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THE DISTINCTION BETWEEN ONE AND MORE THAN ONE INSURED EVENT

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Innholdsfortegnelse

The distinction between one and more than one insured event

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1. Introduction

1.1 The problem

The subject of this article is the distinction between one and more than one insured event under a casualty insurance contract. The "insured event" is the accident or happening that triggers the insurer's liability. In Norwegian terminology the term "forsikringstilfelle" is normally used. This concept is directly synonymous with the "insured event". In marine insurance, the concept of a "casualty" is normally used. The similar Anglo-American expression is "occurrence" or "accident".

Casualty insurance means insurance covering damage to, or loss of, material goods, loss of income, liability or incurred expenses, or other insurance that is not connected to life, personal accidents or illness.[1] This means that insurance connected to life, personal accidents or illness is not included in the article. On the other hand, casualty insurance includes both dry insurance, i.e. insurance covering material property and activity on land, and marine insurance, which broadly speaking is insurance connected to ships, offshore installations and the transport of goods.[2] Further, as the distinction between one and more than one insured event is relevant both to direct insurance and

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[1] See definition in Insurance Contracts Act 69/1989 (ICA) § 1-1 second subparagraph.

to reinsurance, both these kinds of insurance will be discussed. Reinsurance is insurance effected by a direct insurer to protect against losses on direct insurance contracts.

The problem concerning the distinction between one and more than one insured event is not a new one and has been discussed in Norwegian legal theory and practice for many years. However, the discussion gained international attention after the attack on the two towers in New York on 11 September 2001.[3] As the buildings were insured with only one sum insured per occurrence, the owners' right to compensation depends on whether the attacks constituted one occurrence, which would imply that one sum insured was triggered, or two occurrences, implying the triggering of two sums. The purpose of this article is not to provide an answer to that particular dispute, but merely to discuss the problem from a more general perspective, and to try to analyze the different elements of the problem and how it is solved in different legal systems.

The starting point for the discussion in this article is Norwegian law. However, as mentioned, both dry insurance and marine insurance will be examined. The reason for this is that the relevant clauses are fairly similar in dry insurance and marine insurance. A discussion including legal sources from both dry insurance and marine insurance will therefore give a broader picture than limiting the discussion to one area. At the same time, the distinction between one and more than one insured event has been analyzed in recent years in relation to the work on the Norwegian Marine Insurance Plan.[4] Parts of this discussion may be relevant also to the parallel problem in dry insurance.

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2 Bull: *Sjøforsikringsrett*, Oslo 1980, pp. 11-12.

3 Resulting in a lawsuit filed last October by Swiss Re against Silverstein Properties, Inc., the leaseholder of the World Trade Center in New York. In addition to Silverstein Properties, other entities – Massport, the Port Authority of New York and New Jersey, and the security firm for Boston Logan Airport – may face this question as well, see Jeannine Chanes and Mary Daniels, *One Occurrence or Two: How the Courts Decide*.

4 As defined below in item 2.

However, I will also look into English and American law. The aim here is partly to illustrate the international aspect of the problem, and partly to see if Anglo-American law can shed further light on the discussion in Norway. Anglo-American law is particularly relevant as the reinsurance market is international and is often based on English contracts. It may therefore be valuable to look into how the concept of each occurrence is treated by these systems compared with the Norwegian system in order to avoid differences in interpretation.

One interesting aspect concerning reinsurance contracts is that there is very little legal material concerning this issue for such contracts. The explanation for this may be that litigation under reinsurance contracts was very rare until recent disasters.[5] However, during the 1990s, several court cases in the UK concern the distinction between one and more than one insured event under reinsurance contracts. These cases illustrate both the complexity of this distinction and the problems that may arise if the insurers are not careful how they draft the reinsurance contracts.

1.2 The significance of the distinction

The distinction between one and more than one insured event as addressed here is relevant in relation to the economic division of risk between the assured[6] and the direct insurer,[7] and between the direct insurer and the reinsurer.[8] For direct insurance contracts, one may distinguish between two separate problems. One problem is where the assured carries a retained risk in the form of a deductible for each insured event. A deductible is a defined amount of money to be carried by the assured, i.e. to be deducted from the insurer's liability. Both Norwegian marine insurance and dry

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5 *Axa Reinsurance (U.K.) PLC. v. Field*, Lloyd's Law Reports 2 (1996) 233 at p. 239.

6 The claimant under an insurance policy, see ICA § 1-2 letter (c). Norwegian insurance law distinguishes between the assured and the person effecting the insurance, see ICA § 1-2 letter (b). However, this distinction is not relevant in relation to the problems discussed here.

7 The company offering direct insurance cover, see ICA § 1-2 letter (a) ref § 1-1 fourth subparagraph.

insurance contracts normally contain a deductible clause. A deductible for each insured event may, however, contain an annual aggregated limit, stating that when the aggregated amount is reached, no more deductibles shall be carried by the insured. If so, the distinction between one and more than one insured event is no longer relevant once the aggregated amount is reached.

The second problem is where the direct insurance contains an insured sum or a limit that is connected to the insured event, i.e. each insured event triggers a new sum insured. If the losses resulting from a series of incidents of damage exceed the sum insured, the assured will obtain coverage in full only if the series constitutes more than one insured event. A sum insured for each insured event may be combined with a sum insured for the whole insurance period. If so, the distinction between one and more than one insured event is not relevant once the sum insured for the whole period is reached; in this situation the insurer will no longer be liable for any further damage.

The problems are fairly similar for the reinsurance situation, even if the economic sharing of the risk is organized differently in these situations. If the reinsurance is pro rata or proportional, the direct insurer reinsures a certain percentage of the risk inherent in the direct insurance.[9] If so, the direct insurer's retention is defined as a percentage of the claim, which implies that the distinction between two or more insured events is not relevant in this respect. On the other hand, if the reinsurance is defined as excess-of-loss reinsurance or non-proportional reinsurance, the reinsurer will be liable up to a defined limit above a defined underlying amount. In this instance, the reinsurance is triggered once the excess-of-loss amount is exceeded, i.e. the excess-of-loss amount functions as the retained risk for the direct insurer.[10] Also, both proportional and excess of loss reinsurance normally contain a limit or sum insured for each event. This implies that the total coverage for any given risk may be divided between the assured, the direct insurer, and the reinsurers in several layers. If the

[8] The company or person effecting reinsurance cover with a direct insurer.
[9] Riley; *The nuts and bolts of reinsurance*, 1997, p. 7.
[10] Riley p. 9. Excess of loss reinsurance can be divided between different layers, but that is of no consequence for the problems discussed in this article.

concept of the insured event differs between the contracts and/or different situations, this may result in certain problems.

The problem concerning the number of insured events in relation to the economic division of risk is closely connected to another problem, namely, where the chain of events leading to damage crosses the insurance period. The result here is that some incidents of damage occur within the insurance period, and some occur outside this period. If different insurers are covering the two insurance periods, or coverage is effected under different conditions, the distinction between one and more than one insured event will also determine under what conditions the damage will be covered. It may also happen that the chain of events started or ended in a period where there was no insurance coverage whatsoever. If so, the distinction between the number of insured events will determine whether the damage shall be covered by the insurance or paid by the assured. It is not the purpose of this article to discuss this related problem in full. However, as the causative questions are closely related, and as the Norwegian legal sources imply that the solutions may be parallel, this problem will be touched on in the discussion.

2. The legal sources

In Norway, the insurance contract is regulated by the Insurance Contracts Act 69/1989 (ICA). This act is, as a starting point, mandatory for all insurance contracts.[11] However, the ICA contains no provisions that are relevant to the distinction between one and more than one insured event. This implies that the starting point for the discussion is the wording of the clauses, and also that the assured and the insurer are free to regulate this issue in any way they wish in the insurance contract.

[11] ICA § 1-3.

In dry insurance, each company writes its own contracts. However, the wording of the clauses concerning deductibles and the sums insured is fairly similar. Normally, the deductible and the sum insured are connected to the "insured event" ("forsikringstilfellet") or to the "settlement" ("erstatningsoppgjøret").[12] In liability insurance, but not in insurance for material loss or damage, it is also common to include a serial damage clause. The language in these clauses may vary slightly, but the chief content seems to be the same. It is therefore not necessary to refer to any specific contract in this context. However, when it is necessary to illustrate the discussion, examples of clauses will be given.

Marine insurance, on the other hand, is mostly regulated by agreed documents. An agreed document is a standard contract that is constructed by representatives of all interested parties. In Norway, there has been a long tradition for marine insurance contracts to be constructed by broad committees consisting of representatives of both the insurers, the assureds, other interested groups, and also of the Scandinavian Institute of Maritime Law to lead the negotiations and to assist in the writing of the clauses etc. Today, insurance relating to ships is regulated by the Norwegian Marine Insurance Plan of 1996 (NMIP), which contains conditions for all kinds of insurance relating to ships except P&I insurance. The version today is the 2003 version. The NMIP is supplemented by comprehensive commentaries in the Commentary to the Norwegian Marine Insurance Plan. This Commentary has been written by the parties participating in the construction of the Plan, and is intended by the parties to be part of the negotiations and the compromises leading to the provisions in the Plan. The Commentary Version 2003 is on the Internet, but unfortunately not published. References here to the Commentary will therefore be to the last published version, which is the 2002 version.

Cargo insurance is regulated by Conditions for the Transport of Cargo of 1995, CEFOR form Nr. 252A (CC). Similarly to the NMIP, the CC is supplemented by

[12] Wilhelmsen; *Egenrisiko i skadeforsikring*, 1989 (Wilhelmsen), p. 108 ff., Selmer: *Forsikringsrett*, 1982 (Selmer), pp. 275-279.

Commentaries, although these are far less extensive than the Commentaries to the NMIP.

As for other legal sources, we unfortunately have very limited court practice concerning this issue. There are no Supreme Court decisions concerning the interpretation of the Norwegian insurance conditions on this point, and there is, to my knowledge, only one decision from the Appeal Court concerning this problem. In addition, we have an old arbitration case concerning liability insurance. On the other hand, there are several cases from the Insurance Claims Board (FSN), a board consisting of members from the insurance community and representatives of the assured, and headed by a judge.[13] There is also one case from the Norwegian Supreme Court, ND 1974.103 *Sunvictor* concerning the interpretation of an American deductible clause. As a starting point, this case is less important as a legal source for the interpretation of the Norwegian clauses. However, the result from the *Sunvictor* case is incorporated in the interpretation of each casualty in the Commentary to the NMIP, and the case is therefore given relevance through the Commentaries to the Plan. The same holds for several other Supreme Court decisions concerning related problems that are referred to in the Plan. These cases will therefore be referred to in the discussion.

Even if all the legal sources are relevant to the discussion, the relevance and weight of the different sources will vary depending on the kind of insurance the dispute concerns. The starting point for the interpretation is, of course, the language in the disputed clause. In dry insurance, one will focus on the court material concerning dry insurance and FSN practice. In marine insurance, on the other hand, the most important sources are be the Commentary to the NMIP and the NCC, and the court material referred to in these Commentaries. As the discussion in this paper is general, the sources will reflect a general perspective, and will not be related to any particular dispute.

[13] The FSN makes decisions in disputes between the assureds and the insurers. The board's decisions are not binding upon the parties, but are mostly followed.

However, it is reasonable to distinguish between marine insurance and dry insurance in the presentation, as these have developed in different ways. The Commentary to the NMIP contains a systematic approach to the problems referring to the relevant legal sources existing at the time, including theoretical research from a doctoral paper and a handbook. The Commentary therefore sums up the legal situation in the marine insurance sector. In dry insurance, the legal sources are mostly of a more recent date and, also, are less systematic as they consist of several cases without any theoretical discussion. It is therefore of interest to analyze how the legal sources in dry insurance conform to marine insurance.

In respect of the UK position, the legal sources consist of a fairly limited number of court decisions. On the other hand, there are several cases from the US. However, as the number of occurrences in the US is decided by State law and not Federal law, and different states have adopted different approaches, it is outside the scope of this article to include a comprehensive picture of the US regulations. Discussion will be limited to a selected number of examples.[14]

3. Policy considerations

The policy considerations behind the use of deductibles is discussed both in the Commentary to the NMIP[15] and in the theory.[16] One important reason to include a deductible in a policy is to obtain cost-efficient insurance coverage. Insurance is a costly means for financing risk because, in addition to the expected damage, the assured will have to pay for the insurer's administration and overhead, safety funding

[14] As most of the cases from the US and the UK are downloaded from the Internet, references to pages will normally not be provided.
[15] Commentary Norwegian Marine Insurance Plan, 1996, Version 2002 (Commentary NMIP) Part II and III pp. 75-79 concerning § 12-18, and Part I pp. 167-171 concerning § 4-18.
[16] Wilhelmsen p. 48 ff. and p. 374 ff.

and surplus. In general, it is estimated that 70 % of the premium relates to expected damage and 30 % to overhead etc. For incidents of damage below a certain level where the assured is able to pay for the damage out of his own budget, without the need of external financing, it is, therefore, in general, more economic that insurance is not triggered. [17]

This economic argument, however, simply supports the view that damage below a certain level should not be covered. However, this is not a good solution, because it may induce the assured to avoid measures to reduce damage in order to obtain payment in full. This is a moral risk that the insurer, of course, wants to avoid.[18] Also, as deductibles reduce the overall payments from the insurer, the result will be a general reduction in premiums for the benefit of the assured. It is further presumed that a deductible has a deterrence effect.[19] If any damage is fully compensated by the insurer, this may induce the assured to be less careful than he would have been if he had to pay for the damage himself.

On the other hand, as the purpose of insurance is to finance risk for the assured, it is important that the deductible should not be so large or be paid so often that this purpose is defeated.[20]

The policy considerations behind the sum insured are less discussed. As a starting point, the sum insured is the amount that the assured chooses to insure, and the basis for the calculation of the premium. The object of the assured in this regard is, of course, to be fully covered when damage strikes. Further, the sum insured functions as a limit on the insurer's liability for each insured event, thus making future potential liability foreseeable. In respect of serial-damage clauses in liability insurance, it is also

[17] See for a more economic discussion of this point Wilhelmsen p. 384 ff., and references in notes 15-19.
[18] Wilhelmsen p. 57.
[19] Commentary NMIP Part I p. 170, Wilhelmsen pp. 53-54.
[20] Wilhelmsen pp. 57-60.

stated that the purpose of the clauses is to limit the insurer's liability to one sum insured if one instance of negligence results in a whole series of incidents of damage.[21]

Neither is there much research made on the legal aspects of the division of risk between the direct insurer and the reinsurer, i.e. concerning retained risks in direct insurance contracts, and retained risks and limitations in reinsurance contracts. However, some of the material examined in this article will shed some light on this aspect as well.

4. Some starting points

4.1 Overview of the problems and the discussion

The question to be discussed in this article is, as mentioned, how the concept of each insured event or each casualty shall be interpreted for the purpose of determining the number of deductibles or sums insured. Whether one or more casualties occurred will normally not give rise to problems, as each insured event occurs as a separate and distinct happening. However, when two or more incidents of damage are connected in time, space, cause or intent, it might be more difficult to determine the number of insured events. This is clearly illustrated by a number of situations that have been disputed during recent years. As examples from liability insurance can be mentioned situations where several personal injuries or illnesses have been caused either by the same source of asbestos or by the smoking of tobacco, and claims have been made against the producer of the contaminating substance. From hull insurance for ships, situations can be instanced where an error in design or the like in the cylinder linings from the factory causes them to crack after a certain period of use. And, as already

[21] Lett: *Serieskadeklausuler i ansvarsforsikring*, in NFT 1/92 p. 56, Hornsberg og Lett: *Erhvervs- og produktansvarsforsikring*, Copenhagen 1993, p. 152.

mentioned in respect of fire insurance, the question of whether the two terrorist plane-crashes into two separate buildings was one insured event or two insured events.

The question as to when successive events constitute a single casualty or several casualties is illustrated in three standard scenarios[22]:

1. *One and the same peril materializes several times*. The examples mentioned above are in this group. From dry insurance can also be mentioned the situation where the same person commits a series of thefts from his employer, see FSN 2788. Most of the legal sources discussed in this article concern this situation, thus implying that this is the most common situation.
2. *Damage caused by one event interacts with new circumstances and results in further damage*. By way of example, the steering gear of a ship was damaged in a collision, with the result that the helm was locked in a starboard position. Before the crew was able to stop the engine, a new collision occurred.
3. *One incident of damage requires several repairs*. A typical example is where the initial repairs were inadequately carried out or were not sufficiently thorough, cf. ND 1977.38 NH *Vestfold I* which concerned the question of whether new damage resulting from errors committed during repairs to an engine after the grounding of the vessel were to be regarded as a consequence of the grounding.

All these situations are relevant in relation to the number of deductibles. They are also generally relevant to the number of sums insured and to the limits under liability insurance and reinsurance contracts. The problems are less relevant to insurance for material loss or damage, where the sum insured is related to the insured value. If the insured object sustains several incidents of damage without any intervening repairs, payment of the full sum insured will normally be sufficient to cover the losses. However, if one or more incidents of damage have been repaired before the next

incident occurs, or the sum insured is less than the insured value (for instance, the situation with the two towers in New York), the assured may need to be insured for two sums in order to cover his losses.

