporting evidence relative to its damage claim, and I accept that evidence, which was not contested by Mr. Burton.

DEFAULT PROCEEDINGS

[11] The Statement of Claim was served upon all defendants personally in November 2012, and examinations for discovery of all defendants were conducted in December 2014 and January 2015. Both Ms. Fontaine and Mr. Burton testified at trial.

[12] Court of Queen's Bench Rule 19, which governs default proceedings, includes the following provisions:

> **Consequences**
>
> 19.02(1) A defendant who has been noted in default,
>
> (a) is deemed to admit the truth of all allegations of fact made in the statement of claim;
>
> . . .
>
> **Trial**
>
> 19.05(4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial.
>
> 19.06 A plaintiff is not entitled to judgment ... at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment as a matter of law.

[13] In this case, the plaintiff requested judgment as against all defendants, but did not file a Notice of Motion in support of that request. Although

Ms. Fontaine was aware that the trial was taking place, there is no evidence of whether Ms. Comeau or Ms. Lang were aware of it, and neither of them attended the trial.

[14] Court of Queen's Bench Rule 37.01 permits the Court to entertain a motion in the absence of a Notice of Motion being filed. In addition, the Rules do not specifically require that defendants noted in default must be given notice of trial or that judgment will be sought against them.

[15] Given that Ms. Fontaine, Ms. Comeau and Ms. Lang were noted in default in October 2015 and no steps were taken to set aside that default, I accept that they did not intend to defend the claim, and undertook the risk that the trial would proceed without them.

ISSUES

[16] The issues before me are:

1. Did the defendants breach the standard of care, and in particular did Mr. Burton breach the standard of care, by dropping his cigarettes into the planter?;
2. If the standard of care was breached, who caused or materially contributed to the plaintiff's loss?; and
3. If multiple defendants are held liable, how should liability be apportioned among them?

ISSUE ONE - DID THE DEFENDANTS BREACH THE STANDARD OF CARE, AND DID MR. BURTON BREACH THE STANDARD BY DROPPING HIS CIGARETTES INTO THE PLANTER?

(a) *Relevant Legal Principles*

[17] A defendant's conduct is negligent if it creates an unreasonable risk of harm. "In measuring whether the hazard is an unreasonable one, the court balances the danger created by the defendant's conduct, on one hand, and the utility of that conduct, on the other hand. If the hazard outweighs the social value of the activity, liability is imposed; if it does not, the defendant is exonerated" (The Honourable Allen M. Linden & Bruce Feldthusen, ***Canadian Tort Law***, 9th ed. (Toronto: LexisNexis, 2011) at 134).

[18] To assist in this weighing process, the Court must consider the individual's conduct against the objective standard of a reasonable person in similar circumstances.

[19] The Court in ***Jordan Rental Properties v. Schofield***, 148 N.S.R. (2d) 104, 1996 CarswellNS 33 (WL Can) at paragraph 20 (S.C.), held that while the ordinary principles of negligence law apply in fire cases, the highly dangerous nature of fire will always ensure that a high standard of care is imposed upon defendants.

(b) *Positions of the Parties*

Plaintiff

[20] The plaintiff submitted that a smoker who just drops his lit cigarette, as Mr. Burton did in this case, is negligent. The risk of fire starting from the disposal of a lit cigarette is obvious, notorious and serious. The potential for loss is great. Simply dropping a lit cigarette is an activity devoid of social utility, and is a breach of the standard of care. In addition, fire is a clearly foreseeable consequence of the disposal of a cigarette, and the notoriety of the dangers of careless smoking overcomes any challenge to foreseeability (***Ragoonanan Estate v. Imperial Tobacco Canada Ltd.***, 51 O.R. (3d) 603, 2000 CarswellOnt 4613 (WL Can) at paragraph 72 (S.C.J.)).

[21] The plaintiff argued that reasonable care is required in putting out a cigarette, in a manner that would not risk causing fire, and that a reasonable smoker knows that if he does not ensure that his cigarette is extinguished fully, it could cause a fire. (***Condominium Corp. No. 7921945 v. Cochrane***, 2004 ABPC 4 at paragraph 8, 2004 CarswellAlta 33 (WL Can), and ***R. v. Barre***, 2005 BCPC 509 at paragraph 58, 2005 CarswellBC 2655 (WL Can))

[22] In ***Condominium Corp. No. 7921945***, *supra*, one smoker disposed of his cigarette by pressing it into the side of a planter and then pushing it into the planter, while the other flicked his butt without regard for where it went. Both individuals were found to have breached their duty.

[23] The plaintiff also pointed to ***Barre,*** *supra*, at paragraph 59, where a smoker was not paying attention and failed to direct his mind to the importance of discarding and putting out his cigarette in an appropriate place and manner in a forested area. That individual was found to have failed to meet the standard of care.

[24] While Mr. Burton may have thought that the planter contained mud, which is not combustible, it was incumbent upon him to ensure that he was not disposing of a lit cigarette into combustible materials. He took no steps to verify whether the planter contained soil or another substance. The planter in fact contained peat moss and sheep manure, and ignited into an open flame.

[25] Also, Mr. Burton dropped his cigarettes into the planter without regard for whether they were extinguished. His negligent act was failing to ensure that his cigarettes were extinguished, regardless of what substance was contained within the planter. It was not enough for him to assume that the cigarettes would self-extinguish.

[26] In addition, there is no evidence that Ms. Fontaine said that it was okay to drop cigarettes into the planter without extinguishing them. Even if Mr. Burton followed her lead by using the planter to dispose of his cigarettes, it was his decision to drop them in without making any effort to extinguish them.

[27] Furthert, it is not a defence to have been told what to do by Ms. Fontaine. Mr. Burton knew or ought to have known the risks of disposing of a lit cigarette,

and he breached the standard of care by failing to ensure that his cigarettes were extinguished.

Mr. Burton

[28] Mr. Burton's evidence was that during his four or five hour visit to the Unit, he smoked three or four cigarettes. Ms. Fontaine told him not to throw his butts off the balcony into the grass, because the plaintiff did not like the property to be full of butts.

[29] He disposed of his butts in the planter, which he assumed contained mud. He just dropped them in, on top of the mud, expecting them to extinguish themselves. He did not consider what the planter was made of, nor did he make inquiries as to what was in the planter. He was not aware that the planter contained peat moss and sheep manure, or that peat moss is flammable.

[30] Mr. Burton testified that he disposed of his butts in the planter because he was directed by Ms. Fontaine to do so. He is "pretty sure" that she said it was okay to dispose of them in the planter, and he saw her dispose of her butts there. Ms. Fontaine did not give him instructions on how to drop the butts into the planter, including whether to attempt to extinguish them.

