LA COMPAGNIE CHIMIQUE FRANCO-AMÉRICAINE (1954) LIMITÉE v. IMPERIAL INSURANCE OFFICE ET SUN INSURANCE OFFICE[1]

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Assurance automobile — Clause de non-responsabilité au cas de collision ou de capotage — Exception quant aux pertes causées par l'eau — Accident résultant d'une collision suivie d'un capotage — Cause efficiente — Cause indirecte.

An automobile, in attempting to avoid a collision with another moving object, strikes a stationary object and plunges from its precarious position on a quay into the water, resulting in total loss of the automobile. No negligence is attributable to the driver of the automobile. What is the cause of the damage: the attempt to avoid collision, the striking of the stationary object, or the water? Or is each potential cause responsible for a certain proportion of the total damage?

When this problem is posed in the context of insurance law, as it was in the recent case of *La Compagnie Chimique Franco-Américaine* (1954) *Ltée v. Imperial Insurance Office et Sun Insurance Office*, important legal consequences flow from its solution. Here, the automobile was insured for loss by the appellant. Damage due to the action of water was a risk covered by the policy, whereas collision was specifically excluded from the general liability. Therefore, the insured's right to recover depended upon which cause the Court chose.

In such cases, the Court's decision may considerably influence the wording of subsequent contracts. If the criteria adopted differ from those used in previous decisions, the risk borne by the insurer may be appreciably increased, thereby leading to higher premiums. On the other hand, the coverage may be found to be too limited and the insured may request a change in the terms of the policy in order to obtain wider protection.

In this case, a unanimous judgment of the Court of Queen's Bench, held that the cause of the total loss was collision. Consequently, the insured was not protected and received no compensation whatever for the loss. Hyde, Rinfret, Taschereau, and Owen, J. J. concurred in the opinion of Mr. Justice Bissonnette.

The opinion given by the learned judge is short and factual, without reference to authorities or philosophical trimmings. The primary purpose of

[1][1962] B.R. 608.

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this comment will be to extract the criteria by which collision was held to be the "cause efficiente" of the damage. In so doing, it must be further considered whether they conform to previous standards as enunciated by jurisprudence or whether they have no further application beyond the facts of this case. Secondly, was the Court under any duty to choose only one cause of the total loss, thereby excluding any recovery by the insured? Or could the Court have chosen the alternative of assigning portions of the total loss to different causes, each of which met the qualifications of "cause efficiente" as laid down in the jurisprudence? Such a solution, it is suggested, would be more equitable in that it would allow the insured partial recovery of the loss and would come closer to fulfilling the intentions of both parties in entering into the contract than does the Court's decision.

The facts are not in dispute. Mr. Simard, president of the plaintiff company, La Compagnie Chimique Franco-Américaine (1954) Limitée, was crossing the St. Lawrence River from Ile aux Coudres to St. Joseph de la Rive in the insured automobile aboard a ferry. Being low tide, the ramp ascending the dock was at an acute upward slope so that a vehicle commencing the climb could not immediately observe the events occurring on the level of the dock. The dock itself protruded from the main waterfront as a peninsula from the shoreline. Consequently, Mr. Simard, mounting the incline in the insured automobile, did not perceive a heavy truck backing up in the direction of the ramp until a direct collision could only be avoided by "un rapide coup de volant". However, the jerk of the wheel caused the automobile to shuttle to one side where it came to rest momentarily upon a rounded niggerhead, and then toppled over the side of the dock into the water. In the words of Mr. Simard at the trial:

> Alors, au moment où je suis sorti et où j'ai fait un écart pour éviter d'être démantibulé par ce camion chargé de billes de bois, l'automobile, en faisant le détour, s'est trouvée à s'accrocher sur le *niggerhead*, la roue droite avant, et elle a monté sur le *niggerhead*.
>
> Evidemment, à ce moment-là la roue ayant accroché, il n'y avait aucun moyen de revenir sur le quai.[2]

It is of some importance for a clear comprehension of the forces involved to understand the features of the niggerhead, upon which the vehicle balanced momentarily before plunging into the water. The closest analogy to the shape of a niggerhead would be an imaginary black cast iron mushroom, used for the purpose of mooring ships to the dock.

Notwithstanding salvage value, the automobile was a total loss. It is interesting to note that the insurers prepared a division of the loss based on the source of damage: $2156 for collision damage and $1274 for water damage.

