Causes, Exclusions, and the Search for Meaning in an Ambiguous Universe

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The Supreme Court of Canada's 1990 decision in *C.C.R. Fishing Ltd. v British Reserve Insurance Co. Ltd.,*[1] coupled with its 2001 decision in *Derksen v 539938 Ontario Ltd. et al*,[2] presents tremendous challenges for coverage counsel. Aside from the immediate consequences of the Court's reasons for motor vehicle liability insurers – the interpretation of the phrase "use and operation" in motor vehicle insurance coverage grants and in liability policy exclusion clauses, and the question of whether motor vehicle and general liability policies are intended to overlap – three broader, interrelated topics have emerged which are of more general concern: the status of "proximate cause" analysis; the purpose and effect of exclusion clauses; and the significance of policy wordings. Behind these topics lies a fundamental question as to the circumstances in which courts will find wordings to be ambiguous.

Proximate Cause

Derksen adopted the objections to proximate cause analysis which had first been raised by the Court in *C.C.R. Fishing* the latter was a marine insurance case, in which the loss had occurred as a result of two independent perils: a sea suction valve to a heat exchanger had been left open when the ship was laid up at dock; and caps screws on a flange which connected the line to the heat exchanger corroded, leaving a gap through which sea water could enter the engine room. The Court held that the corrosion did not constitute "ordinary wear and tear" or "inherent vice" – both excluded perils – as it had resulted from the inappropriate use of steel screws in a bronze fitting. Justice McLachlin, as she then was, stated,

> " I conclude that even if one were to assume that the proximate cause of the sinking was the failure of the cap screws, that would not assist the respondents, since the cause of that failure was not ordinary wear and tear or inherent vice, but the fortuitous negligence of the repairers.

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[1] [1990] 1 S.C.R. 814; [1990] S.C.J. No. 34

[2] 2001 SCC 72; [2001] 3 S.C.R. 398

"I have approached the matter thus far on the assumption made in the Court of Appeal below that there can only be one proximate cause of the loss, concluding that even on that basis, there is coverage. However, I am of the view that it is wrong to place too much emphasis on the distinction between proximate and remote cause in construing policies such as this . . . ".[3]

". . . the loss, viewed in all the circumstances of the case, was fortuitous. The trial judge was right to take the view that he need not analyze which of the two causes of the loss was proximate, given that it was clear on his findings that the sinking of the ship would not have occurred but for the unusual and fortuitous event of the valve being negligently left open.

"This broader approach has much to recommend it, in my view. *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.* It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, the loss is 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."[4]

". . . it is my view that in determining whether a loss falls within the policy, 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. On this approach, the loss here at issue falls within the policy

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[3] *ibid*, at 822

[4] *ibid*, at 822 - 823

> because it would not have occurred but for the negligent act of leaving open the valve" [5] (emph. added).

The italicized portion of these reasons which refers to the undesirability of 'metaphysical debates' was applied in *Derksen* to a situation in which the trial judge had found the accident to have arisen out of two independent perils – a contractor's negligence in placing a heavy plate on his vehicle's tow bar, and then forgetting to store it, in the course of clearing up a work site, and then setting the vehicle in motion "without having conducted even a cursory circle check of the unit" [6] The Court expanded *C.C.R. Fishing*'s application beyond the field of marine insurance:

> "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."[7]

Concurrent, or Serial?

Some of the conceptual difficulties with *C.C.R. Fishing*'s attack on proximate cause analysis have been described elsewhere.[8] One of the most pressing practical problem for insurers, and their counsel, is the threshold question of whether the Court's objections to proximate cause are limited to situations involving concurrent independent perils – as was the case in both *C.C.R. Fishing* and *Derksen* – or whether they apply also to cases of "chains of causation", where one peril causes another, and potentially others on down the line, leading serially or sequentially to the loss. Justice McLachlin's criticisms seem to apply to insurance coverage issues generally, regardless of the pattern of events which precipitate a loss, and some courts have at least leaned towards interpreting

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[5] *ibid*, at 825 - 826

[6] *supra*, note 2, at para 19

[7] *supra*, note 1, para. 36

[8] A. J. Saunders, "Proximate Cause in Insurance Law – Before and After *Derksen*, (2006), The Advocates' Quarterly, Vol. 32 p.140

the decision in that manner.[9] Other courts have viewed the prohibition on proximate cause analysis as applying to only to cases of concurrent causation.[10]

But a close reading of these cases reveals some degree of judicial confusion as to what constitutes a "concurrent" cause. In *Trafalgar Ins. Co. of Canada v Imperial Oil Ltd.*,[11] damage to a residence was alleged to have arisen out of the conduct of two parties – Imperial Oil, who had caused an oil spill, and a contractor, R.W. Hope Limited, who had conducted clean up work. Hope's insurer denied coverage on the grounds of a pollution exclusion. The Ontario Court of Appeal held that the question of whether the damage for which Hope was alleged to be liable arose out of pollution was answered by its earlier decision in *Ontario v Kansa Gen'l Ins. Co.*;[12] the contractor's alleged conduct was not a new intervening act of negligence which broke the chain of causation between the damage and the original spill, and the exclusion therefore applied. However, in reaching that conclusion, the *Trafalgar* court considered the potential application of *Derksen*, and chose to distinguish it in these terms:

