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Concurrent Causation in Insurance – A Comparative Study Between England and France

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Abstract

This paper aims to define and outline the legal framework governing whether insurers' liability, and therefore insurance coverage, remains valid in the presence of concurrent causations. It uses a comparative qualitative methodology, with an analysis of case law, statute, and academic literature to attempt to understand where responsibility lies and whether the apparent simplicity of the French Civil law contains useful legislation that could be applied to future reforms for English and Welsh law. The paper aims to find that the law in England and Wales lacks clarity and strong precedent. There is an overlap between insurance law and liability, and the complexity with respect to concurrent causation affects the validity of many insurance claims. This causes legal difficulties where insurance claims cannot easily be concluded. The paper recommends reform to the law of England and Wales to adopt a legal principle similar to French civil law, where damage is fully compensated, regardless of cause, removing the complexity of concurrent causation entirely, providing better consumer support, and reducing a drain on court resources by speeding up processes.

Keywords: Concurrent causation; Insurance liability; Civil liability; Insurance law; Proximate cause

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التسبب المتزامن المُوجِب للمسؤولية التأمينية – دراسة تحليلية مقارنة بين القانون الإنجليزي والقانون الفرنسي

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ملخص

يهدف هذا البحث إلى تحديد وتوضيح الإطار القانوني الذي يحكم التسبب المتزامن الموجب للمسؤولية التأمينية، أي ما إذا كانت مسؤولية شركات التأمين، تظل قائمة في حالة وجود أسباب متزامنة للضرر بغض النظر عن المضرور؛ حيث نبحث في الفرق بين التسبب المتزامن والتأمين المتزامن الموجب للمسؤولية المدنية.

يتبع البحث المنهج التحليلي المقارن بين النظام الفرنسي والأنجلوسكسوني، من خلال تحليل الأحكام القضائية، والنصوص التشريعية، في محاولة لتأطير موضع المسؤولية، وما إذا كان ما يسمى (البساطة الظاهرة) في القانون المدني الفرنسي يوجد ما يقابلها في السوابق القضائية في قانون إنجلترا وويلز.

ونستخلص بعد البحث أن القانون في إنجلترا وويلز يفتقر إلى الوضوح؛ نتيجة عدم وجود السوابق القضائية الرصينة في هذه الفرضية تحديدًا. حيث إن السوابق الموجودة متضاربة و متداخله بين قانون التأمين والمسؤولية التقصيرية.

وفي الختام نقدم توصياتٍ بإجراء تعديلات تشريعية جذرية لقانون إنجلترا وويلز من خلال تبني مبدأ قانوني مشابه لذلك الموجود في القانون المدني الفرنسي، الذي يُعوض الضرر بالكامل بغض النظر عن السبب، مما يُلغي تعقيد الأسباب المتزامنة ولبسها بشكل كامل، ويُوفر حماية أفضل للمضرور، ويُقلل من العبء على المحاكم.

الكلمات المفتاحية: المسؤولية التأمينية، قانون التأمين، الضرر المباشر، التسبب المتزامن، المسؤولية المدنية

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Introduction: Context and Parameters

Theoretical Framework

The English Supreme Court has helpfully clarified that an analysis of both insuring and exclusion clauses is required to determine whether insurance coverage remains valid when assessing concurrent causations. By exploring case law and precedent in the UK, along with comparative examples from New Zealand and the USA, and evaluating legislative reforms over the past ten years, it will be examined whether concurrent causation is as complicated as it first appears, or if the law does have a systematic process to determine whether the insured party can claim. The paper will look at the impact that COVID-19 has had on the speed of handling the claim, as well as on the interpretation of the results. Then, the seemingly simplistic French legislation and case law will be compared.

The Research Problem

The key issue that this paper seeks to examine is the 'thorny' topic of concurrent causation. The legal position in both English and French law is clear enough when there is simply one cause of action that may give rise to an insurance claim. In English law, from the 'founding mother' of tortious negligence claims,[1] to far more recent case law[2] where there is only one possible tortfeasor, liability does not suffer from a lack of clarity. It is only where there is multiple or concurrent causation that legal problems begin to surface for obvious reasons. There are also issues of 'material contribution'[3] to tortuously sustained damage or injury, which runs alongside the issue of concurrent liability, but for this paper, it will be assumed that such material contributions are simply a subset of concurrent liability. In the relatively recent raft of mesothelioma case law, for example,[4] who should carry the burden of liability where the direct tortfeasor cannot be established has been far less straightforward.[5] Notwithstanding the addition to the legislative canon on this matter[6] in English law, the issue of concurrent causation is still an intractable problem, especially as Zhao[7] explains "… In English law, the insurer is not liable for a loss concurrently caused by proximate causes if one is an insured risk and the other an excluded risk, but the insurer is liable if the loss is concurrently caused by an insured risk and an uninsured risk." The confusion here is palpable.

Liability Insurance: Contextual and Legal Background

It has often been argued that liability insurance is '…simply a necessary evil in today's climate of litigation?'[8] Commentators point the reader towards the Shavell model, and this paper strongly supports

1 Donoghue v Stevenson [1932] AC 562.

2 Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4.