The relevant terms of the insurance policy from which the intention of the parties is to be inferred is as follows:

> Couverture générale. L'assureur s'engage à indemniser l'assuré contre les pertes ou dommages directement et accidentellement causés à l'automobile, y compris ses accessoires (mais non les

[2] *Ibid.*, p. 610.

tapis, couvertures de voyage, bagages, effets personnels, carrosseries supplémentaires et appareils de radio à la fois émetteurs et récepteurs et leurs accessoires) et résultant de toute autre cause que la collision avec un autre objet, en mouvement ou stationnaire, ou le capotage.

Les bris de glaces et les pertes causées par des projectiles, chutes d'objets, incendies, vols, explosions, tremblements de terre, ouragans, grêle, eau, inondations, vandalisme, émeutes ou agitations populaires ne seront pas considérés comme des pertes résultant de collision ou de capotage.[3]

In summary, damage to the automobile resulting from the action of water was an insured risk. Collision, in general, "avec un autre objet en mouvement ou stationnaire" was excepted as a cause of damage for which the insurer would be responsible. By the terms of the policy, the insurer was prevented from contending that contact with the water was a collision.

The fundamental claim of the plaintiff was that the cause of the damage to the automobile was a result of the action of water, which comes within the coverage of the policy. This was substantiated by several subsidiary arguments. Collision with the niggerhead was a mere "effleurement", not a collision within the meaning of the policy. On this point, *Sowards v. London Guarantee and Accident Company*[4] was cited in support. Further, the water was an intervening cause which broke the chain of causation commencing with the attempt to avoid collision with the truck. Finally, the object of the enumeration of special risks covered was to resolve any possible ambiguity arising out of the scope of the word 'collision' in the favour of the insured. It is a basic rule of interpretation of contracts that an exception to the general rule must be restrictively interpreted, *i.e.*, not stretched by analogy beyond its normal meaning.

The defendant company countered that the damage to the vehicle was a direct result of collision, and as such excluded from coverage under the policy in virtue of the clause of exoneration of responsibility. *Leyland Shipping Company Limited v. Norwich Union Fire Insurance Society Limited*,[5] the leading case, and *Sin Mac Mines Limited v. Hartford Fire Insurance Company*[6] were cited in support. A secondary or alternate argument put forward on behalf of the defendant was that the damage suffered in attempting to avoid the insured event was analogous to damage sustained from the insured event itself. *Canadian Rice Mills Ltd. v. Union Marine General Insurance Company*[7] held that damage sustained as a result of attempting to avert damage by the perils of the sea, the insured risk, was covered.

In the court of first instance, Mr. Justice Smith of the Superior Court sitting in Montreal, in a judgment rendered November 18, 1959,[8] held that the plaintiff-insured, La Compagnie Chimique Franco-Américaine, had failed to establish

[3] *Ibid.*, p. 610.

[4] [1923] S.C.R. 365.

[5] [1918] A.C. 350.

[6] [1936] S.C.R. 598.

[7] [1941] 1 D.L.R. 1 (Privy Council).

[8] Unreported.

that the loss or damages claimed were the result of risks in respect of which insurance was provided by the policy. The cause of the loss was therefore held to be collision. The appeal to the Court of Queen's Bench, Appeal Side, was from this judgment. The basic fact found to be material in the Superior Court was that the automobile went over the side of the wharf in an endeavour to avoid collision with the truck. Collision and upset (capotage) were not risks insured under the policy.

The Court of Queen's Bench, affirmed the decision of the Superior Court by holding that the 'cause efficiente' of the loss of the automobile was collision with the niggerhead. The opinion of Mr. Justice Bissonnette rested on the following facts held to be material. Collision with the niggerhead was not "un simple effleurement", as the plaintiff had suggested, but a "cause efficiente" which prevented the exercise of all control over the car. The inevitability of the consequences of plunging into the water as a result of collision with the niggerhead is implied. By corollary, collision with the niggerhead is therefore deemed to be collision within the meaning of the excepted cause of the policy. Secondly, while damage caused by water was a risk covered by the policy; for the insurer to be liable, it must be a "cause efficiente". The role of water in the loss was placed in the following perspective:

> Si l'action de l'eau ne fut que la suite, la conséquence d'une cause déjà existante, dont le mouvement avait été préalablement déclanché, cette eau, loin de jouer un rôle actif, n'a été qu'une cause indirecte, accidentelle, n'assurant en quelque sorte que les effets d'une cause immédiate, nécessaire, étrangère à sa présence dans le lit du fleuve.[9]

Hence, Mr. Justice Bissonnette, and the Court in so concurring with his opinion, appear to have denied any possibility of the water acting as an independent cause of damage, and consequently refused to allow the apportionment of damage or loss between that caused by collision and that caused by water. The Court has thus chosen one of the events as the fountainhead of all the damage inflicted on the automobile, which co-incidentally is an uninsured event, thus denying the liability of the insurer for any of the loss.

In reaching this conclusion, the Court has laid particular stress on the unity of events as a characteristic of the elusive concept of "cause efficiente". In the mind of the Court, the sequence of events from collision with the niggerhead to plunging into the water is similar to dropping a match into a keg of gunpowder. So instantaneously does the loss follow from the efficient cause that it is impossible to talk of events, but only of a single event. The learned judge emphatically rejected the plaintiff's suggestion that the effect of the niggerhead was merely to suspend momentarily the vehicle's plunge into the water. Had this been accepted, it would have removed collision with the niggerhead as the "cause efficiente". No resort was thought necessary to the defendant's secondary argument discussed above.

The interpretation of the automobile's contact with the niggerhead as constituting collision is well founded in Canadian jurisprudence, particularly

[9][1962] B.R. 608, at 612.

when the phrase "avec un autre objet, en mouvement ou stationnaire" expressly qualifies 'collision' in the terms of the policy.

The case of *Sowards v. London Guarantee and Accident Company*[10] was cited by the plaintiff. In that case Mr. Justice Anglin observed:

> However comprehensive the meaning to be given to the word 'object' it is quite certain that the coming together of the automobile and the highway, due to the upsetting of the former, was not an event which anybody would dream of describing as a collision. That word, in my opinion, is used in the policy in the sense in which it is ordinarily employed. Injury to the car sustained by its overturning owing to some defect in the roadbed was a risk which it was not intended to cover.[11]

However, the weak link in the insured's protection revealed by the *Sowards* case was later removed in collision policies by the inclusion of collision with either moving or stationary objects under the coverage. Moreover, the *Sowards* case has been frequently distinguished in jurisprudence.

In *Kliant v. Providential Assurance Company*,[12] a car, in attempting to avoid a collision, swerved off the road, struck a small boulder, and overturned in the ditch. Collision was defined as: "the meeting and mutual striking of two or more moving bodies or of a moving body with a stationary one".

It was held in *Austin v. Jordan*[13] that damage incurred by the rear of a car in contact with the cement shoulder of a bridge when the car struck a soft shoulder in the road was a result of collision.

The case of *MacDonald v. Guardian Assurance Company*[14] supported the proposition that damage caused to an automobile through hitting rocks and trees on a river embankment was the result of collision.

In the judgment of *Howard McLean v. Guardian Assurance Company*,[15] the *Sowards* case was distinguished and the *Austin v. Jordan* decision followed in holding that damages sustained by a truck hitting the embankment of a road constituted damages resulting from collision.

In the light of the aforementioned jurisprudence, therefore, there can be little doubt that the contact of the insured automobile with the niggerhead was a collision. Consequently, the interpretation given to the word 'collision' in the insurance policy under review by the Court was not an unnatural one since it did not exceed the limits established by jurisprudence. No ambiguity as to the meaning of collision existed to be interpreted in favour of the insured. The basic rule of interpretation that an exception to a general rule, here a general coverage for loss, should be interpreted restrictively, *i.e.*, not extended by analogy, was respected.

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[10] *Supra.*

[11] *Ibid.*, p. 372.

[12] [1925] 63 S.C. 7.

[13] [1931] 4 D.L.R. 292 (Supreme Court of Ontario).

[14] [1929] 1 D.L.R. 518 (Supreme Court of Nova Scotia).

[15] [1953] I.L.R. 1-098 (Supreme Court of Ontario).

The learned judge then proceeded to describe the collision as the "cause efficiente" of the loss, or the cause from which all losses to the automobile flowed. Before examining the conclusion that the collision was indeed *the* "cause efficiente", and the only one, of the damage, let us determine under the microscope of jurisprudence what qualities entitle collision to be described as *a* "cause efficiente". In so doing, we may discover the properties of a true cause in the context of the law.

