Alie v. Bertrand & Lafarge Cda – (2001 - 23 insurers)

- Defective concrete foundations in Hawkesbury.
- Cause was either that the concrete was not properly saturated making it susceptible to freeze/thaw cycles or that the fly ash recommended by Lafarge caused an adverse chemical reaction known as internal sulfate attack.
- Concrete crumbled with resulting moisture, mildew and mould.
- All foundations had to be replaced
- Lafarge held 80% liable and Bertrand 20%.
- Primary cause was fly ash.
- Court ruled Bertrand should have independently tested and were "willfully blind".
- Foundations constructed by third parties and concrete problem could only be rectified if the foundations were destroyed and re-poured.
- Structural integrity of the homes was threatened if the foundations were not replaced. This was the type of property damage covered under the G.L.'s.
- The "business risk" principle did not remove coverage for the damage to the plaintiff's property.
- Defect was not the result of Bertrand's faulty workmanship.
- Only cost excluded was the cost to supply the replacement concrete.
- Triggers for coverage were "injury in fact" (when property damage actually occurred) and "continuous trigger" (time of initial exposure to the harmful substance to the time the injury was discovered).
- Bertrand's coverage was allocated on a "pro rata" basis i.e. # of foundations poured in each year and the applicable insurer for those years.

General

1. Triggers: exposure

Manifestation

Injury-in-fact

Triple trigger (or “continuous” – used in Alie vs. Bertrand) from the time the damage occurred - and continued to occur – to the time the damage manifested itself.)

As a result of Alie vs. Bertrand IBC has inserted wording to exclude known losses occurring prior to policy inception.

2. Complex structure theory rejected (i.e. that one component of an insured’s work cannot damage another part of the work) (set down in SCC decision of Winnipeg C.C. #36 v. Bird Construction) in Bridgewood. Court said inappropriate to apply a tort principle to what is clearly a contract analysis.

Bridgewood Building Corp vs. Lombard

& Beige Valley Developments vs. Lombard (April 2006 – Ont. Court of Appeal)

- Case similar to Alie vs. Bertrand. Both contractors supplied faulty concrete by Dominion Concrete resulting in crumbling foundations that had to be replaced. (spent $2M of their own money).
- Relied on the "exception to the exclusion" under old G.L. policies for work done by sub-contractors.

  N.B. Before 1986 most policies excluded work performed by subs but between 1986 and Dec. 1, 2001, most policies covered defective work by subs. As G.L. policies were usually occurrence based this could pick up cover for G.L.'s between 1986 and 2001.
- In 2001 IBC drafted new G.L. wordings which removed the "exception to the exclusion"
- Repairs required due to defective concrete supplied by sub-contractors
- Argument by insurers was that G.L. policies are not performance bonds.
- Court rejected and upheld lower court decision.
- Argued by Lombard that to indemnify is against "public policy" and would encourage shoddy or poor workmanship or material used.
- Court rejected this stating that coverage is determined based on the policy wordings and that coverage provision must be interpreted "broadly" while exclusions must be interpreted "narrowly" and that contra proferentum rule will apply.
- Lombard also argued that this was a "business risk" but court said (1) the general contractor had minimal control over the sub's work and insurer still had right of subrogation over the sub who would not have cover under his

G.L. policy; (2) if G.C.'s made a habit of hiring incompetent subs they will soon be out of business (reputational risk). Marketplace will put them out of work and (3) insurers can exclude work by sub-contractors by clearly doing so in the policy wordings (endorsements available since Dec. 1, 2001).

- Also of note, Lombard denied on basis of:

2. "No lawsuits/no liability"
3. Breached voluntary payment condition
4. Exclusion for liability assumed in contract. Rejected as builder had a statutory obligation to repair under the Ontario New Home Warranty Plan Act
    - the court rejected (1)–(3) To have held otherwise the insured's would have to had breached the statute and not effected repairs; run the risk that houses would collapse or cause personal injury and risk losing their licence for not complying with the statute in order to trigger cover. This would be contrary not only to "Public Policy", but to common sense as well.

