CITATION: Goodyear Canada Inc. v. American International Companies (American Home Assurance Company), 2011 ONSC 5422
COURT FILE NO.: CV-09-00377269
DATE: 20110916

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
GOODYEAR CANADA INC. Plaintiff **– and –** AMERICAN INTERNATIONAL COMPANIES (Formerly American Home Assurance Company), GERLING CANADA INSURANCE COMPANY (Formerly Gerling Global General Insurance Company), ING CANADA (Formerly Guardian Insurance Company of Canada), NORTHUMBERLAND GENERAL INSURANCE COMPANY, ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, AVIVA CANADA (Assumed The Business Of The General Accident Assurance Company Of Canada, and Scottish & York Insurance Co. Limited), THE HOME INSURANCE COMPANY, ACE USA (ACE INA INSURANCE), JEVCO INSURANCE COMPANY, LOMBARD CANADA LTD. (Assumed the Business Of Phoenix Assurance Company Of London) Defendants	*William G. Scott and Eli Mogil*, for the plaintiff *Ian A. Mair/Vern Rogers*, for the defendant, American International Companies *Robert J. Clayton*, for the defendant Gerling Canada Insurance Company (formerly Gerling Global General Insurance Company) *Mark G. Lichty/W. Colin Empke,* for the defendant, ING Canada *Don Rogers/Marcela Saitua*, for the defendant, Northumberland General Insurance Company *Mark W. Barrett,* for the defendant, Royal & Sun Alliance Insurance Company of Canada *Steven Stieber,* for the defendant, Aviva Insurance Company of Canada *Douglas H. McInnis*, for the defendants, Lombard Canada Ltd. and The Home Insurance Company **HEARD:** May 30, 31, June 1, 2, and 3, 2011

STINSON J.

I – OVERVIEW

[1] The plaintiff, Goodyear Canada Inc. ("Goodyear" or "Goodyear Canada"), and its American parent ("Goodyear U.S.") have been named as defendants in numerous lawsuits in jurisdictions in the United States (the "U.S. Claims"). The U.S. Claims involve individuals who are seeking compensation for personal injury and/or death from asbestos-related diseases, allegedly resulting from exposure to certain asbestos-containing products manufactured by Goodyear Canada and sold into the U.S. market between 1969 and 1973. All of the U.S. Claims arise in the United States and relate to exposures or occurrences happening in the U.S.

[2] In 2004, Goodyear Canada commenced this litigation against the defendant property and casualty insurers seeking declaratory relief regarding its Canadian insurance coverage in relation to the U.S. Claims. The bodily injuries alleged in the underlying lawsuits potentially span the period of 1969 to the present. The insurance policies that were initially included in this action were issued by the defendants to Goodyear Canada between 1969 and 1986. Because of a business decision on the part of Goodyear to move coverage for all U.S.-based product liability claims to an American insurer in 1980, beginning in that year Goodyear's Canadian policies contained an exclusion regarding such claims. As a consequence, Goodyear has now restricted its claims in this action to occurrence-based policies that were in force between 1969 and 1980.

[3] The parties have agreed that, rather than proceeding directly to trial, it would be more efficient to bring a motion to determine certain discrete legal and factual issues that might resolve the matter or at least significantly narrow the scope of the dispute. The parties defined the issues to be determined in the motion in Justice Colin Campbell's Order dated January 12, 2011. The parties reserved their rights on all other issues regarding the action that are separate from the limited issues on the motion.

[4] Given that the U.S. Claims allege that the claimants were injured over a period of years as a result of asbestos fibres lodging in their lungs, the court that tries this case will ultimately have to adopt a "trigger theory" to determine which insurers' policies respond and how responsibility for payment of the U.S. Claims will be allocated amongst the parties.

[5] The main legal issue to be determined at this stage – assuming that the trial court adopts a trigger theory that engages the post-1985 period and adopts *pro rata* allocation – is whether Goodyear will be responsible for any injuries and/or occurrences found to have occurred after 1985, by reason of its assertion that insurance coverage for asbestos-related claims was not commercially available for purchase during that period that would respond to U.S. Claims.

[6] The principle that an insured, here Goodyear, should not be held responsible for the years during which it could not purchase insurance due to the unavailability of such insurance is referred to as the "Stonewall Principle" because that scenario was addressed in a U.S. case called *Stonewall Insurance Company v. Asbestos Claims Management Corporation*, 73 F.3rd 1178 (2d Cir. 1995) ("*Stonewall*"). The court in *Stonewall* held that, when allocating an asbestos-based claim for insurance purposes over a number of years of injury, the insured should not be deemed

to self-insure for those years when the insured could not voluntarily insure itself because of the existence of an asbestos exclusion. The insured is therefore not required to bear *pro rata* allocation for the period during which insurance was unavailable.

[7] On this motion the court is asked to decide whether the Stonewall Principle should be adopted as part of the law of Ontario. This determination will be of critical importance in this action, because, if the Stonewall Principle does not apply, it is conceivable that Goodyear effectively has no insurance coverage for most of the U.S. Claims. This is a result of the nature of *pro rata* allocation: the monetary value of a single claim may be spread across so many years that the portion allocated to a given year will not exceed the per-claim deductible that Goodyear must absorb before being indemnified by its insurer.

[8] Connected to and underpinning the legal issue regarding the applicability of the Stonewall Principle, the court is also asked to decide a factual issue, in relation to which the parties tendered affidavit and *viva voce* evidence on the hearing of the motion: whether insurance coverage for U.S. asbestos claims was available to Canadian commercial insureds on a commercially reasonable basis after 1985.

[9] A final issue the court is asked to determine is whether, with respect to the annual policies issued between 1969 and October 31, 1980, the deductible (which was $10,000 per claim up to March 30, 1976 and $25,000 per claim thereafter) should be prorated in a similar fashion to the way the U.S. plaintiffs' bodily injury claims would be prorated across the number of years of coverage.

II – THE PARTIES

A. The Plaintiff

[10] Goodyear Canada is the Canadian subsidiary of Goodyear U.S., a large U.S.-based multinational business enterprise. Goodyear Canada's primary business is the production of tires and rubber products for automobiles, trucks and light and heavy machinery. Its main product liability concern is catastrophic tire failures.

[11] From 1969 to 1973, Goodyear Canada manufactured and distributed asbestos-containing gasket material for use in industrial applications in the U.S. It sold the product mainly to one primary customer in the U.S. for resale to others. The gasket material was an insignificant part of the overall Goodyear Canada business, which remained focused on tires; Goodyear ceased to manufacture the product in 1973.

[12] Lawsuits stemming from asbestos-related injuries have become widespread in the U.S. over the last three decades. Claimants repeatedly sue manufacturers that had any historical involvement in the production of products with asbestos. Goodyear Canada and Goodyear U.S. have both been identified as such manufacturers. As a result, they have been named in thousands of proceedings, in various U.S. states. All such actions are in the U.S. and involve U.S. occurrences. No asbestos claims have been commenced against Goodyear Canada in Canada.

B. The Defendants

i. American International Companies ("AIC")

[13] AIC (formerly American Home Assurance Company and now Chartis) provided Goodyear with excess insurance coverage to varying amounts during the period from October 31, 1969 to October 31, 1976 with underlying primary insurance coverage by a series of insurers through those years that provided primary insurance coverage to a policy limit in each year of $500,000.00.

ii. Gerling Canada Insurance Company ("Gerling")

[14] Gerling (formerly Gerling Global General Insurance Company) provided excess insurance coverage to Goodyear Canada in two policy years, 1974-75 and 1975-76 excess to underlying $15,000,000 umbrella policies granted by American Home Assurance Company. The underlying American Home Assurance Company policies were in turn excess to a $500,000 primary policy issued by Royal & SunAlliance Insurance Company in policy year 1974-75 and Guardian Insurance Company of Canada in 1975-76.

iii. ING Canada ("ING")

[15] ING is the successor to Guardian Insurance Company of Canada ("Guardian"). Guardian issued an occurrence-based general liability comprehensive general liability ("CGL") policy of insurance, to Goodyear Canada for a one-year period, October 31, 1975 to October 31, 1976.

iv. Northumberland General Insurance Company ("Northumberland")

[16] Northumberland provided primary CGL insurance to Goodyear Canada for the periods from October 31, 1978 to October 31, 1979 and October 31, 1979 to October 31, 1980. Northumberland also provided excess CGL insurance, or "buffer coverage", to Goodyear Canada for the period from October 1, 1978 to October 31, 1978.

v. Royal & SunAlliance Insurance Company ("RSA")

[17] RSA (the successor company to Royal Insurance Company of Canada) issued an occurrence-based general liability policy of insurance to Goodyear Canada for three consecutive one-year periods from October 31, 1972 to October 31, 1975.

vi. Aviva Insurance Company of Canada ("Aviva")

[18] Aviva assumed the business of The General Accident Assurance Company of Canada and Scottish & York Insurance Co. Limited. The two relevant policies of insurance issued by Aviva were for the period October 31, 1976 to October 31, 1977 and renewed to October 31, 1978 and for the policy period December 7, 1978 to October 31, 1979.

vii. Lombard Canada Ltd. ("Lombard")

[19] Lombard acquired the business of Phoenix Assurance Company Ltd. ("Phoenix"), through a series of commercial transactions. Phoenix provided liability insurance to Goodyear Canada, covering annual periods of October 31, 1969-70, 1970-1971 and, 1971-1972.

