

WHAT'S REALLY HANGING OVER YOUR HEAD?

Legal Issues in Roofing

by:

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This paper outlines recent legal developments in six areas that may be of interest to those involved with the roofing industry. The quantification of damages is discussed in the context of roof failures. Contractual limitation of liability clauses are examined in relation to the effect they have on the parties to the contract and others. The new limitations statute and the applicable limitation periods set out therein are outlined, together with a brief list of factors that affect the calculation of the limitation period. The standard of care that is now applied in the design of roofing is discussed in reference to a recent decision. The paper examines the responsibility of insurers who have issued a standardized commercial general liability insurance policies to a roofer who is embroiled in litigation, and gives examples of the insurer's reasons for denying the claims. Finally, the paper looks at recent cases discussing the form of warranty currently being used in the roofing industry, and analyzes why some common warranty conditions might not be upheld by the courts.

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What *is* really hanging over your head if you are an owner, designer, manufacturer or contractor involved in roofing? Should you be worried about potential liability arising from a roofing contract or warranty? This paper discusses recent developments in six areas of law related to roofing, and is intended to provide you with a general idea of the issues that might affect you, so that you can take any steps you feel are necessary to prevent the proverbial roof from caving in.

Quantification of Damages

Despite the best efforts of those involved with the design, manufacture and construction of roofs, occasionally, roof failure does occur. Given that roof failures give rise to loss that calls for compensation for the owner, and potentially its tenants, the damages will need to be assessed.

It is clear from past jurisprudence that the general rule in determining the quantum of damages in such a scenario is that the owner must be placed in the same position as it would have been, had the roof not failed.¹

This rule becomes difficult to apply where, because of depreciation and other similar factors, it is unclear what position the owner would have been in but for the failure of the roof.

In cases where the owner has had to replace property damaged as a result of another's breach, the traditional approach, summarized in *Upper Lakes Shipping*, was to allow the plaintiff owner to recover from the defendant the full cost of replacement:

The basic rule where there is depreciation appears to be that when the plaintiff can only replace that which is damaged with a new article, the plaintiff is entitled to new for old and the defendant responsible for the full price of the new item.²

¹ *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc. et. al.*, [1988] O.J. No. 270, at p 11.

² *Ibid.*

However, in recognition of the fact that the application of this rule would, in some cases, leave the owner in a better position than it would have been in before the damage occurred, recent cases have held that the plaintiff is not entitled to an award of damages which includes an element of betterment, i.e. the extent to which the plaintiff would benefit by replacing the defective property with new property.³ For example, if an owner is forced to replace the roof as a result of a roof designer's negligence, but the roof he acquires is constructed using better quality materials than those used to construct the original roof, that difference in quality between the original and the replacement materials would represent betterment to the owner.

This betterment issue was dealt with in the context of the claim by a developer against a manufacturer of phenolic foam roof insulation in *Orlando Corp. v. Dufferin Roofing Ltd.*⁴ In assessing the damages that should be awarded to the owner, the court relied on, and extensively quoted the reasoning of the Ontario Court of Appeal in its 1998 *Upper Lakes Shipping* decision with respect to the measure of damages.

In *Upper Lakes Shipping*, the plaintiff had to replace a damaged three-year-old conveyor belt with a new belt. Each belt had an expected useful life of 15 years. The cost of replacement of the damaged belt was \$231,460, after the salvage value of \$7,000 was taken into account. Since only 12 out of the total 15 years of the belt's useful life expectancy were lost as a result of the defendant's negligence, the defendant was required to pay only 12/15 or 80% of the 231,460 replacement cost. Hence, the damage award took into account the fact that the plaintiff in this case had used the belt for 3 years before it was damaged, which the court valued at 3/15 or 20% of the replacement cost (i.e. \$46,290).

In addition, the court noted that the plaintiff "was forced to spend the remaining 20%, 12 years earlier than would otherwise have been the case".⁵ In this way, the plaintiff lost the opportunity to invest the sum of \$46,290, and collect interest on that amount for 12 years. The Ontario Court of Appeal, dealt with this interest calculation as follows:

³ *Preload Co. of Canada Ltd. v. City of Regina (1958)*, 13 D.L.R. 2(2) 305 (Sask. C.A.). For a full discussion of this point see Waddams, *The Law of Damages* (1997), paras. 1.2730-1.2800.