3 McGhee v National Coal Board [1972] UKHL 7, 1 W.L.R. 1.

4 Fairchild v Glenhaven Funeral Services Ltd. [2002] UKHL 22.

5 Barker v Corus (UK) plc [2006] UKHL 20.

6 The Compensation Act 2006.

7 Zhao L. (2022) Insurer's liability under concurrent causation: English law and Chinese law compared. Legal Studies. 2022; 42(1):120-136. doi:10.1017/lst.2021.31

8 TS Mei, 'Insurance in Between: A Critique of Liability Insurance and its Principles' (2007) 21(1) Literature and Theology 82.

the assertion that '…liability insurance will generally raise welfare because its risk-spreading gains will likely be larger than its adverse effects on precautionary activities.'[9] As such, there is perhaps an obvious overlap between insurance law and the broader law of tort, especially about the negligence model of duty, breach, and foreseeable causation. There can be no question that the seminal case of Donoghue,[10] with Lord Atkin's quasi-biblical 'neighbour principle', set the parameters for the concept that damage caused by negligence must be compensated by the tortfeasor and as such '… Tort cases are typically denominated in terms of a victim suing an injurer …' but it is also true to suggest that '… injurers do not typically pay the damages (if any) for which they are held liable …'[11] and as such the relationship between tort law and liability insurance has been described '… using the metaphor of a bipolar star: separate bodies that form a common gravitational field.'[12]

The law student in a tort class is often confused by the seemingly convoluted chain of causation in the case of Baker.[13] The injured party was first hit by a car, damaging his leg. This facilitated a change of work, compelling the injured party to take a more sedentary job, whereby he was then subjected to being shot in the same leg in an armed robbery, which resulted in amputation. The perpetrators of the robbery were nowhere to be found, so the full claim was brought against the driver of the car, who caused the first, and more minor injury. The Court of Appeal held that the driver should indeed pay for the full loss of the leg, and there is no question that insurance played a major role here, with Harman LJ sending a clear warning to drivers to make sure that they were fully covered by the newly introduced insurance regime. As has been argued, '… first-party insurance may work as an alternative to tort; society needs to worry less about making injurers pay victims if the latter can collect from their insurers instead.'[14] Though this is a rather obtuse ruling, this paper would argue that, from a policy perspective at least, the court was correct in emphasising the need for insurance, especially as this motor insurance was a relatively new concept at the time.

However, when concurrent causation is part of the equation, the problem becomes naturally more acute. As has been suggested '… This doctrine is a new concept to property insurance law, which seeks to establish liability for losses that would not be covered under a traditional causation analysis.[15] Brewer argues that '… liability insurance contracts are classified by causation, and contain in their insuring clauses the words, 'loss caused by …' or their equivalent. The phrase is deceptively simple.[16] Within it

9 Tom Baker, Peter Siegelman, 'The Law and Economics of Liability Insurance: A Theoretical and Empirical Review' (All Faculty Scholarship, Pen Carey Law 2013) 350 <https://scholarship.law.upenn.edu/faculty_scholarship/350> accessed 25th March 2024.

10 Donoghue v Stevenson [1932] AC 562.

11 Baker (n2).

12 Kenneth S Abraham, 'Environmental Liability and the Limits of Insurance' (1988) 88 Colum L Rev 942.

13 Baker v Willoughby [1970] AC 46.

14 Baker (n2).

15 DG Houser & CH Kent 'Concurrent Causation in First-Party Insurance Claims; Consumers Cannot Afford Concurrent Causation' (1986) 21(4) Tort & Insurance Law Journal 573.

16 Insurance Law in the United Kingdom / Birds, John - Alphen aan den Rijn: Kluwer Law International, 2024 - 264 p. - ISBN: 9789403513881 - Permalink: http://digital.casalini.it/5813171 - Casalini id: 5813171.

lie a multitude of vexing legal and philosophical problems, not the least of which is the problem of concurrent causation.'[17] It is this 'problem' that will now be deconstructed to ascertain exactly how 'vexing' it seems to be. With solutions inspired by the general theory of liability, it is clear that we are dealing with a national judiciary that remains, on the whole, deeply rooted in tradition, contributing to the formation of a legal structure that goes beyond the mere texts of the law. It is a creative praetorian judiciary that refuses to be confined to the civil law framework and its fringes, which reflect shortcomings and an inability to keep pace with the evolving reality around it.[18]

1. Research Hypothesis

English common law appears to be overly complicated concerning the occurrence of concurrent causation and whether this affects the validity of insurance claims, or whether one of many concurrent causes falls under a contractual exemption. This also seems to give an unfair advantage to the insurance companies. There are many relevant cases in both English and French legal jurisdictions, with many appropriate discussions of each in the literature. Though it should be noted from the outset that the French civil code, which only alludes to causality in a rather subsidiary manner, the general concept of causality is to be found in the body of French jurisprudence, along with academic discussion of the relevant literature, and for each jurisdiction. This paper will explore where the responsibility lies with regard to ensuring the insurer knows any potential risks and whether the law is skewed in favour of insurance companies. By comparing English law with the French legislation, this paper will seek to see if the civil code can offer any helpful insights on possible future reform. It is perhaps also true to suggest that causation, especially concurrent causation, is a problematic concept in all legal regimes, not only in Common Law jurisdictions.

2. Methodology

This paper mainly benefits from a qualitative methodology, via a historical comparison study and an analytical deconstruction of the contentious issue of insurance law and practice in both England and France. The paper primarily investigates case law, statute, and secondary sources in the form of academic articles, whereby the work of authors, commentators, and policy experts is deconstructed to form a response to the research question.

3. Concurrent Causation – A Definitional Perspective

As Brewer explains in an American context and albeit in rather complex words, '… When an insured cause joins with one or more additional causes, which may be uninsured or may be insured under a separate contract, concurrent causation can be said to exist. A dispute may then arise between the insurance carrier and the insured as to whether the damage was caused by an insured event or by an event that is either specifically excluded from coverage or simply not within the scope of the contract;

17 William Conant Brewer Jr. 'Concurrent Causation in Insurance Contracts', (1961) 59 (8) Mich L Rev 1141 <https://repository.law.umich.edu/mlr/vol59/iss8/2> accessed 12th March 2024.

