

CANADIAN LAW OF MARINE INSURANCE FREQUENTLY ASKED QUESTIONS

Prepared by Christopher J. Giaschi

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1. What law governs contracts of marine insurance?

The law governing contracts of marine insurance is a question that is rarely asked but the answer to this question has very important ramifications. Under Canadian law the question is uniquely important because of the constitutional division of powers between the Federal and Provincial Governments under the *Constitution Act*. Although Canadian law of marine insurance is derived largely from the law of England, England is a unitary state. The law of marine insurance in England can be found in the various statutes passed by the English Parliament and in the case law as it has been developed by the courts. In Canada the law governing marine

insurance is also found in statutes and case law, however, in Canada one must always consider the constitutional division of powers and the constitutional applicability of any particular statute.

Until approximately 1983 it was generally considered that, for constitutional purposes, marine insurance was within the power of the various provinces to legislate under the heading "property and civil rights" in the *Constitution Act*. For this reason many provinces had passed provincial marine insurance acts and had provided for insurance acts of general application to apply to contracts of marine insurance. For example, within British Columbia a contract of marine insurance was governed by the *Insurance (Marine) Act* and also by specified sections of the *Insurance Act* of British Columbia. Those sections of the *Insurance Act* legislated such things as payment or refund of premiums (s. 17), assignees (s.18), time for payment of claims (s.21), limitation periods (s.24), and third party actions against insurers (s.26). Additionally, there are other Provincial acts of general application that have been applied to policies of marine insurance such as the relief against forfeiture provisions of the *Law and Equity Act* of British Columbia or the *Judicature Act* of Ontario.

In *Triglav v Terrasses Jewellers*, [1983] 1 SCR 283, the Supreme Court of Canada held that a contract of marine insurance was first and foremost a contract of maritime law and that it was within the power of the Federal government to legislate under the heading "navigation and shipping" in the *Constitution Act*. The Supreme Court further held that the law governing contracts of marine insurance was Canadian maritime law as enacted by the Federal Court Act. Canadian maritime law includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as amended from time to time by the federal Parliament and as it has developed through judicial precedent to date. (An analysis of the content of Canadian maritime law is beyond the scope of this paper, however, interested readers can view a paper on this topic on the author's internet site www.admiraltylaw.com.)

As a consequence of the decision in *Triglav v Terrasses Jewellers* it was recognized that there was a need for a Federal act dealing with marine insurance and, ultimately, the *Federal Marine Insurance Act* was passed. The Federal Act as passed was modeled on the English *Marine Insurance Act 1906*. This was a mistake in that the *Marine Insurance Act 1906* provides an incomplete regulation of marine insurance. In England, as in the provinces prior to the decision in *Triglav v Terrasses Jewellers*, marine insurance is not regulated solely by the *Marine Insurance Act* but also by other acts of general application. By simply modeling the Federal Act on the English Act of 1906 other important aspects of the regulation of marine insurance were ignored. This has not been a problem until recently as it was generally thought that in the absence of specific federal legislation the provincial acts would apply. However, this may no longer be the case.

In *Ordon v Grail*, [1998] 3 S.C.R. 437, the Supreme Court of Canada held that it would be very rare that a provincial act of general application would apply to a matter otherwise governed by Canadian maritime law. The importance of this decision for marine insurance is that it is now extremely doubtful whether provincial statutes have any application to contracts of marine insurance. This leaves a number of gaps in the law of marine insurance including limitation

periods and third party rights against insurers. The possibility of federal legislative reform to deal with these gaps is currently under discussion.

In conclusion, the law governing contracts of marine insurance is Canadian maritime law (which includes the law administered by the English Admiralty courts in 1934 as that law has been amended by judicial precedent) and the Federal Marine Insurance Act. Provincial insurance statutes and other provincial statutes of general application probably do not apply to contracts of marine insurance.