⁴ *Orlando Corp. v. Dufferin Roofing Ltd.*, [2001] O.J. No. 1946.

⁵ *Supra*, note 1, at p. 12.

In our opinion, the proper approach in assessing this head of damages is to award to the plaintiff for damages for loss of interest, an amount, the present value of which, when invested and amortized over the period from October, 1981 to October, 1993, will produce annually the sum of \$5,323.35 representing interest at the rate of 11.5%⁶ per annum on \$46,290. The fund would be exhausted at the end of that period. It would, however, have produced for the plaintiff the interest to which he would have been entitled on the premature expenditure of his funds.⁷

In *Orlando Corp v. Dufferin Roofing Ltd.*, an owner/developer incurred costs to replace the roofs on two of its buildings prematurely. In assessing the owner/developer's damages, the trial judge, Ferrier J. summarized the basic principle flowing from the decision of the Court of Appeal in *Upper Lakes Shipping* as follows:

Where a property has a useful life, and the plaintiff will incur the cost of replacing that property at the end of its life, if the useful life has been shortened as a result of the defendant's intervention, then the plaintiff's loss is the loss of the use of its money.⁸

In *Orlando*, the court observed that the calculation of the plaintiff's loss of the use of its money involves the following considerations:

1. What is the appropriate useful life to be included in the determination?
2. What is the appropriate discount rate?
3. What amounts ought to be included in the calculation?
4. What amounts ought to be deducted in the calculation as betterments?⁹

To arrive at the present value of any future repair or replacement costs, the discount rate pursuant to Rule 53.09(1) of the *Rules of Civil Procedure*¹⁰ should be applied.¹¹

⁶ In the *Upper Lakes Shipping* case, *supra*, the parties agreed that the appropriate interest rate to be applied to the betterment allowance was 12% for the period from October 5, 1981 to March 18, 1988, and 11% for the period from March 18, 1988 to October 1993.

⁷ *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc. et. al.* (1992), 89 D.L.R. (4th) 722 (C.A.) at p. 724.

⁸ *Supra* note 4, , at para. 396.

⁹ *Ibid.*, at para. 399.

¹⁰ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

¹¹ *Supra* note 4., at para. 404.

It has become clear that although the court will generally deduct from the damage award any amount by which property was improved, to take betterment into account, it will also allow compensation to the extent that it has had to expend funds prematurely to obtain that improvement.¹²

In *Orlando*, the court also made it clear that a gross-up of the damage award for income tax pursuant to Rule 53.09(2)¹³ is inappropriate in cases where the damage award will not be invested, but instead, will be spent immediately to repair the defects which gave rise to the damages sought by the plaintiff. In denying this “gross-up” amount, Ferrier J. took into account the fact that the cost of repair and replacement is a tax deductible expense, as opposed to an after-tax expense.¹⁴

One further principle applied by the courts when quantifying and apportioning damages that should give some comfort to roofing contractors, designers and manufacturers is the principle of contributory negligence; the plaintiff cannot recover for losses that it could reasonably have avoided.

Where an owner has failed to inspect and maintain its roof, for example, the owner may be seen to have contributed to its own damages. Such conduct on the part of an owner could lead the court to apportion damages between those found to have improperly installed, designed or manufactured the roof, and the owner itself.¹⁵

An owner who conducts itself in this way also opens the door to others to raise the defences of causation, remoteness and failure to mitigate.

¹² *Supra* note 7 at p. 724.

¹³ *Supra* note 10.

¹⁴ *Supra* note 4 at paras. 410-411.

¹⁵ *Negligence Act*, R.S.O. 1990, c. N.1.

Limitation of Liability Clauses

It is trite law that the courts may adjust a damage award to give effect to a contractual limitation of liability clause negotiated between parties of similar bargaining power in circumstances where it is not unconscionable, unreasonable or contrary to public policy to do so.¹⁶

The Canadian Standard Form of Contract Between Client and Architect¹⁷ contains an example of a conventional limitation of liability provision:

The *Client* agrees that any and all claims, whether in contract or tort, which the *Client* has or hereafter may have against the *Architect* in any way arising out of or related to the *Architect's* duties and responsibilities pursuant to this *Contract*, shall be limited to the amount as mutually agreed to by the *Client* and by the *Architect*, and as described in A20, Other Terms and Conditions, and if not specified, the limit shall be \$250,000.

