Product Liability: Damage to Property

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A typical Public and Products Liability insuring clause

- “The Insurer will indemnify the Insured against legal liability to pay compensation and claimants’ costs and expenses in respect of accidental
- Injury to any person
- Loss of or damage to material property
- Nuisance, trespass, obstruction or interference with any right of way, light, air or water
- occurring within the Territorial Limits during the Period of Insurance in connection with the Business.”

“in respect of” damage to property

- The words “in respect of” in this context mean “for” and not merely “caused by”, “consequential upon” or “in connection with” (*Rodan International Ltd v Commercial Union* [1999] Lloyd’s Rep. I.R. 495).
- The liability must therefore be for loss of or damage to material property of the person whose property it is.

“in respect of” damage to property - *Rodan*

- *Rodan International Ltd v Commercial Union*:
- “... A products liability policy in which the cover provided is defined in words such as those used in the present policy is confined to liability for physical consequences caused by the commodity or article supplied. The liability of the assured in damages will have to be expressed in terms of money but that liability must be in respect of the consequences of the physical loss or damage to physical property (or some personal - “bodily” - injury).

“in respect of” damage to property - *Rodan*

- “Provided that the commodity or article supplied has caused the physical consequence, the compensation payable by the assured to the third party will include, and the liability of the insurer to indemnify the assured, will extend to the totality of the loss which the third party is entitled to recover from the assured by way of damages in respect of that physical consequence. Thus, if a defective article supplied by the assured causes bodily injury to the third party disabling him or, for example, causes his premises to be destroyed by fire, the third party will be entitled to recover from the assured the full value of what he has lost which will, in the two examples I have given, include compensation for future loss of earnings. They are part of what the third party has lost as a consequence of the physical loss or injury and they are accordingly part of the liability of the assured in respect of that physical consequence. …” (Hobhouse LJ at p.500 col.1 and col.2)

Financial loss

- The insured's liability for the claimant's consequential losses, such as loss of business or loss of profit on lost future sales, will not be covered by an insuring clause in the above terms.

- The insured's liability for financial loss suffered by the claimant as a consequence of loss of or damage to another person's property is not "in respect of" such loss or damage. (See *Tesco Stores Limited v. Constable* [2008] Lloyd's Rep IR 636 at [21] – [23] and the authorities cited in those paragraphs).

- *Tioxide Europe Limited v. CGU International Plc* [2005] Lloyd's Rep IR 114: Such financial loss may be "on account of" physical loss and damage if the insuring clause uses that phrase, although there must still be a sufficiently close connection between the loss claimed and the loss or damage and the words "on account of" would not extend the indemnity to cover liability for consequential loss of business or profits.

Defect in the product

- Liability for loss due to a defect in the product itself will not be sufficient. Any physical loss or damage must be external to the product.
- *Pilkington UK Ltd v CGU Insurance Plc* [2004] Lloyd's Rep. I.R. 891, a case concerning the installation of glass panels in the Eurostar Terminal at Waterloo:
- "35. In my view, while the English authorities are not in themselves determinative of the issue in this case, they make clear that, in order to establish cover in respect of the loss claimed, the insured must demonstrate some physical damage caused by the commodity for which purpose a defect or deterioration in the commodity is not itself sufficient *and* that the loss claimed must be a loss resulting from physical loss or damage to physical property of another (or some personal injury)." (Potter LJ)

Defect in the product

- Horbury Building Systems Ltd v Hampden Insurance [2007] Lloyd's Rep I.R. 237, a case concerning the collapse of the ceiling in a cinema unit within a cinema complex:

- "27. … when one is seeking to discern the intention of contracting parties in a case such as this, one is entitled to assume some knowledge of the law on their part. … I cannot help observing that a contractor is not liable in tort to the buyer or occupier of a building if a defect is discovered before any personal injury or physical damage is caused by the defect. The cost of repairing the defect is pure economic loss and not recoverable in tort: *D and F Estates Ltd v Church Commissioners* [1989] AC 177, 206; *Murphy v Brentwood District Council* [1991] 1 AC 398, 475. It is only if the defect itself causes damage to other property that damages may be recovered by an action in tort, along with economic loss flowing from the physical damage. It is therefore again highly unlikely that these contracting parties were seeking to provide for cover that would extend to liability for the losses flowing from the closure of the rest of this complex because of possible defects in the structure. ..." (Keane LJ)

Defect in the product

- See also decisions in relation to defective work in the context of public liability insurance for building contractors:
- *James Longley & Co v Forest Giles Ltd* [2002] Lloyd's Rep IR 421 at [17] – [19], Potter LJ
- *AXA Insurance UK Plc v. Thermonex* [2013] Lloyd's Rep IR 323 at [59] - [61], HHJ Simon Brown QC

Defect in the product - Rodan

- In *Rodan,* liquid constituents of the soap powder supplied by Rodan migrated from the powder into the cardboard cartons belonging to Rodan's customer in which the powder was packaged, causing the cartons to stain. Further, as those constituents were hydroscopic, they attracted moisture from the atmosphere causing it to penetrate into the powder so that it became caked.

