

Proximate Cause in Insurance Law  
– Before and After *Derksen*

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### 1. Introduction

Causation is a fundamental component of insurance, and insurance law. Assureds desire indemnity against the risk of certain types of losses; underwriters issue policies which provide such indemnity in the event of certain perils, often with other perils being specifically excluded. Any coverage provided by the policy is contingent upon there being a causal connection between the loss, and a covered peril.

In insurance law, as in tort law, it is recognized that loss or damage may be the product of multiple causes. A particular action or state of affairs may serially or sequentially give rise to other factors, which may ultimately produce a loss; also, independent factors, neither of which is sufficient in itself to cause a loss, may do so when combined.

In either case, the common law distinguishes those causes which are legally significant from those which are not, the former loosely being grouped under the rubric of “proximate cause”.<sup>1</sup> This traditional notion of proximate cause was recently expounded by Hall J.A. of the B.C. Court of Appeal in *Liesch v The Standard Life Assur. Co.*:

“Causality is an often interesting philosophical and legal question. The law takes a practical approach, treating causality as a practical factual matter. Courts ask the question, what is the efficient or proximate cause of an occurrence? We would not think it productive to proceed too far back in time. Philosophically, the cause of an event in a person's life could be taken as far back as their birth or career choice but such an inquiry would range beyond the helpful or appropriate in a legal context. A motor vehicle accident at an intersection could occur consequent upon someone leaving home to drive to an appointment

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<sup>1</sup> In tort law, “[t]he concept of proximate cause narrows the class of all tortious causal factors to the legally responsible tortious factors”: Richard Fumerton and Ken Kress, “Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency”, 64 *Law & Contemp. Probs.* 83 (Autumn 2001) at 86.

but the proximate cause would be failing to properly observe a traffic signal. Only the latter has legal relevance”.<sup>2</sup>

In its 1990 decision in *C.C.R. Fishing Ltd. v British Reserve Insurance Co. Ltd.*,<sup>3</sup> and again in its 2001 decision in *Derksen v 539938 Ontario Ltd. et al.*,<sup>4</sup> the Supreme Court of Canada appears to have significantly restricted the concept of proximate cause in the context of insurance law, perhaps to the point of having intended to extinguish it altogether. *C.C.R. Fishing* concerned a marine insurance policy, and there were aspects of the judgment of McLachlin J. (as she then was) that indicated that the Court’s analysis might be restricted to such policies. However, *C.C.R. Fishing* was subsequently applied in *Derksen*, a decision which dealt with a more common form of Commercial General Liability policy. Therefore, in as much as *C.C.R. Fishing* may have laid down a rule for the interpretation of insurance policies, it is clear that the rule was intended by the Court to be one of general effect. Now that the scope of *Derksen* is being considered by trial and appellate courts, this would appear to be an appropriate time to consider its potential impact, and in particular whether a broad reading of *Derksen* and *C.C.R. Fishing* will in the long run be sustainable.

## 2. The Traditional Rule

The seminal case on proximate cause in the context of insurance is, of course, *Leyland Shipping Co., Ltd. v Norwich Union Fire Ins. Society, Ltd.*,<sup>5</sup> in which an insured cargo ship, holed by a torpedo and having been anchored in an outer harbour while awaiting repair, eventually became a total loss due to the strain of the wind and seas, and of repeated grounding at low tides. The latter were said to be incidents of insured perils of the sea; however, “all consequence of hostilities or warlike operations” were excluded from cover. By s. 55 of the *Marine Insurance Act*, 1906, the insurer would become liable,

“ . . . for any loss proximately caused by a peril insured against, but . . . not liable for any loss which is not proximately caused by a peril insured against.”

All of the law Lords agreed with both the trial judge and the Court of Appeal, that the proximate cause of this loss was the torpedoing. Lord Finlay L.C. viewed the strain on the vessel while at anchor not as being a new peril, but rather the natural consequence of the explosion; Lord Dunedin agreed; for him, the matter

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<sup>2</sup> 2005 BCCA 195; 39 B.C.L.R. (4<sup>th</sup>) 313 at 324

<sup>3</sup> [1990] 1 S.C.R. 814; [1990] S.C.J. No. 34

<sup>4</sup> 2001 SCC 72; [2001] 3 S.C.R. 398

<sup>5</sup> [1918-19] ALL E.R. Rep. 443; [1918] A.C. 350 (H.L.)

was one of “a pure question of fact, to be determined by common-sense principles”.<sup>6</sup> Similarly, Viscount Haldane held that the attempts to obviate the original damage by bringing the ship into the anchorage did not break the relationship between the initial cause and the ultimate loss. Lord Atkinson cautioned against the temptation “to split up complex causes into their components and establish a sequence between them”.<sup>7</sup> It was Lord Shaw who gave the most thoughtful consideration to the meaning of “proximate”:<sup>8</sup>

“In my opinion, too much is made of refinements upon this subject. The doctrine of cause has been since the time of Aristotle, and the famous category of material, formal, efficient and final causes, one involving the subtlest of distinctions. The doctrine applied in these to existences rather than to occurrences. But the idea of the cause of an occurrence or the production of an event or the bringing about of a result is an idea perfectly familiar to the mind and to the law, and it is in connection with that that the notion of *proxima causa* is introduced. Of this, I will venture to remark that one must be careful not to lay the accent upon the word ‘proximate’ in such a sense as to lose sight of or destroy altogether the idea of cause itself. The true and overruling principle is to look at a contract as a whole, and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all. To treat *proxima causa* as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

“. . . The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up, which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed. . . . In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one

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<sup>6</sup> *ibid*, at p.449

<sup>7</sup> *ibid*, at p. 451

<sup>8</sup> *ibid.*, at pp. 453 - 454

has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency. Fortunately, this much would appear to be in accordance with the principles of a plain business transaction and it is not at all foreign to the law.”

Two aspects of their Lordships’ reasons are particularly noteworthy. First, they did not conceive of proximate cause as a technical legal doctrine, but as a matter of common-sense analysis of the facts. Second, though they were dealing with the interpretation of a section of the *Marine Insurance Act*, Lord Shaw in particular plainly did not consider his analysis to be limited to marine insurance policies.

*Leyland Shipping’s* approach to the problem of proximate cause was endorsed in the several concurring judgments of Supreme Court of Canada in a non-marine property insurance case, *Sherwin-Williams Co. of Canada v Boiler Insp. and Ins. Co. of Canada*,<sup>9</sup> in which the policy insured against damage by accident, including explosion, but excluded losses from and accidents caused by fire. Notwithstanding the fact that the explosion may have been initiated by a spark or flame – arguably a “fire” within the meaning of the exclusion – the damage was held to be covered, explosion being the proximate cause. In the words of Estey J.,<sup>10</sup>

“Seldom, if ever, does an explosion, fire or accident result from one cause. The law, from all the causes leading up to a result, selects that which is direct or proximate and regards all the others as remote. The direct or proximate cause may not be the last, or, indeed, that in any specified place in the list of causes but is the one which has been variously described as the ‘effective’, the ‘dominant’ or ‘the cause without which’ the loss or damage would not have been suffered.”

Locke J., in his judgment, carefully reviewed the expert evidence, and noted that the ignition of the explosive vapours had been preceded by the rupture of a manhole door – another possible link in the chain of causation, which was covered. The ignition may itself have been a “causa sine qua non”, as was the grounding of the ship in *Leyland Shipping*, but that did not convert it into a proximate cause:

“I agree that loss of which fire is the direct or proximate cause is excluded, but in my view the loss was not so caused.

