SERIAL AND INDEPENDENT CONCURRENT CAUSES IN INSURANCE LAW

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Until the decision in *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*,[1] the element of causation in insurance law, particularly in the context of insuring provisions, revolved largely around the concept of proximate cause, meaning the effective and dominant cause of the loss. Since that decision, the focus has shifted to a consideration of the impact of concurrent causes, both in regard to insuring agreements and exclusion clauses. The significance of concurrent causes has long been a matter of note, but it is only fairly recently, with the decision in *Derksen v. 539938 Ontario Ltd.*,[2] that our high court has cleared away some of the confusion attached to that issue.

An area that has not, however, received the attention it merits is the distinction between serial and independent concurrent causes. Serial causes are those where each is a consequence of the one preceding it; where, in other words, there is a causal connection not only between each cause and the loss, but also among the various causes. This is usually described as a "chain of causation". Independent causes, on the other hand, are unrelated. The fact that they operate simultaneously to produce the loss is a mere co-incidence of time and situation. There is no causal connection between independent concurrent causes; the causal connection exists only between each of those causes and the loss. A rough analogy from the world of electricity is the difference between circuits connected in series and in parallel.

Both serial and independent concurrent causes operate concurrently in effect (that is, in producing the loss), but independent concurrent causes can also operate concurrently in time, as opposed to the "arrow of time" sequential operation of serial causes. The temporal aspect of concurrency is not a matter of significance; the important consideration is concurrency in factual causation.

While the concept of proximate cause is no longer, in our view, a matter of critical importance, its substance lives on in the principle of

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1. [1990] 1 S.C.R. 814, 69 D.L.R. (4th) 112, [1990] 3 W.W.R. 505.
2. [2001] 3 S.C.R. 398, 205 D.L.R. (4th) 1, 153 O.A.C. 310.

intervening cause. An intervening cause is one that satisfies two criteria: (a) it is something other than a normal incident of the risk created by an earlier cause, and (b) it so overshadows that other cause that it is treated as being the sole true and effective cause of the loss. An intervening cause may therefore be viewed as an extreme form of proximate cause.

After reference to the general rules of interpretation of insurance policies, this article will consider the concept of proximate cause, and then concurrent causes, and in particular the distinction between serial and independent concurrent causes. The question whether a "but for" cause is sufficient will then be addressed, as well as some incidental matters.

1. The Importance of Causation

In tort law, causation is an essential element of the cause of action because the common law has imposed it on the basis of common sense and policy considerations. Insurance policies are contracts. The fundamental consideration in contract law is the intent of the parties as expressed by the language employed in the contract, filtered through the lenses of reasonable expectations and the other general principles applicable to the interpretation of insurance policies. Causation is an essential element in regard to coverage for, and the exclusion of, both first and third party claims to the extent that the terms of the policy reflect the intention of the parties to make it so.

The dictionary meaning of "cause" is "a person or thing that gives rise to an action, phenomenon, or condition".[3] "[T]he best definition is 'that which produced an effect'".[4] A cause is not necessarily an event; it is "something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening".[5] The "but for" test of causation "serves as an exclusionary test. Its purpose is to eliminate from consideration factually irrelevant causes . . . If the but for test is not met then the injury would have occurred regardless of the act or omission in question."[6]

In tort law, causation is intended to establish the "substantial connection",[7] the "sufficient link",[8] between the wrongdoing and the

3. *New Oxford English Dictionary* (New York: Oxford University Press Inc., 2001).
4. *Krane Service Ltd. v. American Home Assurance Co.* (1986), 21 C.C.L.I. 182 at para. 8, 50 Sask. R. 317, [1987] I.L.R. ¶1-2151 (Sask. C.A.).
5. *Axa Reinsurance (U.K.) Plc. v. Field*, [1996] 1 W.L.R. 1026 at p. 1035 (H.L.).
6. *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 at para. 25, 217 D.L.R. (4th) 145, 163 O.A.C. 129 (C.A.).

injury. In an insurance claim, "if no connection needs to be established then just about everything would be covered under a policy".[9] Even in an all-risk policy, it may be necessary to ascertain the cause of the damage to determine whether it comes within an exclusion clause,[10] or whether the events or circumstances giving rise to the loss were fortuitous in nature and resulted in a loss that occurred within the temporal term of the policy.[11]

2. General Rules of Interpretation of Insurance Policies

The fundamental consideration in the interpretation of any contract provision, including those in insurance policies, is "the true intent of the parties at the time of entry into the contract".[12] Absent issues of incapacity, fraud or legislative mandates or prohibitions, the various rules that have been adopted should serve only as guides for determination of that "true intent", which is to be gathered primarily from the words used in the contract.[13] Two corollaries of that basic principle are, first, that the plain meaning of policy language should be respected and enforced,[14] although some

7. *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289 at p. 299, [1990] 2 S.C.R. 311, 107 N.B.R. (2d) 94; *Hock (Next Friend of) v Hospital for Sick Children*, [1998] O.J. No. 336 (QL) at para. 116, 106 O.A.C. 321 *sub nom. Hock v. Hospital for Sick Children* (C.A.).
8. *Lurtz v. Duchesne*, [2003] O.J. No. 1540 (QL) at para. 164 (S.C.J.), vard 194 O.A.C. 119 (C.A.).
9. *PrairieFyre Software Inc. v. St. Paul Fire & Marine Insurance Co.* (2003), 66 O.R. (3d) 331 at para. 48, 3 C.C.L.I. (4th) 295 (S.C.J.), affd 71 O.R. (3d) 712, 188 O.A.C. 189, 10 C.C.L.I. (4th) 175 (C.A.).
10. *Strata Plan NW2580 v. Canadian Northern Shield Insurance Co.* (2006), 36 C.C.L.I. (4th) 109 at para. 16, 55 B.C.L.R. (4th) 176, [2006] I.L.R. ¶1-4486 (B.C.S.C.).
11. *Don-Rich Foods Ltd. v. Citadel General Assurance Co.* (2003), 5 C.C.L.I. (4th) 53 at para. 69 (Man. Q.B.).
12. *Consolidated-Bathurst Export Ltd. v Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at para. 26, 112 D.L.R. (3d) 49, [1980] I.L.R. ¶1-1176.
13. *Dunn v. Chubb Insurance Company of Canada*, 2009 ONCA 538 at paras. 32-33 (C.A.); *Dumbrell v. Regional Group of Companies Inc.* (2007), 279 D.L.R. (4th) 201 at paras. 47-56, 85 O.R. (3d) 616, 220 O.A.C. 64; *Oakleaf v. Home Insurance Ltd.*, [1958] O.R. 565 at para. 9 (C.A.); *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Co-operators General Insurance Co.* (2009), 73 C.C.L.I. (4th) 157 at para. 71, [2009] I.L.R. ¶1-4844 (Ont. C.A.). This general rule is subject to the vagaries of the parol evidence rule.
14. *RBC Travel Insurance Co. v. Aviva Canada Ltd.* (2006), 82 O.R. (3d) 490 at paras. 10-11, 274 D.L.R. (4th) 348, 215 O.A.C. 132 (C.A.); *Stuart v. Hutchins* (1998), 6 C.C.L.I. (3d) 100 at paras. 29-30, 164 D.L.R. (4th) 67, 40 O.R. (3d) 321 (C.A.); *Farmer v. Great West Life Insurance Co.* (1985), 49 O.R. (2d) 49

decisions have applied the *caveat* "unless to do so would defeat the main object of the contract or virtually nullify the coverage",[15] and second (the mirror image of the first), that these rules of interpretation should be applied only where there is a genuine ambiguity in the policy language.[16] "Ambiguities should not be judge-made; they should be apparent from a reasonable reading of the policy."[17] A sub-corollary is that words of limitation should not be read into exclusion clauses,[18] although that has been done.[19]

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at para. 14, 14 D.L.R. (4th) 604, 10 C.C.L.I. 217 (C.A.). This reflects the principle that "certainty in contract is an important policy value underlying the construction of contracts": *Plan Group v. Bell Canada* (2009), 179 A.C.W.S. (3d) 40, 2009 ONCA 548 at para. 31 (C.A.).