Hence, there are three different causation problems to be discussed. However, problem number 3 is a special case under problem number 2, and for this reason these two problems are discussed together. Also, problems numbers 2 and 3, which concern a chain of causation, are discussed before problem number 1. The reason for this is that, based on the wording, it is easier to argue that a causative chain of incidents of damage should be treated together than to demonstrate that several incidents of damage resulting from the same underlying cause shall be regarded as one insured event.

Before these problems are discussed in detail, it is, however, necessary to examine certain general starting points relevant to the questions of causation. First, the significance of the wording used in the clause as a starting point for the interpretation, see item 4.2. Second, the significance of the methods used to define the insured event as a condition for the liability of the insurer, see item 4.3. Third, whether the concept of the insured event is the same in relation to the deductible and to the sum insured, see item 4.4.

4.2 Insured event, settlement and serial damage clause

As has already been mentioned, it is common to link the deductible and the sum insured to each insured event. In dry insurance, it is most common to use the expression "insured event", but sometimes the deductible is connected to "the settlement". In marine insurance, the sum insured and the deductible are connected to

[22] Wilhelmsen, p. 114 ff., Brækhus and Rein, *Håndbok i kaskoforsikring* (Brækhus and Rein), pp. 36-37, Commentary NMIP Part I pp. 169-171 concerning § 4-18.

each separate casualty.[23] The similar expression in Anglo-American policies is often "each separate accident or occurrence". Excess-of-loss reinsurance contracts will normally cover an open or a limited amount above a defined amount for "each occurrence", where the excess-of-loss cover is triggered when the direct insurer has paid the retained risk for "each occurrence". Proportional reinsurance contracts will normally contain a limit for each occurrence.

As a starting point, there seems to be little difference between the wordings "insured event", "casualty" and "accident or occurrence". What may be asked, however, is whether the wording "settlement" implies a different concept. The concept of a "settlement" means the economic calculations and payments made by the insurer to compensate the assured for damage that has been incurred. The "settlement", therefore, is the economic compensation connected with the incurred damage. If there is only one insured event and one settlement, differences in the language have no consequences. However, the situation may be different if two or more insured events are discovered and reported at the same time, or more or less at the same time, and therefore settled at the same time. In this situation, one may argue that there is one settlement but two or more insured events. On the other hand, one insured event may strike different insured objects where there is a separate "settlement" for each object, i.e. one sum insured for the buildings, one for the machinery, and one for the equipment and furniture. Here, one may argue that there is only one insured event, but several settlements, and thus several deductibles.

There seems to be little authority on this question. However, the problem is touched on in FSN 2788:

> In this case a maid committed several thefts of insured property from the same employer during a period of two years. The deductible was connected to the "settlement", and the insurer claimed that one deductible should be applied to each

[23] NMIP § 4-18 (sum insured) and § 12-18 (deductible), NCC § 32 (sum insured). NCC contains no deductible clause.

> theft. The conclusion of the Board was however that only one deductible should be paid. The Board stated that the interpretation of the wording "settlement" was uncertain, but since there was only one "settlement" for all the thefts only one deductible should be applied, even if the thefts could constitute more than one insured event.

Hence the Board opens up the possibility of different interpretations, but does not conclude on this point.

However, policy considerations clearly favour interpreting "settlement" as synonymous with "insured events". Cost efficiency considerations requiring that the assured shall retain the risk for smaller loss that he can easily carry over his own budget should regard each insured event, and not several unconnected incidents of damage. In the latter case, the purpose of the insurance would be severely limited. On the other hand, if several individual incidents of damage were added together, one would lose the deterrent effect of subsequent incidents. Also, the mere coincidence relating to the discovery and the reporting of different insured events, or to the speed with which the insurer makes settlement, can hardly be decisive for the number of deductibles. It is therefore reasonable to interpret "settlement" in this context as the settlement for each "insured event".[24]

The core problem with the expression "each insured event or occurrence" is that it gives very little guidance concerning the solving of the causative problems described above in item 4.1. In the examples given where several personal injuries are caused by the same source of asbestos or the same producer of tobacco, it may be argued from the wording "insured event" that each injury constitutes the insured event, or that the negligence of the insured is the insured event. In the first case, there will be one deductible and one sum insured for each claim; in the latter case, only one deductible will be triggered, but all claims must compete for the one sum insured. The same holds for the case relating to brittleness problems in offshore pipelines. Is it the design failure or the error in workmanship that is the insured event (one deductible/sum

[24] For a more detailed discussion, see Wilhelmsen pp. 108-110.

insured), or each fracture that occurs (several deductibles/sums insured)? The causative chain may also be divided into more steps, for instance, where a producer delivers contaminated food to several restaurants which serve the food to different customers, causing harm to several people who claim damages against the producer's liability insurance. Is the deductible and/or the sum insured under the production liability insurance in this case tied to the production of the contaminated food, to each separate sale, or to each injury?

As a starting point, however, the words "event" or "casualty" imply a happening that can be defined in terms of time and place. It less accords with the normal meaning of this word to say that a condition, an absence of something happening, or an omission is an "event".[25] This suggests that the words "insured event" or "casualty" are narrower concepts than the concept of "cause". Since, on the other hand, the word "insured event" is a broader concept than "loss" or "claim"; it is quite possible to imagine that one insured event or one occurrence can lead to several losses or claims by several injured people.

Liability insurance normally contains a definition of the insured event in the form of a serial damage clause. A typical serial damage clause reads as follows:

> All damage that is caused by the same situation, act or omission leading to liability, or which is caused by a connected series of events (serial damage), shall be treated as one insured event. The insurer's liability for serial damage is limited to the sum insured when the first serial damage occurred.

Similar clauses are often found in Construction All Risk insurance for the offshore sector:

> Definition of occurrence etc:

[25] This reflection is particularly emphasized in two English court decisions interpreting the expression "arising out of one event", see *Axa Reinsurance (U.K.) PLC. v. Field*, Lloyd's Law Reports 2 (1996) 233 and *Caudle v. Sharp* (1995) 2 L.R.L.R 433 (CA), both referred to below in item 7.1.

> The terms "accident", "occurrence" and "event", wherever used herein shall mean an incident or a happening, or a series of incidents, or happenings, or repeated exposure to conditions, which cause physical loss, physical damage or liability covered hereunder during the period of this policy. All such losses emanating from the same incident, or happening, or series of incidents, or happenings, or repeated exposure to substantially the same conditions, existing at, or emanating from one location, shall be deemed one "accident", "occurrence" or "event".[26]

Also, reinsurance contracts normally contain a definition of each occurrence or of each loss, for instance:

> Definition of Each and Every Loss:
> For the purpose of this reinsurance the term "each and every loss" shall be deemed to mean "each and every loss and/or occurrence and/or calamity and/or disaster and/or catastrophe and/or series of any thereof arising out of one event".[27]

When a serial damage clause is incorporated, it is obvious that one cannot treat each incident of damage or each loss as a separate occurrence. If several instances of damage are caused by the same negligent act or omission, or arise out of one "event", these will constitute one insured event. However, the clauses do not give any guidance as to what is the "same negligent act or omission", or when several incidents of damage "arise out of one event".

Serial damage clauses are mainly found in liability insurance, in Construction All Risk insurance for the offshore sector, and in reinsurance contracts. Neither the NMIP nor the NCC contains any such clauses. Neither is it common to incorporate a serial damage clause in dry insurance for material loss or damage, for instance, fire insurance or combined insurance. It is difficult to say whether the reason for this is that the insurer wants a narrower concept of one insured event or if the problems

[26] Visund Field Development art. 20, enclosed in Venger: *Kaskoforsikring av petroleumsinstallasjoner under bygging*, in Marlus no. 233, enclosure p. 8.

discussed here seem to be less important in these kinds of insurance. However, as will be seen below, disputes do arise in these branches also. One question to be asked here is whether the legal sources analyzed imply any difference in the interpretation depending on whether the use of the wording "insured event" is combined with a serial damage clause or not.

4.3 The definition of insured event in relation to liability

In general, three different approaches are used to describe the insured event as the event that triggers the insurer's liability.[28] The approaches focus on different parts of the chain of events leading to the liability of the insurer: the cause, the incident of damage, or some consequence of the damage. The question, then, is whether these differences have any significance for the distinction between one event and several insured events for the purpose of the deductible and of the sum insured.

The first approach is to focus on the cause of the damage rather than on the physical impact that constitutes the damage. This method is used in the NMIP and the NCC:[29]

> The insurer is liable for loss incurred when the interest insured is struck by an insured peril during the insurance period.

This implies that it is sufficient for the peril to "strike" during the insurance period to trigger the liability of the insurer; there is no requirement that the insured object shall be physically damaged. Thus, the starting point is that if physical damage occurs in 2003, but is caused by a peril that struck in 2002, this damage shall be covered by the 2002 insurer. There are some modifications to this rule when the peril is an unknown

[27] Marine cargo and Hull Excess of Loss, Article VI, referred from Riley: *The nuts and bolts of reinsurance*, London 1997, p. 157.
[28] Wilhelmsen: Periodisering av forsikringstilfellet – finnes det en patentløsning, in *Festskrift til Birger Stuevold Lassen*, p. 1077 ff.
[29] NMIP § 2-11 first subparagraph, NCC § 7.

defect or incident of damage,[30] but this is not relevant here. This technique may imply that the concept of "each casualty" referred to in the clauses concerning the deductible and the sum insured is based on the same approach, i.e. that the "casualty" is established once the peril has struck, and that all incidents of damage stemming from the same peril constitute one casualty or insured event.

The second approach is to define the insurer's liability in terms of "incidents of damage" caused by the covered perils. This method is common in dry insurance for material goods. Compared to the "peril-has-struck" principle, this method implies that it is not sufficient that the peril strikes within the insurance period: in addition, the peril must have resulted in a destructive physical impact on the insured object. With this starting point, one may argue that, as there is no liability before physical damage or loss is incurred, the cause or peril causing the damage is not relevant to the concept of an insured event. The implication will then be that each incident of damage is treated separately.

The third approach is to relate the insurer's liability to some defined consequence of the damage or loss. The most practical example in this respect is the "claims-made" principle in liability insurance, where the insurer's liability is triggered when either the injured person has notified the assured about the claim or the assured has given such notification to the insurer. This method of defining the insurer's liability may imply that the insured event is synonymous with the individual claim for compensation. In liability insurance, with no serial damage clause, the claims-made principle may thus result in one deductible and one sum insured for each claim. However, as such liability insurance contracts normally also contain a serial damage clause, the serial damage clause serves to neutralize the claims-made principle in this respect.

[30] NMIP § 2-11 second subparagraph.

Hence, the main question here is whether the difference between the peril-has-struck principle and the damage principle results in a similar difference concerning the interpretation of each insured event.

4.4 The same concept in all relations?

As mentioned above under item 1, the distinction between one and more than one insured event arises in different situations where there are different interests involved. If there is a question of the number of deductibles, the assured will argue for as few insured events, or the broadest possible concept of the insured event, as possible, whereas the insurer will claim that there are as many insured events as there are separate instances of damage. If there is a question of the number of sums insured, the interests of the assured and the insurer will run in opposite directions. Similarly, in a dispute between the direct insurer and the reinsurer, their interests will change depending on what the dispute concerns. Thus, the question is whether the concepts are the same in all situations.[31]

In many cases, the deductible and the sum insured are contained in one clause and related to the insured event or settlement. In these cases, the presumption seems to be that the concepts are the same. The same holds if the deductible and the sum insured are contained in different clauses, but the concepts are tied together in a common definition or in a serial damage clause.

On the other hand, the result is less clear if there are different clauses and no common definition. An argument in favour of a common concept in these instances is that the deductible and the sum insured are related to the same expression. The starting points for the interpretations are therefore identical. However, the functions of the two clauses and the policy considerations are different. Because of this, it is argued in the

[31] For a more detailed discussion, see Wilhelmsen p. 112 ff.

Commentary to the NMIP § 4-18 concerning the sum insured "that the content of the casualty concept will not necessarily be the same" in relation to § 4-18, as in relation to § 12-18 concerning the deductible.[32] One consideration that may lead to different results is that the deductible is supposed to have a deterrent effect, and induce the assured to act so that damage may be avoided. If the assured had a possibility of averting the last incident of damage, this, then, is an argument to apply a new deductible. In relation to the sum insured, considerations concerning deterrence should lead to the opposite result, namely, that the new incident of damage should not trigger a new sum insured.[33] Nevertheless, one may argue that negligence on the part of the assured is a peril that, similarly to other perils, should trigger a new sum insured.[34] Under an all-risk cover similar to the NMIP,[35] the negligence of the assured is a peril insured against, similarly to other perils. But the result should be the same for insurance policies based on the named-peril principle, because the insurer may only react against the assured's negligence if he is guilty of gross negligence.[36]

Another consideration that may lead to a different interpretation is that the assured's need for cover will differ.[37] One consideration concerning the deductible is that the deductible should not be applied so frequently that the value of the financial protection is unduly reduced. This argument favors a wide concept of the insured event in respect of the deductible. For the sum insured, the argument runs in the opposite direction. If the assured sustains a series of losses that cannot be covered by the one sum insured, his need for economic protection will favour a narrow concept of the insured event and of as many events as possible. However, the need for the economic protection of the assured is met by the insurer's need for limiting his liability, which may be reduced by applying a too narrow concept in this respect.

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32 Commentary NMIP § 12-18, in the same direction, Selmer pp. 276-279.
33 Commentary NMIP § 4-18.
34 Brækhus and Rein p. 39.
35 NMIP § 2-8.
36 ICA § 4-9.
37 Wilhelmsen p. 113, Selmer p. 276.

As there is no court case or other practice concerning both the deductible and the sum insured, the answer is quite open. It is therefore of interest to see if it may be presumed on the basis of the discussion of the different legal sources that the concepts differ.

Similar questions, but far less discussed, arise in connection with reinsurance contracts. For excess-of-loss reinsurance one question is whether the concept of each event or occurrence is the same for the retained risk of the direct insurer and the limit per occurrence for the reinsurer. If there are several layers of reinsurance, a similar question will arise between the primary and excess reinsurance layer. This is similar to the relationship between the deductible and the sum insured in direct insurance contracts, except for the fact that the interested parties are professionals and the policy considerations different. Another problem, however, is whether the concept of an insured event that is linked to the deductibles and to the sums insured under direct insurance is the same as the limit under the reinsurance contracts. This problem may arise both in respect of excess-of-loss reinsurance and proportional reinsurance, and may be a problem of some consideration. If the concept of an insured event is interpreted more narrowly in the reinsurance contracts than in the direct insurance contracts, the result may be that a series of incidents of damage that are treated as several individually insured events in the direct insurance contracts may be treated as one insured event in the reinsurance contract. The result may be that the direct insurer will have to pay his limits several times, but may only recover one limit from the reinsurer. On the other hand, if the concept of occurrence is interpreted more widely in the direct insurance contract, the direct insurer's liability for each insured event may be more limited than the liability of the reinsurer. In this situation, a series of losses that, for the purpose of the direct insurance contract, constitutes one insured event, and thus trigger only one limit, may be divided into several individual insured events for the purpose of the reinsurance coverage. One insured event according to the direct insurance contracts may thus represent several insured events according to the reinsurance coverage. However, as the reinsurer will never be liable for a higher amount than the direct insurer, this difference will have no consequences for the reinsurer's position. The main question here is, therefore, whether the concept of

"each insured event" in the reinsurance coverage is wider than the equivalent concept in the direct insurance contracts, and thus may trigger fewer limits than the coverage under the direct insurance contracts.

5. Chain of causation

5.1 The wording

The situation to be discussed here is when damage caused by one event interacts with new circumstances and results in further damage. As a starting point, the expressions "insured event" or "casualty" imply a happening or event that can be described in terms of when it happened, where it happened, and how it happened. On the other hand, if such an event has happened, the expression does not solve the question of whether new damage or losses caused by the initial insured event shall be attributed to the initial event or constitute a new event for the purpose of the deductible and the sum insured.

If the insurance contains a serial damage clause or a definition of each separate event as, for instance, all losses arising out of one event or losses caused by the same negligent act, then it is clear that a causative link may be relevant. An argument to support this solution on a more general basis is the main rule concerning the insurer's liability. Once the insured event has occurred, the insurer will be liable for all later incidents of damage or losses caused by this insured event.[38] It is difficult to combine this rule concerning liability with a solution that states that the later incidents of damage constitute a new event for the purpose of the deductible and the sum insured. If the insured event occurs during the insurance period, but results in incidents of damage occurring after the insurance period, the insurer will also be liable for the incidents of damage occurring after the expiry of the insurance period. However, if

this constitutes a new insured event for the purpose of the deductible and the sum insured, the consequences seem to be that there is no liability for the insurer. Therefore, it seems that the most logical solution is to attribute all damage caused by the initial event to this event.

The question, then, is this: When is the causative chain from the initial insured event breached, so that new damage constitutes new insured events for the purpose of the deductible and the sum insured? As mentioned above under item 2, the best overview of the legal sources is obtained by dividing the discussion between marine insurance and dry insurance.