Where there is *no* limitation of liability provision, an owner claims against several involved parties, who might, in turn, make further claims against one another or against others. The purpose of these further claims is to seek contribution towards any amount eventually payable to the owner, which would be apportioned between each of these parties, usually according to the degree of their responsibility.

A limitation provision throws a wrench into this scheme.

The question that arises is how does such a limitation in one contract affect others who are not parties to that contract, but are involved in the design, manufacture and installation of the roof?

For example, is the manufacturer of a defective roofing membrane who would otherwise be entitled to make a claim against the roofer who installed the membrane incorrectly for contribution and indemnity, limited in the amount of its claim simply because the roofer had a limitation of liability in its contract with the owner?

¹⁶ *Hunter Engineering Co. v. Syncrude Canada Ltd.* (1989), 57 D.L.R. (4th) 321 (S.C.C.).

¹⁷ 2002 Canadian Standard Form of Contract for Architectural Services, Document 6, clause GC8.1.

What if the manufacturer and the roofer are each 50% responsible for \$1,000,000 of damages? Is the owner entitled to seek \$800,000 of the damages from the manufacturer, because the roofer's liability is limited to \$200,000? Or, is the manufacturer also protected from claims by the owner by the limitation of liability provision in the roofer's contract, even though the manufacturer had no knowledge of the provision?

These questions were recently answered in the case of *PDC 3 Limited Partnership v. Bregman + Hamann Architects et al.*,¹⁸ which involved the construction and maintenance of the roof of the Terminal 3 building at Toronto's Pearson International Airport.

In *PDC 3*, the plaintiff owner commenced an action against the architects, the *general* contractor, the roofing subcontractor and the maintenance provider for damages in the range of \$10,000,000. The architects' contract with the owner included a limitation of liability clause, whereby the architects' exposure to liability in any lawsuit was limited to \$250,000.¹⁹ The contracts with the other defendants did not contain any limitation of liability clauses. The defendants cross-claimed against one another pursuant to the *Negligence Act*²⁰. The architects contended that because of the limitation clause in their contract with the owner, the other defendants were not entitled to any contribution from them in excess of \$250,000.

On a motion to determine this issue²¹, Chapnik J. confined the co-defendants' claims for contribution to \$250,000. The court reasoned that the limitation clause was bargained for as part of the negotiation over price between the architects and the owner. To permit the co-defendants to make their claims for contribution in amounts exceeding the limitation for which the architects expressly contracted would reduce the contractual provision to a nullity, and result in a wind-fall to the co-defendants.

In addition, since the plaintiff accepted the contractual provision limiting the architects' liability to \$250,000, it was not entitled to recover from the other defendants any damages in excess of that amount.

¹⁸*PDC 3 Limited Partnership v. Bregman + Hamann Architects et al.* (2000), 49 O.R. (3d) 722 (Sup. Ct.).

¹⁹ See 2002 Canadian Standard Form of Contract for Architectural Services, Document 6, clause GC8.1, for example.

²⁰ *Supra* note 15.

²¹ pursuant to Rule 21 of the *Rules of Civil Procedure*, *supra* note 10.

The court's decision in *PDC 3* suggests that persons jointly and severally liable with a party who has contracted for limited liability with the plaintiff, might be able to benefit from limited liability even if their own contract with the plaintiff does not contain a similar provision, and even if they were not aware of the contractual limitation from which they benefit.

On appeal, the decision of Honourable Madame Justice Chapnick was overturned, but on technical, procedural grounds.²² The Court of Appeal held that the issue was not appropriate for determination by way of a "Rule 21" motion, and should be reserved for trial. The decision by the Court of Appeal led to an eventual settlement of the action between the parties, so the issue of the impact of a limitation clause on non-privies has yet to be resolved.

Limitation Periods

A limitation period prevents a claim from being brought after a specified period of time has elapsed. The potential claimant's legal rights and remedies are extinguished once that period expires. The rationale, or policy, behind limitation periods in civil actions is thus understood:

Limitation periods ensure that law suits are brought within a reasonable time. At some point, individuals should be able to assume that past misconduct is behind them. Further, limitation periods attempt to ensure justice is done by encouraging potential claimants to seek resolution of litigious matters promptly, when evidence is fresh and accurate fact finding still possible.²³

All parties involved with roof design, manufacture and construction, and in particular, developers and owners, are well advised to be attentive to the running of the clock with respect to limitation periods, and to be proactive in preserving their legal rights. Failure to do so may mean that an opportunity to adjudicate a legitimate claim on the merits will be lost.

