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• CAUSATION IN MULTI-PARTY LITIGATION •

Don J. Smith, Dentons Canada LLP
C. Byron Yep, Guild Yule LLP

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Introduction

In *Resurfice Corp v. Hanke*,¹ Chief Justice McLachlin commented that “[m]uch judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates”.² While the Chief Justice’s comments were clearly well intentioned, the *Resurfice* decision only added fuel to the fire. The judicial and academic ink continues to flow.

Those not familiar with the nuanced academic debate that surrounds this topic may be surprised at the efforts taken to provide guidance on how to answer the simple question: *did the defendant cause the plaintiff’s loss?*

The objective of this article is to provide some clarity to the issues surrounding the test for causation that can be used in practical applications. This article is not meant to be a comprehensive survey of the nuances that arise in the context of a factual causation analysis; for that you are referred to the sources cited within this article.

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Please address all editorial inquiries to:

Boris Roginsky, Journals Editor
LexisNexis Canada Inc.

Tel. (905) 479-2665; Toll-Free Tel. 1-800-668-6481

Fax (905) 479-2826; Toll-Free Fax 1-800-461-3275

E-mail: cjil@lexisnexis.ca

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Basics

All law students are familiar with the elements of an action in negligence: a duty of care, a breach of the standard of care, compensable injury, and causation.³ This paper focuses on the last requirement, namely the inquiry as to whether the defendant's breach was in fact the cause, or one of the causes, of the plaintiff's injuries.

Our hypothetical law students are also equally familiar with the general premise that it is the "but for" test of causation that a court applies. If the plaintiff establishes, on the balance of probabilities, that the defendant's negligence caused her injuries, then the defendant is liable to the plaintiff.

Before moving forward, distinctions need to be drawn between the language of causation, as it is often a source of confusion. One source of confusion is the difference between "factual causation" and "legal causation". In determining legal causation a trier of fact decides if, as a matter of law, the plaintiff's injuries are sufficiently connected (or "foreseeable") to the defendant's negligence to justify imposing liability on the defendant. The terms used in legal causation are "proximate cause" and "remoteness".

The focus of this article will be, for the most part, on factual causation, or "cause-in-fact". This is a question of whether, as a matter of fact, the defendant's negligence was necessary to bring about the plaintiff's injuries. Where the term "causation" is used, reference is being made to cause-in-fact unless otherwise noted.

Complications – Factual Uncertainty and Multiple Causes

Why does causation get so much attention? Why is it complicated? Two of the more prominent reasons are:

- (1) the variety and availability of evidence that can be introduced to prove cause-in-fact, especially in medical malpractice and personal injury cases; and
- (2) the myriad of fact patterns that can arise when there is more than one potential cause-in-fact.

The first point is easily understood. As to the second, there are many examples of these problems in reported cases. The classic example is *Cook v. Lewis* [*Cook*]⁴ which rarely escapes mention in any causation paper. In *Cook*, two defendants negligently fired their guns in the direction of the plaintiff. One of the bullets struck the plaintiff but it could not be determined which defendant had actually shot the plaintiff. This is the classic factual uncertainty problem of two sufficient causes: each of the defendant's negligence was *sufficient* to bring about the plaintiff's injury, but only one did *in fact*. The plaintiff could not prove *which* was the necessary "but for" cause and would have lost if the court had not established an alternative to "but for" causation.

Another example of factual uncertainty arises when there are multiple *insufficient* causes that are all *necessary* for the loss. These cases can be further complicated when there is a combination of negligent and non-negligent causes to a particular injury. Consider the very hypothetical case of a plaintiff with a particular medical condition that makes him overly sensitive to a toxin. Add in two defendants, each whom negligently expose the plaintiff to half of the lethal dose within a short period of time. None of the three causes on their own were sufficient to cause the plaintiff any harm, it is their combination that makes them all *necessary*.

Finally, consider the situation where two sufficient causes may yield an absurd result under the "but for" test. A classic example is two fires

negligently started by two defendants that burn down the plaintiff's house. Either fire on its own is sufficient to bring about the loss. Both defendants would defend on the basis that their own negligence was not *necessary* to cause the fire, due to the other defendant's negligence. In this situation, there can be no cause-in-fact of the fire, and arguably no liability under the traditional test.

These examples only scrape the surface of the various permutations of causation that exist with multi-party actions but serve to highlight why proving cause-in-fact is a simple question with a complicated answer.⁵

Development of The Law: from *Snell* (1990) to *Clements* (2012)

Most articles that discuss the law of causation start with a brief history of the Supreme Court of Canada's key decisions that developed the law as it now stands. This article does not risk being unique.

***Snell v. Farrell* (1990)⁶**

The story begins with *Snell*, a case where the court sought to grapple with the problem of factual uncertainty. The plaintiff suffered permanent blindness following cataract surgery performed by the defendant. None of the medical experts could determine what had caused the plaintiff's stroke that led to her blindness. One potential cause was innocent; the other was the negligence of the defendant. It was also possible that the defendant's negligence had not caused any injury at all.

The trial judge found that the cause-in-fact of the plaintiff's injury was the defendant's negligence. The court upheld the trial judge's decision. In doing so, the court concluded that the "but for" test for causation was the standard to be applied,

and held that any causal problems with factual uncertainty can be resolved by a weighing of the evidence and the drawing of inferences. The standard of proof did not require scientific certainty.