5.2 Legal sources concerning marine insurance

5.2.1 Overview

As mentioned above in item 2, a very important legal source for the interpretation of the NMIP is the Commentary, which reflects the negotiations leading to the provisions in the Plan. The Commentary to the NMIP contains two observations that are relevant to the question as to when several incidents of damage caused by a chain of events shall be attributed to the first event for the purposes of the deductible and the sum insured. The first observation is a general one, related to the number of sums insured as defined in NMIP § 4-18, which states that the insurer is liable for one sum insured for "each casualty".[39] The Commentary here states that there is no case law regarding this question, but that certain elements may be taken from ND 1974.103 NH *Sunvictor*. The *Sunvictor* case concerns the interpretation of an English deductible clause, which, in contrast to the provisions in the Plan, contains a serial damage clause. It is, therefore, not directly relevant to the interpretation of the provisions in the

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[38] Selmer p. 279.
[39] Commentary NMIP Part I p. 169.

Plan. However, by the reference made in the Commentary, this case is more directly relevant than one would think, and it is therefore discussed below in item 5.2.2.

The second observation concerns the number of deductibles according to NMIP § 12-18 in reference to the specific question of repair errors. This is discussed below in item 5.2.3.

5.2.2 ND 1974.103 *Sunvictor*

As mentioned, ND 1974.103 the *Sunvictor* concerns the interpretation of an English deductible clause for hull insurance. It is relevant to marine insurance both because it concerns hull insurance and because it is referred to in the Commentary. However, it is also relevant to reinsurance because it contains a serial damage clause that corresponds to serial damage clauses often used in reinsurance contracts.

> The Sunvictor departed from Montreal 15 December 1968 on a trip to Quebec. The channel was filled with pack ice. On 17 December, the engines stopped because the cooling water intake was clogged with ice, and the ship grounded. The Sunvictor could not refloat by itself, but had to be helped by towboats the following day. During the grounding and the salvage, the Sunvictor sustained further ice damage. The Sunvictor then sailed to Trois-Rivières as a port of refuge, but continued early the next morning to Quebec to avoid becoming icebound. During this trip the Sunvictor sustained further ice damage.
>
> The deductible was USD 100,000 for "claims arising out of each separate accident". It was further stated that,
>
> "For the purpose of this clause each accident shall be treated separately, but it is agreed (a) that a sequence of damages arising from the same accident … shall be treated as though due to one accident …"
>
> It was agreed that the grounding due to ice in the cooling water intake and the ice damage during refloating was one accident, but the insurer claimed that the ice damage sustained on the voyage from Trois-Rivières to Quebec was a new accident. The Supreme Court held that the entire sequence of incidents of damage constituted one accident for the purpose of the deductible. Part of the reasoning was that the later ice damage was caused by the fact that the Sunvictor was delayed during the grounding, and during this period the ice problem in the channel grew more serious, thus increasing the risk of further damage.

The wording of the clause that is interpreted in this case is "that a sequence of incidents of damage arising from the same accident … shall be treated as though due to one accident". The Supreme Court found that there was a causative link between the grounding and the later ice damage incurred under Quebec Bridge. The reason for this was that the vessel was delayed by the grounding, and as the ice conditions grew more serious during this time, there was a strong risk of further damage. The argument thus conforms to the general argument of how foreseeable new damage is in questions concerning causation. This illustrates the connection between the number of insured events and the question of the insurer's liability for consequential damage caused by the insured event.

5.2.3 The Commentary to NMIP § 12-18

The situation in respect of errors made during repairs is commented on in the Commentaries to NMIP § 12-18[40]:

> In the type of situation where one incident of damage requires several repairs, a deciding factor for the number of deductibles must be whether the error committed by the repair yard is foreseeable, cf. ND 1977.38 NH *Vestfold I:* Only where the repair yard's error is unforeseeable, e.g. because it is a question of gross negligence on the part of the repair yard, shall the new damage be deemed to constitute a new casualty which gives rise to a new deductible. An example of repair yard errors which may under the circumstances be considered unforeseeable is where the repair yard forgets tools or the like inside an engine resulting in damage when it is started. By contrast, it is not necessarily unforeseeable that a part is installed the wrong way in an engine, cf. the *Vestfold I* case. Sub-standard work, e.g. poor welding work, will normally also be foreseeable. If the yard's error is foreseeable, both the repairs of the same damage and the further development of the damage must be recoverable without any new deductible.

Similarly to what is mentioned above concerning the *Sunvictor* case, the main test here is whether the repair error and the resulting new damage are foreseeable. As the

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[40] Commentary NMIP Part II and III pp. 76-77.

Commentary refers to ND 1977.38 *Vestfold I,* further guidance concerning this test may be found here:

> The *Vestfold I* grounded 12 November 1967 near Harstad, and sustained damage to its gear. The damage was repaired at a yard in Harstad. On 6 January 1968 the gear broke down in Trondheim harbour. The machinery had then been working for only 50 hours after the first repair. During the last repair, damage to both the axle and the gear was discovered. It was also revealed that new parts which were installed during the first repair had been installed incorrectly. The assured claimed against the yard for damages, but this claim was refused because the yard had not acted negligently. He then claimed against the insurer. The insurance contained a clause stating that damage to the machinery was only covered if it was brought about by an external cause, *inter alia,* grounding. The breakdown of the machinery with no external cause was not covered. The insurer thus claimed that he was not liable for the breakdown of the gear, whereas the assured claimed that the grounding in Harstad had caused both the breakdown of the axle and the gear.
>
> It was agreed in the lower court that the damage to the axle was caused by the grounding at Harstad and had not been discovered during the original repairs. Thus, this damage should be attributed to the grounding. The claim before the Supreme Court concerned damage to the gear only. It was agreed that this damage was caused either by the wrong installation at Harstad, or by the failure to discover the damage to the axle there, or by a combination of these causes. The Supreme Court stated that the question of causation had to be decided by using the allocation principle in the 1964 NMIP § 20. It further stated that there was a legally relevant chain of causation between the grounding and the damage to the gear, and that the failure of the repair could not breach the chain of causation from the grounding. The errors committed by the yard were, however, of such a character that part of the damage should be attributed to this cause. Thus, damage was allocated, with two-thirds to the insurance, and one-third to the assured.
>
> The reasoning for this result was that the grounding at Harstad was a major part of the total picture. It was through this grounding that the vessel sustained its primary damage, namely, damage to the axle and gear, which developed into further damage. The judge then discussed whether the errors committed by the yard could breach the chain of causation from the grounding. This question would depend on the kind of error that was committed in the individual case. When a ship is damaged it should be repaired. The assured had, in this instance, a duty to effect repairs. Normally a repair would be successful. However, it did happen that a yard overlooked damage or carried out repairs incorrectly, for instance, by a wrong installation. Such errors were foreseeable. The evaluation could be different if the yard had acted with gross negligence.

The *Vestfold I* case concerns the question of causation between a casualty and later incidents of damage, but the Commentary to the NMIP presumes that the same evaluation shall be made concerning the number of deductibles. This further confirms

the connection between the question of liability for consequential damage and the number of insured events. The case seems to presume that it is generally foreseeable that errors are committed when repairs are being carried out. Both a failure to discover the total damage and a wrongly made installation are foreseeable.

On the other hand, gross negligence by a yard may lead to a different result. As the yard in this case was not guilty of any negligence, the question of whether a negligent error made by a yard may breach the chain of causation is not resolved. However, the focus on gross negligence in both the *Vestfold I* case and the NMIP may imply that ordinary negligence by a yard will not normally breach the chain of causation.

Nevertheless, it is emphasized that the assured had a duty to repair the ship. These comments can be explained by considerations relating to deterrence or loss prevention. If the assured could be blamed for the occurrence of the new damage, this should result in a new deductible, see further above in item 3.

5.3 Legal sources concerning dry insurance

5.3.1 RG 1952.232, Norwegian Arbitration Case

The first legal source for dry insurance is a case in RG 1952.232, which is a Norwegian arbitration case concerning liability insurance. The case concerns the number of sums insured where the sum insured was tied to "each separate event":

> An entity had during road surfacing spread a slippery liquid on the road without giving any kind of warning or blocking off the road. This resulted in a bicycle overturning, and in car A crashing into the mountain wall at the side of the road. Car A blocked the part of the road that was not sprayed with the liquid. The result of this was that two other cars B and C coming from opposite directions were both forced to drive on the slippery part of the road and ended in a head-on collision. The sum insured for each event was NOK 10,000, which was not sufficient to cover the losses. The assured claimed that there were three separate events, whereas the insurer claimed that there was only one. The insurer primarily claimed that all the events were caused by the same negligent act,

see below under 6.3. However, he also claimed that the collision between B and C was caused by A's crash into the mountain wall, and therefore, at least, these two incidents of damage constituted one event for the purpose of the sum insured.

The arbitration judge concluded that A's crash and the collision between B and C constituted two separate events. The judge admitted that the two incidents were closely connected, but that the collision still seemed to be a separate event that should be treated separately for the purpose of the sum insured. A major argument for this result was that the assured when reading the clause would, according to the ordinary meaning of the words, presume that he could claim the sum insured for each individual accident. If the insurer wanted to combine several separate accidents this should be directly expressed in the policy.

The liability insurance that was interpreted in this case contained no serial damage clause. Today such a clause is normally included. With a serial damage clause, it is doubtful if the result in this case would be upheld. However, the decision illustrates that if there is no serial damage clause, the insurer risks that the concept of each event will be interpreted narrowly, by considering each injured party separately. This conforms to the "damage incurred" approach of ordinary liability insurance, where liability is triggered when a negligent act results in damage to a third party, but does not conform to the ordinary causation principles concerning liability. Also, compared with the *Sunvictor* case, where the interest of the assured was based on a broad concept of accident, in the asphalt case, the interest of the assured and the injured third parties lay in a narrower concept. Thus there is a clear possibility that a judge will take the assured's interest in financial coverage into consideration. This suggests that the result might not be followed in a case concerning the number of deductibles.

5.3.2 Decisions from the FSN Board

There are only two decisions from the FSN Board concerning a chain of causation. FSN 1232 concerns a series of thefts, whereas FSN 1146 concerns several cracks in a sewage pipe.

In FSN 1232, a series of thefts was committed from a storage facility for meat in the period from March to October 1988. The thieves entered the storage facility the first

time by removing the window frame, which was replaced after the theft was committed. The Board presumed that the same method to enter the storage facility was used for the later thefts. They therefore concluded that there was one burglary which led to a series of later thefts. As there was causation between the individual losses, only one deductible was applied.

In FSN 1146, a sewage pipe had sustained several cracks. During the digging performed to repair the cracks, new damage occurred when an 18-meter-long plastic sewage pipe was compressed. The majority of the Board concluded that this pressure-damage occurring during the repairs was a foreseeable result of the digging, and only one deductible should be applied. The minority concluded that the new damage was a new casualty, triggering a new deductible. The majority's result was followed in FSN 3499, but there is no rationale given for the conclusion in this case.

FSN 1232 and 1146 seem to accord with the *Sunvictor* case in the reference to the criterion of foreseeability. This is not explicitly stated in FSN 1232, but it seems fairly obvious that, when the thieves had loosened the window frame and used this entrance on later occasions, later thefts were foreseeable. The FSN cases, on the other hand, do not give any support for considerations of deterrence.

5.4 Summary

The expression "insured event" gives little guidance for solving the situation where there is a causative chain between the initial insured event and later damage. However, a serial damage clause may imply that all incidents of damage caused by the same event should be attributed to this event for the purpose of the deductible and the sum insured. This solution is supported by the general rules of causation implying that the insurer is liable for all losses caused by the insured event. The question that remains is, however, when is the chain of causation breached so that a new incident of damage will trigger a new deductible and a new sum insured?

The *Sunvictor* case, the *Vestfold I* case and the FSN practice all imply that the decisive argument here is whether, given the first incident of damage, a new incident of damage is foreseeable. By foreseeable is here meant that the first incident of damage results in a higher risk than normal for the next incident of damage to occur. The risk

may refer to ordinary surroundings changing their character (ice continuously packing together in the *Sunvictor* case), or to the insured object being more vulnerable to new damage (due to repairs, *Vestfold I;* digging, FSN 1146; or easy access for thieves, FSN 1232). Thus, both marine insurance and dry insurance imply that the number of insured events for the purpose of the deductible conforms to the question of the insurer's liability for later damage caused by the initial insured event.

The *Vestfold I* case further seems to presume that considerations of deterrence may be relevant, but these are related to the question of liability, and not to the question of the number of deductibles. There is less support in the other cases to make a similar presumption.

On the other hand, the asphalt case is more difficult to explain in this context. It seems quite obvious that the risk of collision on the slippery part of the road was very high once car A had blocked the other part. One possible explanation is that the decisive argument was to protect the assured and the injured third parties from an extensive uncovered loss. If this should be so, the result would probably be different if the question concerned the number of deductibles only. This implies that the concept of event is not necessarily interpreted in the same way in different situations.

In FSN 1146, the two incidents of damage occurred at the same place and presumably within a rather limited period of time, thus implying that closeness in time and place may be an argument. However, in the other cases, these arguments seem less decisive. In FSN 1232, the thefts were committed in the same facility, but over a period of eight months. In the *Sunvictor* and the *Vestfold I* cases, there is both some geographic distance and some distance in time. The foreseeability of the later damage and the need for financial protection therefore seems to have more weight in these cases than closeness in time and place.

6. Common underlying peril

6.1 The wording

As already mentioned, the expressions "insured event" or "casualty" imply a happening that can be defined in terms of when it happened, where it happened, and how it happened. It is less in accordance with the ordinary meaning to say that an underlying condition, an absence of something happening, or an omission, is an event. The latter circumstances can be described as a peril or a cause, but not necessarily as an event.

In liability insurance, which is tied to the negligent act or omission of the assured, the expression "insured event" therefore does not support that several incidents of damage caused by the same negligence shall be treated as one event. A negligent act may be described as an event, but an omission does not necessarily qualify as such. As there is no reason to make any distinction between an act and an omission in this connection, the logical approach would be to focus on the individual damages or claims. This is also supported by the fact that liability insurance normally ties the insurer's liability either to the injury sustained by the third party (damage principle), or to the notification made by the injured third party to the assured or by the assured to the insurer (claims-made principle).

However, liability insurance will normally contain a serial damage clause, stating that all damage caused by the "same situation, act or omission" leading to liability shall be treated as one insured event. This definition seems to extend the concept of event: a situation or an omission can normally not be described as an event. Compared with the definition of an insured event as a condition for triggering the insurer's liability, the "situation, act or omission" leading to liability is the underlying cause of the insured event. The serial damage clause thus seems to introduce a peril-has-struck principle for the purpose of the deductible and the sum insured, equating "event" with the underlying cause.

A definition of the insured event in other kinds of insurance is less clear on this point. If such a definition states that a series of incidents of damage or of losses arises out of "one cause" or "the same originating cause", then the result will be similar to liability insurance. The use of the word "cause" in this context may be found in some reinsurance contracts, but is, to my knowledge, less common in direct insurance contracts. The normal solution in direct insurance contracts seems to be to use the expression: "a series of incidents of damage or of losses arising out of 'one event' or 'one accident'." If so, one seems to be back to the requirement of something that can be defined in terms of time and place, rather than in the more general concept of a cause.

6.2 Legal sources in marine insurance

6.2.1 Introduction

The Commentary to NMIP contains three observations that are relevant to the situation where several incidents of damage have the same underlying peril or cause. The first observation is in reference to the *Sunvictor* case that has already been referred to above in item 5. As the *Sunvictor* case also concerns the situation where there is a common underlying peril, it is relevant to item 6 also, see item 6.2.2. The second observation concerns § 4-16 regulating the number of sums insured. Here, it is stated that some guidance may be found in case law concerning limitation of liability under section 175 no. 4 of the Norwegian Maritime Code, which ties the limitation of liability to "the sum total of all claims arising from one and the same event". References are made to ND 1984.129 *Tønsnes* and ND 1987.160 *Ny Dolsøy*, which are discussed below in item 6.2.3. The third observation relates to the number of deductibles in relation to § 12-18 and concerns the situation where an error in design has caused several incidents of damage, see below in item 6.2.4.

6.2.2 ND 1974.103 *Sunvictor*

ND 1974.103 *Sunvictor* is referred to above in item 5.3.2 concerning the chain of causation between the two incidents of ice damage sustained on a trip to Quebec. As the court found that there was causation between the two incidents, there was no need to discuss the common underlying peril. However, the court also stated that there was no need to decide whether such causation between the different occurrences of damage was a condition of the clause, as the decisive factor in this case was that all the damage was caused by the same underlying cause, namely, "the general ice situation on the St. Lawrence River". The judge pointed to the fact that all the damage was a result of the ice problems on the river. Ice problems led to the grounding, which made it necessary to bring the *Sunvictor* to safety, and during this attempt, further damage occurred, again due to ice and in a situation where the captain had no choice as to where to take the vessel. The chain of events from the time the *Sunvictor* was grounded to its arrival in Quebec thus constituted a sequence of incidents of damage according to the deductible clause. The ice problems from Trois-Rivières to Quebec could not be viewed as a "new peril", as the underlying problem was the ice, and it was not unforeseeable that further ice damage could occur.

The court pointed to the ice conditions on the river as "the general peril" that caused all the damage. The ice problem led to the grounding, which again made it necessary to bring the ship to safety, and, during this situation, new ice damage occurred in a situation where the captain had no choice concerning alternative measures.

As already mentioned several times, the word "accident" points in the direction of a casualty or a happening that can be described in terms of a definite time and place, and not to the cause behind the casualty. Even so, the *Sunvictor* case implies that where additional damage or loss is the result of the same underlying cause or peril only one deductible should be applied. This corresponds to the peril-has-struck principle in marine insurance, see above item 4.3.