York Region Condo Corp vs. Lombard (April 2008)

- Repairs to a constructed foundation
- Court distinguished between a “Natural” and a “Constructed“ foundation.
- $7.3M repairs to a sinking parking garage
- Sub-contractors installed defective dewatering system as a means to repair an aquifer punctured when the condo was constructed.
- The faulty dewatering system from 1989 – 1995 pumped not only water away from the foundation, but also natural soil causing erosion/voids.
- Lombard, who insured the G.C., argued that by the sub installing a faulty dewatering system there was no “resulting” damage, but rather only damage to the constructed foundation, which was excluded from coverage under it’s “own work/product“ exclusion.
- Court said by removing soil under the constructed foundation, damage was caused to the natural foundation (compacted soil/earth/rock) and this “natural foundation” is part of the property of the condo corp. Therefore, damage to the constructed foundation was “resulting damage” covered under the G.L. policy.
- There was no faulty workmanship to the constructed foundation, it was damaged as a consequence of faulty workmanship to the “natural” foundation.
- Court rejected the “pure economic” loss vs. “compensatory damages” by analyzing the policy wording in determining the liability of contractors for the cost of repairing defective buildings. If the economic loss is recoverable in tort, then it is recoverable under the policy. (see Winnipeg Condo Corp #36 vs. Bird Construction 1995 S.C.(R)

- Both Winnipeg CC #36 and Alie vs. Bertrand stated that it was “artificial characterization” to determine coverage as either “property damage” or “economic loss”. The focus should be on the language of the insuring agreements and their interpretation.
- In Alie the court concluded that the damage to the foundations and to the structural integrity of the house went beyond the insured’s own product (i.e. the defective concrete) and that the damage claimed met the definition of “property damage” under the policy and only the cost of replacing the defective concrete was not recoverable.
- In this case the “defect” was the defective dewatering system. The damage to the third party C.C. was the voids below the constructed foundation causing consequential damage to the foundation. The C.C. was not seeking to repair the defective dewatering system, but rather compensation to rectify the consequential damage to fill the voids, alter the water table and repair the foundations damaged as a result of the voids. “There is no allegation that the foundation, as originally constructed, was defective”.
- Court reviewed what constitutes an “occurrence” and an “accident”. “Accident” is often not defined under the policy. Court agreed that a G.L. is not a performance bond, but stated “one must take care not to allow this perspective to lead to an overly narrow interpretation of the insuring agreement when on proper interpretation the claim falls within the insuring agreement. In this case the court concluded that the G.L. is intended to provide compensatory damages to third parties for an accident which includes any “unlooked for mishaps or occurrences” or an “unfortunate

incident that happens unexpectedly and unintentionally, typically resulting in damage or injuries".

- The court concluded that if the G.L. does not respond to mishaps, calculated risks or dangerous operations, then what is left to cover other than some exceptional cause of liability?
- To interpret the work "accident" as excluding an event caused by negligence "is contrary to the very principle of insurance, which is to protect against mishaps, risks and dangers".

Progressive Homes Ltd. v. Lombard (S.C.C. September 2010) (duty to defend – sent back to trial)

- Court re-affirmed the Ontario decisions that remediation to work done by sub-contractors under the exception to the "own work" exclusion was in fact covered.
- "Complex structure theory" (i.e. that one component of a building cannot damage another) does not operate in the insurance coverage context.
- This is a leaky condo case with construction defects in framing, windows, flashing, stucco, venting and roofs, leading to water leaks into the units. Most of the work done by subs.
- The big news in this case is that the courts suggest that in fact defective property itself could constitute resultant property damage given the appropriate fact situation. Not an issue in this case but could open a vista of coverage for insureds.
- Court rejects the CGL policy is not a performance bond argument by asserting that "the CGL policy picks up where the performance bond leaves off and provides coverage once the work is completed".
- Looked at definitions:

1 "Property Damage" – includes damage to any tangible property and is not limited to damage to third party property; (very important new concept)

2 "Accident" – need not be a sudden event; rather simply has to be neither expected nor intended by the insured (fortuitous).