- Hobhouse LJ (with whom Mummery LJ agreed) held that although the policy would not cover damage by the defective powder to itself, what had happened was that the powder had damaged the cartons and as a consequence of the damage to the cartons, the powder had suffered damage.

- Pill LJ dissented on the grounds that this involved a finding that the damage caused by the powder to the powder was within the policy, i.e. the powder was both the cause of the damage and the property damaged. He considered that the further damage to the powder should be regarded as an inevitable consequence of its unmerchantability.

Damage to another part

- The policy may provide cover either explicitly or by way of an exception to and exclusion for the damage that one part of the product supplied may cause to another part of the product supplied. The operation of any such provision may depend on how it is expressed. The few relevant cases are in the context of liability insurance for building contractors.

- *Mitsubishi Electric UK Limited v. Royal London Insurance (UK) Limited* [1994] 2 Lloyd's Rep 249: The exclusion of the costs of replacing or rectifying a defect in design etc. was limited, in the event that damage should result from the defect, to the additional costs of improvement to the design etc. but there was a significant deductible for "each and every loss in respect of any component part which is defective in design …".

Damage to another part

- In *Mitsubishi,* 94 identical toilet modules were manufactured off site and then installed into a building which was being constructed as it rose floor by floor. Each toilet module had tiles fixed to a cementitious board which was defective and caused bowing of the tiles in each of the modules. Insurers argued that the relevant component part was each toilet module and that the deductible applied 94 times but the Court of Appeal held that the component part was the cementitious board and that there was only 1 deductible to be applied to the claim.

- "… I do not agree with the Judge's view that each toilet module constituted a component part of the works, since it seems very artificial to me to regard these modules as "defective in design plan specification materials or workmanship". It may be, literally, that the modules were defective in specification or materials because they contained the defective cementitious board, but it seems much more natural to me to regard the defective cementitious board as the defective component." Bingham MR at 253 col 1

Damage to another part

- Bingham MR appears to have based the decision to select the defective cementitious board on the use of the words “component part” and he accepted that it was appropriate linguistically also to describe the toilet modules as being defective in specification or materials because they contained the defective cementitious board.

- *James Longley & Co v Forest Giles Ltd* [2002] Lloyd's Rep IR 421: Exclusion in Public Liability policy of liability for “Damage to the defective part of any Product Supplied or Contract Works”. Supply and installation of vinyl flooring by Dfts, which included the laying of a screed. The vinyl flooring was laid before the screed had dried out causing the vinyl flooring to bubble. Court of Appeal held that even if it could be said that there was relevant damage to property, it was only to the vinyl surface and possibly the screed itself and liability for the damage was excluded as being damage to the defective part of the product supplied or of the contract works (Potter LJ at [18]).

Damage to another part and the “complex structure” theory

- *Murphy v. Brentwood* [1991] 1 AC 398: House of Lords rejects the theory advanced in *D & F Estates Limited v. Church Commissioners for England* [1989] AC 177 that in the case of a complex structure such as a building, one element of the structure might be regarded for *Donoghue v. Stevenson* purposes as distinct from another element.

- It was held that the structural elements in any building form a single indivisible unit of which the different parts are interdependent so that to the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure.

Damage to another part and the “complex structure” theory

- However, the House of Lords was prepared to recognise that there might be actionable damage by one part of a building to another where an integral component of the structure was built by a separate contractor and where a defect in such a component had caused damage to other parts of the structure’.
- e.g. a steel frame erected by a specialist contractor failing to give adequate support to floors or walls, defective electrical wiring installed by a sub-contractor causing a fire destroying the building, a defective central heating boiler exploding and damaging a house and a defectively manufactured turbine causing the loss of a ship.
- In *Jacobs v. Morton & Partners* (1994) 72 BLR 92 Mr Recorder Jackson QC applied the complex structure theory to those parts of a building which had been the subject of defective remedial works.

Damage to another part and the “complex structure” theory

- As the standard form of public/product liability insuring clause is addressing liability in tort (*Tesco Stores Ltd v Constable & Others* [2008] Lloyd’s Rep. I.R. 636 at [15]), it can be said that policy references to “the part” affected must be contemplating something which was consistent with the examples given in the House of Lords of circumstances where there could be liability in tort on the part of a contractor or manufacturer of a particular part of the works.

