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CONCURRENT CAUSES OF A LOSS: ONE PERIL COVERED, ONE PERIL EXCLUDED – DOES THE INSURED HAVE COVERAGE?

AN ANALYSIS OF THE *DERKSEN* DECISION

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I. OVERVIEW

Historically, when faced with a claim for coverage under either a property or liability policy, insurers looked to determine if there was a single, dominant, or "proximate" cause of the loss. If so, and that cause of the loss was an included peril of coverage, then coverage was granted. If that cause of the loss was an excluded peril, then coverage was denied.

However, the term "proximate cause" is a negligence law concept, and its application in an insurance policy analysis can be problematic. In the past decade there has been a shift away from the "proximate cause" definition to a more expansive test to ascertain if a peril fits within the boundaries of coverage. This issue was ultimately considered by the Supreme Court of Canada three years ago in *Derksen v. 539938 Ontario Ltd.*[1] The Supreme Court of Canada not only assumed the role of deciding if there could be more than one cause of a loss, but also stated how to determine the applicability of coverage when one of the losses was covered and one was excluded.

The insurance industry has typically taken the stance that exclusions are premised upon either the existence of another policy of insurance, or, because the loss was not fortuitous. However, because our courts have begun to find there can be many losses arising from a "mix" of perils, some of which are covered, others are not, the issue has become:

> Does the insured have coverage when one of the perils is excluded and yet another peril that contributed to the loss is covered under the policy?

This paper devotes discussion to the problem both in the liability and property setting.

II. THE LAW BEFORE *DERKSEN*

Thirty years ago our courts would have likely adopted the English Court of Appeal's practise where two causes of a loss, one within coverage and one not, caused the court to find, "The preferred analysis is to determine which cause is the 'effective or dominant cause'." (*Wayne's Tank & Pump Co. v. Employer's Liability Assurance Corp.*).[2]

Fifteen years ago the Supreme Court of Canada first determined that:

> "*…it should not debate on which of various causes of a loss were proximate…..scepticism is advised when addressing this metaphysical topic…*"
>
> (*CCR Fishing Ltd. v. British Reserve Ins. Co.*)[3]

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[1] 205 D.L.R. (4th) 1
[2] [1974] Q.B. 57
[3] [1990] 1 SCR. 814

Ten years ago our B.C. Court of Appeal spoke on this issue, clarifying that water damage due to seepage and leakage – a cause of loss commonly excluded in B.C. – may in fact have a concurrent or second cause that *is* covered, such as a burst water pipe. (*Pavlovic v. Economical Mutual Insurance Company*).[4] That decision opened the door to a series of otherwise excluded claims against insurers and caused this debate to continue on about what constituted "concurrent causes of loss."

In the same time period the Supreme Court of Canada gave a broad interpretation to the words "ownership, use or operation" of a vehicle. (*Amos v. I.C.B.C.*).[5] The court concluded an injury arose out of the ownership, use or operation of a vehicle, after an individual had been attacked and shot through the window of his car by persons apparently attempting to gain entry to the car. The Court found the incident resulted from an "ordinary and well-known activity" to which motor vehicles are put and found a sufficient connection between the injuries and use of the vehicle.

In doing so, the Supreme Court considered the causation issue and noted that the words "arising out of" were viewed in certain cases as words of a much broader significance than "caused by". It was decided that negligence or fault in the use or operation of the vehicle does not need to be the cause of the injury.

All of these decisions would ultimately play a role in the *Derksen* case.

III. THE *DERKSEN* DECISION

In 2001 the Supreme Court considered the claims that arose out of an accident in which one child was killed and three were injured. A steel base plate (part of a road sign assembly), which had been put on the defendant's truck by the defendant driver as part of the clean up at a work site, flew off the truck through the windshield of an oncoming school bus.

The Plaintiffs alleged negligence at the work site and in the operation of the truck. The motions judge decided (and was upheld at the Supreme Court of Canada) that the accident resulted from concurrent causes (negligent clean up AND negligent operation of the truck) and that both the CGL and the auto policies provide coverage. Furthermore, this decision was made notwithstanding the standard exclusion in the CGL policy of the "use or operation of an automobile".

The Supreme Court made the following findings:

[4] 99 B.C.L.R. (2d) 298
[5] [1995] 3 SCR. 405

1) *Derksen* was based on a series of events that are separate causes contributing to the same loss, as opposed to a series of events that are the same cause of the loss.