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<sup>9</sup> [1950] S.C.R. 187, aff’d, [1951] A.C. 319 (H.L.)

<sup>10</sup> *ibid.*, at p. 202, *per* Estey J.

“ . . . I agree with the learned trial judge that there was no break in the chain of causation which led through a succession of causes directly from the peril insured against to the loss.”<sup>11</sup>

### 3. Proximate Cause in the U.K. and the U.S.A.

In the U.K., this vigorous notion of proximate cause has prevailed. The leading case at present is the 1974 decision of the Court of Appeal, *Wayne Tank and Pump Co. Ltd v The Employers' Liability Assur. Co. Ltd*.<sup>12</sup> The assured's liability policy provided indemnity against property damage claims resulting from scheduled types of accident, but excluded

“ . . . liability consequent upon . . . damage caused by the nature or condition of any goods or the containers thereof sold or supplied by or on behalf of the Insured . . . ”.

Goods sold by the assured – plastic pipe – were not suitable for their customer's purpose and were a fire hazard at the operating temperatures to which they would be exposed. An employee of the assured switched on heating tape intended to warm the pipes' contents, prior to testing, and negligently left the circuit on, and the pipes unattended, through the evening. Fire ensued. Denning M.R. and Roskill L.J. held that the effective or dominant cause of the loss was not the workman's negligence, but the defective nature of the product, and that the loss was therefore within the exclusion clause. Cairns L.J. (with whom both other justices agreed in the alternative), held that both causes could be viewed as dominant,<sup>13</sup> in which case the exclusion would, as a matter of logic, trump the covered peril:

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<sup>11</sup> per Locke J. at 209

<sup>12</sup> [1974] QB 57, [1973] 3 All ER 825, [1973] 3 WLR 483, [1973] 2 Lloyd's Rep 237

<sup>13</sup> Brown's *Insurance Law in Canada*, (Toronto, Carswell: Looseleaf Ed., 2005) p.8-18, notes that “[i]t has been stated that, at least in English law, there can only be one proximate cause for any given loss”: citing Colinvaux's *The Law of Insurance*, (4<sup>th</sup> ed., 1979) p. 79, which in turn cites the judgment of Lord Dunedin in *Leyland Shipping*. A close reading of the latter, however, may not support that statement, and the point has not been carried over into the current edition of *Colinvaux and Merkin's Insurance Contract Law* (London, Sweet & Maxwell: Looseleaf Ed., 2005). Lord Shaw's judgment in *Leyland Shipping* referred only to a case where one proximate cause “has to be selected” (*supra*, note 6) out of many; nothing in his judgment, at any rate, precluded a finding of multiple, equally proximate causes.

“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 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.”<sup>14</sup>

In contrast, no consistent rule for the application of proximate cause analysis has yet emerged in the United States. In many cases, what is referred to as the “efficient proximate cause” rule is applied; if that cause is one which is excluded, the exclusion will be given full effect. In other cases, the exclusion will be overcome if an equally relevant cause is found to have contributed (the “concurrent causation” rule).<sup>15</sup> Which interpretive rule applies may depend on whether the policy in issue is one of first-party or third-party coverage; there is a tendency to enforce the efficient proximate cause rule in property insurance disputes.<sup>16</sup> Some U.S. case law also turns on whether the causes are serial, rather than concurrent.<sup>17</sup> Indeed, the exceptions and distinctions drawn in these cases are so numerous that one could be forgiven for viewing the decisions as being essentially ad hoc.

#### 4. The *Ford Motor* Detour

Prior to *C.C.R.*, the Canadian case law exhibited less complexity than seen in the U.S., and even less subtlety than evidenced in *Wayne Tank*, largely because of the next major Supreme Court of Canada decision on insurance law to follow *Sherwin-Williams: Ford Motor Co. of Canada v Prudential Assur. Co.*<sup>18</sup> *Ford Motor* involved an atypical policy wording. A plant was shut down due to a wildcat strike in December 1951. The power house employees were intimidated by the strikers into cutting off the electrical power and heat. Powered ventilation louvers were left open for the duration of the 13-day shutdown. Equipment rusted due

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<sup>14</sup> *Supra.*, footnote 12, per Cairns L.J. at Q.B. 69

<sup>15</sup> e.g. *Wallach v Rosenberg* 527 So.2d 1386 (Fl.Dist.Ct.App. 3<sup>rd</sup> Dist., 1988)

<sup>16</sup> See Robert P. Dahlquist, “Perspectives on Subsidence Exclusions and the Role of Concurrent Causation”, *Tort & Insurance Law Journal*, Vol. 37 No. 3 (Spring 2002), p. 949, n66

<sup>17</sup> See the discussion of efficient proximate cause in *Chadwick v Fire Ins. Exch.*, 17 Cal. App. 4th 1112; 21 Cal.Rptr. 2d 871 (1993, Cal.Ct.App. 1stApp.Dist.). The complex history of proximate cause in California jurisprudence is nicely summarized in Scott Johnson, “The Efficient Proximate Cause Doctrine in California: Ten Years After *Garvey*”, 2 J.Ins.Coverage 1 (Autumn 1999)

<sup>18</sup> [1959] S.C.R. 539

to condensation, pipes broke, and the metal in heat treating furnaces solidified. The policies in issue offered coverage against “Riot”, and the definition of “Riot” was amended by way of an endorsement:

“6. Riot: The term ‘Riot’ shall in addition to Riot include open assemblies of strikers (inside or outside the premises) who have quitted work and of locked-out employees.

There shall in no event be any liability hereunder in respect to

(a) Loss or damage (other than ‘Fire’) occasioned by felonious acts where the objective is theft, burglary or robbery, and ‘Riot’ is only incidental thereto;

(b) Loss or damage occasioned by acts of employees who are working or ostensible working;

(c) Loss due to physical damage to the property insured caused by cessation of work or by interruption of process or business operations or by change in temperature, whether the liability in respect thereto is specifically assumed now or hereafter in relation to any other peril or not.”

Both the trial judge, who had found in the assured’s favour, and the Ontario Court of Appeal, which reversed, had agreed that the “riot” was a proximate cause of the loss; the Court of Appeal went further, and held that the interruption in the plant’s processes, and the cold temperatures in the building, were concurrent proximate causes. The Supreme Court of Canada dispensed with proximate cause analysis altogether. Drawing on a line of cases involving fire insurance policies that excluded explosion,<sup>19</sup> and boiler and machinery insurance that excluded fire,<sup>20</sup> the Court unanimously held that the structure of the policy’s exclusions led inevitably to the loss being excluded, whatever label might be applied to the various causes:

“In cases such as this the problem is not solved by a mere determination that riot was the proximate cause of the loss. Causation is not being considered in the abstract but in relation to a claim for indemnity under an insurance policy which contains an exclusion. Liability for causation by riot is limited by the exceptions stated in cl. 6(c). It seems to me clear, as it did to the Court of Appeal, that the parties had in contemplation that a riot might cause not only direct physical damage to the property but might also bring into being cessation of work,

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<sup>19</sup> *Stanley v. The Western Ins. Co.* (1868), L.R. 3 Exch. 71, 37 L.J. Ex. 73; *Re Hooley Hill Rubber & Chemical Co. Ltd. v. Royal Ins. Co.* [1920] 1 K.B. 257; *Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Ins. Co. Ltd.* [1921] 1 A.C. 303; *Sin Mac Lines Ltd. et al. v. Hartford Fire Ins. Co. et al.* [1936] S.C.R. 598, 3 D.L.R. 412..