15. *Kohanski v. St. Paul Guarantee Insurance Co./Cie d'assurance St. Paul Garantie* (2006), 32 C.C.L.I. (4th) 234 at para. 38, 78 O.R. (3d) 684, 207 O.A.C. 13 *sub nom. Kohanski v. St. Paul Guarantee Insurance Co.* (C.A.); *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada* (2003), 50 C.C.L.I. (3d) 107 at paras. 130 and 209, [2003] I.L.R. ¶1-4212 (Ont. S.C.J.); *Excel Cleaning Service v. Indemnity Insurance Co. of North America*, [1954] 1 S.C.R. 169; *Weston Ornamental Iron Works Ltd. v. Continernal Insurance Co.*, [1981] I.L.R. 1-1430 (Ont. C.A.); *Foodpro National Inc. v. General Accident Assurance Co. of Canada* (1988), 63 O.R. (2d) 288*n*, 49 D.L.R. (4th) 480*n*, [1988] I.L.R. ¶1-2341 (C.A.), leave to appeal to S.C.C. refused [1988] 2 S.C.R. vii. A somewhat wider, and we believe unjustified, approach was taken in *PrairieFyre Software, supra*, footnote 9, at paras. 31-32, where it was said that a literal meaning will not be applied if it produces an unjust result. Had the qualifier "patently" been added before "unjust", we would agree. Otherwise, the court is given altogether too much latitude to interfere with the parties' freedom to contract and the responsibility of each party to protect its interests is eroded.
16. *Hope v. Canadian General Insurance* (2002), 37 C.C.L.I. (3d) 1 at para. 13, 212 D.L.R. (4th) 247, 158 O.A.C. 311 (C.A.); *Jordon v. CGU Insurance Co. of Canada*, [2004] I.L.R. 1-4293 at para. 19, 10 C.C.L.I. (4th) 149 (B.C.S.C.); *Boliden Ltd. v. Liberty Mutual Insurance Co.* (2008), 90 O.R. (3d) 274 at para. 30, 235 O.A.C. 126, 62 C.C.L.I. (4th) 45 (C.A.); *McLean (Litigation Guardian of) v. Jorgenson* (2005), 78 O.R. (3d) 308 at para. 5, 262 D.L.R. (4th) 556, 205 O.A.C. 227 (C.A.); *Lloyd's, London, Non-Marine Underwriters v. Scalera*, [2000] 1 S.C.R. 551 at para. 71, 185 D.L.R. (4th) 1 *sub nom. Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 5 W.W.R. 465 *sub nom. Sansalone v. Wawanesa Mutual Insurance Co.* A provision is ambiguous if it is reasonably susceptible of more than one meaning: *Dunn, supra*, footnote 13, at para. 34.
17. *RBC Travel Insurance, supra*, footnote 14, at para. 10; *Stuart, supra*, footnote 14, at para. 34. See *Algonquin Power, supra*, footnote 15, at paras. 168-71.
18. *Ford Motor Co. of Canada v. Prudential Assurance Co.*, [1959] S.C.R. 539 at paras. 15-16; *Ramsay v. Voyageur Insurance Company*, [1998] I.L.R. 1-3596, 176 W.A.C. 59, 51 B.C.L.R. (3d) 213 (C.A.); *Goodman v. Royal Insurance Co. of Canada* (1997), 43 C.C.L.I. (2d) 216 at para. 37, [1997] 8 W.W.R. 69, 149 W.A.C. 20 (Man. C.A.), leave to appeal to S.C.C. refused 167 W.A.C. 153*n*.

Another consequence of those general rules, one that is counterintuitive and might be described as stretching the envelope, is that the same word or term found in coverage and exclusion provisions can be interpreted differently to give effect to the principle that coverage provisions should be interpreted broadly and exclusion clauses narrowly.[20]

While courts must have some discretion at least in the interpretation of contract provisions, for the simple reason that few such provisions are absolutely clear and unambiguous, the general and broad scope of that discretion has led to the comment "In this type of litigation the court is always faced with lines of cases which can support each side",[21] and to the concern that the insurer will be criticized for its choice of language regardless of how careful it may have been in making that choice.[22]

An example of the rules being applied in a technically correct manner, but one that almost certainly defeated the original intention of the parties, was a claim for damage where water from a garden hose that had been left running found its way into the insured's basement. The insuring agreement provided coverage for damage by "escape" of water from a "plumbing system". The water system to which the hose was attached was part of the plumbing system of the house and, "on a very broad interpretation", the water "escaped" from a "plumbing system" and the claim came within the insuring agreement.[23]

Some helpful comments in the context of causation language in insurance policies are:

> 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.[24]

19. For example, exclusions for "settling" and "earth movement" were held in some decisions to apply only to naturally occurring phenomena or those due to natural causes. In others, that restriction was not imposed. See *Engle Estate v. Aviva Insurance Co. of Canada* (2008), 68 C.C.L.I. (4th) 108 at paras. 17-21, [2009] 2 W.W.R. 150, 98 Alta. L.R. (4th) 191 (Q.B.); *Strata Plan NW2580*, *supra*, footnote 10, at paras. 32-49. A number of related decisions are referred to in those cases.
20. *Djepic v. Kuburovic* (2006), 80 O.R. (3d) 21 at paras. 38-43, 263 D.L.R. (4th) 709, 206 O.A.C. 306 (C.A.); *Derksen, supra*, footnote 2, at paras. 51-52.
21. *Chandra v. Canadian Northern Shield Insurance Co.* (2006), 36 C.C.L.I. (4th) 242 at para. 35, [2006] I.L.R. ¶1-4516 (B.C.S.C.).
22. *Ibid.*, at para. 44.
23. *Lowe v. Security National Insurance Co.*, 2006 CarswellAlta 1225 at paras. 6-7 (Prov. Ct.).

> As to injury resulting from a cause described in an excluding clause, it is the expressed intention of the parties which must govern, but that rule must be applied sensibly to give effect to and not to defeat the parties' intention.[25]
>
> If there is ambiguity, and two reasonable competing interpretations could apply, the interpretation most favourable to the insured must be applied. Generally, the contract should be interpreted in a manner that favours common sense and accords with commercial reality.[26]
>
> The doctrine of proximate cause . . . is based upon the presumed intention of the parties as expressed in the contract . . .[27]

3. Proximate Cause — Historically

In 1949, the Supreme Court of Canada said "The doctrine of proximate cause is common to all branches of insurance."[28] Until fairly recently, the concept of "proximate cause" was a highly important, even critical, consideration, particularly in regard to the question whether a claim came within the coverage provisions in the policy.

The proximate cause is that which is "in substance" the cause.[29] It is the "effective and predominant" cause,[30] the cause that is "proximate in efficiency",[31] "the real effective cause of what has happened",[32] "the true effective cause".[33] It is not necessarily the cause closest in time to the occurrence of the loss.[34] It does not have to

24. *Leyland Shipping Co. Ltd. v Norwich Union Fire Insurance Society Ltd.*, [1918-19] All E.R. Rep. 443 at p. 453 (H.L.).
25. *Canadian Bank of Commerce v. London & Lancashire Guarantee & Accident Co.*, [1958] O.R. 511 at para. 34 (C.A.).
26. *Algonquin Power*, *supra*, footnote 15, at para. 129.
27. *Oakleaf, supra*, footnote 13, at para. 9, quoting from A.W. Baker Welford and W.W. Otter-Barry, *The Law Relating to Fire Insurance,* 4th ed. (London: Butterworths, 1948).
28. *Sherwin-Williams Co. v. Boiler Inspection & Insurance Co.*, [1950] S.C.R. 187 at para. 70, affd *infra*, footnote 29. Other notable decisions referring to proximate cause were *Hall Brothers Steamship Co. Ltd. v. Young*, [1939] 1 K.B. 748 at p. 762; *Canadian Bank of Commerce*, *supra*, footnote 25, at para. 34; *Oakleaf*, *supra*, footnote 13; *Voisin v. Royal Insurance Co. of Canada* (1988), 66 O.R. (2d) 45 at para. 24, 53 D.L.R. (4th) 299, 29 O.A.C. 227 (C.A.).
29. *Boiler Inspection and Insurance Company of Canada v Sherwin-Williams Company of Canada*, [1951] A.C. 319 at pp. 334 and 339.
30. *Yorkshire Dale Steamship Co. v. Minister of War Transport*, [1942] A.C. 691 at p. 698 (H.L.); *Wayne Tank and Pump Co. Ltd. v Employers Liability Assurance Corporation Ltd.*, [1974] Q.B. 57 at p. 67 (C.A.).
31. *Leyland Shipping*, *supra*, footnote 24, at p. 452.
32. *Ibid,* at p. 453; *Collier v. Insurance Corp. of British Columbia* (1995), 30

be "the immediate instrument of destruction".[35] Synonyms that have been employed for "proximate cause" are "immediate, direct, real, effective, efficient";[36] "dominant, substantial, efficient, direct, 'in substance' the cause, effective and predominant, dominant or determining";[37] "*causa causans*".[38]

In the law of tort, causation is "essentially a practical question of fact which can best be answered by ordinary common sense".[39] That principle has similarly been adopted with regard to claims made under insurance policies. "Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician would understand it"[40] and[41]

> Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the 'common-sense' cause . . . Each case must be judged in the light of its own facts and by resorting, not to the refinements of the philosophical doctrine of causation, but to the commonplace tests which the ordinary businessman conversant with such matters would adopt.

These are some examples of proximate cause:

a. A widespread power failure disabled the refrigeration system

C.C.L.I. (2d) 69 at para. 79, 88 W.A.C. 81, 100 B.C.L.R. (2d) 201 (C.A.), leave to appeal to S.C.C. refused 111 W.A.C. 159*n*.