18 The Civil Liability Regime of the Polluter-Producer in Comparative Law: What Evolution?, Chehida Kada Maamar Bentria, International review of law, Apr 30, 2021.

or in the alternative, a dispute may arise between companies as to which of two insurance contracts applies'[19] If for example, a driver crashes his car into a tree due to a fire breaking out in his dashboard, is the driver likely to be covered by a clause in his insurance policy relating to fire, or one relating only to collision? As Harrington argues, also from a United States perspective, '…Few issues are more vexing for adjusters than when a policyholder incurs damage from two or more causes at the same time and at least one of those causes is excluded from coverage under the applicable property policy.'[20] Referring to the aftermath of Hurricane Katrina in the United States in 2005, Harrington explains that '… distressed policyholders learned that structural damage caused by high winds might not qualify for coverage if flood waters compounded the damage or if it could not be determined how much of the damage was caused by wind as opposed to water.'[21]

Concerning English law and the existing legal framework, Richards[22] argues that '… While matters of concurrent causation have come before the courts in recent years, the question of how English law should respond to a loss caused in fact by two perils operating simultaneously but where either peril was capable of causing the entire loss remains an open question …' and as such fraught with uncertainty and legal difficulty and this will be analysed in due course. Illustrating her point concerning a New Zealand case and United States case law, respectively, Richards uses the examples of New Zealand Fire Service Commission v Legg[23] where fire spread from burning waste from an insured's farming business and waste from his landscaping business, the policy covered liability for farming operations, but not for liability that arose from any unconnected trade or profession. It was therefore impossible to determine which part of the waste caused the fire to spread. In Anderson v. Minneapolis[24] there was a lack of certainty as to the outcome where property damage was caused by a fire for which the defendant was liable, and where there was also a fire of unknown origin due to prevailing weather conditions.[25] As such, it is clear where the confusion and lack of certainty arise, and this paper argues that this lacuna in the law is far from acceptable. Returning to English law, Richards refers to the historical legal position set down in

> … s.55(1) Marine Insurance Act 1906 that, to recover for a loss, an assured will need to establish the loss was proximately caused by a covered peril. Linguistically, the reference to 'a covered peril' could be taken to mean that the role of the courts is to identify a single proximate cause of the loss.

19 Ibid.

20 Joseph Harrington, 'Concurrent Causation: An Adjuster's Dilemma', (Adjusters International 2020) <www.adjustersinternational.com/pubs/adjusting-today/concurrent-causation-new/> accessed 14th March 2024.

21 Ibid.

22 Katie Richards 'Causing dissent: Professor Malcom Clarke and Sufficient Concurrent Causation' University of Bristol (BILA, Platinum Edition Journal, 2022)) <https://bila.org.uk/wp-content/uploads/2022/11/8-Causing-Dissent-Prof-Malcolm-Clarke-and-Sufficient-Concurrent-Causation-Dr-Katie-Richards.pdf> accessed 12th March 2024.

23 New Zealand Fire Service Commission v Legg [2016] NZHC 1492.

24 Anderson v Minneapolis (1920) 146 Minn. 430, 179 NW 45.

25 Richards (n 13).

3.1. English Case Law

In more recent years, however, the position has changed somewhat with cases such as the ruling of the English Supreme Court in The B Atlantic[26] in the following terms: "while the general aim in insurance law is to identify a single real, effective or proximate cause of any loss, the correct analysis is in some cases that there are two concurrent causes." As Richards explains,

> … in The B Atlantic, the assured contended that the detention of the vessel, which occurred after Venezuelan authorities discovered drugs placed on board by unknown third parties, was a loss caused by a covered peril. Cover was agreed on the basis of the Institute War and Strikes Clauses Hulls-Time (1/10/83) and, as such, afforded cover for inter alia detainment, confiscation and losses caused by persons acting maliciously …

Richards explains that there were numerous exclusions, including where '… detainment occurred "by reason of infringement of any customs or trading regulations." 'The question then for the English Supreme Court was in relation to the interaction between the insuring clauses and the exclusions. The Supreme Court accurately, in this paper's opinion, elected to follow the 1970s ruling in Wayne Tank,[27] and held unanimously that the exclusion clause 'cut back or define[d] the limits of cover otherwise available' under the policy. The court gave effect to 'the natural meaning of the [policy] words in their context' to determine, first, whether there was a loss proximately caused by an insured peril and then to consider whether an exclusion clause reduced the cover. Since, '… on the facts of The B Atlantic, the loss was caused by the detention of the vessel due to an infringement of customs regulations, the insurer was able to rely on the exclusion clause to avoid liability'[28] thus, this paper would suggest, providing a pragmatic solution to what was a 'knotty' legal problem.

3.2. The Miss Jay Jay[29]

Richards describes this case as '…the best-known English example of multiple causes combining to cause a loss…' and explains the factual background as follows:

> …a yacht on a trial run from Deauville to Hamble sustained damage to its hull as a result of the combination of the perils of the seas and defective design of the hull. In essence, the lightweight materials used to construct the yacht – and for it to sail at speed – were unable to withstand the short, frequent waves on that crossing. The policy covered losses caused by external accidental means (accepted as equivalent to perils of the seas) and excluded losses caused by defective design where that was the sole cause of the loss. Each cause was necessary to cause the whole loss, but neither was sufficient to bring about the loss on its own. As a result, the policy did not provide for the situation where the loss was caused

26 Atlasnavios-Navegação, LDA (formerly Bnavios-Navegação, LDA) v Navigators Insurance Co Ltd and others (The B Atlantic) [2019] AC 136.