2) Insurers may suggest there was an independent and intervening act (more proximate cause) that broke the chain of causation, but this is not correct. The operation of an intervening force will not ordinarily absolve a defendant of further responsibility, if it can be considered a normal incident of the risk created by the harm.

3) Where there are concurrent causes there is no presumption that all coverages are ousted if one of the concurrent causes is an excluded peril. This is a matter of interpretation and must be expressly stated in the insurance policy.

4) Applying *Pavlovic*, because insurers have language available to them that would remove all ambiguity from the meaning of an exclusion clause in the event of concurrent causes, there is no reason to decide in favour of the insurer.

5) The broad interpretation of the phrase, "arises out of the use or operation of an automobile" as per *Amos*, did not apply. The phrase was interpreted broadly in that case because it appeared in a coverage clause, but in *Derksen* the phrase "arises out of" appears in an exclusion clause and so must be construed narrowly.

6) Nothing in the CGL policy indicated that harm from an insured risk would not be covered if that harm was also caused by an expressly excluded risk. The exclusion clause was ambiguous with respect to losses from concurrent causes.

7) Each insurer was liable for coverage for only that portion of the loss attributable to their insured's risk.

IV. THE APPLICATION OF THE *DERKSEN* DECISION

In the past three years there have been thirty-seven (37) different decisions from Canadian courts that have dealt with the principles articulated in *Derksen*. This segment of the paper will identify how the courts have applied *Derksen* and how it has impacted on Canadian insurers.

Motor Vehicle Accident Claims

Despite what is described as a continuing shift toward a more expansive definition of the phrase "arising out of the use or operation of a motor vehicle" since *Amos*, *Derksen*

has allowed courts to look to other conduct which might have otherwise been included under an auto insurer's coverage. The following are some examples:

a) Oil leak from fuel truck pollutes land

Although a fuel leak is considered to be an "ordinary and well-known activity" (*Amos* wording) to which vehicles are put, and was connected to the operation of the fuel truck, this was also a failure to inspect the fuel lines which was deemed to be covered under the CGL policy. Both the auto and CGL policies applied. (*Harvey's Oil Ltd. v. Lombard General Insurance Co. of Canada*).[6]

b) Accident during sales demonstration of vehicle

The insured caused the accident while demonstrating an amphibious vehicle. There was an exclusion for the use and operation of a motor vehicle. The court found another (concurrent) cause of the loss – the insured's allegedly defective salesmanship - which was covered under the policy. (*Neary v. Wawaneesa Mutual Insurance Co.*).[7]

c) Dog in back of open truck bites passer-by

Applying the principles from *Amos*, the allegation that the Defendant dog owner failed to keep his dog contained in the vehicle constituted a causal connection to the loss and therefore was a "use and operation". The failure to control the dog also called for coverage under the dog owner's CGL policy. Both CNS and ICBC were required to provide a defence and indemnity for the Defendant. (*Taylor v. Maris*).[8]

d) Pleadings allege negligent supervision as separate cause of loss

It appears that auto insurers and insureds will continue to turn to *Derksen* to try and stretch the web of coverage wide enough to find a second cause of a loss to obtain additional coverage. This has been attempted in our courts on a few occasions already and, fortunately for insurers, the Ontario Court of Appeal has offered some guidance on those actions pled in an effort to obtain dual coverage.

An employee, while driving his work vehicle, injured the Plaintiff. The Plaintiff sued both the employee and the employer. The Ontario Court of Appeal determined that an allegation against the employer for negligent hiring, training or supervision of the employee may be germane to whether the defendant was negligent in the use or operation of a vehicle, but not a "stand alone ground for recovery". "*The allegations, even if proved, without also proving negligent use of a motor vehicle would not allow the insured to succeed.*" (*Unger (Litigation Guardian of) v. Unger*).[9]

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[6] 231 Nfld & P.E.I.R. 281
[7] 216 N.S.R. (2d) 219
[8] 201 B.C.A.C. 314
[9] [2003] O.J. No. 4587 (Q.L.)(C.A.)