Athey v. Leonati (1996)⁷

Next up is *Athey*, a decision that primarily earns its spot in the storyline due to the confusion caused by the court's *obiter dicta*. In that case, the plaintiff had a back injury that was caused by a number of possible factors including pre-existing problems and two successive motor vehicle accidents.

The court applied *Snell* and drew an inference of cause-in-fact, attributing the plaintiff's injuries to the defendant's negligent conduct. The court also discussed an alternative means to establish liability in tort, without having to prove cause-in-fact. This was the "material contribution to harm" standard.

The court stated:

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury...⁸

While the court did not give clear guidance as to when the "but for" test would be unworkable, it opened the door for an alternative means to establish liability. In such a situation, the plaintiff needed only to show that the defendant's conduct materially contributed to the risk of the harm that the plaintiff actually suffered.

Resurface Corp v. Hanke (2007)⁹

In *Resurface*, there was no factual uncertainty in issue. The plaintiff had erroneously placed gasoline into the water tank of an ice resurfacing machine, causing an explosion that resulted in his injuries. The issue before the court was whether

an alleged negligent design was also a factual cause of the plaintiff's injuries.

Ultimately, the court concluded that the trial judge had been correct in his conclusion that the cause-in-fact of the plaintiff's injury was his own operator error. The court reaffirmed the "but for" test for causation as the default test for factual causation.

In *obiter*, the court addressed the application of the "material contribution" test, which it said could only be resorted to in special circumstances when two requirements are met:¹⁰

- (1) it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injuries using the "but for" test; and
- (2) it must be clear that the defendant breached the duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.

If those conditions are met, then liability can be imposed on the defendant, notwithstanding the fact that the plaintiff has failed to prove factual causation on a balance of probabilities.

Clements v. Clements (2012)¹¹

The court took the opportunity in *Clements* to clarify the law as it pertains to factual causation, and for the most part, affirmed what is set out above.

In *Clements*, the plaintiff was injured in a motorcycle accident where she was riding as a passenger behind her husband, the defendant. It was not disputed that the defendant was negligent. However, the defendant argued that the accident would have occurred in any event because a nail that had stuck into the motorcycle's tire caused a flat. The entire court agreed that the trial judge

had erred by applying the material contribution test. The majority of the court ordered a new trial while the dissent would have ruled outright in favour of the defendant.

The majority of the court set out the state of the law as it pertained to factual causation and provided the following guidelines:

- (1) The test for showing causation is the “but for” test: is the defendant’s negligence *necessary* for bringing about the plaintiff’s injury?¹²
- (2) There is no need for scientific evidence of the exact contribution the defendant’s negligence made to the injury. The trier of fact is to weigh evidence and is permitted to draw inferences of causation.¹³
- (3) There may be more than one “but for” cause of an injury.¹⁴
- (4) “Material contribution” is only resorted to in rare situations, and requires:¹⁵
 - (i) the plaintiff must show that her loss would not have occurred “but for” the negligence of two or more tortfeasors, each of whom possibly caused the injury; and
 - (ii) through no fault of her own, the plaintiff is unable to show that any one of the tortfeasors in fact was the necessary or “but for” cause of the injury.

Post-Clements Issues and Ediger Post-Clements Uncertainty

The result of *Clements*¹⁶ is that material contribution as a means of establishing liability in tort will rarely be applied. In fact, it may be many years before a case with unique enough circumstances presents itself to fit within the *Clements* standard. Resort to material contribution will

almost never be available in medical negligence cases where a defendant can easily point to a non-negligent potential cause, for example, a pre-existing condition.

The court left open the possibility that the material contribution test could be applied in the future in a single tortfeasor case. The example given was a mass toxic tort case with multiple plaintiffs. But in all normal situations, it is prudent to consider that in single tortfeasor situations, we are limited to the “but for” test.¹⁷

In reaffirming the “but for” test as the test for factual causation, the court in *Clements* purported to provide some guidance to triers of fact on how the “but for” test is to be applied:

- (1) the “but for” test is to be applied in a **robust common sense** fashion;¹⁸ and
- (2) a trial judge is to take a **robust and pragmatic** approach to determining if a plaintiff has established that the defendant’s negligence caused her loss.¹⁹

The Supreme Court of Canada did not provide a definition of “robust”, “common sense”, or “pragmatic”; nor did it set out how the analysis would differ without those words. This aspect of *Clements* has been criticized and it has been suggested that these terms are meaningless.²⁰ What is clear is that it is not necessary to espouse a “but for” test with the use of any of “robust”, “pragmatic”, or “common sense” in order to properly apply the *Clements* principles for factual causation.

Ediger (2013)

The Supreme Court of Canada revisited the issue of factual causation in *Ediger*,²¹ a case with a factual uncertainty issue involving multiple potential “but for” causes. The infant plaintiff was injured

after the defendant's failed attempt at a forceps delivery. She suffered bradycardia and was born with cerebral palsy, brain damage, and spastic quadriplegia.

The potential causes of the plaintiff's injuries were:

- (1) negligence by the defendant doctor by not having a surgical backup team available prior to attempting the forceps delivery;
- (2) negligence by the defendant doctor for failing to obtain the mother's informed consent; and
- (3) non-negligent compression that occurred at the same time as the attempted forceps delivery.

The expert evidence led at trial could not conclusively establish what had caused the plaintiff's bradycardia. The trial judge applied *Snell* and *Clements*. Upon considering and reviewing all the expert evidence tendered, she drew an inference that the defendant's failure to have a surgical backup team immediately available was a "but for" cause of the plaintiff's injury.