<sup>20</sup> *Sherwin-Williams, supra, note 7*

interruption to process or business operations, and change in temperature and that for losses assignable to these causes or exceptions there was to be no liability. The peril insured against was riot "as hereinafter defined or limited" subject to the exception that there should in no event be any liability for losses as caused in clause 6(c). These causes were unquestionably operating concurrently with the continuing riot. It is true also that they resulted solely from the riot except 'change in temperature', which was a combination of the lack of internal heat, the open windows and an external factor, change in atmospheric temperature. But they are none the less limitations on liability.

“ . . . The principle to be deduced is no more than this – that liability for the consequences of what the Court holds to be the proximate cause of the loss may be negated by a properly framed clause of exclusion and it seems to me that if it is found, as a matter of construction, that the causes specified in the clause of exclusion apply, then it is of no significance whether these are referred to as proximate causes or simply causes.”<sup>21</sup>

This decision was clearly a function of the specific structure of the insurance policy. The coverage for the specific insured peril – Riot – that had initiated the chain of events leading to the loss was clearly made subordinate to the excluded perils. To hold that the exclusions were rendered non-operative because the covered peril had occurred, would have rendered the exclusions a nullity.

It did not necessarily follow that the same analysis would apply to policies which provide broad coverage for fortuitous losses generally – for example, all risk wordings. In such policies, one possible reading of the “perils excluded” is that they are to be taken merely as restrictions on the scope of the coverage grant, as opposed to carving out exceptions in the case of a loss otherwise covered. The distinction is important, because the former interpretation avoids the “nullity” argument: if the exclusions merely assist in defining what is meant by a fortuitous loss, they will always have some “effect”, but need not apply to a loss in which the proximate cause is *another* fortuitous event.

Nevertheless, over the following 40 years, Canadian courts tended to give *Ford Motor* a much broader reading. No matter whether the policy in question offered coverage for specified perils subordinate to specific exclusions, or broad coverage for fortuitous losses generally, and no matter whether a covered peril or an excluded peril was judged to be the proximate cause, the dominant view was that exclusions would prevail.<sup>22</sup>

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<sup>21</sup> *supra*, note 16 at 545

<sup>22</sup> 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*

In effect, the courts set a low bar for determining whether what was before them was a “properly framed clause of exclusion”.

### 5. Proximate Cause Avoided: *C.C.R. Fishing*

We then come to *C.C.R. Fishing*.<sup>23</sup> The insured vessel had sunk as a result of two factors: the negligence of the crew in leaving a valve open; and, the failure of some through-hull fittings that had been negligently installed two years earlier, which failure allowed water to enter the vessel. Schedule “A” to the *Insurance (Marine) Act*<sup>24</sup> provided that the policy’s coverage for “perils of the sea” would encompass “only fortuitous accidents or casualties”. In addition, s. 56 of the *Act* obliged the court to undertake a proximate cause analysis:

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 which 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

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*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 (4<sup>th</sup>) 135 per Gerwing J.A. at 143 - 145

<sup>23</sup> *supra*, note 3

<sup>24</sup> R.S.B.C. 1979 c.203

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.

The insurer denied coverage on the grounds that the failure of the fittings was the proximate cause of the loss, and constituted excluded ordinary wear and tear, or – in a position advanced for the first time before the Supreme Court of Canada – inherent vice. The assured maintained that both causes were “fortuitous”; the failure of the fittings being due to negligence in the selection of appropriate materials, and the failure to close the valve being negligence on the part of the ship’s crew. The Supreme Court of Canada held in the assured’s favour, restoring the trial judgment. The failure of the cap screws did not constitute either of the exclusions relied upon by the Insurer. The loss was clearly fortuitous, and of the type intended to fall within coverage:

“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.”<sup>25</sup>

But the Court did not stop there. McLachlin J., in a unanimous judgment, went on to make very significant statements regarding the utility of “proximate cause” analysis:

“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 . . .  
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“ . . . 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

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<sup>25</sup> *supra*, note 3 per McLachlin J. at 822-823

<sup>26</sup> *ibid*, at 822

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.”<sup>27</sup>

“ . . . 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 because it would not have occurred but for the negligent act of leaving open the valve”<sup>28</sup> (emph. added).

Several aspects of *C.C.R. Fishing* are particularly noteworthy. First, the Court views the exclusionary provisions in s.56 of the *Insurance (Marine) Act* as merely defining what constitutes a fortuitous loss; it is not clear that their reasoning would also apply to exclusions which might be intended to apply even if the loss were otherwise covered. Second, the short shrift given the concept of proximate cause seems inconsistent with the prominence it is given in the *Act*. Third, the Court’s aversion to proximate cause analysis is remarkable, given its pervasiveness in insurance law since *Leyland Shipping*. The specific objections raised by McLachlin J. will be explored further, below.

## **6. Proximate Cause Revived? *Triple Five Corp.***

The most significant judgment to consider *C.C.R. Fishing*, prior to *Derksen*, was that of the Alberta Court of Appeal in *Triple Five Corp. v Simcoe & Erie Group*.<sup>29</sup> The case arose out of a tragic accident at the West Edmonton Mall, in which a rollercoaster in the indoor amusement park derailed due to a design defect. The defendants denied coverage under the Mall’s property insurance policy, citing the exclusions for

“ . . . mechanical breakdown or derangement, latent defect, faulty material, faulty workmanship, inherent vice, gradual deterioration or wear and tear . . . ”.

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<sup>27</sup> *ibid*, at 822 - 823

<sup>28</sup> *ibid*, at 825 - 826

<sup>29</sup> (1997), 42 C.C.L.I. (2d) 132, [1997] 5 W.W.R. 1, affirming (1994), 159 A.R. 1 (Q.B.), 29 C.C.L.I. (2d) 219; leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 263

However, “error in design” was not excluded, and so the Mall sued, arguing that the design deficiency was the accident’s proximate cause.

The facts were distinguishable from those in *C.C.R. Fishing* and *Wayne Tank*, in that the causes were serial or successive in nature, rather than being independent, concurrent causes. The problem before the court, therefore, could be categorized as one of characterization of the causal factors, rather than choosing between independent factors that might be seen as equally consequential.<sup>30</sup> The assured argued that notwithstanding the exclusion, the presence of a covered peril in the chain of causation militated in favour of coverage. The Court of Appeal’s handling of this argument echoes the judgment of Locke J. in *Sherwin-Williams*:

“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. If that is the governing rule in Canada, and if we would then adopt the distinction between the original design flaw as cause and the resulting defect as another cause, the Mall would be successful on this appeal. But this is not a case of two causes. There is here but one direct and inexorable link between the design flaw and the loss.<sup>31</sup>

“. . . we do not think we must pronounce on the issue about whether the coverage or the exclusion operates in a case where there are two causes, one excluded and one not. This is because we do not accept that there were two causes in this case. As we have said, there was only one operative cause here. In sum, we do not appreciate why one should, for the purpose of interpretation of an exclusion, make the thin distinction between the design error and its

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<sup>30</sup> see the discussion of the characterization problem in *Aetna Cas. & Sur. Co. v Yates* 344 F2d 939 at 941: “We do not think that a single phenomenon [of rot] that is clearly an excluded risk under the policy was meant to become compensable because in a philosophical sense it can also be classified as water damage”; and, in *Chadwick, supra*, note 15: “When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application. An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss,” citing *Finn v. Continental Ins. Co.*, (1990) 218 Cal.App.3d 69, 72 [267 Cal.Rptr. 22].

