**CITATION:** Aviva Insurance v. Regional Hose, 2010 ONSC 1228
**COURT FILE NO.:** C-1060/09
**DATE:** 2010-02-23

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Aviva Insurance Company of Canada, applicant

**AND:**

Regional Hose Toronto Ltd., respondent

**BEFORE:** The Honourable Mr. Justice D. J. Gordon

**COUNSEL:** C. McKibbin for the applicant

E. Dreyer for the respondent

**HEARD:** November 16, 2009



## ENDORSEMENT

[1] Aviva Insurance Company of Canada ("Aviva") applies for a declaration and order that it is not obliged to provide a defence to Regional Hose Toronto Ltd. ("Regional Hose") in an action commenced by Kinectrics Inc. ("Kinectrics"), being Toronto court file no. 06-CV-306233.

[2] By preliminary motion, Aviva also seeks an order striking the affidavit of Logan Booth, sworn 13 October 2009 and served on behalf of Regional Hose.

[3] For the reasons that follow, the motion and application are granted.

## Background

[4] Aviva provided a commercial general liability policy of insurance ("CGL" policy) to Regional Hose from 1 February 2004 to 1 February 2005. During this time period, Regional Hose is said to have delivered certain manufactured components to Kinectrics. On 16 February

2006, a statement of claim was issued on behalf of Kenectrics, seeking damages from Regional Hose.

[5] This application was issued on 28 September 2009, pursuant to Rule 14.05 (3) (d) and (h), *Rules of Civil Procedure*.



**Statement of Claim**

[6] In its primary claim, Kinectrics seeks "damages for breach of contract, breach of warranty, negligent misrepresentation and negligence in the amount of $225, 000.00".

[7] Kinectrics is involved in scientific research, development and testing services for customers in the energy and environmental fields. Kinectrics alleges it purchased components from Regional Hose for a testing program to demonstrate the adequate life of a gearbox housing and gearbox carrier for a wind turbine project. The components were identified as hydraulic cylinders and associated mounting equipment, rod eyes, eye brackets, knuckles and pins. Problems are said by Kinectrics to have occurred with the eye brackets, a hydraulic cylinder and the knuckles, being the subject matter of the lawsuit.

[8] The specific allegations in the statement of claim regarding the components are as follows:

> Failure of Eye Brackets
>
> 8. The Plaintiff states that there were two premature eye bracket failures, the first after only 260,000 cycles, and a second at 417,000 cycles, although a minimum of one million load cycles without failure is the engineering norm for this equipment. The first failure was repair welded by the Defendant but that eye

bracket failed a second time at 388,000 cycles. All failures occurred at a sharp corner stress riser on the bracket.

9. The eye brackets suffered premature fatigue failure because of improper design and manufacture by the defendant. After the third failure, the Plaintiff redesigned the eye brackets and provided the drawings to the Defendant for manufacture.

Failure of Cylinder

12. One of the Parker hydraulic cylinders prematurely failed at 297,000 cycles because of a manufacturing or material defect, resulting in a fatigue crack forming on the rod at the piston connection. The Plaintiff was forced to replace the cylinder, with a resulting significant delay in the testing program.

Defective Knuckles

13. The knuckles supplied were improperly manufactured in that the pinholes were not perpendicular to the two faces of the part. They were required to be re-machined, resulting in further delays in and additional expenses to the Plaintiff for the completion of the GETS project.

[9] Kinectrics goes on to allege “breaches” in the following paragraphs:

Breaches

14. The Plaintiff states that the Defendant breached the terms of the sale agreement by supplying defectively manufactured hydraulic cylinders, eye brackets and knuckles. Such failures also constitute breaches of the implied warranty of fitness for intended purpose and the implied warranty of merchantable quality.