The leading case on the theory of proximate cause is a decision rendered by the House of Lords in *Leyland Shipping Company Limited v. Norwich Union Fire Insurance Society Limited.*[16] A ship, the property of Leyland Shipping Co. Ltd., was insured for loss resulting from perils of the sea, but not against damage resulting from hostilities or enemy action. The ship was subsequently torpedoed by a German submarine, but managed to crawl into port. A storm arose. The harbour authorities, fearing the ship would sink thus blocking the port to other ships, ordered her removed from her safe mooring to a more precarious position. The ship was grounded in the transfer and sank. The House of Lords held that the damage was due to enemy action as the proximate cause. Several properties of proximate cause were emphasized in the various opinions of the members of the tribunal. In the words of Lord Shaw of Dunfermline, proximate cause is equated to "cause efficiente": "The cause which is truly proximate is that which is proximate in efficiency."[17]

To dispel any confusion over the role of chronological order in the selection of the proximate cause, Lord Shaw's comment on the matter has been quoted in numerous other leading judgments, *e.g. Boiler Inspection and Insurance Company of Canada v. Sherwin-Williams Company of Canada.*[18]

> 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.[19]

Lord Shaw describes another feature of the proximate cause in his subsequent reasoning: "The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold."[20]

Lord Dunedin, in a frequently quoted remark establishes a further criterion in the selection of proximate cause — the quality of dominance:

> The solution will always lie in settling as a question of fact which of the two causes was what I shall venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two.[21]

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[16]*Supra.*

[17]*Supra*, p. 369.

[18][1951] A.C. 319; [1950] S.C.R. 187.

[19]*Supra*, 369.

[20]*Supra*, p. 371.

[21]*Supra*, p. 363.

By way of summary of the doctrine of proximate cause, the following passage from Welford, *Accident Insurance*,[22] 2nd ed., was cited by Locke, J. in the Supreme Court judgment in the *Boiler Inspection and Insurance Company* case:

> The operation of the doctrine of proximate cause is not affected by the number of causes which may intervene between the peril and the loss. Thus, a scratch may produce septicaemia, which develops into septic pneumonia resulting in death; nevertheless the death is proximately caused by the scratch. In these cases, though the loss is not the immediate result of the operation of the peril upon the subject matter of insurance, there is, nevertheless no break in the chain of causation, which leads, through a succession of causes, directly from the peril to the loss. They are so intimately connected the oue with the other, that but for the operation of the peril, the loss would not have happened.[23]

Thus the jurisprudence has suggested several definite criteria or properties to be associated with proximate or efficient cause. Dominance in relation to other causes, continuity of effect in other subsequent events before the loss, the event as a unity, and efficiency are emphasized as positive qualities, while chronological order is not necessarily a relevant factor. Insofar as collision with the niggerhead possesses these qualities, Mr. Justice Bissonnette has termed it the "cause efficiente" of the loss of the automobile.

We now come to the final consideration of this comment. It is suggested that it is open for the courts to interpret the facts in such a fashion as to hold that there were two "causes efficientes" operating upon the same object to cause the total loss, each carving out its direct path to the loss. Is the Court bound in law to choose from two causes, each possessing the properties to qualify it as a "cause efficiente", only one to which legal effect will be attached? Or may the Court find concurrent proximate causes at work upon the insured object, perhaps from different directions and not along the same track? In other words, can the Court apportion damages resulting from each 'substantial'[24] cause of the loss? The jurisprudence is not entirely clear since the judgment frequently turns upon an interpretation of the facts of a particular case.

A leading case in a line of jurisprudence dealing with the interaction of fire and explosion, where one has been an insured event and the other excepted, is *Hobbs v. The Guardian Fire and Life Assurance Company of London*.[25] Loss occurred when a match was dropped in gunpowder where the policy coverage was for fire only. Gwynne, J. of the Supreme Court of Canada comments on the interaction of causes resulting in the total loss:

> And can they separate the loss so as to claim exemption from liability for so much as is attributable directly to fire subsequent to the explosion, and the answer, in my opinion, is that the whole loss of damage is loss by fire within the contract of indemnity, and that the defendants are liable for the whole.[26]

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[22]Welford, *The Law Relating to Accident Insurance*, 2nd ed. (1932), p. 179; see also pp. 174-186.