²² The Court of Appeal held that the issue was not appropriate for determination by way of a Rule 21 motion, and that the issue should be reserved for trial. *Supra* note 18.

²³ James C. Morton, *Limitation of Civil Actions*. (Toronto: The Carswell Co. Ltd., 1988).

The Ontario limitations regime has recently undergone a significant change with the passage of the *Limitations Act, 2002*²⁴ (hereinafter the “Act”), which will come into force on January 1, 2004.

Section 4 of the *Limitations Act* creates a basic limitation period, which replaces the general limitation periods set out in the current limitations statute²⁵, as well as many of the special limitation periods presently scattered in various other statutes. The basic limitation period is 2 years, running from either the time of occurrence of the events on which the claim is based, or from the time the occurrence of the events ought to have been discovered by the exercise of reasonable diligence.

The latter condition is commonly referred to as the “discoverability principle”. It ensures that the clock does not start to run until such time as the wronged party has had a reasonable opportunity to obtain full knowledge of all the material facts on which its cause of action is based. For instance, where an owner has a claim against a roof designer in negligence, the limitation period would not start to run until such time as the owner could reasonably discover that the roof failure was caused by faulty design.

Section 5 sets out the discoverability principle as follows:

1. A claim is discovered on the earlier of,
 - (a) the day on which the person with the claim first knew,
 - i) that the injury, loss or damage had occurred,
 - ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - iii) that the act or omission was that of the person against whom the claim is made, and
 - iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

²⁴ *Limitations Act, 2002*, S.O. 2002, C.24, Sched. B.

²⁵ *Limitation Act*, R.S.O. 1990, c. L.15.

- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Subsection 5(1)(a)(iv), above, introduces a practical consideration of proportionality.²⁶ An example of a practical application of proportionality might be a hairline crack in a roof deck, which may or may not grow into a problem that warrants commencing a law suit. The owner is not required to commence a proceeding to protect its legal rights until the damage ceases to be trivial.

The court is now required to presume that a person with a claim knew of the act or omission giving rise to the claim, on the day on which the act or omission took place.²⁷ The onus is on the claimant who learns of its claim more than two years after the act or omission occurs to convince the court that the act or omission was not discoverable until some later date.²⁸

Section 15 of the *Limitations Act* also introduces an ultimate limitation period of 15 years, running from the day the act or omission, on which the claim is based, takes place. No proceeding can be commenced once the ultimate limitation period has run, irrespective of when the claim was discovered.

A full discussion of exceptions to the Act's basic framework is outside of the scope of this paper. However, some circumstances that delay, interrupt or re-start the running of time should be noted:

1. *Parties under a Legal Disability* – Limitation period does not run against minors²⁹ or incapable persons³⁰ who are not represented by a litigation guardian.

²⁶ Graeme Mew, *When Does Time Start to Run? When Does Time Run Out? When Does the Clock Stop Running?* LSUC CLE Conference, *The Limitations Act, 2002: Understand the New Rules Before Time Runs Out*, held June 11, 2003.

²⁷ Pursuant to s. 5(1)(b), *supra* note 24.

²⁸ Based on the four criteria specified in subsection 5(1)(a). *Supra* note 24.

²⁹ *Supra* note 24. See s. 6.

³⁰ For example those persons who are mentally disabled, or found incompetent. See s. 7, *supra* note 24,

2. *Attempted Resolution* - the running of time is suspended during the time that the parties have agreed to submit the resolution of their dispute to an independent third party.³¹ If the Alternative Dispute Resolution initiative is unsuccessful, the time resumes to run when the dispute resolution is terminated or a party terminates or withdraws from the agreement.
3. *Acknowledgments* - acknowledgments of liability in writing restart the clock.³²
4. *Concealment* - the ultimate limitation period is suspended during any time in which the person against whom the claim is made, (i) willfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or (ii) willfully misleads the person with the claim as to the appropriateness of a proceeding as means of remedying the injury loss or damage.³³
5. *Environmental Claims* - there is no limitation period with respect to an environmental claim that has not been discovered.³⁴ “Environmental claim” is defined as a “a claim based on an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect”. In practice, this section means that the ultimate limitation period will not extinguish an undiscovered environmental claim. However, the basic two year limitation period will apply once an environmental claim has been discovered.