[31] Mr. Burton argued that it was reasonable to drop his butts into the mud or dirt that he believed was contained within the pot, on the basis of the advice or direction, express or implied, of Ms. Fontaine, who had been using the planter to dispose of cigarette butts for some time.

[32] Mr. Burton argued that his mother Ms. Fontaine would not direct him to do something unsafe. She could have provided another means of disposal, such as a receptacle containing non-combustible contents. It is unreasonable to expect him to make his own assessment and inquiries when Ms. Fontaine had been using the planter to dispose of cigarettes without incident. If there is liability, therefore, Ms. Fontaine is primarily liable.

[33] In addition, the plaintiff's property manager knew that peat moss was combustible, which knowledge should be imputed to the plaintiff. The plaintiff did not warn its tenants of the risks, and permitted them to smoke only on the balconies, where planters were allowed to be placed. Ms. Fontaine, in using a planter containing peat moss to dispose of cigarette butts, was doing something that the plaintiff knew was unsafe, in the place where the plaintiff told her to do it, without telling her that it was unsafe.

[34] In ***Cone v. Welock***, [1970] S.C.R. 494, a person used gas to ignite a fire, thinking it was heating oil. Mr. Burton submitted that this is similar to a smoker who disposed of a butt into a pail that he believed contained water, but instead contained a flammable substance.

(c) *Analysis*

[35] All of the defendants in this case, including Mr. Burton, had a duty to take reasonable steps to extinguish their cigarettes, and due to the dangerous nature of fire, a high standard of care is imposed upon them (***Jordan Rental Properties***, *supra*, at paragraph 20).

[36] Careless smoking creates an unreasonable risk of harm. This is so because the danger created by a smoker's conduct outweighs the social value of his or her activity. The gravity of the potential harm that will flow from careless smoking is significant, and there is a real risk of harm occurring. Conversely, there is no social utility in smoking carelessly and the risk can be avoided easily. It is not the mere act of smoking that is dangerous or inherently negligent. It is the lack of appropriate attention to smoking, and in this case the disposal of a lit cigarette, that becomes dangerous.

[37] I have concluded, after considering the conduct of Mr. Burton against the objective standard of a reasonable person in similar circumstances, that he failed to meet the applicable standard of care.

[38] Mr. Burton admitted that he simply dropped his cigarette butts into the planter, without physically tapping them out or attempting to do so. He expected them to extinguish themselves. This approach did not reflect reasonable care. Even if the planter contained mud, as Mr. Burton assumed it did, his butts could have blown out of the planter prior to extinguishment, or flammable debris could have blown into the plastic planter and ignited. Mr. Burton created a situation conducive to combustion by leaving multiple, lit cigarettes to self-extinguish.

[39] At the time of the fire, Mr. Burton was approximately 26 years of age. Whether his mother Ms. Fontaine told him to use the planter to dispose of butts, or whether she led by example by doing so herself, is immaterial. He had a duty

to take reasonable steps to extinguish his cigarette butts regardless of what Ms. Fontaine said or did.

[40] In ***Cone***, *supra*, upon which Mr. Burton relied, the defendant used a can marked "oil", which actually contained gasoline. He dipped his finger into the can before using it, to test the substance, and still believed that the contents was oil. He also made an inquiry of another person before using the contents of the can. In this case, Mr. Burton took no steps and made no inquiries relative to the contents of the planter before dropping his cigarettes. Had he done so, the manner in which he disposed of his cigarettes would still constitute a breach of the standard of care, but his potential share of the liability may have been diminished.

[41] Ms. Fontaine testified on examination for discovery, as read in by the plaintiff at trial, that she did not drop her cigarette butts into the planter. Instead, she dipped them into the mud, believing that she extinguished them. At trial, Ms. Fontaine testified that when she put her cigarettes into the planter, she would make sure that they were out, but she did not pay attention to how the other defendants put their cigarettes into the planter.

[42] Ms. Comeau testified on examination for discovery, as read in by the plaintiff at trial, that she would poke her cigarette into the soil and then wiggle it. As far as she knew, her cigarettes were extinguished. She stated that there was no discussion about where to put the cigarettes, though Ms. Fontaine told her

not to throw them over the balcony. In using the planter, she essentially followed Ms. Fontaine's lead.

[43] Ms. Lang testified on examination for discovery, as read in by the plaintiff at trial, that she was told to throw her butts in a pot, which appeared to contain mud. She could not recall how she put the butts in the pot. This is the only evidence before the Court relative to the manner in which Ms. Lang disposed of her cigarettes.

[44] I have concluded that both Ms. Fontaine and Ms. Comeau took reasonable steps to extinguish their cigarettes by inserting them into the "mud" in the planter. Ms. Comeau wiggled her cigarettes in the mud and Ms. Fontaine made sure that her cigarettes were out. These actions do not constitute a breach of the applicable standard of care.

[45] There is no evidence before the Court of the manner in which Ms. Lang disposed of her cigarettes. While she may have disposed of them in the same manner as Mr. Burton did, it is equally possible that she disposed of them in the same manner as Ms. Fontaine and Ms. Comeau, namely by taking steps to extinguish them, or in some other manner. In these circumstances, the plaintiff has not met its onus of establishing that Ms. Lang breached the applicable standard of care.

[46] I have determined, however, that Ms. Fontaine breached the applicable standard of care by providing to her guests an ashtray comprised of combustible materials, namely peat moss, sheep manure, and plastic. In doing so, she also

created a situation conducive to combustion, such that a fire was reasonably foreseeable, and her actions were negligent.

[47] I recognize that Ms. Fontaine was unaware that the planter contained peat moss and that peat moss was flammable. Having said that, she should not have been using the planter as an ashtray, particularly without confirming the nature of its contents. Each time Ms. Fontaine did so prior to March 26, 2012, a fire was foreseeable, but she mitigated the risk of fire by making sure that her cigarettes were extinguished.

[48] I am mindful of Ms. Fontaine's evidence that she did not think she gave a direction to her guests to dispose of butts in the planter, and that they probably followed her lead. This evidence is consistent with that of Mr. Burton and Ms. Comeau. Whether Ms. Fontaine gave a verbal direction to use the planter to dispose of butts or whether she led by example, she provided an inappropriate receptacle for the cigarette butts of her guests.

(d) *Conclusion*

[49] Mr. Burton breached the standard of care by merely dropping his cigarettes into the planter and Ms. Fontaine breached the standard of care by providing to her guests a combustible ashtray.

