

# CONCURRENT CAUSATION AND INSURANCE CONTRACTS

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## **Introduction**

In the context of insurance contracts, the question of what caused a loss, and whether that cause triggers insurance coverage, is deceptively simple. Indeed, the question has been described as one, merely, of “common sense”.<sup>1</sup> But, of course, reasonable people, applying their respective common sense, can, and have, travelled different paths to find themselves at far different conclusions as to what caused any given loss. Just as in tort law, in the insurance contract context problems arise when a loss is occasioned by multiple causes, whether they be independent or interdependent. But the approaches to those problems taken by tort law are necessarily different from those taken in the insurance/contractual context. Multiple tests have evolved in tort to deal with the seemingly endless variety of factual circumstances that come before the courts (with varying degrees of success). In the insurance context, counsel and courts have tackled the problem as one of language and the intent of the contracting parties.

Over the past twenty years, the Supreme Court of Canada has laboured to clarify the means by which causation is to be determined with respect to the question of insurance coverage and multiple causes. In *Derksen v. 539938 Ontario Ltd.*,<sup>2</sup> the Court clarified and enlarged upon the comments of then-Madam Justice McLachlin, for the

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<sup>1</sup> *Nadrofsky Steel Erecting Ltd. v. Hartford Fire Insurance Co.*, [1980] I.L.R. 1-1222 (Ont. H.C.); [1980] O.J. No. 589.

<sup>2</sup> 2001 SCC 72.

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Court, in *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*,<sup>3</sup> in which she questioned the utility of the concept of “proximate cause” when determining causation with respect to insurance contracts. Historically, the question of proximate cause required courts to determine the single, dominant cause of a loss when determining whether coverage was triggered. But in *C.C.R.*, the Court took the view that a loss would trigger coverage if it could “be shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things.”<sup>4</sup> This approach avoids the unacceptable situation in which a loss, caused by an insured risk, would not be insured despite the parties’ intent that it be so, simply because another concurrent cause of the loss is not insured.

Hillel David and Gary Caplan have observed that, since *C.C.R.* and *Derksen*, “the concept of proximate cause is no longer a matter of great importance”.<sup>5</sup> While that is certainly true, the question of whether the parties intended there to be coverage in the causal circumstances of a given loss is, as it has always been, a central question. In light of that, we may run the risk of oversimplifying questions of causation when determining the existence of coverage.

In this paper, we intend to provide a relatively brief overview of the basic principles of insurance contract interpretation, the leading Supreme Court of Canada cases that have dealt with the problem of multiple causes of loss, and some of the suggested approaches to that problem. Finally, we conclude with our own general comment that whatever approach is taken, it must be based upon the “first principle” that

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<sup>3</sup> [1990] 1 S.C.R. 814.

<sup>4</sup> *Ibid.*, at para. 28.

<sup>5</sup> Hillel David & Gary Caplan, “Serial and Independent Concurrent Causes in Insurance Law” (2009) *The Advocates’ Q.* 57

an insurance policy is a contract and any trigger of coverage must be determined in the context of the intent of the parties to that contract.

### **Principles of Insurance Contract Interpretation**

Courts and commentators alike often observe that the interpretation of insurance contracts must start with the intent of the parties. The rules of interpreting insurance contracts are well settled. Of paramount importance is the intention of the parties ascertained objectively from the words selected by the parties to express their legal obligations in writing. The Supreme Court of Canada discussed this general purpose in *Co-operators v. Gibbens*:<sup>6</sup>

The courts have developed a number of general interpretative principles that reflect a concern that customers not suffer from the imbalance of power that often exists between insurers and the insured but, on the other hand, that customers obtain no greater coverage than they are prepared to pay for. The exercise of interpretation should avoid “an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted”: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (S.C.C.), [1980] 1 S.C.R. 888, *per* Estey J., at p. 901.

And in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*,<sup>7</sup>

the Court laid out a summary of the basic principles of insurance contract interpretation:

The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole ...

Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction .... For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties ... so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded.... Courts should also strive to

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<sup>6</sup> 2009 SCC 59 at para. 20.