The new limitations legislation is of particular interest to all parties involved with the manufacture, design, and construction of roofs, as a newly built roof is expected to have a useful life expectancy which exceeds the ultimate limitation period specified in the *Limitations Act*. This places an added pressure on the owners of the building to inspect and maintain their roof, and to take all the necessary steps to preserve their legal rights and remedies before the ultimate limitation period runs out.

³¹ *Supra* note 24. See s. 11.

³² *Supra* note 24. See s. 13.

³³ *Supra* note 24. See s. 15(4)(c).

³⁴ *Supra* note 24. See s. 17.

Standard of Care in roof design and detailing:

It is fairly obvious that a designer has a general obligation to comply with industry standards and building codes when designing the various components of a building. It is now clear, however, that when a designer deviates from expected or prescribed practices, in a design, that designer assumes a greater risk of liability if the component should fail. At the very least, the designer should be prepared to be called upon to justify the deviation.

This issue has been raised in the context of the failure of two flat warehouse roofs where the roof design incorporated phenolic foam insulation without a vapour barrier³⁵. The owner of the warehouses sued the roofing contractor and the insulation manufacturer. What was interesting in that case was that the owner was responsible for design and specifications.

The court established in that case that while many warehouses in Ontario did not incorporate a vapour barrier in the roof assembly, the professional literature, industry publications, building code and other evidence made it clear that, at the time of design, building designers were required to analyze whether a vapour barrier was necessary. It was found that the designer had ignored the available building science methods which would have indicated the necessity of the vapour barrier.

The owner failed to lead any evidence of anyone involved in the design of the roof, to explain why a vapour barrier was not included. Ferrier, J. of the Ontario Superior Court of Justice made the following observation, which was quoted with approval by the Court of Appeal:

No one involved in the design of these buildings was called as a witness by the Plaintiff, yet the Plaintiff utilized the services of its own architects and professional engineers in the design of these buildings. Consequently, counsel were left with limited opportunity to cross-examine the Plaintiff's witnesses about Orlando's design decision to omit a vapour barrier.

Orlando made a fatal mistake by not calling evidence to prove that it considered, pre-construction, whether a vapour barrier was actually required in the circumstances or not. The trial judge inferred from the lack of evidence respecting why a vapour barrier is omitted, that the

³⁵ *Orlando*, *supra* note 4.

reason was cost savings. The Court of Appeal upheld this reasoning, and found that the failure to design properly led to an appointment of 90% of the damages to Orlando.

The manufacturer of the insulation, in that case, was also found partially negligent (10% of damages) for failing to warn that its product required a vapour barrier. The courts found as a fact that the insulation manufacturer was aware that the owner was not using vapour barriers in its warehouse roof designs, and that the insulation manufacturer was aware, or should have been aware of the corrosive nature of the insulation when exposed to water.

In spite of the court's findings that Orlando had "an independent obligation to assess the need for a vapour barrier and it did not do so", the court held that the insulation manufacturer had an obligation to warn Orlando of the potential danger of not using the insulation product properly, in conjunction with a vapour barrier, and quoted *Hollis v. Dow Corning Corp.*³⁶ in reaching this conclusion:

... a manufacturer of a product has a duty in tort to warn consumers of any dangers inherent in the use of its product of which it has knowledge or ought to have knowledge.

In the view of the court, the insulation manufacturer's knowledge of the inherent corrosive potential of the insulation, combined with its failure to warn, constituted a negligent misrepresentation by omission.

Insurance Claims

When the various parties involved in the design, manufacture, installation, repair and maintenance of roofing systems find themselves embroiled in a claim for damages arising out of a failure of some aspect of the roof envelope, they often turn to their insurers seeking coverage for their defence costs and indemnity.

³⁶ [1995] 4 S.C.R. 634 at 652.

Justice Iacobucci of the Supreme Court of Canada pointed out in *Scalera*³⁷ that although they are related, there is a distinction between an insurer's "duty to defend" (pay the costs of defending the allegations against the insured) and its "duty to indemnify" (payment of amounts owing by the insured pursuant to a court order or a negotiated settlement agreement):

... the duty to defend is contingent upon a finding that the nature of the claim against the insured in the liability action – not the judgment or settlement arising from that action – would, if proven, require the insurer to indemnify. As a result, the duty to defend is decided at the inception of the claim based upon a comparison of pleadings or, if no pleadings are issued, the known facts of the claim as against the policy coverages. The duty to indemnify is the issue which arises after the claim is investigated or investigated and defended or upon settlement or following a trial.