[50] Neither Ms. Fontaine nor Ms. Comeau breached the standard of care in the disposal of their cigarettes. There is no evidence that Ms. Lang breached the standard of care.

ISSUE TWO - IF THE STANDARD OF CARE WAS BREACHED, WHO CAUSED OR MATERIALLY CONTRIBUTED TO THE PLAINTIFF'S LOSS?

(a) *Relevant Legal Principles*

[51] It is well-established law that the test for proving causation is the "but for" test. The plaintiff must show on a balance of probabilities that but for the defendant's negligent act, the damage would not have occurred. In other words, the defendant's negligence was necessary to bring about the alleged injury. This is a factual determination. (***Clements v. Clements***, 2012 SCC 32 at paragraph 8, [2012] 2 S.C.R. 181)

[52] A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that a defendant's negligence caused the loss. Scientific proof of the precise contribution of the defendant is not required. In addition, evidence connecting the breach of duty to the injury suffered permits the Court, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. (***Clements***, *supra*, paragraphs 9 and 10)

[53] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the damage would have occurred without his negligence; in other words that the injury was inevitable (***Clements***, *supra*, paragraph 11).

[54] In the alternative, a plaintiff may succeed by establishing a "material contribution to risk of injury", without showing "but for" causation. This can occur in cases where it is impossible to determine which of a number of

negligent acts by multiple actors in fact caused the injury, where it is established that one or more of them did so. (***Clements***, *supra*, paragraph 13)

(b) *Expert Evidence*

[55] In this case, the Court heard evidence from both Michael Purtill (**"Mr. Purtill"**) and Ken Swan (**"Mr. Swan"**) relative to the cause of the fire, both of whom were qualified as experts by consent.

[56] Both Messrs. Purtill and Swan are experienced fire investigators who attended at the scene shortly after the fire. Each of them conducted an origin and cause investigation, including an interview of Ms. Fontaine and other witnesses to the fire. Mr. Swan also obtained some information from Mr. Purtill.

[57] Mr. Purtill examined the debris, and considered potential evidence of a heat source capable of ignition, including:

(a) an electrical conductor (a cable vision cable), which he did not look at closely;

(b) two barbecues (one propane and one briquette style);

(c) the Unit's air conditioning unit, which he looked at from the outside only; and

(d) two electrical receptacles, which he dismissed because there was no evidence of arc tracking, no globules and not enough discolouration. He did not look inside either receptacle, but testified that if there was a failure in a receptacle it would be at a connection point.

[58] Mr. Purtill concluded that none of these items were potential heat sources and ruled them out as the originating point of the fire. Mr. Purtill concluded that there was no evidence of spontaneous combustion and noted that at 69%, relative humidity was high.

[59] Mr. Purtill based his conclusion upon the evidence of eye witnesses, the physical evidence and the scene examination. He concluded that the fire originated in the planter, and that the most reasonable cause was careless disposal of smoking material combined with combustible material. In particular, a discarded cigarette was allowed to smoulder within the planter until there was enough heat generated for flaming combustion. This led to the quick ignition of combustibles in the vicinity of the planter, and extended to the vinyl siding of the building. Mr. Purtill did not find the planter or the peat moss in the debris of the fire, which is not unusual.

[60] Mr. Purtill testified that peat moss will allow heat to incubate, and will absorb heat until it combusts. The fire takes the path of least resistance within the peat moss and may self-extinguish, but if there is enough heat and oxygen, there will be a flame. He stated that peat moss could smoulder for up to 15 hours with no discernable smoke. This investigation was Mr. Purtill's first involving peat moss.

[61] Mr. Swan was advised by Mr. Purtill that because of the nature of the destruction at the scene, he was unable to do a reconstruction or excavation of the debris. Mr. Purtill also advised Mr. Swan that he had screened some of the

debris on the ground and did not find anything that might lead to a secondary ignition source, anything electrical in nature or anything that did not belong.

[62] Mr. Swan and Mr. Purtill also shovelled through the debris together. Mr. Swan agreed that there was no source of origin within the debris, such as matches, a lighter, a heater, a fan or other electrical item that could have failed.

[63] After confirming as much as he could with Mr. Purtill, Mr. Swan conducted an independent investigation, including an examination of the building, and determined for himself what the burn patterns meant. Mr. Swan did not see Mr. Purtill's report, but he did receive a briefing on its contents before he completed his report. Mr. Swan did not discuss with Mr. Purtill his theory or conclusion on the origin and cause of the fire.

[64] Mr. Swan's observations of the building, confirmed in the photographs of the building, reflected that the fire moved from the outside into the building, from the second floor up to the third floor, and from the second floor down to the first floor.

[65] Mr. Swan inspected the entry of hydro and gas lines into the building and concluded that neither one ignited or was the fuel source of the fire. Based upon his inspection of the building, Mr. Swan concluded that the fire started on the east side of the balcony of the Unit, prior to his interview of Ms. Fontaine.

[66] Mr. Swan noted that there was damage to the exterior of the air conditioner on the balcony, on the east side of its frame, which further supported that there was a vertical fire, consistent with the observations of witnesses. The

aluminum fins of the air conditioner unit were intact, and therefore the fire did not start within that unit.

[67] Mr. Swan did not look at or take apart the electrical receptacles on the balcony, because he did not know they were there. He agreed that he should have tested them in the course of forming his hypothesis of the cause of the fire.

[68] Mr. Swan knew that there was a large propane barbecue found in the debris, with no propane cylinder attached, which Ms. Fontaine advised she had not used that season. There was also a small steel barbecue in the debris. Mr. Swan did not evaluate or inspect the interior of either barbecue.

[69] Mr. Swan learned from Ms. Fontaine that there were no electrical appliances or extension cords on the balcony. Also, there were four people visiting the Unit and smoking on the balcony, using a planter to dispose of their cigarettes, which was located on the east side of the balcony, the same place where the fire originated.

[70] Ms. Fontaine advised Mr. Swan that the pot contained mud or dirt, but agreed to telephone Mr. Friesen, from whom she received the plant, and report back. She later advised Mr. Swan that the pot contained peat moss. Mr. Swan accepted and relied upon the information that he received from Ms. Fontaine as she had "eliminated virtually all accidental ignition sources on her own balcony with the exception of smoker's materials, which she clearly explained were deposited into a combustible container". Mr. Swan concluded that there was no other potential accidental source of the fire on the balcony.

[71] Mr. Swan assumed that the planter was not very wet because of its location on the balcony near the building, where it was covered, so that rain could not access it.

[72] Mr. Swan concluded that the fire started at the east end of the floor of the balcony, as a result of cigarettes being deposited into the planter. This conclusion aligned with the evidence of Ms. Fontaine and the witnesses who observed the fire from the exterior of the building.