<sup>31</sup> 42 C.C.L.I. (2d) at 137

direct and immediate result, a defect in the machine. In the circumstances of this case, this seems nothing more than a play on words.”<sup>32</sup>

Further, the Court took the same broad view of the function of exclusion clauses, as expressed by Cairns L.J. in *Wayne Tank*.<sup>33</sup> Responding to the Mall’s argument that the American “concurrent causation” rule<sup>34</sup> should be followed, the Court stated:

“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.”<sup>35</sup>

Reliance on *C.C.R. Fishing* did not assist the Mall:

“It was said before us that this case is also authority for the proposition that, so long as the last step in the chain of causation was fortuitous, there is coverage even if the exclusion apparently operates. To accept this view would be a large step toward the American rule, would change the law, and would lead to the conclusion the law is that an insurance policy cannot exclude a fortuitous peril. We do not accept this. The comments by McLachlin, J. did not go that far. And they must be understood in the context that she first decided that the exclusion did not apply on the basis of her interpretation of that exclusionary term, a ruling that does not decide the exclusion issue before us.”<sup>36</sup>

### **7. Proximate Cause Extinguished: *Derksen***

This interpretation of *C.C.R. Fishing* – essentially, limiting it to its facts – was short-lived. In *Derksen*, the Supreme Court of Canada had before it a fact pattern which was alleged to fall under two separate primary

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<sup>32</sup> *ibid*, at 140

<sup>33</sup> *supra*, note 12

<sup>34</sup> *supra*, note 13

<sup>35</sup> 42 C.C.L.I. (2d) at 138

<sup>36</sup> *ibid*, at 139

policies: a motor vehicle liability policy, and a CGL with an exclusion for loss arising out of the assured's ownership, use or operation of a motor vehicle. The truck in question was being driven away from a worksite by a contractor. In the course of clearing up the site, the contractor had placed a steel base plate on a cross-member of the tow bar attached to a compressor unit at the rear of the truck; the trial judge inferred that this was not an act of "loading" the vehicle – which arguably would have constituted "use or operation" – but rather was, in the words of the Supreme Court's decision, "at most, a preliminary step prior to loading it on the automobile".<sup>37</sup> The truck was driven along a highway. The plate flew off the tow bar, penetrating the windshield of an oncoming school bus. One child was killed, three others seriously injured.

The contractor's negligence in clearing the worksite, and his further negligence in driving the vehicle with an unsecured load, without having first conducted a circle check, were viewed by the trial judge as independent, concurrent causes. Both the Ontario Court of Appeal and the Supreme Court of Canada accepted this characterization. Before the Supreme Court it was argued on behalf of the CGL Insurer that the driving of the vehicle was the dominant cause of the loss, or, alternatively, an independent intervening proximate cause that interrupted the chain of causation between clearing the site, and the injury. Amongst its many objections to this line of argument, the Court held it to be precluded by *C.C.R. Fishing*:

"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, 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>38</sup>

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<sup>37</sup> [2001] 3 S.C.R. per Major J. at 411

<sup>38</sup> *ibid*, at 413

But if both causes were to be regarded as equally “proximate”, what was the effect of one of those causes being excluded? The Court rejected a broad reading of *Ford Motor*:

“In my opinion, *Ford* does not provide a general principle of universal application as urged by the appellants. The exclusion clause in *Ford* expressly provided that all coverage would be excluded if liability were due to an excluded peril even if the loss was also due to another covered peril. *Ford* was decided on a careful analysis of the relevant facts and the wording of the exclusion clause at issue in that case. *Ford* says nothing more than that a properly framed exclusion clause can oust coverage. Whether a particular exclusion clause actually ousts coverage in a given case is a matter of interpretation.”<sup>39</sup>

Previous cases which had given such a broad reading to *Ford Motor* were to be distinguished on their facts. *Wayne Tank* was not to be followed, as it “had its roots in the field of maritime law”, and was

“... 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*)”.<sup>40</sup>

(No mention is made in the judgment of the interpretive concern, implied in *Wayne Tank*<sup>41</sup> and articulated in *Triple Five*,<sup>42</sup> that failing to give effect to exclusion clauses may – in some circumstances at least – render them a nullity.)

This decision could be viewed as a radical departure from years of sound jurisprudence on the issue of proximate cause in the field of insurance law. Whatever shortcomings there have been over the years in the application of *Ford Motor*, that case did not stand for the proposition that proximate cause analysis should never be undertaken. The structure of some insurance policies would obviate the need for identifying which of several causes was dominant, but in all other cases such analysis should continue to be necessary, in order to determine whether a legally relevant link existed between the covered and/or excluded perils, and the loss. It is certainly arguable that Canadian courts, in giving *Ford Motor* a broad reading over the years, may not have set the bar sufficiently high in determining whether exclusion clauses are “properly framed”. But if a broad reading of *Ford Motor* is a dead end, the Supreme Court’s apparent rejection of proximate cause,

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<sup>39</sup> *ibid*, at 414

<sup>40</sup> *ibid*, at 416

<sup>41</sup> *supra*, note 12

<sup>42</sup> *supra*, note 32

through applying *C.C.R. Fishing* to all insurance policies, gives us only a narrow passage out of this cul-de-sac: strict interpretation, on a case-by-case basis, of the specific words of the policy.

*Derksen* justifies this approach through adopting the reasoning of Finch J.A. (as he then was) of the B.C. Court of Appeal in *Pavlovic v. Economical Mutual Insurance Co.* Reliance on this decision is somewhat problematic, because though the reasoning in *Derksen* is premised on that case being one of concurrent causation, *Pavlovic* was a serial causation case. A break in an underground domestic water line led, 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 insured home's foundations. Allowing the assured's appeal, the Court of Appeal said that the policy's exclusion of damage "caused by seepage or leakage of water below the surface of the ground" did not clearly apply when the seepage was but one link in the chain:

"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:

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 . . . .

"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."<sup>43</sup>

Certainly it is open to insurers to draft exclusions incorporating much more specific language, and one might hope that the courts would be willing to give such clauses their intended effect. But, to use one of the examples of such wording referred to by Finch J.A., insurers historically have used the phrase "directly or indirectly" as a means of *avoiding* the consequences of proximate cause analysis.<sup>44</sup> Likewise, the more

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<sup>43</sup> (1994), 28 C.C.L.I. (2d) 314 at 320

<sup>44</sup> e.g., *Coxe v Employer's Liability Assur. Co. Ltd.*, [1916] 2 K.B. 629; *American Tobacco Co. v Guardian Assur. Co.* (1925), 22 Ll.L.Rep. 37 (C.A.); *Spinney's (1948) Ltd. v Royal Ins. Co. Ltd.*, [1980] Lloyd's Rep. 406 (Q.B.); *Oei v Foster*, [1982] 2 Lloyd's Rep. 170; *Tektrol Ltd. v Int'l Ins. Co. of Hanover Ltd.*, [2004] EWHC 2473 (Comm). See also the comment of 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: "Those words

extended example quoted by Finch J.A. – “We do not insure for such loss regardless of the cause of the excluded event . . .” – has its origins in the Insurance Services Office wordings developed in specific response to *Safeco Ins. Co. v Guyton*,<sup>45</sup> perhaps the high-water mark in California’s application of the concurrent causation rule to first-party property losses.<sup>46</sup> Given this history, it would seem curious to infer from the absence of such phrases, in policies insuring risks within jurisdictions that have not embraced the “concurrent causation rule”, an insuring intent to be governed by anything other than traditional notions of proximate cause.