III – FACTS

A. Goodyear's Insurance Program, 1969-1980

[20] Between 1969 and 1973 and up until October 31, 1980, Goodyear Canada managed in Canada its own insurance program for occurrences and accidents anywhere in the world, including the United States. During that time period, Goodyear Canada sought and obtained CGL policies to protect itself from product liability claims worldwide.

[21] Goodyear's Canadian insurance policies in place during the 11 year period from 1969-1980 were occurrence-based in format, meaning that they covered bodily injury that occurred during the policy period. Each policy in succession expressly states that it only provides coverage for bodily injury occurring or sustained during its policy period. The limits of liability contained in each consecutive policy range from $500,000 in the early years and up to $1,000,000 by October 31, 1978.

[22] The policies also contained clauses providing for deductible amounts which had to be absorbed by Goodyear before the coverage would respond. Applicable deductibles are $10,000 for each claim under each yearly policy in effect from October 31, 1969 to May 31, 1976, and $25,000 for each claim under each yearly policy thereafter until October 31, 1980.

B. 1980 Territorial Exclusion and Goodyear's Shift from the Canadian to the American Liability Insurance Market

[23] In 1980, Goodyear U.S. decided that each Goodyear company affiliate, including Goodyear Canada, would seek insurance coverage for accidents or occurrences which took place locally only (i.e. for Goodyear Canada, only for events that occurred in Canada). Under this practice, accidents or occurrences in Canada arising from products manufactured by Goodyear U.S. or other affiliates were indemnified under the Goodyear Canada insurance policy. Equally, accidents or occurrences in the United States arising from products manufactured by Goodyear Canada or other affiliates were indemnified under Goodyear U.S.'s insurance coverage.

[24] As a result, as of October 31, 1980, Goodyear Canada became an insured under U.S. policies with respect to U.S. losses and occurrences. Because Canadian coverage for U.S.-based claims was now redundant, a U.S. Territorial Exclusion was added to Goodyear Canada's CGL policies and continued to form part of Goodyear's Canadian liability insurance program through the 1980s and 1990s and after. The effect of this exclusion is that the Canadian primary policies containing it do not provide any coverage whatsoever to Goodyear Canada for occurrences or injuries happening in the U.S., whether involving Goodyear Canada products or otherwise, after October 31, 1980.

[25] As the result of the decision taken by Goodyear and the addition of the U.S. Territorial Exclusions to the Canadian policies, U.S. products liability exposures of Goodyear Canada were intended to be insured and were in fact insured from 1980 onward under policies issued by U.S. liability insurance carriers. Goodyear Canada became an insured under the U.S. policies with respect to U.S. losses and occurrences, so that if there was to be asbestos coverage for accidents or occurrences in the U.S., the intention would be that as of 1980 forward, the coverage would be under the U.S. policies. Put otherwise, effective October 31, 1980, Canadian insurers of Goodyear Canada did not insure any of Goodyear Canada's U.S. product liability exposures.

[26] Accordingly, for the purposes of Goodyear U.S.'s insurance program with its American insurers from 1980 to 2006, Goodyear Canada was an 'insured' for purposes of its product liability occurrences in the U.S. In this action Goodyear Canada is not proceeding against any of the American insurers.

[27] The coverage provided by the American insurance policies that covered Goodyear Canada included high attachment points before the insurers would become involved and their policy proceeds exposed. This effectively left the majority of the product liability claims in the U.S. to be directly handled by the Goodyear entities themselves. Taking on this responsibility also reduced insurance costs. Beginning in the July 1, 1980-1981 policy period, the retained amount was US$1.5 million for each occurrence. This amount remained in force for several policy periods until the July 1, 1985-1986 policy, when it increased to US$2.5 million.

[28] Throughout the above initial period of high self-insured retentions in the U.S. (i.e. 1980 to 1986), neither the U.S. nor Canadian policies contained asbestos exclusions. Exclusions for asbestos-based claims were endorsed to the U.S. policies, beginning with 1986-1987. Goodyear entities proceeded to increase the retained amounts under the U.S. policies as follows:

- US$5 million 'each occurrence' - July 1, 1986/87 policy et seq.
- US$7 million 'each occurrence' - July 1, 1994/95 policy et seq.
- US$15 million 'each occurrence' - July 1, 2002/03 policy et seq.
- US$25 million 'each occurrence' - August 1, 2005/06 policy.

[29] Given the very high deductibles or self-insured retentions, which Goodyear is obliged to pay toward claims costs and liability before insurance coverage attaches, there is no dispute that, for the purposes of pro rata allocation of any bodily injury claim, Goodyear Canada must be regarded as self-insured for the period 1980-1986.

C. 1984-1986: The Beginning of Asbestos Claims against Goodyear Canada

[30] Beginning in 1977-1978, Goodyear U.S. was named in U.S. actions alleging injuries from exposure to asbestos.

[31] The first asbestos claim against Goodyear Canada commenced in the United States was in October of 1984. Up to the end of 1986, there were approximately 12 additional asbestos injury claims commenced in the United States against Goodyear Canada. These claims involved

personal injury allegedly occurring as a result of exposure to gasket material manufactured by Goodyear Canada. These early claims were made against Goodyear as a third party, by the U.S. purchaser of the gasket materials, Durabla, who was being named as a first party defendant. Goodyear Canada notified its insurers about the claims as they came in. Similarly, on the U.S. side, Goodyear U.S.'s risk management team advised its insurance broker of incoming claims and, pursuant to any renewals or new markets in the placing of insurance, the claims would have been disclosed to the insurers. Though Goodyear Canada notified its insurer, given the quantum at issue, it settled these early claims below the applicable deductible and without involvement of the insurer.

D. 1986 Onwards: Asbestos Litigation Becomes a Very Significant Risk and Eventually Cannot be Covered

[32] It is clear that, by the 1990s, it was impossible to obtain coverage for asbestos-related claims arising in the United States, due to the volume and breadth of claims being made. The parties dispute the precise date upon which coverage ceased to become available. Initially, insurers who did not wish to cover asbestos related claims did so with general pollution exclusions, which, they thought, also included asbestos-related liability. However, at some point in the mid-1980s, in response to some U.S. court decisions in which the pollution exclusions were found not to exclude coverage for asbestos-related injuries, insurers began to insert specific asbestos exclusions in the policies they wrote. This began the elimination of coverage for such risk on a commercially reasonable basis.

[33] Given the significant volume of asbestos-based bodily-injury claims, it eventually became impossible for manufacturers of asbestos-containing products, such as Goodyear, to obtain product liability insurance coverage for such claims. That development led, in due course, to the emergence of the Stonewall Principle in the context of claims made by manufacturers on their previous occurrence-based policies.

[34] The demarcation of the point at which insurance coverage for asbestos product liability claims ceased to be commercially available to Goodyear Canada is a contested issue between the parties, and was the subject of expert evidence before me. The disputed period will be dealt with in more detail below.

IV – ISSUES AND ANALYSIS

[35] The Order of Justice Campbell dated January 12, 2011 directed that the following issues raised by the plaintiff be addressed on this motion:

1.(a) For what years, after 1985, was insurance coverage not available on a commercially-reasonable basis to Canadian commercial insureds with respect to occurrences arising in the United States from asbestos-related injuries (the "No Coverage Years 1")?

1.(b) Whether Goodyear was obligated to self-insure for any asbestos-related injury found to have been suffered by third-party claimants during the No Coverage Years 1.

1.(c) In the alternative, for what years after 1985, was insurance coverage not available on a commercially-reasonable basis to Canadian commercial insureds who produced products with asbestos with respect to occurrences arising in the United States from asbestos-related injuries (the "No Coverage Years 2")?

1.(d) Whether Goodyear was obligated to self-insure for any asbestos-related injury found to have been suffered by third-party claimants during the No Coverage Years 2.

1.(e) Whether deductibles for each insurance policy triggered in this action should be allocated amongst all policy years triggered, on a pro-rata basis.

The Order of Justice Campbell also directed that the following issues raised by the defendants be addressed on the motion:

2.(a) Does the fact that Goodyear had self-insured retentions on its liability policies during the No Cover Years 1 and the No Coverage Years 2 affect the answer to issues 1(b) and 1(d)?

2.(b) Does the fact that Goodyear had made for commercial decision in 1980 to move all of its risk for products sold in the U.S. market (including asbestos) to the U.S. insurance market affect the answers to issues 1(b) and 1(b)?

2.(c) Whether self insurance type schemes were available to Goodyear after 1985 to afford financial protection to it with respect to U.S. residents contracting asbestos related diseases caused by asbestos manufactured in Canada by Goodyear and shipped to Goodyear U.S.

2.(d) Whether the pollution exclusions contained in the Goodyear policies preclude coverage to Goodyear for asbestos related injuries.