[73] Mr. Swan has dealt with peat moss fires before. He testified that a six-hour delay (from 5:30 p.m., when Ms. Fontaine said someone was last on the balcony, to 11:30 p.m., when the fire was discovered) before flames are observed is not unusual. Typically, peat moss does not break into an open flame immediately, but will smoulder, and in this case could have smouldered for up to 24 hours given the size of the planter. He said that there is often not a large amount of smoke and the flame is not often seen.

[74] Mr. Swan acknowledged that the fire could have started due to a cigarette put into the planter the day before Mr. Burton visited Ms. Fontaine. He agreed that there is no evidence of how many cigarettes were put into the planter or when they were put there.

[75] The third expert witness called by the plaintiff was Robert Shirer (**"Mr. Shirer"**), a fire investigator, chemical engineer and forensic engineer. Mr. Shirer conducted testing to determine the likelihood of smouldering combustion caused by ignited cigarettes disposed of in peat moss.

[76] Mr. Shirer completed testing under two standards established by the American Society for Testing and Materials ("**ASTM**"): one that related to measuring the ignition strength of cigarettes, which was designed to compare different brands of cigarettes (standard E2187-09), and another that related to the determination of moisture content in soil (standard D4643-08).

[77] Although Mr. Shirer used these standards as a basis to design the testing, he implemented a series of adaptations, as follows:

(a) He used two moisture variables in the testing: one with the peat moss as found in the bag (14% moisture content), and another with added water (31% moisture content);

(b) The peat moss was configured in two ways: both loosely and more densely packed in a container, each of which contained the same weight;

(c) Airflow within the test chamber was both ventilated (chamber door partly open, exhaust fan on) and non-ventilated (chamber door closed, exhaust fan off); and

(d) Cigarettes were placed on peat moss, in three positions:

(i) horizontally, laid on the peat moss;

(ii) vertically, inserted into the peat moss; and

(iii) vertically, twisted or butted into the peat moss; and

(e) The pre-burn ash was removed from the cigarettes prior to placement in the test chamber.

[78] These variables gave rise to 24 different configurations of cigarettes, each of which included 40 determinations, such that a total of 960 cigarettes were tested.

[79] All testing occurred at room temperature, at the relative humidity of the day, which was warmer than the outdoor temperature at the time of the fire. Mr. Shirer testified that the outdoor temperature of 3 degrees at the time of the fire would have had a reducing effect on the ignitability of the peat moss, but would not have reduced ignitability to zero.

[80] Initially, Mr. Shirer placed the cigarettes into an air draw system, which drew a constant amount of air through each cigarette. The cigarettes were marked with a dot at 5 mm and 15 mm from the tip. Once each cigarette had smouldered to the 15 mm mark, it was removed from the air draw system, and the ash removed or tapped off. The cigarette was then placed into the peat moss in one of the three positions described above.

[81] In the testing, Mr. Shirer used Canadian Sphagnum peat moss, the most common type of peat moss available for sale in Manitoba, which did not include any component of sheep manure. Mr. Shirer had no information on whether this peat moss was the same peat moss found in the planter in this case.

[82] Mr. Shirer acknowledged that:

(a) the peat moss in the planter could have been adulterated by inorganic matter, including:

(i) topsoil; and/or

(ii) ash, based upon the fact that hundreds of cigarettes had been extinguished by Ms. Fontaine in the planter;

(b) the presence of ash in the planter would have diminished the airflow and kept oxygen out of the peat moss;

(c) he had no direct information regarding the amount of moisture in the planter;

(d) some moisture could have entered the planter while it was on the balcony; and

(e) the peat moss in the planter had a greater propensity to be dense than loose, given that it had been in the planter for two to three years.

[83] After the completion of testing, Mr. Shirer concluded that:

(a) Horizontally placed cigarettes caused smouldering combustion within the surface peat moss 34.4% of the time in the 'as-is' moisture condition, 8.1% of the time in the 'damp' moisture condition, and 21.3% overall;

(b) Vertically inserted cigarettes caused smouldering combustion within the peat moss 0% of the time in the 'as-is' moisture condition and in the 'damp' moisture condition; and

(c) Vertically twisted or butted cigarettes caused smouldering combustion within the peat moss 0.6% of the time in the 'as-is' moisture condition, and 0% of the time in the 'damp' moisture condition.

[84] In other words, the higher the moisture level in the peat moss, the more difficult it was to ignite.

[85] There was only one ignition of the peat moss in the 640 cigarettes in the vertical positions, or 0.2% of the time. Accordingly, Mr. Shirer concluded that it is 99% more probable that a horizontally placed cigarette would ignite the peat moss than would a vertically inserted cigarette.

[86] Mr. Shirer stated that in any test where the peat moss smouldered, there was confirmation that the given conditions allowed for ignition. In addition, the cigarettes that burned longer had a greater propensity to ignite peat moss.

[87] For those cigarettes that ignited the peat moss, Mr. Shirer did not check how long the smouldering continued before self-extinguishment or before other items were ignited. That was not part of the testing, and active steps were taken to extinguish the smouldering caused by those cigarettes before flaming combustion.

[88] Mr. Shirer provided a supplementary report reflecting his view on the effect of having a 20% sheep manure component within the peat moss. He concluded that sheep manure is less combustible than average peat moss, such that adding 20% sheep manure to the peat moss may slightly reduce the material's flammability and ignition properties but would not have significantly impacted the testing results. He also stated that the older the sheep manure was, the more combustible it would be.

(c) *Positions of the Parties*

Plaintiff

[89] The plaintiff submitted that the evidence of each of Ms. Fontaine, Ms. Cherepak (a resident in the building), Mr. Purtill and Mr. Swan was consistent that the fire started in the east corner of the balcony of the Unit, where the planter was located.

[90] There is no evidence of a credible ignition source other than the planter, including the following sources pointed to by Mr. Burton:

(a) Ms. Fontaine's barbecue, which was not used that season, and which Messrs. Purtill and Swan excluded as a potential cause;

(b) The barbecue which fell from the balcony above as the fire progressed, which is not where the fire started;

(c) A spark from the balcony above, of which there is no evidence;

(d) The air conditioner for the Unit, which was on the balcony, not in use, and which Messrs. Purtill and Swan excluded as a potential cause;

(e) The electrical receptacles on the balcony, as there were no signs of an electrical fire;

(f) The content of the plastic pail on the balcony, which may have contained garbage or other flammable substance, of which there is no evidence; and

(g) A cigarette thrown from the street, of which there is no evidence.