It is possible to read *Derksen* narrowly, as only applying to concurrent causation situations. Indeed, as discussed below, some courts have taken this view. But this narrow reading may seem strained in light of the Supreme Court’s implicit endorsement of *Pavlovic*. It is also possible that the Supreme Court, in *Derksen* and in *C.C.R. Fishing*, meant its critique of proximate cause only to preclude the drawing of distinctions between causes that common sense tells us are of roughly equal significance. The words used by the Court, however – “metaphysical debates”, “fine and contestable reasoning”, “artificial exercise” – do seem to indicate a broader intent. *Derksen* seems to have brought us to a state in which all causes are, by default, to be treated as having equal legal relevance, and where no cause is by itself sufficient to overcome the effect of any other cause. The broad reading of *Derksen* is that the existence of *any* causal connection between a peril or a state of affairs that is covered, no matter how remote or seemingly inconsequential, and a loss, may effectively nullify *any* exclusion clause that does not incontrovertibly apply to that remote risk. Before examining whether Canadian courts have interpreted *Derksen* in this fashion, it may be appropriate to consider briefly whether the *C.C.R. Fishing* critique is sound.

### **8. The Limitations of *C.C.R. Fishing***

Recall the points made by McLachlin J.:

1. Distinguishing the degree of proximity between various causes, and insured losses, is an artificial exercise, tantamount to a metaphysical debate;
2. There is an apparent injustice in making indemnity dependent on fine distinctions;

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typically are intended to broaden the ambit of causation between the peril and the loss and avoid a rigid and narrow proximate cause analysis”.

<sup>45</sup> 692 F.2d 551 (9<sup>th</sup> Ct., 1982)

<sup>46</sup> Johnson, *supra*, note 17, at n14 et seq.; see also 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).

3. The test is calculated to produce disputed claims and litigation.

Dealing with these in reverse order, the Supreme Court did not cite any empirical evidence that disputes over proximate cause are a greater source of coverage litigation than any other aspect of policy interpretation. Such disputes have been few and far between in Canada over the last 50 years, but of course that has been due in large part to courts having dispensed with proximate cause analysis, following a broad reading of *Ford Motor*. We could look to the U.S. experience, but the writer's impression is that a very significant proportion of proximate cause-related litigation there in the last two decades has been a consequence of inconsistent rulings as to when "efficient proximate cause" analysis is to be utilized, rather than over whether particular causes are to be viewed as such.

Professor E. R. Hardy Ivamy, the U.K.'s leading scholar in the field of insurance law, has noted that many decisions in the area of proximate cause are,

“. . . difficult to reconcile. But the apparent inconsistencies may be regarded as depending rather on inferences of fact than on matters of law”.<sup>47</sup>

This point has some merit, and it leads to this question: Is the complexity inherent in causation cases to be addressed with a rule that can account for factual distinctions from case to case? Or, is it more appropriate to have a rule that can be invoked without regard to the facts – or, perhaps, no rule at all?

It may be fairly anticipated that a focus on identifying one particular peril in cases of concurrent causes, as being *the* proximate cause, might very well give rise to a disproportionate number of coverage disputes. But that outcome could be significantly mitigated by adopting the *Wayne Tank* principle.<sup>48</sup> In respect of concurrent causation fact patterns, proximate cause analysis should still be undertaken, but the circumstances of a particular loss may be such that two – or more – causes are appropriately viewed as having equal legal significance, rather than all causes being treated as equally proximate, and of equal legal significance, by default.

Serial causation losses under first-party property policies pose an equally significant, if not greater, risk of leading to disputes over which link in the chain is the proximate cause. But the majority of such claims deal with but a few fairly similar fact patterns, with which property insurers are well familiar, e.g. structural damage due to subsidence, and water damage caused by broken pipes, variously as a result of natural or man-made perils. If our trial courts are given the opportunity to apply proximate cause analysis to such cases, with

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<sup>47</sup> Ivamy, *Chalmers' Marine Insurance Act 1906* (London, Butterworths: 9<sup>th</sup> ed., 1983) p.78

<sup>48</sup> *supra*, note 12

the benefit of guidance from appellate decisions, is there any reason not to believe that clearer policy wordings will emerge from the process, and some measure of certainty will be gained?

As to the second point made by McLachlin J., the making of principled distinctions is part and parcel of the business of judging. Fine distinctions are routinely drawn in many areas of the law: dealing with degrees of culpability in criminal law, and with categories of intention in the law of regulatory offences,<sup>49</sup> and in negligence. Why courts should be any less concerned with drawing such distinctions between categories of causes in the field of insurance law, is not clear.

McLachlin J.'s first point in her critique of proximate cause may put one in mind of the old saw regarding medieval scholasticism – that it was concerned with determining the number of angels who could dance on the head of a pin. *Derksen* is not the first judgment to express reluctance to go down this path. Lord Shaw's invoking of Aristotle's categories of causes in *Leyland Shipping* may have set a poor example, but in the same year Justice Cardozo of the New York Court of Appeals stated,

“The problem before us is not one of philosophy. . . . General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract. . . .

“It may be said that these are vague tests, but so are most distinctions of degree. On the one hand, you have distances so great that as a matter of law the cause becomes remote; on the other, spaces so short that as a matter of law the cause is proximate. . . . Between these extremes, there is a borderland where juries must solve the doubt.”<sup>50</sup>

The same point was made by Lord Wright in *Yorkshire Dale Steamship Company Ltd. v. Minister of War Transport (The “Coxwold”)*:

“The choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here

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<sup>49</sup> See *Alphacell Ltd. v Woodward*, [1972] A.C. 824 (H.L.), in which Lord Pearson discusses both *Leyland Shipping* and *Yorkshire Dale Steamship* (*infra*, note 49), in the context of determining whether a defendant was liable for the absolute liability offence of having caused pollution of a river.

<sup>50</sup> *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 120 N.E. 86 at 87 (1918)

means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view”.<sup>51</sup>

If, however, our courts feel averse to imposing metaphysical standards, insights from other branches of the social sciences do support assigning different legal consequences to different degrees of causation. Current studies in linguistics and psychology demonstrate that discrimination between types of causation – e.g. between the *proximate* and the *remote* – is neither artificial nor arbitrary. All human languages differentiate, at least to some extent, between degrees of causation. In English, to give a few examples, we speak of causes that *force* or *necessitate* certain consequences. *Contribute* and *influence* are verbs that suggest a less direct connection. Other terms – *enable* or *permit* – are even more passive. These distinctions are not merely artifacts of the evolution of language. Rather, differentiation between causal factors seems to be deeply rooted in our psychology – in how we perceive causal relationships to exist.<sup>52</sup> Causation itself is inherently complex. It was not made more complex when courts began to utilize the paradigm of proximate cause; the paradigm, rather, has served to reflect our innate perceptions.