In the *Sunvictor* case, the underlying cause was the "general ice situation", but the result presumes that this general peril gains the status of an active cause. The reason for this is that 1) the captain had no real choice as to how to handle the problem, and 2) the ice created a continuous risk of further ice damage. The first argument implies that if the captain could have avoided the later damage, a new deductible might be applied. This conforms to the deterrence effect behind the deductible. The second argument refers to a test of how foreseeable the new damage was. However, contrary to the discussion concerning the chain of causation, the foreseeable test refers back to the underlying peril as having caused the first incident of damage, and not to any changes in the surroundings or in the insured object as a result of the first damage. If, once the peril has struck the insured object, it is foreseeable that the same peril may strike again, only one deductible should be applied.

6.2.3 Rt 1984.1190 NH *Tønsnes* and Rt 1987.1369 *Ny Dolsøy*

The ship owner's right to limitation of liability under section 175 no. 4 of the Norwegian Maritime Code is tied to "the sum total of all claims arising from one and the same event". The ship owner thus is liable for the limitation fund for all damage arising from "one and the same event"; if new claims constitute a new event, this will trigger a new limitation fund. The distinction between one and more than one event for the purpose of the number of limitation funds was discussed in Rt. 1984.1190 NH *Tønsnes* and Rt. 1987.1369 *Ny Dolsøy*:

> In Rt. 1984.1190 NH *Tønsnes,* the trawler *Tønsnes* damaged seven net loops owned by five fishing vessels during one hour of fishing. The owner of *Tønsnes* accepted that he was liable for the damage, but claimed that he had a right to limit his liability according to Chapter 10 of the Maritime Code of 1883, and that all claims "arose from one and the same event" according to the previous Maritime Code of 1883 § 235. As the total losses exceeded one limited liability sum the claims would, in order to be covered, have to be reduced pro rata. The injured ship owners, on the other hand, claimed that there was one event for each net loop that was damaged by the trawl during the time it was out, i.e. altogether seven events.

> The Supreme Court decided that all the claims in the case arose out of "one and the same event". The reasoning of the court was that all the sustained damage was caused by one particular disposition – the shooting of the trawl – and that the trawl was in use for a limited period of time (approximately 70 minutes). The fact that the trawl could have been withdrawn earlier, and with the exercise of greater care should have been withdrawn earlier, would not have led to a different result.

> Rt 1987.1369 *Ny Dolsøy* (ND) concerned damage caused by contaminated bunker oil. The oil was delivered from Norske Fina AS, and was loaded onboard *Ny Dolsøy* one week after *Ny Dolsøy* had delivered the catch from the previous fishing. *Ny Dolsøy* delivered the oil to two fishing vessels within the same fishing area with 24 hours between the deliveries. After a short period both these vessels experienced problems with their engines, and it was claimed that the bunker oil had been contaminated. After an unsuccessful claim against Norske Fina AS for damages, a claim was made against *Ny Dolsøy*. One question concerning this claim was whether the delivery to the two vessels constituted one or two events in regard to the previous Maritime Code § 235.

> The majority of the Supreme Court (three against two) decided that the two deliveries had to be regarded as "one and the same event". The court found that the bunker oil that was delivered to the two fishing vessels was contaminated, and that the contamination was caused by the failure to clean the tanks of *Ny Dolsøy* after the previous fishing. The majority further decided that the claim should be limited to one limitation fund. The reason for this was that liability was caused by the same negligent act, namely, the failure to clean the tanks and the pipe system of *Ny Dolsøy*. Further, the bunker oil was delivered according to a single order to vessels that were situated in the same fishing area and within a connected operation, even if some time had to pass between the two individual deliveries. The majority was of the opinion that the connection between the two deliveries was of such a nature that it accorded with normal interpretation to characterize them as one event.

These two cases concern the interpretation of "one and the same event", which can be compared with the concept of an insured event without any serial damage clause or further definition. Thus, from an interpretative point of view, it could be argued that the "event" was the damage caused by the negligence and not the negligent act itself. This is particularly relevant to the *Ny Dolsøy* case, because the failure to clean the tanks and the pipe system is more similar to an absence of an event, i.e. of cleaning, than to an event. The *Tønsnes* case is more complicated because the negligence here consisted of an event, i.e. the shooting of the trawl. However, if the interpretation is accepted, the result must be that the negligence causing the damage should be treated in the same way, regardless of how the negligence came into force. Also, a more narrow interpretation would be favored by policy considerations, i.e. to protect the

injured third parties against an uncovered financial loss. The need to protect the negligent party is more limited because he already has a right of limitation.

Hence, the results of these two cases are somewhat surprising. Even so, according to the Commentaries, weight should be placed on the decisions concerning the number of sums insured. This solution for the sum insured can be explained by considerations of deterrence. In the *Tønsnes* case, the trawl should have been withdrawn earlier if the owner had been more careful, and in the *Ny Dolsøy* case, delivery should have been stopped. On the other hand, the result for the deductible is more difficult to explain. Either one should here apply one sum insured and several deductibles according to the Commentaries' distinction, or the two cases imply that, when there is one act of negligence, one should be somewhat careful using considerations of deterrence to imply a duty to correct the negligence.

The court also refers to the close connection between the incidents of damage concerning the limited time period in the *Tønsnes* case (70 minutes) and the fact that there had to be some time between the two deliveries (24 hours) in the *Ny Dolsøy* case. The connection in time is here much closer than in the *Vestfold I* case, and also in the *Tønsnes* case closer than in the *Sunvictor* case. On the other hand, the geographical connection can be compared to the *Sunvictor* and *Vestfold I* cases. The *Tønsnes* and *Ny Dolsøy* cases thus hardly create more restrictive limits to the connection in time and place.

It can also be mentioned that once the negligent act had taken place in these two cases, new damage was very much foreseeable. The court does not directly mention this criterion, but it is obvious that the decisions in this respect conform to the other legal sources.

6.2.4 The Commentaries on error in design etc.

The Commentary on § 12-18 concerning the number of deductibles also contains some comments concerning one more specified peril, namely, error in design:[41]

> A situation that has given rise to considerable problems in relation to the number of deductibles is where there is an error in design or the like in the cylinder linings from the factory which causes them to crack after a certain period of use. There may not necessarily be any pattern in the occurrence of the cracks. In some instances, it is discovered at the same time that several linings have cracked, whereas, in other instances, weeks or months may pass between the occasions a lining cracks. The deciding factor for the question regarding the number of deductibles in such cases must be the extent to which the cracks can be traced back to the same cause. If the cracks are attributable to the same cause, they must be regarded as one casualty, giving rise to only one deductible. Elements in this evaluation include whether there is a close connection in terms of time or place between the incidents of damage, whether the new incidents are of a totally independent nature, or whether the common underlying factor increases the risk of new damage, cf. above under § 4-18. Cracks that may be traced back to the same error on the part of the manufacturer should be regarded as one casualty and give rise to only one deductible. The incidents described here take place within the same area in the ship and, in the event of an error in manufacture, it is foreseeable that the error will affect several of the manufactured units until the error is discovered. If, however, there are several separate errors, or it is clear that the manufacturer should have discovered the error and done something about it, the incidents will constitute several casualties in relation to the deductible.
>
> At the same time, it is clear that if the assured can be blamed for not having averted the damage, this warrants the calculation of a new deductible from the time the assured should have intervened. If the assured has shown negligence in failing to replace the linings that have not yet cracked, new cracks should give rise to a new deductible. In that event, each new crack should be regarded as a new casualty in relation to the deductible, based on the view that the assured's motivation to replace the rest of the linings increases with each new crack that arises.

According to these remarks, there is one casualty if 1) there is one error in design or a similar error, 2) this error results in the same kind of problem within the same insured unit and within a limited period, and 3) once the error is made, it is foreseeable that this error will affect several parts of the unit. On the other hand, if the assured can be blamed for not having averted the new cracks, a new deductible should be applied.

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[41] Commentary NMIP Part II and III pp. 77-78.

The Commentary therefore seems to place more weight on the deterrence effect here than in the *Tønsnes* and *Ny Dolsøy* cases.

6.3 Legal sources concerning dry insurance

6.3.1 Court practice

The question of the number of deductibles or sums insured when there is a common underlying factor is discussed in the Gulating Appeal Court 27.11.2002, and RG 1952.232.

> In the Gulating Appeal Court, 27 November 2002, a technical consultant company committed three different errors in its technical calculations for a building project. The errors resulted in the subsidence of the construction floor due to insufficient reinforcement. The builder claimed that the subsidence should be allocated different percentages for the three different errors, thus triggering three liability limitation sums under the consultant contract and three sums insured under the liability insurance contract for the consultant company. Both the liability limitation sum and the sum insured were related to "each incident of damage".
>
> The judge concluded that the subsidence of the floor constituted one incident of damage and that only one liability limitation sum and sum insured could be claimed. The court referred *inter alia* to the argumentation presented at the city court. The city court judge found that the lack of sufficient reinforcement was caused by the use of a special calculation method, and the consultant's lack of understanding of, or experience with, the functioning characteristics of the building material that was being used for the construction floor. Thus, even if several different errors were committed, these errors were brought about by a common underlying cause, i.e. a lack of understanding of the functioning of the building material. The higher court judge added that the different errors were committed during a limited period and concerned the same question, namely, the calculation and evaluation of the reinforcement required and the choice of the reinforcement method for the floors. Thus, the three different errors constituted one "complex of causes" with errors that were related. However, the judge also pointed out that even if it were technically possible to attribute the subsidence of the floor to the different errors, it was not natural to divide the subsidence into three different incidents of damage for the purpose of the sum insured. The court also referred to the *Sunvictor* case, stating that the unevenness was caused by a common underlying cause.

In this case, one could argue that, as there was only one incident of damage (subsidence of the floor), it was irrelevant that this was caused by more than one error. Even so, the judge also emphasized the connections between the errors, and the fact that the three different errors made during the project had a common underlying cause, viz. a lack of understanding of, or of experience with, the functioning characteristics of the building material. This implies that an underlying error consisting of the lack of understanding or of experience may constitute the operative "event" for the purpose of the sum insured. This is so, even if the liability insurance in this case contained no serial damage clause. It is also emphasized that the errors must be seen in conjunction with one another because they were committed during a limited period and concerned the same question. This implies that separate errors may result in one accident or event if the errors are in some way related, for instance, because they are caused by a lack of understanding of the technology or of the material involved.

This case is particularly interesting when compared with RG 1952.232 referred to above in item 5. In this case, the assured spread a slippery liquid on the road, which resulted in the turnover of a bike, a car driving off the road, and two other cars colliding. The primary claim of the insurer was that all the damage was caused by the same event, namely, the negligent spreading of the slippery substance. The court, however, decided that the insured sum was tied to the individual claim or incident of damage, and not to the underlying negligence. This is directly contrary to the argumentation in the subsidence of the floor case. As both cases concern the injured parties' right to compensation when the sum insured for each event is lower than the sustained damages, it is difficult to see any reason for this difference. The subsidence of the floor case thus gives a further argument for stating that the asphalt case is no longer valid.

6.3.2 Practice from the FSN Board

There are several cases from the FSN Board dealing with the question of more than one incident of damage brought about by a common underlying cause for the purpose of the deductible. The cases concern different kinds of insurance. In order to see the line of reasoning, it seems necessary to distinguish between insurance for material property and liability insurance.

6.3.2.1 Insurance for material property

Two main groups may be distinguished here. One group concerns cracks or fractures in pipelines or water damage due to such fractures. The other group concerns damage caused by vandalism or theft. The difference between the groups is that in the second group the insured event is triggered by a criminal human act, whereas the insured event in the first group is defined as physical damage to material property.

The starting point for fractures to pipelines is that, if there is no connection between the several fractures that are discovered at the same time, each fracture constitutes one event (FSN 1876). On the other hand, if the cracks stem from the same cause and are also connected in time, they may constitute one event:

> FSN 1882: After having repaired a fracture in a water pipe system, continuous sound could be detected and a second fracture was discovered. The Board stated that the two fractures had occurred in the same pipeline and both were caused by corrosion due to stress. Further, the two cracks were related in time. One deductible was applied.
>
> FSN 2079 concerned four fractures in a sewage pipe due to pressure from two different sources. As the underlying cause was the weakness of the pipe under pressure, it did not matter that the pressure stemmed from two sources. The cause of the weakness is not discussed.

The starting point for these cases is that each insured event as described in terms of the physical damage it had caused thus constitutes one insured event for deductible purposes. On the other hand, if several incidents of damage are brought about by the same underlying cause (corrosion or weakness), the Board applies a peril-has-struck

principle. However, the majority in FSN 2464 seems to depart from this line of thinking:

> This case concerned water damage to twelve bathrooms in a hotel. The cause was not clear, but apparently there was some leakage in the structure. The majority of the Board found that as the extent and spread of the damage was different in the different rooms, the result was twelve deductibles. This was the case even if there were partly a common cause, leakage in the structure and spillage of water, and also even if all instances of damage were detected at the same time. The minority found that the instances of damage sprang from the same cause, that they were detected at the same time, and thus constituted one accident.

The minority concluded that all the leakages were brought about by the "same cause". However, it is not stated whether the "same cause" refers to the "leakage and water spillage", or if there is some underlying common cause for the several leaks. If all the leaks were caused, for instance, by the same weakness in the material, error in design or error in workmanship, the case would conform to FSN 1882 and 2079 above. The majority view is difficult to explain. On the other hand, if there is no underlying cause, but merely the same kind of incident (leakage) occurring several times, the majority view seems more correct. As the Board does not explain the cause in more detail, it is difficult to analyse the case any further. However, one may infer that twelve leaks in the structure of the bathrooms, discovered at the same time, were caused by a particular error that occurred during the building process.

Another group of cases concerns *vandalism and theft under insurance for material property*. If the same person commits vandalism or theft on separate occasions, the starting point is that one deductible should be applied to each case of vandalism. This holds even if there is a close connection in time and/or place:

> FSN 3472: The landlord discovered several instances of damage to the rented property after a four-year-long rental period. The Board found that these were committed on several occasions. As none of them exceeded the deductible, no compensation was paid.
>
> In FSN 4016, the Board expressed the view that several cases of vandalism by the tenant during the rental period should be treated as several insured events for the

purpose of the deductible, unless it could be proved that the vandalism was committed on the same occasion.

FSN 3060: The assured's car was damaged twice with five days in between. The first case of vandalism occurred outside the assured's house, and the next at his place of work. The assured claimed that the same person had committed the vandalism. The Board stated that it was obvious that since there were five days between the two acts of vandalism two deductibles should be applied. The result would be the same if the same person had committed the two acts of vandalism.

In FSN 4052, the assured discovered a theft from his storage room on 25.08.00, and moved the rest of his property to another similar storage room in the same building. A theft from this building was discovered on 29.08.00. The storage rooms were protected by barred doors that were locked by a padlock. The thief had entered the rooms by tearing away the bars, and had not touched the padlock. The Board found that the same thief had committed both thefts, and that the second theft was committed on the night following the first theft. The Board applied one deductible for each theft.

In the first two cases, there is a close connection in place, but less close in time. Further, the common underlying factor that the damage was caused by the same person was not sufficient to link the incidents. The result is the same in the third case, where there is a close connection in time but less close in place. In FSN 4052, on the other hand, there is a close connection both in time and place, and the thefts were committed by the same person. Here, one could have argued that the second theft was caused by the first theft either because the thief knew how to enter the storage room, or because he knew what was inside after his first theft. Thus, FSN 4052 does not seem to conform to the result in FSN 1232 where several thefts were committed in a storage facility for meat.

On the other hand, if several incidents of vandalism occur as the result of the same error or act, or by one or more acts during the same occasion, only one deductible should be applied:

FSN 2504: The assured discovered after having rented out his house that four doors and a toilet were destroyed. The insurer deducted one deductible for each damaged item and argued that the acts of destruction occurred over time and on different occasions. The Board found that all incidents of damage had occurred during the rental period, but that if the incidents had taken place on different occasions the approach of the insurer was correct. On the other hand, incidents of damage taking place on the same occasion had to be treated as one insured event for the purpose of the deductible. The Board found

that it was likely that the damage to the four doors had been committed during a "wild party" in the course of the rental period. If this were correct, one deductible should be applied to these items. Damage to the toilet, on the other hand, occurred on a separate occasion and triggered a separate deductible.

FSN 3053: A house was damaged in January 1995 by water leaking down from the roof. The water came from three holes made in the floor of a built-in veranda above the room. The holes were made by a sharp instrument, but it was not known whether the holes had been made on the same occasion or on several occasions. The Board found it more likely that the holes had been made on one occasion than on three different occasions. The holes were probably made by a child or a childish person having fun. One deductible was applied.

The distinction between one occasion and several occasions is not easy to apply. Playing on the veranda or a "wild party" is one occasion – two successive thefts with 24 hours between them are two occasions. However, what would be the situation if the player had made two holes, retreated and made another hole ten hours later, or if the thief had entered the second storage room after ten hours?

Also, there is one case where several thefts committed on different occasions were treated as one event:

FSN 2788: A maid working for the assured in the period from 1993 to 1995 committed several thefts of money, furniture and other items. The insurer claimed that each theft was an insured event triggering one deductible. The assured claimed that as there was one continuous theft according to criminal law, it should be treated as one insured event.