It is interesting to note that in setting out the test for factual causation and reviewing the reasoning of the trial judge, the court did not make use of the terms "common sense", "robust", or "pragmatic."

Ediger is a useful example of how a trial judge is to apply *Snell*, and what considerations come into play in determining if a plaintiff has established a "but for" cause-in-fact:

...*Snell* stands for the proposition that the plaintiff in medical malpractice cases – as in any other case – assumes the burden of proving causation on the balance of probabilities. Sopinka J. observed that this standard of proof does not require scientific certainty. The trier of fact may, upon weighing the evidence, draw an inference against a defendant who does introduce sufficient evidence contrary to that which supports the plaintiff's theory of

causation. In determining whether the defendant has introduced sufficient evidence, the trier of fact should take into account the relative position of each party to adduce evidence.²²

In upholding the trial judge's reasoning, the court noted that:

Faced with conflicting expert testimony on the feasibility of the "displacement" theory and evidence of other potential causes, it was incumbent upon Holmes J. to weigh the evidence before her and determine whether [the plaintiff] had proven causation on the balance of probabilities. Holmes J. ultimately concluded that [the plaintiff] did satisfy this burden...²³

Intervening Causes – An Issue?

Technically speaking, intervening causes (or "supervening causes") are matters of legal causation and a proximate cause analysis. The law on this area is not particularly developed in Canada and is often argued in the criminal law context.²⁴ Those principles can be applied in the civil context, but only if we do not lose sight of the differing standards of proof.

The question that is posed is: "Have the actions of an independent actor severed the chain of factual causation making it unjust to impose liability on the defendant?" An act that completely severs the chain of factual causation is often referred to as a *novus actus interveniens* (a "new act intervening").

Generally speaking, defendants should not be held accountable for objectively unforeseeable consequences of their actions.²⁵ The question a trier of fact must determine is whether the new act is of sufficient magnitude to break the chain of causation.²⁶ Drawing on the guidance in *Maybin*,²⁷ this will typically involve two assessments, neither of which is necessarily determinative:

- (1) Was the general nature of the intervening act and the risk of harm objectively foreseeable at the time of the breach of standard of care by the defendant? and

- (2) Was the intervening act brought about by an independent actor acting independently from the initial breach?

In practice, it is rare that a defendant that breaches the standard of care and is the cause-in-fact of a plaintiff's injury is absolved of liability under this doctrine. This can be seen by these brief examples:²⁸

- (1) Defendant puts plaintiff at risk of harm (cause A) and plaintiff fails to avert or mitigate the harm (cause B): the issue here is mitigation.
- (2) A first defendant puts the plaintiff at risk (cause A) and a second defendant fails to avert or mitigate the harm (cause B): both can be liable, but no intervening act for a failure to act.
- (3) Defendant puts the plaintiff at risk (cause A) and plaintiff commits separate act (cause B) that contributes to the harm: the issue is contributory negligence and apportionment of fault.
- (4) First defendant puts the plaintiff at risk (cause A) and the second defendant commits a separate act (cause B) that contributes to the harm: if both wrongs combine to create an indivisible loss, both defendants are liable.

The above scenarios would seem to limit the doctrine of *novus actus interveniens* in tort law to only the most obvious and egregious examples of unforeseeable independent acts of a third party. The concepts of duty of care, factual causation, mitigation, contributory negligence, and apportionment of fault appear apt to deal with most other situations.

An example of the successful application of the *novus actus interveniens* defence is *Hollett v. Coca-Cola Ltd.* [*Hollett*].²⁹ In *Hollett*, two of the plaintiff's vehicles were damaged by the

personal defendant, JMF, who was driving a van stolen from the corporate defendant, Coca-Cola.

At the time of the accident, JMF did not have a driver's licence because he was too young. He was intoxicated and decided to steal a Coca-Cola van from a parking lot at a Coca-Cola plant. The keys had been left in the ignition and the door was unlocked. This was the 70s after all!

The question at trial was whether Coca-Cola was liable to the plaintiff. While the court found that Coca-Cola was negligent for having left a vehicle with the keys in the ignition unattended in the parking lot, it concluded that it was not reasonably foreseeable that a van would be stolen and operated in a negligent manner leading to an accident. In other words, JMF's negligence was a true supervening cause and Coca-Cola was not liable to the plaintiff.

Fault Allocation

A detailed discussion of fault allocation in tort is beyond the purview of an article on factual causation. However, in the case of multiple negligent causes of a plaintiff's injury, the court must apportion liability based on each defendant's comparative "fault".

The relevant portions of the *Negligence Act*,³⁰ provide as follows:

Apportionment of liability for damages

- 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

...

Liability and right of contribution

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are jointly and severally liable to the person suffering the damage or loss, and

(b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

The difference between these two sections is that if a plaintiff is also contributorily negligent, then she can only recover against each defendant on the basis of several liability to the extent that each defendant is found to be at fault.³¹

When apportioning damages between parties, the trier of fact is to apply the “relative blameworthiness approach”. This is due to the use of the term “fault” in the *Negligence Act*. A useful statement is found in *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*:³²

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.³³

The following are some factors that a trier of fact may consider in assessing relative degrees of fault:³⁴

- (1) the nature of the duty owed by the tortfeasor to the injured person;
- (2) the number of acts of fault or negligence committed by a person at fault;

- (3) the timing of the various negligent acts; *e.g.*, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault;
- (4) the nature of the conduct held to amount to fault; *e.g.*, indifference to the results of the conduct may be more blameworthy, similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis;
- (5) the extent to which the conduct breaches statutory requirements; *e.g.*, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy;
- (6) the gravity of the risk created;
- (7) the extent of the opportunity to avoid or prevent the accident or the damage;
- (8) whether the conduct in question was deliberate, or unusual or unexpected; and
- (9) the knowledge one person had or should have had of the conduct of another person at fault.

