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British Insurance Law Association
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Forthcoming Events

**BILA YOUNG PROFESSIONALS LECTURE 3 February 2022**
All together now: Issues in Aggregation
Nathalie Koh, Fountain Court Chambers

**BILA VIRTUAL LECTURE 23 February 2022**
Non-Disclosure
Aidan Christie QC and Martyn Naylor, 4 Pump Court
The Proximate Causes of Loss

Professor Özlem Gürses
King’s College London
Question of causation: a matter of judgment

• It is true that questions of causation can give rise to problems both of law and of fact and opinions may and often do differ upon them.

• *Royal Greek Government v Minister of Transport (The Ann Stathatos)* (1949)
• *Shell International Petroleum Co Ltd v Gibbs* [1983], Lord Roskill
A matter of law:

• s 55(1) of the MIA 1906:
  “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.”
‘Proximate’ cause : the meaning

• Financial Conduct Authority v Arch Insurance (UK) Ltd [2021]
  the word “proximate” is somewhat misleading.

• Becker, Gray and Co v London Assurance Corporation Lord Sumner [1918]
  the word “direct” would be a better word as “the terminology of causation in English law is by no means ideal. It would be the better for a little plain English”. 
‘Proximate’ cause: the meaning

• In *Dudgeon v Pembroke* (1877), Lord Penzance:
  
  “‘causa proxima et non remota spectatur’ is the maxim by which …contracts of insurance are to be construed…”.

• *Reischer v Borwick* [1894], Lindley LJ:
  
  the proximate cause rule was “cardinal” in insurance law and practice.

• *Shell International Petroleum Co Ltd v Gibbs* [1983] Lord Roskill:
  
  s 55(1) is the statutory application of this long-established principle of marine insurance law.
Efficient cause

• *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] Lord Shaw:
  - “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.”

  - when the notion of proximate cause was introduced, the law had been familiar with the idea of the cause of an occurrence, the production of an event and bringing about of a result.

  - the proximate cause, the real or direct cause is identified as a matter of common sense that an ordinary business man conversant with such matters would adopt.
Terminology

• Proximate refers to

determining predominant real causes

• eliminates

remote indirect distant causes.

• Larrinaga Steamship Co, Ltd v The King [1945] A.C. 246, 253 Viscount Simon L.C.
• Yorkshire Dale Steamship Company, Ltd v Minister of War Transport [1942] A.C. 691, 702, Lord Macmillan
• ENE Kos 1 Ltd v Petroleo Brasileiro SA Petrobras (No 2) (The Kos) [2012] 2 A.C. 164, [37], [48], Lord Mance
• Thompson v Hopper (1858) El. Bl. & El. 1038, 1047
• Lawrence v Aberdein (1821) S B. & Ald. 107, 110
• Ionides v The Universal Marine Insurance Co(1863) 14 C.B. N.S. 259, 289, Willes J
Aristotle’s doctrine of the four causes?

- The notion of causation in insurance dismisses the metaphysical distinctions between
  material,
  formal,
  efficient
  final causes,

Lord Shaw (*Leyland Shipping*): its philosophical sense the doctrine applied to existences, in insurance it applies to occurrences.
A complex exercise?

• The weight of the evidence and measuring their contribution to the loss occurrence will vary from case to case
• no evidence submitted to prove what caused the loss
• consider various impossibilities or improbabilities.
• *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985]
• *Ide v ATB Sales Ltd* [2009]
• *Suez Fortune Investments Ltd & Anor v Talbot Underwriting Ltd & Ors. (Brillante Virtuoso)* [2019]
Not a chain but a net

• *Leyland Shipping* – Lord Shaw:

• ‘The chain of causation’: handy expression, but inadequate.
• Causes are not always as distinct from one another as “beads in a row or links in a chain”
• Causation is not a chain, but a net.

• At each point influences, forces, events 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.
Taylor v Dunbar (1868)

- Cargoes of dead pigs and beef became putrid: delay
- Delay: tempestuous weather, high running seas: the ship had to seek shelter in Cuxhaven.

  - Delay in the prosecution of the voyage (proximate)
  - Tempestuous whether (remote cause)

an unusually protracted voyage which was the direct cause of the putrefaction of the cargo.
Last cause in time?

- *Pink v Fleming* (1890) Lord Esher:
  - “the last cause only must be looked to and the others rejected, although the result would not have been produced without them.”
Pink v Fleming

- Collision
- Port of repair
- Discharge cargo of lemon-oranges
- The cargo was reshipped following repair
- On arrival: the goods had been damaged by the handling necessary for their discharge and reshipment and by the delay.
- Cause: the delay, not the collision
- No doubt the cause of the handling was the repairs, and the cause of the repairs was the collision.
- Lord Esher: to connect the loss with the collision, the claimants must go back two steps,
- Note: Reischer v Borwick in which the court found the proximate cause as a matter of judgment, also added that their approach was consistent with Pink v Fleming.
“unless otherwise agreed”

• The policy may provide for some other connection between the loss and the occurrence of an insured peril.