The Board agreed that the thefts constituted one continuous theft according to criminal law. The question was whether this had any consequences for the insurance settlement. According to the conditions, the deductible should be applied to each settlement. The Board found that in this case the thefts constituted one settlement, and applied one deductible.

As mentioned above in item 4.1, the Board in this case also expressed the view that the thefts might constitute more than one insured event even if they were met by one settlement. However, the Board does not conclude on this point. The difference

between this case and FSN 3472 and 4016 concerning vandalism during the rental period may, however, be explained by different interpretations of "insured event" and "settlement". As mentioned above in item 4.1, my opinion is that these expressions should be interpreted as identical for the purpose of the deductible, but this is not necessarily the opinion of the Board. Another explanation may be that there was a connection between the thefts because they were triggered by the same employment situation that made it possible to commit minor thefts on several occasions, thus reducing the risk of discovery. The difference between one rental situation and one employment situation would then be that when your employer does not discover a theft this will indicate that he will not discover the next one either, and thus a temptation to continue is established. Or to use the wording from the *Sunvictor* case and the *Vestfold I* case: Once the first theft has been committed and is successful, it is foreseeable that the maid will commit more thefts.

6.3.2.2 Liability insurance

The next group of cases to be discussed concerns liability insurance. Here, the Board does not distinguish between one occasion and two occasions, but between one error and several errors:

> FSN 2509: The assured – an engineering company – was engaged in a pilot project to develop an underwater tool to be used on an offshore structure. During the project several errors were made which, according to the principal, were caused by design errors committed by the assured. The insurer accepted liability, but claimed that, as there were eight separate incidents of damage, eight deductibles should be applied. The Board found that the incidents of damage were caused by several different design errors of a different character and with different consequences for different parts of the project. Therefore, eight deductibles should be applied.
>
> FSN 3215: A surveying company surveying work for a painting company forgot to survey two staircases and some outside work on a house. This resulted in a loss for the painting company for which this company claimed damages. The liability insurer of the surveying company accepted liability but applied two deductibles. This was accepted by the Board, which found that the assured had made two separate errors. One error was

> that the surveying company had misunderstood the information concerning whose responsibility it was to paint the two staircases, with the result that these were not painted. The other error was that the company failed to include the outside work on one of the houses. As there was no connection between the two errors, two deductibles should be applied.

The Board emphasized that the damage was caused by different errors having different consequences for the project or the work. According to the subsidence of the floor case, both parts of the argumentation should be seen together. Different errors leading to the same damage (i.e. subsidence of the floor) should, according to this case, constitute one event. Also, it could be argued that if a connection between the different errors could be established in that they were caused by a lack of understanding of, or experience with, the material or the methods used, this would be sufficient to tie several of the errors together into one event. However, this was clearly not the case in FSN 3215, and there is no information suggesting such a connection in FSN 2509.

On the other hand, it is emphasized that if several incidents of damage are caused by the same error, only one deductible should be applied. This seems to conform to the content of a serial damage clause stating that several incidents of damage caused by the same negligent situation, act or omission shall be treated as one incident of damage or as one insured event. This may also be compared to the focus on the same occasion on insurance for material loss or damage. The approach in these cases is therefore contrary to the asphalt case referred to above, because in this case all the incidents of damage were caused by the same act triggering liability, viz. the spillage of slippery fluid on the road without giving notification or warning of this.

However, in FSN 1854, several errors or acts of negligence causing losses are treated as one event because of a common underlying cause:

> In FSN 1854, cheques were stolen from a customer of a bank. Seven of these were falsified by the thief and cashed through seven different employees in different branches of the bank on the 6th and 9th of April. The majority of the Board found that one deductible should be applied, as the cheques were stolen on one occasion and cashed by the same person over a few days. The minority, on the other hand, focused on

> the fact that the insurance was connected to the mistakes made by the employees, and that the individual acts of each employee should therefore be regarded as separate liability cases. The theft of the cheques was not sufficient to trigger liability. In this case, the majority looked behind the insured event (the error made by each employee) and focused on the common underlying factor or peril.

The majority view here accords with the result in FSN 2788 in that the Board focuses on the common underlying cause leading to seven instances of negligence by different persons. In both 1854 and 2788, the deductible was connected to "the settlement" and not to the casualty or the insured event, and, as already mentioned above, the Board may interpret these concepts differently. However, it is clear that the Board in FSN 2788 and 1854, and also the minority in FSN 2464, goes behind the casualty or event that triggers the insurer's liability, i.e. the theft and the negligence, and places decisive weight on the causative factor behind this event. In this respect, the decisions may be compared with the *Sunvictor* case, where decisive weight is placed on the "ice conditions" as the common cause of the two situations in which damage occurred. This is also in accordance with the subsidence of the floor case which focuses on several errors due to an underlying lack of understanding of, or experience with, the building material, or to being made during the same project and constituting "a complex of causes". However, it is difficult to say if the result here would have been the same if the errors had led to clearly separate incidents of damage and perhaps also to different chains of causation, similar to FSN 2509 (eight different errors in design).

6.4 Summary

The expression "insured event" as a starting point focuses on the immediate event triggering the damage and not on the underlying cause of this event. This is particularly so when the cause is a condition, for instance, weakness or corrosion, or an omission or situation in liability insurance. However, a serial damage clause implies that all incidents of damage caused by the same negligent act, omission or condition should be attributed to this event for the purpose of the deductible and the

sum insured. The same holds for a definition of "occurrence" stating that all damage or loss arising from the same cause constitutes one occurrence. On the other hand, if the word "cause" is changed to "event", this result is less clear.

However, the legal sources for marine insurance clearly imply that, despite the wording, one looks to the underlying cause of the incidents of damage. This holds if the cause is a negligent act (shooting of a trawl, error in design or material), a negligent omission (failure of cleaning, error in design or material), or a condition (ice). According to this material, "insured event" cannot be interpreted in a narrow way to mean each incident of damage. Both the *Sunvictor* case and the *Tønsnes* and *Ny Dolsøy* cases correspond to a peril-has-struck principle rather than to an incurred-damage principle.

The legal sources for dry insurance are less clear. FSN cases concerning vandalism focus on damage committed on the same occasion, rather than on the cause. However, if several acts of vandalism are committed on the same occasion, each act is an event triggering liability, and thus the "occasion" may be compared to cause. Several decisions also accept the underlying cause as decisive if the cause is an act (theft of cheques leading to several negligent acts), an employment relationship (maid carrying out a series of thefts during a two-year period), or a weakness (in pipes). On the other hand, a rental relationship is not sufficient, and separate failures are separate causes, even if committed during the same project.

In deciding whether several incidents of damage constitute one event or several insured events, several arguments may be inferred from the discussed material:

1. One relevant argument is whether there is a close connection in terms of location and time between the successive incidents of damage, or whether the new incidents are of a totally independent nature. However, one cannot claim that this connection should be very tight: The time span varies from two years in FSN concerning thefts, to a couple of hours in FSN concerning vandalism. The space varies from the same place

to the same fishing area. However, FSN concerning theft may indicate that if the damage takes place at the same location, the time period may be extended. Similarly, for a period of some hours, the geographical area may be extended.

2. What possibilities did the assured have of averting the last incident of damage? This argument was put forward in the *Sunvictor* case and the Commentary to the Plan, and also follows from the policy considerations behind the deductibles. For liability insurance, one may here infer that if one has a possibility of avoiding the last incident of damage, this constitutes a new act of negligence. However, the *Tønsnes* and *Ny Dolsøy* cases imply that the weight of the considerations in respect of deterrence is more limited than one would have thought.

3. Does the initial damage or its cause entail an increased risk of new damage, or is the last incident a result of a "generally prevailing risk of damage" which would have occurred with the same effect independently of the first damage or its cause? This argument is relevant in the *Sunvictor* case and some FSN cases, and may be explained by the risk of new damage created by the first damage.

7. The solution in some other legal systems

7.1 English law

Apparently, there is limited English authority on the number of occurrences for the purpose of determining the number of deductibles or the sum insured in English court practice. There are, however, some cases concerning the sum insured. These cases concern either direct insurance and reinsurance covering war perils, or a combination of underwriters' error and omission (E&O) insurance[42] and reinsurance. As the latter

[42] Similar to liability insurance for professional services.

decisions quote extensively from the previous ones, it is necessary to cite them in chronological order. A summary can only be drawn when all the cases are presented.

The first two sets of cases concern negligent underwriting that was covered under the underwriters' E&O insurance, and where the E&O insurer had covered his loss under an excess-of-loss reinsurance. These two sets of cases had a parallel development through the court system where the lower court in one of the cases relied on the lower court in the other case. In order to understand this development, it is therefore necessary to present the cases in the same parallel way.[43]

The first case in the matter is *Deeny v. Gooda Walker Ltd.* (1996) L.R.L.R. 183.

> This case did not concern the interpretation of "each occurrence", but rather gives the foundation for the single line of the latter cases. The case concerns two companies in the Gooda Walker group acting as the managing agents for four syndicates and also as members' agents for more than 200 names. The underwriters wrote catastrophic excess-of-loss insurance for spiral businesses that resulted in enormous losses for the names. The names, claiming that the losses were caused by a breach of the duty of care, sued for damages. It was held that the three professionals who conducted the underwriting for Gooda Walker failed to measure up to the necessary standard because they had failed to investigate the risk, however, the extent of the liability was not calculated in this case.

The next case is *Caudle v. Sharp* (1995) L.R.L.R. 80.

> In this case, various original insurers arranged 32 run-off reinsurance contracts with syndicates for whom Mr. Outhwaite was the underwriter and his company the managing agent. The contracts led to large losses for the members of the syndicates, who sued the company. The action was settled for a large sum, and the company, among others, claimed under its E&O policies, written by a syndicate of which Mr. Sharp was the representative. This syndicate was in turn reinsured by another syndicate of which Mr. Caudle was the representative. Mr. Sharp's syndicate paid claims under the E&O policy, and claimed against Mr. Caudle's syndicate under its reinsurance. One issue in this case was whether the losses under all 32 contracts could be aggregated for the purpose of a claim under the reinsurance. The reinsurance policy contained a clause stating that the reinsurance was "only to pay the excess of the Ultimate Nett Loss to the

[43] The presentation is built on the factual description of the development in *Axa Reinsurance (U.K) PLC. v. Field*, Lloyd's Law Report (1996) 233, pp. 235-236, which is the last case in this development.

> reinsured of ... or 2,500,000 pounds each and every loss with a limit of liability to the reinsurers of ... or 2,500,000 pounds ...". ('Each and every loss and/or occurrence' was defined as a 'series of losses ... arising out of one event'.) The arbitrators held that there was only a single loss arising out of one event, namely, the negligence of Mr. Outhwaite in writing the contracts without conducting the necessary research and investigations into the problems of asbestosis. This failure was the occurrence that gave rise to the series of losses. The award was upheld on appeal, "...on the basis that there was a continuing state of affairs amounting to an event out of which the losses arose, rather than on the basis that the writing of the 32 contracts taken together was an event " (p. 87).
>
> The direct insurer Sharp could thus claim the amounts he had paid to settle the negligence claims in excess of 2,500,000 pounds up to an additional 2,500,000 pounds.

The third case in this development is *Cox v. Bankside Members Agency Ltd.* (1995) 2 Lloyd's Rep. 437, which represented part of the large and complex volume of litigation following the *Deeny* case mentioned above:

> Bankside was among the defendants in the *Deeny* case. Bankside had E&O insurance with various syndicates, including Syndicate 204. In the *Bankside* case, several preliminary issues were grouped together for the purpose of managing the large amount of litigation under different contracts and between different parties then pending before the commercial court. An issue in that case was how, in the light of the various acts and omissions which were the basis of the liability of the members' agents in the *Deeny* case, losses should be aggregated for the purpose of a provision limiting the insurer's total liability. The limits in the mentioned E &O policies were tied to "any one occurrence or series of occurrences arising from one originating cause". On the basis of the decision in *Caudle v. Sharp (1995) L.R.L.R. 80,* it was argued that losses deriving from successive failures of a particular underwriter to pay sufficient regard to the correct principles of underwriting stemmed from one originating cause. Just as Mr. Outhwaite's lack of appreciation of the consequences of asbestos was the single event which was the cause of the losses that stemmed from the 32 disastrous run-off contracts, so also the lack of appreciation of the effect of the spiral was the single originating cause responsible for all the Gooda Walker losses. The judge disagreed. The failure of an individual that led him to commit a number of negligent acts could arguably be said to constitute the single event or originating cause responsible for all the negligent acts and their consequences. However, this was not true when a number of individuals each acted under an individual misapprehension. This was so, even if the nature of this misapprehension was the same. Even when applying the reasoning in Caudle v. Sharp, the result was that the approach to underwriting of each individual underwriter was a separate originating cause. Since there were three underwriters, the result was that there were three originating causes.

The fourth case is the appeal of *Caudle v. Sharp* (1995) L.R.L.R. 80 in *Caudle v. Sharp* (1995) 2 L.R.L.R 433 (CA).

> In this case the judge accepted that the underwriting of each of the 32 contracts was an occurrence. The question therefore was whether the losses from the underwriting of the policies could be described as "arising out of one event". Contrary to the lower court, the judge found that they could not. The judge stated:
>
> First, can Mr Outhwaite's "failure to conduct the necessary research and investigation into the basic underlying problem of asbestosis" properly be decided as an "event" within the clause? If so, it was a happening, so far as relevant for this purpose, without beginning and without end. It was an omission on his part and therefore capable of constituting negligence, but it did not become a negligent omission until Mr Outhwaite underwrote a relevant policy of insurance. Until he did that, his failure was not negligent, however deficient in general knowledge expected of an underwriter he may have been; he was not obliged to accept insurances of this sort. I therefore have considerable difficulty in accepting that his failure to inform himself before the first of the insurance contracts was entered into was an "event" within the usual meaning of that word, or that any event occurred unless and until he entered into a contract which made his state of knowledge relevant. That was a negligent act and a relevant occurrence, but it arose out of his decision to underwrite the insurance rather than from his previous failure to inform himself of what he should have known; a fortiori if he was aware of that deficiency himself ... . For these reasons I would hold that Mr. Outhwaite's "blind spot" or "his failure to conduct the necessary research and investigation" does not fall within the natural and normal meaning of the word "event" except by reference to each and every occasion when he entered into an insurance contract, which given his lack of knowledge it was negligent for him to do so. In my judgement his ignorance of failure cannot be regarded as a single event ...

The appeal in the *Caudle* case resulted in another step in the *Deeny* case, *Axa Reinsurance (UK) Plc. v. Field* (1996) 2LLR 233.

> The background to this case was the excess-of-loss treaty between Syndicate 204, represented by Field, which had covered Bankside's E&O insurance, and Axa Reinsurance (UK). The reinsurance contained the following clause:
>
> "This reinsurance is only to pay the excess of an Ultimate Net Loss to the Reinsured of pounds 500,000 ... for each and every loss with a limit of liability to the Reinsurers of pounds 500,000 ... for each and every loss ...".
>
> The expression "each and every loss" was defined as "each and every loss and/or occurrence ... and/or series of losses and/or occurrences ... arising out of one event".
>
> The question to be answered by the court was whether the expression "arising out of one event" should be interpreted in the same way as the expression "arising out of one originating cause" in the *Cox v. Bankside* case. Field argued that claims under the reinsurance coverage should be aggregated in the same manner as the result in the *Cox v. Bankside* case concerning the underlying direct E&O insurance, i.e. that the losses resulting from each underwriter's negligent underwriting could be aggregated. Thus, the

> Syndicate should pay the losses in excess of 500,000 pounds and up to the limit for each of the three underwriters. This argument succeeded in the lower court, which held that the expressions "arising out of one originating cause" and "arising out of one event" were identical for insurance purposes. However, this result was rejected by the House of Lords. The judge first commented upon the assumption of the lower court that where a direct insurer takes out reinsurance, and where both policies contain provisions allowing losses to be combined, the parties are likely to have intended that their effect be much the same.
>
> "This assumption may very well be correct where the reinsurance is of the proportionate kind, under which the reinsurer is sharing the risk assured by the direct insurer. In such an event it is indeed likely that the treatment of multiple losses, and hence the outcome of the parallel contracts was meant to be the same. But where a reinsurer writes an excess of loss treaty for a layer of the whole account ... of the reinsured I see no reason to assume that aggregation clauses in one are intended to have the same effect as aggregation clauses in the other. The insurances are not in any real sense back-to-back."
>
> According to the judge, the reason for this was that the underwriting strategy would not necessarily be the same for the direct insurer and the excess-of-loss insurer. The direct insurer could evaluate the individual risk according to his knowledge of the policy holder, the claim frequency, and the way the claims would be divided between claims lower than and above the deductible, and limit his risk by the use of deductibles and aggregated limits in the individual policies and by effecting reinsurance. The reinsurer, on the other hand, would have to take a broader view because he could not rate the individual risk. The elements of prudent underwriting were therefore not the same for the direct insurer as for the excess-of-loss reinsurer.
>
> The judge then made the comparison between the "originating cause" and the "event":
>
> "In my opinion these expressions are not at all the same. In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way ... . A cause is to my mind something less constricted: it can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses it sought to aggregate. To my mind the one expression has a much wider connotation than the other."

