War isn't over…

The Court of Appeal considered the proximate cause test and whether there were concurrent proximate causes, in the context of a property insurance policy exclusion for loss 'occasioned by war'

The Court of Appeal Judgment in ***University of Exeter v Allianz Insurance Plc*** **[2023] EWCA Civ 1484** (see this link), discussed causation in the context of an 'occasioned by war' exclusion. Property damage to University halls of residence and losses associated with temporarily re-housing students arose after the controlled detonation of an unexploded bomb that had been dropped during WWII.

This Appeal Judgment provides a useful review of the guidance on concurrent proximate causes in the Supreme Court case of ***FCA v Arch*** **[2021] UK SC 1** ("***Arch***"), and the ***Wayne Tank*** rule.

Background

In 1942, Exeter, like many other cities, suffered a series of bombing raids. One bomb fell on what was then farmland, but did not explode. After the war, the city expanded and by 2021, the University of Exeter ("the University") had established student halls of residence in the vicinity of the site of the 1,000kg bomb, when it was unearthed during construction work.

The discovery of the bomb led to a professional Explosive Ordinance Disposal team (the "Disposal Team") being appointed, who concluded that given the condition of the unexploded bomb (due to age, rusting and uncertainty as to whether it was booby-trapped), it should be detonated on site, using the so-called 'Low Order Technique'. Although the Disposal Team had hoped this could be done safely, unintentionally it caused physical damage to the University's nearby student halls of residence, which had been evacuated as they were within the cordoned area.

The Disposal Team had also considered another method that would have involved the explosives being steamed out (the "ACE method"). However, this was *"temporarily removed from service due to a lack of contractor safety inspections".* There was no criticism of the Disposal Team's actions, and their decision to detonate the bomb on site.

The Claim

Following the incident, the University made a claim against its property insurers. The insurance claim was declined on the basis that the loss fell within the scope of the policy's war exclusion. This excluded *"loss, destruction, damage, death, injury, disablement or liability or any consequential loss occasioned by war, invasion, acts of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power*." (emphasis added)

The University did not accept that events dating back eight decades were the proximate cause of the damage, primarily arguing the more potent cause was the events that unfolded at the time of detonation.

High Court Judgment

The parties had agreed that:

1. the phrase *"occasioned by"* gives rise to the proximate cause test. (In view of this, it was irrelevant that the exclusion did not refer to damages *directly or indirectly caused by*);

2. the dropping of the bomb was an act of war. (This meant that the exclusion would apply unless the University could show that the dropping of the bomb was not *the* proximate cause, or *a* concurrent proximate cause); and

3. the mere fact that the detonation of the bomb occurred after the end of the war in which it was dropped, did not automatically rule out the operation of the war exclusion.

In the High Court, Judge Bird stated that whether a loss is caused by an insured peril is a question of interpretation of the contract of insurance and he decided that although the explosion was triggered by the decision to detonate the bomb, that decision had been necessitated by the presence of the bomb. Had the bomb not been at the site, there would have been no explosion. Since the bomb had provided both the explosive payload and the need for the detonation, the Judge concluded that the dropping of the bomb was the *"obvious proximate cause of the damage".* The *"occasioned by war"* exclusion therefore applied and no payment was due from insurers.

The High Court also addressed whether the dropping of the bomb was a concurrent cause that in combination with the detonation, caused the loss. The Judge rejected the University's argument that the passing of time was relevant to the analysis, as this did not impact on the potency of the bomb. Even if the dropping of the bomb was not ***the*** proximate cause of the damage, the dropping was at least ***a*** proximate cause. Therefore, on this alternative argument, following the ***Wayne Tank*** principle on concurrent proximate causes, the war exclusion would apply and the claim could be rejected by the insurer. There was nothing in the policy (even the phrase "*regardless of any other cause or event contributing concurrently or in any other sequence"* in the terrorism act and cyber event parts) to indicate the parties disapplied the concurrent proximate causes rule when interpreting the war exclusion.

Appeal Judgment

In the Court of Appeal, Judge Coulson gave the leading Judgment, focussing first on the proper interpretation of the war exclusion. The Court of Appeal unanimously decided that this was a classic case where there were two concurrent proximate causes of approximately equal efficacy.