33. *Leyland Shipping, ibid*., at p. 453.
34. *942325 Ontario Inc. v. Commonwealth Insurance Co*. (2006), 81 O.R. (3d) 399 at para. 3, 207 O.A.C. 382, 32 C.C.L.I. (4th) 163 (C.A.); *Yorkshire Dale Steamship*, *supra*, footnote 30, at p. 698; *Boiler Inspection and Insurance Company, supra*, footnote 29, at p. 340; *Shea v. Halifax Insurance Co*., [1958] O.R. 458 at para. 13 (C.A.); *Canadian Bank of Commerce, supra,* footnote 25, at para. 36.
35. *Krane Service Ltd., supra*, footnote 4, at paras. 9-10.
36. *Willemse v. Co-operators General Insurance Co*., [2000] I.L.R. 1-3780, 15 C.C.L.I. (3d) 112 (B.C.S.C.)
37. *Oakleaf, supra*, footnote 13, at para. 19.
38. *Sherwin-Williams Co*., *supra*, footnote 28.
39. *Snell, supra*, footnote 7, at p. 300; *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 at para. 16, [1996] 3 S.C.R. 458, [1997] 1 W.W.R. 97; *Hock, supra*, footnote 7, at para. 120.
40. *Yorkshire Dale Steamship, supra*, footnote 30, at p. 706; *Krane Service*, *supra*, footnote 4, at para. 7; *Wayne Tank*, *supra*, footnote 30, at p. 68; *Boiler Inspection*, *supra*, footnote 29, at pp. 333, 334 and 339. *Leyland Shipping*, *supra*, footnote 24, at p. 449: "I think the case turns on a pure question of fact to be determined by common-sense principles. What was the cause of the loss of the ship? I do not think the ordinary man would have any difficulty in answering. She was lost because she was torpedoed."
41. *Oakleaf*, *supra*, foonote 13, at paras. 10 and 12, quoting from *Becker Gray & Co. v. London Assce. Co*., [1918] A.C. 101 and *Yorkshire Dale Co. v. Minister of War Transport*, [1942] A.C. 691.

in a commercial establishment, with the result that perishable items were lost or damaged. The electrical blackout, and not the lack of refrigeration, was the proximate cause of the loss.[42]

b. A crane driven along the highway fell into a ditch when the driver lost control because the steering mechanism failed due to the uncoupling of a bolt. The proximate cause of the loss was the bolt failure, not the fall into the ditch.[43]
c. Internal pressure in a tank blew off the door, with the result that gas escaped. When combined with air, the gas formed an explosive mixture. Something caused the mixture to ignite and explode. A fire followed the explosion. The "tearing asunder" of the tank, and not the ignition of the released gas, was the proximate cause of the loss (although the part of the damage attributable to the fire was excluded).[44]
d. Heating oil was delivered from a tank. The oil was being heated by a flame in a fire tube to reduce the viscosity so that it would flow. The serviceman failed to check the oil level with the result that there was insufficient oil in the tank to absorb the heat from the flame and an explosion occurred. The proximate cause of the loss was the flame, not the explosion caused by the flame.[45]
e. Equipment that was defectively designed was installed in a factory. It was switched on and left unattended overnight without having been tested. It caught fire the next morning. The supply of faulty equipment, and not the failure to test it, was the proximate cause of the loss.[46]
f. A windstorm blew down trees, which then caused a landslide that damaged a building. The windstorm was the proximate cause of the loss.[47]
g. A windstorm caused a ladder to break a window. Rainwater flowed into the building through the broken window. The windstorm was the proximate cause of the loss (although the overflow or flood was said to be the "proximate cause" in so far as the exclusion for those perils was concerned).[48]
h. Excessive soil was placed on property adjacent to the insured's building. The load caused earth movement, which in turn

42. *942325 Ontario Inc.*, *supra*, footnote 34.
43. *Krane Service Ltd.*, *supra*, footnote 4.
44. *Boiler Inspection*, *supra*, footnote 29.
45. *Shea*, *supra*, footnote 34.
46. *Wayne Tank*, *supra*, footnote 30.
47. *Aven v. Western Union Insurance Co.*, [2000] I.L.R. 1-3781, 13 C.C.L.I. (3d) 136 (B.C.S.C.)
48. *Oakleaf*, *supra*, footnote 13.

caused structural damage to the building. The proximate cause of the loss was the excessive load and not the earth movement.[49]

i. A marina sold a stored boat without the owner's consent to an innocent third party. The owner's action to recover the boat from the third party failed. The marina's wrongdoing, and not the transfer of valid title to the third party, was the proximate cause of the loss.[50]

j. A pressure valve in a swimming pool did not open properly, and the force of groundwater caused the pool to lift. The proximate cause was the force of the groundwater, not the malfunction of the valve.[51]

k. An inebriated person fell and was injured. The proximate cause of the injury was his abuse of alcohol and not the fall.[52]

l. A vessel was torpedoed during war. It was brought into a harbour for repairs, but bad weather caused it to bump against the quay. The authorities feared it would sink in the berth and directed its removal to an outer berth. Tidal actions ultimately wrecked the vessel. The proximate cause of the loss was the torpedoing of the vessel, not any of the subsequent events.[53]

m. A ship collided with a pilot boat off the coast of France through no fault of the ship's officers or crew. French law provided that damage to the pilot boat in such circumstances was payable by the ship, regardless of the lack of fault on the ship's part. The proximate cause of the loss was the French law, not the collision.[54]

4. Proximate Cause — Still a Critical Concept?

In the *C.C.R. Fishing Ltd.* decision,[55] the Supreme Court of Canada called into question the continuing importance of the proximate cause concept, particularly in relation to coverage

49. *Strata Plan NW2580*, *supra*, footnote 10.
50. *M.J. Jones Inc. v. Royal & SunAlliance Insurance Co. of Canada* (2004), 71 O.R. (3d) 553, 187 O.A.C. 334, 10 C.C.L.I. (4th) 164 (C.A.).
51. *Willemse*, *supra*, footnote 36. A questionable decision in our view because the authorities have generally considered the initiating cause — the cause that sets in motion the chain of causation that ultimately results in the loss — to be the proximate cause.
52. *Ramsay*, *supra*, footnote 18.
53. *Leyland Shipping*, *supra*, footnote 24.
54. *Hall Brothers Steamship Co. Ltd.*, *supra*, footnote 28.
55. *Supra,* footnote 1.

clauses.[56] Until *Derksen,* however, *C.C.R. Fishing* for the most part went unnoticed as to its treatment of the concept of proximate cause.

McLachlin J. said the following in *C.C.R. Fishing*:[57]

> 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. Generally speaking, the authorities do not follow such a course. I do not read s. 56 of the Insurance (Marine) Act as limiting the cause of the loss to a single peril. Realistically speaking, it must be recognized that several factors may combine to result in a loss at sea. It is unrealistic to exclude from consideration any one of them, provided it has contributed to the loss. What is essential in order to establish that the loss is "fortuitous" is an accident caused by the intervention of negligence, or adverse or unusual conditions without which the loss would not have occurred.

While that statement expressly downplays the significance of proximate cause, it might also be seen as a suggestion that, at least in so far as marine policies are concerned, a "but for" cause will suffice to act as a proximate cause. That view was repeated in later passages in *C.C.R. Fishing* where there were further express references to causes "without which the loss would not have occurred", or similar language, as being sufficient to satisfy the causation requirement in the policy being considered.[58] More on "but for" causes later. As indicated, subsequent decisions continued to apply the proximate cause concept.[59]

The question whether proximate cause remained a critical concept was revisited in *Derksen*. The loss there was the result of two concurrent causes: negligent clean-up of a work site and negligent loading of a motor vehicle. The insurance policy excluded coverage for loss arising from the use or operation of a motor vehicle. One of the issues considered was the question whether coverage was excluded on the basis that the proximate cause of the loss was the use or operation of a motor vehicle.

Relying on *C.C.R. Fishing,* Major J. said: "[T]he utility of the 'proximate cause' analysis with respect to insurance policies is questionable . . . [I]t is undesirable to attempt to decide which of the

56. Proximate cause has historically been a lesser issue in regard to exclusion causes.
57. *Supra,* footnote 1, at para. 26.
58. *Ibid*., at paras. 27-28 and 32-33.
59. *Collier*, *supra*, footnote 32, at para. 81; *Canevada Country Communities Inc. v. Gan Canada Insurance Co*. (1999), 10 C.C.L.I. (3d) 217 at paras. 26-28, 204 W.A.C. 111, 68 B.C.L.R. (3d) 94 (C.A.); *Kellogg Canada Inc. v. Zurich Insurance Co*. (1997), 46 C.C.L.I. (2d) 233, [1997] I.L.R. ¶I-3479 (Ont. Ct. (Gen. Div.)); *Aven, supra*, footnote 47; *Willemse*, *supra*, footnote 36.

two concurrent causes was the 'proximate' cause."[60] Proximate cause was nevertheless an issue in at least one post-*Derksen* decision,[61] and the following statement was made in another: "[The] concern [regarding the utility of the proximate cause analysis] appears to be confined to cases of concurrent causation."[62] While that might appear to be a self-evident comment, its true meaning probably lies in the question whether the concept of proximate cause, in the sense of a strong causal connection, remains an important consideration, or whether a simple "but for" cause will suffice. That issue will be considered later.