27 Wayne Tank and Pump Co. Ltd. v Employers Liability Assurance Corporation Ltd. [1974] Q.B. 57.

28 Richards (n 13).

29 J J Lloyd Instruments v Northern Star Insurance Co (The Miss Jay Jay) [1987] 1 Lloyd's Rep. 32.

> by perils of the seas and defective design since the latter was, on the facts, uninsured but not expressly excluded.[30]

Concerning the judgment in the Court of Appeal, with which this paper generally agrees, according to Slade LJ, it was held that:

> It seems that there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy, the assured will be entitled to recover. No authority has been cited to us, which leads me to suppose that this passage incorrectly states the relevant law relating to marine insurance policies and, in my judgment, it incorporates the principle applicable to the present case. The crucial point is that in the contingencies envisaged in the passage, to apply the provisions of the policy and section 55 of the Act, the loss is treated as proximately caused by the cause insured against, notwithstanding the presence of a concurrent cause not covered by the policy.

However, it seems clear that this may have been a rather simplistic solution to a potentially complex set of facts, and as such, this ruling faced criticism, especially from leading insurance law commentator Malcome Clarke, suggesting that,

> [I]f a yacht breaks up in moderate seas and the yacht was negligently designed or constructed, a tort inquiry is likely to point to the designer or constructor. But, when the question arose in the Miss Jay Jay, in connection with insurance against perils of the sea, the search for a proximate cause went no further back than the peril …[31]
>
> As Steward argues, after the Miss Jay Jay, there still needed to be an analysis of the facts to '… determine the proximate cause or causes [especially where] the assured is privy to the unseaworthiness.'[32]

3.3. FCA v Arch [33]

In the key recent English case following and based on the Covid pandemic, the case of Arch Insurance is perhaps one of the most important cases on concurrent causation in recent years, especially where there are many identical causes of an insured loss, none of which are necessary nor sufficient to cause the loss as a whole. In this key test case, the Supreme Court was required to interpret clauses within various business interruption policies and other matters of causation. The case hinged on considerable business interruption losses when it was announced by Boris Johnson and Rishi Sunak that businesses were legally required to cease trading in March 2020 following the coronavirus outbreak. In this case, the Supreme Court examined '… a representative sample of policy wordings

30 Richards (n 13) see p. 3.

31 Malcome Clarke, 'Law of Insurance Contracts' (loose-leaf, Informa 2021 release), [25-6B].

32 David Steward, 'A Peril Insured': Proximate Cause and the Case of Miss Jay Jay' (2018) <www.linkedin.com/pulse/cause-c%C3%A9l%C3%A8bre-david-steward> accessed 14 March 2024.

33 Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1.

offered by eight insurers and was required to determine inter alia the correct interpretation of 'occurrence' in the context of disease clauses,' which provided cover for loss resulting from the occurrence of Covid within a geographical radius of the insured premises and "… hybrid clauses, which covered losses caused by the occurrence of disease and restrictions imposed by a public authority which prevented access to the insured premises."[34] It was also necessary for their Lordships to address whether a singular case of disease could be regarded as a proximate cause of the loss, notwithstanding the existence of many other cases of disease outside the radius covered by the policy.[35]

As explained by Richards, and with which assertion this paper agrees, perhaps the more interesting point addressed by the Supreme Court was its '… assessment of the causation point; could an individual occurrence of the virus within the specified radius constitute a proximate cause under the policy?'[36] The Supreme Court held that:

> There is, in our view, no reason in principle why such an analysis cannot be applied to multiple causes that act in combination to bring about a loss. Thus, in the present case, it obviously could not be said that any individual case of illness resulting from COVID-19, on its own, caused the UK Government to introduce restrictions which led directly to business interruption. However, as the court below found, the Government measures were taken in response to information about all the cases of COVID-19 in the country as a whole. We agree with the court below that it is realistic to analyse this situation as one in which all the cases were equal causes of the imposition of national measures.[37]

As Richards argues, and with which this author concurs, it seems an eminently sensible and pragmatic approach following closely in the shadow of relatively recent multiple causation tort law mesothelioma cases such as Fairchild[38] and recent statutes.[39] As Lord Bingham commented in Fairchild, which was thought only to have a narrow application, it is perhaps 'unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development …'[40] and as such apply to broader issues such as concurrent causation in insurance claims. However, it cannot be ignored that insurance policy documents are still contracts, and as such, as Clarke seems to argue quite clearly, the tortious analogy, it is suggested, is perhaps not the panacea of all evils. As has been written in a Canadian context,

> … Courts and commentators alike often observe that the interpretation of insurance contracts must start with the intent of the parties. The rules of interpreting insurance contracts are well settled. Of paramount importance is the intention of the parties

34 Para [4] per Lord Hamblen and Lord Leggatt.

35 Ibid [5].

36 Richards (n 13) 5.

37 Ibid.

38 Fairchild v Glenhaven Funeral Services [2003] 1 AC 32.

39 Compensation Act 2006.

40 At para [34].

> ascertained objectively from the words selected by the parties to express their legal obligations in writing …[41]

and if, as is common in jurisdictions such as California, there are '… Anti-concurrent causation clauses [which] protect insurance companies when both a covered event and an excluded event simultaneously or in sequence cause damage to a property …' are included, then they become contractually binding.[42]

4. English Law Reforms – 2016 and Beyond; Evolution or Revolution?

It has been argued that the Insurance Act 2015, which came into force on 12 August 2016, to some extent at least has clarified some of the issues raised and identified above. It can be said that the Act places more of a burden on the insured to make a 'fair representation' of any risks that may be a foreseeable basis for a claim, whether a single risk or, as is relevant to this paper, concurrent or multiple risks. Once made, though, the Act seems to benefit the insured by removing uncertainty and ambiguity as to a claim. As Howard[43] suggests,