2. What is the limitation period governing a marine insurance claim?

The federal Marine Insurance Act does not prescribe a limitation period for a claim under a marine insurance policy. This omission has resulted in a great deal of uncertainty as to whether there is a statutory limitation period applicable to such claims. This uncertainty arises because of the decision of the Supreme Court of Canada in *Ordon v Grail*, [1998] 3 S.C.R. 437. Until the decision in *Ordon v Grail* it was thought that the limitation periods prescribed by provincial statutes would apply to marine insurance claims. Within British Columbia, section 24 of the *Insurance Act* provides for a one year limitation period from the time of the furnishing of a proof of loss. However, with the decision of the Supreme Court of Canada in *Ordon v Grail*, [1998] 3 S.C.R. 437, it is now very doubtful whether provincial limitation periods are constitutionally applicable to matters otherwise governed by Canadian maritime law, including marine insurance.

The question of the applicable limitation period is further complicated by section 39 of the *Federal Court Act*. Section 39(1) provides that the laws relating to limitation "in force in any province between subject and subject" apply to proceedings in the Federal Court "in respect of any cause of action arising in that province". Section 39(2) provides that a cause of action arising otherwise than within a province is subject to a six year limitation period.

At first reading section 39 of the *Federal Court Act* would seem to incorporate by reference the applicable provincial limitation period. It may, in fact, do so but only in respect of actions commenced in the Federal Court. It does not apply to actions commenced in any other court.

The application of provincial limitation periods to maritime matters was recently considered by the Federal Court in the case of *Geist et.al v Vancouver Marina et al.* (June 21, 2000) Registry No. T-1411-97). In this case Prothonotary Hargrave of the Federal Court held, on the basis of the *Ordon v Grail*, that the British Columbia *Limitation Act* was constitutionally inapplicable to a claim in contract and tort against a marina for damage to a vessel. Similar reasoning would likely apply in respect of a claim under a marine insurance policy. However, the Prothonotary also held that because of s. 39 (1) of the *Federal Court Act* the British Columbia *Limitation Act* was incorporated as federal law and therefore did apply to the action commenced in the Federal Court.

The important consequence of *Geist et.al v Vancouver Marina et al.* is that the limitation period applicable to a marine insurance claim may depend on the court in which the action is commenced and where the cause of action arose. If the action is commenced in the Federal

Court and the cause of action arose solely within one province, the applicable limitation period could be that prescribed by the province in which the cause of action arose. If the action is commenced in the Federal Court and the cause of action arose otherwise than within a single province, the applicable limitation period could be the six years prescribed by section 39(2) of the *Federal Court Act*. If the action is commenced in a court other than the Federal Court section 39 has no application and the provincial limitation period is constitutionally inapplicable. In such a case there is either no prescribed limitation period or the matter is governed by common law equitable considerations of undue delay and prejudice rather than definite time limits. (*Roscoe's Admiralty Practice*, (5th ed.) at p.102; *The Kong Magnus*, [1891] P. 223)

3. Are contractual limitation periods and notice clauses valid?

Some policies of marine insurance expressly provide for actions against insurers to be commenced within a set period of time (contractual limitation periods) or for notice of claims or possible claims to be given within a set period of time (contractual notice periods).

The validity of contractual limitation periods depends, in part, on the legislation that governs the particular insurance contract. As we have seen, the legislation governing the insurance contract may depend on the court in which the action is commenced as well as the place where the cause of action arose. Insofar as a matter might be governed by the *Insurance Act* of British Columbia, any contractual term limiting the time for bringing an action would be null and void to the extent that it is contrary to the one year period prescribed by section 24. This follows from section 4 of the Act which provides that the statutory limitation period applies "notwithstanding any law or contract to the contrary".

However, as indicated above, there is great uncertainty as to when the *Insurance Act* of British Columbia can apply to marine insurance, if at all. For this reason, insurers would be well advised to ensure that policies contain a contractual term limiting the time for bringing an action after a claim is filed. Such contractual terms have been upheld and enforced by the courts. (See for example *Robertson v Pugh* (1888) 15 S.C.R. 706) The enforcement of such provisions, however, will likely be subject to a claim for relief against forfeiture.

Notice provisions in policies have similarly been upheld and enforced by the courts but are also subject to a claim for relief against forfeiture.