It is thus clear from the *Axa* and the *Caudle v. Sharp* cases that a negligent omission in the mentioned cases to investigate the insured risk does not in itself constitute an event. According to *Caudle v. Sharp,* the failure does not constitute an event until it has manifested itself through a negligent act, i.e. writing a contract. On the other hand, according to the *Cox v. Bankside* case, the negligent omission constitutes a cause. The English system thus distinguishes between an event and a cause for the purpose of the aggregation of losses.

The next group of cases concern direct insurance and reinsurance of war perils. The first case is an unpublished arbitration award called the *Dawson Field Award* (29 March 1972) which is not published, but is extensively cited in another case, *Kuwait Airways Corporation and Another v. Kuwait Insurance Co. S.A.K and Others* [1999] 1 Lloyd's Rep. 803.

> In the *Dawson Field* arbitration, four aircraft were hijacked by the Popular Front for the Liberation of Palestine (PFLP) in 1970. The hijackings were concerted and designed as a means to procure the release of terrorist prisoners. One aircraft was placed in Cairo and the other three were placed at Dawson Field. The jet at Cairo was blown up first, partly because the hijackers felt that they could not retain control over the situation in Cairo, and partly as an incentive to enforce their demands in respect of the other three planes. Their demands were not, however, met, and they decided to blow up the remaining three planes. The explosions at Dawson Field took place within some five minutes.
>
> The arbitration arose under an excess-of-loss reinsurance contract containing an excess-of-loss clause that spoke of "the ultimate net loss sustained in respect of each and every loss ... and/or occurrence and/or series of occurrences arising out of one event". The question was whether the loss of the aircraft arose out of one event. The respondent contended that the proximate cause of the destruction of the aircraft was the hijacking, and hence each hijacking constituted one occurrence. The underwriter claimed that the hijackings arose out of one event, viz. the PFLP's overall plan, and constituted one event. The judge, however, disagreed with both of them.
>
> The judge stated: "I turn next to 'occurrence'. As a word this is more or less interchangeable with 'event'. Both denote something which happens, a happening. ... Whether or not something which produces a plurality of loss or damage can properly be described as one occurrence ... depends on the position and viewpoint of the observer and involves the question of the degree of unity in relation to the cause, the locality, the time and, if initiated by human action, the circumstances and purposes of the persons responsible." The judge accepted neither the respondent's contention that the proximate cause of the destruction was the hijacking, nor the claim that the decisive event was the overall PFLP plan. He emphasized that "a plan cannot by itself constitute an event". In his view, the "destruction of the aircraft arose from the decision or order to detonate the explosive charges in them, which was thereupon carried out in the way described above. If three aircraft became total losses because of a decision or order to blow them up together was carried out, why is the carrying out of the decision or the order not one event?"

The conclusion therefore lies between the underlying overall PFLP plan, which would have resulted in one occurrence for all four explosions, and the hijacking of each

individual plane, which would have resulted in four occurrences. The decisive event was the decision to blow up the three planes at Dawson Field.

The second case, *Kuwait Airways Corporation and Another v. Kuwait Insurance Co. S.A.K and Others* [1999] 1 Lloyd's Rep. 803, concerns the number of sums insured under a direct war insurance policy.

> The case concerns the loss of 15 aircraft during Iraq's invasion of Kuwait in August 1990. Among the primary targets of the invading forces was the Kuwait Airport. The forces were in control of the airport by the morning of 2nd August, and within the day of Kuwait itself. On the ground at the airport were 15 planes belonging to the plaintiffs (KAC). Within a week, by 8th August, 14 of the 15 aircraft had left Kuwait. The fifteenth, an airbus which had been redelivered at the end of a lease to Egyptair, was the last to leave, since it was not airworthy pending an overhaul. KAC claimed the loss of the 15 aircraft from their war-risk insurers.
>
> The war insurance policy had a maximum sum insured in respect of ground risk of 300 million USD for "*any one occurrence, any one location*". It was agreed that the loss of the planes occurred at "one location", i.e. Kuwait Airport. One of the questions in the case was whether the loss of the aircraft constituted "one occurrence", or whether the aircraft were separately lost when they were flown out from Kuwait Airport. The underwriters contended that as all the aircraft were lost altogether on the first day of the invasion this constituted a single occurrence, and that the subsequent removal of the aircraft from the airport to the Iraqis should be seen as the logistics of their disposal, subsequent to their loss. The judge agreed and stated *inter alia:*
>
> "An occurrence ... is not the same as a loss, for one occurrence may embrace a plurality of losses. Nevertheless, the losses' circumstances must be scrutinized to see whether they involve such a degree of unity as to justify their being described as, or as arising out of, one occurrence. ... In assessing the degree of unity, regard may be had to such factors as cause, locality and time, and the intentions of the human agents. An occurrence is not the same thing as a peril, but in considering the viewpoint or focus of the scrutineer one may properly have regard to the context of the perils insured against."
>
> It was held that as the aircraft were all lost on 2nd August, there is unity of time and unity of location. Further, "there is unity of cause, for, whichever of the insured perils is the appropriate one, it operates alike for all aircraft". There is also unity of intent. The judge concluded: "the occurrence is the successful invasion of Kuwait, incorporating the capture of the airport and with it KAC's aircraft on the ground; at its narrowest, it is the capture of the KAC fleet at Kuwait airport. On either view, it seems to me those matters are appropriately described as one occurrence."

The last case is *Mann and Holt v. Lexington Insurance Co* [2001] LRLR 179 (GA).

> In this case, the claimants were reinsurers and the defendant a retrocessionaire. The underlying direct insurance was written by an Indonesian insurer and covered stores in Indonesia belonging to PT Ramayana. The stores were at different locations identified in a schedule. The Indonesian insurer had reinsured the risk with DP Mann and syndicate and Holt. DP Mann had taken 25 % of the primary risk and retroceded 20 % to Lexington Insurance Co. Holt had reinsured 1.7 % and retroceded the whole percentage to Lexington. According to the cover note between Mann and Holt on the one side and Lexington on the other, the sum insured was "USD 5,000,000 per occurrence", whereas the deductible was "2.50 % of the adjusted claim subject to a minimum IDR 25,000,000 for each location and any one occurrence". The sum insured in the reinsurance contracts effected between the Indonesian insurer and Mann and Holt was, however, tied to "each and every loss, each and every location".
>
> In the course of the civil unrest that preceded the resignation of President Suharto, 22 Ramayana stores in Java were damaged over a period of two days. The issue between the parties was whether this riot damage constituted one occurrence or a number of occurrences. The judge first discussed whether it could be presumed that the expression "each occurrence" in the retrocession cover note meant the same as "each and every loss, each and every location" in the reinsurance contract. The answer was yes. The reasoning was that the reinsurer received a share of the premium in return for accepting a share of the risk, and likewise the retrocessionaire took a share of the premium for accepting his share of the risk. It must therefore be presumed that the number of sums insured should be the same in both contracts. This was supported by the concept of "occurrence" for "each location" tied to the deductible, which corresponded to the concept of "occurrence" for "each location" tied to the sum insured under the reinsurance contract. The result of this would be that, as the stores were at different locations, the claims could not be aggregated.
>
> However, even assuming that the "occurrence" could not be qualified in this way, the result would be the same. Applying the reasoning in the *Dawson Field* case and the *Kuwait Airways* case for establishing the meaning of the word "occurrence" in an insurance context, the judge stated that there was no unity as to time or place. The only point of unity that one could attempt to prove was that the riots were centrally orchestrated by the government. It was, however, the judge's view that it would still be "difficult to conceive of a situation in which, if the properties were some distance apart, and, if there was a lack of unity of time, there could still be one occurrence by virtue of some factor such as 'orchestration' ". It was held, therefore, that the losses constituted more than one occurrence within the meaning of retrocession, by reason of the different localities and times at which they occurred.

The *Kuwait Airways* case and the *Dawson Field* case both place decisive weight on the common underlying cause of the losses. However, the relevant cause is the decision to destroy (*Dawson Field*), or the seizure of Kuwait or the Kuwait Airport. Both the *Dawson Field* case and the *Mann and Holt* case state that the overall plan behind the

act cannot in itself be an occasion. The *Mann and Holt* case conforms to the *Dawson Field* case in that an overall plan lying behind all the incidents of damage is not sufficient for the incidents to constitute one event. This seems to conform to the result of the *Axa* case and the *Caudle v. Sharp* case that a negligent omission does not in itself constitute an event.

Thus, according to the English court decisions, an "occurrence" is synonymous with an "event", but not necessarily equivalent to a single "loss" or the happening of an insured peril. On the other hand, an occurrence or an event is a narrower concept than a cause. An occurrence or an event is something that happens at a particular time, at a particular place, in a particular way. A condition, an absence of something happening, an omission or a plan cannot be an event, but may constitute a cause. The distinction between one event and several events depends on the position and viewpoint of the observer and involves the question of the degree of unity in relation to the cause, the locality, the time and, if initiated by human action, the circumstances and purposes of the persons responsible.

Compared with Norwegian law, the English interpretation of "any one event" is similar in approach; an event is not the same as each separate loss or incident of damage, or even the immediate cause of the loss. The interpretations also seem to be similar if several losses "arise out of" a common underlying cause which can be described as a happening defined in terms of time and place. On the other hand, the English concept of an event is narrower than the concept of a cause: a permanent state of affairs or the absence of something happening does not constitute an event. This seems contrary to the *Sunvictor* case (ice conditions treated as an "accident"), *the subsidence of the floor* case (implying that a lack of understanding of, or experience with, the building material is an "event") and FSN 1882 and 2709 (weakness of a pipeline under pressure is a "casualty"). Further, both the Commentaries to the NMIP and the several FSN cases interpret the concept of an insured event or a casualty all as incidents of damage having the same cause.

It should be emphasized that the English cases concern the number of sums insured under direct insurance and the relationship between the direct insurer and the reinsurer, whereas most of the Norwegian cases concern the number of deductibles. The policy considerations are therefore not the same. In a case concerning the number of sums insured, the judge may choose a narrow interpretation of "event" in order to protect the assured and the injured third party against an extensive uncovered loss. Compared with the *asphalt* case, the English interpretation is fairly wide. However, compared with the *Ny Dolsøy* case the English interpretation is more restrictive, as failure to clean can not constitute an event. The shooting of the trawl in the *Tønsnes* case, on the other hand, seems to qualify as such. This part of the reasoning in the English system is not very logical from a Norwegian point of view.

The English decisions also comment on the relationships between direct insurance and reinsurance and between reinsurance and retrocession. According to the *Axa* case, there is no necessary connection between the definition of each occurrence in the underlying direct insurance contract and an excess-of-loss reinsurance. On the other hand, the *Mann and Holt* case presumes that the retrocession is based on a similar concept of "each occurrence" as the reinsurance contract, even if the wording interpreted literally would lead to another result.

7.2 American law

7.2.1 Introduction

In the US, insurance coverage disputes are governed by State law, not by Federal law. Different states employ different tests to determine the number of occurrences.[44] This implies that the answer to the question may differ depending on which state's law is

[44] Jeannine Chanes and Mary Daniels, *One Occurrence or Two: How the Courts Decide* (Chanes and Daniels). Unpublished paper.

applied to the dispute. It is outside the scope of this article to give a detailed account of the solution in every US state, or to make a presentation of all the court cases concerning this issue.[45] The discussion here will therefore be limited to an overview of some cases in order to illustrate the complexity of the problems and to see if some lessons can be learned for Norwegian insurance and reinsurance practice.

As a general starting point, it seems as if the US courts employ three different approaches, defined as three different tests, in distinguishing between one and more than one insured event.[46]

- cause (or negligent act or omission) test
- effect test
- unfortunate event (or liability triggering event) test

The different tests refer to different parts of the chain of causation leading to the ultimate insurance claim. As already mentioned, different states have adopted different approaches. However, to complicate matters, some states have adopted several tests, thus creating a conflict of approach within the same state.[47] Also, it should be pointed out that the test is the starting point as expressed by the court. The way in which the tests are interpreted may not necessarily lead to different results in the actual case.

It is claimed that the approach or test is applied for liability, property and employee dishonesty policies.[48] However, the cases I have found concern liability insurance involving more than one victim. As a general rule, application of the cause test yields the minimum number of occurrences (frequently one), while the effect test yields the maximum possible number of occurrences (frequently one per claimant or instance of

[45] A good overview of the cases concerning the number of sums insured is given in Annot. 64 A.L.R.4th 668 (1988) (64 A.L.R.). Most of the cases cited here are collected from this overview.
[46] 64 A.L.R. § 1-2, Arthur A. Johnson Corporation et al., Respondents v. Indemnity Insurance Company of North America, Metropolitan Life Insurance Co. v. Aetna and Surety Co et al. (2001) 255 Conn. 295, 765 A.2d891, 2001 Conn. LEXIS 18.
[47] This holds for Louisiana and Texas for liability insurance, see 64 A.L.R. § 6 and 7.
[48] Chanes and Daniels.

loss or property damage). The unfortunate event test tends to produce a number somewhere in between.[49]

7.2.2 The effect test

The effect test is employed to determine the number of occurrences on the basis of the effect of an accident,[50] which seems to be equivalent to maintaining that each person who has suffered a loss has suffered an accident.[51] Thus the number of accidents is determined by the number of persons injured or items damaged. This also seems to be the oldest approach. The leading exposition of this doctrine is *South Staffordshire Tramways v. Sickness & Acc. Assur. Assn*:[52]

> In a tramcar accident 40 passengers were injured and made claims against the tramcar-company. The tramcar-company had effected liability insurance with a limitation of "2501. in respect of any one accident". It was held that there was one accident for each claim for the purpose of the limitation in the policy. The rationale appears to be that, inasmuch as the purpose of the policy is to afford protection against claims for injuries, it is much more appropriate to equate "accident" with an "accident to any one claimant" or an "occurrence harming any one claimant".

Today, this test is the one most rarely used. However, examples are found, both for deductibles and sums insured. In *Reynolds v. S&D Foods,*[53] this test is applied for deductibles "per claim" in the insurance policy:

> A dog food manufacturer delivered dog food infested with salmonella poisoning to two kennels, which caused injuries to nine dogs. The owners of the injured dogs claimed against the dog food manufacturer for damages. The manufacturer's liability policy contained a $5,000 deductible "per claim" to be applied to all injuries "sustained by one person ... as a result of any one occurrence". The court held that "a claim" is "a challenging request, ... a demand for benefits or payment", and that "it seems a distortion of this fundamental meaning ... that a claim refers to an incident or accident which gives rise to various claims". The policy wording further implied that "one

[49] Chanes and Daniels.
[50] The *Metropolitan* op. cit.
[51] *Arthur A. Johnson* op. cit.
[52] (1891) 1 Q.B. 402 (Court of Appeal).
[53] Inc. (1993, DC Kan) 822 F.supp. 705.

> occurrence" could result in several claims for the purpose of the deductible. The deductible should therefore be applied for each injured dog, and not for the two deliveries of poisoned food.

In this case, the language of the policy "per claim" and the defined relationship between the claim and the occurrence clearly supports the effect approach.

However, the effect approach has also been applied in cases where the policy limit is connected to "one accident" or similar expressions. One example is *Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co.*[54]:

> The assured excavated under its buildings for the purpose of remodelling them. As a result of the excavation, the assured's buildings, together with the building adjoining the premises on the east, collapsed simultaneously. Two days later, although there was no further excavation work, the building immediately west of the assured's premises collapsed. All collapses were proximately caused by the excavation work carried out by the assured prior to the first collapse. The assured's general liability policy covered the "ownership, maintenance, or use of the premises insured and all operations necessary or incidental thereto", with limitations of $10,000 for "one accident" and $25,000 in aggregate. The court noted that there were two separate days between the two collapses, and that there were two accidents. The court further stated that if "the excavation was a single act, and constitutes a single accident, then the question comes as to when the accident occurred. The owners on the west suffered no loss and experienced no unforeseen event until the 29th".

Another example is *Anchor Casualty Co. v. McCaleb*[55]:

> The case concerned liability insurance for a partnership engaged in drilling for oil. During the policy period, an oil well blew out with tremendous gas pressure causing eruptions intermittently for over two days. During this time, considerable quantities of oil and gas distillate, sand and mud were blown into the air and carried by various shifts in the wind onto the properties of landowners and tenants in the immediate area. Four claims for property damage, aggregating more than $35,000, were filed. The policy contained a provision limiting the aggregate liability to $25,000 and the liability for "each accident" to $5,000. The court held that each separate instance of damage to the properties of the claimants constituted a separate accident and thus the insurer was liable up to $5,000 for "each accident", but that the damage to all parties arising out of the fires should not exceed the policies' aggregate limit of $25,000. The court pointed out that the blowing-out of the well was not a single accident, but a series of events, a catastrophe. Numerous accidents were the product of this motivating force and the wind

[54] (1954) 197 Tenn 60, 270 S.W.2d 358.
[55] (1949, CA5 Tex) 178 F.2d 322.

> as a supervening force. The eruptions continued intermittently for two days; and during this period the wind changed from time to time, blowing mud and sand on different properties. The wording "each accident", as used in the policy, must be construed from the point of view of the person whose property was injured. Further, the term "aggregate" was meant to serve as a total limit of damage to the property of different persons resulting from a closely related series of events, such as appeared in the present case.