Practical Considerations

As a plaintiff:

- if there is only one possible negligent cause, or multiple causes but with one that is non-negligent, forget about arguing material contribution to risk;
- consider instructing causation experts that scientific certainty is not necessary; if they cannot provide an opinion that the defendant's negligence caused the injury, can they provide an opinion that it was more likely than not the cause?
- if there is likely contributory negligence on the plaintiff's behalf, ensure that all parties at

“fault” are added as defendants because liability will be several;

- in most cases, establishing “but for” causation will be straight forward, do not let defendants convince you otherwise; and
- remember that it is not necessary that the defendant’s negligence be the *only* “but for” cause of the plaintiff’s loss.

As a defendant:

- if relying upon the defence of *novus actus interveniens*, make sure to plead it;
- if possible, point to non-negligent causes as well as the plaintiff’s own negligence to ensure the plaintiff cannot resort to the material contribution test;
- expressly name all parties and non-parties in your response to civil claim that may be at “fault” for causing the plaintiff’s loss; the court can apportion fault between anyone, regardless of whether they are parties, but your pleading must have sufficient particularity to allow the court to make that finding;³⁵
- if you are unsure of the identity of a contributing party, refer to it with as much specificity as possible.

[*Editor’s note*: This is an updated version of a paper prepared for the “CLEBC course Multi-party Litigation 2014”, which was held in Vancouver, B.C., on May 9, 2014.

Don Smith is counsel in the Vancouver Construction Group of Dentons Canada LLP. In addition, his insurance defence practice is concentrated on construction defence, defence of municipalities, product liability, and defence for property and liability insurers in complex multi-party claims.

C. Byron Yep is an associate with Guild Yule LLP. He practises commercial litigation, insurance defence litigation, and is a member of the firm’s Construction Law Group.]

¹ [2007] S.C.J. No. 7, 2007 SCC 7 [*Resurfice*].

² *Ibid.* at para. 20.

³ *Ediger v. Johnston*, [2013] S.C.J. No. 18, 2013 SCC 18 at para. 24 [*Ediger*].

⁴ [1951] S.C.J. No. 28, [1951] SCR 830 [*Cook*].

⁵ For a detailed examination of the multitude of combinations that can arise in a causation analysis see Allan Beever, *Cause-in-Fact: Two Steps out of the Mire* (2001) 51 UTLJ 327.

⁶ [1990] S.C.J. No. 73, [1990] 2 SCR 311 [*Snell*].

⁷ [1996] S.C.J. No. 102, [1996] 3 SCR 458 [*Athey*].

⁸ *Ibid.* at para. 15.

⁹ *Resurfice*, *supra* note 1.

¹⁰ *Ibid.* at para. 25.

¹¹ [2012] S.C.J. No. 32, [2012] 2 SCR 181 [*Clements*].

¹² *Ibid.* at paras. 8 and 13.

¹³ *Ibid.* at paras. 9 and 10.

¹⁴ *Ibid.* at para. 12.

¹⁵ *Ibid.* at para. 46.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at para. 44.

¹⁸ *Ibid.* at para. 9.

¹⁹ *Ibid.* at para. 46.

²⁰ David Cheifetz, *Five Easy Enough Pieces: The Nuts and Bolts of Factual Causation in Negligence after Clements*, (materials prepared for the Continuing Legal Education Society of British Columbia, May 2013) at 2.1.5.

²¹ *Supra* note 3.

²² *Supra* note 3 at para. 36 [citations omitted].

²³ *Ibid.* at para. 39.

²⁴ See, generally, *R v. Maybin*, [2012] S.C.J. No. 24, 2012 SCC 24 [*Maybin*].

²⁵ *Hussack v. Chilliwack School District No. 33*, [2011] B.C.J. No. 1023, 2011 BCCA 258 at para. 87.

²⁶ *Ibid.* at para. 77.

²⁷ *Supra* note 24.

²⁸ Adopted from Joost Blom, *Proximate Cause Remoteness and Supervening Causes*, (materials prepared for Continuing Legal Education Society of British Columbia, June 2011).

²⁹ [1980] N.S.J. No. 15, 37 N.S.R. (2d) 695 (S.C.T.D.). For other examples, including mostly those where the doctrine does not apply, see Allen M Linden & Bruce Feldthusen, *Halsbury’s Laws of Canada, Negligence*, at para. HNE-96 (QL).

³⁰ R.S.B.C. 1996, c. 333.

³¹ *Leischner v. West Kootenay Power and Light Co.*, [1986] B.C.J. No. 117, 70 B.C.L.R. 145 (C.A.).

³² [2000] B.C.J. No. 1828, 2000 BCCA 505.

³³ *Ibid.* at para. 46.

³⁴ *Aberdeen v. Langley (Township)*, [2007] B.C.J. No. 1515, 2007 BCSC 993 at paras. 62 and 63.