5. Concurrent Causes — Coverage Provisions

Few losses can be attributed entirely to a single cause. In most cases two or more causes can properly be said to have been at play in the circumstances leading to the occurrence of the loss.[63] Even were proximate cause still an important concept, it is sometimes impossible to determine which of two or more concurrent causes should be described as the "proximate" cause.[64]

60. *Derksen*, *supra*, footnote 2, at para. 36. See also *Dawson Truck Repairs Ltd. v. Insurance Corp. of British Columbia* (2008), 62 C.C.L.I. (4th) 163 at para. 42, [2008] 8 W.W.R. 409, 430 W.A.C. 253 (B.C.C.A.). It should be noted, however, that the "Conclusion" paragraph in *Derksen* contained the following statement (at para. 37): "Nor was the use of the automobile the 'proximate cause' of the accident."
61. *942325 Ontario Inc.*, *supra*, footnote 34, at para. 3. See also *M.J. Jones Inc., supra*, footnote 50, at para. 5. In *Continental Insurance Co. v. Almassa International Inc.* (2003), 46 C.C.L.I. (3d) 206 (Ont. S.C.J.), the concept was treated as irrelevant even where an exclusion clause expressly excluded loss or damage "proximately caused" by delay, the term being found ambiguous (at paras. 104-108).
62. *Strata Plan NW2580, supra*, footnote 10, at para. 20.
63. The rationale for this view is expressed in *Canadian Bank of Commerce, supra*, footnote 25, at para. 35. In *Saskatchewan Wheat Pool v. Royal Insurance Co. of Canada* (1989), 43 C.C.L.I. 68, 64 D.L.R. (4th) 135, 79 Sask. R. 284 (C.A.), leave to appeal to S.C.C. refused 68 D.L.R. (4th) vii, Gerwing J.A. said (at para. 19): "The law recognizes reality in the concept of concurrent causation . . . To fail to do so would, in many instances, be ludicrous, and would constitute a return to a wholly mechanistic theory of liability in seeking to artificially isolate what are obviously, in reality, intermingled causal factors."
64. In *Board of Trade v. Hain Steamship Company Ltd.*, [1929] A.C. 534 (H.L.), the following was said (at p. 544): "[I]t is impossible to say that the negligence of either ship by itself was the proximate cause of the collision." In *Derksen,* the argument by one party that a particular cause was the "single dominant cause" of the loss was rejected (at paras. 30-31). In *Wayne Tank, supra*, footnote 30, the following was said (at p. 69): "I should prefer to say

The concurrent causes might be serial in nature,[65] or they might be truly independent concurrent causes, as was the situation in *Derksen*. Is coverage for the loss affected where one or more of those concurrent causes is not an excluded, but also not an insured, peril?

The response to that question is given in the following statement: "[I]t is no answer to a claim under a policy that covers one cause of a loss that the loss was also due to another cause that was not so covered."[66] That principle has been applied even where the insuring agreement required the loss to have been the result of an insured peril "directly and independently of all other causes". The involvement there of a non-covered peril that was found to be "no more than a *causa sine qua non* or a passive ally in the occurrence of the injury or loss" did not take the loss out of the insuring agreement.[67]

A different approach was suggested, but not taken, by Gerwing J.A. in the following passage:[68]

> Were it not for the law with respect to the interpretation of exclusion clauses, I would be much attracted to what appears to me as a common sense apportionment of liability. That is, a plaintiff in seeking to avail himself of a clause in an insurance contract must, as in all other contracts, place himself squarely within it or he has not met his onus as plaintiff. This concept would, in my view, be tempered by saying that the "cause" need not be a monolithic concept and indeed is, factually and legally, often composed of two or more factors. However, since the insurance company is, according to the law binding on us, able to avail itself of a more beneficial interpretation of "cause" in exclusion clauses, and has the ability to avoid liability if a "cause" thereunder is one of many, it seems to me the only appropriate way to interpret "cause" in the insuring agreement or inclusionary clause must be a similar one giving a parallel benefit to the insured.

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that unless one cause is clearly more decisive than the other, it should be accepted that there are two causes of the loss and no attempt should be made to give one of them the quality of dominance."

65. Or, as described in *Dawson Truck Repairs, supra*, footnote 60, at para. 22: "[M]echanical fracture, failure or breakdown can be a cause or an effect."
66. *Board of Trade*, *supra*, footnote 64, at p. 539. See also *Saskatchewan Wheat Pool, supra*, footnote 63, at paras. 25-33; *Lizotte v. Traders General Insurance Co.* (1984), 10 C.C.L.I. 222 at para. 58, [1985] 1 W.W.R. 595, [1985] I.L.R. ¶1-1874 (B.C.S.C.), supp. reasons 10 C.C.L.I. 237, [1985] I.L.R. ¶1-1967, affd 20 C.C.L.I. 320, [1986] 3 W.W.R. 546, 20 C.C.L.I. 320, [1986] I.L.R. ¶1-2076 (C.A.); *M.J. Jones Inc.*, *supra*, footnote 50, at paras. 4-6.
67. *Voisin, supra*, footnote 28, at paras. 15-16.
68. *Saskatchewan Wheat Pool, supra*, footnote 63, at para. 33. The same approach was referred to in *Lizotte*, *supra*, footnote 66, at paras. 33-34, although one of the independent concurrent causes there was an excluded, rather than a non-covered, cause (see para. 41).

The roadblock created by the lack of symmetry between the suggested proportional approach to coverage, and the non-proportional exclusion of the entire loss where only one of several concurrent causes was an excluded cause, has, however, since been overtaken by the decision in *Derksen*. The change in the treatment of exclusion clauses resulting from that decision is described below. That change has not yet, however, resulted in any revisit to the view expressed by Gerwing J.A. We believe that that approach should now be adopted. Where there are independent concurrent causes, one or more of which is neither a covered nor an excluded cause, coverage should be available only for that part of the loss attributable to the insured cause, and the onus should rest with the insured to identify the covered part of the loss. In the case of serial concurrent causes, the entire loss should be recoverable. That would result in the same approach both for insuring and exclusion provisions, thereby resolving the concern that underlay Gerwing J.A.'s rejection of the "common sense apportionment of liability".

6. Concurrent Causes — Exclusion Provisions

Until the decision in *Derksen*, the generally accepted view was that *all* loss, and not merely that part of the loss attributable to the excluded peril, would be excluded in the event that the excluded peril caused or contributed to the occurrence of the loss,[69] perhaps even where the loss could be apportioned in some manner as between the insured and excluded causes.[70] *Derksen* held that only that part of the loss attributable solely to the excluded peril would be excluded, unless the exclusion clause clearly provided otherwise. That view was foreshadowed in earlier decisions where the same result was obtained.[71]

Derksen held that the scope of the excluded loss depends on the language of the exclusion clause; that it is entirely a matter of interpretation of that language.[72] The court went on to suggest that

69. The leading English decision adopting this view was *Wayne Tank*, *supra*, footnote 30, a case that was disapproved in *Derksen*. Canadian decisions that had adopted this view are *Goodman*, *supra*, footnote 18, at para. 48; *Saskatchewan Wheat Pool*, *ibid.*, at para. 25; *Willemse, supra*, footnote 36; *Kellogg Canada*, *supra*, footnote 59, at para. 37. Other decisions are cited in *Goodman*.

70. *Lizotte, supra*, footnote 66, at para. 57. See also *Board of Trade, supra*, footnote 64, at p. 541.

71. *Boiler Inspection, supra*, footnote 29; *Ford Motor, supra*, footnote 18, at para. 12, citing a number of decisions to that effect.

72. *Derksen, supra*, footnote 2, at paras. 40, 42 and 48.

express language would be required to exclude the entire loss,[73] and that this approach was supported by the rules regarding the interpretation of insurance policies, and more particularly the rule that ambiguities should be resolved in favour of the insured, as well as the fact that language is available to insurers to remove all ambiguity in the event of concurrent causes.[74]

The conclusion in *Derksen* was that the part of the loss attributable to auto-related negligence was excluded, while the part of the loss attributable to non-auto-related negligence was covered.[75] The *Derksen* principle therefore retains the exclusion for that part of the loss attributable solely to the excluded cause where there are independent concurrent causes.[76]

There was no comment regarding which party bore the onus of showing what part of the loss was excluded and what part was covered, but given that the insured had satisfied the onus of proving a causal connection between a covered cause and the entire loss, and that the insurer was relying on an exclusion to exclude part of the loss, the onus would ordinarily rest with the insurer to identify the part of the loss that was excluded from coverage. It may be very difficult, and in some cases practically impossible, to allocate any particular part(s) of the loss to an excluded cause where there is an independent concurrent insured cause.[77] One way to circumvent that difficulty is to make the attribution on a percentage basis.[78] If the insurer does not identify the part of the loss, if any, attributable solely to the excluded cause, and the court is unable to arrive at any reasonable estimate on the evidence proferred, then the full loss should be recoverable.[79]

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73. *Ibid.*, at paras. 48 and 55-56.
74. *Ibid.*, at paras. 46-47 and 54-55.
75. *Ibid.*, at paras. 62-63.
76. Implicitly agreeing with the view expressed in *Triple Five Corp. v. Simcoe & Erie Group* (1997), 42 C.C.L.I. (2d) 132 at paras. 19-20, 145 D.L.R. (4th) 236, [1997] 5 W.W.R. 1 (Alta. C.A.), leave to appeal to S.C.C. refused 150 D.L.R. (4th) viii.
77. As noted in *Lizotte*, *supra*, footnote 66, at para. 38. See also *Lowe, supra*, footnote 23, at paras. 10 and 13.
78. *Skyway Equipment Co. v. Guardian Insurance Co. of Canada* (2005), 28 C.C.L.I. (4th) 271, 49 C.L.R. (3d) 94 (Ont. S.C.J.), where unrelated negligence on the part of two different parties each contributed to the occurrence of the loss (at para. 227). In *Lizotte*, *ibid.*, a pre-*Derksen* decision, a percentage allocation was considered but rejected because of the view that a loss is not apportionable and because of the rule then in force that an excluded cause excluded *all* coverage, even where there were independent non-excluded concurrent causes of the loss (at paras. 57-59).
79. An analogy may be drawn to the situation where a plaintiff has not proved his or her damages: *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161, 163 D.L.R.