> "The pleadings [in the present case] do not involve allegations of concurrent negligence, but rather what I would label allegations of sequential negligence, that is Imperial Oil's primary negligence in allegedly causing the escape of the fuel oil and Hope's alleged negligence, which in my view arose out of the oil spill, in allegedly failing to eliminate or limit the consequences of Imperial Oil's earlier negligence. These allegations of negligence are closely related but are not concurrent."[13]

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[9] *R.E. v Wawanesa Mutual Ins. Co.* (2006), 80 O.R. (3d) 114 at para. 98; *B & B Optical Management Ltd. v. Bast*, 2003 SKQB 242 (CanLII); [2004] 6 W.W.R. 747; 235 Sask. R. 141, at para. 38

[10] *Trafalgar Ins. Co. of Canada v Imperial Oil Ltd.* (2001), 57 O.R. (3d) 425; 2001 CanLII 21205 (Ont.C.A.), at para. 58; *The Owners, Strata Plan NW2580 v Canadian Northern Shield Ins.Co.* 2006 BCSC 330; 55 B.C.L.R. (4th) 176; 36 C.C.L.I. (4th) 109; [2006] I.L.R. I-4486

[11] *supra*, note 10

[12] 1994 CanLII 626; 17 O.R. (3d) 38; 69 O.A.C. 208

[13] *supra*, note 10, para. 58

Conversely, in *B & B Optical Management Ltd. v Bast*, an electrical contractor's negligence in making a 220-volt connection to 110-volt circuitry, and its consequence – excluded "loss or damage to electrical devices . . . caused by artificially generated electrical currents" – were held to constitute concurrent causes:

> "It is clear that both the electricity and the negligence of the contractor were causes of the damage; in the absence of either, there would have been no loss. Therefore, we have a case of two concurrent causes of the loss, and must examine the exclusion clauses in accordance with the principles enunciated in *Derksen* . . .".[14]

One of the difficulties with these cases is that this is clearly not the sense in which the *Derksen* court was referring to "concurrent" causes. "Concurrent" in that sense is simply a short form of denoting independent perils which, when combined, have the concurrent effect of producing a loss. In *Trafalgar*, the two alleged perils were clearly independent. Imperial Oil's spilling of fuel oil did not cause the contractor to act negligently; it merely set the stage for the later event, just as the negligent cleanup of the construction site in *Derksen* set the stage for the negligent operation of the truck. In *B & B Optical*, on the other hand, the 220-volt electrical current never would have been introduced into the premises but for the contractor's negligence; the reasons in that case seem to confuse the concurrent/serial distinction with but-for causation. The distinction between "concurrent" and "serial" in coverage cases lies not in the sequence in which the perils occur, nor in whether they are both necessary causes of the loss (clearly they must be, or the exclusion would not apply), but rather in whether the perils themselves are causally connected

Once past the hurdle of classifying a fact pattern as involving "concurrent" or "serial" perils, further issues may arise depending on the wording of the policy. Some of these issues are explored below..

Exclusion Clauses

In *C.C.R. Fishing*, McLachlin J. (as she then was) interpreted the statutory exclusions,

> " . . . 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

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[14] *supra*, note 9, para 43

> insured or for any loss proximately caused by rats or vermin or for any injury to machinery not proximately caused by maritime perils”,

as being intended to address non-fortuitous events.[15] Therefore, the intervention of a fortuitous cause - the negligent use of the wrong screws – triggered coverage:

> “I do not read s. 56 of the Insurance (Marine) Act as limiting the cause of the loss to a single peril. Realistically speaking, it must be recognized that several factors may combine to result in a loss at sea. It is unrealistic to exclude from consideration any one of them, provided it has contributed to the loss. What is essential in order to establish that the loss is "fortuitous" is an accident caused by the intervention of negligence, or adverse or unusual conditions without which the loss would not have occurred. This is the shared idea which underlies the exclusion from coverage of damage due to ordinary wear and tear or inherent vice.
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> . . .
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> “. . . it does not matter if one of the causes of the loss is ordinary wear and tear or inherent vice, provided that an efficient or effective cause of the loss -- one without which the loss would not have occurred -- was fortuitous. That is certainly so in the case at bar. It is not disputed that had the valve been closed, as it should have been, the vessel would not have sunk. Thus the loss, viewed in all the circumstances of the case, was fortuitous.”[16]

This analysis may be perfectly appropriate in the context of marine insurance claims. But a broader application may be problematic. Exclusion clauses in All Risks policies, for example, may serve purposes other than explicitly limiting coverage to fortuitous losses;[17] many exclusions can only properly be understood to operate *if* an otherwise covered loss has occurred. This point, and its consequences, were addressed by the Alberta Court of Appeal in *Triple Five Corp. v Simcoe and Erie Group*:

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[15] *supra*, note 1, para. 9

[16] *ibid*., paras. 21 - 22

[17] Kenneth S. Abraham, “Peril and Fortuity in Property and Liability Insurance”, (2001) 36 Tort and Ins. L.J. 777