Is the difficulty inherent in grappling with causation issues, a sufficient reason to dispense altogether with the concept of proximate cause? In the field of insurance law, in any event, *Derksen* appears to dictate this course. But, is it desirable that we adopt a legal norm that runs counter to our own intuitions? If we perceive causes to exist in varying degrees, then contractual provisions that speak of causal relationships necessitate interpretation through proximate cause analysis. Anything less will only yield artificial meanings. Our common psychological grasp of causation must be accounted for in determining the reasonable expectations that parties to a contract have in the interpretation of causally related terms.

### 9. Whither Proximate Cause?

If our courts will not voluntarily undertake proximate cause analysis, it seems probable that they will be obliged to do so by changes in standard policy wordings. Insurers will not likely be willing to continue to expose themselves to the risk of being found liable for otherwise excluded losses simply because of the presence or intervention of a remote non-excluded peril. And, to the extent that commercial insurance policy wordings are the result of negotiations, it is equally unrealistic to think that assureds will insist on contractual

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<sup>51</sup> [1942] 73 Ll. L. Rep. 1 at 10 (H.L.)

<sup>52</sup> Generally, see Leonard Talmy, *Toward a Cognitive Semantics – Vol. 1, Concept Structuring Systems* (Cambridge: MIT Press, 2000), ch. 8, “The Semantics of Causation”; and, Grace Song and Phillip Wolff, “Linking Perceptual Properties to Linguistic Expressions of Causation”, in M. Achard & S. Kemmer (ed.), *Language, Culture and Mind* (Chicago: University of Chicago Press, 2003). This is not to deny the hypothesis that language itself can shape our perceptions.

terms that do not reflect our intuitive grasp of causation. It may be expected that the Canadian insurance industry will react to *C.C.R. Fishing* and *Derksen* by incorporating into their standard wordings the types of clauses discussed by Finch J.A. in *Pavlovic*,<sup>53</sup> just as their American counterparts reacted to *Guyton*. The question then will be whether Canadian courts will be willing to give effect to such terms.

The American experience with anti-concurrent causation clauses has not been entirely satisfactory. Many jurisdictions have given effect to such clauses, and have upheld denials of coverage even where the proximate cause is a covered peril. California – as usual, the locus of much of the case law – has gone in the other direction, but their decisions largely turn on a provision of the state Insurance Code that mandates coverage when an insured peril is the proximate cause of the loss.<sup>54</sup> In Washington State, however, where no such statute exists, the state Supreme Court held by a 7:2 majority in *Safeco Ins. Co. v Hirschmann*<sup>55</sup> that a clause excluding loss caused by earth movement, “whether occurring alone or in any sequence with a covered peril” could not apply to a landslide whose proximate cause was a severe wind and rain storm, that was not excluded.<sup>56</sup> The Supreme Court of Appeals of West Virginia has gone so far as to hold that anti-concurrent causation wording in all risk policies defeats the reasonable expectations of policyholders.<sup>57</sup>

In *Liristis v American Family Mutual*,<sup>58</sup> the Arizona Court of Appeals recently came up with a novel twist: it ruled that a clause excluding “loss . . . resulting directly or indirectly from or caused by. . . mold” had no application to a homeowners’ claim for mold damage on the grounds that the loss in question was the mold

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<sup>53</sup> *supra*, note 43

<sup>54</sup> Johnson, *supra*, note 17

<sup>55</sup> 112 Wn.2d 621; 773 P.2d 413; 1989 Wash. LEXIS 61(Wn.Sup.Ct.)

<sup>56</sup> More recently, the same court confirmed in *Findlay v United Pacific Ins.* 129 Wn.2d 368, 917 P.2d 116 (1996 Wn.Sup.Ct.) that broad policy language may not be used to eliminate the relevance of proximate cause analysis in all possible circumstances, but, in that case, upheld the application of an anti-concurrent causation exclusion clause which was structured so as to govern specific covered perils (similar to the ‘subordinate’ perils in *Ford Motor*).

<sup>57</sup> *Murray v State Farm Fire and Cas. Co.* 509 S.E.2d 1 (W.Va. 1998)

<sup>58</sup> 61 P.3d 22 (2003 Az.App.Ct.)

*itself*, and not a *result* of mold.<sup>59</sup> It seems that U.S. courts determined to find coverage in the face of plainly worded exclusion clauses are capable of no end of inventiveness.

Two Canadian decisions dealing with “directly or indirectly” exclusions – a B.C. appeal decided prior to *Derksen*, and a Saskatchewan trial decision, issued subsequently – raise some concern as to whether such exclusions will be regarded by our courts as a sufficiently strong statement of insurers’ intentions to overcome the rule that exclusions are to be interpreted narrowly, and the doctrine of *contra proferentem*. The first of these, *Canevada Country Communities Inc. v GAN Canada Ins. Co.*,<sup>60</sup> was a case of serial causes, water damage to insured premises due to a frozen pipe having ruptured. The policy excluded

“loss or damage, unless directly caused by a peril not otherwise excluded herein, caused directly or indirectly by rust or corrosion, frost or freezing”.

An earlier, identical case before the Newfoundland Supreme Court, *N.D. Dobbin Ltd. v Sun Alliance Ins. Co.*, had been resolved in favour of the insurer. The trial judge, Aylward J., had interpreted the exception to the exclusion, “unless directly caused by a peril not otherwise excluded herein”, as applying to the excluded peril, not to the loss or damage; if the peril that directly or indirectly caused the loss was itself directly caused by a non-excluded peril, the exclusion clause would not apply. In the result, the “directly or indirectly” qualification was given full effect.<sup>61</sup>

“If frost or freezing has any meaning it must mean and does mean below freezing temperatures. Frost and freezing in this sense are one and the same. Loss or damage caused directly or indirectly by frost or freezing is specifically excluded unless directly caused by an insured peril. I find there is no such insured peril and that the damage resulting in this case results from frost or freezing and the frost or freezing was not caused by an insured peril. If the Court accepts the position which the defence [sic] postulates, that is, that the frost or freezing was caused by low temperatures, and low temperatures is a peril that is insured under the policy, it is difficult to conceive of any situation where damage resulting from frost or freezing is ever excluded.

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<sup>59</sup> See the case comment on *Simonetti v Selective Ins. Co.* 859 A.2d 694 (2004 NJ.Super.App.Div.) in *Mealey’s Litigation Report: Insurance*, Vol. 19 No. 9, January 1, 2005, pp. 12-13.

<sup>60</sup> (1999), 10 C.C.L.I. (3d) 217 at 225, 204 W.A.C. 111 (B.C.C.A.)

<sup>61</sup> [1986] N.J. No. 229; 61 Nfld. & P.E.I.R. 240; *aff’d*, [1989] N.J. No. 86 (Nfld.C.A.)

“The words of 9(b) are clear and unambiguous and the words must be given their plain meaning. Applying the plain meaning to the words, I am satisfied that the clause clearly provides that loss or damage caused directly, or indirectly, by frost or freezing are not covered unless the frost or freezing was directly caused by an insured peril. I have found no such insured peril.”<sup>62</sup>

In contrast, in *Canevada* Rowles J.A. (Prowse J.A. concurring) proceeded on the basis that the exception applied to the damage, rather than to its direct or indirect cause. The water damage may have been caused indirectly by freezing, but it had also been caused directly by the covered peril of the discharge of water from the broken pipe, and the exclusion therefore was of no effect.<sup>63</sup>

“The damage to the property would accordingly have been excluded by paragraph 6(b) as being indirectly caused by freezing were it not for the fact that the interposed event in this case, namely, the discharge of water from the sprinkler system, was itself a peril expressly covered by the Policy.”