Pursuant to the common law and law of equity as well as various statutes of general application, the Courts have a power and discretion to relieve against forfeiture. There have been many cases in which this discretion has been exercised to prevent an insurer from avoiding an insurance policy for breach of a condition, including a condition relating to notice. The predominant factor leading the Courts to exercise this discretion is lack of prejudice. The insurer cannot simply rely on the failure to give notice or the passage of time. Rather, the insurer must show that it has, in fact, been prejudiced in some material way, such as by a judgment having been rendered against the assured or by a disappearance of material witnesses or evidence. It is only when the insurer can show actual prejudice that the Courts will

not exercise the discretion in favour of the assured and relieve against the forfeiture of the insurance policy.

4. How are insurance policies interpreted?

Insurance policies are a contract between the insurer and the insured and, as a consequence, the general rules of interpretation of contracts apply to insurance policies. The first rule of interpretation of contracts is that the court will consider the contract as a whole to search for an interpretation that is consistent with and promotes the intention of the parties to the contract. (*Consolidated Bathhurst v Mutual Boiler & Machinery*, [1980] 1 S.C.R. 888) The application of this general rule is not, however, always straight forward. Generally, courts tend to broadly interpret coverage clauses and narrowly interpret exclusions. (*Reid Crowther v Simcoe & Erie General Insurance* (1993) 13 C.C.L.I. (2d) 16) Further, if there is any ambiguity in the policy, such ambiguity is almost always resolved in favour of an interpretation that benefits the insured. This is an application of the doctrine known as *contra proferentem*, which means the words of a contract should be interpreted against the interests of the person who drafted it.

A review of the cases interpreting marine insurance policies will uncover many cases where the courts seem to have used the doctrine of *contra proferentem* as a tool to avoid the plain meaning of the policy and the intention of the parties as disclosed by the words used. Further, such a review might lead one to believe that the doctrine of *contra proferentem* is the first rule of interpretation of insurance contracts. This is, however, not the case. *Consolidated Bathhurst* makes it very clear that the doctrine of *contra proferentem* is but one tool to determine the true intent of the parties. The approach set out in *Consolidated Bathhurst* was recently restated by the Supreme Court of Canada in *Brisette v Westbury Life Insurance Co.*, (1992) 13 C.C.L.I. (2d) 1. In that case the Supreme Court noted that where two or more meanings are possible the court should select the meaning that promotes the intent of the parties. Further, the Supreme Court specifically said that courts should avoid an interpretation which will give either a windfall to the insurer or an unanticipated recovery to the insured.

5. When is the insurer entitled to void the policy for breach of a warranty?

The Federal *Marine Insurance Act* defines a warranty as a promissory warranty by which the insured

(a) undertakes that some particular thing will or will not be done or that some condition will be fulfilled; or

(b) affirms or negates the existence of particular facts.

The identifying characteristic of a true warranty is the consequence that flows from a breach of the warranty, namely that the insurer is discharged from liability. This is dealt with in s. 39 of the Act:

(1) Subject to this section, a warranty must be exactly complied with, whether or not it is material to the risk.

(2) Subject to any express provision in the marine policy or any waiver by the insurer, where a warranty is not exactly complied with, the breach of the warranty discharges the insurer from liability for any loss occurring on or after the date of the breach, but does not affect any liability incurred by the insurer before that date.

These provisions would seem to entitle the insurer to void the policy for any breach of warranty by an insured from the time the warranty was breached and regardless of whether the breach of warranty was material to the risk. However, the case law indicates that these provisions are much more strictly construed. The leading case is *Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II")* [1984] 1 WWR 97, where the Supreme Court of Canada construed a warranty clause in a policy as being a mere "suspensive condition" that would have entitled the insurer to avoid the policy if the loss had occurred during the breach but, as the loss occurred after the breach and the breach was not causative, the court held that the assured could not avoid the policy. Similarly, in *Shearwater Marine Ltd. v. Guardian Insurance Co. et al.*, (October 1, 1998) No.CA022988 (B.C.C.A.) the British Columbia Court of Appeal held that a warranty clause merely suspended the policy while the breach continued and did not entitle the insurer to avoid the policy. (For further cases and discussion see *Warranties in Marine Insurance* at www.admiraltylaw.com/warranties.htm.)

Therefore, notwithstanding the relatively clear words of the *Marine Insurance Act*, a breach of a warranty will not always entitle the insurer to avoid a policy of marine insurance. It is more likely that the insurer will only be entitled to do so where the loss occurred during the currency of the breach and the breach was material to the loss.