The Ontario Court of Appeal confirmed supervision is not a concurrent cause when it made the same decision again in a sexual abuse claim. The supervision claims were a "legal characterization rather than a contributing cause of the injury. "The injury would have been the same with or without the allegedly negligent supervision because it was caused by the sexual assault." (*Thompson v. Warriner*).[10]

Property Damage Claims

a) Marine cargo delayed – exclusion for loss caused by delay

A shipment of lumber was delayed four months. The insured claimed coverage but the policy excluded loss "proximately caused by delay". The Ontario Supreme Court applied *Derksen* and concluded that the cause of the loss was not only the delay but a number of other covered factors including the lack of aeration, enclosed space, lack of daylight and moisture in the cargo hold. (*Continental Insurance v. Almassa International Inc.*).[11]

b) Lightning strike caused power outage leading to mould

The lightening (covered peril) caused the insured's ventilation system to fail, resulting in moisture and condensation, which damaged walls of the insured's house. There was an exclusion for moisture and dampness. The Court found lightning was "only an indirect cause", not a concurrent cause and the claim was excluded. (*Balon v. SGI Canada*).[12]

This decision reflects the inconsistency that now appears in some cases in attempting to determine what is, in fact, a concurrent cause. Arguably, this case is factually to *Pavlovic* (water line breaks causing seepage and leakage) yet produced the opposite result.

c) Marijuana grow-op exclusion and fire loss

With the increasing number of property damage claims in B.C. due to marijuana grow operations, insurers are often attempting to avoid coverage and rely on their respective grow–op exclusions. *Derksen* has caused insurers to look closely at their exclusion wordings. The insureds will argue the real or proximate cause of the loss was fire, not the grow operation.

The grow operation cause is excluded but fire is a covered peril. As *Derksen* confirms, there are two causes: the grow operation and the fire and when there is a loss that is caused concurrently by one covered peril and one not covered, there is an ambiguity in the wording and the exclusion is to be interpreted narrowly in favor of the insured, thereby granting coverage.

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[10] 2002 CarswellOnt 1476 (ONCA)
[11] 46 C.C.L.I. (3d) 206
[12] 2004 CarswellSask 836 (SKPC)

Insurers are beginning to redraft their wordings to circumvent the *Derksen* issue by the use of the terms caused "directly or indirectly" (see below for a review of the choices for wordings). However, if they do so, insurers are still faced with another problem.

There has not yet been a decision on the applicability of a grow op exclusion (no coverage for loss resulting directly or indirectly from a marijuana grow operation) when considered against the statutory requirement that Fire be an included peril. Part 5 of the *Insurance Act* (s. 122) requires that the insurance contract is deemed to cover fire loss, "whether resulting from explosion or otherwise". In other words, by law, insurers must include fire as a covered peril when offering coverage under a "fire" policy.

The issue is then whether or not this statutory requirement to provide fire coverage from Part 5 of the *Insurance Act* overrides an exclusion for any kind of loss resulting from a grow-operation (directly or indirectly). Does the *Insurance Act* really make fire coverage a deemed peril that cannot be excluded? This argument is based on the application of Part 5 of the *Insurance Act* (the Fire Insurance section) which is, arguably, no longer applicable to a multi-peril (all-risks) policy.

The Supreme Court of Canada in *Churchland v. Gore Mutual et al*.[13] had determined that a multi-peril (all-risks) policy should be viewed as falling under Part 2 (the "General Insurance" section). Fortunately for insurers, Part 2 does not require that a multi-peril policy include fire as a covered peril. Therefore, if a court finds most property policies are multi peril policies, there would be no statutory requirement that the peril of fire be provided in a property policy. If this is the case, it is open to insurers to use *Derksen* and argue in favor of the applicability of a grow-op exclusion.

d) Equipment damaged by improper electrical connection or contractor's negligence

High voltage due to improper electrical connection caused damage to equipment. The property insurer denied the claim on the basis of their exclusion for loss caused by "artificially generated electrical causes". While the loss was caused by this, the Court found it was also caused by the contractor's negligence, which was not in the terms of the exclusion, thus coverage applied. (*B & B Optical Management Ltd. v. Bast*).[14]

Life Insurance Claims

The concepts from *Derksen* not only apply to property and liability claims, but life insurance policies as well. An insured was in a motor vehicle accident, pulled himself from the wreckage and began to walk home. While he was covered for accidental injury, he was not covered for disease resulting from an accidental wound (he had a previous heart disease). On the walk home he suffered a heart attack and died. The

[13] 2003 SCC 26
[14] 2003 SKQB 242

Court found that the stress of the accident was an "external trigger" on his heart disease. Applying *Derksen*, there were two concurrent causes, one of which was covered so the insurer was required to pay. (*Heitsman v. Canadian Premier Life Insurance Co.*).[15]

V. SAMPLE POLICY WORDINGS

Derksen has created an opportunity for insureds seeking coverage that might otherwise have been denied. In those situations where the facts of the claim lend themselves to an argument that there was more than one cause of the loss, more than one peril, the creative insureds can use *Derksen* to their advantage. However, *Derksen*, has also cleared the way for insurers to prevent these increased opportunities for coverage by simply creating "tighter" exclusionary wordings.