[91] The plaintiff pointed to Ms. Fontaine's evidence that she did not have a cigarette after her guests departed. Her evidence is credible because she admitted that she smoked on the balcony and that she deposited her butts into the planter. In addition, after the fire, she phoned Mr. Friesen to determine what was in the planter, and then reported to Mr. Swan that it contained a peat moss mixture, which was not in her interests.

[92] In addition, both Messrs. Purtill and Swan testified that any smoke generated by the peat moss smouldering would be difficult to detect, and not necessarily noticeable. Accordingly, no conclusion can be drawn from the fact that no one, including Ms. Fontaine, noticed smoke on the balcony.

[93] The plaintiff submitted that when looking at the totality of the evidence, it is more likely and probable that the fire was caused by Mr. Burton dropping a cigarette into the planter than one of the other, speculative causes suggested at trial. Pursuant to the expert evidence, the only cause of the fire consistent with all of the known facts was the careless disposal of cigarettes into the planter containing peat moss on the east side of the balcony.

[94] The plaintiff noted that while Mr. Burton cross-examined the plaintiff's experts, he did not call his own expert. As such, there is no evidence before the Court that contradicts the evidence of the plaintiff's experts. Their respective methodologies were challenged, but their conclusions were not, and as such those conclusions should be accepted.

[95] The plaintiff directed the Court to ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, [2015] 2 S.C.R. 182, where the Court commented upon the effect of an expert's lack of independence and impartiality as it relates to the admissibility of the evidence, and in relation to the weight to be given to the evidence, if admitted. The plaintiff submitted that in this case, the expert evidence was admitted without challenge. Accordingly, any arguments of bias by Mr. Burton must go to weight.

[96] The plaintiff submitted that the evidence of Mr. Shirer was convincing and that it is significantly more likely that the fire started from a horizontally placed cigarette (Mr. Burton's) than a vertically placed cigarette (anyone else's). Accordingly, "but for" causation is clearly established as against Mr. Burton.

[97] The plaintiff submitted that very little turns on what kind of peat moss Mr. Shirer used in his testing, because his task was to determine which placement of cigarettes was more likely to ignite, not whether peat moss is flammable.

[98] The plaintiff acknowledged that it is impossible to know the conditions in the planter that day, but suggested that its contents were not damp because there was a ceiling above the balcony and walls on three sides. On the fourth side of the balcony there was a railing which afforded further protection. The plaintiff submitted that once it is accepted that the fire started in the planter, it follows that whatever conditions were present must have supported combustion.

[99] The plaintiff submitted that if Mr. Shirer's conclusions are accepted, the Court should find that it was more likely that one of Mr. Burton's cigarettes caused the fire, than did anyone else's cigarette, such that he is liable.

[100] In the alternative, if Mr. Shirer's evidence is not accepted, and the Court finds that all defendants were negligent, the Court must conduct a material contribution analysis because it would not be possible to show who was specifically responsible for the fire.

[101] The plaintiff pointed to the discussion of ***Cook v. Lewis***, [1951] S.C.R. 830, found in ***Clements***, *supra*, at paragraph 18, where the possibility of material contribution as an exceptional substitute for the "but for" causation test arose, where multiple tortfeasors are involved. In ***Cook***, *supra*, it could not be established which defendant's gun fired the shot that injured Mr. Lewis. The evidence shed no light on this issue, so both defendants were found jointly and severally liable. In this case, each of the four defendants are liable, on the basis that they materially contributed to the risk of the fire.

Mr. Burton

[102] Mr. Burton disputed the origin and cause of the fire as argued by the plaintiff, and in particular that it originated in the planter, as there was no actual evidence of the cause found after the fact.

[103] Mr. Burton submitted that one of the problems with the evidence of Messrs. Purtill and Swan is that they utilized circular reasoning in reaching their conclusions. They testified to the perfect conditions that are required for peat

moss to smoulder, related to moisture, temperature and location of the fire, which they concluded must have existed in this case because the fire was caused by cigarettes disposed of in peat moss.

[104] Mr. Burton also argued that Messrs. Purtill and Swan exhibited expectation bias in their investigations. Expectation bias occurs when an investigator reaches a premature conclusion too early in the study, without having examined or considered all of the relevant data. That premature conclusion then influences the investigation and conclusion in a way that is not valid scientifically. Instead, an investigator should not form a specific hypothesis until data has been collected, and should approach the investigation without presumption.

[105] Mr. Burton submitted that if the fire had been smouldering in the peat moss for hours before the fire broke out, smoke would have been observable, particularly given the plaintiff's theory that his cigarette(s), which caused the fire, were laid on top of the planter. This theory was supported by Mr. Purtill, who testified that smoke would be seen as the peat moss smouldered. In addition, Mr. Burton pointed to the tests conducted by Mr. Shirer, some of which generated visible smoke. Mr. Burton argued that if the peat moss was smouldering in the planter as alleged, one of the four individuals would have noticed the smoke and done something about it.

[106] Mr. Burton acknowledged that the point of origin of the fire was at the bottom of the wall on the east side of the balcony. The only way to properly

conclude that the fire started from cigarettes in the planter was to know that all other causes were eliminated in a proper way, which was not done.

[107] Mr. Burton pointed to several potential alternate causes of the fire, including:

(a) The air conditioning unit, which was not mentioned in Mr. Swan's report, even though he agreed that his report was supposed to be complete, and set out the whole of his process;

(b) Two electrical receptacles and the conductor/copper wire in between them, which Mr. Swan should have inspected pursuant to proper scientific practice. In addition, Mr. Swan did not review the building plans, nor did he consider the impact of the sliding balcony door upon the electrical components;

(c) A plastic pail on the balcony, used to catch condensation from the air conditioner, in which someone, such as a child residing in the Unit, could have placed material that combusted spontaneously, which was not excluded as a possible cause;

(d) The balcony of the unit above, from which something flammable or burning could have dropped onto the balcony of the Unit, such as a cigarette butt, an ember from the briquette style barbecue, or the barbecue itself; and

(e) A passerby who could have flicked a cigarette butt or other item onto the balcony of the Unit.

[108] These possibilities were not considered seriously or at all because Messrs. Purtill and Swan were exhibiting expectation bias, and had already made up their minds that the cause of the fire was cigarette(s) in the planter.

[109] In addition, the conclusions of Messrs. Purtill and Swan were dependent upon what they were told regarding the cause of the fire. For example, they relied on Ms. Fontaine's evidence that there were no other ignition sources on the balcony. Mr. Burton did not suggest that Ms. Fontaine was dishonest with investigators, but he argued that if their minds were open, they would have determined that the fire in the planter may have been smouldering before his last cigarette on the balcony.