15. The Plaintiff expressly made known to the Defendant the particular purpose for which all of the parts and equipment were required, and relied upon the Defendant’s skill and judgment in providing such parts. The equipment and parts purchased by the Plaintiff from the Defendant are of a description that it is in the course of the Defendant’s business to supply. The parts which failed were not reasonably fit for the plaintiff’s particular purpose and were of unmerchantable quality.

16. The Plaintiff pleads and relies upon the *Sale of Goods Act*, R.S.O. 1990, c.S.1 as amended.

17. The Plaintiff further states that the Defendant negligently misrepresented to the Plaintiff that the equipment to be manufactured and supplied to the Plaintiff would meet its stated requirements, which representations the Plaintiff detrimentally relied upon and which induced it to enter the sale agreement with the Defendant.

18. The Defendant was negligent in designing the eye brackets and supplied equipment which was negligently manufactured, including the replacement eye bracket redesigned by the Plaintiff, as set out above.

19. As a result of the breaches of contract, breach of warranty, negligent misrepresentation and negligent manufacture, the Defendant has caused the plaintiff to suffer substantial losses for which it is in law responsible.

[10] Lastly, Kinectrics described its losses in the following manner:

Damages

20. As a result of the defective and unfit parts, as described above, the Plaintiff incurred significant costs, losses and expenses, including the following:

i) payment for parts which were of unmerchantable quality and unfit for their intended purpose;

ii) payment for repairs and replacement parts;

iii) the cost of preparing an alternative design for the eye brackets;

iv) additional labour costs incurred in analyzing the failures, removing the failed equipment and installing replacement parts;

v) additional management and overhead costs, and losses sustained as a result of delays in performing the tests for the Plaintiff's customers;

vi) such additional costs and expenses as counsel may advise.

**Statement of Defence**

[11] Regional Hose, in its statement of defence, denies the allegations of Kinectrics and goes on to say the problems resulted from Kinectrics actions, as follows:

Plaintiff's Actions

4. The Plaintiff relied upon its own knowledge and judgment in selecting the components it required which it purchased from the defendant.

5. The Plaintiff selected the purchased components from the catalogue of components which was provided to the Plaintiff by the Defendant. The catalogue is published by Parker Canada Holding Co. (also known as Parker Hannifin Coporation).

6. The failure of any of the components was as a result of mis-use, improper use and/or negligence of the Plaintiff.

Plaintiff's Secrecy

7. The Plaintiff refused to inform the Defendant of the nature, purpose and details of its use and application of the components required by the Plaintiff because of the secrecy of the Plaintiff's testing programme.

8. Upon encountering difficulties with its testing programme, the Plaintiff denied the Defendant access to the premises to examine the components and their use and application by the Plaintiff.

[12] As to damages claimed by Kinectrics, the stated position of Regional Hose is as follows:

Plaintiff's Damages

10. The damages claimed by the Plaintiff are:

a) unforeseeable;

b) not caused by the Defendant;

c) too remote;

d) unreasonable; and

e) excessive.

## **Insurance Policy**

[13] The CGL policy, in some detail, sets out matters covered or excluded.

[14] Section 1A pertains to coverage for bodily injury and property damage liability and provides, in part, as follows:

> 1. Insuring Agreement
>
> a. We will pay those sums that the Insured becomes legally obliged to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sum or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS COVERAGES A, B AND D. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory".

[15] Section 1A also deals with exclusions, the following being referred to by counsel:

> 2. Exclusions
>
> This insurance does not apply to:
>
> (j) "Property damage" to "your product" arising out of it or any part of it.
>
> (l) "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> 1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> 2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

[16] Section V of the policy sets out definitions of certain terms, including:

> 5. "Impaired property" means tangible property other that "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of the agreement;

If such property can be restored to use by:

a. The repair, replacement, adjustment or removal of “your product” or “your work”; or

b. Your fulfilling the terms of the contract or agreement.

7. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

10. “Property damage” means:

a. Physical injury to tangible property, including all resulting loss of use of that property; or

b. Loss of use of tangible property that is not physically injured.