³⁵ *Wells v. McBrine*, [1988] B.C.J. No. 2366, 33 B.C.L.R. (2d) 86 (C.A.).

• “NOT MY FAULT”
CURRENT ISSUES UNDER THE DESIGN/WORKMANSHIP EXCLUSION
SEPTEMBER 2014 (PART 1) •

Gregory J. Tucker, Owen Bird Law Corporation

Introduction

This is an updated version of a paper prepared for CLEBC in September 2014. Since the paper was first prepared and delivered, the decision in one of the recent cases discussed, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*¹ [*Ledcor*], has been overturned.² The appeal in *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.*,³ [*Acciona*], remains outstanding and will be heard in early May 2015. Also, since this paper was originally delivered, a second decision has come down considering the same wording as that in *Acciona; PCL Constructors Canada Inc. v. Allianz Global Risks US Insurance Co.*⁴ That decision will also be discussed.

This article will address the scope of the exclusion generally, and will focus on some specific issues that have arisen as a result of recent case law, including *Ledcor*, *supra* and *Acciona*, *supra*.

Wordings

There are several variations on the wording of the exclusion, some common and others less so. By far the most common wording in use in Canada refers to “cost of making good”, “faulty design or workmanship”, followed by a “resulting damage” exception. A fairly standard wording provides:

PERILS EXCLUDED:

- (c) cost of making good faulty or defective workmanship, material, construction or design, but this exclusion shall not apply to damage resulting from such faulty or defective workmanship, material, construction or design;⁵

A somewhat more detailed version of this wording is as follows:

This policy does not insure:

- (a) The cost of making good:
 - (i) faulty or improper material;
 - (ii) faulty or improper workmanship;
 - (iii) faulty or improper design

provided, however, to the extent otherwise insured and not otherwise excluded under this Policy⁶ resultant damage to the property shall be insured.

The “cost of making good” wording has been considered many times by Canadian courts.⁷

Some wordings, instead of “cost of making good”, refer to damage “caused by” or “attributable to” faulty design or workmanship. For example, the following wording was considered in *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada*:⁸

We will not pay for loss ... caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

Similarly, in *British Columbia Rail Ltd. v. American Home Assurance Co.*,⁹ the court considered an exclusion for “loss or damage caused by ... faulty workmanship, error in design ...”.

In some cases the exclusion refers to neither “cost of making good” nor damage “caused by” faulty design or workmanship, and refers only to the excluded perils themselves. For example, in *British Columbia v. Royal Insurance Co. of Canada*,¹⁰ the wording provided:

This policy does not insure:

- (a) (i) faulty or improper material;
- (ii) faulty or improper workmanship;
- (iii) faulty or improper design;

provided, however, to the extent otherwise insured and not otherwise excluded under this policy, resultant damage to the property shall be insured.

There are also variations on the language used to describe the scope of “resultant damage”, within the exception to the exclusion. One such variation was considered by the B.C. Supreme Court in *Supreme Steel Ltd. v. Aon Reed Stenhouse Inc.*,¹¹ in which the exception provided:

It is specifically understood and agreed that all loss or damage arising as a consequence of faulty workmanship, faulty materials or negligent design is insured, except that the original cost of the component(s) that is/are actually proven to be either faulty and/or of negligent design shall be excluded. [emphasis added]

In some cases, courts have found other exclusions to have the same effect as an exclusion for faulty design. In *Triple Five Corp. v. Simcoe & Erie Group*, [*Triple Five*]¹² the court considered an exclusion which provided:

10. Perils Excluded

This policy does not insure against:

...

- (j) mechanical breakdown or derangement, latent defect, faulty material, faulty workmanship, inherent vice, gradual deterioration or wear and tear, but this exclusion shall not apply to damage resulting therefrom;¹³

The exclusion did not mention design. The issue in *Triple Five* was design of the West Edmonton Mall rollercoaster. The court found that the mechanical breakdown, latent defect, and inherent vice wording operated to exclude the cost of making good the faulty design.

Courts have occasionally considered wordings which provide cover for some aspect of faulty

design or workmanship, e.g., in *CIC Mining Corp. v. Saskatchewan Government Insurance*,¹⁴ the policy said this:

THIS POLICY DOES NOT INSURE:

- (a) Cost of making good faulty workmanship or materials but this exclusion shall not apply to physical loss or damage resulting from such faulty workmanship or materials, except as provided in the faulty or defective workmanship clause.
- (b) Cost of making good error in design of process, equipment or machinery, but this exclusion shall not apply to physical loss or damage resulting from such error in design.

...

FAULTY OR DEFECTIVE WORKMANSHIP CLAUSE

It is understood and agreed that this Policy is extended to insure the cost of making good faulty workmanship which renders any portion of the project unfit for its intended purpose.

Faulty or Defective Workmanship rendering any portion of insured property unfit for the purposes for which it was intended is considered to have caused physical loss or damage but this extension will not extend to cover any Business Interruption or consequential loss [emphasis added].