- Accident includes "continuous or repeated exposure to conditions".
- Defective workmanship itself could be an "accident" which is a case specific determination. It will depend both in the circumstances of the

defective workmanship alleged in the pleadings and the way “accident” is defined in the policy (if it is defined at all).

- Lombard argued that “property damage” does not result from damage to one part of a building arising from another part of the same building and that damage to other parts of the same building is “pure economic” loss (complex structure theory).
- Court rejected that approach stating that the focus of insurance policy interpretation should first and foremost be in the language of the policy at issue. “General principles of tort/law are no substitute for the language of the policy. I see no

  limitation to third party property in the definition of “property damage”. Nor is the plain and ordinary meaning of the phase “property damage limited to damage to another person’s property”.
- “I would construe the definition of “property damage”, according to the plain language of the definition, to include damage to any tangible property. I do not agree with Lombard that the damage must be to third-party property. There is no such restriction in the definition.”
- “The plain meaning of “property damage” is consistent with reading the policy as a whole. Qualifying the meaning of “property damage” to mean third-party property would leave little or no work for the “work performed” exclusion Lombard argues that the exclusion clauses do not create coverage. This is true. But reading the insurance policy as a whole is not the same as conjuring up coverage when there was none in the first place.

  Consistency with the exclusion clauses is a further indicator that the plain meaning of “property damage” is the definition intended by the parties.”

- "Does the definition of "property damage" exclude defects? Or, can defective property constitute "property damage" as defined in the policies. Progressive concedes that the effect of the definition of "property damage" is to exclude coverage for a claim to repair a defect. Lombard agrees that defects are not included in the definition of "property damage"."
- "While the point was not contested and nothing turns on it in this appeal, it is not obvious to me that defective property cannot also be "property damage". In particular, it may be open to argument that a defect could not amount to a "physical injury", especially where the harm to the property is "physical" in the sense that it is visible or apparent (see e.g., Annotated Commercial General Liability Policy, vol. 1, at p. 10-10). Moreover, where a defect renders the property entirely useless it may be arguable that defective property may be covered under "loss of use", the second portion of the definition of "property damage"."
- "I would also note that not barring defective property from the definition of "property damage" at the outset gives meaning to the exclusion clauses discussed below. Specifically, the second version of the policies expressly excludes coverage for defects. This would be redundant if defects were excluded from "property damage" at the outset. While perfect mutual exclusivity in an insurance contract is not required, this redundancy supports the view that the definition of "property damage" may not categorically exclude defective property."
- "Do the pleadings allege "property damage"? In my view, they do. The pleadings describe water leaking in through windows and walls and allege "deterioration of the building components resulting from water ingress and

infiltration". The pleadings also describe defective property, which may also be "property damage": e.g. improperly built walls, inadequate ventilation system, poorly installed windows. Whether specific property actually falls within the definition of "property damage" is a matter to be determined on the evidence at trial. This meets the low threshold of showing that the pleadings reveal a possibility of property damage for the purpose of deciding whether Lombard owes a duty to defend."

- Three versions of the policies (five successive GL's)

o Year 1: "Work performed" exclusion applies. Work performed "by or on behalf of the named insured" but modified by GL Broad Form Extension to exclude any work performed by the insured and not on behalf of the insured. Therefore does not exclude property damage caused by a sub's work or to the sub's work.

Year 2, 3 and 4: "work performed" exclusion revised to exclude "property damage to that particular part of your work arising out of it or any part of it and included in the products and completed operations…". Would only exclude coverage for defects. Court said that this version expressly contemplates the division of the insured's work into its components by using the phrase "that particular part of your work" therefore repairing the defective component is not covered but resulting damage is (no exception to the exclusion for work performed by subs).

o Year 5: same as year 2-4 except brought back in the exception to the exclusion for work done by subs. Therefore only the defect to insured's own component would be covered. Subs defect and resulting damage would be covered.