7. Causation-Related Language

Examples were given in *Derksen,* taken from the *Ford*[80] and *Pavlovic*[81] decisions, of language effectively excluding *all* loss where there are independent concurrent causes, one of which is an insured cause. The language in the exclusion clause in *Ford* was: "There shall in no event be any liability hereunder in respect to . . .".[82] The various terms referred to in *Pavlovic* were: "caused directly or indirectly", "caused by, resulting from, contributed to or aggravated by", and "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 sequence with the excluded event to produce the loss".[83]

The following causation-related terms have also been considered: "arising from";[84] "arising out of";[85] "because of";[86] "caused by";[87]

(4th) 639, 112 O.A.C. 138 (C.A.), leave to appeal to S.C.C. refused 67 D.L.R. (4th) vii at paras. 67 and following.

80. *Supra*, footnote 18.

81. *Pavlovic v. Economical Mutual Insurance Co.* (1994), 28 C.C.L.I. (2d) 314, 86 W.A.C. 98, 99 B.C.L.R. (2d) 298 (C.A.)

82. *Derksen, supra*, footnote 2, at para. 39.

83. *Ibid.*, at para. 47. See also *Balon v. SGI Canada* (2004), 16 C.C.L.I. (4th) 291 at paras. 27-28, 266 Sask. R. 141 (Prov. Ct.).

84. *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at paras. 24-25, 127 D.L.R. (4th) 618, [1995] 9 W.W.R. 306; *Quick v. MacKenzie* (1997), 33 O.R. (3d) 362 at paras. 16-17, 99 O.A.C. 390, 43 C.C.L.I. (2d) 262 (C.A.); *Mantini-Atkinson v. Co-operators General Insurance Co.* (2005), 75 O.R. (3d) 442 at para. 23, 200 O.A.C. 1, 23 C.C.L.I. (4th) 18 (C.A.); *Canadian Bank of Commerce, supra*, footnote 25, at paras. 32-36; *Hauck v. Dominion of Canada General Insurance Co.* (2005), 22 C.C.L.I. (4th) 188 at paras. 22-26, 253 D.L.R. (4th) 634, [2005] 10 W.W.R. 242 (Alta. C.A.); *Kaler v. Red River Valley Mutual Insurance Co.* (1995), 30 C.C.L.I. (2d) 1 at paras. 18-20, 126 D.L.R. (4th) 700, 93 W.A.C. 136 (Man. C.A.).

85. *Derksen*, *supra*, footnote 2, at paras. 51-58; *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*, [1960] S.C.R. 80 at para. 11; *Amos*, *ibid.*, at paras. 26-30; *Union of India v E.B. Aaby's Rederi*, [1975] A.C. 797 at pp. 807-09 and 813-14 (H.L.); *Ontario v. Kansa General Insurance Co.* (1994), 17 O.R. (3d) 38 at para. 21, 111 D.L.R. (4th) 757, 69 O.A.C. 208 (C.A.), leave to appeal to S.C.C. refused 115 D.L.R. (4th) viii; *Mantini-Atkinson*, *ibid.*, at para. 23; *Canadian Bank of Commerce, supra*, footnote 25, at paras. 31-32; *Hauck*, *ibid.*, at paras. 22-26; *Chan v. Insurance Corp. of British Columbia* (1996), 33 C.C.L.I. (2d) 226, [1996] 4 W.W.R. 734, 113 W.A.C. 187 (B.C.C.A.), leave to appeal to S.C.C. refused 136 W.A.C. 239*n*; *Collier, supra*, footnote 32, at paras. 41 and following; *C. (D.) v. Royal & Sun Alliance Insurance Co. of Canada* (2004), 73 O.R. (3d) 611 at para. 34, 17 C.C.L.I. (4th) 155 (Ont. S.C.J.). The term "based on, arising from, or in consequence of" was considered in *Dunn*, *supra*, footnote 13, at para. 47.

86. *R.W. Hope Ltd. v. Dominion of Canada General Insurance Co.* (2001), 34

"direct" and "directly";[88] "directly or indirectly";[89] "due to";[90] "in consequence of";[91] "in the course of";[92] "respecting a claim for or in respect of";[93] "resulting from";[94] "results from or was in any manner or degree associated with or occasioned by";[95] "sole" and "solely".[96]

C.C.L.I. (3d) 192 at para. 30, 57 O.R. (3d) 425 *sub nom. Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.*, 154 O.A.C. 7 *sub nom. Hope (R.W.) Ltd. v. Dominion of Canada General Insurance Co.* (Ont. C.A.); *Harnden Estate v. Farmers' Mutual Fire Insurance Co. (Lindsay)* (1998), 37 O.R. (3d) 745 at paras. 15-16, [1998] I.L.R. ¶1-3535 (Ont. Ct. (Gen. Div.)).

87. *Amos*, *supra*, footnote 84, at paras. 24-25; *McMillan v Thompson (Rural Municipality)* (1997), 40 C.C.L.I. (2d) 147, 144 D.L.R. (4th) 53, [1997] 3 W.W.R. 1 (Man. C.A.), leave to appeal to S.C.C. refused 150 D.L.R. (4th) vii at paras. 5 and 56 and following.
88. *942325 Ontario Inc., supra,* footnote 34, at para. 3; *Chisholm, supra*, footnote 6, at para. 20; *Greenhalgh v. ING Halifax Insurance Co.* (2004), 72 O.R. (3d) 338 at paras. 39 and 49, 243 D.L.R. (4th) 635, 72 O.R. (3d) 338, 190 O.A.C. 64 (C.A.), leave to appeal to S.C.C. refused 248 D.L.R. (4th) vii; *Iroquois Falls Community Credit Union Ltd.*, *supra*, footnote 13, at paras. 34 and 41; *Shea*, *supra*, footnote 34, at paras. 14-16; *Canevada Country Communities*, *supra*, footnote 59, at paras. 26-29; *Strata Plan NW2580, supra*, footnote 10, at para. 22; *Willemse, supra*, footnote 36; *Balon, supra*, footnote 83, at paras. 14-20; *M.J. Jones*, *supra*, footnote 50.
89. *Herbison v. Lumbermens Mutual Casualty Co.* (2007), 286 D.L.R. (4th) 592 at paras. 13-14, [2007] 3 S.C.R. 393 *sub nom. Lumbermens Mutual Casualty Co. v. Herbison*, 230 O.A.C. 395; *Consolidated-Bathurst*, *supra*, footnote 12, at para. 23; *Derksen*, *supra*, footnote 2, at para. 47; *Djepic, supra*, footnote 20, at para. 41; *Labreque v. Clarica Life Insurance Co.* (2002), 43 C.C.L.I. (3d) 88 at para. 7, 60 O.R. (3d) 223, 160 O.A.C. 195 (C.A.); *Alchimowicz v. Continental Insurance Co. of Canada* (1996), 37 C.C.L.I. (2d) 284, 22 M.V.R. (3d) 41 (Ont. C.A.); *Russo v. John Doe* (2009), 95 O.R. (3d) 138 at paras. 32-34, 73 C.C.L.I. (4th) 10 (C.A.); *Canevada Country Communities, supra*, footnote 59, at paras. 27-31; *Catalano v. Canadian Northern Shield Insurance Co.*, [2000] I.L.R. 1-3830 at para. 16, 222 W.A.C. 144 *sub nom. Catalano v. Trail (City)*, 74 B.C.L.R. (3d) 207 (C.A.); *Pavlovic, supra*, footnote 81, at para. 23; *Strata Plan NW2580, supra*, footnote 10, at paras. 54-55; *B & B Optical Management Ltd. v. Bast* (2003), 7 C.C.L.I. (4th) 144 at para. 52, [2004] 6 W.W.R. 747, 235 Sask. R. 141 (Q.B.).
90. *Mantini-Atkinson, supra*, footnote 84, at paras. 18-20.
91. *Yorkshire Dale Steamship, supra*, footnote 30, at pp. 697 and 700; *Hall Brothers Steamship, supra*, footnote 28, at p. 762.
92. *PrairieFyre Software, supra*, footnote 9, at paras. 44 and following.
93. *Boliden, supra*, footnote 16, at para. 33.
94. *Bird Construction Co. v. United States Fire Insurance Co.* (1985), 18 C.C.L.I. 92 at para. 21, 24 D.L.R. (4th) 104, 45 Sask. R. 96 (C.A.).
95. *Farmer, supra*, footnote 14.
96. *Shea, supra*, footnote 34, at paras. 14-16.

8. Limitation to Derksen — Serial vs Independent Concurrent Causes

Derksen is not, however, as sweeping a decision as might first appear. The mere fact that a loss was due to concurrent causes, at least one of which was an insured cause and one an excluded cause, does not necessarily mean[97] that only that part of the loss, if any, that the insurer can show is attributable solely to the excluded cause is excluded (absent appropriately clear language that excludes all or additional parts of the loss).

A distinction must be drawn between serial and independent concurrent causes. The fact situation in *Derksen* involved independent concurrent causes. Those were, as previously noted, negligent clean-up of a work site and negligent loading of a motor vehicle.