> … An insured will owe a duty to insurers to make a "fair presentation" of the risk. For the insured, this means fully disclosing every material circumstance that the insured either knows or "ought to know," or providing sufficient information to put the insurer on notice that it needs to make further inquiries…

whether single or multiple risk. This should, in theory, eliminate the need to argue multiple or concurrent causation, as it would seem logical that only causes identified at the outset will be subject to an insurance claim. Howard explains that,

> … An insured "ought to know" what it would have found out by a "reasonable search" for information; this is a significant change. Although an individual or small trader is not likely to have much difficulty in carrying out a reasonable search, larger and corporate businesses will need to ensure that they have a structured and trackable system in place for enquiring of all staff and contractors about information that might need to be disclosed before taking out or renewing an insurance policy. This is likely to increase the burden on such businesses.[44]

This paper argues that following this '… shift in English insurance law after the introduction of the Insurance Act 2015 …' perceived as being widely 'pro-insured', the recent judgment in B Atlantic in 2019 highlighted above seems to be a 'helpful confirmation of the value and importance of exclusions

41 Richard B. Lindsay and Scott W. Urquhart, 'Concurrent Causation and Insurance Contracts' (2016) <https://lklaw.ca/drive/uploads/2016/07/scottcausation.pdf> accessed 16th March 2024.

42 Avner Gat, 'Concurrent Causation: Explained by a Public Adjuster' (website, 2023) <www.avnergat.com/concurrent-causation/> accessed 23rd March 2024.

43 Clare Howard, 'Insurance Act 2015: Good News or Bad?' (Mills and Reeve, 10 December 2016) <www.mills-reeve.com/insights/publications/insurance-act-2015-good-news-or-bad> accessed 23rd March 2024.

44 Ibid.

in insurance policies.'[45] However, even after the introduction of the Act, the judgment in the B Atlantic was still far from clear. Though '… Lord Mance did refer to a possible scenario in which a certain peril will dominate and exclude from relevance a later development which, taken by itself, may otherwise be seen as triggering an exclusion …' it remains uncertain as to the answer to this question and it '… seems likely, however, that the Court will continue to strive to find a single proximate cause and will only deem there to have been concurrent causes in the most extreme examples.'[46] What does seem clear, even after the introduction of the Act, as stated in the FCA v Arch case, is that it is 'always a question of interpretation,' where there are two proximate causes, one of which is an insured peril but the other is excluded, 'the exclusion will generally prevail.'[47] It seems that the

> … key hurdle for the policyholders was the "but for" test, which shows, for example, that "but for" the cases of COVID-19 in the vicinity, they would not have suffered any interruption … Satisfying the "but for" test is not enough to satisfy proximate causation), but the reasoning of the Supreme Court depended upon the finding that the insured peril was one of multiple broadly equal effective/dominant causes.[48]

As such, as the authors suggest, it is perhaps the 'raft' of business interruption case law post-Covid making its way through the courts rather than the introduction of the Covid-pre-dated Act, which is likely to pave the way for the development of the law in this complex and commercially vital area.

4.1. Post-COVID Case Law

As Fletcher and Kramer suggest, and this paper would support,

> … Causation is a concept of fundamental importance in many contexts in insurance and can give rise to difficult issues of fact and law. Correct resolution of these issues depends not only on the general law and the many decided cases but also, often crucially, on the proper interpretation of the relevant policy wording and the application of business common sense …

Though the case of Arch seems, this paper would argue, to have gone some way to clarifying the position on concurrent causation, '… further elucidation is to be expected from the raft of business interruption cases now making their way through the courts …' one of these being the Spire[49] case. The Court of Appeal usefully set down key points:

- The usual principles of contractual construction apply, and such clauses are to be construed in a balanced way without predisposition to narrow or broad interpretation (per Andrew Baker LJ,

45 Clyde & Co, 'Concurrent Proximate Cause' (Website, 17 July 2018) <www.clydeco.com/en/insights/2018/07/concurrent-proximate-cause> accessed 16th March 2024.

46 Ibid.

47 Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1 para 174.

48 Andrew Fletcher, Adam Kramer 'Insurance Contract Law: Causation' (Thomson Reuters Practical Law Online, 2023). <https://3vb.com/wp-content/uploads/2023/06/Insurance-contract-law-causation-w-039-3868.pdf> access 12th March 2024.

49 Spire Healthcare Ltd v Royal & Sun Alliance Insurance Ltd [2022] EWCA Civ 17.

with whom Bean and Underhill LJJ agreed, in paragraph 20. See also AIG Europe v Woodman [2017] UKSC 18). However, some formulations have been held to achieve a broad effect, for example, 'consequent on or attributable to one source or original cause' (paragraph 21).

- There is, in principle, no distinction between an 'original' and an 'originating' cause, both of which connote a considerably looser causal connection than 'proximate cause' (paragraph 21 and Beazley Underwriting Ltd v The Travelers Companies Incorporated [2011] EWHC 1520).

However, although the original cause does not need to be the sole cause of the insured's liability (or loss), it is necessary to find a single unifying factor, and not every "but for" cause is sufficient to amount to an 'original cause' (paragraph 24).[50]

However, s. 11 of the Act still allows for express exclusions which may seek to exclude one or more specific causes of loss from being recoverable. As Mekin and Ozlem[51] explain,

> …A key element in the operation of s. 11 is the words added in December 2014, "other than a term defining the risk as a whole." Such terms fall outside s. 11, and it is plain from the Law Commission's documents that insurers should be allowed to exclude certain forms of loss entirely …

However, it seems to be clear that the purpose of s. 11 is to '… prevent denial of liability for a loss of a completely different nature from that contemplated by an exclusion …' and what is perhaps noteworthy is that,

> … A direct causal link between the breach and ultimate loss is not required, and the test is not whether the non-compliance caused or contributed to the loss, but whether non-compliance with the term could have increased the risk in the circumstances that the loss occurred. It is necessary to look at the issue broadly and not to consider "the way" in which the loss occurred.[52]

This paper's critical analysis would argue that about concurrent causation liability, '… Section 11 in particular was adopted at the last minute and with virtually no parliamentary discussion. It will take some years and a series of seminal decisions of the English courts to know exactly what effect these reforms will have.'[53] Though Merkin and Gürses draw comparisons with New Zealand and Australia, and other commentators,[54] selecting China as the comparator, this paper will now seek to compare the approach of French law.