This reasoning, however, would seem virtually to render the phrase “directly or indirectly” a nullity. Any excluded *indirect* cause would, by definition, have to be accompanied by a *direct* cause. Under an all risk wording, the vast majority of such direct causes would be insured perils; in fact, the “characterization” problem noted above in connection with serial cause losses arises just because it is always possible to find some link in the chain that is not specifically excluded.<sup>64</sup>

Central to this interpretation was Rowles J.A.’s determination that the phrase “directly or indirectly” could not be read as synonymous with “proximately or remotely”:<sup>65</sup>

“If ‘directly’ and ‘proximately’ are synonymous, the term ‘indirectly’, as the antonym of ‘directly’, must presumably refer to a minor cause which operates in some indirect or ineffective fashion. *That reading would lead to the nonsensical conclusion that the policy*

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<sup>62</sup> *ibid.*, at para. 34

<sup>63</sup> *Supra*, footnote 60, at p. 225

<sup>64</sup> *Supra*, footnote 30

<sup>65</sup> *ibid.*, at 224. Instead, Rowles J.A. accepted the respondent assured’s definition of “direct”: “. . . concerned with the degree to which an event leads straight or immediately to its consequence” (pp. 224 - 225). Southin J.A., in dissent, chose to adopt the reasoning of Aylward J. in *N.D. Dobbin*.

*does not insure loss or damage where rust, corrosion, frost, or freezing constitutes even a minor or 'indirect' cause of the loss or damage"* (emph. added).

This “nonsensical conclusion” is, of course, exactly what insurers have intended to achieve through this wording. Unfortunately even in the wake of *Derksen* and *Pavlovic*, that intent has yet to be consistently realized. In *Tux and Tails Ltd. v S.G.I. Canada*<sup>66</sup> a piece of freight being carried within a transport truck fell onto and punctured a container of methyl mercaptan, an odorous gas; the gas in turn contaminated a shipment of formal wear. One of the policy’s exclusions read,

“This Rider does not insure against loss or damage caused directly or indirectly by:

. . .

- (e) dampness or dryness of atmosphere, . . . contamination, . . . rust or corrosion, marring, scratching or crushing, but this exclusion does not apply to loss or damage caused directly by fire, lightning, smoke, windstorm, hail, explosion, strike, riot, impact by aircraft, spacecraft or land vehicle, leakage from fire protective equipment, rupture of pipes or breakage of apparatus not excluded under paragraph (1) of Clause 5 hereof, vandalism or malicious acts, theft or attempt threat or accident to transporting conveyance”.

Baynton J. declined to apply the exclusion. Rather than giving meaning to the “directly or indirectly” wording, he avoided its clear implication by holding that the excluded peril of “contamination” should be narrowly defined “as meaning the inherent contamination of the insured goods, such as by rust, rot, etc.” (in other words, inherent vice). Further, the exception for loss caused by “accident to transporting conveyance” should be broadly construed to encompass accidents *within* a conveyance, even though the conveyance itself was not damaged.

In the face of such decisions, underwriters seeking to mitigate the impact of *Derksen* by redrafting their policy language would be well advised not to rely simply on inserting the phrase “directly or indirectly” into their stock exclusion clauses. A more carefully drafted exclusion was given full effect in the recently issued *The Owners, Strata Plan 2580 v Canadian Northern Shield*,<sup>67</sup> an earth movement case. The policy excluded,

“. . . loss or damage caused directly or indirectly . . . to buildings by . . . settling, expansion, contraction, moving, shifting or cracking *unless concurrently and directly caused by a peril not otherwise excluded*” (emph. added).

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<sup>66</sup> [2003] S.J. No. 438; 2003 SKQB 287

<sup>67</sup> 2006 BCSC 330

Applying *Canevada*, Martinson J. held that settling was the direct cause of the loss; the unfavourable (to the underwriters) result in *Canevada* was avoided by the fact that the exception required there to be an independent concurrent cause. The fact that the settlement had been set in motion by a non-natural cause – excessive preloading of neighbouring land – was not relevant.<sup>68</sup>

“ . . . there were no concurrent causes of the Damage. As discussed above, in insurance situations, a ‘concurrent cause’ is generally understood to be an independent contributing cause. . . . Although the excessive preload, the earth movement/settlement and the resultant structural damage may have all existed concurrently, the exception to [the Exclusion] requires concurrent causation. In this case, the causation was successive, not concurrent”.

Alternatively – and contrary to the concern expressed by Rowles J.A. in *Canevada* – Martinson J. held that *Pavlovic* would mandate a denial of coverage, even if the settlement were to be characterized as an *indirect* cause; an insurer, she held, may by the use of appropriate language, exclude every contributing cause in a chain of causation.<sup>69</sup>

Even if Canadian courts prove reluctant to give full effect to anti-concurrent causation language, there may be circumstances in which it is still open to insurers to argue that some links in the chain of causation are so remote that they really constitute background conditions, rather than active perils.<sup>70</sup> The argument is based on

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<sup>68</sup> *ibid*, at para. 52

<sup>69</sup> *ibid*, para. 54. Unfortunately, Martinson J. also adopted the rather confusing distinction between “proximate” and “direct” that had been put forward, as noted in Rowles J.A.’s majority judgment, by the respondent’s counsel in *Canevada*: that “proximate” is “concerned with the quality of the closeness of a particular cause”, whereas “direct . . . [is] concerned with the degree to which an event leads straight or immediately to its consequence” (*Canevada*, pp. 224 - 225; *Strata Plan NW2580*, para. 22). ‘Close’ and ‘immediate’ would seem to be very similar concepts that focus on temporal factors. The writer suggests that the *Leyland Shipping* definition of proximate as “dominant” or “efficient” is more helpful.

<sup>70</sup> Not to be confused with the argument that a “passive” condition, or “underlying state of affairs,” should be distinguished, in causation analysis, from an “active” peril. Hunt J. of the U.S. District Court (Nev.) advocated such a distinction in *Pioneer Chlor Alkali Co. v Nat’l Union Fire Ins. Co.* 863 F. Supp. 1226; 1994 U.S. Dist. LEXIS 18521, n.8. However, an argument based on this distinction did not succeed in *Midland Mainline Ltd. v Eagle Star Ins. Co. Ltd.* [2004] EWCA Civ 1042. See also the concurring judgment of Smith J.A. of the B.C. Court of Appeal in *B.M. v British Columbia (Attorney General)* 2004 BCCA 402 at para. 184, wherein he describes Major J.’s reference in *Derksen* to the *Walker Estate*

the judicial reaction to attempts by insurers, relying on “directly or indirectly” exclusions, to invoke extremely remote conditions in order to avoid covering damage caused by proximate perils. The point was articulated in by Mustill J. of the English Court of Queen’s Bench in *Spinney’s (1948) Ltd. v Royal Ins. Co. Ltd.*:

“I do not find it necessary to discuss the reported decisions on the meaning of various individual words of the clause, for whatever they may mean on their own, it is quite clear that the draftsman has gone to great lengths to ensure that the doctrine of proximate clause does not apply. Plainly, there must be some limit on the application of the clause, for the chain of causation recedes infinitely into the past. The draftsman must have intended to stop somewhere; and that place must be the point at which an event ceases to be a cause of the loss and becomes merely an item of history. The draftsman has not explained how that point is to be identified nor indeed do I believe that words can be found to do so. It is, eventually, a matter of instinct . . .”<sup>71</sup>

In the post-*Derksen* era, insurers may fairly expect that the same logic is to apply. If extremely remote causes are now potentially to be given equal legal significance as more proximate perils, and either in themselves trigger coverage or defeat less clearly worded exclusions, it should be open to insurers to negate the legal effect of such extremely remote causes by relying on “directly or indirectly” language in their exclusion clauses.

