

## TRIGGER THEORY: RECENT CASE LAW AND ANALYSIS

By: **Laura Chant**

### Introduction

In *Reid Crowther Limited v. Simcoe & Erie General Insurance Company*, [1993] 1 S.C.R. 252, the Supreme Court of Canada outlined the process to determine when coverage is triggered under a commercial general liability policy. When the policy is “occurrence-based”, bodily injury or property damage must occur within the policy period to trigger coverage. However, when the act or omission by the insured results in injury or damage that occurs over an extended period of time, one of four trigger theories is applied to determine when coverage is triggered and which insurer is required to respond. These trigger theories can be summarized as follows:

- a. the Exposure Theory: coverage is triggered by the first exposure to the condition which causes the injury or property damage;
- b. the Manifestation Theory: coverage is triggered, or bodily injury or property damage is said to occur when the Plaintiff first becomes aware of the property damage or bodily injury;
- c. the Injury-in-Fact Theory: the date of the occurrence is the date that the bodily injury or property damage actually occurs.
- d. the Continuous or Triple Trigger Theory: bodily injury or property damage is said to occur throughout the period from initial exposure to the diagnose of the disease of injury

The application of a particular trigger theory turns on the particular facts of the claim and, in particular, the damages giving rise to the claim. This paper reviews the application of these various trigger theories by our Courts over the last ten years.

### The Exposure Theory

In *Lanark Mutual Insurance Co. v. Economical Mutual Insurance Co.*, [2006] I.L.R. I-4517, the Plaintiff insurer commenced an action against the Defendant insurer seeking contribution in respect of defence costs from a prior claim by its insured against a contractor. The contractor was hired in 1991 to install electrical components of a furnace. In March 2003, a fire broke out at the insured’s residence. The fire was caused by an electrical failure arising from the 1991 furnace installation. Economical had

issued a commercial general liability policy (“CGL policy”) to the insured that was in effect at the time of the furnace installation between June 1991 to June 1992. Lanark issued a CGL policy to the insured from July 2002 to July 2003, during which time the fire occurred. Economical was unable to locate a copy of their CGL policy which was in force between 1991 and 1992.

The Ontario Superior Court of Justice determined that Economical’s CGL policy was likely occurrence-based and that the Plaintiff’s property damage was possibly caused by an “occurrence” which took place at the time of installation. Accordingly, the Court held that Economical had a duty to defend and share in settlement costs incurred by Lanark according to each policy’s limits. The Court also noted that the Economical policy did not stipulate that the duty to defend and indemnify arose only when property damage occurred during the policy period.

### **Continuous Trigger Theory**

In *Alie v. Bertrand & Frere Construction Co.*, [2003] I.L.R. 1-4146, Lafarge Canada Inc. supplied ash to Bertrand & Frere Construction Company Ltd. Bertrand mixed the ash into concrete that was supplied to numerous contractors, who, in turn, used the concrete in a number of residential home foundations. Damage to the homes was observed between 1986 to 1992. A number of homeowners eventually commenced actions against Bertrand and Lafarge for the cost of repairs to their homes. Both Bertrand and Lafarge carried primary and umbrella CGL policies between 1986 to 1992. However, all of the insurers refused to indemnify on the basis that the loss did not occur during the course of their respective policy periods.

The Ontario Supreme Court determined that the damage occurred over the period from 1986 (when the concrete was first poured) to 1992 (when the foundations required replacement). The insurers for Bertrand and Lafarge were required to indemnify their respective insureds on a pro rata basis if their policies were in effect between 1986 to 1992.

The Court of Appeal largely upheld the trial court’s decision. The Court of Appeal held that it was not possible to determine how much of the damage occurred during any particular policy period. The Court of Appeal further held that the trial judge was correct in rejecting the “exposure”, “manifestation” and “injury-in-fact” theories. The Court of Appeal agreed that the continuous trigger theory was applicable and divided the damages on a pro rata basis amongst insurers for both Bertrand and Lafarge that had policies in effect between 1986 to 1992.

In *Hay Bay Genetics Inc. v. MacGregor Concrete Products (Beachburg) Ltd.*, [2003] 29 C.L.R. (3d) 60, the Plaintiff operated a pig farm. The Plaintiff hired a contractor in 1994 to install a concrete tank to store pig manure. The contractor, in turn, hired the Defendant subcontractor to deliver and install the tank. The septic tank eventually leaked manure. Environment Canada laid criminal charges against the Plaintiff in 1988 and required the Plaintiff to clean up the environmental damage that occurred. The Plaintiff was required to remediate and build additional structures to catch the contaminated run-off. The Plaintiff commenced an action against the Defendant for the cleanup costs and associated rebuilding of the concrete tank. The Defendant sought defence costs from Lombard (its CGL insurer from 1990 to 1994) and ING Halifax (its CGL insurer from 1996 to the date the cleanup was completed). The Defendant did not have any liability policy in place between 1994 and 1996.