6. Does an "All Risks" policy cover all risks?

It is often assumed by insureds that an "All Risks" policy of insurance does exactly what the title implies, i.e. that it provides coverage against all risk of damage or loss. In fact, this is not the case. First, most "All Risks" policies of insurance generally provide such coverage subject to the exclusions specifically enumerated within the policy. To the extent that any loss comes within the exclusions it will, of course, not be covered. Second, even if a loss does not come within an exclusion it may still not be covered under an "All Risks" policy. The leading case on the meaning of "all risks" is *British and Foreign Marine Insurance Company Limited v Gaunt*, [1921] A.C. 41. In this case the House of Lords held that the words "all risks" do not cover all damage however caused and specifically held that the words would not cover damage caused by wear and tear, inevitable deterioration or inherent vice. The court further held that "All Risks" policies cover only damage caused by an accident or due to some fortuitous circumstance or casualty. The various judgements of the law lords are captured by the following quotation from Lord Sumner at p.57:

There are, of course, limits to "all risks". They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself.

Therefore, in order for there to be coverage under an "All Risks" policy the loss must have been caused by a fortuity i.e. an accident or casualty. A loss caused by wear and tear, deterioration or inherent vice of the subject matter insured is not covered.

7. Is there coverage under a policy of insurance where there are two concurring causes of the loss, one of which is expressly excluded by the terms of the policy?

This issue has been directly considered and decided by various courts. In *Charterhouse Properties Ltd. v Laurentian Pacific Insurance*, (1993) 75 B.C.L.R. (2d) 299, a recent decision by the British Columbia Court of Appeal, the issue was whether there was coverage under a property policy for a loss which was caused, in part, by wear and tear, an excluded peril. The trial judge had found that it was sufficient if one of the contributing causes was an insured peril. The Court of Appeal held, however, that this was not sufficient. At p. 304 the Court quoted from a prior decision it had rendered as follows:

As I view the English and Canadian authorities they appear to hold that where damage is caused by two independent concurring causes, one of which is covered by the policy and the other is not expressly excluded, the damage is recoverable. Conversely, if one of the concurring causes is excluded by the terms of the policy the damage is not recoverable.

This decision suggests that so long as one of the concurring causes is an excluded peril there will be no coverage under the policy. However, this decision may not be entirely consistent with the decision of the Supreme Court of Canada in *C.C.R. Fishing Ltd. v Tomenson Inc.*, (1990) 43 C.C.L.I. 1. In this case the Supreme Court of Canada was called upon to determine whether there was coverage for a sinking which was caused by a combination of factors namely, failure to close a valve and corrosion of cap screws. The Supreme Court ultimately found that both of these causes were insured perils but nevertheless considered whether there would have been coverage if an excluded peril had been a contributing cause. On this issue the Court said:

I am of the view that it is wrong to place too much emphasis on the distinction between proximate and remote cause in construing policies such as this...Realistically speaking, it must be recognized that several factors may combine to result in a loss at sea. It is unrealistic to exclude from consideration any one of them, provided it has contributed to the loss. What is essential in order to establish that the loss is "fortuitous" is an accident caused by the intervention of negligence, or adverse or unusual conditions without which the loss would not have occurred. This is the shared idea which underlies the exclusion from coverage of damage due to ordinary wear and tear or inherent vice.... On this reasoning, it does not matter if one of the causes of the loss is ordinary wear and tear or inherent vice, provided that an efficient or effective cause of the loss - one without which the loss would not have occurred - was fortuitous...

It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, the loss is shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things.

This statement is, arguably, inconsistent with the view expressed by the British Columbia Court of Appeal in *Charterhouse Properties Ltd. v Laurentian Pacific Insurance*.

8. Who has the right to control a subrogated action and how must the proceeds of such an action be distributed as between the insurer and insured?