[36] The defendants subsequently withdrew their request for the determination of issue 2(d) on the ground that, based on the evidence tendered on the hearing of the motion, that question was moot.

[37] Upon hearing oral argument, the issues for determination distilled to the following three:

(1) Whether and for what years, after 1985, was insurance coverage not available on a commercially-reasonable basis to Canadian commercial insureds with respect to occurrences arising in the United States from asbestos-related injuries?

(2) Should the Stonewall Principle be adopted into Ontario law?

(3) Should deductibles for each insurance policy triggered in this action be allocated amongst all policy years triggered on a pro-rata basis?

By subsequent correspondence, counsel confirmed that these are the central points which must be addressed in order to resolve the dispute between the parties.

Issue 1 - The Availability of Insurance for Asbestos-Related Injuries after 1985

[38] The plaintiff and defendants presented expert witnesses to opine on the availability for Goodyear Canada of insurance for U.S.-based asbestos-related injuries after 1985. Fact and expert witnesses also filed affidavit evidence relating to this issue.

i. The Evidence

Eldrich Carr

[39] The plaintiff submitted the affidavit of Eldrich Carr, U.S. Manager of Insurance at Goodyear U.S. from 1986-1996. Mr. Carr recalled that in the mid-1980's insurers in the United States, speciality insurers, and offshore insurers had unanimously imposed an asbestos exclusion on all CGL policies. He further provided evidence that from 1986, he sought, but was unable to obtain, insurance coverage for Goodyear U.S. which would cover asbestos-related claims in the United States.

[40] Mr. Carr assumed responsibility for insuring all foreign risks, including those of Goodyear Canada, in or around 1988. He testified that he looked for coverage for asbestos claims and could not find such coverage in Canada or the United States.

[41] Mr. Carr testified that Goodyear would have secured asbestos coverage if it had been available at whatever was a reasonable premium and for the lowest possible deductible.

John Gelston

[42] John Gelston, the Senior Vice President and Chief Broking Officer of HKMB HUB International Insurance Brokers, gave oral testimony as the plaintiff's expert witness. He opined that insurance coverage could not be obtained in Canada for Goodyear with respect to U.S. asbestos exposures from 1986 onward.

[43] Crucial to Mr. Gelston's opinion is the characterization of insurance as involving a transfer of risk. He acknowledged that Goodyear may have had available to it a number of other products to assist with the funding of claims, such as a self-insured retention ("SIR"), but insisted that these alternative methods would constitute risk financing exercises that involve no transfer of risk. His refusal to characterize these products as insurance distinguished him from the defendants' principal expert, Jack Lee.

[44] Referring to the insurance market as a whole, Mr. Gelston testified that 1985-1988 was a "hard market", that is, an insurance market typified by risk aversion among insurers. Under such circumstances, underwriters would have been hesitant to write average or substandard risk and their resolve to avoid uneconomic risk would be even more firm than usual. Mr. Gelston

recounted that even routine risks were not getting covered during that period. He added that Canadian underwriters were particularly suspicious of U.S. exposures because of their vulnerability to the U.S. litigation system and its penchant for high punitive damage awards.

[45] Mr. Gelston opined that a combination of factors would have conspired against Goodyear's ability to obtain coverage for asbestos-related U.S. liability: that it had manufactured products containing asbestos; that these had been exported to the United States; that, by 1984, the Goodyear Canada had been subject to a number of asbestos-related claims in the U.S.; and the presence of a hard market.

[46] Ultimately, Mr. Gelston opined that coverage for asbestos and pollution related incidents was not available in the marketplace in Canada in 1985-1986 and that Goodyear Canada would not have been able to get asbestos coverage for U.S. claims from a U.S. insurer after 1986. He further testified that, from 1986 onwards, as underwriters became more and more aware of the asbestos issues, it would have become increasingly more difficult to purchase that coverage, even in a soft cycle, because it literally would be accepting a risk where there would be known claims. Mr. Gelston suggested that coverage may have been available in theory but not in practice, since the price would be so prohibitively expensive that coverage was not purchasable from a practical perspective, positing that an insurer would have wanted a minimum premium equal to 1.5 times the maximum policy payout (i.e. a $1.5 million premium for a $1 million limit).

[47] On the topic of pollution exclusions, Mr. Gelston testified that as of 1985, insureds were told that a pollution exclusion would have caught asbestos and that a policy containing such an exclusion would mean that there was no coverage for asbestos-related insurance. However, beginning in the mid-1980s, the industry began to appreciate that American courts were interpreting pollution exclusions contrary to insurers' intentions – namely so as not to exclude coverage for asbestos-related liability. Because of this uncertainty, and the view that a pollution exclusion alone was insufficient to also exclude coverage for asbestos, insurers began to add a specific asbestos exclusion. There was, therefore, a transition period of approximately two years wherein an insured may not have been subject to an asbestos exclusion but was nonetheless party to a policy with a pollution exclusion that did not intend to cover asbestos-related exposure. He opined that by 1986, every Canadian insurer was aware of the asbestos situation and covered themselves.

[48] Mr. Gelston acknowledged that Goodyear's Canadian policies began to include an asbestos exclusion as of December 31, 1987. He opined that the December 31, 1987 exclusion would have been prompted by the general underwriting approach of liability insurers to exclude asbestos coverage on their liability coverage during and after the aforesaid transition period. Mr. Gelston opined that if it had not been for the U.S. territorial exclusion that was put in place in 1980 on its Canadian insurance program, liability insurers in Canada would have excluded asbestos coverage for Goodyear prior to 1987. It was only because U.S. asbestos claims had already been excluded from the Canadian policy by way of U.S. territorial exclusion that the exclusion onto Goodyear Canada's policies was delayed from 1986 to December 31, 1987.

Stephen White

[49] Stephen White, a former underwriter, a Certified Canadian Insurance Broker and an insurance industry consultant, filed an affidavit as an expert witness for the defendants. Mr. White conceded that he generally agrees with Mr. Gelston's views about the exclusion of asbestos-related claims from the year 1986 in the regular insurance market.

[50] However, Mr. White's evidence was that coverage could have been accessed through alternatives to conventional insurance. Mr. White outlined various options, including the creation, in some manner or other, of a "captive insurance company", contracting with an existing insurer with special facilities for sequestering financial accounting for loss provision and claim payment, and the securing of coverage through a very high SIR.

Jack Lee

[51] Jack Lee, a Certified Canadian Insurance Broker, gave oral expert testimony on behalf of the defendants. Mr. Lee testified that, while asbestos was an area of concern for insurers in the mid-1980s and onward, there were still markets to approach and coverage to be found for insureds with the right risk profile.

[52] Based on what Mr. Lee learned from Goodyear Canada's records of its claims history and coverage requirements, he considered it highly probable that coverage could be found from Canadian insurers for its products liability exposures in Canada that would not exclude asbestos. While he viewed it as more difficult to obtain coverage from Canadian insurers for Goodyear Canada's products exposure for U.S. occurrences, he opined that it would still be possible to do so even into the 1990s, particularly if Goodyear Canada's tire exposure in the U.S. was excluded. Mr. Lee was of the specific view that he could have found an insurer to give Goodyear Canada coverage that did not exclude asbestos if placed on top of a $1 million SIR.

[53] Mr. Lee acknowledged that there would be difficulties in insuring asbestos-related risk but refused to entirely rule out the availability of coverage for such risk in the mid-to-late-1980s. He was of the opinion that, where an insured produced a product containing asbestos, certain underwriters would consider writing the risk depending on the product, whether it could come in contact with a third party, how long ago the entity produced the product, product use, purpose and claims history. Key factors would be the loss history and whether it is quantifiable. An underwriter may have been willing to extend coverage to Goodyear Canada, but only after subjecting it to scrutiny and, even then upon protecting itself with tools such as high deductibles and an annual maximum.

[54] While Mr. Lee concluded that there would have been a limited market to provide coverage for liability arising from the production of asbestos in the United States, he was not prepared to say that coverage would have been available indefinitely beyond. Rather, he was unable to say how far beyond the 1980s such coverage might have been extended, and said that this would have come down to specific circumstances.

ii. Analysis

[55] The parties' positions on this issue may be summarized as follows. The plaintiff maintains that coverage for asbestos-related liability occurring in the United States was not available whatsoever at any time after 1985, at least not at commercially reasonable rates. The defendants counter, first, that while conventional coverage may have been difficult to obtain during that period, given the particular circumstances of Goodyear Canada and its exposure, some Canadian insurers would have been prepared to provide coverage at least into the 1990s, when asbestos exclusions became standard. Moreover, the defendants argue that even if conventional insurance were unavailable to Goodyear, alternative insurance products would have been, and these constitute insurance.

[56] For his part, the defendants' expert Mr. White agreed with the plaintiff's expert Mr. Gelston regarding the non-availability of conventional insurance from 1986 onward. Despite that concession, the defendants' position (as also advanced by Mr. Lee) was that other types of insurance-like products remained available, and thus the plaintiff could have obtained coverage. My determination of the issue availability of insurance therefore requires me to first decide whether, for the purposes of the Stonewall Principle, "insurance" refers only to so-called conventional insurance.