Neither of the policies in these cases contained a definition of the concept of "one accident". Also, the aggregate amounts of $25,000 in both policies protected the insurer against a more substantial claim. However, in *Lombard v. Sewerage & Water Bd.*[56], the effect approach was used even if the policy contained a clause saying that "continuous or repeated exposure to conditions" constituted one accident:

> The case concerned the liability of a city and its sewerage and water board for damage caused by the installation of a concrete drainage canal. Seventeen suits representing the claims of 119 plaintiffs were brought by property owners for alleged residential damage. The liability policy issued to the city and the board afforded coverage for $50,000 per occurrence, and $100,000 in aggregate for operations conducted by independent contractors. The term "occurrence" was defined as "an accident or a continuous or repeated exposure to conditions which results during the policy period in injury to person or real or tangible property which is accidentally caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence". The court held that "it can hardly be said that this construction project lasting more than one year is a single 'occurrence' within the contemplation of the quoted clause. Rather, we think it is more logical to view this project as a series of 'occurrences' resulting in damages during the course of this prolonged undertaking. The word 'occurrence' as used in the policy must be construed from the point of view of the many persons whose property was damaged. As for each of these plaintiffs, the cumulated activities causing damage should be considered as one occurrence, though the circumstances causing damage consist of a continuous or repeated exposure to conditions resulting in damage arising out of such exposure." In reaching this decision, the court emphasized that the word "occurrence" had been substituted for the word "accident", manifesting an intent to broaden coverage. Full policy limits were thus available to each damaged party.

The effect approach has been explained by noting that modern courts have difficulty accepting the theory that a pattern of behaviour, conduct, inactivity or negligence by the policyholder justifies aggregating individual claims into a single occurrence. Courts often have difficulty categorizing an abstract pattern of behaviour as a

condition that would satisfy the continuous exposure clause. In addition, some view the effect test as more appropriate when the injuries or the damage arises at different locations and at different times, and therefore clearly does not constitute one occurrence.[57]

The effect test seems to be different from the approach of both Norwegian and UK law. It may be compared to the Norwegian *asphalt* case, but here the judge focuses on the three instances of separate incidents of damage, and not on the number of claims (the collision resulted in claims from two parties). The *asphalt* case is therefore closer to the event approach, see below.

7.2.3 The Unfortunate Event Test

A second approach is the unfortunate event test. This test focuses on "an event of an unfortunate character that takes place without one's foresight or expectation",[58] or an unexpected, unfortunate occurrence.[59] As a starting point, focus is here shifted from the effect of the accident in the form of a claim from an injured party or an incident of damage resulting from the accident as such. The difference seems to be that, instead of counting the number of persons or items being struck by the unfortunate event, one takes one step backwards in the chain of events leading to the claim. If there is one event for each claim, the result will be the same as for the effect approach.[60] On the other hand, if one and the same event causes several claims, the effect test will result in several accidents, whereas the event test results in one accident.

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56 (1973, La) 284 So.2d 905.
57 Chanes and Daniels.
58 *Croshier v. Levitt*, 5 NY 2d, 259, 269 (1959).
59 *Arthur A. Johnson* op. cit.
60 This was the case in *Anchor Casualty Co. v. McCaleb* (1949, CA5 Tex) 178 F.2d 322 cited above.

The reasons for preferring this test to the effect test is that people "use the word 'accident' to describe the event, no matter how many persons or things are involved".[61] A further argument is that premiums are based on the risk insured and the potential amounts of liability covered. Such a system of computing rates is not compatible with the idea of virtually limitless liability, depending solely upon the number of claimants.[62]

An example of this approach is *Arthur A. Johnson Corp. v. Indemnity Ins. Co.*[63] This case concerned liability under a contractor's liability policy for property damage caused by the collapse of two walls. It is particularly interesting as it is very similar to *Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co.*[64] referred to above:

> The assured was a general construction contractor who had entered into an agreement with the city department of transportation (DOT) to construct platform extensions in subway stations. As part of the job, the contractor excavated a trench that extended between two streets in front of two adjoining, but separate buildings. The separation of the buildings prevented water in the sub-basement of one to flow into the sub-basement of the other. The contractors removed the underground vault walls in front of each building and constructed in their place two entirely separate, temporary cinder block walls, six inches thick, enclosing the front of the sub-basement of each building. On August 26, 1947, a rainfall of unprecedented intensity took place and flooded the excavation beyond the capacity of the pumps. At 5:10 p.m., one of the sections of the cinder block wall gave way and that sub-basement was flooded, causing property damage to the owner and occupants therein. Subsequently, at 6:00 p.m., the wall protecting the other building was breached and similar flood damage occurred. The insurer and the assured agreed that the collapse of the wall was not due to negligence on the part of the builder.
>
> The contractor had agreed to indemnify DOT for any claim for damages caused by the work regardless of negligence, and had insured this liability. The insurance contained a limit of $50,000 for each accident. The collapse of the two walls resulted in several claims that were settled for well over $50,000. The insurer claimed that as the rainfall was the proximate cause of all the damage, only one limitation sum could be claimed. The contractors argued that the number of persons harmed should determine the number of "accidents".

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61 *Saint Paul –Mercury Ind. Co. v. Rutland* (225 F. 2d 689 (C.A. 5th 1955) p. 691.
62 *Saint Paul –Mercury Ind. Co. v. Rutland* (225 F. 2d 689 (C.A. 5th 1955) p. 692.
63 (1959) 7 NY.2d 222, 196 NYS.2d 678, 164 NE.2d 704.
64 (1954) 197 Tenn 60, 270 SW.2d 358 referred to above.

> In analyzing the number of occurrences, the New York Supreme Court considered and rejected both the cause test and the effect test, choosing instead the unfortunate event test. It determined that this test was the most practical, and that it corresponded with what the average person anticipates when buying and reading an insurance policy. Under the unfortunate event test, the court concluded that the collapse of the two walls constituted two accidents because the property damage had occurred at separate times to separate buildings, and because the collapse of the first wall did not contribute to the collapse of the second wall. Further, the court noted, it was almost one hour between the two 'collapses', and if the walls and buildings were located blocks away from each other on different job sites, but subject to the same rainfall, "no one could contest that there were two accidents". It was also pointed out that the rainfall in itself did no harm, but the breaching of the wall that let the rain in.

It is interesting to observe that the result in this case is the same as in *Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co.* in that the decisive factor for the number of occurrences is the collapse of the building or wall. However, in the *Arthur A. Johnson* case the 'collapses' generated more claims than in the *Kuhn's* case. Thus the effect approach would have resulted in more occurrences in the *Arthur A. Johnson* case than in the *Kuhn's* case. It can also be noted that in this case both the collapse and the underlying cause – the heavy rainfall – could be described as an "event". Compared

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cited above.

2d 689 (C.A. 5th 1955) p. 691.
2d 689 (C.A. 5th 1955) p. 692.
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ed to above.

factor to break the chain of causation. The effect test, on the other hand, would in this situation lead to two occurrences.

In *Metropolitan Life Insurance Co. v. Aetna Casualty and Surety Co.* (2001),[66] the Connecticut Supreme Court relied on the *Arthur A. Johnson* case and the *Wesolowski* case to apply the event test in a case concerning a series of asbestos-related bodily injury cases.

> Metropolitan is a large mutual insurance company that insured employee health-care plans of various manufacturers and distributors of asbestos and products containing asbestos. Beginning in the 1970s and continuing to the present time, Metropolitan was sued in thousands of lawsuits filed throughout the US seeking recovery for asbestos-related bodily injuries resulting from alleged failure to publicize adequately the health risks of asbestos exposure. The claims refer to a period of time beginning in the 1930s when Metropolitan engaged in medical research on asbestos. It was alleged that the research discovered the hazard of asbestos activities, and that Metropolitan had a duty to disclose this result to the general public, but failed to do so.
>
> Metropolitan was insured under primary, umbrella and first-layer excess general liability insurance policies, and had also effected excess-of-loss liability insurance cover. In 1993, Metropolitan made a settlement with the insurer having effected the three underlying policies for an amount of $300 million. This settlement terminated all obligations of the underlying policies. Metropolitan thereafter made a claim for coverage under the excess-of-loss policies. These policies provided a stated dollar amount of insurance on a per occurrence basis and were in excess of the underlying cover of $25 million per occurrence. The policies also contained the following clause:
>
> "The total liability of the company for all damages, including damages for care and loss of services, as the result of any one occurrence, shall not exceed the limit of liability stated in the declarations as applicable to "each occurrence". For purposes of determining the limit of the company's liability and the retained limit, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence."
>
> The term "occurrence" is not defined further. The judge, following the logic from the *Arthur A. Johnson* case and the *Wesolowski* case, held that the occurrence or the immediate event in this case was each claimant's initial exposure to asbestos, rather than Metropolitan's alleged failure to warn. Metropolitan's alleged failure to warn, while a possible cause of the claimants' injuries, occurred earlier in the "causal chain", creating merely a "potential for future injury". It did not fall within the definition of an event that took place "unexpectedly and without design". The court also concluded that the continuous exposure clause in the policies served to combine claims arising from

[66] 255 Conn. 295; 765 A.2d 891, 2001 Conn. LEXIS 18.

> exposure to asbestos at the same place at roughly the same time (for instance, a ship or one plant) into one occurrence, and not to combine hundreds or thousands of exposures over a period of sixty years and at different locations into one occurrence. The excess liability policies were thus triggered when the limit of $25 million was exhausted for each claim.

The *Metropolitan* case demonstrates that the effect test and the event test may lead to the same result. According to the judgment, it is based on the event test, but the result is that each claim constitutes one event.[67] One reason for this is that the injuries occurred in many different places under different circumstances and over an extended period, so that they could not be tied together by the occurrence of an unexpected event. The result conforms to UK practice in that a failure (to warn) cannot constitute an event.

In the property damage context, a Californian court applying the unfortunate event test has held that a series of four acts of arson committed by one person against four buildings were four separate occurrences, in part because each act of arson was a separate crime that would support a separate charge in a criminal proceeding.[68] This conforms to Norwegian FSN practice concerning vandalism that has not occurred on "one occasion", and the case concerning thefts from two different storage rooms.

It is argued that the event test is the most modern, because the concept of the unfortunate event as one of several possible factors contributing to injury or damage coincides with the modern understanding of the scientific causation process.[69] Under the traditional approach, causes were imagined as discrete, sequential incidents proceeding in a linear fashion to the ultimate injury. Such an approach makes it easy to attribute an event to one, isolated cause. A more realistic approach, however, is to look at the variety of interrelated and intermingled events as combining to affect the probability of other events.

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[67] Chanes and Daniels describe this case as an example of the effect test, but the judge expressly states that the "event test" is to be applied.

[68] Chanes and Daniels.

This principle, which is at the heart of the unfortunate event test, dictates that the cause of injury or damage must be an event close to the injury or the damage itself. More remote events, while certainly related to the ultimate injury or damage, merely cause the potential for liability or loss, and are not, in and of themselves, the direct cause – or the unfortunate event – that results in the harm.

As already mentioned, the event test seems to conform to the UK approach to the concept of "event". It also conforms to the Norwegian "damage" principle for triggering liability, and to some Norwegian practice concerning theft and vandalism. Similarly to the Norwegian and UK cases, the US cases applying the event test state that connections in time and space are relevant arguments. However, the US requirements on this point are clearly much more restrictive than the Norwegian practice. In the *Kuhn* case, the time span between the collapsing of the two buildings was less than an hour, and both were more or less at the same location. The result here thus seems contrary to the Norwegian cases concerning the *Sunvictor, Tønsnes* and *Ny Dolsøy*. Also, Norwegian practice implies that the concept of one event includes the situation where an intervening cause has interfered in the chain of causation following the first event. This seems contrary to the presumption in the *Wesolowski* case.

7.2.4 The cause test

7.2.4.1 Overview

The cause test has been adopted by a majority of states.[70] These states have concluded that, where there are losses to more than one person or entity, the number of occurrences should be determined by looking at the underlying cause of the loss or the liability. As long as multiple injuries or instances of property damage are the direct

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[69] Cf. Chanes and Daniels.

[70] 64 A.L.R. 4th 668 (1988) §§ 2 and 3, *Progressive Preferred Ins. Co. v. Derby*, 2001 WL 672177 (Ohio Ct. App. 6th Dist. Fulton County 2001), Chanes and Daniels.

result of a single action or event, they are treated as one occurrence.[71] Particularly for liability insurance, the decisive factor is whether there was one proximate, uninterrupted and continuing cause that resulted in injuries and damage.[72] The rationale underlying the cause approach is the fact that proximate cause is an integral part of any interpretation of the words "accident" or "occurrence" as used in a contract for liability insurance.[73]

If the cause and the liability-triggering event happen simultaneously, the cause approach and the event approach will lead to the same result. This is, for instance, the case when the liability is connected with an act resulting in fire injuring several people or spreading to several buildings,[74] or an explosion injuring several people.[75]

Most of the cases cited concern liability insurance where several incidents of damage are caused by an underlying common cause. However, some cases concern the question of a chain of causation between several incidents of damage, and one case concerns property insurance. As the liability cases provide the broadest picture, it seems natural to present them first.

7.2.4.2 Liability insurance, chain of causation

Most of the cases cited concern an underlying common cause, but the cause test is also used when there is a causative chain between several incidents of damage. Examples of this are three cases concerning automobile liability insurance:

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71 Chanes and Daniels.

72 *Flemming ex rel. Estate of Flemming v. Air Sunshine*, Inc., 311 F.3d 282 (3d Cir. 2002), *Appalachian Ins. Co. v. Liberty Mutual Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982). The Flemming case contained a definition stating that all damage arising out of "continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence".

73 *Progressive Preferred Ins. Co. v. Derby*, 2001 WL 672177 (Ohio Ct. App. 6th Dist. Fulton County 2001).

74 *Greaves v. State Farm Insurance Company*, 984 F. Supp.12 (D.D.C 1997), *Tri-State Roofing Co. v. New Amsterdam Casualty Co.* (1955, DC Pa) 139 F Supp 193, *Travelers Indem. Co. v. New England Box Co.* (1960) 102 NH 380, 157 A2d 765.

Hyer v. Inter-Insurance Exchange of Auto Club[76] concerns automobile liability insurance with a policy provision limiting the insurer's liability to $1,000 "with respect to claims ... arising from one accident". The policy contained no definition of "one accident". The insured's automobile, as a result of the driver's negligence, collided with an oncoming automobile, and the force of that collision broke the steering wheel of the assured's automobile, causing it to become unmanageable. The car was deflected and collided with a second oncoming car. The court held that when only one negligent act or omission is the sole proximate cause, there is but one accident, even though there are several resultant injuries or losses. The court then added that the use of the word "claims" in the plural, in connection with the words "one accident", clearly indicated that there might be several claims arising from one accident, as for instance, where two or more vehicles are damaged. Although there might be several injuries and therefore several claims, the total liability of the insurer should not exceed $1,000 if the claims all arose from one accident.

In *Olsen v. Moore*,[77] the assured's vehicle struck two vehicles almost simultaneously. The court stated that as there was virtually no time or space interval between the two impacts, and the assured never regained his control over the vehicle prior to striking the second automobile, there was but one accident or "occurrence". Thus, only one limit of liability tied to "each occurrence" was triggered.

In *Progressive Preferred Ins. Co. v. Derby,*[78] the assured negligently backed over the victim, shifted the dump truck into forward and drove over the victim again. All of these events were in a continuous series, closely linked in both time and space. The assured was never in control of the truck's injury-inflicting potential or of the situation at any time during this period. Thus, the court concluded that it was the assured's initial negligence that was the predominant, active and continuing cause of any and all of the injuries.

In these cases, the time and space arguments are emphasized. This is similar to the argumentation in the *Kuwait* and *Dawson Field* cases, and also similar to Norwegian practice. However, the damages are much more tightly connected in terms of time and space in the referred US cases than in Norwegian practice. Another argument is that the assured never was in control, or regained control, of the situation after the first accident occurred. This argument is similar to the argument in the *Sunvictor* case and may also be compared to remarks in the Commentary to the NMIP concerning the

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75 *Plante v. Columbia Paints* (1992, ND) 494 NW2d 140.

76 (1926) 77 Cal App 343, 246 P 1055.

77 (1972) 56 Wis 2d 340, 202 NW2d 236.

78 2001 WL 672177 (Ohio Ct. App. 6th Dist. Fulton County 2001).

assured's negligence. However, the requirements inherent in this argumentation in the US again seem to be stricter than in the Norwegian cases.

7.2.4.3 Liability insurance: common underlying cause

Most of the cases concern the situation where several incidents of damage or injuries are caused by a common underlying cause or negligent act or omission.