- Furthermore, as explained earlier, ordinarily, a policy giving insurance cover against liability for property damage caused by the products supplied by the Insured will not provide cover against damage caused by the product to itself.

Contamination - The *Bacardi* case

- Bacardi-Martini Beverages Limited v Thomas Hardy Packaging Limited [2002] 1 Lloyd's Rep 62 and [2002] 2 Lloyd's Rep 379
- Not an insurance case.
- Defendants ('THP'): operators of a brewery which manufactured, bottled, sold and distributed alcoholic carbonated drinks. The drinks were supplied to the Claimant.
- Third Party ('Messer'): supplied carbon dioxide to THP for use in the manufacture of the drinks.
- The carbon dioxide supplied by Messer was contaminated with benzene. The contaminated carbon dioxide was added to a mix of concentrate and water to create the carbonated drinks.
- The benzene thereby contaminated the carbonated drinks manufactured by THP and supplied to the Claimant.

Contamination - The *Bacardi* case

- Contract between THP and Messer contained a limitation of liability clause limiting Messer's liability "in respect of … direct physical damage to property".
- The issue: Did the contaminated carbon dioxide cause "direct physical damage to property" by damaging the concentrate and water with which it was mixed?
- Held: There may well be borderline cases as to whether or not damage has occurred and this case "may also be regarded as close to the border" but the contaminated carbon dioxide had not caused any physical damage to other property. All that had happened as a result of the admixture was that THP had created a defective end product. The mix of concentrate and water itself ceased to exist (as always intended) and the finished product came into existence at the moment of such admixture.
- Nor was there damage to the bottles, caps, trays or packaging used for the defective new product. All that happened was that they were rendered valueless or less valuable by being used to wrap defective product which had to be recalled and scrapped.

The basis of the *Bacardi* decision

- In the Court of Appeal Mance LJ held that the clause had:

  > "obvious undertones of tort thinking behind the identification and description of the types of harm"

- Mance LJ went on to consider the facts by reference to tort authorities on damage.

Does *Bacardi* apply to Product Liability Insurance?

- In *Bacardi*, at first instance (before Tomlinson J), the point was taken that a decision that there was no damage might impact on the response of a product liability policy.
- Tomlinson J made it clear that ordinarily he would only expect a product liability policy to respond where there was some personal injury or damage caused by the product and that if an Insured required more extensive cover, it would need to negotiate such additional cover with Insurers.
- The commercial purpose of product liability insurance with an insuring clause in the terms equivalent to the standard insuring clause quoted earlier is to provide indemnity against the insured's liability for third party personal injury or property damage of a type that is protected by the law of tort.
- *Bacardi* should therefore be regarded as a case which provides a result that the law of tort would have provided and which would therefore apply to the application of the usual form of products liability insuring clause.

Damage at a molecular level

- *Tioxide Europe Limited v. CGU International Plc* [2005] Lloyd's Rep IR 114, Langley J - "pinking" of uPVC products manufactured for outdoor use, eg door and window frames.

- Ingredients of uPVC compounds from which products manufactured included lead-based ingredients and titanium dioxide pigment. Tioxide manufactured and supplied the titanium dioxide pigment for use by their customers in the manufacture of the uPVC compounds which were in turn supplied to others for use in the manufacture of the uPVC products. The "pinking" of the uPVC products in use was caused by the escape of electrons from the Tioxide pigment particles as a result of photoactivity caused by ultraviolet radiation from natural daylight. The escape of electrons was as a result of the inadequate coating of the titanium dioxide particles. The electrons combined with the lead-based particles to create plumbic lead, giving the uPVC products a pink colour.

- Held: an unwanted change in colour caused by the pigments is in ordinary language a "physical change" and, if it impairs the value of the product, is a "physical injury", which was caused by the pigment particles affecting the lead-based particles.

When is contamination ‘damage to property’ in the law of tort?

- *Merlin v. British Nuclear Fuels Plc* [1990] 2 Q.B. 557 - aerial contamination of land by radionuclides emitted from a nuclear fuel reprocessing plant.
- Physical changes were restricted to the settlement of radionuclides upon household surfaces and to a change in the composition of the air surrounding the home. The claimants had two young children and decided to move from their house, which subsequently sold at an under-value.
- Held by Gatehouse J that there had been no “physical damage to tangible property”.
- This decision was explained in *Blue Circle Industries v. Ministry of Defence* on the basis that the judge did not hold that the house and the radioactive material were so intermingled as to mean that the characteristics of the house had in any way altered. It was therefore possible on those facts for the judge to hold that the cause of the reduction in the value of the plaintiffs' house resulted from stigma, not from damage to the house itself.