Derksen established what may be described as a default rule for the application of exclusion causes in situations involving independent concurrent causes. That rule provides that an exclusion clause will exclude coverage only for that part of the loss, if any, that is attributable solely to an excluded cause. While not expressly stated, the onus, as indicated above, presumably will rest with the insurer to identify the excluded part of the loss. That default rule will apply unless the language of the exclusion clause is sufficiently clear to evidence the intention to exclude the whole or additional parts of the loss.

No consideration, however, was given in *Derksen* to the situation where there are serial concurrent causes. The distinction was recognized in a later decision in the following statement: "In *Derksen,* the exclusion clause excluded one cause of the injuries but did not exclude a second cause of the injuries which was entirely separate and stood alone."[98] Should the default rule apply equally in the case of serial concurrent causes? In our view, the answer is that it should not.

While the Supreme Court of Canada has not considered the issue, guidance is available from decisions of lower courts. A chain of events should not be "divided too precisely and treated as a series of separate

97. As suggested, incorrectly in our view, in the following statement in *Balon*, *supra*, footnote 83, at para. 26: "[O]n its wording the [exclusion] clause is ambiguous. It does not specifically exclude coverage where loss or damage was produced by condensation or moisture along with or concurrently with other comprehensive perils." See also *Continental Insurance Co., supra*, footnote 61, at para. 108, and *Lowe, supra*, footnote 23, at para. 13.

98. *Thompson v. Warriner* (2002), 113 A.C.W.S. (3d) 1065, 2002 CarswellOnt 1476 at para. 1(2) (C.A.).

perils . . . [A]ttempts [should not be made] to bifurcate on a spurious basis what is, in reality, a single event."[99] While serial acts or events may literally be separate causes of a loss, they should be treated as a single event and a single cause where one is the consequence of that which preceded.[100] A notable statement on this point is:[101]

> 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 . . . [T]here 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 direct and immediate result, a defect in the machine. In the circumstances of this case, this seems nothing more than a play on words.

Where there are serial concurrent causes, one of which is an excluded cause, all causes that follow the excluded cause are causally connected to, and dependent for their existence on, the excluded cause. Except to the extent that a part of the loss has already occurred prior to the appearance of the excluded cause, the entire loss can fairly be said to be entirely attributable to the excluded cause, notwithstanding the interposition of other causes between the excluded cause and the loss. A simple example is an explosion which then causes a fire, where explosion is a covered peril while fire is excluded. The part of the loss that occurred before the fire as a result of the explosion would be covered.[102] In the same situation, if fire were the covered peril and explosion the excluded peril, the entire loss would be excluded, unless the fire was *not* caused by the explosion — unless, in other words, the situation involved independent, rather than serial, concurrent causes. In the latter situation, only the explosion damage would be excluded and the insurer would have the onus of identifying the damage attributable to the explosion.

One explanation, as noted above, is that there is in reality only a single cause in a situation involving serial causes, and as the excluded cause is a critical element of that single cause in the "but for" sense that the ultimate result would not have obtained were it not for the excluded cause, the entire loss (except for any part that pre-dated the intervention of the excluded cause) is attributable to that cause. In fact, the excluded cause in that situation would probably be considered the proximate cause were that concept still important. An analogous view is taken in the following statement: "To be

99. *Canevada Country Communities*, *supra*, footnote 59, at paras. 33-34.
100. An example is shown in *Algonquin Power, supra*, footnote 15, at para. 206. See also *Chandra*, *supra*, footnote 21, at paras. 50-51.
101. *Triple Five Corp.*, *supra*, footnote 76, at paras. 18 and 25.
102. As in *Boiler Inspection*, *supra*, footnote 29.

concurrent, each cause of action must be 'non-derivative' . . . [and] independent of the other".[103] On that approach, serial causes would not be "concurrent", but rather would amount to a single cause.

Where, on the other hand, there are independent concurrent causes, as in *Derksen,* it cannot be said that the entire loss is attributable to any single cause, because, assuming for the sake of simplicity that there are only two causes, one insured and one excluded, either one may have been sufficient to cause either the whole or some part of the loss. Conversely, and again unlike the situation of serial concurrent causes, it cannot be said that the loss, or some part of it, would not have occurred without the presence of the excluded cause (subject to the intervening cause principle, which will be discussed later) because neither of the independent causes depended on the other for its existence.

It should also be noted that while it may be difficult, and in some cases impossible, to allocate loss between excluded and covered causes in the case of independent concurrent causes, it is much more likely to be impossible to do so in the case of serial concurrent causes because of the close interconnection among the causes. While the rules of interpretation of insurance policies are justifiably slanted in favour of the insured, the balance should not be tipped so far as to make the insurer's position illusory.

One of the justifications often employed for the application of rules of interpretation that favour the insured's position is that the insurer could have inserted language in the policy that would have clearly excluded coverage for the loss claimed. Courts should, however, bear in mind the countervailing reality that it is impossible to foresee all eventualities or even to draft language in any practical way that will cope with all foreseen eventualities. Reference to causation-related language is made above.

Another approach is to say that, in the case of independent concurrent causes, there are two separate chains of causation, one linking the insured cause to the whole or some part of the loss, and the other linking the excluded cause to the whole or some part of the loss. It is therefore appropriate, in the case of independent concurrent causes, to require the insurer to identify that part of the loss to which the chain of causation that includes the excluded cause is connected. It is different in the case of serial concurrent causes, where there is only a single chain of causation that links the excluded cause to the entire loss.

An example of the correct application of the *Derksen* principle is a

103. *McLean, supra*, footnote 16, at para. 7.

case where a truck driver with a history of heart disease had his vehicle slide into a ditch and overturn. He got out of the cab and started to walk along the road and had a fatal heart attack, which was triggered by the accident. The life insurance policy excluded loss resulting from sickness or disease. The death was due to two independent concurrent causes: the vehicle accident and the pre-existing heart ailment. No identifiable part of the loss could be attributed solely to the excluded cause and recovery in full under the policy was granted.[104]

An incorrect application of *Derksen* is demonstrated in a case where a covered cause (the escape of water from a plumbing system) led to an excluded cause (water below the ground) which ultimately caused damage in the form of basement flooding. It was held that the exclusion clause did not oust coverage in the case of these concurrent causes.[105] Similarly, a contractor's negligence (a covered cause) led to electrical overload (an excluded cause), which was the direct cause of the loss. It was held, incorrectly in our view, that the loss was covered because only one of the causes was excluded.[106] In both cases the causes were serial, not independent, concurrent causes, and as the loss in each case was attributable to the excluded cause, it should have been excluded.

9. Further Limitation to Derksen — Concurrent Causes of Action

The fact that concurrent causes of action, such as contract and tort, are available does not trigger the *Derksen* principle. That is because the concurrent claims are for "one and the same loss", so that an exclusion of claims for breach of contract prevails.[107] The entire loss in that situation is attributable to the excluded cause.

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104. *Heitsman v. Canadian Premier Life Insurance Co.* (2002), 43 C.C.L.I. (3d) 129, 4 B.C.L.R. (4th) 124, [2003] I.L.R. ¶1-4140 (S.C.), supp. reasons 43 C.C.L.I. (3d) 138, 28 C.P.C. (5th) 67. See also *Continental Insurance Co., supra*, footnote 61, at paras. 92-109, where causes (lack of aeration, lack of daylight and moisture) that were independent of the concurrent excluded cause of delay were at work in causing the damage to a ship's cargo, and *Neary v. Wawanesa Mutual Insurance Co.* (2003), 50 C.C.L.I. (3d) 176 at paras. 33-45, 216 N.S.R. (2d) 219, [2003] I.L.R. ¶1-4210 (C.A.), where the independent concurrent causes were the use of a vehicle and defective salesmanship. *Djepic, supra*, footnote 20, involved independent concurrent causes similar to those in *Derksen*.
105. *Lowe*, *supra*, footnote 23, at paras. 10-13. A similar position was taken in *Balon, supra*, footnote 83, at para. 26.
106. *B & B Optical Management Ltd., supra*, footnote 89.
107. *Dominion Bridge Co. v. Toronto General Insurance Co.*, [1963] S.C.R. 362 at paras. 4-6.

10. Were There In Fact Concurrent Causes?

The mere description of a matter as a concurrent cause does not necessarily make it so. It must be a separate and distinct cause in substance, not merely in form. Where, for example an allegation was made of "negligent business conduct", including negligence in the hiring and training of the vehicle operator and negligent entrustment of the vehicle to that person, in addition to allegations of negligent operation of the vehicle, there was in substance only one cause of the loss, and that was the negligent operation of the vehicle. The other allegations were derivative and did not provide any "stand-alone ground for recovery".[108] Similarly, an allegation of failure to supervise was not a separate concurrent cause, but rather was subsumed into the claim for sexual assault, which was excluded from coverage.[109] These decisions are analogous to those that say that there is, in reality, only a single cause in a situation involving serial concurrent causes.

11. "But for" Causes — Coverage Provisions

Given that the presence of concurrent causes, one or more of which do not involve an insured peril, is not a basis for denial of coverage, the question arises: What degree of causal connection must there be between the insured peril and the loss? More particularly, is it sufficient that the insured peril amounted to no more than a "but for" cause of the loss? In tort law, a cause is sufficient if it "materially contributed" to the occurrence of the injury, and a contributing factor is "material" if it falls outside the *de minimis* range.[110] This means that a "but for" cause will probably be sufficient in a tort claim. The question whether it may also be sufficient in an insurance claim must be considered separately in regard to coverage and exclusion clauses.