[57] The traditional concept of insurance involves the payment of a premium by the insured to the insurer in consideration of the insurer assuming responsibility for a defined risk for which the insured is otherwise exposed. Black's Dictionary provides the following definition of insurance:

> An agreement by which one party (the insurer) commits to do something of value for another party (the insured) upon the occurrence of some specified contingency; esp. an agreement by which one party assumes a risk faced by another party in return for a premium payment.

[58] This concept is reflected in the statutory definition found in the *Insurance Act,* R.S.O. 1990, c. I.8, s.1 as follows:

> "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance;

[59] Thus a key element of insurance is the transfer to or assumption of risk by the insurer. The insurer assumes varying degrees or levels of risk by accepting premiums from a range of customers for a range of risks in the expectation that not all will materialize requiring a payout. Those risks that do materialize will be covered by a combination of premium income, investment income, the insurer's reserves, and/or its re-insurance arrangements. The insurer forecasts, predicts as best it can, and agrees to underwrite potential claims, based on the likelihood or uncertainty that they will arise; the insurer further positions itself to cover claims in the event that they do arise, and at the same time covers its costs and possibly makes a profit.

[60] I acknowledge that there are forms of conventional insurance in which the premium charged by the insurer is a function of past claims and is sometimes adjusted after the fact.

Nevertheless, the insurer who issues such a policy assumes the risk of responding to claims that may or may not materialize: once again, there is a transfer of risk from the insured to the insurer.

[61] Other "insurance-like" products were said by Mr. White and Mr. Lee to have been available options for Goodyear in seeking coverage for asbestos-based claims in the post-1985 era. In my view, however, these products are not conventional insurance but rather a form of financing mechanism for known liabilities. By a certain point in time – all parties acknowledge – asbestos-based claims ceased to be a mere possibility but instead became a certainty, for which appropriate financial contingencies had to be put in place. To the extent these approaches were labelled "insurance" or may have involved an insurer as claims processor, I do not consider there to have been any transfer of risk such as is standard for conventional insurance.

[62] Presumably, insurers who provide these insurance-like arrangements do so on the basis of full knowledge of the financial burden being assumed and stipulate for "premiums" accordingly. In other words, they expect to be fully covered for the anticipated payouts, plus their administrative expenses and profit. In my view, unlike conventional insurance, such alternative schemes do not dovetail with the rationale, as I understand it, of the Stonewall Principle (discussed in greater depth below).

[63] Essentially, *Stonewall* involved a conscious decision by the court to allocate to insurers, who voluntarily assumed an unknown risk, full and ongoing responsibility for claims that arose, in part, at least, during their respective coverage periods. Having agreed to participate in a risk-assuming venture for which their exposure was uncertain – and in consideration for which the insurers stood to make a profit if the risk did not materialize – it is not unreasonable (so the theory goes) to assign full responsibility to the insurers. The fact that the insurer might not have forecast the size of the risk being assumed, or that the risk might be far more extensive than was anticipated, are not relevant considerations.

[64] Assuming for the sake of discussion that this rationale is valid, in my view it does not extend to a situation where the insurer is not assuming a risk, but in reality is serving as a financing vehicle or banker, or merely as a claims processor. The risk-reward equation is absent.

[65] I therefore do not consider that the Stonewall Principle should include alternatives to conventional insurance, assuming these were available.

[66] Having determined that, for the purposes of the Stonewall Principle, we are concerned with the availability of conventional insurance and not of alternative insurance products, the other question to decide in relation to the first issue is a factual one: at what stage did conventional product liability insurance for U.S.-based asbestos claims cease to be available to Goodyear Canada on commercially reasonable terms? Based upon the facts and evidence on this record, the question is not whether insurance was or is unavailable but, rather, when it ceased to be.

[67] Given the limitations of Mr. Carr's testimony, I do not find it of much assistance in deciding whether asbestos coverage would have been available to Goodyear Canada for U.S.-based claims during the period 1985-1986. He was not involved in seeking insurance for Goodyear Canada until 1988. At that point he was unable to secure coverage for asbestos risks. If

anything, the latter testimony supports the plaintiff's contention that coverage was not available, at least from 1988 onwards.

[68] There is no dispute between expert witnesses that coverage for asbestos-related liability in the United States is no longer available. Mr. Gelston and Mr. Lee differ, however, as to the date at which Goodyear Canada could no longer obtain such coverage. Mr. Gelston was prepared to pinpoint that date at 1986; the defendants' other expert, Mr. White, agreed. Mr. Lee hesitated to give a specific date, citing only the mid-1990s.

[69] Where the testimony of Messrs. Gelston and Lee differs on this crucial issue, I prefer and accept the testimony of Mr. Gelston. While both experts were honest, generally well informed, and forthright, Mr. Lee displayed some critical weakness in his testimony that leads me to give more weight to that of Mr. Gelston.

[70] In cross-examination, Mr. Lee was confronted with an April 1983 article from an authoritative U.S. insurance industry newspaper. The article outlined the implications of asbestos litigation for the insurance industry. Mr. Lee testified that the trigger theory arguments that helped to fuel the U.S. insurance industry crisis about asbestos coverage emerged after this time. In this respect, he was plainly wrong; three trigger theories and their implications for insurers of asbestos claims were discussed in the April 1983 article. Mr. Lee further testified that he was not familiar with the seminal 1981 court decision that introduced the continuous trigger theory of liability – *Keene Corp. v. Insurance Co. of North America*, 667 F. 2d 1034 (D.C. Cir. 1981) ("Keene"), which incorporated it into American jurisprudence – to the severe detriment of insurers who had insured asbestos-related risk. It is clear that by 1983, insurance industry publications – which Mr. Lee acknowledged were authoritative and read by Canadian underwriters and brokers who were offering U.S. coverage – were noting the severity of the asbestos "crisis" and speculating that some insurers might become insolvent as a result. This information is at odds with Mr. Lee's efforts to downplay any concerns that insurers may have had in 1985.

[71] It is very significant that Mr. Lee was mistaken on his chronology of when trigger theories began to matter to the insurance industry. Given the direct link between asbestos jurisprudence in the United States and the introduction of asbestos exclusions, as well as the importance of chronology to the very question that Mr. Lee was asked to opine on, his poor command of this central issue undermined the worth of his testimony. The fact that the problem was, in some quarters, being described as a crisis for the insurance industry as early as 1983, causes me to further doubt that the reliability of Mr. Lee's evidence. By contrast, this information supports and is consistent with Mr. Gelston's evidence about the onset of insurers' reluctance to underwrite asbestos risks.

[72] In addition, I note that – while it is clear that plaintiff has the burden on this issue – no one is better positioned to displace the notion that insurance was unavailable for a given period than the very insurers that are parties to this matter. The plaintiff faced the daunting prospect of proving a hypothetical negative. The defendants in this action comprise many of the most prominent insurers in Canada, both at present and during the period in question. None of them called an employee or underwriter to testify that they did or would have been willing to insure an enterprise like Goodyear Canada for asbestos-related exposure in the U.S. post-1985. While this

does not shift the burden of proof from the plaintiff to the defendants, based upon the defendants' failure to adduce evidence from witnesses within their control, I am prepared to draw an adverse inference from this lack of testimony. I conclude that the testimony of the defendants' own employees or underwriters would not have been helpful to or supportive of the defendants' case.

[73] For the foregoing reasons, I accept the plaintiff's evidence on this point and find that Goodyear Canada did not have available to it conventional insurance coverage on commercially reasonable terms for asbestos-related liability in the United States after 1985.

Issue 2 - The Applicability of the Stonewall Principle

i. Claim Allocation and Trigger Theories

[74] This motion deals with the allocation of responsibility for asbestos-related claims occurring across multiple policy periods. Because of the nature of asbestos-related illness, the event – bodily injury – that triggers coverage cannot be pinpointed to a particular point in time and thus within the boundaries of a given policy. A court addressing these types of issues needs to adopt both a method for the allocation of a claim across multiple policy periods as well as a so-called "trigger" theory.

[75] The policies in question were issued between 1969 and 1980. All were occurrence-based policies that provided for coverage of occurrences happening during the policy period. The typical grant of coverage in these policies is as follows:

> The company will indemnify the Insured for all sums which the Insured will be legally obligated to pay for damages and expenses ... caused by or arising out of each occurrence happening during the policy period.

[76] The policies do not have a specific allocation clause that addresses how to allocate a particular claim over multiple policy periods. Accordingly, both the policies themselves and the common law must be considered.

[77] With respect to asbestos claims, considerable jurisprudence has developed in the United States with respect to how such claims should be allocated. Various theories (called "trigger theories") have been developed as to which policies are called upon to respond to particular claims in order to determine how to allocate a loss over a period of time. In other words, trigger theories help to determine the allocation of the burden of a loss across multiple policy periods. Some trigger theories developed in the United States are as follows:

- exposure theory - This theory, which has often been adopted in the context of bodily injury claims, is based on the premise that mere exposure to a harmful condition will be sufficient to cause damage within the meaning of a CGL policy.