**Affidavit of Logan Booth**

[17] Logan Booth is the president of Regional Hose. In his affidavit, sworn 13 October 2009, Mr. Booth provides photographs of the Kenectrics test rig and the components previously mentioned. Reference was made to Professor Perovic of the Department of Engineering at the University of Toronto as having taken several of the photographs. Mr. Booth also speaks briefly as to the components being returned to Regional Hose and a subsequent inspection of same.

[18] I understand Mr. Dreyer to say the issue of causation is an important matter and, in this regard, he argues there are other “possibilities” regarding damage to the components than as alleged in the statement of claim. Mr. Dreyer submits the photographs assist in comprehending

the position advanced by Regional Hose. He argues the evidence is admissible pursuant to the "underlying facts exception" or as "demonstrative aids".

[19] Mr. McKibbon disagrees. He submits the only relevant items are the statement of claim and insurance policy. Extrinsic evidence, he says, is not admissible, such going beyond matters raised in the statement of claim and not necessary in determining whether there is a duty to defend.

[20] Counsel referred to two decisions regarding the admissibility of extrinsic evidence: *Monenco Ltd. V. Commonwealth Insurance Co*., [2001] 2 S.C.R. 699 (S.C.C.); and *Halifax Insurance Co. of Canada v. Innopex* Ltd. (2004), 72 O.R. (3rd) 522 (Ont. C.A.). The commentary of several authors was also alluded to in oral submissions and in the factums.

[21] In *Monenco*, evidence was tendered by the insured on the initial motion. In reference to the motions judge, Iacobucci J. described the evidence and the initial ruling at para.s 12 and 21, saying:

> 12. Taylor J. held that the evidence adduced by the respondent -- which included submissions made by Monenco during the negotiation of the CGL policy, details of Monenco's insurance program, correspondence between the appellants and the professional liability insurer (Simcoe & Erie) regarding the Suncor action, and evidence regarding the involvement of Simcoe & Erie in the settlement of the Suncor action – could be considered. Although the appellants challenged the admission of this evidence, Taylor J. found he could consider it to determine the parties' reasonable expectations regarding the CGL policy, but only if this policy was ambiguous on its face. He thus reserved judgment on the admissibility of this evidence.
>
> 21. Taylor J. revisited the challenged extrinsic evidence and reiterated that it was to be considered only if the policy was ambiguous in its wording. Based on his analysis of the coverage provided by the CGL policy and in particular, the relevant exclusions, he was of the view that this was not the case. As such, he stated that he did not consider the extrinsic evidence in reaching his conclusions.

[22] At para. 22, Iacobucci J. summarized the decision of the British Columbia Court of Appeal on this issue as follows:

> 22. Southin J. A. For the court first reviewed the relevant provisions of the appellant Monenco's CGL policy with the respondent. She then considered what materials, if any, in addition to Suncor's pleadings could be examined to determine whether the claims against the appellants were covered under the CGL policy. Southin J. was of the view that whether Suncor's claims "arose out of" a project of the sort described in the turnkey exclusion could only be determined by looking at the contract that existed between Suncor and the joint venture. Because this contract had been pleaded in Suncor's Amended Statement of Claim, Southin J. A. found that it was "sufficiently incorporated by reference" into the pleadings. Moreover, she considered the fact that Suncor pleaded that the joint venture carried on business under the name "ABM-1978" to be sufficient to enable the court to look at the joint venture agreement as well.

[23] Iacobucci J. commenced his analysis of the legal principles governing the duty to defend with the following statement at para. 28:

> 28. The starting premise for assessing whether an insurer's duty to defend has been triggered rests in the traditional "pleadings" rule. Whether an insurer is bound to defend a particular claim has been conventionally addressed by relying on the allegations made in the pleadings filed against the insured, usually in the form of a statement of claim. If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence. This remains so even though the actual facts may differ from the allegations pleaded.