There are also two entirely separate set of graduated wordings, the “DE” and “LEG” wordings, prepared by two groups of London underwriters (the full text of the wordings is set out below in Section VII). Those wordings have been in use for many years in Canada, to some degree, and are becoming increasingly common. Until very recently, none of those wordings had been given any judicial consideration in Canada. Now, one of those wordings, the LEG 2, has been considered in *Acciona*.¹⁵

In summary, while there are many potential variations on the wording of the exclusion, all have some features in common:

- (1) a description of the matters to which the exclusion applies (design, workmanship, materials, plans, specifications, etc.);

- (2) reference to the scope of the exclusion (“cost of making good”, “loss or damage caused by”);
- (3) a description of the standard which applies (“faulty”, “faulty or defective”, or “error in”); and
- (4) some form of “resulting damage” exception.

Each of these issues will be considered in turn.

What is “Design” or “Workmanship”?

This is probably the most straightforward aspect of the exclusion. Courts generally have not had much difficulty determining whether the case involves design, workmanship, or one of the other conditions referred to in some versions of the wording (such as construction, material, plans, or specifications).

“Design” has been held to include such matters as:

- (1) consideration of stability of underlying soils (*B.C. Rail v. American Home*,¹⁶ and *Algonquin Power*¹⁷);
- (2) consideration of loads potentially to be imposed on parts of the structure by other parts of the structure or related structures (*Poole Construction Co. v. Guardian Insurance Co. of Canada*¹⁸ and *Simcoe & Erie General Insurance Co. v. Royal Insurance Co. of Canada*¹⁹);
- (3) consideration of loads potentially to be imposed by external forces, such as wind and ice loads (*Willowbrook Homes (1964) Ltd. v. Simcoe & Erie General Insurance Co.*,²⁰ *Collavino Inc. v. Employers’ Mutual Liability Insurance Co. of Wisconsin*).²¹

“Workmanship” has been held to include such matters as:

- (1) procedures used in erection of trusses as part of construction of a building (*Bird Construction Co. Ltd. v. United States Fire Insurance Co.*;²²

- (2) temporary and permanent bracing in connection with construction of a house (*Greene v. Canadian General Insurance Co.*²³);
- (3) steps taken (or not taken) to protect equipment during construction (*Sayers & Associates Ltd. v. Insurance Corp. of Ireland Ltd.*²⁴);
- (4) procedures used in testing portions of a building or other structure for purposes of contract acceptance (*Pentagon Construction (1969) Co. v. United States Fidelity and Guaranty Co.*[*Pentagon*];²⁵ *Ploutos Enterprises Ltd. v. Stuart Olson Constructors Inc.*²⁶);
- (5) procedures used in cleaning portions of a building or other structure for purposes of contract acceptance (*Ontario Hydro v. Royal Insurance*,²⁷ and *Ledcor*).²⁸

These are illustrative examples only and are obviously not exhaustive as to the matters that would constitute design or workmanship for purposes of the exclusion.

One case considering the definitions of both “design” and “workmanship”, and the border between the two is *Pentagon*.²⁹ In *Pentagon* a tank failed during testing, required in connection with its commissioning and acceptance. Neither the drawings nor the contract documents mandated a specific test procedure. The drawings should have stated that certain welding had to be completed before testing was carried out. The testing was carried out without the welding having been done, and the tank collapsed. The insured claimed the cost of rebuilding the tank. Insurers denied, asserting that the failure to complete the welding prior to testing was faulty design, faulty workmanship, or both. The insured argued that, because the test procedure was not specified in the contract documents or drawings, the test procedure was not a matter of design, and that

because there was no specific act of negligence on the part of a particular employee that could be pointed to as having caused the collapse, there was no faulty workmanship.

Robertson J.A. said the following in connection with “design”:

My view is that the word “design” as it is used in the policy expresses a concept of the finished product of the work to be done by Pentagon [the insured] under the contract and that that concept finds its expression in the plans and specifications; those plans and specifications themselves are not, however, the design. It follows that detailed instructions of how the work of construction is to be carried out are not part of the design of the tank. Consequently, the lack of instructions as to the order in which the welding and the testing were to be done cannot constitute faulty or improper design.³⁰

With respect to “workmanship”, Robertson J.A. said the following:

There was argument directed in essence to establishing whether or not there was on the part of an employee of Pentagon negligence that caused the failure of the tank. This appeared to be predicated by Pentagon on the idea that “loss or damage caused by faulty or improper workmanship” had in mind only specific acts that could be characterized as faulty workmanship or improper workmanship, such as manual operations of an artisan. (A dictionary definition relied on by Pentagon was taken from Funk & Wagnall, New Standard Dictionary (1943): “2. The work or result produced by a worker; as all these are his workmanship.”) In my view, this was not all that was intended to be comprehended by the words. The workmanship referred to comprehended as well the combination, or conglomeration, of all the skills that were directed to the building of the tank.³¹

Accordingly, it was not necessary that there be some act that could be characterized as “manual operations of an artisan” to constitute faulty workmanship. All of the acts involving application of some degree of skill and required in connection with construction of the tank constituted workmanship. As those matters included carrying out of the final testing, there was faulty workmanship.

Bull J.A. agreed with Robertson J.A. regarding the existence of faulty workmanship, but also found that there was faulty design. Bull J.A., referring to *Hudson’s Building and Engineering Contracts*, 10th ed., 1970 said:

... “design” is referred to as being a wide term which includes not only structural calculations, shape and location of materials, but their choice, as well as the choice of particular work processes, and concludes with the following words:

“In other words, in sophisticated contracts the design includes the specifications as well as the drawings.”