<sup>7</sup> 2010 SCC 33.

ensure that similar insurance policies are construed consistently ... . These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer... One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly.<sup>8</sup>

While it may be tempting for a party seeking insurance coverage to lean heavily on the *contra proferentem* rule, there first must be an ambiguity in the language of the contract. Simply because a word or phrase may have more than one meaning does not make it ambiguous. Whether or not a word or phrase is ambiguous involves the consideration of its use in its place and context. It is only when two or more different meanings are *equally, reasonably* and *sensibly* applicable can the word or phrase be said to be ambiguous.<sup>9</sup>

At issue in the *Pentagon* case was the definition or interpretation of the phrases “faulty or improper workmanship” and “faulty or improper design” as they were used in the exclusion clause. The court was of the view that the counsel for the insured was attempting to use the doctrine for the purpose of creating a doubt. The court noted that “the fact that counsel can present arguments as to the meaning of a phrase that are opposed to one another does not prove that the phrase is ambiguous”.

The normal rules of construction lead a court to search for an interpretation that, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of the entry into the contract. A literal meaning should not be applied

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<sup>8</sup>*Ibid.* at paras. 22 to 24.

<sup>9</sup> *Pentagon Construction (1969) Co. Ltd. v. United States Fidelity & Guaranty Co.* (1977), 77 DLR (3d) 189 (BCCA), at para.3.

to bring about an unrealistic result or a result that would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation that would promote the intention of the parties.

Similarly, an interpretation that defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of the interpretation of the policy that promotes a sensible commercial result. (It is trite to observe that an interpretation of an ambiguous contractual provision that would render the endeavour on the insured to obtain insurance protection nugatory should be avoided.)

Said another way, the courts should be loathe to support a construction that would either enable the insurer to pocket the premium without risk, or the insured to achieve a recovery that could never be sensibly sought nor anticipated at the time of the contract.

That said, it has been expressed as the “cardinal rule” of contract interpretation that the court should give effect to the intention of the parties as expressed in their written document.<sup>10</sup> These rules of contractual interpretation apply equally to insurance contracts as they do to contracts in general.<sup>11</sup>

### **C.C.R. Fishing**

In the now well-known case *C.C.R. Fishing*, the Court considered the case of the fishing vessel, “La Pointe”, that sank while berthed due to water ingress as a result of two causes: 1) the failure of cap screws not suited for their purpose that had been negligently installed in years previous; and 2) the negligent failure to close a valve that, if closed,

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<sup>10</sup> *BG Checo International Ltd. v. B.C. Hydro*, [1993] 1 SCR 12.

<sup>11</sup> *Pense v. Northern Life Assurance Co.* (1908), 42 SCR 246 affirming (1907), 15 O.L.R. 131.

would have saved the vessel in spite of the failure of the cap screws. The policy in that case provided coverage for “perils of the sea” defined as “fortuitous accidents or casualties of the seas”. Also applicable was section 56 of the *Insurance (Marine) Act*,<sup>12</sup> the language of which has not changed in substance since:

**Included and excluded losses**

**56** (1) Subject to this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss that is not proximately caused by a peril insured against.

(2) In particular

(a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay is caused by a peril insured against;

(c) unless the policy otherwise provides, *the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured or for any loss proximately caused by rats or vermin or for any injury to machinery not proximately caused by maritime perils* (emphasis added).

The trial judge found that the negligence with respect to both the improper cap screws and the open valve caused the water ingress and the sinking. He found that the loss was a fortuitous accident and a peril of the sea, and, therefore, coverage was triggered.

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<sup>12</sup> R.S.B.C. 1979, c. 203.

The Court of Appeal<sup>13</sup>, however, articulated a test that required that the sinking be a foreseeable consequence of the negligence. The majority decided that the failure of the cap screws was the proximate cause of the loss but that the failure was not fortuitous, and the sinking as a result of corrosion was not a foreseeable result. Further, the Court of Appeal held that neither the corrosion nor the water ingress could be a peril of the sea.

At the Supreme Court, the Court approached the problem differently. In the first instance, the Court had no doubt that the accident at issue was the sinking of the vessel and that this was, in fact, a peril of the sea in that it could not, obviously, have occurred on land. The real issue for the Court, taking an expansive view, was whether the cause of the sinking was fortuitous. In doing so, the Court adopted a “non-technical approach to the question of causation”.<sup>14</sup> On concluding that both the installation of the cap screws and leaving the valve open were negligent, the sinking must have been fortuitous and coverage for the loss was triggered. So concluding, Madam Justice McLachlin wrote as follows:

...the cause of the loss should be determined by looking at all the events which gave rise to it and asking whether it is fortuitous in the sense that the accident would not have occurred “but for” or without an act or event which is fortuitous in the sense that it was not to be expected in the ordinary course of things. This approach is preferable, in my view, to the artificial exercise of segregating the causes of the loss with a view to labelling one as proximate and the others as remote, an exercise on which the best of minds may differ.<sup>15</sup>

On the issue of foreseeability, while it is incorrect to characterize the reasons of the majority at the Court of Appeal as resting solely on such a test, the Supreme Court resoundingly rejected foreseeability as having any place in determining whether coverage

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<sup>13</sup> 34 B.C.L.R. (2d) 1.