At common law an insurer has no right of subrogation until the insured has been fully indemnified. Pursuant to section 81 of the federal *Marine Insurance Act*, this common law rule has been modified such that an insurer is subrogated to all of the rights and remedies of the insured upon payment of a loss. This right of subrogation entitles the insurer to commence action against the wrongdoer in the name of the insured. However, where the insured has not received a full indemnity, either because of the existence of uninsured losses or because of the application of a deductible, the insurer does not have the right to control the action. At common law an insured who has not been fully indemnified retains the right to hire and instruct lawyers and to control the litigation. The insured who does so owes a duty to the insurer to pursue the claim with diligence and in good faith.

The distribution of the proceeds from a subrogated action as between the insurer and insured is dictated by section 88 of the federal *Marine Insurance Act* which provides that the insured is deemed to be self insured with respect to his uninsured losses. Thus, the insured and insurer share rateably in the proceeds from the subrogated action. For example, where a ship is insured for \$5,000.00, the deductible is \$1,000 and \$4,000.00 is recovered the insured is entitled to 1/5 of the recovery and the insurer is entitled to 4/5.

9. What is the meaning of "accident or occurrence"?

Many liability policies provide coverage for third party liability coverage for damages "caused by an accident or occurrence". Therefore, the meaning of the words "accident or occurrence" is often central to coverage issues under such policies.

There has been much case law concerning the meaning of "accident" and "accident or occurrence" in liability policies. The definition of accident most often employed in the cases is "an unlooked for mishap or an untoward event which is not expected or designed" (*Fenton v J. Thorley & Co.*, [1903] AC 443 at 448). How the courts have applied this definition to individual cases has varied substantially.

In *Canadian Indemnity Co. v Andrews & George* [1952] 4 DLR 690, a decision of the Supreme Court of Canada, the assured was a manufacturer of glue. Due to a quality control failure in the manufacturing process the glue produced was defective. The assured was sued by its customer and found liable. The assured then sought to recover the damages from its liability insurer. It was held that there was no coverage under the policy as what happened was something which the assured normally guarded against and therefore could not be said to be unexpected.

In the later case of *Crisp v Delta Tile & Terrazzo Co.* [1961] OWN 278, the Ontario Court of Appeal had to consider whether a liability policy would respond to a loss where the assured's workmen were doing tile work in a house but did not seal off that part of the house in which the work was being done. As a consequence of their actions dust permeated the entire house. The Court of Appeal held that there was no accident within the meaning of the policy as the

assured's workmen had actual knowledge of what would happen if they did not seal off the work area. The Court of Appeal said, at p. 279:

There was, in this sense, a deliberate courting of the risk with knowledge of the risk, there was an element of reckless conduct in the sense that they could not have cared whether or not the dust damage would ensue when they proceeded with the work in the way they did with the knowledge which they had.

This decision was followed by *McCollum v Economical Mutual* [1962] OR 850, a case in which the assured sandblasting company was found liable to its customer for damage caused to windows and doors during sandblasting operations. The assured sought coverage under its liability policy. The Court held that insofar as the damages were caused by the failure to take adequate precautions the assured was covered by the liability policy, however, insofar as the damage was caused by the wilful failure to take any precautions whatsoever, then the damages were not covered.

The circumstance under which deliberate action by the assured might be characterized as an "accident" was further refined in *Avalon Consolidated v McNamara Industries* [1975] I.L.R. 1064. This was a case in which a contractor was seeking liability coverage for a collapsed arena. The insurer argued that there was no coverage because of the high degree of negligence. However, the Court held that there was coverage as there was no "deliberate courting of the risk".

There is no doubt in my opinion that according to the authorities "accident" includes negligence, and it was not the intention of the parties to an insurance policy which covered an insured for loss caused by accident that the Courts would have to consider the degree of that negligence, ...Careless conduct that causes "any unintended and unexpected occurrence that produces hurt or loss" is an accident regardless of the degree of negligence involved. But if it is clear that the actions of the insured were so reckless that they amounted to a deliberate courting of the risk with knowledge of that risk it cannot be said that the damage resulting from these actions was caused by negligence. At this stage, in my view, the negligence of the insured becomes clothed with the characteristic of wilfulness amounting to intentional negligence and such negligence cannot be called "accident".