> "But the Mall would have us decide first that there are two separate kinds of causes, first a "design error" that is external to the property and therefore an insured peril, and a "latent defect" that is internal to the property and excluded. It would then invoke the dubious rule that there is coverage if, in a chain of causation, any one link is within coverage even if another link in the chain is an excluded cause. . . .
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> "In passing, we say that the rule ultimately relied upon by the Mall is dubious because we do not wish to be understood as accepting it. Given a series of events leading to the loss, what if some "causes" in that chain are included as insured perils and some are excluded? American authorities relied upon by the Mall hold that:
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> > Where a policy expressly insures against direct loss and damage by one element but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause. *Firemen's Fund Insc v. Hanley* 252 F. 2d 780 at 785, [approved in several cases cited by Mall]
>
> "We have two difficulties with this rule. First, it seems directly opposed to the office of an exclusion, which by definition is to make an exception to a more general rule. Second, it seems to lead to the conclusion that there can be no exclusions. We say this because there is of course no coverage in the first place unless one can say the loss can be tied to an insured peril. Thus, the prerequisite condition for non-operation of an exclusion will always apply. As a result, no exclusion can be effective."[18]

Essentially the same point was made by Cairns L.J. in the English case, *Wayne Tank and Pump Co. Ltd v The Employers' Liability Assur. Co. Ltd.*:[19]

> "On this approach if one cause is within the words of the policy and the other comes within an exception in the policy, it must be taken that the loss cannot be recovered under the policy. The effect of an exception is to save the insurer from liability for

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[18] [1997] A.J. No. 248; [1997] 5 W.W.R. 1; (1997), 42 C.C.L.I. (2d) 132 at 138

[19] [1974] QB 57, [1973] 3 All ER 825, [1973] 3 WLR 483, [1973] 2 Lloyd's Rep 237

> a loss which but for the exception would be covered. The effect of the cover is not to impose on the insurer liability for something which is within the exception."[20]

Thus, the fact that a loss is fortuitous is not, generally, a ground upon which an exclusion clause may be avoided. Again, *B & B Optical* serves as an instructive example of the consequences of applying *C.C.R. Fishing* too broadly. The trial judge stated,

> "In *C.C.R. Fishing* . . . the Supreme Court of Canada held that it does not matter if one of the causes is excluded from coverage, provided that an efficient or effective cause of the loss – one without which the loss would not have occurred – was not excluded. There is no need to determine what was the "proximate" cause. (While this case concerned a maritime insurance policy, the general procedure articulated may apply to all exclusion clauses in insurance contracts.) The court stated that the proper procedure in determining the applicability of an exclusion clause is to first ascertain the cause or causes of the loss, and to then ask whether the loss is fortuitous in that it would not have occurred but for the accident or unforeseen event brought about by negligence or adverse or unusual conditions. If the loss is fortuitous and at least one cause does not fall within one of the exclusions, then the policy applies.
>
> "Applying this to the instant case, both the electricity and the negligence of the contractor were causes of this loss; in the absence of either, there would have been no loss. The presence of electrical wiring in the building is not an adverse or unusual condition; the building had been supplied with electricity prior to the contractor's work. But, the contractor's error in reconnecting the power supply is undoubtedly an unusual condition which brought about an unforeseen event. This would classify the power surge as being fortuitous. Since the error of contractors does not fall within one of the exclusion clauses in the insurance policy, the policy should apply with full force."[21]

Of course, the difficulty with this decision is that for artificially generated electrical currents to damage an electrical device, something fortuitous must happen. The fortuity cannot negate the exclusions; rather, the fortuity is a precondition for establishing a right to indemnity, subject to the

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[20] *supra*, note 12, per Cairns L.J. at Q.B. 69

[21] *supra*, note 9, at

exclusions. As interpreted by the trial judge, it could be argued that the exclusion – to steal a phrase from *Triple Five* – could never be effective.

Unfortunately, *Derksen* provides no assistance in terms of the general questions of the purpose and effect of exclusion clauses. McLachlin J.'s observations on the interplay between fortuity and exclusion in *C.C.R. Fishing* are not referred to; neither is *Triple Five*. *Wayne Tank* is said to suffer from a number of "shortcomings":

> "On review of the analysis in *Wayne Tank*, which had its roots in the field of maritime law, 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*)"[22]

– which is all well and good when the exclusion is ambiguous, but of little assistance when the exclusion appears, at face value, to relate to the problem at hand.

Policy Wordings

Thirty or forty years ago, a Canadian insurance coverage lawyer could treat a number of propositions about insurance coverage as truisms – for example, that the phrase "legally obligated to pay" in a liability policy's insuring agreement referred only to tort liability, or that coverage is not available for intentional acts. If these truisms reflected a rule-based regime of interpreting insurance contracts, it would be fair to say that this regime has now given way to a more nuanced approach, in which courts tend to consider the wording of policies as a whole, and the reasonable expectations of insurer and assured, given their specific circumstances.[23]

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[22] *supra*, note 2, para. 46

[23] e.g., The trial judgment of Finch J.(as he then was) in *Vancouver General Hospital v. Scottish & York Ins. Co.* (1987) 41 DLR (4th) 657 (BCSC) at 663; 15 BCLR (2d) 178, 28 CCLI 148 (rev'd (1988) 55 DLR (4th) 360; 34 BCLR (2d) 145; 36 CCLI 1): "The question is not what liability policies usually cover, but rather, what this particular policy covers." See also *Cultus Lake Park Board v Gestas Inc.*, [1995] BCJ No. 2595; 15 BCLR (3d) 89; 33 CCLI (2d) 245