[23][1950] S.C.R. 187, at 208.

[24]See William Conant Brewer, Jr., "Concurrent Causation in Insurance Contracts" (1961) 59 Mich. L. Rev. 1142 et seq.

[25](1887) 12 S.C.R. 631.

[26]*Ibid.*, p. 642.

In *Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Insurance Company*,[27] the insured, a manufacturer of explosives, was covered for fire, but not explosion. A fire started which later ignited the T.N.T. on the premises, and the insured buildings, whether by explosion or fire, were almost totally destroyed. The insured claimed the whole amount of the damage done, but the Court held the insurer liable for damage caused by fire only. In so doing, the Privy Council confirmed the Quebec Court of Queen's Bench's order of an enquiry into the loss due respectively to fire and explosion.

However, the *Hobbs* case may be distinguished from the foregoing. In the former, the action of the two causes was instantaneous, the match and the keg of gunpowder, so that the fire and the explosion could be described as a single event. In the latter instance, the fire and the explosion were clearly two distinguishable events, if only on the fact that the explosion of the T.N.T. occurred ten minutes after the commencement of the fire.

The Supreme Court of Canada has held that where the coverage is for loss by fire, and the excepted cause is explosion, the insurer is liable for damages caused by the fire only. While attempting to ascertain the fuel remaining to power an oil tanker, a crewman lit a match over the fuel storage tank igniting vapours which caused an explosion and scuttled the ship.[28] In the comparatively recent case of *Boiler Inspection and Insurance Company v. Sherwin-Williams Company of Canada Ltd.*,[29] the insurer of damage caused by excess pressure in the boiler was held liable for all damages resulting from the bursting of the tank permitting the escape of fumes which caused an explosion, the principal instrument of damage. In the judgment of the Privy Council, Lord Porter states:

> . . . that the incidents from the moment when the first flash was observed until the ultimate explosion took place were all part of one momentary event . . . Each was a part of the same event, the ignition being the first and the explosion the final stage of the disaster.[30]

In holding the insurer liable for damage caused by an event, the jurisprudence appears to have tested the cause for its unity, *i.e.*, whether it was possible to extract more than one substantial event from the series of incidents.

In applying this jurisprudence to the case under comment, it is suggested that the collision with the niggerhead was responsible only for its portion of the total loss, estimated by the insurers themselves to be $2156. Similarly, it is possible to describe the action of the water as inflicting its share of the total loss, independently of collision. Had the automobile toppled over into a dry river bed, damages sustained would have been limited to that suffered as a result of contact with the niggerhead and the river bed, for which the insurer in this case would not be liable. Unlike this hypothetical situation, the action of water was an additional force of destruction, and an insured event.

[27][1921] 1 A.C. 303.

[28][1936] S.C.R. 598; *Sin Mac Lines* case, *supra*.

[29][1951] A.C. 319, confirming [1950] S.C.R. 187.

[30]*Ibid.*, at p. 337.

It is therefore respectfully suggested that the Court could have ordered an estimate prepared of the damage caused by collision and that caused by water.

This alternative is based not upon a different view as to the law on this matter, but upon a different interpretation of the facts. It demonstrates that even a judicious application of approved criteria does not entirely remove the choice which the judge as a human being must make between alternative solutions, each capable of being supported in strict law. Standards such as dominance, efficiency, unity, and continuity can increase the predictability of the insurer's liability by confining this subjective factor within certain limits. Yet they can never transcend their function as guides to become invariably reliable criteria. This sentiment appears to be the motivation of the following opinion expressed by Lord Dunedin in the *Leyland Shipping* case:

> My Lords, we have had a large citation of authority in this case, and much discussion on what is the true meaniug of causa proxima. Yet I think the case turns on a pure question of fact to be determined by common sense principles.[31]

In exempting the insurer from liability, Mr. Justice Bissonnette is secured by a learned appreciation of the criteria established over the years by the jurisprudence. Notwithstanding the possibility of a different conclusion of fact being drawn from the application of the same criteria, the judgment of the Court has reaffirmed both the traditional properties of proximate cause and the reality that the law must allow for the discretion of the judiciary in applying the law.

[31] *Supra*, at p. 362.