One of the leading cases on this issue is *Canadian Indemnity Co. v Walkem Machinery* (1975) 53 DLR (3d) 1, a decision of the Supreme Court of Canada. This case concerned whether there was coverage under a Comprehensive Business Liability Policy for a repairer of a crane who had been found by the trial judge to have known of the dangerous condition of the crane but to have nevertheless pawned it off on an unsuspecting customer. Notwithstanding this conduct, it was held that there was coverage. In Reasons delivered by Mr. Justice Pigeon he specifically said that the proper test is whether there was an "unlooked for mishap or occurrence" and rejected any suggestion that liability resulting from negligence, dangerous operations or the taking of a calculated risk by the assured could not constitute an accident. However, in concurring Reasons Mr. Justice Ritchie said:

I do not however, agree that the word "accident" as used in a comprehensive business liability insurance policy includes a "calculated risk" which phrase appears to me to imply the very antithesis of an "unlooked for mishap or occurrence".

The Supreme Court of Canada again considered this issue in *Co-operative Fire & Casualty v Saindon* (1975) 56 DLR (3d) 556. The facts of this bizarre case were that a homeowner was having an argument with his neighbour. The homeowner approached the neighbour with a power lawn mower and raised the mower toward the neighbour. The neighbour put up his hands to protect himself and in doing so his hands were struck by the revolving blades of the mower. The homeowner sought coverage under the liability portion of his home owner's policy. At issue in the case was whether coverage was excluded by an exclusion clause for intentionally caused injury. The homeowner argued that he raised the lawn mower not to injure the neighbour but merely to scare him and that the injury was unintentional. The Court, however, held that as he intended to raise the lawn mower it did not matter if the consequences were more severe than intended. During the course of its judgment, at p. 566, the Court quoted with approval from *Gray v Barr*, [1971] 2 All ER 949, a case with similar facts in which the insurer argued that what transpired was not an accident.

No doubt the word accident involves something fortuitous or unexpected, but the mere fact that a wilful and culpable act-which is both reckless and unlawful- has a result which the actor did not intend surely does not, if that result was one which he ought reasonably to have anticipated, entitle him to say that it was an accident.

Thus the mere fact that an unintended consequences result from an intended act does not make an intentional act an "accident".

Co-operative Fire & Casualty v Saindon was followed by *Mutual of Omaha v Stats* (1978) 87 DLR (3d) 169, another case by the Supreme Court of Canada. This was a claim by the beneficiary of an accident insurance policy. The assured was killed while driving when impaired. The insurer denied coverage on the grounds that there was no fortuity in that what happened was the natural and probable consequence of driving while impaired. The Supreme Court of Canada held that there was coverage even if what happened was due to gross negligence. However, the Court went on to say that the knowledge of the assured was a key factor in determining whether what occurred was "accidental".

A person may be found to have been negligent or even grossly negligent but at the time that that person performed the acts in question he might never have thought himself to be negligent. If on the other hand the person realized the danger of his actions and deliberately assumed the risk of it, then in Grant J.'s view his actions could not be characterized as accidental. I agree with the Court of Appeal that such analysis does not apply to the circumstances of this case and I agree, therefore, with the view of the Court of Appeal that this occurrence was an accident within the words of the policy.

One final case of interest is *Cansulex v Reed Stenhouse Ltd.* (1986) 18 CCLI 24, a decision of the British Columbia Supreme Court. This case involved corrosion damage caused to various ships by wet sulphur. The insurers of the shipper denied coverage under liability policies issued by them. One of the issues was whether there had been an "accident or occurrence" within the

meaning of the policy. The insurer relied on *Crisp v Delta Tile & Terrazzo Co.* referred to above. The Court however declined to follow *Crisp v Delta Tile & Terrazzo Co.* finding that "no calculated risk arises in this case" and further holding:

I have no hesitation in concluding that on the basis of these authorities that cases such as Crisp v Delta Tile and others do not correctly state the law applicable in a case such as this, and that the corrosion damage to MV Cambridgeshire was indeed caused by an accident or occurrence within the meaning of the policy. At the very least, there was an occurrence which, as I have stated, is regarded as a wider word than accident.