[24] With reference to *Non-Marine underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551 (S.C.C.), at para. 34, Iacobucci J. said:

> 34. At the same time, *Scalera*, held that the bare assertions advanced in a statement of claim are not necessarily determinative. If so, the parties to an insurance contract would always be at the mercy of a third-party pleader. As such, it was stated at para. 79 that "[w]hat really matters is not the labels used by the plaintiff, but the true nature of the claim" (emphasis added). Based on this, courts have been encouraged to look behind the literal terms of the pleadings in order to assess which of the legal claims put forward by the pleader could be supported by the factual allegations. This analysis is undertaken with a view to discerning the true "substance" of the allegations. Thus, the key question is not whether the claims are meritorious, but "whether, assuming the verity of all of the plaintiff's factual allegations, the pleadings could possibly support the plaintiff's legal allegations" (at para. 84).

[25] At para. 36, Iacobucci J. offered the following comment on extrinsic evidence:

> 36. While these principles are instructive for the purposes of the present case, one important question arising in this appeal has been left open by the jurisprudence to date. That is, whether, in seeking to determine the "substance" and "true nature" of a claim, a court is entitled to go beyond the pleadings and consider extrinsic evidence. Without wishing to decide the extent to which extrinsic evidence can be considered, I am of the view that extrinsic evidence that has been explicitly referred to within the pleadings may be considered to determine the substance and true nature of the allegations, and thus, to appreciate the nature and scope of an insurer's duty to defend.

[26] In the application of the legal principles to the present case, Iacobucci J. made reference to the specific extrinsic evidence tendered, at para.s 37-39, saying:

> 37. It should be recalled that the question whether an insurer is bound to provide defence coverage in an action taken against the insured arises as a preliminary matter. Of course, after trial, it may turn out that there is no liability on the insurer and thus, no indemnity triggered. But that is not the issue when deciding the duty to defend. Consequently, we cannot advocate an approach that will cause the duty to defend application to become "a trial within a trial". In that connection, a court considering such an application may not look to "premature" evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation.
>
> 38. In the present case, I affirm Southin J. A.'s holding that the contract between Suncor and the joint venture, having been referred to in the Amended Statement of Claim, could be reviewed to determine the substance and the true nature of Suncor's claims. In a similar vein, I agree with Southin J. A. that, because Suncor had pleaded that the joint venture had carried on business under the name "ABM-1978", this enabled the court to review the joint venture agreement as well.
>
> 39. In endorsing Southin J.A.'s rulings on this extrinsic evidence, I must emphasize that it was not considered for the purpose of examining the contentious points in issue in the underlying litigation between Suncor and the appellants. Reference to these documents did not require factual findings to be made that would impact this litigation which, in this particular case, had been settled by the time the duty to defend application was brought before the courts. A review of the extrinsic evidence simply illuminates the substance of the pleadings and as such, is consistent with the reasoning in *Scalera, supra*.

[27] In *Halifax*, Borins J. A. described the competing motions for summary judgment as a "trial within a trial". Affidavit evidence and transcripts of cross-examinations had been filed. On appeal, one of the issues was the admissibility of extrinsic evidence.



[28] Borins J. A. reviewed *Monenco* and, at para.s 36-39, provided this direction:

> 36. I would add a word on the role of extrinsic evidence in determining an insurer's duty to defend. The procedure advocated in the authorities discussed in *Monenco* is similar to rule 21.01(1) (b) motion to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, in that the test established by *Nichols* and *Scalera* is similar to the test established by *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 on the hearing of a rule 21.01(1) (b) motion. There is another similarity as under rule 21.01 (2) (b) no evidence is admissible on a substantive adequacy motion. However, the court is entitled to consider documents referred to and relied on in the pleadings, as such are not evidence precluded by rule 21.01 (2) (b): *Web Offset Publications Ltd. V. Vickery* (1998), 40 O.R. (3rd) 526 (Gen. Div.), aff'd (1999), 43 O.R (3rd) 802 (C.A.). Similarly, on a duty to defend application the court may consider documents referred to on the underlying statement of claim where to do so may assist in determining the substance and true nature of that claim.
>
> 37. Generally speaking, in this province the process adopted to decide a duty to defend issue is an application under rule 14.05(3) (d) or (h). This is a summary procedure well suited to determining a duty to defend issue which necessarily arises, as Iacobucci J. noted in *Monenco*, as a preliminary matter. To follow this procedure avoids a duty to defend application becoming a "trial within a trial" into the truth of the allegations in the underlying statement of claim, as occurred in this case. As Iacobucci J. made clear in *Monenco*, so long as the facts pleaded come within the coverage in the policy, the insurer is under a duty to defend even though the actual facts may differ from the pleading. That is why extrinsic evidence going to the truth of the allegations pleaded, as occurred in this case, is not receivable. Moreover, as the motion judge did in this case, the court must avoid findings that would compromise or affect the underlying litigation. This is not to say that evidence is never permissible on a duty to defend application. Indeed, as in this case, it is not uncommon that expert evidence is helpful to the court in the interpretation of the insurance coverage and, on occasion, in interpreting technical language in the underlying claim.
>
> 38. What the insurer did in this case, by the procedure it followed, was to turn a duty to defend application into a duty to indemnify application by introducing extrinsic evidence pertaining to what it termed "the true facts". It is well-recognized that the insurer's duty to defend is broader that its duty to indemnify.

> The time to determine the insurer's duty to indemnify, if at all, is at the conclusion of the underlying litigation.
>
> 39. In addition, the procedure undertaken by the insurer, albeit a misguided effort to persuade the court on the basis of "the true facts", demonstrates that Rule 20 does not lend itself to deciding duty to defend issues. The delay involved to bring a motion for summary judgment, that can be resorted to only after the defendant has delivered a statement of defence, necessarily defeats the objective of deciding duty to defend issues expeditiously as a preliminary issue. Moreover, further delay is possible if genuine issues arise which cannot properly be resolved by a motion judge on a Rule 20 motion.

[29] As can be seen from *Monenco* and *Halifax*, there are significant limitations on the use of extrinsic evidence when determining the duty to defend issue.

[30] At para. 21 of his factum, Mr. Dreyer quite properly observes that "most members of the bench would have no idea, for example, what an "eye bracket" is or, for that matter a "test rig"." He goes on to describe how the court might benefit from use of the photographs.

[31] As a result of their involvement in this lawsuit, and perhaps from other knowledge, counsel, no doubt, well understand the technical or engineering issues regarding the test rig and the components and what the photographs are intended to portray. Unfortunately, the photographs are meaningless to me without further explanation.

[32] The test rig and the components are identified in the statement of claim. Nevertheless, it cannot be said that photographs of these items are an adequate substitute for something "explicitly referred to in the pleadings" nor does it "illuminate the substance of the pleadings" (*Monenco*). Further, the use of the photographs may well be to determine the truth of the allegations pleaded, a matter clearly prohibited at this stage (*Halifax*).

[33] Accordingly, the proposed evidence is of no assistance in my analysis of the duty to defend and, further, does not meet the test for admissibility at this stage. In result, the motion is granted. The affidavit of Mr. Booth is struck from the record. The affidavit, and attached photographs, was not considered in the decision that follows on the application.



## Duty to Defend

[34] Mr. Dreyer concedes the cost to repair or replace the components supplied by Regional hose to Kinectrics is not covered by the insurance policy. The focus, then, is with respect to Kinectrics damage claim for losses resultant from delay.

[35] Aviva's position, briefly stated, is that Regional Hose is unable to demonstrate an "occurrence" within the meaning of the CGL policy. Mr. McKibbon submits the allegations in the statement of claim of Kinectrics focus on defective manufacture by Regional Hose. He argues that the policy was never intended to underwrite what would otherwise appear to be a warranty claim.