<sup>14</sup> *C.C.R. Fishing* at para. 30.

<sup>15</sup> *Ibid.* at para. 33.

is triggered. Indeed, to do so was improperly to import tort law concepts into the realm of contract interpretation.

### **Derksen**

Given that in *C.C.R. Fishing* both the corroded cap screws and the open valve were non-intentional, unexpected causes of a peril of the sea, the special problem posed by a loss with two or more causes where one cause triggers coverage and another cause is excluded was not specifically addressed. But the jettisoning of the doctrine of “proximate cause”, with its insistence that a single, dominant cause be identified, allowed subsequent courts to find more reasoned approaches to that problem. Some ten years after *C.C.R.*, the Supreme Court had occasion to address the issue in *Derksen*.

The facts of *Derksen* are well known so we will review them only briefly here. A contractor was insured under an automobile policy (the “Auto Policy”), a CGL (the “CGL”), each with \$1 million limits, and an excess coverage policy. The CGL contained the common exclusion clause excluding coverage for injury arising out of the ownership, use, or operation of a motor vehicle, and the relevant statutory scheme prevented recovery for pecuniary loss from injury arising from the use or operation of a motor vehicle.

While cleaning up at a worksite, a shareholder/employee of the contractor negligently placed a steel plate on a cross-member of a tow bar connected to the contractor’s vehicle where the plate remained as the employee drove off the worksite and



onto the highway. While driving down the highway, the plate flew off the tow bar and went through the windshield of an oncoming school bus resulting in death and injury.

At the Supreme Court of Canada, the issues were whether the accident arose out of a single auto-related cause or whether it arose out of two concurrent causes, and if the latter was the case, did the auto-exclusion clause in the CGL oust coverage. Central to the issues was the finding of the trial judge, undisturbed by the Court, that the placing of the steel plate on the cross-bar did not constitute "loading" of the vehicle. It was, rather, entirely part of the negligent clean-up of the work site.

The appellant defendants relied on the doctrine of proximate cause, though, arguing that the dominant cause of the loss was the negligent driving of the vehicle and not the clean-up. The Court rejected that analysis, citing *C.C.R. Fishing*. Mr. Justice Major, for the Court, wrote:

In any event, the utility of the "proximate cause" analysis with respect to insurance policies is questionable. In *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814 (S.C.C.), McLachlin J. (as she then was) stated (at p. 823):

The question of whether insurance applies to a loss should not depend on metaphysical debates as to which of various causes contributing to the accident was proximate. Apart from the apparent injustice of making indemnity dependent on such fine and contestable reasoning, such a test is calculated to produce disputed claims and litigation.

Although McLachlin J. was analysing insurance policies with respect to perils of the sea, her comments are equally applicable here. The courts below recognized that there were both auto-related and non-auto-related negligence. Furthermore, as the motions judge concluded, s. 267.1 of the *Insurance Act* recognizes that there may be concurrent causes. In such circumstances, it is undesirable to attempt to decide which of two concurrent causes was the "proximate" cause.<sup>16</sup>

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<sup>16</sup> *Derksen* at para. 36.

As to the second issue, the appellants submitted that all coverage should “be excluded if liability were due to an excluded peril even if the loss was also due to another covered peril.”<sup>17</sup> The Court rejected such a sweeping proposition. Rather, the issue of exclusion would be decided as a matter of contractual interpretation. Justice Major writes as follows:

...there is no compelling reason to favour exclusion of coverage where there are two concurrent causes, one of which is excluded from coverage. A presumption that coverage is excluded is inconsistent with the well-established principle in Canadian jurisprudence that exclusion clauses in insurance policies are to be interpreted narrowly and generally in favour of the insured in case of ambiguity in the wording (*contra proferentem*).