There are two noteworthy points about this judgment. First, the suggestion that "occurrence" has a wider meaning than accident is not supported by other authority except to the limited extent that "occurrence" extends coverage to continuous or repeated exposure to conditions. (See Hilliker, *Liability Insurance Law in Canada* p. 118; Sanderson, *The Comprehensive General Liability Policy* p.76) "Occurrence" is defined in a standard CGL policy to mean "accident including continuous or repeated exposure to substantially the same general harmful conditions". Secondly, the statement that *Crisp v Delta Tile* does not correctly state the law must be questioned. The Supreme Court of Canada has had ample opportunities to declare that *Crisp v Delta Tile* is not good law but has not done so. Further, as recently as *Mutual of Omaha v Stats* the Supreme Court of Canada seems to have endorsed the basic concept in *Crisp v Delta Tile* that there is not an "accident" where an assured proceeds on a course of action with full knowledge and appreciation of his/her acts and the consequences thereof.

10. Where a loss is covered by two or more liability policies of insurance what are the rights of the insurers inter se?

Frequently a loss occurs that is covered by two or more policies of insurance. When this occurs there is immediately a question as to which of the policies is primary and which is excess and as to the rights of the insurers as between themselves to contribution. To resolve these problems "other insurance" clauses were developed. These clauses generally fall into one of three categories. The first type of clause is a pro-rata clause which provides, as the name implies, that both policies shall share the loss pro-rata. The second type of clause is an excess clause which stipulates that the policy in which the clause is contained is excess and the other policy is primary. The third type of clause is called an escape clause. It provides that in the event there is other insurance, the policy will be void or will not contribute.

There has been a good deal of case law dealing with competing "other insurance" clauses. Most of this case law has involved situations where the two policies have contained similar "other insurance" clauses, ie. where both policies contain a pro-rata clause or both contain an excess clause. In those situations, the courts have held that the two clauses cancel each other out with the result that both insurers must contribute rateably to the loss. (See for example: *Weddell v Road Transport & General Insurance Co.* [1932] 2 K.B. 563; *McGeough v Stay'N Save Motor Inns Inc.* (1994) 92 B.C.L.R. (2d) 288; and *Simcoe & Erie General Insurance Co. v Kansa General Insurance Co.* (1994) 93 B.C.L.R. (2d) 1.)

There have been some cases that have considered situations involving two different types of "other insurance" clauses. The leading British Columbia case is probably *Seagate Hotel Ltd. v Simcoe & Erie General Insurance Co. et al.* (1980) 22 B.C.L.R. 374, which was affirmed on appeal at (1981) 27 B.C.L.R. 89. This case concerned a personal injury, the liability for which was covered by two policies of insurance. Both policies contained "other insurance" clauses. One policy contained a pro-rata clause and the other contained an excess clause. The Court held that the resolution of the issue depended on the precise wording of the two clauses and when this wording was taken into account the policy with the pro-rata clause was held to be the primary policy and the policy with the excess clause was excess.

I am unaware of any Canadian or English case that have considered an escape clause and an excess or pro-rata clause. However, there are some U.S. decisions which have considered such clauses. *Viger v Geographical Services Inc.* [1972] AMC 2113, affirmed on appeal to the Fifth Circuit Court of Appeal (476 F 2d 1288), involved a personal injury to an employee of a time charterer. The accident was covered both by the vessel owner's P&I insurance and by the time charterer's liability insurance. The liability policy contained a pro-rata clause and the P&I policy contained an escape clause. The Court gave effect to the "escape clause" with the result that the P&I policy was not required to respond to the loss. (See also *Lodrigue v Montegut*, [1978] AMC 2272)

However, the U.S. case law is not unanimous. In Louisiana there is some doubt as to whether an escape clause will be given precedence over an excess clause. For example, in *Graves v Traders and General Insurance Co.*, 214 So. 2d 116, the Louisiana Supreme Court held that escape and excess clauses cancelled each other and liability was apportioned. Further, one American judge has said: "A review of the jurisprudence reveals as many differing views on reconciling conflicting 'other insurance' clauses as there are variations on the three standard provisions." (*Offshore Logistics Services v Mutual Marine*, 462 F. Supp. 485).

In general, it would seem that the rights as between two insurers will depend on the types of insurance clause contained in the respective policies of insurance. To ensure the maximum protection, an insurer would be well advised to ensure that the "other insurance" contained in its policy is an escape clause. Otherwise the insurer could end up being the only insurer who pays the loss.