• A looser causal link than the proximate cause
A looser connection?

• “directly or indirectly caused by” and
• “following”
• “in connection with”
• “as a result of”,
• “arising from”, and
• “in consequence of”,
• The FCA test case “it is rare for the test of causation to turn on such nuances” and hence it was not profitable to search for shades of semantic difference between such phrases.
Attributable to

• *Thompson v Hopper* (1858), Cockborn CJ:
  “...it is not necessary that the unseaworthiness should have been the proximate and immediate cause of the loss, provided it can be shewn to have been so connected with the loss as that it must necessarily have led to it.”
Attributable to

• Insurance Act 2015 s.10(2)

“An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.”
The but for test

- May allow a remote cause to be considered as the cause of the loss although it is not the real or direct cause that produced the loss.

- The question always is what the cause is, not merely what is a cause. *Yorkshire Dale Steamship Company, Ltd v Minister of War Transport* [1942] Lord Wright
The but for test

• *Orient-Express (Orient-Express Hotels Ltd v Assicurazioni Generali SpA) [2010] (overruled)*

• The competing causes of the hotel’s loss were

  (1) damage to the hotel and
  (2) damage to the city

• HELD: Damage to the city caused the loss
But for v proximate cause

• *Shell International Petroleum Co Ltd v Gibbs* Shell (1983)
• Almost 200,000 tons of crude oil was lost as a result of a fraudulent operation of the conspirators who
• successfully took the cargo to South Africa in breach of the then international sanctions.
• 180,392 metric tons of it was discharged in Durban
• about 15,840 metric tons of cargo was scuttled with the ship
• But for the fraud ...however,
• the proximate cause of the loss: the scuttling of the vessel.
Concurrent (interdependent) causes

• none of the rival causes can be identified as the proximate cause under the standards of “real” or “efficient” or “direct” cause.

➤ One excluded v one insured risk
➤ One insured and one uninsured
Interdependent concurrent causes

• It is neither possible to reject the claim if an insured risk is one of the rival causes, nor is it satisfactory to say that the loss was caused by an insured peril because it was not the sole proximate cause

  ➢ *One without the other would not have caused the loss*

  ➢ Neither would have produced the result on its own, but their combination did.
Causes equal in proximity

- In *Cory v Burr* [1883]
- barratry v “capture and seizure”
- Lord Blackburn, however, was ready to rule that both the barratrous act and the seizure were equal in proximity.
Concurrent interdependent causes

• *The Miss Jay Jay* [1987]
  • An seaworthy vessel
  • met the adverse weather conditions (insured v uninsured)

• In *Jason v Batten (1930) Ltd* [1969]
  • coronary thrombosis: a motor accident combined with the assured’s pre-accident health conditions (insured v excluded)

Exclusion prevails because: the object of the exclusion is to *except such losses otherwise covered by the policy*
Concurrent independent causes?

• If each could have caused the loss on its own, their efficiency could not be 50/50 because the standard of proof is satisfied on the balance of probabilities.

• The loss must have been brought about one of these independent causes.

• The causes can be classified as the remote and proximate, and there is no room for the concurrent cause formula to apply.
The FCA case

• Some policies provided cover for
• “interruption of or interference with the Business during the Indemnity Period following ... any occurrence of a Notifiable Disease within a radius of 25 miles of the Premises ...”
• (RSA and MSA)
The FCA test case

• Their Lordships held

- *an insured peril which acts in combination with other causes of equal efficacy to bring about loss was capable of being regarded as a proximate cause*

- one occurrence of Covid-19 within the identified radius was satisfactory for the proximate cause purposes
The common sense of mankind

• In *Reischer v Borwick* Lindley LJ:

  The sinking of this ship was proximately caused by
  ➢ the internal injuries produced by the collision, and
  ➢ by water reaching and getting through the injured parts whilst she was being towed
to a place of repair.

  ✓The sinking was due as much to one of these causes as to the other
  ✓each was as much a proximate cause of her sinking as the other, and
  ✓it would be contrary to good sense to hold that the damage by the sinking was not
covered by this policy.

  In *Leyland Shipping*: Viscount Haldane described *Reischer* as “what the common sense
of mankind would assert in such a case”.
Conclusion

• What is and is not the proximate cause – terminology appear to be consistent
• Efficient cause: common sense, one cause is singled out as the proximate cause
• Concurrent interdependent causes: reflects the parties intention
• The but for test: remote causes
• The FCA test case: not strictly concurrent interdependent but not strictly independent causes either
Questions & Answers

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