Doctrine of Proximate Cause-The Application of Commonsense

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This article analyses the application of doctrine of proximate cause to ascertain which of the successive causes is the cause to which the loss is to be attributed within the intention of the insurance policy. The article explains that proximate and not remote cause shall be taken as the cause of loss. It accentuates various landmark judgements. Further, it also explains different scenarios like if perils are acting in an unbroken sequence, if an excepted peril precedes an insured peril, if an excepted peril follows an insured peril, if no excepted peril is involved in which of the above mentioned cases insurer will be liable to pay. Lastly the author's views that how so ever complex or technical the doctrine may appear but is based on the common application of commonsense.

Introduction

Properties are exposed to various perils like fire, earthquake, explosion, perils of sea, war, riot, and civil commotion and so on and every event is the effect of some cause. The law however refuses to enter into a subtle analysis or to carry back the investigation further than is necessary. It looks exclusively to the immediate and proximate cause, all causes preceding the proximate cause being rejected as too remote. The doctrine of proximate cause, which is common to all branches of insurance, must be applied with good sense so as to give effect to and not to defeat the intention. Wherever there is a succession of causes which must have existed in order to produce the loss, or which has infact contributed, or may have contributed to produce it, the doctrine of proximate cause has to be applied for the purpose of ascertaining which of the successive causes is the cause to which the loss is to be attributed within the intention of the policy. [1]

Doctrine of Proximate Cause

Proximate cause refers to an action that leads to an unbroken chain of events; events that end with someone suffering a loss. Proximate cause is used to examine how a loss occurred and how many may have played a role in causing the loss. Proximate cause refers to the initial action that caused a loss. The starting point in the chain of events that led to a loss. As the well known maxim of lord Bacon runs: "*It were infinite for the law to consider the causes of causes and their impulsions one of another therefore it contended itself with the immediate cause*" and rejects all causes preceding the proximate cause as too remote.[2]

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Sometimes the direct cause is easy to determine; someone throws a ball through a window and breaks a window. In this case, the direct cause is the act of throwing and it is easy to make the connection between the cause and the loss. However, if a child lights a firecracker, then fearing that the firecracker will explode in his or her hands, tosses the firecracker to a second child. The second child also fears the impending explosion and proceeds to toss the firecracker to a third child. This third child is the unlucky recipient of the firecracker at the precise moment of explosion; a loss occurs as the child is injured.

The question of proximate cause becomes important in determining who is responsible for the injuries to the third child. Direct cause is very easy to connect to the loss. The second child tossed the firecracker to the third child knowing that there would be an explosion. This act demonstrates either malicious intent or at least a degree of wanton disregard for another's safety. The second child is then directly responsible for the third child's injuries; the direct cause of loss.

Proximate Cause *v.* Remote Cause

The practical solution devised by law for fixing the cause of the loss is the doctrine of proximate cause, expressed in the legal maxi, *Causa Proxima Non Remota Spectator*, which means that proximate and not remote cause shall be taken as the cause of the loss. "*where various factors or causes are concurrent and has to be selected, the matter is determined as one of fact and choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency....*"said Lord Shaw in Leyland's case.[3]

The classic definition of proximate cause is this: 'Proximate cause means the active, efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source.'[4]

Avertion of one Loss Resulting into Another

Whether steps are taken to avert one loss by insured perils, which result in another form of loss, can be regarded as proximately caused by the original peril. The case involved a concert due to be given in Ostende by Michael Jackson, which had to be cancelled due to emotional shock suffered by Jackson on hearing the news of the death of Princess Diana. Concert was rescheduled but this in turn involved cancelling a further concert to be given in Barcelona as Jackson had a policy of not performing on the consecutive days. Dispute related to the anticipated loss of profit from cancellation of the Barcelona concert. The promoters were insured under two policies: a primary policy and a separate deductible buy back (DBB) policy which insured the sum excluded by the deductible in the primary policy. Thus, the live issue between the promoters and the DBB insurers was whether the losses following from the cancellation of the Barcelona concert were recoverable under the DBB policy.

The Court of Appeal held that primary insurers were liable for the losses incurred by the promoters by reason of the cancellation of the Barcelona concert, as this was clearly within the control of promoters and Jackson and thus outside the policy. It arose because of Jackson's inability to perform in Ostende and the subsequent attempts by the promoters to mitigate the loss arising from the Ostende concert by rescheduling it, even though that meant the cancellation of the Barcelona concert.[5]

According to later decision of the House of Lords and the Privy Council, the doctrine of proximate cause is no longer directed to the cause proximate in time, but is to be taken as referring to the dominant or effective cause even though it is not nearest in time.

This doctrine of proximate cause is common to all branches of insurance and is based on presumed intention of the parties expressed in the contract.[6]

Test for Determining Proximate Cause

Courts have formulated some general rules for determining proximate cause in cases where perils are acting consecutively or concurrently as follows:

A. Where perils are acting consecutively in an unbroken sequence, that is, one peril is caused by and follows from another peril, "where perils are acting consecutively in an unbroken consequence, that is one peril is caused by and follows from or each cause in the sequence is the reasonable and probable consequence, directly and naturally resulting in the ordinary course of events from the cause which precedes it.