[. . .]

It is sometimes the case that an insurer defends a claim but does not indemnify the insured. This can occur because the claim was proven on a different basis than it was plead and the facts proven failed to place the claim within the coverage of the policy. In this way, the insurer's duty to defend is normally much broader than the duty to indemnify against a judgment or settlement rendered against the insured.

We discuss here the insurer's obligation to defend the insured under the policy.

The insurer will usually have issued a commercial general liability, or "GL," insurance policy. The CGL policy has been developed by the insurance industry over several decades, and contains standard terms relating to coverage.

The insurer, upon receiving written notification of the claim, reviews the claim against the insured's CGL policy and makes a determination of whether the claim falls within coverage for the payment of the insured's defence costs.

Upon making its determination as to coverage, the insurer will notify the insured and advise, in writing, of its decisions. If the insurer agrees to pay for the costs of defending the claim, it may

³⁷ *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000], 1 S.C.R. 551 (Iacobucci J., at p. 581).

choose to retain a lawyer, and assume responsibility for carrying the action or a part of the action.

If the insurer denies coverage, and refuses to defend an insured under a CGL policy, the insured is not bound by the insurer's determination and the insured may apply to the courts for a declaration that the insurer is obligated to defend under the policy, at any time, during or after the litigation of the underlying claim relating to the failed roof.

In determining whether the insurer has an obligation to cover the insured's defence costs, the court will typically look to the pleadings in the underlying litigation.

The insurer's duty to defend was set out by the Supreme Court of Canada in *Nichols v. American Home Assurance Co.*³⁸:

... the duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in an insurance contract. Courts have frequently stated that "the pleadings govern the duty to defend"...

... At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices. In this sense, as noted earlier, the duty to defend is broader than the duty to indemnify.

In its 2001 decision in *Monenco Ltd. v. Commonwealth Insurance Co.*³⁹, the Supreme Court of Canada clarified its findings in *Scalera*, as follows:

...*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". 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. (at para. 84).

³⁸ [1990], 1 S.C.R. 801 at 810. (McLachlin J. at pp. 809-810) See also *Cooper et al. v. Farmers Mutual Insurance Company* (2002), 59 O.R. (3d) 517 (C.A., Cronk J.A. at p. 422, para. 15).

³⁹ [2001] 2 S.C.R. 699.

Occasionally the pleadings are vague and provide little guidance as to the facts that will be adduced or can be adduced to prove the cause of action alleged. If procedural steps such as an application for particulars does not cure the vagueness, then the insured will be given the benefit of the doubt as to whether the pleadings suggest a claim that falls within the coverage of the policy. Where there is doubt as to whether pleaded allegations fall within coverage the uncertainty must be resolved in favour of the policyholder.⁴⁰

The court will give the widest possible latitude to pleadings in determining whether they raise a claim within the policy. It is not an issue of whether allegations will be substantiated at trial. For the purposes of determining whether there is a duty to defend, a Court looks at whether there is a possibility that the claim may fall within the Policy.

The standard CGL provisions relevant to cover for indemnity and defense costs are the following:

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. INSURING AGREEMENT

a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of “bodily injury” or “property damage” to which this insurance applies. No other obligation or liability to pay sums 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”. We will have the right and duty to defend any “action” seeking those damages but:

- 1) The amount we will pay for compensatory damages is limited as described in SECTION III – LIMITS OF INSURANCE;
- 2) We may investigate and settle any claim or “action” at our discretion; and
- 3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payments of judgments or settlements under Coverages A, B or D or medical expenses under coverage C.

⁴⁰ *Slough Estates Canada Ltd. V. Federal Pioneer Limited* (1995) 20 O.R. (3d) 429 (Gen. Div.) and *Amherst (Town) v. Coronation Insurance Co.* (1995), 27 C.C.L.I. (2d) 144.

- b. Compensatory damages because of “bodily injury” include compensatory damages claimed by any person or organization for care loss of services or death resulting at any time from the “bodily injury”.
- c. “Property damage” that is loss of use of tangible property that is not physically injured shall be deemed to occur at the time of the “occurrence” that caused it.