First, as to coverage clauses, the authorities are divided. On the one hand are decisions where covered perils that amounted only to "but for" causes did not qualify,[111] not even under the relaxed causal

108. *Unger (Litigation Guardian of) v Unger* (2003), 68 O.R. (3d) 257 at paras. 20-27, 234 D.L.R. (4th) 119, 179 O.A.C. 108 *sub nom. Unger v. Unger* (C.A.). See also *Co-operators General Insurance Co. v Murray* (2007), 86 O.R. (3d) 255, 51 C.C.L.I. (4th) 270, [2007] I.L.R. ¶1-4608 (S.C.J.) However, in *Neary*, *supra*, footnote 104, the combination of the language of the policy and the circumstances of the loss led to the opposite result (see paras. 33-48).

109. *Thompson v. Warriner, supra*, footnote 98.

110. *Athey*, *supra*, footnote 39, at para. 15.

111. *Greenhalgh, supra*, footnote 88, at para. 37; *Canadian Bank of Commerce,*

connection test established in *Amos*[112] in regard to claims under automobile policies, where "the required nexus or causal relationship between a plaintiff's injuries and the ownership, use or operation of his or her car was 'not necessarily a direct or proximate causal relationship'".[113] This was explained in one case as follows: "The 'but for' test is not employed, as its application would cast too wide a net in extending coverage."[114]

On the other hand are decisions that indicate that an insured peril that is no more than a "but for" cause is sufficient because, notwithstanding the low degree of causal connection, it is "an efficient or effective cause of the loss". In adopting the latter view, McLachlin J. said:[115]

> [I]t does not matter if one of the causes of the loss is ordinary wear and tear or inherent vice, provided that an efficient or effective cause of the loss — one without which the loss would not have occurred — was fortuitous . . . It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, the loss is shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things.

While a "but for" cause may be sufficient, the mere fact that the loss occurred during the course of the insured peril does not necessarily mean that the causation test has been satisfied. "Authority is hardly needed for the proposition that you do not prove that an accident is 'the consequence of' a warlike operation merely by showing that it happened 'during' a warlike operation."[116] It is not enough that the covered peril "merely created an opportunity in time and space for the damage to be inflicted, without any causal connection direct or indirect" to the loss.[117] "*[S]ome* causation link must be found and it must constitute a link in an unbroken chain."[118]

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supra, footnote 25, at paras. 34-35; *Willemse, supra*, footnote 36; *Balon, supra*, footnote 83, at paras. 14-20.

112. *Amos, supra*, footnote 84.
113. *Chisholm, supra*, footnote 6, at para. 20; *Vytlingam (Litigation Guardian of) v Farmer* (2007), 286 D.L.R. (4th) 577 at para. 25, [2007] 3 S.C.R. 373 *sub nom. Citadel General Assurance Co. v. Vytlingam*, 230 O.A.C. 372 *sub nom. Vytlingam v. Farmer*; *Herbison, supra*, footnote 89, at paras. 11-12.
114. *Russo, supra*, footnote 89, at para. 26.
115. *C.C.R. Fishing*, *supra*, footnote 1, at paras. 27-28; *942325 Ontario Inc.*, *supra*, footnote 34, at para. 3; *Sherwin-Williams*, *supra*, footnote 28 at para. 59.
116. *Yorkshire Dale Steamship*, *supra*, footnote 30, at pp. 696-97. See also *Union of India*, *supra*, footnote 85, at pp. 813-14 and 816.
117. *Herbison*, *supra*, footnote 89, at para. 10; *Russo, supra*, footnote 89, at para. 34.

12. "But For" Causes — Exclusion Provisions

Here too there is a split in the authorities on the question whether an exclusion clause will apply where an excluded peril is no more than a "but for" cause of the loss. Some decisions have held that a "but for" cause is sufficient.[119] The explanation given for that in one case was that the listing of an excluded peril had the effect of making that peril the proximate cause of the loss in so far as the exclusion clause was concerned.[120] Other decisions have held that the excluded peril must be something more than a "but for" cause to make the exclusion applicable,[121] unless the language of the exclusion clearly indicates otherwise.[122] The governing consideration, and one which supports the sufficiency of a "but for" cause, is best described in the following statement: "[I]f 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."[123]

13. Intervening Cause

There is considerable overlap between the questions: What makes a cause an independent cause? and What constitutes an intervening cause that breaks the chain of causation? In answer to the first

118. *Herbison*, *ibid*., at para. 14 (original emphasis).

119. *Triple Five Corp., supra*, footnote 76, at paras. 19-20; *Willemse*, *supra*, footnote 36; *Kellogg*, *supra*, footnote 59, at para. 37; *Foundation of Canada Engineering Corp. v. Canadian Indemnity Co*. (1974), 44 D.L.R. (3d) 298 at para. 33, [1974] 3 W.W.R. 23, [1974] I.L.R. ¶903 (Man. C.A.), affd [1978] 1 S.C.R. 84, 74 D.L.R. (3d) 266, [1977] 2 W.W.R. 75.

120. *Oakleaf, supra*, footnote 13, at paras. 14-15, although it should be noted that the exclusion there contained the words "irrespective of the cause", and emphasis was given to those words by the court. Language of that nature would be unnecessary, at least in so far as loss attributable to the excluded peril is concerned, if the generally accepted principle that an excluded peril trumps an insured peril were applied.

121. *Pavlovic, supra*, footnote 81, at paras. 19-26; *Aven, supra*, footnote 47. See also *Tux & Tails Ltd. v Saskatchewan Government Insurance* (2003), 6 C.C.L.I. (4th) 264 at para. 27, [2004] 2 W.W.R. 437, 237 Sask. R. 76 (Q.B.), where the roundabout approach was, in our view incorrectly, taken that an exclusion did not apply because an insured peril constituted a "but for" cause of the loss (although it may be that the discussion involved an exception to an exclusion).

122. This appears to be the view taken in *Canadian Bank of Commerce, supra*, footnote 25, at para. 37.

123. *Ford Motor Co., supra*, footnote 18, at para. 12, applied in *Co-operative Fire and Casualty Co. v. Saindon*, [1976] 1 S.C.R. 735 at para. 28, 56 D.L.R. (3d) 556, [1975] I.L.R. ¶1-669.

question, independent causes are, as stated above, those that are causally unrelated. The concurrency between such causes is a concurrency only in time and situation, not in causal interconnection. Serial causes, on the other hand, are causally interdependent. The answer to the second question similarly incorporates the concept of causal connectivity, but in a more relaxed or looser manner.

In the context of a claim under an automobile policy, the intervening cause principle was stated as follows: "[Was there] an intervening act, independent of the ownership, use or operation of the vehicle, which broke the chain of causation"?[124]

An intervening act "may not necessarily break the chain of causation if the intervention can be considered 'a not abnormal incident of the risk' created by the [earlier act] or is likely to arise in 'the ordinary course of things'".[125] In another decision, the following less qualified statement was made: "[A]n intervening act will absolve the insurer of liability if it cannot fairly be considered a normal incident of the risk created by the [earlier act]."[126]

A more general formulation is the question whether the two acts are "so closely intertwined that from the perspective of causation, direct or indirect, the two were not severable".[127] Another is: "[T]he courts look at the peril to see whether the peril immediately, or by setting in motion a series of identifiable causes without any break in the chain of causation, leads directly to the loss."[128] One decision referred to the fact that "One thing led inexorably to another."[129] In another, the following test was adopted: "A chain of causation arises when 'the occurrence of a factor sets off a series of incidents eventually resulting in the loss which is the subject of the claim.'"[130]

A more complex explanation was given in one of the early leading decisions: "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 indefinitely."[131] Happily, that

124. *Amos, supra*, footnote 84, at para. 30.
125. *Herbison, supra*, footnote 89, at para. 13; *Vytlingam, supra*, footnote 113 at paras. 29-30.
126. *Greenhalgh*, *supra*, footnote 88, at para. 38.
127. *Herbison*, *supra*, footnote 89, at para. 13.
128. *Oakleaf*, *supra*, footnote 13, at para. 13.
129. *Kaler*, *supra*, footnote 84, at para. 19, although the unnecessary qualification "without any new intervening cause" was added.
130. *Strata Plan NW2580*, *supra*, footnote 10, at para. 18, quoting from Craig Brown, *Insurance Law in Canada* (Thomson Canada, 2002).
131. *Leyland Shipping*, *supra*, footnote 24, at p. 453.

description has not been adopted for test purposes; the difficulty and uncertainty in its application are manifest.

The tests referred to above show that, by definition, a cause that is part of a causal chain cannot be an intervening cause within the chain itself. Serial causes are not "severable"; one leads "inexorably" to the next. An insured cause that is part of a group of serial concurrent causes therefore cannot be an intervening cause that nullifies the effect of an excluded cause that is also within the group of serial concurrent causes. An independent cause, on the other hand, *can* constitute an intervening cause that will nullify the effect of that excluded cause if it breaks the chain of causation between the excluded cause and the loss. To do so, it must be viewed as having been the only true or effective cause of the loss — in other words, the causal impact of any earlier cause, such as the excluded cause in this scenario, must be seen as having been eclipsed by this later cause.[132] Conversely, an independent excluded cause can nullify the effect of an earlier independent covered cause if it similarly severs the causal impact of the earlier covered cause. Here again this general proposition can be affected by the language of the relevant provisions.