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50 Ibid.

51 Robert Merkin, Özlem Gürses, 'Insurance contracts after the Insurance Act 2015' (2016) 132 (3) Law Quarterly Review, 445 <https://centaur.reading.ac.uk/90253/> accessed 13th March 2024.

52 Ibid.

53 Ibid. .

54 Liang Zhao 'Insurer's Liability Under Concurrent Causation: English Law and Chinese Law Compared' (2021) 42 (1) Legal Studies 120 < DOI:10.1017/lst.2021.31> accessed 15th March 2024.

5. The French Approach

As Moreteau explains,

> French law has developed no system that could properly be described under the name of proportional liability. Civil Code provisions regarding civil liability (art. 1382 and following) provide for full compensation of damage, wherever the basic conditions are met. Court interpretation of these articles is known to offer a particularly victim-friendly environment, favouring full compensation (reparation intégrale) of damage. However, French courts have developed strategies to offer limited compensation when causation is uncertain and techniques to fully compensate victims in dubious circumstances.[55]

As the author explains,

> … French courts routinely apply the doctrine of loss of a chance (perte d'une chance) whenever of the opinion that the defendant's activity deprived the victim of the opportunity of a favourable event when the victim can do nothing to remedy the situation …

It is also suggested, albeit rather sweepingly, that

> … The French find it convenient to shift from causation to damage. Rather than admitting that causation is partial or uncertain and following a path similar to articles 3:101 to 3:106 of the Principles of European Tort Law (PETL), French courts regard loss of a chance as a head of damage that will be fully compensated.[56]

With insurance specifically, it should be noted that the industry in France is governed and regulated by the French Prudential Supervisory Authority, which was created by Order No. 2010-76 of 21 January 2010 and became, by Law No. 2013-672 of 26 July 2013, the Autorité de Contrôle Prudentiel et de Résolution ("ACPR"). Their 'mission' is 'to ensure the protection of the clients, the insureds, the adherents (the term used to describe insureds under group insurance contracts) and beneficiaries of the entities under its supervision, as well as the stability of the financial system.'[57] The authors explain that, seemingly contrary to the aim of the Insurance Act 2015 and jurisprudence in English law already illustrated,

> … There is a general tendency of French law, as enforced by courts, to protect consumers and non-professionals, rather than insurers in general. Insurance contracts are indeed subject to Art. L.132-1 of the Consumer Code regarding abusive clauses, except when the insurance policy is related to the professional activity of the insured. According to Art.

55 Olivier Moréteau, 'Causal Uncertainty and Proportional Liability in France' in Proportional Liability: Analytical and Comparative Perspectives, (Eds) Israel Gilead, Michael D. Green and Bernhard A. Koch, (De Gruyter, Boston 2013) 141-152 <https://doi.org/10.1515/9783110282580.141>

56 Ibid.

57 Yannis Samothrakis, Sophie Gremaud 'Insurance & Reinsurance Laws and Regulations France 2023' (ICLG Website, 2023). <https://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/france> accessed 16th March 2023.

> L.132-1 of the Consumer Code, contractual clauses shall be interpreted, in the event of doubt, in the way that is most favourable to the consumer or the non-professional. Besides, since the adoption of Law No. 2014-344 of 17 March 2014 (Loi Hamon), new provisions benefiting consumers and non-professionals have been introduced in the Insurance Code, in particular about pre-contractual information (especially in case of sales by direct marketing), or the insured's right of withdrawal in case of distant selling, or to termination rights for certain types of insurance contracts.

Concerning the issue of disclosure, especially of a secondary or concurrent risk, it is perhaps interesting to note that '… When taking the insurance contract, the policyholder must answer the questions that were phrased by the insurer (Art. L.113-2 of the Insurance Code). A key document for insurers is therefore the questionnaire, which is a list of questions that they submit to the policyholder …' and that the

> … position of French courts is very strict. Indeed, according to case law, only a false answer to a specific question asked by the insurer may constitute a false declaration (Ch. Mixte, 7 February 2014, No. 12-85.107; Civ. 2, 11 June 2015, No. 14-14.336, 978). A simple declaration, which does not answer any specific question, may not be enough to be considered a false declaration, even if it is signed by the policyholder. Thus, under French law, the insured does not have a duty to make spontaneous disclosures to the insurer when taking the insurance contract.[58]

Returning to Moreteau,[59] his explanation of French tort law and concurrent causation is perhaps the most illuminating for this research. The author refers to the recent reform of the 'delict' system in French law, both by way of reference to the Terre draft and the Catala drafts, stating that

> … Causation is dealt with in different ways in both projects. The Catala draft deals with it in two short articles, with no attempt to define causation or give guidance, but simply insisting that a causal link must be proved (article 1347). The Terré draft defines causation (article 10), describing the cause of damage as any fact susceptible of producing it "according to the ordinary course of things and without which it would not have occurred." Article 10 also limits liability to the immediate and direct consequences of the author's act. Causation may be established by all means, which must be understood as including presumptions.[60]

The author, and with specific relevance to this paper, explains about multiple causations that,