The CGL policy also contains a number of standard exclusions. When determining an insurer’s duty to defend, standard exclusions 2(h)(i) and (j) will be considered by the court:

2. EXCLUSIONS

This insurance does not apply to :

[...] h. “Property damage to:

[...] 5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the “property damage” arises out of those operations; or

6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

[...]

Paragraph 6) of this exclusion does not apply to property damage included in the “products-completed operations hazard”.

- h. “Property damage” to “your product” arising out of it or any part of it.
- i. “Property damage to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

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.

These clauses are commonly referred to as “business risk exclusions” and are premised on the theory that liability policies are not intended to provide protection against the insured’s own faulty workmanship or product, but to afford coverage for damage to other property caused by the insured’s work or property.⁴¹

Insurers have refused, in the past, to cover claims made against roofing contractors in the past on the basis of the exclusions set out above.

⁴¹ *Bothwell Accurate Roofing Limited v. Royal Insurance Co. of Canada* [2001] O.J. 453.

There are two similar, recently decided cases on an insurance coverage issue in favour of insured roofing contractors who installed roofs containing phenolic foam insulation.

The first is the motions court decision of Madame Justice MacFarlane on an insurance coverage issue in favour of the insured in *Bothwell Accurate Roofing Limited v. Royal Insurance Co. of Canada*.

The second is the later trial decision of Justice Ferrier in *Orlando*⁴², arising out of the same factual matrix, and discussed earlier in this paper.

The Plaintiff owner's underlying complaint in each case was the friability of phenolic foam insulation and the corrosivity of the resulting leachate, and its effects on metal roof components, and the resulting cost of early replacement of the entire roof.

The factual matrix underlying the cases is relevant to the decisions of the courts. In each case:

- The metal roof components were installed by someone other than the insured roofing contractor.
- The materials complained of were specified by the owner.
- The insurer argued that defense costs cover should be limited to the proportion of the claims made by the owner that are insured.
- The damages claimed by the owner were for the entire replacement of the roof.
- It was clear that workmanship was not a possible cause of loss.

One point on which the courts relied in finding that the insurer was obligated to cover defense costs, in both cases, was that parts of the building *other than* those installed by the insured had suffered damage. In the instant cases, the steel roof deck installed beneath the roofing system experienced corrosion due to the leachate created when the phenolic insulation was exposed to water over time.

The insurer asserted that because the roofing membrane, insulation, fasteners, and other elements were installed by the insured, and constituted the insured's "work" or "product". The insurer asserted that those items were therefore excluded from coverage, as were the costs of removal

⁴² *Supra* note 4.

and replacement of those items. The insurer went on to take the position that it was not obligated to pay the costs of defending any claims with respect to the cost of removal and replacement of the insured's "work" or "product".

Ultimately, the insurer's position was that it was responsible for only a proportion of defence costs, and that the proportion was equal to the proportionate cost of repairing the steel deck, compared with the cost of the overall repair.

The court disagreed with this position, and found that the insurer was liable for the costs of the insured's defence, without apportionment between "insured" and "uninsured" allegations.

It was been decided in an earlier case, *Daher v. Economical Mutual Insurance Company*⁴³, that defence costs should not be allocated according to the ratio the covered portion of the claim bears to the total claim. Such a result mixes the two competing obligations of an insurer which are its obligation to defend and its obligation to indemnify. Only if there are discrete claims, with multiple causes of action is it possible to decide costs of defending among various causes of action.

Other cases involving the claims of roofers against their insurance companies, seeking reimbursement of defence costs, are currently before the courts. Hopefully, a body of law will develop that will be persuasive to insurers when analyzing their obligations after receiving such claims.

Roof Warranties

A warranty is a written promise that a product is what it is claimed to be and that the manufacturer will take responsibility for repairing or replacing it if it proves to be defective. In the case of a roofing system, warranties may be provided to an owner for the roofing membrane, the roof insulation, or for the roofing system as a whole.

⁴³ (1996), 31. O.R. (3d) 474 (C.A.) (Rosenberg J.A. at 478).

The scope of the warranty is driven by the party that provides it. Manufacturers typically only warrant against defects in their own products. Roofing contractors usually provide warranties for the entire roofing system.