[110] Also, Messrs. Purtill and Swan did not challenge Ms. Fontaine, who smokes one-half of a pack per day, on her assertion that she did not have an additional cigarette after her guests left. As impartial investigators, they had to ask her additional questions, but they simply accepted her advice.

[111] Mr. Burton argued that it is unreasonable to conclude that Ms. Fontaine did not go back onto the balcony after her guests left, if not for another cigarette, then to clean up or to check the balcony. In addition, as was read in at trial, Ms. Fontaine acknowledged that she may have had an additional cigarette after her guests left. If she had done so and the peat moss was smouldering, it is likely that she would have detected it.

[112] Mr. Burton also noted that while hundreds of cigarettes were disposed of in the planter prior to the fire, neither of Messrs. Purtill or Swan suggested that

the physical orientation of the cigarettes in the planter might have been a factor in combustion.

[113] Nevertheless, the plaintiff advanced the evidence of Mr. Shirer, which Mr. Burton submitted was misleading, unreliable or inapplicable for various reasons, including:

(a) The testing was done using Canadian Sphagnum peat moss, fresh from the bag, whereas the peat moss in the planter was years old;

(b) There is no evidence that the contents of the planter was Canadian Sphagnum peat moss, and there is no evidence of how other types of peat moss might react when tested;

(c) The testing did not include any component of sheep manure within the peat moss, though Mr. Shirer read an article and concluded that if the two were mixed on an 80/20 basis, the combustibility of the peat moss would not be reduced by much;

(d) ASTM standard E2187-09, as modified and used by Mr. Shirer, relates to measuring the ignition strength of cigarettes, but contains an introduction relative to ignition of soft furnishings, which is not the subject matter with which this case is concerned;

(e) Pursuant to ASTM standard E2187-09, Mr. Shirer burned the cigarettes for 15 mm prior to testing, such that there was approximately two inches left on each cigarette prior to contact with the peat moss,

which is not the length at which most smokers would dispose of a cigarette;

(f) Mr. Shirer would not agree that most smokers will smoke the whole cigarette, and will not discard it with two inches left;

(g) Not one of the 960 tests was conducted using a cigarette smoked down to the quarter-inch mark, which is the length to which Mr. Burton testified he would have smoked his cigarettes on the day of the fire;

(h) The cigarettes placed horizontally, with two inches remaining, had approximately two inches of surface peat moss to pass over as they burned, which is very different than the cigarettes disposed of by Mr. Burton, which had a quarter-inch remaining. Mr. Shirer admitted that the longer a cigarette burned, the more likely it was to ignite the peat moss;

(i) In the vertical position, water wicked up the cigarettes, as shown in some of the photographs. This proved merely that inserting a lit cigarette into a wet surface would extinguish the cigarette;

(j) The cigarettes inserted into the peat moss vertically were inserted far deeper than a smoker was likely to put them, where the peat moss was more dense, such that the lit end would have been smothered. This process was in no way reflective of the way that any of the four individuals disposed of their cigarettes in this case;

(k) Where smouldering occurred in testing, the fires were extinguished by Mr. Shirer. Accordingly, there is no evidence that the smouldering would have continued, if given the opportunity; and

(l) Mr. Shirer's testing was based upon the assumption that the theory of Messrs. Purtill and Swan relative to the cause of the fire was sustainable, which it is not.

[114] In sum, Mr. Shirer proved that water will extinguish a cigarette, burying a cigarette will extinguish it, and Canadian Sphagnum peat moss will ignite if exposed to heat for long enough. In other words, his report is useless and should not be relied upon in any way.

[115] Mr. Burton submitted that without reliance upon Mr. Shirer's evidence, with regard to the failure of Messrs. Purtill and Swan to act objectively and pursue all possibilities, and with consideration of their concessions that the smouldering could have been ongoing for 15 to 24 hours before the fire, the Court cannot reasonably find him liable.

[116] Mr. Burton submitted that although he did not directly challenge the conclusions made by the plaintiff's experts on cross-examination, the rule in ***Browne v. Dunn*** (1893), 6 R. 67 (H.L.), does not apply, such that he was not required to put to them an alternate conclusion in order to challenge their conclusions in argument.

(d) *Analysis*

[117] I have concluded that Mr. Burton was entitled to challenge the conclusions of Messrs. Purtill and Swan without having called a competing expert witness, and without having directly challenged their conclusions on cross-examination. The rule in ***Browne***, *supra*, applies where counsel seeks to challenge the credibility of a witness by calling contradictory evidence, which was not done in this case. Mr. Burton did not dispute the honesty of the witnesses called by the plaintiff, nor did he allege that any expert witness exhibited bias in favour of the plaintiff. The purpose of the rule in ***Browne***, *supra*, is to prevent the ambush of a witness, and I am satisfied that in this case no such approach was taken.

[118] In considering whether the fire was caused by careless smoking, I have considered the evidence of Messrs. Purtill and Swan, together with each of the alternate potential causes of the fire advanced by Mr. Burton, as listed at paragraph 107 above. Within this context, I have also considered Mr. Burton's argument that Messrs. Purtill and Swan exhibited expectation bias over the course of their respective investigations, in favour of the fire having started in the planter, caused by the disposal of a cigarette.

[119] My conclusions with respect to each of the alternate potential causes of the fire, and the allegations of expectation bias, are as follows:

(a) Both Messrs. Purtill and Swan looked at the exterior of the air conditioner for the Unit and concluded that while it was damaged by the fire, it was not the cause. Mr. Purtill noted that in March the air

conditioner was not in use, and Mr. Swan pointed to the aluminum fins on the air conditioner, which would have been destroyed if that unit was the source of the fire. I accept Mr. Burton's argument that reference to the air conditioner should have been included in the written investigation reports, but the absence of those references does not equate to expectation bias. Both investigators looked at the air conditioner and saw no evidence that it caused the fire, and accordingly the air conditioner provided no lead to be pursued;

(b) Mr. Purtill considered the electrical receptacles and conductors on the balcony wall and found no signs of an electrical fire, such as parting arcs in the wiring, globules or significant discolouration due to resistance heating. If he had found those signs, he would have involved an electrical expert. Mr. Swan also concluded, based upon his inspection, that there were no signs of an electrical fire, but he was not aware of and did not inspect either electrical receptacle on the balcony. He acknowledged that he should have done so. In addition, he could have reviewed the building plans, and considered the impact of the sliding balcony doors upon the electrical, but I find that his failure to do these things does not change the lack of evidence of an electrical fire, or support an expectation bias; and

(c) There is <u>no</u> evidence of the following causes, on which Messrs. Purtill and Swan could have relied:

(i) combustion caused by Ms. Fontaine's barbecue, to which no fuel source was attached;

(ii) the presence of any material in the plastic pail on the balcony that could have or did spontaneously combust;

(iii) a flaming or flammable item, including a barbecue, falling onto the balcony from the unit above; or

(iv) a passerby who flicked a lit cigarette butt or other ignited material onto the balcony.