[36] Regional Hose takes the position that the business risk coverage does not exclude defective manufacture claims, in particular with respect to matters beyond repair of components such as loss of use. Mr. Dreyer submits defective manufacture is not the occurrence but, rather, is only the occasion where the component was damaged. He goes on to say the defective manufacture is a necessary precondition that potentially triggers liability.

[37] Expanding on this latter point, Mr. Dreyer argues there are other possible causes, such as the components being used incorrectly by Kinectrics. The bare allegations in the statement of claim, Mr. Dreyer submits, are not necessarily determinative; rather, it is the allegations the

pleading could raise that ought be considered as Regional Hose must only raise a possibility to trigger the duty to defend.

[38] Counsel provided comprehensive factums and diligently canvassed all potential issues in their oral submissions. Reference was made to numerous decisions as well as secondary authorities, namely opinions of authors.

[39] In my view, the analysis required is not complex. As previously stated, in reference to *Monenco* and to *Halifax,* the focus is on the allegations in the statement of claim and the provisions in the SGL policy.

[40] A duty to defend arises if, on the allegations in the statement of claim, it is "arguable" or "possible" a claim within the policy might succeed: see *Cummings v. Budget Car Rentals Toronto Ltd.* (1996), 29 O.R. (3rd) 1 (Ont. C.A.). The statement of claim, therefore, must be examined closely. A possibility must be a reasonable one; otherwise, an argument can be made to bring every claim within the policy.

[41] It is now well established that defective manufacture is not an "occurrence" or "accident within the meaning of a CGL policy. In this regard, *Celestica Inc. v. ACE INA Insurance* (2003), 229 D.C.R. (4th) 392 (Ont. C.A.) is instructive.

[42] *Celestica* involved a Rule 21 motion to determine a question of law on an agreed statement of facts. The claim resulted from the defective manufacture of a transformer that created a risk of injury necessitating modifications to the photocopiers. The insured sought to recover its costs for the remedial actions under the insurance policy.

[43] At para.s 23-27, Armstrong J.A. reviewed the background and positions, saying:

> 23. Counsel for the respondent referred us to a number of cases which expressly deal with the terms "occurrence" and "accident" in circumstances similar to the case at bar. See *Kitchener Silo v. CIGNA Insurance Co. of Canada*, [1991] I.L.R. para. 1-2764 at 1517 (Ont. Gen. Div.); *Erie Concrete Products Ltd. v. Canadian General Insurance* (1969), 2 O.R 372 (H.C.); *Carleton Ironworks Ltd. v. Ellis Don Construction Ltd.*, [1996] I.L.R. 1-3373 (Ont. Gen. Div.); *Harbour Machine Ltd. v. Guardian Insurance Co. of Canada* (1985), 10 C.C.L.I. 72 (B.C.C.A.); and *Tsubaki of Canada Ltd. V. Standard Tube Canada*, [1993] O.J. No. 1855 (Ont. Gen. Div.). These cases were cited for the proposition that a policy holder's defective design or manufacture is not considered an accident under a policy of the type before the court.
>
> 24. The motions judge considered this line of cases. While he found that the cases provided "more than a little judicial support for [the] notion that comprehensive general liability policies are intended to protect the insured from liability for injury or damage to the person or property of others," he declined to apply them to the case at bar.
>
> 25. The motions judge cited a case comment by Gordon Hilliker with respect to *Tsubaki*, *supra*, in which Mr. Hilliker cautioned against an "overly narrow interpretation" of the language of comprehensive general liability policies. Mr. Hilliker is of the view that *Tsubaki* was wrongly decided in that, contrary to the conclusion of Wilson J. in that case, there was both an accident and property damage sufficient to bring the claim within the insuring agreement.
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> 26. The motions judge found the analysis of Mr. Hilliker to be persuasive, which led him to conclude that the notional damage to the Xerox copiers "could only have happened by misadventure for which the plaintiff was responsible to Xerox at law." With respect, I disagree with this analysis. In my view, this conclusion is both contrary to the decision in *Tsubaki* and to the settled line of authority represented by the cases referred to in paragraph 22. Also, the evidence which was before the motions judge does not support his conclusion.
>
> 27. The court must find damage to the property of a third party. The acknowledgment of the respondent that the defective transformer resulted in notional damage to the Xerox copiers appears to concede that issue. However, the court must still find that such damage was caused by an accident.