- manifestation theory – This theory holds that injury or damage does not occur until the injury or disease becomes apparent, i.e., manifests itself.

- continuous or "triple trigger" theory - Under this theory, which is based on the premise that the developing injury or damage represents a continuous series of new injuries, every insurance policy in effect from the first exposure to discovery or manifestation is triggered.

- "injury-in-fact" theory - Under this theory, the central question is, when did the injury or damage actually occur? Injury need not be manifest, but it must exist in fact.

[78] Eventually in this action, a trial court will have to adopt a trigger theory to deal with the thousands of U.S. so-called "long-tail" asbestos claims that have been made against Goodyear Canada. Although Goodyear Canada manufactured and shipped asbestos gasket material into the United States for only four years, the U.S. Claims allege that asbestos fibres from the material lodged in claimants' lungs at uncertain points in time and stayed there for numerous years, eventually causing disease that manifested at a much later date (even up to the present day).

[79] In the event that the trial court adopts the continuous trigger theory, it will, in addition, have to contend with the allocation of claims across multiple policy periods. Allocation is a non-issue in relation to the manifestation, exposure, and injury-in-fact trigger theories. When these theories are applied, the occurrence is deemed to have occurred at a particular point in time, and it is the policy in force at that point that will respond. With the to the continuous trigger theory, however, responsibility transcends policy periods. Two approaches, "all sums" and "pro rata" have been developed in response to this problem.

[80] The "all sums approach", adopted in some U.S. jurisdictions, allocates responsibility for the full amount of the claim to every insurer who was on risk at any point during the continuous period during which the injury is considered to have occurred. This approach is premised on the theory that, because the policies do not have an allocation clause contained within them, each insurer should indemnify Goodyear for the entire claim on the basis that the grant of coverage in each policy provided that the insurer "will indemnify the insured for all sums which the insured will be legally obligated to pay." The all sums approach operates from the perspective that that it should be up to an insurer to seek equitable contribution from other insurers if one of them were required to pay out the entire claim.

[81] Another other line of cases has applied a "*pro rata* approach" to allocation, which entails:

(1) using the total number of years (or months) from the date when the claimant in each case was first exposed to asbestos to the date when the claimant was first diagnosed with an asbestos-related disease as the denominator;

(2) using the number of years (or months) for which the plaintiff has no responding liability insurance coverage in proportion to the denominator figure as the numerator; and

(3) applying the resulting fraction or percentage to the defence and indemnity costs incurred in the claim in question, and requiring the insurer(s) and insured to cover their share of the liability accordingly.

[82] For purposes of the determination of the issues raised on this motion, the parties have agreed that I should adopt the continuous, or triple-trigger, theory and *pro rata* allocation. This agreement is, however, without prejudice to their ability to argue, at trial, that the court should adopt an alternate theory (such as the manifestation theory), or method of allocation (such as all sums).

ii. The Relevance of the Unavailability of Coverage for Asbestos-Related Liability to the pro rata Allocation of Claims

[83] If a trial court decides to allocate the loss occurring over multiple years on a *pro rata* basis, then it must deal with what happens if an insured had no insurance coverage during part of the time that the injury was found to have occurred. For example, if an occurrence is found to have taken place over a ten year period and the insured did not have coverage for one of those ten years then would it be more equitable that the insured share the burden of the loss and essentially self-insure for the uncovered year, or should the insurers absorb the uncovered year amongst themselves?

[84] In a *pro rata* approach, if an insured elects to self-insure or does not buy enough insurance in a particular year, the insured has to contribute on a *pro rata* basis towards the claim. By contrast, in an "all sums" approach, an insurer whose policy has been triggered is liable for 100% of the loss even if the insured was not insured for other periods in which an "occurrence" took place (thus no allocation for uninsured years takes place).

[85] A different question arises where the insured was unable to insure itself because the insurance industry did not offer insurance on a commercially reasonable basis. In other words, is the insured itself responsible for those years when it could not obtain coverage because coverage was not commercially available in the market-place? This is the main issue to be decided on this motion.

[86] The reason this issue is so important is that Goodyear Canada has been served with thousands of U.S. Claims since 1986, including right up to 2010. Therefore, for example, if the court concludes in a particular claim that there were occurrences between 1970 and 2010, application of the continuous or triple trigger theory would mean that there were 40 years in which injury occurred. Goodyear Canada was insured by the defendants between 1969 and 1980. It then was insured by its U.S. parent in respect of U.S. claims through 1985. The question then becomes whether Goodyear Canada would be deemed to have self-insured with respect to all of the years after 1985 because (as I have found) it could not get insurance coverage for asbestos-based liabilities after 1985. This would add 25 years to the denominator of the pro rata calculation, which could effectively mean that Goodyear's recovery under its pre-1981 insurance with respect to most U.S. asbestos claims would disappear. For example, if a U.S. asbestos injury manifested itself in 2010 and resulted in an award of $400,000 against Goodyear and the claim was allocated over 40 years, based on a *pro rata* approach (and assuming each year contributed equally), the result would mean an allocation of $10,000 per year. This is at or below any of the deductibles of the claimed policies (subject to the argument below regarding pro-ration of deductibles), and thus Goodyear would recover nothing under the various policies with respect to that particular claim.

iii. The Stonewall Principle

[87] In asking this court to end the allocation of asbestos-related claims at the commencement of the period for which no asbestos coverage was available, Goodyear wants this court to adopt the Stonewall Principle. The decision in *Stonewall* involved a former manufacturer of asbestos products which was confronted with tens of thousands of asbestos-related injury claims. The appellate court ruled that multiple policies spanning several decades were triggered. The court then adopted a *pro rata* allocation of the total loss. It noted, however, that an industry-wide asbestos exclusion was introduced in 1985 that resulted in the unavailability of coverage for the insured. The court ultimately concluded that the post-1985 years ought not to be counted in the allocation equation, so as to not hold the insured responsible for any periods of involuntary non-coverage.

[88] No Canadian court has addressed the Stonewall Principle, and American courts have been split in their adoption of it. Goodyear now asks this Court to import *Stonewall* into Ontario law and to conclude that the years in which it could not obtain coverage for asbestos-related liability should not be counted in any *pro rata* allocation equation.

iv. Positions of the Parties

The Plaintiff

[89] Goodyear acknowledges the lack of Canadian cases that deal expressly with the Stonewall Principle or with respect to situations where an injury is found to have occurred during periods when an insured could not obtain asbestos coverage. It submits, however, that the Ontario Court of Appeal has acknowledged the relevance of American jurisprudence on insurance law, particularly where Canadian jurisprudence on point is relatively underdeveloped: *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447 (C.A.) at para. 34 ("*Zurich*"). It therefore relies on the principles articulated by courts in the United States, and asks that *Stonewall* be followed in Ontario.

[90] Goodyear cites a number of American cases that either follow or are consistent with the Stonewall Principle: see *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, 177 F.3d 210 (3d Cir., 1999); *Olin Corporation v. Insurance Company of North America*, 221 F.3d 307 (2d Cir., 2000); *Sec. Ins. of Hartford v. Lumbermens Mutual Cas. Co., et al.*, 826 A.2d 107 (Conn., 2003); *Mayor and City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070 (Md.App. 2002); *Champion Dyeing & Finishing Co., Inc. v. Centennial Insurance Company*, 810 A.2d 68 (N.J.Super.App., 2002); *Pneumo Abex Corporation et al v. Maryland Casualty Company*, 2001 U.S. Dist. LEXIS 20297 (D.C. 2001), modified 2001 U.S. District LEXIS 26373 (D.C. 2001); *Wooddale Builders, Inc. et al v. Maryland Casualty Company et al*, 722 N.W.2d 283 (Minn. 2006).

[91] Goodyear argues that the adoption of the Stonewall Principle is not a question of logic but one of fairness and good public policy. Goodyear emphasizes that the continuous trigger theory is a creation of the courts designed to maximize fairness and coverage to the insured. It argues that it would be perverse for this instrument to effectively result in a denial of coverage for Goodyear.

[92] American courts began to adopt the continuous trigger theory beginning in 1981 in *Keene*. As a result of the potential for that decision to expand their exposure to liability, insurers eventually ceased covering asbestos-related liability. Goodyear argues that insurers should not be allowed to, in effect, frustrate a court-created technique that was implemented to extend coverage fairly.

[93] It submits that, absent the Stonewall Principle, the effect of *pro rata* allocation is to deny the insured of coverage even for the period when it did have insurance. This is because, with such a long timeframe, *pro rata* allocation dilutes per year coverage such that it will not exceed the deductible in a given year. Given that the continuous trigger theory is a creation of the courts, its application should be modified where it would result in unfairness. Goodyear suggests that *Stonewall* provides for this modification and that *Zurich* provides for the means to apply it in Canada.

The Defendants

[94] The defendants argue that there is no reason in law, fact, or principle to adopt *Stonewall* in these circumstances. Rather, they urge the court to reject Goodyear's theory of limited allocation, which, they say, seeks an exception to the rule that, in a *pro rata* allocation, an insured will ordinarily be responsible for periods of self insurance.