Separate from the shortcomings in the analysis in *Wayne Tank*, another compelling reason for rejecting the presumptive proposition advocated by the appellants is the fact that insurers have language available to them that would remove all ambiguity from the meaning of an exclusion clause in the event of concurrent causes. This can be accomplished by the insurer clearly specifying that if a loss is produced by an excluded peril, all coverage is ousted despite the fact that the loss may also have been caused by another, covered peril. Examples from case law indicate that insurers have in fact successfully used enforceable exculpatory language. See *Ford, supra*, and *Pavlovic v. Economical Mutual Insurance Co.* (1994), 28 C.C.L.I. (2d) 314 (B.C. C.A.), at p. 320 *per* Finch J.A. of the British Columbia Court of Appeal:

Applied to the circumstances of this case, the meaning of exclusion [clause] (12) is, at best, ambiguous. It leaves open the question whether the loss is excluded where seepage or leakage is a "contributing cause", as opposed to the only cause. Apt language to achieve the end argued for by the insurer is seen in the policies considered in some other cases. Similar exclusion clauses have used language such as "cause directly or indirectly", or "caused by, resulting from, contributed to or aggravated by". One exclusion clause read:

We do not insure for such loss regardless of the cause of the excluded event, other causes of the loss, or whether other

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<sup>17</sup> *Ibid.* at para. 40.

causes acted concurrently or in any sequence with the excluded event to produce the loss . . .

These examples simply show that it was possible for the insurer to choose language which would not have left the meaning of the exclusion clause open to doubt.

For the foregoing reasons, I decline to adopt the presumption that where there are concurrent causes, all coverage is ousted if one of the concurrent causes is an excluded peril. If an insurer wishes to oust coverage in cases where covered perils operate concurrently with excluded perils, all it has to do is expressly state it in the insurance policy.

Whether an exclusion clause applies in a particular case of concurrent causes is a matter of interpretation. This interpretation must be in accordance with the general principles of interpretation of insurance policies. These principles include, but are not limited to:

- (1) the *contra proferentem* rule;
- (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
- (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.<sup>18</sup>

Essentially, because the policy at issue there did not evince any intention to exclude coverage for a loss caused by concurrent causes, one covered and one excluded, the principles of insurance contract interpretation required the conclusion that the parties intended the portion of the loss caused by the non-excluded cause to be covered.

David and Caplan observe:

The decision of the Supreme Court of Canada in *Derksen* was not as groundbreaking as some have considered. Its true import was to impose on insurers, in the case of independent, as contrasted to serial, concurrent causes, the obligation to draft exclusion clauses with clarity sufficient to demonstrate the intention to exclude the entire loss...<sup>19</sup>

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<sup>18</sup> *Ibid.* at para. 46.

<sup>19</sup> David & Caplan, p. 84.

That is, perhaps, understating the significance of the case. The Court, by emphasising the primacy of the policy language reasserted the importance of the rules of insurance contract interpretation and the intention of the parties.

### **Progressive Homes**

The Supreme Court of Canada reminded us of this most recently in *Progressive Homes*. That case, while not turning on the issue of concurrent causes, is helpful in that it reminds us of the importance of giving effect to unambiguous language in a contract.

At issue was whether an insurer had a duty to defend its insured in actions commenced against a general contractor for damage to the structure built by that contractor caused by, very generally, “leaky condo” defects. The plaintiff in the underlying actions alleged breach of contract and negligence. There were successive commercial general liability policies in place in that case, but, generally, the CGL’s obligated the insurer to “defend in the name and on behalf of the Insured...any civil action which may...be brought against the Insured on account of such bodily injury or property damage.” Property damage was defined as “physical injury to or destruction of tangible property which occurs during the policy period...”, and “occurrence” was defined, helpfully, as an “accident”.<sup>20</sup>

The trial judge, following the line of authority then prevailing in British Columbia,<sup>21</sup> held that defective construction could not qualify as an accident unless it caused damage to the property of a third party. Damage to the work performed by the Insured, then, did not trigger coverage. The BC Court of Appeal dismissed the appeal,

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<sup>20</sup> *Progressive Homes*, paras. 10 and 11.

<sup>21</sup> See: *Swagger Construction Ltd. v. ING Insurance Co. of Canada*, 2005 BCSC 1269

largely on the grounds that faulty workmanship could not be considered “fortuitous.” Such reasoning was reminiscent of that found 20 years earlier in *C.C.R. Fishing*.