The Ontario Supreme Court of Justice applied the reasoning in *Alie* and held that the continuous trigger theory should be applied as the insurers “whose policies were in force at the time the leakage/damage may have occurred, are responsible for indemnification during their precise and respective periods of policy coverage”. Lombard and ING Halifax were required to indemnify on a pro rata basis for their respective periods of coverage. The Defendant was required to bear the burden for any damages that occurred during the period that it did not have coverage in place.

In *Westridge Construction Ltd. v. Zurich Insurance Co.*, 2005 SKCA 81, the Plaintiff contractor completed building a pig farm by October 1994. In October 2001, the swine farm owner sued the Plaintiff for damages resulting from the premature failure of the barn roof. The pig farm owner alleged that, sometime after the building completion, significant rusting was observed to the point that the roof required repair within the next three to five years.

After the Plaintiff was served with the Statement of Claim, the Plaintiff gave notice to each of the five insurers who had issued policies to the Plaintiff from 1994 to 2001. Three insurers acknowledged a duty to defend whereas Sovereign General and Zurich did not. Sovereign General’s CGL policy was in effect from January 1, 1994 to August 31, 1994 and Zurich’s policy with the Plaintiff was in effect from May 31, 1998, to May 31, 2000.

In its review of the Sovereign General policy, the Saskatchewan Court of Appeal noted that Sovereign General was required to indemnify the Plaintiff as the claim arose during the period of coverage. At para. 41, the Court noted that:

The occurrence was a continuing one, commencing at the time of the completion of the building and continuing throughout its use as a swine barn, until the commencement of the action. If these allegations are proved as a fact, the claim in negligence will fall within the time required by the terms of the insuring agreement.

Similarly, in its review of the Zurich Policy, the Court noted that the occurrence “was a continuing one from the date of the completion of the building until the commencement of the action, the pleadings bring this aspect of the case within coverage, as with the Sovereign policy”.

As a result, the Saskatchewan Court of Appeal held that both Sovereign General and Zurich each owed a duty to defend the Plaintiff contractor and pay their proportionate shares of the defence costs.

In *Co-operators Insurance Co. v. Ross*, [2003] 188 O.A.C. 328, the Defendant installed a fireplace at a residence in 1988. In 1997, the residence was consumed by a fire that had originated in the fireplace. The residence was rebuilt and the Plaintiff insurer commenced a subrogated action against the Defendant. In turn, the Defendant commenced a third party claim against Economical (who provided coverage from January 1988 to January 1989) and Lloyd’s (who provided coverage from January 1989 to January 1996). Both Economical and Lloyd’s denied coverage on the basis that the fire occurred after the respective policy periods. A motions judge of the Ontario Superior Court of Justice accepted the possibility that the fire was caused due to a build up of heat and combustible materials near an improperly installed vent which supported a continuous series of losses.

While the motions judge left the determination as to which trigger theory applied for the trial judge, the motions judge determined that both Economical and Lloyd's owed a duty to defend the insured. The Ontario Court of Appeal upheld the decision of the motions judge.

In *Synod of the Diocese of Edmonton v. Lombard General Insurance Co. of Canada*, 2004 ABQB 803, the insured church was sued in 2001 for vicarious liability arising out of sexual assaults perpetrated by a minister employed by the church. The assaults occurred between 1978 to 1984 but the victim alleged that the damages arose in 1998. The church was insured by Le Assicurazioni D'Italia Spa from 1982 to 1984 and then by Lombard. The church brought an action to compel both insurers to defend the sexual assault claim. The church alleged that the assaults ended before the policy with Lombard began but argued that the victim's manifestation of damages occurred during Lombard's policy period.

The Alberta Court of Queen's Bench determined that the Lombard policy was occurrence based and noted that Lombard was only required to respond to "liability inducing events" that occurred during the policy period. As the church could only be vicariously liable for the minister's actions while he was employed with the church, no "liability inducing event" occurred after December 31, 1984 that would trigger Lombard's policy. The Court further noted at that "the realization of the extent of damages at a later date, even if genuine, does not constitute an occurrence for insurance purposes".