A roof system warranty is usually subject to several conditions. Common examples of conditions include:

6. the owner must notify the roofing contractor, immediately and in writing, if a leak should occur during the warranty period;
7. the roofing contractor is entitled to a reasonable period of time to effect any necessary repairs, and is only required to make repairs during regular business hours;
8. the owner must have made full payment to the roofing contractor for the warranty to be of full force and effect;
9. that the warranty is void if any alterations are made to the roof by way of building additions; and,
10. that the warranty is void if the building is used for purposes other than what was intended when the roof was installed, without prior written approval of the party issuing the warranty.

In the *Orlando* case, *supra*, the insulation manufacturer provided a warranty that was subject to terms and conditions that were a veritable catalogue of extensive and virtually complete exclusions of liability⁴⁴:

Domtar shall not be liable for any claim for damages based on negligence, strict liability or any other theory of liability. Proof of defects must be established by the owner; and

⁴⁴ Orlando, *supra* at paras. 341 to 343.

No representative, agent or distributor of Domtar has any authority to change, add to or delete from the provisions of this warranty, or to make any representations other than those expressly stated in this warranty.

In addition the warranty expressly excluded coverage to the plaintiff for:

Damage attributed to improper drainage (standing water), water entry or condensation of moisture within, through or around ceilings, walls, copings, building structure or the underlying or surrounding areas.

The trial judge reviewed Domtar's warranty and stated that "the so-called warranty is not a warranty at all, but rather, a catalogue of exclusions of liability"⁴⁵. The court took a negative view of Domtar's use of its warranty as a tool to limit its liability, after the fact.

There is no evidence that Orlando accepted these terms in reference to the Cooper roof and the terms were not delivered in reference to Coast until the Coast Building had been completed – that is to say, after the fact. There is similarly no evidence that Orlando agreed to these terms in reference to Coast. Nor is there evidence from which such agreement can be inferred, notwithstanding the argument of the defendant to the contrary.

Essentially, the Court would not allow "conditions" prepared by one party to a contract to supercede the contractual assumption of liability that both parties agreed to.

Some industry associations prepare standard forms of warranty for use by their members. The Ontario Industrial Roofing Contractors' Association is an organization that provides its members with a standard form of warranty. Two of the conditions set out therein are of interest:

(b) Neither this warranty nor the contract for the installation of the roof shall render the Company liable in any way for any damage to the above described building or to any contents thereof, or for any interruption of business resulting therefrom. Acceptance of this warranty by the Owner shall constitute conclusive evidence that he does not and will not hold the Company liable for any damage to the said building or any contents thereto, notwithstanding anything to the contrary contained in any agreement, written or oral, for the installation of the roof.

⁴⁵ Orlando, supra at para. 345.

- (c) No responsibility or liability is assumed in respect of repairs made necessary by: gale, hurricane, tornado, hail storm, lightning, or other phenomena of the elements or other hazards which may cause damage to the exterior, interior or contents of the said building or structure; inadequate design or specification; water vapour or moisture migration through or from the roof deck; failure of any materials used as a roof base or deck, or roof insulation over which said roof has been applied; settling of the building or distortion or failure of the building's foundations, walls, copings, or roof deck; failure of any components or appurtenances used in the roof system; nor damage to said roof and flashings caused during or after the application thereof by persons working or being on or about said roof.

These recommended "conditions" raise some of the same limitations that the court held were invalid in *Orlando*. Roofing contractors and manufacturers might be wise to review the warranties they are currently using, in light of these considerations. It is still possible and advisable for the warranty giver to limit its *exposure* to liability, through the use of conditions, that put a positive obligation on the owner. For example, a warranty might be made conditional on the owner:

1. following a prescribed maintenance program;
2. performing its own regular (semi-annual) visual roof inspections;
3. having a qualified roofing consultant perform an inspection at regular intervals (the warranty could even specify the use of specific techniques, such as thermography); and/or,
4. agreeing to enter into an agreement with the roofing contractor for the provision of maintenance services for the duration of the warranty.

These obligations on the owner would reduce the risk of the warranty-giver being called upon in the future, to defend claims for the cost of replacing a roof which might have been sufficient, if properly maintained, without altering the terms of the original contract for the installation of the roof.

In reviewing these six aspects of the law as it relates to roofing, it becomes clear that it is difficult, if not impossible, to contract out of liability entirely. What is possible however, is to take a reasoned approach to protecting your interests, no matter what role you play in roofing.