The difficulty arises when the consequence can be assigned with precision neither to the peril nor to the excepted cause:

(*a*) The excepted peril precedes an insured peril, the insurer is not liable. Where an earthquake fire (an excepted peril) spread by natural means and burnt the insured premises, the insurer was not liable as the loss was proximately caused by the excepted peril.[7]

(*b*) The excepted peril follows an insured peril; the insurer is not liable if the loss caused by each is undistinguishable. *Lawrence v. Accident Insurance Co.*[8] Wherein it was held that the death of a person falling from a railway platform in a fit and being killed by a passing train is not proximately caused by the fit.

B. Where perils are acting in consecutively in broken sequence, each peril is independent of other,

(*a*) If no excepted peril is involved, the insurer will be liable for losses caused by the insured peril.

(*b*) If an expected peril is involved and precedes an insured peril the insurer is liable for the loss caused by the insured peril. Thus a plate glass insurance policy covered breakages from any risk except fire. A fire occurred in the neighbouring premises and taking advantage of it a mob broke the insured plate glass to commit theft. It was held that mob action was the cause of loss and not fire and so the insurer was liable.[9]

C. Where the perils are acting concurrently that is simultaneously. Where the loss is caused by the action of two concurrent and independent causes one of which is the peril insured against the other an excepted cause, the loss is not within the policy since it may be accurately described as caused by the excepted cause and it is immaterial that it may be described in another way that would not bring it within the exception.

(*a*) The insurer is liable if one of them is an insured peril and none of them is an excepted peril or the losses caused by the insured and excepted peril can be distinguished.

(*b*) The insurer is not liable if the losses cannot be distinguished. Where the cases are very complicated, the strict legal provision is not invoked but settled by compromise usually by the insurers by a generous interpretation of the facts.

Perils of the Sea-Causa Proxima

A ship was insured against the peril of the sea by a time policy containing a warranty against all consequences of hostilities. The ship on its voyage was torpeodoed by a German submarine. She was towed near to the port where she was moored inside the outer breakwater. There she remained for two days taking to ground at each ebb tide but floating again with the flood and finally her bulkheads gave way and she sunk. The Court held that torpedoing was the proximate cause of the loss and the underwriters were protected by the warranty against all consequences of hostilities.[10]

Two Real Causes

If it can be said that there are two real causes of a loss, discovering the cause which is the proximate cause is not always an easy matter. In a leading marine insurance case, *Leyland's Shipping Co. v. Norwich Fire Insurance Co*[11], a ship was insured against the peril of the sea by a time policy containing a warranty against all consequences of hostilities. The ship on its voyage was torpeodoed by a German submarine. She was towed near to the port where she was moored inside the outer breakwater. There she remained for two days taking to ground at each ebb tide but floating again with the flood and finally her bulkheads gave way and she sunk. The Court held that torpedoing was the proximate cause of the loss and the underwriters were protected by the warranty against all consequences of hostilities. The point is that the original cause predominates and is regarded as the real cause of the loss unless it was merely facilitating a subsequent cause which totally changed matters.

Conclusion

There is no difficulty if a single peril acts and causes the loss but often these perils do not operate in isolation, but acts in succession or simultaneously and it will be difficult to assess the relative effect of each peril or pick out one of these perils as the actual cause of loss. For instance damage to a cargo of rice was caused by sea water escaping through a gnawed pipe by rats. The existence of rats on board, their thirst, the hardness of their teeth, the incapacity of pipe to resist the gnawing, the ship being afloat and so on, which one of these can be said to be the cause of the effect namely the damage of rice cargo, will be a lengthy assessment.

Law says to look exclusively to the immediate and proximate cause, all causes preceding the proximate cause being rejected as too remote. Nonetheless, it has been said that determining the proximate cause of a loss is simply the application of common sense, and in many of the cases that would appear to be so.

Endnotes

1. E.R.Hardy Ivamy, General Principles of Insurance Law, 6th edition, Butterworths, London(1993), p.406-409.
2. *Marsden* v. *City and Council Assurance* (1865) LR 1 CP 232

3. *Leyland's Shipping Co.* v. *Norwich Fire Insurance Co.,* (1918) AC 350
4. *Pawsey &Co.* v. *Scottish Unionand National Insurance Co.*(1907)
5. *Quinta communication SA* v. *Warriangton Ltd.* (1999) 2 All ER (Comm) 123
6. *Winspear* v. *Accident Insurance Co.,* (1880) 6 QBD 42 (CA)
7. *Tootal Broadhurst Lee & Co.* v. *London and Lancashire Fire Ins Co.* (1908) Welford. Fire (3rd ed.)498
8. (1881) 7 QBD 216
9. *Marsden* v. *City and County Assurance Co.,* (1865) LR 1 CP 232
10. *Supra* note 3.
11. *Supra* note 3.