[95] They point out that each insurer negotiated the policy terms, calculated the premiums, and issued their respective policies with reference to the risks disclosed to each, and the market conditions prevailing, at the time when the policies were issued. The insurers did not negotiate with reference to future risks and market conditions that were unknown and unforeseeable. They therefore ask why insurers on the risk earlier in time should be asked to bear the costs of a hardening insurance market in the future, as the Stonewall Principle would have them do.

[96] In any event, the defendants urge that the Stonewall Principle should be rejected because it offends fundamental tenants of contract law that oblige parties to adhere to their bargains and runs contrary to accepted principles applicable to occurrence-based liability policies. They warn that accepting the theory would effectively result in Goodyear Canada receiving a windfall of 'free coverage' across many years in which it voluntarily elected to carry high self-insured retentions.

[97] The defendants ask why they should be affected by whether insurance is available at a later date after their policies have expired. It is immaterial, they say, that the insured may be unable to find other commercial general liability insurance sufficiently attractive to it years later.

[98] Moreover, the defendants characterize Goodyear's position as being based entirely upon a single U.S. decision that it is a minority position even in the U.S. and has not been widely followed: see *Sybron Transition Corp. v. Security Ins. Co. of Hartford*, 258 F.3d 595 (7th Cir., 2001) ("*Sybron*"); *AAA Disposal Sys. Inc. v. Aetna Ca. & Sur. Co.*, 821 N.E. 2d 1278 (Ill.Ct.App., 2005), appeal denied 829 N.E. 2d 786 (2005); *Reichhold Chemicals, Inc. v. Hartford Accident & Indemnity Co., Hartford* No. X03-CV 88 0085884S, 1999 Conn. Super. LEXIS 2066 (Conn. 1999); *Boston Gas Co. v. Century Indem. Co., et al.*, 910 N.E.2d. 290 (Mass. 2009); *NL Industries, Inc. v. Commercial Union Ins. Co.*, 926 F. Supp. 446 (D.N.J.,

1996); *Mid American Energy Company v. Certain Underwriters at Lloyds London, et al*; Case No. CL 107142, April 13, 2011 Iowa District Court for Polk County. The defendants suggest that *Stonewall* is contrary to Canadian law.

[99] Furthermore, the defendants argue that Goodyear cannot bring itself within the decision in *Stonewall,* even if that case were good law in Ontario. They point out that the appellate court in *Stonewall* court declined to accept the approach of the trial court on the theory that there was no reason to believe that any bargaining had occurred with respect to the asbestos exclusion clauses. The defendants submit that Goodyear made the conscious, voluntary decision to remove the risk of U.S. claims from the insurers in all of its foreign jurisdictions, and posit that premiums paid for the Canadian policies were based on the fact that the Canadian insurer no longer had a risk for claims in the U.S. The defendants maintain that, unlike the *Stonewall* situation, there is clear reason to believe that bargaining occurred, and that Goodyear accepted that it would have no Canadian-based product liability coverage after 1980.

v. Analysis

[100] Goodyear asks me to adopt the Stonewall Principle by concluding that any *pro rata* allocation of liability should not include years for which insurance for asbestos-related liability in the United States was not available from Canadian insurers. Based on my findings above, this would include the period from 1986 to the present. They argue that *Zurich* provides the means to adopt *Stonewall* into Ontario law.

[101] I take *Zurich*, at paras. 34-37, to say that where Canadian courts have not sufficiently dealt with a certain aspect of insurance law that has received attention from American courts, it is open to parties to invite our courts to follow a particular line of American jurisprudence. This is not to say that American case law may be adopted unthinkingly; rather, it may be used by a party to sway the court. In other words, a favourable line of cases from the United States may be helpful to a party, but it is not alone sufficient to convince an Ontario court of the merits of its position. More is required. I note that in *Zurich*, as here, our Court of Appeal had to decide between two competing lines of American case law.

[102] The *Stonewall* decision was a result of a particular genealogy in American insurance law jurisprudence. This began with *Insurance Co. of North America v. Forty-Eight Insulations*, 633 F. 2d 1212 (6th Cir., 1980) ("*Forty-Eight*"), in which the contractual interpretation of the insured's policy led the Sixth Circuit to adopt the exposure theory and *pro rata* allocation. *Forty-Eight* was followed in 1981 by *Keene*, in which a majority in the D.C. Circuit applied an all sums approach, again on the basis of contractual interpretation. The dissenting judge, however, disagreed with the majority in terms of applying all sums and held that the insured should be responsible for those years where it consciously decided not to insure.

[103] In *Owens-Illinois, Inc. v. United Ins. Co.* 650 A.2d 974 (N.J., 1994) ("*Owens-Illinois*"), in the context of claims arising from asbestos-related property damage, the Supreme Court of New Jersey adopted *pro rata* allocation in preference to the all sums approach. Amongst its reasons for doing so was the fact that, with all sums, an insured would be able to escape liability for a period during which it has voluntarily decided to self-insure. The court remarked in this respect (at page 995):

> When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable."

The court offered no explanation or analysis in support of the suggestion that periods where coverage was not available should be treated differently than periods where the risk-bearer willingly chose not to insure.

[104] In the trial court ruling in *Stonewall* (*Stonewall Ins. Co. v. National Gypsum Co.*, 1992 WL 163180, 1992 U.S. Dist. LEXIS 8898 (S.D.N.Y. 1992)), Judge Martin of the Southern District of New York held that the insured ("NGC") could not escape liability for asbestos-related liability during periods for which such coverage was unavailable because it had decided to assume that risk in accepting asbestos exclusion clauses. This holding was overturned on appeal. In its 1995 decision (released subsequent to the decisions in *Forty-Eight, Keene, and Owens-Illinois*), the Second Circuit court held that NGC could not be construed as having elected not to insure, because blanket asbestos exclusions meant that insurance was not an option. With reference to the earlier cases, the court concluded that NGC should not be held liable when it made no such election. In this regard, the court stated as follows (at pages 1203-1204):

> We agree with Judge Martin that proration-to-the-insured is a sensible way to adjust the competing contentions of the parties in the context of continuous triggering of multiple policies over an extended span of years. We agree that such proration is appropriate as to years in which NGC elected not to purchase insurance or purchased insufficient insurance, as demonstrated by the exhaustion of its policy limits. However, we do not agree with the District Judge's subsidiary ruling that proration-to-the-insured should be applied to years after 1985 when asbestos liability insurance was no longer available. Judge Martin applied proration-to-the-insured even after 1985. His rationale was that NGC had "bargained away coverage by accepting asbestos exclusion clauses." We think that is not a realistic view of the situation. There is no reason to believe that any bargaining occurred with respect to the asbestos exclusion clauses.
>
> Moreover, we note that judges who have endorsed proration-to-the-insured have done so only to oblige a manufacturer to accept a proportionate share of a risk that it elected to assume, either by declining to purchase available insurance or by purchasing what turned out to be an insufficient amount of insurance. Thus, Justice O'Hern's opinion in *Owens-Illinois* explicitly contrasts its proration approach to "periods when coverage for a risk is not available." Similarly, Judge Wald endorsed proration-to-the-insured only "prior to the time when such coverage could no longer be obtained.". Judge Martin's opinion appears to be the only one applying proration-to-the-insured to years when asbestos liability insurance was no longer available.
>
> We therefore modify the judgments so as not to apply the proration-to-the-insured approach to years after 1985, the point at which asbestos liability insurance ceased to be available. ...

> We therefore implement proration-to-the-insured by obliging NGC to pay a share of each claim represented by a fraction that has as its denominator the number of years of the injury up to 1985, and as its numerator the number of those years in which NGC was uninsured (either because it purchased no insurance or its policy limits were exhausted). [Citations and footnotes omitted].

[105] *Stonewall*, therefore, was the result of American courts' effort to contend with all sums versus *pro rata* allocation. All sums was adopted first but later rejected in favour of *pro rata* on the basis that unfairness would result if an insured were not held responsible for periods during which it had self-insured and effectively "bargained away" its access to indemnity. In *Stonewall* the Second Circuit responded to say that, where no insurance was available, a self-insured's lack of coverage cannot be said to have resulted from a "bargain". As a result, it truncated the *pro rata* period so as not to include periods where such insurance was not available. What is crucial is that the Stonewall Principle was not derived logically from first principles but was the result of a series of jurisprudential adjustments made with reference to prior case law.

[106] With all due respect to the Second Circuit Court, as a decision that responds to a particular and idiosyncratic legal development, *Stonewall* itself lacks the internal logic necessary to support the proposition that the unavailability of insurance is a relevant consideration in the first place. This point has been picked up in American case law that rejects the Stonewall Principle. The Seventh Circuit decision in *Sybron* is instructive in this respect. *Sybron* was an asbestos case in which the insurer attempted to have *Stonewall* applied in order to reduce the denominator measuring the total time on risk in its *pro rata* allocation. At trial (*Sybron Transition Corp. v. Security Ins. Co. of Hartford*, 158 F.Supp.2d 906 (E.D. Wis. 2000)), Judge Adelman, (at pages 913-915) interpreted *Stonewall* as a narrow exception that must consider both the availability of the insurance and the intent of the prospective insured. At page 600 of the appeal decision, Judge Easterbrook went further, questioning *Stonewall* altogether. It is clear from his decision that he struggled to grapple with the logic of *Stonewall* given the logic underpinning *pro rata* allocation:

> But instead of asking whether Sybron had some kind of insurance, we prefer to ask why it should matter whether Sybron was insured. Suppose it had not set up any casualty reserves for 1986-88 ... Why would this affect the legal obligations of a firm whose last policy expired in 1971? The whole idea of a time-on-risk calculation is that any given insurer's share reflects the ration of its coverage (and thus the premiums it collected) to the total risk. The full risk is not affected by whether insurance is available later.