Derksen's interpretation of *Ford Motor Co. of Canada v Prudential Assur. Co.*[24] may be seen as a continuation of this trend. The Supreme Court overturned the prevailing view [25] that *Ford Motor* stood for the general proposition that an exclusion would presumptively prevail over a covered peril. The Court adopted the reasoning of Finch J.A. (as he then was) of the B.C. Court of Appeal in *Pavlovic v. Economical Mutual Insurance Co.*, a first-party property loss to the insured's residence. An underground domestic water line had fractured, leading, in sequence, to the escape of water, the percolation of water through the soil, collapse of the soil, the creation of voids, and subsidence of the home's foundations. Loss "caused by seepage or leakage of water below the surface of the ground" was excluded. Allowing the assured's appeal, the Court of Appeal held that none of these "causes" was particularly dominant; the better view was that the loss had been "caused by the whole chain of events, of which leakage of water underground was a contributing or indirect cause, and that the chain of events was set in motion by the rupture or failure of the water service line from an unknown cause". Finch J.A. then continued with the comments later quoted in *Derksen*:

> "Applied to the circumstances of this case, the meaning of exclusion (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:
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>> We do not insure for such loss regardless of the cause of the excluded event, other causes of the loss, or whether other causes acted concurrently or in any sequence with the excluded event to produce the loss . . . .

(BCCA), and *B.C. v Surrey School District No. 36*, 2005 BCCA 106; 252 DLR (4th) 430; 37 BCLR (4th) 36; 21 CCLI (4th) 157

[24] [1959] S.C.R. 539

[25] e.g. *Charterhouse Properties Ltd., v. Laurentian Pacific Ins. Co.* (1993), 75 B.C.L.R. (2d) 299 (C.A.); *Lizotte v. Traders General Ins. Co.* (1985), 1 W.W.R. 595, aff'd (1986), 3 W.W.R. 546 (B.C.C.A.); *Clark's Chick Hatchery Ltd. v Commonwealth Ins. Co.* (1982), 38 N.B.R. (2d) 189; and see the obiter comments in relation to the interpretation of exclusion clauses in *Saskatchewan Wheat Pool v Royal Ins. Co. of Canada* (1989), 64 DLR (4th) 135 per Gerwing J.A. at 143 - 145

> "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."[26]

Taken in concert with the *Derksen* and *C.C.R. Fishing* judgments' concerns with proximate causation, and with the purpose of exclusion clauses, this give rise to a number of questions. Presumably insurers will still be entitled to contract to exclude perils which are not proximate. But, how are we to treat exclusion clauses which do not explicitly refer to "causes" of a loss? Are there circumstances in which proximate cause might still be permitted, though not explicitly required? What are the implications of an insurer modifying some of its exclusions with "directly or indirectly" language, but not others? To a certain extent, the answers to such questions in individual cases will simply be matters of interpretation, utilizing principles such as the *noscitur a sociis* doctrine and other rules of construction. But overriding these questions is a more worrisome concern: just because it is *possible* for an insurer to choose more precise language, is an insurer *obliged* to do so?

When the Levee Broke

The phrase "directly or indirectly" in insurance policy exclusions has been described as being "intended to broaden the ambit of causation between the peril and the loss and avoid a rigid and narrow proximate cause analysis".[27] More complex forms of "anti-concurrent causation" clauses have been in wide use in the United States since the Ninth Circuit's decision in *Safeco Ins. Co. v Guyton*,[28] and are still evolving. The consequences of some of these different forms of anti-concurrent causation language were examined in the recent decision of the U.S. District Court, Eastern District of Louisiana, *In Re Katrina Canal Breaches Consolidated Litigation*,[29] a series of summary judgment applications brought by insurers on the pleadings.

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[26] (1994), 28 C.C.L.I. (2d) 314 at 320

[27] per Mackenzie J.A. in *Catalano v Canadian Northern Shield Ins. Co.*, 2000 BCCA 133; 74 B.C.L.R. (3d) 207, 18 C.C.L.I. (3d) 279 (*sub.nom. Catalano v Trail (City)*) at ¶16

[28] 692 F.2d 551 (9th Ct., 1982); see Paul O. Dudey, "History of the Concurrent Causation Theory" in *Adjusting Today*, Issue 21 (2002) http://www.adjustingtoday.com/ATpdf/AT02-2.pdf (September 20, 2006).

[29] Reasons for Judgment of Justice Stanwood J. Duval Jr. released November 27, 2006, http://www.laed.uscourts.gov/CanalCases/Orders/1803.pdf

As widely reported, canal levees throughout New Orleans were breached in the wake of Hurricane Katrina; the levees ought to have been able to withstand the water levels then present, and it is has been alleged that there were deficiencies in the construction or maintenance of the levees and pumping stations, that directly contributed to the breaches. The plaintiffs in these consolidated actions – all homeowners – suffered flood damage. "Flood" was excluded from coverage, but the defendant insurers had utilized different methods of specifying the scope of the flood exclusion. At issue was the sufficiency of these methods, given the allegation that the flood had not entirely been a natural occurrence, but had transpired because of negligence.