Mr. Justice Rothstein, in a judgment concurred in by the full Court, set out the scope of the duty to defend pursuant to an insurance contract as follows:

An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim.... It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend.<sup>22</sup>

Following a brief review of the principles of insurance policy interpretation, Justice Rothstein set out the coverage provisions of the particular policies and the insurer’s principal submission as follows:

The definition of "property damage" in the first policy is:

"Property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an accident occurring during the policy period.

In later versions of the policies, the references to destruction were removed:

"Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property; or
- b. Loss of use of tangible property that is not physically injured.

Lombard's main argument is that "property damage" does not result from damage to one part of a building arising from another part of the same

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<sup>22</sup> *Progressive Homes*, para. 19.

building. According to Lombard, damage to other parts of the same building is pure economic loss, not property damage. What follows from this argument is that "property damage" is limited to third-party property.<sup>23</sup>

The insurer's position, generally supported by the courts below, stemmed from the importation of tort principles into the realm of insurance contract interpretation. And as the Court rejected foreseeability as a requirement for coverage, though it plays a dominant role in tort law, the Court in *Progressive Homes* utterly rejected the notion that property damage is not property damage unless it occurs to the property of a third party.

Justice Rothstein writes:

The focus of insurance policy interpretation should first and foremost be on the language of the policy at issue. General principles of tort law are no substitute for the language of the policy. I see no limitation to third-party property in the definition of "property damage". Nor is the plain and ordinary meaning of the phrase "property damage" limited to damage to another person's property. ...

I would construe the definition of "property damage", according to the plain language of the definition, to include damage to any tangible property. I do not agree with Lombard that the damage must be to third-party property. There is no such restriction in the definition.

The plain meaning of "property damage" is consistent with reading the policy as a whole. Qualifying the meaning of "property damage" to mean third-party property would leave little or no work for the "work performed" exclusion (discussed in more detail below). Lombard argues that the exclusion clauses do not create coverage. This is true. But reading the insurance policy as a whole is not the same as conjuring up coverage when there was none in the first place. Consistency with the exclusion clauses is a further indicator that the plain meaning of "property damage" is the definition intended by the parties.<sup>24</sup>

Specific to the issue of causation, in order for coverage to be triggered, not only must there have been property damage, but that damage must also have been accidental.

"Accident" was defined in the first policy as "continuous or repeated exposure to

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<sup>23</sup> *Ibid.* at paras 30 and 31.

<sup>24</sup> *Ibid.* at paras 35 to 37.

conditions which result in property damage neither expected nor intended from the standpoint of the insured.”<sup>25</sup> The insurer argued that defective workmanship can never be accidental. The Court disagreed. Rather, the accidental nature of a defect will be case-specific and a defect may very well be fortuitous. Justice Rothstein writes:

"Accident" should be given the plain meaning prescribed to it in the policies and should apply when an event causes property damage neither expected nor intended by the insured. According to the definition, the accident need not be a sudden event. An accident can result from continuous or repeated exposure to conditions.<sup>26</sup>

Of course, though a peril may fall within the coverage provisions of a policy, that coverage may be ousted by an exclusion clause, and, indeed, the policies at issue in *Progressive Homes* did contain exclusions commonly found in CGL policies restricting coverage with respect to workmanship by or on behalf of the insured. But an extension endorsement restricted that exclusion to work performed *by* the insured. Justice Rothstein had this to say:

The plain language is unambiguous and only excludes damage caused by Progressive to its own completed work. It does not exclude property damage:

- that is caused by the subcontractor's work;
- to the subcontractor's work, regardless of whether the damage is caused by the subcontractor itself, another subcontractor, or the insured.<sup>27</sup>

The significance of *Progressive Homes* is that it further reinforces the primacy of unambiguous policy language in determining the intention of the parties to that policy. That intention, in turn, determines whether coverage is triggered. The questions should always be: 1) is the loss insured pursuant to the coverage language of the policy? and 2)

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<sup>25</sup> *Ibid.* at para. 43.

<sup>26</sup> *Ibid.* at para. 49.

<sup>27</sup> *Ibid.* at para. 56.

are there any exclusion clauses that clearly oust that coverage, subject to any exceptions? In the event of ambiguity, or an absurd result that would render any coverage illusory, then, and only then, should a court resort to interpretive doctrines in order to discern the meaning of a policy. And though there is overlap with the language of tort law, doctrines such as foreseeability or “pure economic loss” arising from first party property damage have no place in the exercise.