[120] The fact is that all of these potential causes of the fire are purely speculative. While it is possible that one of these scenarios actually occurred and caused the fire, that possibility is very remote, and there is no evidence upon which I can base such a conclusion.

[121] Both Messrs. Purtill and Swan interviewed Ms. Fontaine and relied upon her statements relative to a variety of matters, including what items were situate on the balcony prior to the fire, and whether she smoked a cigarette on the balcony after her guests left. Both investigators were required to act objectively and conduct non-partisan investigations, and should not have favoured any one potential cause of the fire, or the actions of any one person, over another. I do not accept that they were required to push or challenge Ms. Fontaine on her statements, particularly given that she was a co-operative witness. In addition, even if either investigator had pushed Ms. Fontaine to an admission that she was the last person to smoke on the balcony, there is no reason to expect that she

would not have disposed of her butt the same way that she did previously, namely by ensuring that it was extinguished.

[122] For all of these reasons, I do not accept that either of Messrs. Purtill or Swan exhibited expectation bias during their investigation of the fire, and I accept their respective conclusions as to the cause of the fire. I am satisfied on a balance of probabilities that the fire was caused by a cigarette left in a peat moss mixture in the planter on the balcony of the Unit.

[123] With respect to the liability of Mr. Burton and Ms. Fontaine, I have drawn the following conclusions.

[124] Ms. Fontaine used, and provided for the use of her guests, an ashtray comprised of combustible materials. But for her negligence in doing so, the planter would not have combusted. For that reason, Ms. Fontaine must bear some liability for the fire.

[125] I also accept, on a balance of probabilities, that but for Mr. Burton's negligence, the fire would not have occurred, because:

(a) Mr. Burton took no steps to ensure that his cigarettes were extinguished after dropping them into the planter, such that he left multiple, burning cigarettes in the planter over the course of his visit;

(b) Mr. Burton's last cigarette disposed of in this manner was left in the planter unattended for the rest of the evening, as I have found below; and

(c) It is significantly more likely that cigarettes simply dropped horizontally onto peat moss (the disposal method used by Mr. Burton) would lead to the smouldering (and eventually, combustion) of the peat moss than would cigarettes vertically inserted into the peat moss and butted out (the disposal method used by Ms. Fontaine and Ms. Comeau). This conclusion is based upon:

(i) the outcome of the testing conducted by Mr. Shirer (21.3% of horizontally placed cigarettes smouldered compared to 0.2% for vertically placed);

(ii) the previous use of the planter by Ms. Fontaine without incident; and

(iii) common sense.

[126] Accordingly, having weighed all of the evidence, it is more probable that the fire was caused by Mr. Burton than by any other individual.

[127] Although I have already concluded that Ms. Fontaine's method of disposal of cigarettes did not breach the standard of care, I will also consider the likelihood that one or more of her cigarettes caused the fire.

[128] Ms. Fontaine testified that after her guests left between 5:30 and 6:00 p.m., she may or may not have had a cigarette on the balcony. On direct examination, she could not recall whether she had done so. On cross-examination, it was pointed out to her that when she was interviewed by an insurance adjuster on July 30, 2012, she stated that she did have a cigarette on

the balcony after her guests left, which would have been at around 6:00 p.m. She acknowledged that if she had a cigarette, she would have disposed of it in the planter. She also stated that she did not see or smell anything smouldering in the planter. If she had, she would have done something about it.

[129] On re-examination, Ms. Fontaine acknowledged that in a statement given on March 27, 2012, she stated that she was last out on the balcony at approximately 5:30 p.m., just prior to her guests leaving. She then testified that she did not return to the balcony for a cigarette after her guests left.

[130] While it is certainly possible that Ms. Fontaine returned to the balcony after her guests left to have a cigarette, to clean up, or for some other reason, I am not convinced on a balance of probabilities that she did so. The day after the fire, on March 27, 2012, she told both Messrs. Purtill and Swan that she did not do so. In fact, she told Mr. Purtill that Mr. Burton was the last person out on the balcony, at approximately 5:30 p.m. At that time, her memory was fresh as to these details, certainly more so than it was in July 2012 when she made a contradictory statement.

[131] In addition, I note the uncontested evidence that all parties were on the balcony for a cigarette at approximately 5:30 p.m., and that after her guests left Ms. Fontaine got her grandchildren ready for bed. She has stated consistently that she relaxed and fell asleep on the couch at 6:30 or 7:00 p.m., shortly after her guests left. As such, the window within which she may have returned to the balcony was fairly narrow, and there is no evidence that she would have had

another cigarette so soon. Between 10:30 and 11:00 p.m. Ms. Fontaine left the couch and went to bed, but she did not look out onto the balcony at that time.

[132] If Ms. Fontaine had returned to the balcony that evening, and had recognized any sign of fire, I accept that she would have taken appropriate responsive action. As such, if she did return to the balcony after her guests left, I accept that there were no perceptible signs of fire at that time. This is consistent with the photographs of Mr. Shirer's testing and the evidence of Messrs. Swan and Shirer, that one would not necessarily see or smell peat moss smouldering. Both of those experts had investigated peat moss fires on previous occasions, while Mr. Purtill, who believed that smoke would be visible, had not.

[133] I have already accepted that Ms. Fontaine's practice was to make sure that her cigarettes were extinguished when she put them into the planter. The fact that she had been using the planter as an ashtray on a regular basis prior to the fire, without incident, supports the conclusion that it is unlikely that one of her cigarettes caused the fire, whether before or after the attendance of her guests.

[134] I cannot conclude that Ms. Fontaine's disposal practices eliminated the risk of fire entirely, and I acknowledge that it is possible, though unlikely, that an ember from one of her cigarettes smouldered below the surface of the peat moss for hours prior to the fire. This possibility would fall within the 0.2% probability of vertically placed cigarettes giving rise to smouldering, as found by Mr. Shirer in testing.

[135] Similarly, I cannot conclude that the disposal practices of Ms. Comeau and Ms. Lang eliminated the risk of fire entirely. Again, it is possible that one of their cigarettes caused the fire, but there is insufficient evidence before me to conclude that either of their cigarettes probably did so.