Perhaps the most contentious aspect of *Derksen* will be the question of whether it applies only to concurrent perils, or, given its implicit endorsement of *Pavlovic*, to serial perils as well. Thus far, the cases are divided.

The first judgment to consider the issue was the dissenting opinion of Osborne A.C.J.O. in *Trafalgar Ins. Co. of Canada v Imperial Oil Ltd.*, a duty to defend application in respect of a CGL with a pollution exclusion. It was alleged in the underlying action that Imperial Oil had negligently caused a spill of fuel oil, and the co-Defendant Hope had negligently failed to clean it up. Osborne A.C.J.O. held that *Derksen* was of no assistance in determining whether the pollution exclusion ought to apply in a case of serial causation:<sup>72</sup>

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decision, 2001 SCC 23, as “an illustration of circumstances where a quiescent breach of duty attracted liability as a materially contributing cause though its potential to cause harm required release by a subsequent independent act”.

<sup>71</sup> *supra*, note 42, per Mustill J. at 441

<sup>72</sup> (2001), 57 O.R. (3d) 425; 2001 CanLII 21205 (Ont.C.A.)

“The pleadings 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.”

In *Algonquin Power (Long Sault) Partnership v Chubb Ins. Co. of Canada*, the assured argued that *Derksen* supported its claim, as its dam had failed not only because of faulty design, an excluded peril, but also because of one or more other causes, e.g. “sinkhole collapse” (one of several named exceptions to certain of the policy’s exclusions, though not the exclusion for faulty design). The court held otherwise:

“This is not a case where there was more than one cause for the dam's failure. The only cause was faulty design. What we have is a chain of events leading to the compromise of the dam. Faulty design caused hydraulic piping. This led to voids that caused surface sinkholes, cracks and slumps that compromised the dam. The Partnership simply has not established any other concurrent cause for the event.”<sup>73</sup>

*Strata Plan NW2580* also supports this distinction. Martinson J. held that in *Derksen*, the concern with the utility of proximate cause “appears to be confined to cases of concurrent causation”.<sup>74</sup>

However, two Saskatchewan trial decisions have applied *Derksen* in what were fundamentally cases of serial causation. In *Tux and Tails*,<sup>75</sup> discussed above, the court held that the exclusion clause was not to be interpreted so as to encompass contamination caused by accident. In *B & B Optical Management Ltd. v Bast*,<sup>76</sup> the assured’s equipment was damaged by a power surge that had been caused by the negligence of a contractor in connecting the premises to the power grid. The policy excluded “loss of or damage to . . . electrical devices . . . caused by artificially generated electrical currents . . .”. Citing *Derksen*, the court held that there were two causes. Even though the negligence clearly caused the excess voltage, the trial judge – perhaps to make the parallel with *Derksen* more evident – described them as “concurrent causes”.<sup>77</sup>

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<sup>73</sup> [2003] O.J. 2019 (Ont.Sup.Ct.) at para. 205; see also *Chandra v Cdn. Northern Shield Ins. Co.*, 2006 BCSC 715

<sup>74</sup> *Supra*, footnote 67, at para. 20

<sup>75</sup> *Supra*, footnote 66

<sup>76</sup> (2003), 235 Sask. R. 141; [2004] 6 W.W.R. 747; 2003 SKQB 242 (CanLII) (Sask.Q.B.)

<sup>77</sup> *ibid.*, at para. 51

Lastly, a recent Ontario trial decision has, without mentioning *Derksen*, suggested a novel means by which its more difficult implications might be avoided. The assured in *Skyway Equipment Co. v Guardian Ins. Co. of Canada*.<sup>78</sup> had contracted with Blastco Corporation to design and erect enclosures – scaffolds, and tarpaulins – which were then to be rented for use by Blastco in a series of sandblasting/painting projects. The enclosures were damaged in windstorms; the wind caused the tarps to tear or break away, and during one storm the scaffold structure itself was damaged. A number of claims and counterclaims were filed between Blastco, Skyway, and Skyway’s design engineer. The damage was found to be attributable 50% to Skyway’s faulty workmanship, 50% to error in design.

“Faulty workmanship” was an excluded peril under Skyway’s all risk policy. But rather than finding that the role played by faulty workmanship excluded the loss entirely – the broad “*Ford Motor*” approach – or conversely, that the contribution of a covered peril negated the exclusion – the *Derksen* approach – the trial judge simply applied the same percentage allocation, and held that Skyway’s recovery from its insurer of the structural damage claim would be reduced by 50%, on account of Skyway’s own faulty workmanship.

Property insurance losses caused by multiple perils have traditionally been viewed as non-apportionable.<sup>79</sup> Coverage is avoided altogether when loss has been caused by an excluded peril, not merely limited to the contributory role played by it. However, as the Saskatchewan Court of Appeal observed in *University of Saskatchewan v Fireman’s Fund Ins. Co. of Canada*,

“Canadian courts seem to be in the process of developing methods of apportioning the damage among different parties responsible at different times during the period during which it occurred”.<sup>80</sup>

If insurance losses can be apportioned between insurers, there seems no reason in logic why indemnity could not also be apportioned between causes, depending on their degree of “directness” or “proximity”.<sup>81</sup>

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<sup>78</sup> [2005] O.J. No. 3072; 2005 CanLII 25629 (Ont.Sup.Ct.)

<sup>79</sup> *Board of Trade v. Hain Steamship Co. Ltd.*, [1929] All E.R. 26, [1929] A.C. 534, 98 L.J.K.B. 625, per Viscount Sumner at para. 7; applied, *Wayne Tank, supra*, note 10, per Denning M.R. at 67

<sup>80</sup> [1998] I.L.R. 1-3548; 1997 CanLII 9789 (Sask.C.A.), leave to appeal refused (1998), 227 N.R. 287n (S.C.C.)

<sup>81</sup> The U.K.’s Financial Ombudsman (having assumed the jurisdiction of the Insurance Ombudsman Bureau) recognizes that as a matter of law, an excluded peril will trump a covered peril; nevertheless, where coverage may be denied on those grounds, Insurers as a matter of policy are encouraged “to offer a

The Supreme Court of Canada's apparent rejection of proximate cause analysis in *C.C.R. Fishing* and in *Derksen* may ultimately have been driven by the all-or-nothing consequences of the traditional rule – that an underwriter could avoid liability altogether when an excluded peril was in reality but one component of a loss. What the Court seemed to suggest in these cases was that what insurance law required to remedy the injustice that could result, was a unique approach to causation. But a viable alternative rule to proximate cause – one that will not work at cross purposes with our psychological grasp of causation, or that will obviate tortuous interpretation of exclusions and anti-concurrent causation wordings – has so far proven elusive. The solution may lie in just such a unique approach to the measure of indemnity.

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contribution which is proportionate to the contribution of the insured peril”:  
IOB Website Archives, <http://www.theiob.org.uk/bulletins /bulletin22/section3>  
(January 9, 2005)