Examples of situations involving causes that formed an unbroken chain of causation are:

a. A fire inside an oil tank "made it inevitable that the sides of the tank would be erupted by the explosion which necessarily followed". The fire and explosion were serial causes that formed an unbroken chain of causation.[133]
b. Conversely, where loss due to explosion was covered while loss due to fire was excluded, a fire that inevitably followed an explosion was also part of an unbroken chain of causation.[134]

132. The argument that an excluded cause was an "independent intervening cause that interrupted the chain of causation and rendered the exclusion applicable" was rejected in *Derksen*, *supra*, footnote 2, on the basis that the loss was not caused solely by that later excluded cause, but rather was caused by both the excluded cause and an insured cause acting in combination. In view of the fact that the insured cause continued to have causal impact, the chain of causation between the insured cause and the loss was not broken by the excluded cause (at paras. 32-34). In *Baker v. Russell* (2008), 281 Nfld. & P.E.I.R. 247 at para. 39, 863 A.P.R. 247, 67 M.V.R. (5th) 27 (C.A.), leave to appeal to S.C.C. refused April 16, 2009, it was said that the related doctrine of *novus actus interveniens* applies in a negligence claim if "an independent subsequent act . . . is of such impact that it obliterates the defendant's wrong."

133. *Shea, supra*, footnote 34, at para. 12.

134. *Sherwin-Williams, supra*, footnote 28, at para. 71.

c. A landslide of trees, earth and rock following a windstorm was the "natural, indeed almost inevitable" consequence of the windstorm and formed part of an unbroken chain of causation.[135]
d. The alleged failure by the Crown to respond to a pollution problem and failure to warn of the release of pollutants did not break the chain of causation that began with the pollution incident itself.[136] As a matter of note, the court appeared to adopt a "but for" test, saying "there would be no loss without the pollution".[137]
e. The action of city workers to divert flood water, with the result that a basement was flooded, did not break the chain of causation that began with the natural flood.[138]
f. A water line ruptured and the escaping water caused subsidence of foundation soils, which in turn caused damage to the insured's house. The leakage of water from the line did not break the chain of causation that began with the failure of the water line.[139]
g. The design of a drain tile system was faulty, leading to water leaks that entered the insureds' basement. They had repairs made to the system, but the leaks continued. The repairs did not break the chain of causation.[140]
h. A passenger left a cab without paying the fare. The driver followed and demanded payment. In the altercation that followed the passenger was killed. The events following the failure to pay the fare did not break the chain of causation so as to take the claim outside the exclusion of claims "arising from business".[141]

Examples of situations where the chain of causation *was* broken by an independent cause are:

a. Taxi driver failed to escort child passenger across the street. The injury to the child while he was crossing the street did not arise out of the use or operation of the motor vehicle but rather from the independent omission of the driver.

135. *Aven, supra*, footnote 47.
136. *Ontario v. Kansa General Insurance Co., supra*, footnote 85, at paras. 20-21.
137. *Ibid.*, at para. 23. See also *Strata Plan NW2580*, *supra*, footnote 10, at para. 28.
138. *Catalano*, *supra*, footnote 89, at para. 14.
139. *Pavlovic*, *supra*, footnote 81, at paras. 19-22.
140. *Chandra*, *supra*, footnote 21, at paras. 50-54.
141. *Kaler*, *supra*, footnote 84, at paras. 18-20.

b. Person injured in drive-by shooting. The shooting was "a distinct and intervening act completely independent from the use or operation of the van".[142]
c. The insured's alleged failure to remediate a pollution spill in a timely manner and prevent future damage was an act independent of the spill itself and was outside the scope of the pollution exclusion clause.[143]

14. Exceptions in Exclusion Clauses

Some exclusion clauses contain exceptions to the exclusion, the exceptions involving either perils or types of damage, and decisions considering such exceptions are cited here.[144] Causation is, of course, as relevant to the exception as it is to the exclusion.

15. Types of Damage vs Perils

The natural inclination is to check for perils in insuring agreements and exclusion clauses. However, just as a limitation period can be tied to a fixed event rather than to a cause of action, coverage and exclusion clauses can be tied to types of damage rather than types of peril, so that the following statement can apply: "I find that exclusions 13 and 17 refer to types of damage incurred, regardless of the cause",[145] although "provisions excluding perils and

142. *Russo, supra*, footnote 89, at para. 34. *Herbison*, *supra*, footnote 89, is a similar decision.
143. *R.W. Hope Ltd., supra*, footnote 86, at para. 72.
144. *Triple Five Corp., supra*, footnote 76, at paras. 49-55; *Dawson Truck Repairs, supra*, footnote 60, at paras. 27 and following; *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Co. of Canada* (2006), 79 O.R. (3d) 494, 266 D.L.R. (4th) 182, 211 O.A.C. 4 (C.A.), leave to appeal to S.C.C. refused 270 D.L.R. (4th) vii at paras. 11 and following; *Strata Plan NW2580, supra*, footnote 10, at paras. 49-52; *Canevada Country Communities*, *supra*, footnote 59, at para. 31; *Sin Mac Lines Ltd. v. Hartford Fire Insurance Co.*, [1936] S.C.R. 598 at para. 2; *Buchanan v. Wawanesa Mutual Insurance Co.* (2009), 72 C.C.L.I. (4th) 127 at para. 27, [2009] I.L.R. ¶1-4808 *sub nom. Buchanan and Grace v. Wawanesa Mutual Insurance Co.*; *942325 Ontario Inc., supra*, footnote 34, at para. 5; *Lizotte, supra*, footnote 66, at paras. 65-68; *Algonquin Power*, *supra*, footnote 15, at paras. 165-67 and 201 and following; *Tux & Tails*, *supra*, footnote 121.
145. *Jordon*, *supra*, footnote 16, at para. 16. The leading decision on this issue is *Leahy v. Canadian Northern Shield Insurance Co.*, [2000] I.L.R. 1-3860, 229 W.A.C. 302, 77 B.C.L.R. (3d) 44 (C.A.). See also *Engle Estate*, *supra*, footnote 19, at paras. 17-21; *Buchanan, ibid.*, at paras. 19-26; *Boliden, supra*, footnote 16, at para. 33; *Chandra, supra*, footnote 21, at paras. 43-44. A similar statement was made in *Dawson Truck Repairs, supra*, footnote 60, at

provisions excluding damages are also sometimes interpreted synonymously".[146] In a similar vein, the cause of action[147] is irrelevant if the type of event from which the claim arises is excluded.[148]

16. Commentary

The concept of "proximate cause" is no longer a matter of any great importance. In the matter of the necessary level of strength of a causal connection, the question whether a "but for" cause is sufficient in the case of either a covered or an excluded cause is not yet settled. The better view, one that is harmonious with the demise of the critical nature of the proximate cause concept, is that it is sufficient in both cases, subject to the intervening cause principle.

The decision of the Supreme Court of Canada in *Derksen* was not as groundbreaking as some have considered. Its true import was to impose on insurers, in the case of independent, as contrasted to serial, concurrent causes, the obligation to draft exclusion clauses with clarity sufficient to demonstrate the intention to exclude the entire loss, including those parts attributable to an independent covered cause or that fall into an overlap area which can fairly be said to be attributable to both an excluded and an insured cause. By the normal principles of insurance law the insurer would have the onus of identifying the part of the loss, if any, that is attributable solely to the excluded cause. Where that is possible and it fails to do so, the insured would make full recovery.

Where, however, the causes are serial in nature and one of them is an excluded cause, the entire loss will be excluded unless some identifiable part of the loss was the result of an insured cause and occurred before the appearance of the excluded cause. The entire loss is attributable to the excluded cause there because of the reality that there was only a single cause of the loss and the excluded cause was integral to that single cause. Here, it is the insured who bears the onus of identifying the part of the loss that remains covered because the insured has not shown a causal connection between the covered cause and the full loss or any particular part of it. In those circumstances the

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para. 22: "Insofar as the focus is on whether the loss or damage consists of mechanical fracture, failure or breakdown, causation is not relevant. The focus is on the nature of the damage."

146. *Strata Plan NW2580, supra*, footnote 10, at paras. 43-44.

147. Which can be viewed as a form of peril: *PrairieFyre Software, supra*, footnote 9, at paras. 51-55.

148. *C. (D.), supra*, footnote 85, at para. 34.

rule that the insured must prove the loss for which there is coverage under the policy is applicable.

The same approach should be taken on the matter of coverage. Where there are independent concurrent causes, only one of which is an insured cause, coverage should be available only for that part of the loss that the insured identifies as having been attributable to the covered cause. That is the approach suggested by Gerwing J.A.[149] Where, on the other hand, there are serial concurrent causes, only one of which is an insured cause, then the entire loss should be recoverable,[150] for the same reasons that the entire loss should be excluded where only one of several serial concurrent causes is an excluded cause. That would result in symmetry in the treatment of insuring and exclusion provisions and hopefully bring some measure of simplicity and consistency to this difficult subject.

149. See footnote 68. The Gerwing approach was applied by the trial court in *Colorado Intergovernmental Risk Sharing Agency v Northfield Insurance Co*., Colorado Supreme Court Case No. 08SC907, leave granted May 26, 2009.

150. Unless some identifiable part of the loss occurred before the appearance of the covered peril and was caused by a non-insured peril. The onus would rest with the insurer to identify the part of the loss that pre-dated the appearance of the covered peril.