[107] Why then, should an Ontario court adopt a principle of the Second Circuit whose logic is not evident and whose acceptance into American law has been far from unanimous? Goodyear argues that it is not a question of logic: fairness dictates that the continuous trigger theory and *pro rata* allocation, creatures of the courts, should be modified so that their application to our facts do not deny it coverage for the period during which it was insured. While I acknowledge that a *pro rata* arrangement may allocate to Goodyear payouts that are below the deductible for a given year, I do not agree that that this would be an unfair result.

[108] It is a unique characteristic of asbestos, and the diseases cause by it, that has caused courts to turn to the continuous trigger theory and, with it, *pro rata* allocation. Normally there is some scientific way to pinpoint the occurrence of an injury and thus to apportion the liability that comes with it. With asbestos, however, such a pinpoint is scientifically impossible. An individual suffering from asbestosis who worked from 1969 until the present day in a factory containing gasket material produced by Goodyear may have been exposed to asbestos as early as his or her very first shift, as late as last week, or over the entire period. The initial inhalation may have begun the disease process, or the inhaled particles may have lain inert for decades, with the onset and manifestation of the disease occurring only in the recent past. We simply do not know. If the injury occurred in 1969, Goodyear would be indemnified; if it occurred in 2011, it would not. Most importantly, however, there is no reason to think it more likely that an injury occurred in any one year than in any other.

[109] This factual uncertainty is the precise reason why we have the *pro rata* approach and continuous trigger theory. They are a fair means to apportion liability across a number of parties where any one of them may have actually been liable in fact. Not only that, but they are equally to each party's benefit because a given injury might have actually occurred while any one of them was responsible.

[110] The fact that more years have passed between 1981 and the present (30) than there were between 1969 and 1981 (12), is why, under a strict *pro rata* allocation, Goodyear is liable for a longer period. All things being equal, probability dictates that it is more likely that a given claimant's injury occurred during the latter 30 year period than during the previous 12 year period. *Pro rata* allocation and the continuous trigger theory are all about fairness. That the effect of these mechanisms is that a payout may not exceed Goodyear's deductibles, for which it bargained (and paid a corresponding – and no doubt lower – premium), is not unfair: Goodyear is receiving precisely what it bargained and paid for.

[111] Finally, it must be said that there is no right to insurance. When any manufacturer brings a product to market, it is responsible for the attendant risks. Insurers may choose or decline to provide coverage for that risk. While insurers may freely contract to indemnify the manufacturer, they are by no means required to do so. Further, where an insurer deems it no longer to be commercially viable to provide such indemnification, it has the freedom not to contract. *Stonewall* or no *Stonewall*, I see no compelling reason - and surely none grounded in fairness - why an insurer who has made a business decision not to provide coverage should be forced to do so because it was not available elsewhere. The facts of this case provide neither the reasons nor impetus to adopt *Stonewall* at this time.

Issue 3 - The Allocation of Deductibles

[112] The third legal issue to be determined relates to the allocation of deductibles. Goodyear makes the argument, novel in Canada to this point, that if allocation occurs over multiple policy years, then the deductible should be prorated over the covered years. The argument is that if the court is going to apply the common law principle to allocate claims over multiple policy periods, and not apply the all sums rule, it should also, in fairness, prorate the deductible.

[113] The allocation of deductibles greatly affects Goodyear. By way of illustration, assume that an insured had to pay a $250,000 award to a U.S. asbestos claimant and had ten years of insurance coverage with a $25,000 deductible each year. Under the normal *pro rata* approach, each policy year would bear one-tenth of the exposure, or $25,000. The result would be that the entire claim would be payable by the insured since the allocation of liability to each year would be equal to the deductible for that year. Under the prorated deductible approach advocated by Goodyear, the deductible in each policy would also be allocated on a *pro rata* basis over the number of years of coverage, with the result that the deductible for each year would be one-tenth or $2,500. Thus the insured would be responsible only for $2,500 of the $25,000 of liability allocated to each policy year triggered.

[114] Each of the primary policies in issue provides for a deductible of either $10,000 or $25,000. A typical deductible clause provision in the policies is as follows:

> It is hereby understood and agreed that each claim under this Policy shall be adjusted separately and from each such separate claim shall be deducted an amount of Ten Thousand Dollars ($10,000.00). Such amount to be borne by the Insured.

i. Positions of the Parties

The Plaintiff

[115] Goodyear argues that if the court allocates the "claim" over multiple years on a *pro rata* basis then there is only part of a claim in each policy year and, correspondingly, there should only be part of a deductible for each policy year. It maintains that deductible provisions are ambiguous in that they do not address what the deductible is to be for a part of a claim that has been allocated to multiple policy years.

[116] Goodyear argues that the ambiguity in the deductible provisions contained in its Canadian policies, combined with the relative jurisprudential void in Canada and a supportive line of U.S. jurisprudence, provides a good basis for an argument before this court that deductibles should be prorated if there is an allocation over multiple policy years on a pro rata basis.

[117] Goodyear acknowledges that Canadian Courts have applied the full deductible in a few cases: *Alie v. Bertrand & Frère Construction Co.*, [2000] O.J. No. 1360 (Sup. Ct. J.) ("*Alie*"), appeal allowed in part (on other grounds) (2002), 62 O.R. (3d) 344 (C.A.), *Surrey (District) v. General Accident Assurance Co. of Canada* (1994) 94 B.C.L.R. (2d) 115 (S.C.) ("*Surrey*"), and *International Comfort Products Corp. (Canada) v. Royal Insurance Co. of Canada*, [2000] O.J. No. 893 (Sup. Ct. J.) ("*International Comfort*"). Goodyear maintains, however, that they have done so without analysis, and, seemingly, without the issue having been argued.

[118] Suggesting that the allocation of deductibles has yet to be decided with certainty in Canada, Goodyear turns to U.S. courts, where, it says, there are two lines of cases: some U.S. courts have prorated the deductible while others have applied the full deductible. It relies on American jurisprudence in which courts have been prepared to apportion deductibles when a claim triggers multiple policies. The courts in such cases ground their decision on two main

pillars – the ambiguities in the language of the policies and general concerns for fairness or equity.

[119] Goodyear relies on *Nationwide Mutual Insurance Company v. Lafarge Corporation*, 910 F.Supp. 1104 (D.Md., 1996); *Lafarge Corp. v. Hartford Casualty Insurance Co.*, 61 F.3d 389 (5th Cir., 1995); *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290 (Mass., 2009); *PECO Energy Co. v. Boden*, 64 F.3d 852 (3d Cir., 1995); *Clemtex, Inc. v. Southeastern Fidelity Insurance Co.*, 807 F.2d 1271 (5th Cir., 1987); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 578 A.2d 468 (Pa.Super., 1990); and *Sirius (U.K.) Ins., P.L.C. v. Ocean Marine Ins. Co., Ltd.*, 2003 WL 1956259 (Cal.App. 2 Dist.).

The Defendants

[120] The defendants argue that there is no support in fact or in law for the position that deductibles should be allocated on a *pro rata* basis. They suggest that Goodyear's contention conflates the insured's deductible obligation with the insurer's indemnity obligation. They argue that the deductible simply applies in full when a claim triggers its policy regardless of whether other policies/deductibles are engaged that may respond to other portions of a claim. Each insurance policy, they say, is an independent contract applicable to a set period of time.

[121] Arguing that a policy of insurance is a contract, the defendants insist that the court must look to the terms of the policy of insurance. Accordingly, they submit that it is not for the court to attempt to "re-write" unambiguous contractual terms, such as the deductible clauses.

[122] As such, they note that each primary policy of the defendant insurers' policies consistently states that for "each claim under this policy," a deductible in the specified amount will be deducted. Thus, they say, from 1969-1980, Goodyear purchased policies that addressed deductibles in the same consistent manner, allowing them to be read uniformly to require payment of each policy's specified deductible as the threshold to accessing each policy's limit of liability.

[123] They argue that the extent to which coverage limits may then be paid toward further defence or indemnity amounts has no bearing on the amount of the deductible that is due. Similarly, they say, there is no provision setting out a retroactive adjustment to the deductible should the claim happen to be one that involves other insurers who are called upon to indemnify in their policy periods.

[124] The defendants also reject Goodyear's submission that the deductible provisions are ambiguous for not addressing the amount of the deductible in relation to part of a claim that is allocated to multiple policy years, as this submission seeks to overlay ambiguity where none exists.