### **Approaches to the Problem of Multiple Causes**

While it is tempting to state the problem of multiple causes of a loss as one, merely, of determining the parties’ intentions, the reality, of course, is that the facts of any one case are rarely so simple, and it is intellectually dishonest to presume that parties to an insurance contract have considered all factual scenarios. And underwriters do not write policy in a vacuum. Considering the need for predictability in the face of unpredictable circumstance, the allure of tort law doctrine is understandable though ultimately inappropriate.

As such, several different approaches to the problem have been put forward in recent years. As alluded to above, Hillel David and Gary Caplan, in *Serial and Independent Concurrent Causes in Insurance Law*, take the view that the application of *Derksen* is restricted to like cases involving independent concurrent causes; that is, cases in which a loss is caused by unrelated causes operating simultaneously without a causal connection between them. In *Derksen*, the loss was caused by the negligence of the foreman in placing the steel plate on a cross bar of a machine hitched to a vehicle. That negligence was independent of the foreman’s negligence when he drove down the highway without ensuring that the load of his vehicle was secure. It is perhaps too fine a



point. Had the foreman not negligently placed the steel plate, then his negligence while driving would not have caused anything at all. But they are two independent instances of negligence nonetheless. The fault is apportioned between the two causes because while there is, obviously, a dependent link between the serial causes leading up to the result, there is not a causal relationship between the negligent clean-up and the negligent driving.<sup>28</sup>

As for its application to like cases, the authors state:

*Derksen* established what may be described as a default rule for the application of exclusion clauses in situations involving independent concurrent causes. That rule provides that an exclusion clause will exclude coverage only for that part of the loss, if any, that is attributable solely to an excluded cause. While not expressly stated, the onus, as indicated above, presumably will rest with the insurer to identify the excluded part of the loss. That default rule will apply unless the language of the exclusion clause is sufficiently clear to evidence the intention to exclude the whole or additional parts of the loss.<sup>29</sup>

David and Caplan describe *serial* concurrent causes as “those where each is a consequence of the one preceding it; where, in other words, there is a causal connection not only between each cause and the loss, but also among the various causes.”<sup>30</sup> Where an excluded cause exists within the series of concurrent *dependent* causes, the loss following the excluded cause would likely be entirely excluded notwithstanding the presence of non-excluded causes occurring later in the series. The authors write:

...all causes that follow the excluded cause are causally connected to, and dependent for their existence on, the excluded cause. Except to the extent that a part of the loss has already occurred prior to the appearance of the excluded cause, the entire loss can fairly be said to be entirely attributable to the excluded cause, notwithstanding the interposition of other causes between the excluded cause and the loss.<sup>31</sup>

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<sup>28</sup> *Derksen* at para. 61.

<sup>29</sup> David & Caplan at page 73.

<sup>30</sup> *Ibid.* at page 57.

<sup>31</sup> *Ibid.* at page 74.

And further on:

...the excluded cause in that situation would probably be considered the proximate cause were that concept still important.<sup>32</sup>

Of course, the authors point out that in the case of a series of concurrent causes, where not all causes are covered but none are excluded, logic dictates that coverage is triggered.

And so, according to David and Caplan, in the case of independent, concurrent causes, the loss is apportioned between causes and coverage for each portion is triggered or excluded in accordance with the plain language of the policy. In the case of serial causes, coverage will be triggered for loss following a non-excluded cause, even in a case where other causes, acting alone, would not trigger coverage, so long as those other causes are not expressly excluded. And finally, again in the case of serial, dependent causes, coverage will not be triggered for a loss following an excluded cause, even if preceding causes, acting alone, would have triggered coverage.

These approaches to concurrent causes, both serial and independent, have much to recommend them. Most notably, they contain within them fidelity to the parties' intentions to provide coverage for those risks set out in the coverage provisions and exclude those losses arising from excluded causes.

Professor Erik S. Knutsen, albeit largely in the context of American jurisprudence, approaches the problem of multiple causes from a somewhat different perspective.<sup>33</sup> He prescribes the adoption of hard and fast rules for determining causation and coverage as a prescription for the multitude of problems caused by concurrent causation issues. He sets out those problems as follows:

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<sup>32</sup> *Ibid.* at page 74.

<sup>33</sup> Erik S. Knutsen, "Confusion about Causation in Insurance: Solutions for Catastrophic Losses" (2010) 61:5 Ala. L. Rev. 957.