One insurer, Hartford Ins. Co. of the Midwest, had added to their standard policies a form entitled "Amendatory Endorsement Specifically Excepted Perils", which provided as follows:

> As used herein, Peril means a cause of physical loss or damage to property. It has this meaning whether or not it is called a Peril or a Cause of Loss in this policy.
>
> "Flood" was then defined as,
>
> a. Flood, surface water, waves, tides, tidal water, tidal waves, high water, and overflow of any body of water, or their spray, all whether driven by wind or not;
>
> b. Release of water held by a dam, levy or dike or by a water or flood control device.

The policies issued by State Farm Fire and Casualty Co. incorporated what the court referred to as a "Lead-In" Provision:

> We do not insure under any coverage for loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these.

Both of these insurers succeeded in their summary judgment applications. In particular, it was said that the Hartford policy's Lead-In provision "leaves nothing to the imagination".[30] But the three other insurers with motions before the court had all used a less comprehensive, standard I.S.O. wording:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence of the loss.
>
> . . .
>
> (c) Water Damage, meaning
>
> Flood, surface water, waves, tidal water, overflow of a body of water, or spray form any of these, whether or not driven by wind

As this policy language incorporated neither a Lead-In provision, nor a definition which explicitly encompassed release of water from a dam or levee, the court focused its attention on interpreting the word "flood". Evidence that the catastrophic damage in New Orleans was widely described in news sources as a "flood" – i.e. the plain and natural meaning of the word – was disregarded.[31] In an amusing and pointed web log posting critiquing the decision, Portland, Oregon coverage attorney David Rossmiller writes,

> "Let me start out this post with this scenario. Suppose all the dams on the Columbia River above Portland failed -- let's just say there was some big surge of water in the Columbia, maybe because a cliff sheared off in an earthquake and fell into the river. Let's also say the dams had structural flaws that made them unable to withstand increased water pressure, and they crumbled like graham crackers before the water surge could go over the top. Suppose the dams failed, one after the other: John Day, the Dalles, Bonneville, and a big wall of water came rushing down the Columbia Gorge, and when it hit Portland and Vancouver, Washington, it scoured the river valley of homes and people for a mile on either side of the river channel. Here's the

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[30] *ibid*, p.53

[31] *ibid*, p.39

> question: what word do you use to describe what just happened? Here's something to consider in your answer: ever hear of the Johnstown Flood?"[32]

But in the eyes of the court, the different meanings that could be attached to the word "flood" made the term ambiguous *per se*; therefore the *contra proferentem* rule would prevail. The court made reference to the number of jurisdictions in which "flood" had been defined as relating solely to natural events, and applied the test as stated in a West Virginia judgment:

> "As noted in *Murray v State Farm Fire & Cas. Co.*, 509 SE2d 1 (W. Va.1998):
>
> > A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that "one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance" C. Marvel, *Division of Opinion among Judges on Same Court or among other Courts or Jurisdictions Considering same question, as Evidence That Particular Clause of Insurance Policy is Ambiguous*, 4 ALR4th 1253 § 2[a] (1981)."[33]

It could be argued that this approach is manifestly unfair to insurance companies. Judges are fallible; some decisions will wrongly made. But prudent insurers may amend their wordings in response to bad judgments. If those amended wordings are then taken to be the standard against which other policies are judged, then the wrong decision will be legitimized. This seems to be a legal version of what economists refer to as Gresham's Law – "bad money drives out good".

English courts have signaled some reluctance to test policy language on the basis of whether more precise wording could possibly have been used. In *GE Frankona Reins. Ltd v CMM Trust No.1400 The "Newfoundland Explorer"*, the assured challenged the insurer's position that the stipulation "warranted fully crewed at all times" necessarily meant "crewed 24 hours a day". The insurer prevailed:

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[32] http://www.insurancecoverageblog.com/archives/cat-first-party-insurance.html (February 14, 2007). The "Johnstown Flood" link is to http://www.johnstownpa.com/History/hist19.html

[33] *supra.,* note 29 at p. 29. *Murray* is one of the few U.S. decisions in which all anti-concurrent causation clauses have been held to be contrary to public policy.

"Insofar as Mr. Eder's submission involved the proposition that different wording could and should have been used if the Claimant required a crew member to be on board 24 hours a day, I am unable to accept it. As expressed in *Clarke, The Law of Insurance Contracts*, at para. 15-5C, this is tantamount to the "construction of hindsight". See too, the observations of Mance LJ (as he then was) in *Dodson v Dodson Insurance* [2001] 1 Lloyd's Rep 520, at 531 (cited in *Clarke*, *ibid*), where he said:

> It is almost always possible to say after the event that the point could have been put beyond doubt, either way, by express words."[34]

Meanings within Meanings

One of the lessons of the *Katrina Canals* litigation for Canadian insurers is that use of anti-concurrent causation clauses that are less than watertight (excuse the pun) may attract close scrutiny of the excluded terms. Difficulties arise when those excluded terms are broad enough to encompass losses of different types. *Katrina Canals* is an example: the word "flood" could have meant "natural flood", "man-made flood", or flood from any cause. Use of a word which is inherently broad may serve as an invitation to find ambiguity.