> … Proportional liability is on the cutting edge of tort scholarship. The Principles of European Tort Law have proposed proportional liability as a response to causal uncertainty, an issue recently revisited by members of the European Group on Tort Law. In particular,

58 Ibid.

59 Olivier Moréteau, 'France: French Tort Law in the Light of European Harmonization', (2013) 6 (2) J Civ L Stud 15.

60 Ibid.

> in cases where there are multiple tortfeasors or uncertainty of causation, various doctrines are applied, where the causation requirement is attenuated …[61]

Using hunters as his hypothetical, just as other commentators do with an analysis of English law, the author explains that,

> … If several hunters may have caused the damage, they can be made liable under one of the following doctrines: fault-based liability (faute commune, faute collective), if acting as a group and guilty of a collective fault; custody of the bullets when two guns shot simultaneously and at least two bullets hit the victim (gerbe unique); or collective or joint custody of the bullets, also triggering strict liability for the fact of a thing under article 1384 paragraph 1,

demonstrating that concurrent causation is well-established as a doctrine in French law.

Illustrating this by reference to a well-publicised French medical case where the actual tortfeasor was perhaps one of many, the author explains that liability may

> … fall under two different provisions of the Principles of European Tort Law regarding causation. It may be regarded as a situation of concurrent causes. According to Article 3:102, "In case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim's damage." This leads to solidarity because we have multiple tortfeasors Article 3:103(2) (alternative causes) may be a better fit.[62]

The author makes the same assertion related to French asbestos cases, very similar to those heard in the English courts, and as such, this paper can draw similarities between both English and French approaches.

5.1. French Covid-Business Interruption & Insurance

Cass. civ. 2, 1 December 2022 (n°21-15.392, 21-19.341, 21-19.342 and 21-19.343)

As reported, in this case, several restaurant owners had taken out 'multi-risk professional' insurance policies with the same insurer, including 'financial protection' and 'business interruption following administrative closure' cover. These restaurant owners were forced by orders and decrees to close their doors to the public for several periods due to the spread of COVID-19.[63]

They then reported the loss to their insurer to be compensated for their business interruption losses.

The insurer refused to cover them, citing a clause that excluded

[...] operating losses when, on the date of the closure decision, at least one other establishment, whatever its nature and activity, is subject to an administrative closure measure in the same departmental

61 Ibid., 792.

62 Ibid.

63 Naz Meydan, Jean-Michel Reversac, (2023) 'Legal Update for Insurance Sector in France' (Clyde & Co website, 11 April 2023) <www.clydeco.com/en/insights/2023/04/legal-update-insurance-france> accessed 13th March 2024.

territory as that of the insured establishment, for an identical reason.[64]

In four rulings handed down on 1 December 2022, the French Supreme Court validated the above-mentioned exclusion of coverage clause, considering that it is formal and limited.[65] The Paris Court of Appeal[66] held that

> …the clause by which the insurer excludes all coverage if "the provision of such coverage, the payment of such a claim or the provision of such assistance would expose the insurer to any sanction, prohibition or restriction under UN resolutions, laws and regulations enacted by the EU or any other State imposing economic or commercial sanctions, is an exclusion clause within the meaning of Article L.113-1 of the French Insurance Code. Consequently, the Court considers that the above-mentioned clause is not formal and limited and that it is therefore unenforceable against the insured, in that it does not allow him to know precisely the extent of the circumstance that is excluded.

From a contractual perspective, it is also noted that '… Insurance is considered a "contingent contract" under the French classification of contracts. It implies the risk must exist to be insurable.'[67] On a final note, if an action is brought before a French Court,

> … there is now a risk that any exclusion clause in the insurance contract, be it governed by Dutch, German, or English law, for example, is considered to be valid only if it complies with French law standards. This is even the case if both the insurer and the policyholder have their seat in the same (foreign) country. This decision amounts to an excessive extra-territorial application of French law, which is highly questionable.[68]

6. London International Exhibition Centre Plc v Royal & Sun Alliance Insurance Plc & Ors 21st June 2023 – the current position?[69]

'… On 16 June 2023, the High Court handed down judgment in the above matter ([2023] EWHC 1481 (Comm), which involved members of chambers, Aidan Christie KC, Michael Davie KC, Martyn Naylor, and Anna Hoffmann. The judgment considered the application of the analysis by the Supreme Court in the seminal case The FCA v Arch & Others [2021] UKSC 1 (the "FCA Test Case") regarding

64 Ibid.

65 Ibid.

66 Paris Court of Appeal, 21 June 2022 (n°20/10832).

67 Erwan Poisson, Julie Metois 'Insurance Disputes: France' (Allen & Overy website 23 October 2023) <www.lexology.com/indepth/the-insurance-disputes-law-review/france> accessed 14th March 2024.

68 Civ. 2e., 15 June 2023, n° 21-20.538.

69 Rachel Ansell, Katy Handley 'A Significant Development In Covid-19 BI Insurance Litigation – Concurrent Causation Applies To "At The Premises" Wordings: London International Exhibition Centre Plc V Royal & Sun Alliance Insurance Plc & Ors' (4 Pump Court website 21 June 2023) <www.4pumpcourt com/a-significant-development-in-covid-19-bi-insurance-litigation-concurrent-causation-applies-to-at-the-premises-wordings-london-international-exhibition-centre-plc-v-royal/> accessed 13 March 2024 regarding London International Exhibition Centre Plc v Royal & Sun Alliance Insurance Plc & Ors 21st June 2023.

concurrent causation and disease clauses in the context of policy wordings that were triggered by the disease being at the premises, rather than within a radius of the insured premises. Jacobs J concluded that the UKSC's approach and concurrent causation analysis would also apply to such at the premises wordings.'