[44] Armstrong J.A., at para.s 29-31, addressed the issue as follows:

> 29. Support for the view that defective manufacture is not an accident can be found in *Harbour Machine Ltd., supra*. In that case a supplier of marine engines installed two new engines in a boat in such a manner that when the engines were running they caused severe vibrations and ultimately one of two propellers fell off

the boat. The boat owners sued the supplier, who sought to recover the costs under its insurance policy. Esson J. A. in addressing the issue of whether there had been an accident, stated at page 77:

> Nor, apart from the matter of the propeller, could I see any possible basis for holding that there was either an accident or an occurrence. Essentially, the cost of remedying the defect arose out of the faulty planning and design of the installation and the poor workmanship in carrying it out. Apart from a minor matter of the propeller, there was nothing which could constitute a mishap or an occurrence, the event which must happen before there can be said to be either an accident or an occurrence.

30. I am aware that coverage provisions in an insurance policy should be construed broadly. See *Reid Crowther Partners v. Simcoe and Erie General Ins. Co.* (1993), 99 D.L.R. (4th) 741 at 752 (S.C.C.) However, in my view the interpretation of the motions judge extends the meaning of accident beyond its reasonable limits in the circumstances which obtain here. Indeed, the interpretation of the motions judge "would transform the policy into something akin to a performance bond". See *Ohio Casualty ins. Co. v. Bazzi Construction Co.*, [1987] CA7-QL 308, 815 F. 2d 1146 (7th Cir. 1987).

31. There are good policy reasons for refusing to find that defective desing or manufacture can constitute an accident. In *Privest Properties Ltd. v. Foundation Co. of Canada* (1991), 6 C.C.L.I. (2nd) 23 at 72 (B.C.S.C.), Drost J. stated:

> There is a policy reason for this. If the insurance proceeds could be used to pay for the repairing or replacing of defective work and products, a contractor or subcontractor could receive initial payment for its work and then receive further payment from the insurer to repair or replace it. Equally repugnant on policy grounds is the notion that the presence of insurance obviates the obligation to perform the job initially in a good and workmanlike manner.

While Drost J. made the above statement during his consideration of a "work/product" exclusion, I believe the policy is equally apt when applied to the issue of coverage in the case at bar.

[45] The statement of defence of Regional Hose suggests other possibilities on causation; however, only the allegations in the statement of claim are relevant on this application. On any reasonable interpretation of the statement of claim, Kinectrics alleges losses occurred as a result of defective design or manufacture by Regional Hose. There is no ambiguity in the statement of

claim and to suggest other possible causes is to read in an allegation that has not been pleaded and would be contrary to the direction in *Monenco*.

[46] The case at bar, in my view, falls squarely within the parameters of *Celestica*. The damage was not the result of an ‘occurrence” or “accident” and, therefore, there is no duty on Aviva to defend Regional Hose in the action by Kinectrics.

[47] Mr. Dreyer was most persuasive in his submissions and raised other issues in attempt to bring his clients claim within the policy. The claim does not pass the threshold test and, accordingly, there is no need to canvas other matters presented by counsel.

[48] In result, the application is granted. If the parties are unable to agree on the issue of costs, brief written submissions are to be delivered to my chambers within 30 days.

D. J. Gordon J.

**Date:** February 23, 2010