But are such broad words truly ambiguous? Professor Clarke writes,

"It is commonplace that ambiguity in the policy gives the court license to decide what the words mean or should mean and thus, usually, to put on them a construction that favours the insured. But, what is ambiguity? First, students of language distinguish ambiguity from vagueness:

> According to this distinction, a word is vague to the extent that it defines 'not a neatly bounded class but a distribution about a central norm'. Thus the word *green* is vague as it shades into yellow at the one extreme and into blue at the other, so that its applicability in marginal situations is uncertain. Ambiguity is an entirely distinct

[34] [2006] EWHC 429 (Admlty), per Gross J. at para. 24

> concept. a word may have two entirely different connotations, so that it may be at the same time both appropriate an inappropriate. thus the word *light* is ambiguous when considered in the context of dark feathers.
>
> "The appropriate connotation, however, depends not only on the word or phrase but on the reader; what is clear to one man may be unclear to another. A document is not ambiguous because a variety of definitions can be found in the dictionary: the intended meaning may be clear from context . . .".[35]

The distinction between a natural and an artificial peril – be it flood, subsidence, changes in temperature, or any other excluded cause of loss – does not seem to meet the test of "entirely different connotations". Man-made and natural floods are examples of different types of "flood", not different definitions of the word.

It is sometimes said that coverage clauses should be read broadly, exclusions narrowly. In a recent Saskatchewan case, *Tux and Tails Ltd. v S.G.I. Canada*,[36] that "general principle"[37] of interpreting insurance policies was applied, leading to the result that an exclusion for "contamination" would not defeat a claim arising out of accidental contamination; rather, the court held,

> The undefined word "contaminated" in clause 6(e) should be narrowly construed against SGI as meaning the inherent contamination of the insured goods, such as by rust, rot, etc.

However, the Supreme Court of Canada recently clarified that the broadly/narrowly interpretive rule is not to be applied in the first instance, but only when there is an ambiguity in the wording:

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[35] Malcolm A. Clarke, *The Law of Insurance Contracts (4th ed.)*, (London, 2002), p.435, quoting from E. Allan Farnsworth, *Farnsworth on Contracts* (Boston, 1990), section 7.8; Farnsworth quotes from W. Quine, *Word and Object* (1960) p. 85. As Clarke notes, Farnsworth "recognises (section 7.12a) that courts sometimes use "ambiguity" to cover both ideas".

[36] [2003] S.J. No. 438; 2003 SKQB 287

[37] As it was described by the Supreme Court of Canada in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 at 268-69

"Insurance policies form a special category of contracts. As with all contracts, the terms of the policy must be examined, in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding. Nevertheless, through its long history, insurance law has given rise to a number of principles specific to the interpretation of insurance policies. These principles were recently reviewed by this Court in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, 2000 SCC 24. **They apply only where there is an ambiguity in the terms of the policy.**

"First, the courts should be aware of the unequal bargaining power at work in the negotiation of an insurance contract and interpret it accordingly. This is done in two ways: (1) through the application of the *contra proferentem* rule; (2) through the broad interpretation of coverage provisions and the narrow interpretation of exclusions. These rules require that ambiguities be construed against the drafter. In most policies, the drafter is the insurer and the insured is essentially required to adhere to the terms set out by the insurer. Of course, in a case like this one, where it appears that the policy was negotiated (and drafted, in part) by an insurance broker who selected from standard clauses, the identity of the drafter is less obvious. In *Reid Crowther*, McLachlin J. interpreted ambiguities against the insurer even though the custom policy was arranged through a broker. This may be, in part, a recognition by this Court that even where an insurance broker is involved, an imbalance in negotiating power may remain a characteristic of the relationship between insurer and insured. In this case, the trial judge found, as a matter of fact, that the double endorsement requirement imposed by the insurer gave it the "upper hand" in the negotiations (para. 18). **In any event, as I will find that there is no ambiguity in the Policy, it will be unnecessary to resort to these principles**" [emph. added].[38]

Therefore, it would seem that the fact that a term of a policy may be construed in a narrow sense, does not in itself make that term ambiguous. The requirement that exclusions be read narrowly only comes into play if the policy wording is otherwise ambiguous.

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[38] *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 per LeBel J. at paras. 27-28

Generally, Canadian cases have trended towards giving a broad reading to exclusion clauses in insurance policies, where this would not entail a conflict with other interpretive rules (e.g. plain meaning, consistency with other terms in the policy, etc.). Some examples:

- The English decision *Jackson v. Mumford* [39] was thought for many years to stand for the proposition that coverage for "latent defect" under an Inchmaree Clause could not include a defect arising out of an error in design. This narrow interpretation began to be undermined with a 1979 decision from England, *Prudent Tankers Ltd. v. Dominion Ins. Co. (The "Caribbean Sea")*. The trial judge, Goff J. (now Lord Goff of Chiveley) distinguished *Jackson v. Mumford* as simply standing for the proposition that the inadequacy of a particular part of machinery, for a particular purpose, may properly be viewed as constituting a shortcoming of, rather than a defect in, the machinery. He further expressed doubt as to the relevance, to the question of coverage, of the historical reason for the presence of a latent defect:

  > "If the hull or machinery is in such a state that there can properly be said to be a defect in it, and such a defect is the proximate cause of the casualty, it would seem to matter not that it had come into existence by virtue of (for example) poor design, or poor construction, or poor repair, unless a casualty so caused is excluded from the cover . . .".[40]

  This broad reading of "latent defect" therefore enabled the assured to secure coverage. However, Wilson J. of the Alberta Court of Queen's Bench, in a judgment upheld on appeal, applied Goff J.'s reasoning to a latent defect exclusion, in *Triple Five Corp. v Simcoe and Erie Group*.[41]

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[39] (1902), 19 T.L.R. 18 (K.B.)

[40] [1980] 1 Ll. L. Rep. 338

[41] [1994] A.J. No. 760; 159 A.R. 1; 29 C.C.L.I. (2d) 219, at paras 213 - 215; affirmed, [1997] A.J. No. 248 (1997); 145 D.L.R. (4th) 236; [1997] 5 W.W.R. 1; 42 C.C.L.I. (2d) 132; [1997] I.L.R. I- 3457, at para. 37; leave to appeal refused, [1997] S.C.C.A. No. 263

- ➢ A series of cases from the Western provinces – *Kravetsky v. Dominion of Canada General Insurance Co.*,[42] *Shepherd v. Wawanesa Mutual Insurance Co.*,[43] *Leahy v. Canadian Northern Shield Insurance Co.*,[44] and *The Owners, Strata Plan NW2580 v Canadian Northern Shield Ins. Co.*[45] – have given broad readings to "settlement".exclusions; even settlement contributed to by unnatural causes may be excluded, regardless of whether the policy language addresses settlement as a cause or as a type of damage.[46]

- ➢ "Change in temperature" is another peril which may commonly result from negligence or other perils. In *Ford Motor*,[47] the Supreme Court of Canada ruled that the exclusion would apply to freezing within a factory after the workers had gone on strike. In light of *Derksen*'s interpretation of *Ford Motor*, that result should probably be seen as dependent on the structure of that particular insurance policy. However, in *Fresh Taste Produce Ltd. v Sovereign Gen'l Ins. Co.* the Ontario Court of Appeal held that the exclusion, as contained in a standard all risks wording, would apply to a situation in which the power supply to refrigeration equipment had been interrupted by a blackout. The meaning of the exclusion was plain:

> ". . . the language of the clause excluding changes in temperature, other than from the perils named, is clear and unambiguous. The clause is not concerned with how the change in temperature is caused nor does it distinguish between losses due to natural and unnatural causes . . .".[48]

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42 (1995), 25 C.C.L.I. (2d) 238; 96 Man. R. (2d) 224 (Q.B.); aff'd (1995), 25 C.C.L.I. (2d) 238, 100 Man. R. (2d) 46 (C.A.)

43 (1998), 9 C.C.L.I. (3d) 293, 1998 ABQB 1040; rev'd on other grounds (2000), 23 C.C.L.I. (3d) 107, 2000 ABCA 287; leave to appeal refused, [2001] S.C.R. xix

44 (2000), 77 B.C.L.R. (3d) 44, 20 C.C.L.I. (3d) 1, 2000 BCCA 408

45 2006 BCSC 330, 55 B.C.L.R. (4th) 176, 36 C.C.L.I. (4th) 109

46 *ibid*, at para 47

47 *supra*, note 24

48 (2005), 27 C.C.L.I. (4th) 7, [2005] I.L.R. I- 4451

In general, these cases can be seen as consistent with the approach which the Supreme Court of Canada has historically taken to exclusion clauses. For instance, in *Scott v Wawanesa Mutual Ins. Co.* the Court had to consider whether an exclusion for

> "loss or damage caused by a criminal or wilful act or omission of the Insured or of any person whose property is insured hereunder",

would deprive innocent insureds of coverage. The minority would have ruled in favour of the insureds:

> "Strong conflicting lines of authority clearly attest to the fact that the interpretation of the exclusionary clause is far from clear and unambiguous.
>
> . . .
>
> "A more realistic interpretation of the indemnification obligation is that where the definition of "Insured" is defined so as to extend to others than the named insured, that definition should not be construed so as to restrict or limit the coverage enjoyed by the named insured . . .
>
> "Clearly, an insurer might choose to contract on the basis that it considered its indemnification obligation joint with regard to both the named insured and other insured. But in offering to contract on such terms, it would be incumbent on an insurer to manifest this intention in the very clearest of language.
>
> . . .
>
> " . . . where, as is the case here, the ambiguity bears on a clause that stands significantly to defeat the objective of the purchaser in buying insurance, the case for application of the doctrine is compelling. A clause intended to achieve the purpose argued for by the insurer would, in my view, have to be drawn so as to bring it clearly to the attention of the insured. [49]

The majority, however, was untroubled by the assertion that the clause could have been drafted more clearly:

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[49] [1989] 1 S.C.R. 1445 [1989] S.C.J. No. 55, per La Forest J. at paras. 7, 17-18, 22