6.1. Legal Context

In the FCA Test Case, the UKSC held that in the context of radius clauses (which specify coverage for a specific radius, e.g., 25 miles), covered only to cases of illness resulting from COVID-19 that occurred within the radius specified in the clause. To show that COVID-19 was the proximate cause of the BI losses, it was sufficient to prove that the interruption was a result of government action taken in response to cases of disease, which included at least one case of COVID-19 within the radius of the clause.

The critical issue in the present case was whether clauses that provided insurance cover where it could be established that COVID-19 was "at the premises" ("ATP clauses") should also adopt the "concurrent causation" analysis found to apply to the radius clauses in the FCA Test Case.

6.2. Factual Background

The judgment concerned a number of preliminary issues arising out of claims made in six separate actions in respect of business interruption losses allegedly suffered by different policyholders as a result of Covid-19 and related national lockdowns. The Claimant in the lead action owns and operates the "Excel Centre" and brought claims against six insurers.

6.3. Judgment

Jacobs J confirmed that the UKSC causation analysis in the FCA Test Case applied to the ATP clauses (see [248]). The reasons for the decision were, in summary, as follows:

a. It was accepted by both sides that the physical coverage of radius clauses logically encompassed the premises themselves. There was therefore a clear "geographical link" between a radius clause and ATP clauses, as the width of the radius was interpreted as starting from a central point in the premises (see [186] to [189]).

b. At paragraph [250] of the FCA Test Case, the UKSC had noted that, in principle, the same causation analysis should apply to hybrid and prevention of access clauses. This reasoning was adopted in Corbin & King Ltd and Others v AXA Insurance UK Plc [2022] EWHC 409 (Comm) by Cockerill J. These clauses essentially relate to clauses covering occurrences "in the vicinity of the premises" and do not have a specified physical area of coverage. They were, therefore, in the Judge's view, very similar to ATP clauses in terms of size and geography (see [190] and [191]).

c. The diseases covered by the ATP clauses and the radius clauses shared the same proclivity to become widespread and to call for action not solely responsive to cases within the radius or the premises. It could therefore be expected by insurers that individual cases of diseases of those

types may combine to cause a loss that would not have resulted from any individual case alone. Ultimately, therefore, it was not the existence of the radius which permitted that "wider area authority action" should be covered, but rather the nature of the diseases (see [202]).

d. On a proper interpretation of the clauses, the radius is essentially a line that has been drawn for contractual certainty and should not, therefore, impact the appropriate approach to causation (see [205] and [206]).

e. In the FCA Test Case, the UKSC considered that a "fundamental objection" to the alternative "but for" and "weighing up" causation approaches was that they set disease occurring outside the scope of the cover in competition with those occurring within its scope. This argument was equally applicable to ATP clauses (see [207] and [208]).

f. As observed in the FCA Test Case, it was important for construction to apply an approach that was clear and simple. The application of the "but for" test would give rise to anomalies that would be difficult to explain rationally to a reasonable policyholder. In comparison, the concurrent causation approach was straightforward and provided clarity (see [210]).

The Judgment also dealt with the issue of causative potency of individual cases of Covid-19 and confirmed that cases in March 2020 could not be said to have caused lockdowns later in the autumn of that year. This confirmed the conclusions reached in the context of the aggregation question by Butcher J in Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd & Ors [2022] EWHC 2548 (Comm).

Jacobs J also agreed with the arguments presented on behalf of some insurers with policies requiring the presence of a notifiable disease on the premises that such a trigger could only have occurred after Covid-19 had been made a notifiable disease in the relevant part of the UK, e.g. on 5 March 2020 in England (see [273] and [282]).

6.4. Analysis

As the decision may be appealed, it is not yet possible to determine the true extent of its significance. Further, at [191], Jacobs J referred to the potential application of the causation analysis to "vicinity" clauses and noted that this matter was likely to arise in other preliminary issues before him later this year. It will therefore be interesting to see how this develops and how broadly the concurrent causation approach will be applied in future cases.

Further, as observed by Jacobs J at [204], ATP clauses are, on this analysis, essentially heavily confined radius clauses, and the narrower the radius, the more difficult it will be to demonstrate that an occurrence took place within that area. Therefore, whilst the decision is, at first blush, a win for policyholders with ATP clauses, they may face evidential challenges further down the line.'[70]

7. Discussion and Analysis

It is hoped that this paper has successfully defined and outlined the legal framework governing

70 Ibid.

concurrent causation and insurers' liability. It has been illustrated that there are comparisons between the legal framework in English common law and that practiced in France under the civil code, but also palpable differences which are to be expected in common law and civil jurisdictions. There has been a thorough dissection and analysis, especially that of the English common law position, that regardless of a situation having multiple contributing causes, only a single proximate cause should be identified for liability. This paper has demonstrated that the law is far from clear in England and Wales, with at best a lack of precedent and at worst, conflicting case law, which results in a lack of clarity as to the legal position in a key area of law and practice. Even after legislative reforms in 2016, the question that this paper sought to answer is whether the codification in French law gives greater clarity. This seems to be answered in the affirmative, but given codification and certainty in French law, this is not perhaps surprising. Additionally, English common law shows a bias towards supporting the insurance company, with more responsibility placed upon the customer to anticipate all of the potential risks that may damage the item being insured, and which may therefore invalidate the insurance policy, as well as placing the customer in a precarious position where an unanticipated risk invalidates their insurance. French civil law is much more supportive of the insured.

Conclusion

The conclusion of the paper would be a recommendation for further reform of the English Common Law concerning concurrent causation. English consumers would benefit from the adoption of legal principles similar to the French civil code, which removes the complexity of concurrent causation more and is in line with the consumer-supporting 'doctrine of loss of a chance' and the move from causation to damage, which will be fully compensated, regardless of cause.

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