[136] I have placed some weight, but not significant weight, upon the outcome of the testing conducted by Mr. Shirer. I accept that in conducting the testing, he made best efforts to simulate the conditions in the planter, but the fact remains that the precise details of the content, moisture, density and airflow of the peat moss in the planter are, and will always be, unknown. In addition, I accept the evidence of Mr. Burton that his disposed cigarettes were smoked down to one-quarter of an inch. As such, the tested cigarettes, with two inches remaining, were exposed to the peat moss for a longer burn time than Mr. Burton's cigarettes would have been. It is also impossible to know whether the placement of the cigarettes in testing was identical to the placement of the cigarettes by any of the defendants, though I accept that it was similar, based on the descriptions in evidence.

[137] The result of Mr. Shirer's testing is, however, consistent with common sense: a lit cigarette left on top of a combustible surface is more likely to ignite that surface than would a cigarette that was vertically inserted into the same material, such that the oxygen supply to the spark was diminished.

[138] As "but for" causation against Mr. Burton has been established by inference, I must consider his arguments that the fire could have occurred

without his negligence. Mr. Burton did not argue that the fire would have occurred without his negligence or that injury was inevitable. For the reasons set out at paragraphs 119 and 120 above, I have already concluded that the alternate potential causes of the fire advanced by Mr. Burton are speculative and unsupported by the evidence.

[139] If, however, I am wrong that Mr. Burton caused the fire pursuant to the "but for" test, I accept that his disposal of cigarettes materially contributed to the risk of fire, because he disposed of lit cigarettes in the planter and made no attempt to extinguish them. Although Ms. Fontaine had been using the planter as an ashtray for some time, the presence of Mr. Burton constituted a change in the manner in which cigarettes were disposed into the planter, just prior to the fire occurring.

[140] I have also concluded that Ms. Fontaine materially contributed to the risk of fire, by providing for use an ashtray comprised of combustible materials.

(e) *Conclusion*

[141] Both Mr. Burton and Ms. Fontaine caused the fire, and are liable to the plaintiff.

ISSUE THREE - IF MULTIPLE DEFENDANTS ARE HELD LIABLE, HOW SHOULD LIABILITY BE APPORTIONED AMONG THEM?

(a) *Relevant Legal Principles*

[142] In some cases, a plaintiff's loss may flow from a number of different negligent acts committed by different actors, each of which is a necessary or

"but for" cause of the injury. In these cases, the defendants are said to be jointly and severally liable. The judge then apportions liability according to the degree of fault of each defendant pursuant to contributory negligence legislation. (***Clements***, *supra*, paragraph 12)

[143] In ***Clements***, *supra*, the Court stated at paragraph 46 that:

> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[144] For the principles in ***Cook*** (referenced at paragraph 101 above) to apply, there must be some evidence of contemporaneous carelessness or negligence on the part of the defendants. Liability should not arise merely because a defendant falls within the category of a person who had the opportunity to cause the injury.

[145] In addition, with respect to careless smoking, it is well-established law that an occupier of premises is vicariously liable for the negligence of his or her guests. (***Iversen v. Purser***, 73 D.L.R. (4th) 33, 1990 CarswellBC 881 (WL Can) at paragraph 25 (S.C.), and ***Prior v. Hanna***, 43 D.L.R. (4th) 612, 1987 CanLII 3196 at paragraph 23 (Alta. Q.B.))

(b) *Positions of the Parties*

Plaintiff

[146] The plaintiff submitted that the Court should determine that Mr. Burton most probably caused the fire, such that he should be solely liable.

[147] In the alternative, although the three defendants noted in default are deemed to admit the allegations in the plaintiff's claim, the plaintiff submitted that it has proven negligence as against all of them. If the Court cannot determine which of the four smokers caused the fire, all of them should be found jointly and severally liable on the basis that each of them materially contributed to the risk of the fire. Liability should be apportioned under ***The Tortfeasors and Contributory Negligence Act***, C.C.S.M., c. T90, s. 2(2). In that instance, Mr. Burton should bear the majority of the liability, as he alone completely failed to ensure that his cigarettes were extinguished.

[148] The plaintiff submitted that there was no duty upon it as landlord to warn tenants of a concern, or the risks and dangers of smoking. The risks of doing so are notorious, and there is no precedent for a case where a landlord was liable for failing to warn of obvious risks. In this case, the landlord was not responsible for Mr. Burton's failure to put out a cigarette.

Mr. Burton

[149] Mr. Burton argued that there is no evidence that Ms. Fontaine, Ms. Comeau or Ms. Lang ensured that their cigarettes were extinguished, and there is no basis to conclude that the smouldering combustion started while the

guests were present. This is so especially given the plaintiff's argument that smouldering can occur without any visible signs.

[150] Mr. Burton argued that the peat moss could have been smouldering for 15 hours, as acknowledged by Mr. Purtill, or for up to 24 hours, as acknowledged by Mr. Swan. If smouldering can last 15 to 24 hours, it could have been an earlier cigarette that began to smoulder and caused the fire.

(c) *Analysis*

[151] I have already determined that both Mr. Burton and Ms. Fontaine are liable for the plaintiff's loss. Their respective actions created an environment conducive to the ignition of fire.

[152] Mr. Burton is liable due to the negligent manner in which he disposed of his cigarettes. Ms. Fontaine is vicariously liable for the negligence of Mr. Burton, her guest, and she is also negligent in her own right for providing a combustible ashtray to her guests. Having said that, it is just and equitable that Mr. Burton's contribution be greater than that of Ms. Fontaine. Her negligence was grounded in true ignorance. She was simply unaware that the planter which she used as an ashtray contained peat moss or that peat moss is flammable. Mr. Burton's negligence was more blatant in that he intentionally made no effort to extinguish his cigarettes.

[153] I do not accept that the landlord had a duty to warn its tenants, including Ms. Fontaine, about either the dangers of smoking or the flammability of peat moss. If a landlord had such an obligation, it would apply to any inherently

dangerous, but everyday activity in one's apartment, such as the use of an oven or stove or the lighting of a candle.

(d) *Conclusion*

[154] Mr. Burton is apportioned 75% of the liability and Ms. Fontaine is apportioned 25% of the liability, jointly and severally. Mr. Burton's crossclaim is dismissed.

CONCLUSION

[155] The plaintiff's claim against Mr. Burton and Ms. Fontaine is granted, jointly and severally, in the principal sum of $820,000.00.

[156] The plaintiff's claim against Ms. Comeau and Ms. Lang is dismissed.

[157] If the remaining issues of costs, disbursements and interest cannot be resolved by agreement between the parties, counsel may request a date before me to make submissions.

Grammond, J.