[125] Moreover, the defendants suggest that the Ontario Superior Court has already decided this issue. They rely on the statement in *Alie*, that in a multiple claim/multiple policy year fact situation, where a policy of insurance expressly provides on its terms that a deductible applies on a per claim basis, the deductible must be applied separately to each individual claim.

[126] The defendants reject Goodyear's suggestion that where Canadian courts have decided this issue, either the question was "not argued" or there was "no analysis". Instead, the defendants argue that, in *International Comfort* there were only two matters in issue: the allocation of the costs and expenses and the application of the deductible; in that case the court decided that the entire deductible in each policy period applied to the quantum allocated to each policy period, seriatim.

[127] They add that U.S. Courts have also applied per claim deductibles based on the plain language of the policy where they have found the relevant policy language to be clear and unambiguous. The defendants suggest that the American jurisprudence relied upon by Goodyear is distinguishable since those cases deal with per occurrence deductibles. To the extent a few do not, the relevant policy provisions were manifestly ambiguous.

ii. Analysis

[128] It is undisputed by the parties that, where Canadian courts have apportioned liability across multiple policy claims and periods, they have deemed the deductible to apply separately to each individual claim where the concerned policy provides for it. I agree, however, as Goodyear argues, that none of *Surrey*, *Alie*, or *International Comfort* expressly discussed the issue of the *pro rata* allocation of deductibles. Thus, while I acknowledge the results in those cases, I do not think that they bar me from applying *pro rata* allocation of the deductible here, should I to find it to be appropriate.

[129] Where American courts have allocated deductibles *pro rata*, they have done so on the basis of either ambiguities in the language of the policies, or general concerns for fairness or equity. I have no trouble finding that the policies triggered in this case unambiguously call for deductibles to be applied separately to each claim. The plaintiff's argument that the policies are ambiguous because they do not address what the deductible should be where part of a claim has been allocated to multiple policy years, is circular. Goodyear effectively asks this court to find the policies to be ambiguous because they have not predicted the outcome of the very question this court has been asked to decide. The policies at issue in this case are not ambiguous in the sense of those in the American jurisprudence that have formed the basis of *pro rata* allocation of deductibles.

[130] What, then, of fairness? If this court allocates claims over multiple policy periods *pro rata*, is it fair that it should also prorate the deductible? Goodyear suggests that if the court allocates a claim over multiple years on a *pro rata* basis then there is only part of a claim in each policy year and, correspondingly, there should only be part of a deductible for each policy year.

[131] I fail to see the connection. As I have discussed above, the *pro rata* allocation of claims results from a fundamental factual uncertainty underpinning those claims. There is no such factual uncertainty as regards the per claim deductible; in fact, I have expressly found the opposite. The policies clearly and unambiguously dictate that Goodyear must cover a certain, pre-determined, and bargained for amount for each policy period before the coverage is triggered. I see no reason why this should change simply because that coverage is arrived at by way of a *pro rata* allocation, nor do I see how doing so would be unfair.

[132] Both Goodyear and its insurers are sophisticated parties, and there can be no doubt that the policies were arrived at after careful legal and commercial scrutiny. Above all else, the policies are contracts. One can only speculate at the concessions that were made in order to arrive at a given deductible – a lower premium or higher limit, perhaps? This court has been provided with no principled basis on which to alter the policies' deductible, which is a basic term in the contract between the parties. Moreover, Goodyear was unable to provide an explanation of how *pro rata* allocation would actually work in practice, given that not all policies provide for the same deductible, and the presence of SIRs. I suspect that this would involve a complex mathematical equation taking us even further away from the clear language of the policies.

[133] I hold that in the event of a *pro rata* allocation of claims, Goodyear would remain responsible for the full deductible for each claim, as stipulated by each policy.

V – CONCLUSION & DISPOSITION

[134] Taking "insurance" for the purposes of the Stonewall Principle to mean conventional insurance, I find that Goodyear Canada did not have insurance coverage available to it on commercially reasonable terms for asbestos-related liability occurring in the U.S. at any time after 1985. While Goodyear may have had access to alternative, insurance-like products, they would not engage in the risk transfer inherent to conventional insurance. Insurers offering such products would have assumed no risk, which is critical to the rationale underlying the Stonewall Principle. Given my finding that the Stonewall Principle applies only to conventional insurance, I have no problem finding, on the basis of the evidence before me, that such insurance ceased to become available to Goodyear after 1985.

[135] Nevertheless, I decline to adopt the Stonewall Principle into Ontario law. I do not find *Stonewall* to be sufficiently compelling in and of itself to warrant its application here. Nor do I think that fairness compels the application of the Stonewall Principle. The continuous trigger theory has been introduced as a tool to apportion liability across a number of annual periods during which any one party may have been liable in fact. On the facts of this case, this includes Goodyear Canada where it did not seek coverage in Canada. No insurer was willing to assume Goodyear's asbestos-related risks after 1985, and I fail to see why any should be held responsible for that period. The fact remains that it was Goodyear that elected to manufacture a product and thus take on the risks associated with doing so. Where it was unable to purchase coverage, it remained liable for that risk. The interaction between *pro rata* allocation and the deductible that Goodyear freely bargained for has no bearing on that fact that a manufacturer must bear the burden of its own risks when it has not transferred them.

[136] Finally, I reject the notion that Goodyear's deductible should be pro rated over the covered years where allocation occurs over multiple policy years. There is nothing in this case to displace the wording of the policies triggered in this case, which unambiguously call for deductibles to be applied separately to each claim. Unlike the *pro rata* allocation of claims, there is no factual uncertainty compelling *pro rata* allocation. Goodyear and its insurers entered into policy agreements on the basis of a series of contractual terms, including a deductible provision, and I see no reason to depart from this contract as voluntarily entered into by the parties.

[137] The questions before me as recited in Justice Campbell's Order dated January 12, 2011, and my answers to them based on the above analysis are as follow:

1(a) For what years, after 1985, was insurance coverage not available on a commercially-reasonable basis to Canadian commercial insureds with respect to occurrences arising in the United States from asbestos-related injuries (the "No Coverage Years 1")?

Answer: 1986 onward.

1(b) Whether Goodyear was obligated to self-insure for any asbestos-related injury found to have been suffered by third-party claimants during the No Coverage Years 1.

Answer: Yes.

1(c) In the alternative, for what years after 1985, was insurance coverage not available on a commercially-reasonable basis to Canadian commercial insureds who produced products with asbestos with respect to occurrences arising in the United States from asbestos-related injuries (the "No Coverage Years 2").

Answer: 1986 onward.

1(d) Whether Goodyear was obligated to self-insure for any asbestos-related injury found to have been suffered by third-party claimants during the No Coverage Years 2.

Answer: Yes.

1(e) Whether deductibles for each insurance policy triggered in this action should be allocated amongst all policy years triggered, on a *pro-rata* basis.

Answer: No.

2(a) Does the fact that Goodyear had self-insured retentions on its liability policies during the No Cover Years 1 and the No Coverage Years 2 offset the answer to issues 1(b) and 1(d)?

Answer: No.

2(b) Does the fact that Goodyear had made for commercial decision in 1980 to move all of its risk for products sold in the U.S. market (including asbestos) to the U.S. insurance market affect the answers to issues 1(b) and 1(b)?

Answer: No.

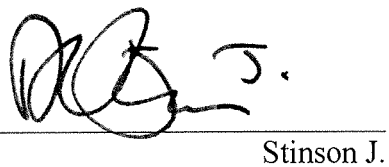
2(c) whether self insurance type schemes were available to Goodyear after 1985 to afford financial protection to it with respect to U.S. residents contracting asbestos related diseases caused by asbestos manufactured in Canada by Goodyear and shipped to Goodyear U.S.

Answer: Not relevant.

2(d) whether the pollution exclusions contained in the Goodyear policies preclude coverage to Goodyear for asbestos related injuries.

Answer: Question withdrawn by defendants.

[138] If the parties are unable to resolve the question of costs. I direct them to arrange a conference call with me to discuss a suitable process for determining that issue.



Stinson J.

Released: September 16, 2011

CITATION: Goodyear Canada Inc. v. American International Companies (American Home Assurance Company), 2011 ONSC 5422
COURT FILE NO.: CV-09-00377269
DATE: 20110916

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GOODYEAR CANADA INC.

Plaintiff

– and –

AMERICAN INTERNATIONAL COMPANIES (Formerly American Home Assurance Company), GERLING CANADA INSURANCE COMPANY (Formerly Gerling Global General Insurance Company), ING CANADA (Formerly Guardian Insurance Company of Canada), NORTHUMBERLAND GENERAL INSURANCE COMPANY, ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, AVIVA CANADA (Assumed The Business Of The General Accident Assurance Company Of Canada, and Scottish & York Insurance Co. Limited), THE HOME INSURANCE COMPANY, ACE USA (ACE INA INSURANCE), JEVCO INSURANCE COMPANY, LOMBARD CANADA LTD. (Assumed the Business Of Phoenix Assurance Company Of London)

Defendants

REASONS FOR JUDGMENT

Stinson J.

Released: September 16, 2011