The combination of the dropping of the bomb and its controlled detonation almost 80 years later *"made the loss inevitable, or at least in the ordinary course of events. Neither would have caused the loss without the other"*. As one of the concurrent causes was expressly excluded from cover under the policy, the rule in ***Wayne Tank and Pump v Employers Liability Assurance Corp. [1974] QB 57***, which was referred to in ***Arch*** at para. 174 applied (where there are concurrent causes of approximately equal efficacy, and one is an insured peril and the other is excluded by the policy, the

exclusion will usually prevail). The University, on Appeal, did not assert that the ***Wayne Tank*** rule did not apply.

The University, on Appeal, argued that Judge Bird had failed to take into account the likely intent of the parties in interpreting the war exclusion. Firstly, the University asserted that it was significant that the relevant exclusion – in contrast to other parts of the policy - did not exclude losses "*directly or indirectly caused*" by war etc. This, the University said, meant that the intention of the parties had been for the war exclusion to concern direct causes only. In this case, they said, the direct cause of the relevant damage was the detonation. Secondly, the University argued it was implausible that the parties had intended for the war exclusion to apply to *"long-ended historic wars".*

Judge Coulson conceded that there was some superficial force to those arguments, but decided that taking into account the above three agreed points, there was no substantial disagreement as to the interpretation of the war exclusion and the Court of Appeal unanimously decided in favour of the insurer.

From a causation perspective, Judge Coulson stated, the discovery of an unexploded bomb would necessitate a number of decisions in how to make the bomb safe. However, the decision(s) that would inevitably have to be made cannot have any relevance to causation, unless something was done which broke the chain of causation (for example, an act of negligence). As explained above, the Disposal Team had not been criticised.

On Appeal, the University had asserted that Judge Bird had failed to apply the **inevitability principle** correctly when considering causation. Pointing out the number of alternative outcomes, ranging from the bomb exploding on impact or it having been disposed of at any point during the subsequent 80 years, the University said the loss to buildings had not been made inevitable *"in the ordinary course of events"* as a result of the bomb being dropped. In other words, damages to the buildings could not be said to have flowed "*inexorably and in the ordinary course of events from the dropping of the bomb alone."* This point was, however, rejected. The Court of Appeal regarded Judge Bird as having been right to find that it was the **combination** of the dropping and the detonation of the bomb that made the damage inevitable, or at least in the ordinary course of events.

As the dropping of the bomb was regarded by the Court of Appeal as a concurrent proximate cause, and a cause that was excluded, the Appeal by the University was unsuccessful.

Judge Coulson noted in the Court of Appeal Judgment, potential issues which might have arisen between the parties, but which did not. For example, he mentioned the question as to whether the word *"war"* could mean a war that had ended at the time the buildings were erected and the policy cover started; or whether the damage was not caused by a *"war-like desire to damage and destroy*", but rather from a controlled explosion.

CPB Comments

The Court of Appeal Judgment usefully refers to the Supreme Court guidance and case analysis in ***Arch*** on the assessment of causation where there could be more than one cause. On the WWII bomb detonation facts, the Court of Appeal Judgment makes it clear that the passage of time is of

little relevance to this assessment, when this does not diminish the underlying potency for causing damage.

Assessment of causation on each given set of facts is not to be an *"unguided gut feeling"*; some care is needed. While common sense principles should prevail when assessing the proximate (also referred to as *"efficient"*) cause of the loss, it is important to bear in mind that the proximate cause is not necessarily the most recent in time to the loss, but on the facts could often be the first in time. Therefore, more nuance applies when considering causation issues and applying the principles and rules to each particular set of facts. It is also clear from the Judgment that the parties' agreements on key aspects of interpretation, such as the University's agreement that the dropping of the bomb was an act of war, was important to the outcome.

Although the Court did not provide a view on the outcome of an argument that historic wars would not qualify as *"war"* for the purpose of the wording of the insurance policy, it is unusual for the Court to highlight such issues at its own volition. The door is open for policyholders to pursue claims based on such arguments on similar facts in the future. Although damages of this specific nature are rare, unexploded bombs will remain present across the nation, both on and offshore, and it is feasible that similar damages could occur again.

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Any questions

If you have any questions regarding the issues highlighted in this article, please get in touch with Helen or Lisbeth.

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