This case brought the B.C. court in line with the Ontario cases which give effect to the subcontractor exception. B.C. had effectively ignored the exception.

Lamar Homes (U.S. Case – Texas fifth circuit)

Look to the insuring agreement for "plain interpretation"

- To assess coverage, like our courts, you have to look at the policy as a whole but in this specific order:
  1. Is there a grant of coverage under the insuring agreement on plain interpretation?
  2. If the answer is to 1. is yes then "business risks" to be excluded are to be found in the "exclusions".
  3. If it is excluded in the policy "exclusions" is there an exception to the exclusion (i.e. for subcontractors)?
- Texas also has concluded that nothing in the definition of "property damage" limits it to third party property therefore, like Progressive Homes damage to the insured's own property due to a construction defect could be covered. The definition only says there has to be physical injury to tangible property (if not, "loss of use", the second part of property damage definition, could be triggered).
- Court affirmed that as long as there is "property damage" then all economic loss as a result of the property damage is covered given the insuring agreement which stated "We will pay those sums that the insured becomes legally obligated to pay as damages because of property damage". Therefore if there is property damage the economic loss is "because of" it.
- Also clarifies that damage to a subcontractor's work is covered (whether it arises out of the insured contractor's work or any subcontractor's work) as is damage to the insured contractor's work arising out of a subcontractor's work.
- "There is, however, an exception to exclusion "L" of substantial importance to insured contractor, which provides that "this exclusion does not apply if the damaged work or

the work out of which the damage arises was performed on your behalf by a subcontractor." *This exception should allow for coverage, for example, if an insured general contractor is sued by an owner for property damage to a completed residence, caused by faulty plumbing or electrical work done by a subcontractor*. The coverage in that circumstance should extend to all "work" damaged, whether it was done by the contractor or by any subcontractor, since the "work out of which the damage arises was performed…by a subcontractor." The only property damage to completed work which is excluded by exclusion "L" is damage to the insured contractor's work, *which arises out of* the insured contractor's work.[85]".

- "If the policy's exclusion for damage to the insured's work contains a proviso stating that the exclusion is inapplicable if the work was performed on the insured's behalf by a subcontractor, it would not be justifiable to deny coverage to the insured, for damages owed because of property damage to the insured's work caused by the subcontractor's work. Reading the policy as a whole, it is clear that the intent of the policy was to cover the risk to the insured created by the insured's use of a subcontractor. Moreover, if coverage were never available for damage to the insured's work because of a subcontractor's mistake, on the theory that there was no occurrence even under those circumstances, the foregoing subcontractor proviso to the exclusion for damage to the insured's work would be meaningless, and if possible, policies should not be interpreted to render policy provisions meaningless."

AXA v. Ani Wall 2008

- In AXA v. Ani Wall ➔ Insurer attempted to involve the rip and tear exclusion, which was said to exclude any liability arising out of the repair or replacement of defective concrete. Court stated that if accepted this position it would leave a "gaping hole in the coverage". It would therefore be "repugnant to the insurance coverage" and should not be enforced.
- In Ani Wall also included the "Your Work" exclusion. Court rejected as a subcontractor Dominion Concrete supplied the defective concrete
- Same case involved the "your product" exclusion.
- Court whittled away this exclusion on two basis:
    1. The foundation and footings once incorporated in the building forms part of "real property" (consistent with U.S. and Cdn. decision) which is exempted from this exclusion.
    2. Even if 1 was not applicable the court said that as Ani Wall's product such as the foundation is the insured's overall product then to exclude cover would be repugnant ("principle against repugnant exclusion"). Essentially it would make the G.L. coverage useless. The interpretive principle is that an exclusion to coverage should not be enforced when the result would be to defeat the main object of the contract as it would virtually nullify the coverage sought for the anticipated risks.
    - Significance of this case is that court accepted "Dominion as a subcontractor" when effectively they only supplied the concrete. Does that make all material suppliers "sub-contractors"? It leaves the door open.