Set out below are examples of the type of wording our courts have identified as appropriate:

1) *"We do not cover the following things if they happen at the same time as an excluded peril or cause of loss above or elsewhere in this policy or contribute with an excluded peril or cause of loss to produce a loss."*[16]

2) "*There shall in no event be any liability hereunder in respect to loss due to physical damage to the property insured caused by (cessation of work or by interruption to process or business operations or by change in temperature) whether liability with respect thereto is specifically assumed now or hereafter in relation to any peril or not."*[17]

3) *"Caused directly or indirectly..."*[18]

4) *"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."*[19]

Some exclusions have been applied in circumstances where there was also a covered loss because the exclusion simply stated, "*we do not insure*" a certain peril, as opposed to excluding loss "*caused by*" that peril. By distinguishing between provisions that exclude specific types of damages, regardless of cause, from provisions that exclude damage from a specific cause, regardless of its type or nature, an insurer eliminates the causal analysis required by the *Derksen* decision. For example:

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[15] 2002 BCSC 1080

[16] *Balon v. SGI Canada* , 2004 SKPC 104

[17] *Ford Motor Co. of Canada Ltd. v. Prudential Assurance Co*. [1959] S.C.R. 539; *Derksen*, *supra*.

[18] *Pavlovic*, *supra*; *B & B Optical Management*, *supra*.

[19] *Pavlovic*, *supra*.

> *"We do not insure wear and tear, deterioration, defect, design fault or mechanical breakdown, rust or corrosion, extremes of temperature, wet or dry rot or mould, and contamination except that resulting damage by an insured peril is covered."* [20]

However, this type of exclusion is not as judicially accepted as the other wordings might be. It is important to note that the Manitoba Court of Appeal specifically stated that it disagreed with the BC Court of Appeal's *Leahy* decision on the same wording.[21]

VI. CONCLUSIONS

If there is some evidence on the basis of which the courts could conclude there was more than one cause of a loss, *Derksen* and other subsequent decisions allow the courts to reach that conclusion instead of determining a single and proximate cause.

If one determines that there were two concurrent causes of a loss, one being an excluded peril and one being a covered peril, this would not necessarily result in there being no coverage for that loss.

Derksen has identified that it is in the hands of the insurers to create appropriate exclusionary language to circumvent what will otherwise be a grant of coverage in the insured's favor. Some pre and post *Derksen* decisions have identified the type of policy wordings needed.

In the construction of insurance contracts, coverage provisions will be construed broadly and exclusion clauses narrowly. Applying these rules, when dealing with coverage under an auto policy, *Amos* states that a motor vehicle does not have to be the injury causing instrument for a causal connection requirement inherent in the phrase "caused by an accident that arises out of the use or operation of a vehicle" to be satisfied. Conversely, unless the exclusion for the use or operation of a vehicle specifically uses wording other than "caused by", *Derksen* may apply to find some other cause of the loss. Without wording that describes how to handle an exclusion vs. a grant of coverage, the exclusion will not supersede coverage.

Despite the expansion of coverage granted by *Amos*, ICBC and other auto insurers will rely on *Derksen* to look to CGL policies for additional coverage to share the risk.

As a result of *Derksen* insureds will become more creative in their demands for coverage in property damage claims when they typically might have otherwise fallen under an exclusion clause.

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[20] *Leahy v. CNS*, 2000 BCCA 408; *Jordon v. CGU Insurance Co. of Canada*, 2004 BCSC 402

[21] *Rivard v. General Accident Assurance Co. of Canada*, 2002 MBCA 70.

The decisions referred to in this paper are examples of how the courts have interpreted *Derksen* and certain exclusionary wordings in the past three years. It will be an ongoing challenge for insurers to determine to what degree they are prepared to amend their policy wordings to adhere to the principles from *Derksen* and following cases.