In my opinion, the construction contract here qualifies as such a “sophisticated contract” and with respect to it “design” would include the drawings and specifications for the project or “Works” thereunder.³²

Bull J.A. found that there was a deficiency in the plans and specifications, in that they failed to specify that final testing not be carried out until after the welds in question were in place. Accordingly, there was faulty design in addition to faulty workmanship.

The third member of the court, MacLean J.A., adopted the reasons of Robertson J.A., but did not find it necessary to consider whether there was faulty design in addition to faulty workmanship. In other words, MacLean J.A. adopted that portion of the reasons of Robertson J.A. finding that there was faulty design, but not that portion of the reasons finding that there was faulty workmanship.

The question of what constitutes faulty design and workmanship was also considered in some detail in *Foundation Co. of Canada Ltd. v. American Home Assurance Co.*,³³ albeit in *obiter*, as the exclusion was found not to apply on the grounds that the cause of the failure was not “foreseeable”. In that case, Wilson J. considered the wording in some detail. The court said the following in connection with design:

“Design” is defined in the *Dictionary of Canadian Law* (Toronto: Carswell, 1991) as:

1. A plan, sketch, drawing, graphic representation or specification intended to govern the construction, enlargement or alteration of a building or part of a building and related site development. 2. With reference to a boiler, pressure vessel or plant or an elevating device, means its plan or pattern, and includes drawings, specifications, and where required, the calculations and a model. ... (from H.G. Fox, *The Canadian Law of Copyright and Industrial Designs*, 2nd ed. (Toronto: Carswell, 1967) at 652.

Black's Law Dictionary, 6th ed., defines “design” as:

... the plan or scheme conceived in mind and intended for subsequent execution; preliminary conception of idea to be carried into effect by action; contrivance in accordance with preconceived plan. A project, an idea.

Taken together, the definitions of “design” include the conceptual aspects, contrasted with the actual carrying out of a course of action. Design includes all but the physical work of implementation.³⁴

With respect to workmanship, Wilson J., after considering various cases, said this:

From a review of the case-law it appears that workmanship and construction go hand in hand. Construction involves the physical implementation of a design. Workmanship involves the qualities of skill and knowledge and performance of the construction. The two terms are often used interchangeably in the case law, as they are to a degree, inextricably intertwined.³⁵

“Workmanship” is not restricted to work that directly results in the creation of the physical “product”. A narrow definition of “workmanship” has been adopted in some American cases. There is a line of U.S. authority which treats “workmanship” as including only work involving a “flawed product” rather than a “flawed process”.³⁶ Courts adopting that interpretation have held that such matters as faulty bracing and faulty protection of property at the jobsite are not “faulty workmanship”. The “product” versus “process” reasoning is inconsistent with various Canadian decisions, including *Sayers*,³⁷ (failure to protect electrical equipment at a jobsite), *Bird*

Construction,³⁸ (faulty bracing) and *Greene*,³⁹ (faulty bracing). There is a contrary line of U.S. cases adopting a definition of workmanship that includes both “faulty product” and “faulty process”, and that line of authority appears to be more consistent with the Canadian case law. U.S. cases adopting this reasoning include *L.F. Driscoll Co. v. American Protection Ins. Co.*⁴⁰ and *BSI Constructors Inc. v. Hartford Fire Ins. Co.*⁴¹ In *Ledcor*,⁴² the Alberta Court of Appeal expressly rejected the “product only” definition of workmanship. The court concluded, at para. 31, that such a narrow interpretation would be outside the scope of normal meaning of the word “workmanship” which “generally encompasses any application of skill or effort to a task”. The decision in *Ledcor* involved a final, pre-acceptance construction clean of the exterior of an office tower. As the court noted, the final pre-acceptance construction clean of a tower “was as much a part of its construction as the designing of the foundations, the hammering of the nails, and the pouring of the concrete”.

One of the few cases to give a narrow interpretation to the words “design” and “workmanship” is *Todd's Men and Boys' Wear Ltd. v. Diamond Masonry (Calgary) Ltd. [Todd's]*.⁴³ In that case, the exclusion referred to design and workmanship, but not “construction”. There was a failure to properly erect temporary bracing, resulting in the collapse of a wall under construction. The court held that this involved neither “design” nor “workmanship”. The fault was one of “construction”, and as the exclusion did not refer to construction, it did not apply. In *Foundation*,⁴⁴ the court held (p. 51) that *Todd's* was incorrectly decided. In addition, the decision is incompatible with *Greene*,⁴⁵ and likely incompatible with *Bird Construction*,⁴⁶ *Todd's* cannot be considered good law.

In most cases, it will not matter whether the act in question is characterized as one of design or workmanship, as both are generally within the exclusion. Broadly considered, any act carried out on the site in connection with the project, involving some degree of care and skill, will constitute design or workmanship for the purposes of the exclusion.

[*Editor's note*: These materials were prepared by Gregory J. Tucker of Owen Bird Law Corporation, Vancouver, B.C., for the Continuing Legal Education Society of British Columbia, September 2014.]

Gregory J. Tucker is with Owen Bird LC in Vancouver. Mr. Tucker has a commercial litigation practice, with a focus on insurance and related matters.]

¹ [2013] A.J. No. 1088, 2013 ABQB 585, [2013] I.L.R. 1-5495.

² [2015] A.J. No. 338, 2015 ABCA 121.

³ [2014] B.C.J. No. 2137, 2014 BCSC 1568.

⁴ [2014] O.J. No. 6210, 2014 ONSC 7480, [2015] I.L.R. 1-5709.