When is contamination ‘damage to property’ in the law of tort?

- *The “Orjula”* [1995] Lloyds Rep 395 - contamination of a ship with hydrochloric acid:

  “ Here, specialist contractors were engaged in undertaking the decontamination work using soda to neutralize the acid before washing the deck and hatch covers down with fresh water; further, it is pleaded, not perhaps surprisingly, that the vessel was required to be decontaminated of the hydrochloric acid before she could sail from the special berth to which she had been directed after discovery of the leakage. On these alleged facts, I would have no hesitation in concluding that the vessel should be regarded as having suffered damage by reason of her contamination.” (at 399 col 2, Mance J)

When is contamination ‘damage to property’ in the law of tort?

- *Hunter v. Canary Wharf Limited* [1997] AC 655 - contamination with dust

> “… the deposit of dust is capable of giving rise to an action in negligence. Whether it does depends on proof of physical damage and that depends on the evidence and the circumstances. Dust is an inevitable incident of urban life and the claim arises on the assumption that the defendants have caused "excessive" deposits. Reasonable conduct and a reasonable amount of cleaning to limit the ill-effects of dust can be expected of householders. Subject to that, if, for example, in ordinary use the excessive deposit is trodden into the fabric of a carpet by householders in such a way as to lessen the value of the fabric, an action would lie. Similarly, if it follows from the effects of excessive dust on the fabric that professional cleaning of the fabric is reasonably required, the cost is actionable and if the fabric is diminished by the cleaning that too would constitute damage. Excessive dust might also be shown to have damaged electrical apparatus and there could no doubt be many other examples. The damage is in the physical change which renders the article less useful or less valuable. … that rather than any general concept of loss of utility is the appropriate test.” (at 676, Pill LJ)

When is contamination ‘damage to property’ in the law of tort?

- *Blue Circle Industries v. Ministry of Defence* [1999] Ch 289 - contamination of land with radioactive material

> “Damage … will occur provided there is some alteration in the physical characteristics of the property, in this case the marshland, caused by radioactive properties which render it less useful or less valuable … The plutonium intermingled with the soil in the marsh to such an extent that it could not be separated from the soil by any practical process. … The marshland was less valuable as was apparent from the valuation evidence … and the accepted fact that the estate was unsaleable until the contaminated soil had been removed. Further, the level of contamination was such that the topsoil of the marsh had to be excavated and removed from the site because the level of radioactivity exceeded that allowed by the regulations. … the addition of plutonium to the topsoil rendered the characteristics of the marshland different. … The land itself was physically damaged by the radioactive properties of the plutonium which had been admixed with it. The consequence was economic, in the sense that the property was worth less and required the owner to expend money to remove the topsoil, but the damage was physical. (at 300, Aldous LJ)

Product liability insurance cases on contamination

- *James Budgett Sugars v. Norwich Union Insurance* [2003] Lloyd's Rep IR 110 – contaminated sugar delivered by insured to a manufacturer of mincemeat.

- The issue between the parties was as to whether certain losses were covered. It was common ground between the parties that damage to property had occurred, but it transpired that the parties did not agree on what constituted the damage. The insured said the damage comprised the contamination of the sugar before it left the supplier and the insurer said the damage was to the mincemeat caused by the incorporation of contaminated sugar. The Judge considered that the latter was probably the better view whilst recording that nothing turned on the point in the case. [30]

- The only basis, consistently with the authorities, on which, the incorporation of the contaminated ingredient into the mixture could be said to cause damage to the other ingredients would be if the contamination was of property which continued to exist in a contaminated and therefore damaged condition. At least some of the ingredients of the mincemeat would have to survive the manufacturing process intact as separately identifiable elements rather than being subsumed into an admixture as in the *Bacardi*.

Product liability insurance cases on contamination

- *Omega Proteins Ltd. v Aspen Insurance UK Ltd.* [2011] Lloyd's Rep IR 183 - contaminated animal carcasses delivered by insured, intermingled by the insured's customer with sound material and supplied in bulk to a third party.
- There was no argument by the parties or detailed consideration in the judgment as to whether damage had in fact occurred and the only reference to this aspect was at [83] where it was said that the contaminated material would damage, by rendering unusable, the sound product with which it was mixed.
- The rationalisation for there being damage in such circumstances would have to be the same as that for the *James Budgett* case, namely that the material with which the contaminated material was mixed continued to exist as separately identifiable material rather than being subsumed into an admixture as in the *Bacardi* case.

Contamination - The answer?

- Product liability policies are not product guarantee policies insuring against liability for supplying a defective product which causes neither injury no damage.
- Solids may be more capable of surviving and being damaged by admixture with contaminants than liquids!!