> “In my view, the terms of the insurance policy are perfectly clear and unambiguous. The policy does not cover the type of risk which occasioned this loss. Such risk was specifically excluded. The wording of the exclusion clause for the purposes of the present case is unambiguous, as is the definition of ‘Insured’.
>
> . . .
>
> “Were I convinced that a different interpretation would advance the true intent of the parties, I would gladly subscribe to it. However, when the wording of a contract is unambiguous, as in my view it is in this case, courts should not give it a meaning different from that which is expressed by its clear terms, unless the contract is unreasonable or has an effect contrary to the intention of the parties. In the present case, the policy of insurance excludes liability of the insurer for damage caused by the criminal or wilful acts of the insured. The definition of ‘Insured’ clearly includes the minor children living in the home. It may well be that insurance companies do not wish to pay for the delinquency of teenagers within the home. I do not see how they could word their policy to exclude such a risk other than by the precise terms used in this policy.”[50]

Does *Derksen* signal a change in approach to these problems? One of the principle issues in that case was the interpretation of a CGL’s motor vehicle exclusion:

> This insurance does not apply to:
>
>> “bodily injury” or “property damage” arising out of the ownership, use or operation by or on behalf of any Insured of. . . [a]ny “automobile” . . .”.

Although the accident unquestionably arose out of the operation of a motor vehicle, the Court, citing *Pavlovic*, held that the exclusion would have to be more specifically worded to defeat a claim which also arose out of a concurrent, covered peril:

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[50] *ibid*, per L’Heureux-Dube J. at paras. 44, 51

> "[I]nsurers 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 . . .
>
> ". . .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."[51]

The Court felt that its conclusion was justified in the context of the risks insured under commercial general liability cover:

> "The appellants argued that such an interpretation would require General Accident to cover a risk for which it did not collect a premium. That is not so. General Accident agreed to cover liability which arose from non-auto-related causes and accepted a premium for assuming this risk. The motions judge found, and I agree, that the negligent clean up of the work site was a non-auto-related cause of the injury. Absent express language to the contrary, the CGL policy should cover this risk, notwithstanding that a contributing cause (i.e. auto-related) was excluded from coverage. General Accident is being held liable only for that portion of the loss attributable to the insured risk – the insurer is not being held to provide coverage for a risk which it did not contemplate or for which no premium was received. To the contrary, if the insurer was not held liable on the wording of this clause, it would have collected a premium for a risk which it did not cover.
>
> "It is a principle of construction that where there are ambiguities, the reasonable expectations of the parties be given effect. This principle favours interpreting the term "arising out of the ownership, use or operation...of...any automobile" in the

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[51] *supra*, note 2, per Major J. at paras. 47, 48

context of the CGL policy as applying only to that portion of the loss attributable to auto-related causes . . .”.[52]

This reference to the premium of course echoes the majority judgment of Estey J. in *Consolidated Bathurst Export Ltd. v Mutual Boiler and Machinery Ins. Co.*:

> The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. If a court were to accept the submissions of the respondent, that loss suffered by the insured by reason of the failure of a machine due to wear and tear and the consequential downtime of the plant was excluded by the definition of accident, then the insured would have purchased, by its premiums, no coverage for what may well be the most likely source of loss, or certainly a risk pervasive through much of the plant. Similarly, to interpret corrosion as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract. It may well be argued by insurers that the premium will reflect such a narrowed coverage. There is no evidence that such is the case here.[53]

The *Derksen* court’s assertion that insurers are collecting premiums for assuming the risk of losses caused concurrently by excluded and covered perils, could be seen as a conclusion masquerading as argument. The scope of the risk assumed by an insurer can only be judged with reference to all of the policy’s terms.[54] If in fact liability insurers have set their premiums in the expectation that they will be liable for any loss otherwise covered under the policy’s terms which is also contributed to by the use of a motor vehicle, then they ought to be obliged to assume that risk. But that logical proposition does not assist in determining the intent behind the wording.

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[52] *ibid*, paras. 56 - 57

[53] [1980] 1 SCR 888 at 903

[54] see the dissenting judgment of Binnie J. in *Somersall v Friedman* 2002 SCC 59 at para. 117, in the context of subrogation clauses

Estey J.'s judgment in *Consolidated Bathurst* left open the door to insurers introducing evidence as to the intended scope of a policy's coverage grant and exclusions. In what circumstances will this be necessary? Will the introduction of new forms of anti-concurrent causation wordings, and conflict judgments as to their effectiveness, create the prospect of such wordings being viewed as potentially ambiguous, therefore necessitating an explanation by underwriters as to what they *meant* to say? Unfortunately (but not surprisingly) there was no such evidence tendered in *Derksen.* Nevertheless, the Court's proposition regarding the scope of the motor vehicle exclusion might now be testable, in hindsight, with reference to the present-day insurance market. In reaction to *Derksen*, the Insurance Bureau of Canada incorporated the "directly or indirectly" phrase into the new motor vehicle exclusion wording, in the 2005 edition of its Form 2100 CGL. Is it the case that insurers who have adopted this revised wording, decreased their premiums? Perhaps the older exclusion wording *could* have been more clear. But the Court's reasoning was arguably not strengthened by unfounded assumptions about how insurers go about the business of setting premiums.

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