⁵ This specific wording is taken from *Foundation Co. of Canada Ltd. v. American Home Assurance Co.*, [1995] O.J. No. 2164, 25 O.R. (3d) 36 (Gen. Div.), aff'd [1997] O.J. No. 2332 (C.A.) [*Foundation*].

⁶ This specific wording was considered in *Greene v. Canadian General Insurance Co.*, [1991] N.J. No. 170, 5 C.C.L.I. (2d) 193 (S.C.), upheld on appeal [1995] N.J. No. 251, 23 C.L.R. (2d) 203 (C.A.) [*Greene*].

⁷ Among the cases that have considered "cost of making good" wording are *Bird Construction Co. v. United States Fire Insurance Co.*, [1985] S.J. No. 902, 18 C.C.L.I. 92 (C.A.), aff'g [1982] S.J. No. 792 (Q.B.) [*Bird Construction*]; *Foundation Co. of Canada Ltd. v. American Home Assurance Co.*, supra note 5; *Poole Construction Co. v. Guardian Insurance Co. of Canada*, [1977] A.J. No. 784, [1977] I.L.R. 1-879 (S.C.T.D.); *Sayers & Associates Ltd. v. Insurance Corp. of Ireland Ltd.*, [1981] O.J. No. 107, 126 D.L.R. (3d) 681 (C.A.) [*Sayers*]; *Willowbrook Homes (1964) Ltd. v. Simcoe & Erie General Insurance Co.*, [1980] A.J. No. 855, [1980] I.L.R. 876 (C.A.); *Simcoe & Erie General Insurance Co. v. Royal Insurance Co. of Canada*, [1982] A.J. No. 722, [1982] 3 W.W.R. 628 (Q.B.); *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada*, [2003] O.J. No. 2019, 50 C.C.L.I. (3d) 107 (S.C.J.); *Inland Concrete Ltd. v. Commonwealth Insurance Co.*, [2011] A.J. No. 683, 2011 ABQB 378, 2 C.L.R. (4th) 55; *Canadian National Railway*

Co. v. Royal and SunAlliance Insurance Co. of Canada, [2004] O.J. No. 4086, 15 C.C.L.I. (4th) 1 (S.C.J.), overturned on appeal, [2007] O.J. No. 1077, 2007 ONCA 209, 48 C.C.L.I. (4th) 161; overturned on appeal and trial judgment restored, [2008] S.C.J. No. 67, 2008 SCC 66, [2008] 3 S.C.R. 453; *Ploutos Enterprises Ltd. v. Stuart Olson Constructors Inc.*, [2008] B.C.J. No. 372, 2008 BCSC 271, 60 C.C.L.I. (4th) 59; and *Ledcor*, supra note 1.

⁸ *Ibid.*

⁹ [1991] B.C.J. No. 697, 49 C.C.L.I. 189 (C.A.).

¹⁰ [1991] B.C.J. No. 2959, 4 C.C.L.I. (2d) 206 (C.A.).

¹¹ Unreported, June 13, 2008, B.C.S.C., Vancouver Action S023382.

¹² [1994] A.J. No. 760, 29 C.C.L.I. (2d) 219, aff'd [1997] A.J. No. 248, 145 D.L.R. (4th) 236, 42 C.C.L.I. (2d) 132.

¹³ *Ibid.*, para. 32.

¹⁴ [1994] S.J. No. 442, 24 C.C.L.I. (2d) 229 (C.A.).

¹⁵ *Supra* note 3.

¹⁶ *Supra* note 9.

¹⁷ *Supra* note 7.

¹⁸ *Supra* note 7.

¹⁹ *Supra* note 7.

²⁰ *Supra* note 7.

²¹ [1984] O.J. No. 1011, 5 C.C.L.I. 94 (H.C.J.), aff'd [1985] O.J. No. 227 (C.A.).

²² *Supra* note 7.

²³ *Supra* note 7.

²⁴ *Supra* note 7.

²⁵ [1977] B.C.J. No. 1212, [1977] 4 W.W.R. 351 (C.A.).

²⁶ *Supra* note 7.

²⁷ [1981] O.J. No. 215.

²⁸ *Supra* note 1.

²⁹ *Supra* note 25.

³⁰ *Ibid.*, para. 22.

³¹ *Ibid.*, para. 27.

³² *Ibid.*, paras. 9 and 10.

³³ *Supra* note 5.

³⁴ *Ibid.* paras. 19 to 21.

³⁵ *Ibid.*, para. 59.

³⁶ Cases on point include *City of Barre, Vermont, v. New Hampshire Insurance Company*, 136 Vt. 484, *Mortenson Co. v. Indemnity Ins. Co. of North America*, 1999 WL 33911358 (D. Minn.), *Allstate Ins. Co. v. Smith*, 929 F.2d 447 (1991), *Century Theatres Inc. v. Travellers Property Cas. Co.*, 2006 WL 708667 (N.D. CAL.).

³⁷ *Supra* note 7.

³⁸ *Supra* note 7.

³⁹ *Supra* note 7.

⁴⁰ 930 F.Supp. 184 (E.D.Pa. 1996).

⁴¹ 705 F.3d 330 (U.S.C.A., 8th Circuit), 2013.

⁴² *Supra* note 1.

⁴³ [1985] A.J. No. 743 (Q.B.).

⁴⁴ *Supra* note 5.

⁴⁵ *Supra* note 6.

⁴⁶ *Supra* note 7.

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