Concurrent causation cases are the most costly, inefficient, tortured and unpredictable of insurance cases. They also appear remarkably frequently in the litigation system. Settlement is therefore unlikely, owing to the unpredictable nature of the outcomes. It is difficult for insurers and insureds alike to arrange their insurance and indeed, their very conduct, around shifting standards for resolving these disputes. Different jurisdictions approach the problem of concurrent causation in different ways. Even within jurisdictions, various approaches provide little doctrinal guidance to courts, insurers, and insureds faced with determining coverage questions about concurrently caused losses. The major efficiency problems with contemporary approaches to concurrent causation include issues of jurisprudential consistency, inefficient pleading problems, inefficient counsel involvement, and a potential offloading of liability to a secondary insurance market: the insurance brokers.<sup>34</sup>

To deal with these issues (and to impose market certainty), Professor Knutsen proposes “immutable” rules, immune from any attempt by, in most cases, insurers to draft around evolving jurisprudence and legislative attempts to impose default rules.<sup>35</sup> He urges an approach that would focus in on the resulting loss and either apportion losses between discrete causes or take a liberal approach to coverage in the case of indivisible, reciprocal causes.<sup>36</sup>

But for exclusions, these approaches ought to bring about the same result on the coverage issue as the approaches suggested by Messers David and Caplan. But on the issue of exclusion clauses, the various authors seem to part ways. In the case of reciprocal causes, where a loss is traced to interdependent causes occurring either serially or in parallel,<sup>37</sup> and one cause is excluded while another is covered, Professor Knutsen

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<sup>34</sup> *Ibid.* at page 978.

<sup>35</sup> *Ibid.* at page 997.

<sup>36</sup> *Ibid.* at page 1009.

<sup>37</sup> Interestingly, Professor Knutson characterizes *Derksen* as a case involving reciprocal, interdependent causes, as opposed to independent causes. The Court, as noted above, apportioned fault between the causes and David and Caplan expressly limit the case’s application to cases involving independent, concurrent causes.

urges adoption of a liberal approach and coverage of the loss.<sup>38</sup> As to the inevitable criticisms of such an approach, he writes:

There is an argument that the liberal approach does violence to an exclusion clause. In a reciprocally caused loss, however, where a covered cause combines with an excluded clause, the ties go to the insured. To do otherwise is to adopt the inefficient conservative approach to concurrent causation. Because more often than not reciprocally caused losses involve liability insurance, the varying arrays of behavior that could combine to produce reciprocal concurrently caused losses might actually trigger exclusions far too regularly, thereby frustrating available coverage.<sup>39</sup>

And further on:

For those insurance disputes where the potentially insured loss results from reciprocal concurrent causes...applying a liberal rule is the most efficient response. If a loss is caused by a covered cause, the loss is covered, even though an excluded or non-covered cause may have combined together to produce the loss. This approach is straightforward to apply. Whatever increase in liability for insurers is created in its application is more than made up in the increased predictability savings on a system-wide level. This approach also preserves the unique compensation aspect of liability insurance that is so important to injured third parties.<sup>40</sup>

While this approach is appealing from a policy perspective, in the sense that it is desirable for coverage to be available when a loss, either first or third party, is suffered, this solution loses some lustre when one considers that it may not just do violence to an exclusion clause but to the intent of the parties as well.

### **Conclusion**

Clearly, the solution to the problems posed by concurrent causes of a loss in determining insurance coverage is not one just of common sense. The doctrine of proximate cause, determining the single, dominant cause of a loss, is appealing because it led down a single, open path to judgment once the necessary findings of fact were made.

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<sup>38</sup> Knutsen at page 1021.

<sup>39</sup> *Ibid.* at page 1021.

<sup>40</sup> *Ibid.* at page 1022.

The problem, though, has always been the sometimes arbitrary and expensive nature of that fact-finding adventure. Canada has left the doctrine of proximate cause behind and has gone a long way towards developing a new doctrine to deal with concurrent causes, particularly those that are independent of each other.

But we are still without a clear approach to serial, dependent causes that bring coverage clauses and exclusions clauses into play simultaneously. Professor Knutsen's solution is attractive if only because it is a solution. But we caution against any solution that does not respect the intention of the parties to an insurance contract as evidenced by clear, unambiguous language. Ultimately, any approach to the issue of concurrent causation must show that respect.