One example of the cause test applied to a deductible per occurrence is *Owens-Illinois, Inc. v. Aetna Casualty and Surety Co.*[79]

> Owens-Illinois (O-I) manufactured and sold a thermal insulation product that contained asbestos between the years 1948 and 1958. As a result, the company was named in thousands of lawsuits alleging injury or wrongful death caused by exposure to the asbestos. The injuries manifested themselves in the late 1970s and early 1980s. O-I was insured by Aetna for product liability claims. The policy was an excess indemnity policy or an "umbrella" policy. Under these policies, O-I was self-insured for each occurrence resulting in personal injury up to the "retained limit" or "per occurrence deductible" set forth in the policy. The deductible was $100,000 for part of the period, and $250,000 for the rest of the period. Above the deductible amount, the policies provided that Aetna would cover O-I's "ultimate net loss" up to the "aggregate annual" and "per occurrence" limits set in the policies. These two limits were identical in each policy and ranged from $20 million to $50 million under the different policies.
>
> The US District Court for the District of Columbia was asked to resolve the number of occurrences for the purpose of the deductible. The parties agreed that the determination of the number of occurrences should be based on the cause of the injury, but they did not agree on what the cause was. The policyholder argued one cause (the decision to manufacture and sell asbestos-containing products), while the insurance company argued multiple causes (each claimant's exposure to asbestos).
>
> The term "occurrence" was defined in the policy as "an accident, continuous or repeated exposure to conditions, which results in person injury ...". Further, the policy contained a "Limits of Liability" provision stating that:
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> "Regardless of the number of ... (2) persons or organizations who sustain injury or damages, or (3) claims made or suits brought on account of personal injury ... (Aetna's liability) resulting from any one occurrence shall be limited to the amount stated in Section I as applicable to "each occurrence" ... (and) "aggregated annual" ... .

[79] (1984) 597 F. Supp. 1515, 1984 U.S. Dist. LEXIS 21792.

> For the purpose of determining the limit of Aetna's liability, all personal injury ... arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence."
>
> The court began its analysis by noting that treating each claimant separately would effectively deny the policyholder coverage because the deductibles were larger than any claim successfully brought against the company. The court then examined the definition of occurrence and the unifying definitional provisions in the limits of liability sections. The language used in these clauses mandated that any per occurrence analysis must focus on the underlying circumstances behind the claims rather than on the claims or lawsuits themselves. Moreover, as the court pointed out, the insurance company's position depended on establishing the circumstances behind each of tens of thousands of claims. The court rejected this approach as administratively unworkable and a clear distortion of the policy language. Finally, the court looked at the language of the policy to determine the policyholder's business purpose in purchasing the coverage. It found that the policyholder intended the coverage to relieve it from the risk of unknown liabilities. Since treating each claimant's lawsuit as a separate occurrence would effectively eviscerate the coverage and deprive the policyholder of the security it had paid for, the court concluded that the policyholder's asbestos-related liabilities all arose from a single occurrence.

In this case, the requirement for connection in time and space is greatly loosened compared with the event approach; the time span was 40-50 years, and the injuries took place at many different locations. The case illustrates the difference in the approaches when compared with the *Metropolitan* case, which also concerned asbestos exposure over many years and at different locations. There are, however, also some differences that may explain the difference in result: In the *Metropolitan* case, the negligence consisted of a failure to warn, and not the sale of the product containing asbestos. The chain of causation from the negligence to the injury is therefore closer in the *Owen* case. Further, the *Owen* case concerned the number of deductibles, and the assured's need for financial protection supported the result. The *Metropolitan* case concerned the number of sums insured, where the assured's need for financial protection supported a narrower concept of event. However, because of the settlement between Metropolitan and the first layer insurers, the situation was different in the actual case.

Contrary to the event approach, the cause approach allows a negligent omission to constitute the decisive "occurrence" or "accident", see, for instance, *Mead Reinsurance v. Granite State Ins. Co.*[80]:

> This case concerned a general liability insurance consisting of two layers issued to a city. The first layer provided for a limit of $900,000 per occurrence for "net claims" which exceeded the City's $100,000 self-insured retention limit. The second layer provided coverage of $5,000,000 per occurrence in excess of the first limit and the retention. The policy defined one occurrence as damage arising from "repeated exposure to substantially the same general conditions". The city was sued in twelve law suits for numerous civil rights' violations for the use of excessive force. The city and the first layer insurer claimed that there was only one occurrence as the liability was based on breach of municipal policy. The second layer insurer claimed that there were several occurrences as the underlying claims arose from different police actions resulting in different injuries and involving different classes of plaintiffs. It was held that eleven of the claims were premised on the city's deliberate indifference to the use of excessive force by its police department; however, one action alleging policy harassment was separate, so that the twelve complaints together involved two occurrences within the meaning of the liability policies.

The characteristic feature of this case is that the direct harm causing event, the use of excessive force, is caused by an underlying failure to control these acts. The situation is similar in *General Acc. Ins. Co. of America v. Allen*,[81] concerning sexual abuse:

> The assured's three children were sexually molested in different ways by her husband between 1986 and July 1988. The court found that the abuses were a result of the assured's negligence in failing to prevent the abuse and to warn the children of the danger facing them from her husband, and that the negligence was covered by the assured's homeowners' insurance. The policy contained a clause limiting the liability to $25,000 per occurrence, where occurrence was defined as injury resulting from continuous or repeated exposure to substantially the same general conditions. The court held that the injury resulted from "continuous or repeated exposure to substantially the same conditions" and therefore constituted one occurrence for the purpose of the limit.

These cases are similar to the *Metropolitan* case concerning liability for injuries caused by asbestos in that the underlying negligence in both cases is a negligent omission (failure to warn or indifference to the use of force). Also, the sexual abuse

[80] (1988, CA9 Cal) 865 F.2d 992, re-reported, (CA9 Cal) 873 F.2d 1185.

[81] 708 A.2d 828 (Pa. Super. Ct. 1998), re-argument denied, (May 11, 1998). See also *CIM Ins. Corp. v. Masamitsu*, 74 F. Supp. 2d 975 (D. Haw. 1999).

took place over a period of three years. Thus, in this case, there is not much closeness in time.

Another example where the cause is an omission is *Home Indem. Co. v. Mobile*[82]:

> This case concerned the liability of a city for the negligent maintenance of a drainage system after three major rainfalls on April 13, 1980, May 16-17, 1980 and May 5-6, 1981. During and following these rainfalls, overflows occurred at various points in the surface water drainage systems maintained by the city, and extensive flood damage resulted. Two hundred property owners alleged that the city was liable for the flood damage due to its negligence in the planning, construction, operation and maintenance of the drainage system. The city was insured for property damage liability up to $100,000 for any one occurrence and contained a definition of occurrence similar to the one cited above. The insurer maintained that each separate rainfall and consequent flooding was "one occurrence"; and that since there were three separate rainfalls that resulted in flooding, it was liable for only three "occurrences". The city and the numerous flood victims maintained that "occurrence" should be defined in terms of the resulting damage to each claimant's property, so that each incident of flooding to the property of each individual property owner was an "occurrence". Rejecting both these definitions of "occurrence", the court stated that each discrete act or omission, or series of acts or omissions, on the part of the city which caused the water to flood and damage the properties was a single "occurrence" within the terms of the insurance policy. For example, if on account of the city's negligence a drain on one street was blocked so that water flooded ten houses on that street, that would be one "occurrence" with a limit of $100,000 applicable to the total damage done to the ten houses. If, at some other location, on account of negligence on the part of the city, a storm sewer spilled over or broke open so that water flooded one house, that would be another occurrence with a total of $100,000 coverage available for the claims arising out of the damage to that house. And if, on the other side of the city, on account of the city's negligence, water flooding caused damage to 100 houses, that would be a third "occurrence", and there would be $100,000 in coverage applicable to all property damage proximately resulting from that negligent act. As the number of negligent acts and omissions was not clarified, this question could not be decided.

It follows from the court material that the courts in liability cases justify the cause approach by several arguments relating to the language of the policy. One argument is that the limit is related to each occurrence or accident rather than to each claim. This shows the intent of the parties to focus on the circumstances underlying the claims or losses rather than their individual components. Another argument is the use of a definition of the term "occurrence", which often includes language that groups

[82] (1984, CA11 Ala) 749 F2d 659 (applying Alabama law).

together a "continuous or repeated exposure to conditions". However, as mentioned above concerning the effect case, some courts have difficulty accepting the theory that a pattern of behaviour, conduct, inactivity or negligence by the policyholder justifies aggregating individual claims into a single occurrence. A third argument is that many policies contain restrictive language limiting the policyholder's recovery to a per occurrence limit "regardless of the number of … persons or organizations who sustain injury or damage, or … claims made or suits brought". This choice of wording also supports the position that the parties tend to gauge coverage not based on individual lawsuits or the properties damaged. These "unifying definitional principles" require that the number of occurrences be determined by looking at the underlying cause.[83]

A common feature of the event test and the cause test is that they both justify aggregating individual claims or losses based on the policy language, and both focus on the events that cause the liability or loss. Therefore, under both tests, a court would look at the same set of circumstances to determine the number of occurrences. But where the court applying the cause test might analyze the events near the beginning of the chain of causation – such as a negligent act or omission on the part of the policyholder – under the unfortunate event test it would analyze the events closer to the end of the causation chain (and closer to the actual injury or loss).[84]

Another difference between the two approaches is, as already mentioned, that negligent behaviour, such as failure to warn of danger, cannot constitute an occurrence under the unfortunate event test because negligence does not cause injury or damage, it only creates the possibility for future injury.

[83] Chanes and Daniels.
[84] Chanes and Daniels.

7.2.4.4 Property insurance

There are fewer decisions addressing the number of occurrences for other types of policies, such as employee dishonesty policies and property policies. However, one example is the *United States Fire Insurance Co. v. Safeco Insurance Co.*[85]

> The case concerned leakage of water through the roof of the assured's building. Leakage damage first occurred in November 1979. In January 1980, the assured entered into a contract with a company for re-roofing the entire roof. In March 1980, the assured sustained additional water damage due to the failure of the roofing company to effectively cover a portion of the roof on which it was working. The assured had two insurance policies: one providing primary coverage for losses up to $100,000 per occurrence; and a second, "umbrella" policy covering excess losses. The definition of "one occurrence" in the primary insurance policy stated that "all bodily injuries and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence". The primary insurer refused to pay more than $100,000, asserting that all of the water damage resulted from one "occurrence". The issue presented to the Alabama Supreme Court was whether the additional damage caused by the later rainfall, resulting from the roofing company's negligence, was part of a single occurrence as defined by the insurance policy. The court first set out the applicable standard "[a]s long as the injuries stem from one proximate cause there is a single occurrence". Thus, a single occurrence may result in multiple injuries to multiple parties over a period of time; but if one cause is interrupted and replaced by another intervening cause, the chain of causation is broken and more than one occurrence has taken place. Based on the facts of the case, the court then determined that two separate occurrences had taken place, because the additional damage was caused by a "separate, intervening cause" (the negligence of the roofing crew) rather than the prior condition of the roof. In addition, the two instances of water damage were found to be easily distinguishable in time and space; and one event did not cause the other. In sum, the initial water damage was caused by the "occurrence" of the leaky roof, and the later damage was caused by the "occurrence" of the negligence of the roofing crew.

Compared to the Norwegian *Vestfold I* case and the Commentaries to the NMIP, it is clear that the cause approach in the US results in a narrower concept of "event" than "occurrence" or "event" in the Norwegian approach. Similarly to the *Vestfold I* case, the court uses ordinary causative principles as a starting point. However, whereas the Norwegian solution is that ordinary negligence by the repair yard does not breach the chain of causation, the result in the US is different.

[85] 444 So.2d 844, 846 (Ala.1983).

8. Some conclusions

The subject of this article is the distinction between one and more than one insured event in casualty insurance contracts. The discussion concerns mainly Norwegian law, but also some court material from the UK and the US is analyzed. The material discussed illustrates in several ways the complexity of the problems. One demonstration of this complexity is the development in the English cases concerning liability insurance for underwriters, where the different levels of the court system came to different conclusions. An even clearer demonstration is the fact that American courts have chosen three different approaches to solve the problems, using different explanations, even if the language may be the same.

If one compares the three systems, the general impression is that the Norwegian practice allows for a relatively wide concept of "insured event" or "occurrence". This holds even if there is no serial damage clause or definition. The Norwegian approach may be compared to the UK interpretation of a serial damage clause aggregating damage or losses arising out of one originating cause, but appears to be wider than the US cause approach. The UK interpretation of "event" appears to be very similar to the US event approach. The strictest concept of "occurrence" is obviously the US effect approach.

The material also appears to indicate that it may be difficult to solve this problem by careful drafting. This, in particular, is the situation in Norway, where the wide concept of "insured event" is applied even without a serial damage clause or a definition of occurrence. However, the US material reveals that using serial damage clauses or definitions of occurrence that clearly indicate that the intention was to aggregate claims or damages may hinder the claims approach. The choice between the event approach and the cause approach, on the other hand, seems to be more a question of

jurisdiction and choice of law in the US than on the language that is used. In the UK, however, the language of the policy will decide the choice between the event approach and the cause approach. These differences are particularly interesting for insurers effecting reinsurance with English or American reinsurers. As noted in item 7.1, insurers cannot be certain that their reinsurance contracts will be interpreted in the same way as the direct insurance contracts unless the language is identical. But even identical language may lead to different results in different systems, unless care is taken to secure a back-to-back solution.

The material also illustrates that none of the systems has managed to define the concept of one event in a clear, concise and logical way. Rather, the approach to interpret the concept of one event is to define the arguments that are relevant to the distinction. All three systems place weight on the connection between the incidents of damage in time and place. However, these requirements are practised very differently. The time between the incidents of damage that have occurred in a continuous series and have been aggregated varies from a few seconds or minutes[86] up to several years.[87] On the other hand, damage occurring with an interval of 50 minutes or in "quick succession" has not been aggregated even though the cause was the same.[88] Similarly, the connection in space varies between the same spot[89] and many locations,[90] but there are also examples where several incidents of damage at the same spot have not been aggregated.[91]

Another group of common arguments are considerations concerning causation, such as how foreseeable the new damage is once the peril has struck or the first damage has occurred (the Norwegian approach), unity of cause (the UK approach), or proximate

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86 *Progressive Preferred Ins. Co. v. Derby* (above in item 7.2.4.2) and *Dawson Field* (above in item 7.1).
87 *Owen Illinois* (above in item 7.2.4.3) and FSN 2788.
88 *Arthur A. Johnson Corp. v. Indemnity Ins. Co* (above in item 7.2.3), the *Asphalt* case (above in item 5.3.1 and 6.3.1).
89 For instance, the *Dawson Field* case.
90 For instance, the *Owen Illinois* case (above in 7.2.4.3), and the Norwegian *Ny Dolsøy* case (above in 6.2.3).
91 Typical for the US effect approach, see also for instance *Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co* (above in item 7.2.2).

cause (the US cause approach). However, the event approach is more restricted in what qualifies as a cause than the cause approach. A condition, a plan, an intellectual failure or an absence of something happening can be a cause, but not an event. Further, whereas a negligent act by a third party breaches the chain of causation in the US cases, this is not so in Norwegian practice.[92]

Considerations concerning deterrence, on the other hand, are only expressly provided for in the Norwegian material. The reason for this may be that this consideration mainly concerns the deductible, and the material from the UK and the US mainly concerns the sum insured. However, the US cases concerning a chain of causation under the cause approach[93] emphasize that the assured did not regain control of the car before the new incident of damage occurred. This can be compared to an argument concerning deterrence: Once the assured has control over the situation, a new incident of damage constitutes a new act of negligence by the assured under liability insurance.

An argument that is not often expressed, but which may explain some of the differences in the material, is the assured's purpose for having insurance, i.e. the need for financial protection. The only case that expressly states this argument is the *Owen Illinois* case concerning the number of deductibles under a liability policy. However, it may explain the result in the Norwegian *asphalt* case, and also the US effect approach. It may also explain the general trend that the Norwegian concept of "event" is broader than both the UK and the US concepts. As mentioned above, the Norwegian material mainly concerns the number of deductibles, where the assured is protected by a broad concept of "event", whereas the UK and the US material mainly concerns the number of sums insured, where the situation is the opposite.

If we return to the starting point for this article, viz. the terrorist attack on the two towers in New York, on the 11th September 2001, it is clear that the number of occurrences will depend on the actual wording of the policy and the choice of law.

[92] The *Vestfold I* case, above in item 5.2.3, and Commentary to NMIP, above in item 6.2.4.

However, according to the US effect approach, it seems clear that the attack constitutes two occurrences. According to the cause approach as applied in the UK (depending on the language of the policy), the US (depending on the state), and Norway (in general), it may be argued, on the other hand, that the two attacks brought about by the same decision made by a terrorist group or by an overall plan made by such a group constitute one occurrence. In that case, there seems to be sufficient unity of time and space, and unity of cause and intent to lead to this result.

According to the event approach, the result is somewhat more uncertain. The US event-approach cases imply that a failure to warn cannot constitute an event, and also that the court looks to the immediate damage-triggering event rather than to the common cause. In the *Arthur A. Johnson* case, the conclusion was that there were two accidents, even though the two buildings were damaged by the same rainfall at the same location. This may imply that the two attacks constitute two accidents. The English interpretation of "event" is even more uncertain. According to the reasoning in the *Dawson Field* case and the *Mann and Holt* case, an overall plan cannot constitute an event. On the other hand, according to the *Dawson Field* case, a decision to destroy may be described as an event. Also, there is unity of time and space comparable to the *Dawson Field* case. Or, to argue along the lines of the *Kuwait* case, once the Kuwait Airport was captured, the stolen planes were lost, even if the actual thefts took place over a period of several days. Similarly, once the planes were captured, the two towers were lost. A general argument supporting this result is that the owner of the buildings paid a premium based only on one sum insured per occurrence, presuming that the possibility of total loss to more than one of the buildings was close to non-existent. This possibility is, therefore, not included in the premium calculations.

[93] Above in item 7.2.4.2.