**Revisiting Concurrent Causation and Principles in English Insurance Law: A Legal Fiction?**

**Meixian Song\***

# Abstract

*This article poses and discusses the question: are the concept and principles of concurrent causes in English insurance law essentially valid, or simply a legal fiction? This article addresses the question from two aspects. First, while concurrent causation in itself is a real concept in insurance contract law, it is often difficult to ascertain in fact and define in law. As for the other aspect, this article suggests that the central cases of* Wayne Tank *and* The Miss Jay Jay *have long been misinterpreted by insurance lawyers as having broadly laid down concurrent causes principles in English insurance law. Even following the Supreme Court’s adoption, in the Financial Conduct Authority (FCA) COVID-19 business interruption insurance test case, of a principled application of the doctrine of concurrent causes, concurrent causation remains a largely theoretical analysis, as applied by the English courts. It is submitted that a judicial reinterpretation of both* Wayne Tank *and* The Miss Jay Jay *is overdue, and that the focus should be on the interplay of causation and interpretation in the determination of insurance indemnity, no longer referring to the two cases as establishing legal principles of causation.*

# Introduction

The insured is only permitted to recover from the insurer that loss which is caused by an event covered by the insurance contract. Subject to any contrary terms in the contract, the cause is the so-called proximate cause.1 When speaking of the proximate cause, it may be understood that judges require the identification of a single cause. However, it now appears to be settled in English law that, in cases where there are concurrent causes of loss, if there are two causes of approximately equal efficiency, one covered and one excluded, the insured cannot recover (the “*Wayne Tank* principle”).2 The insured can nevertheless recover if one of these causes of approximately equal efficiency is an insured peril and the other operative

\* Lecturer in Law, University of Southampton. Email: [m.song@soton.ac.uk.](mailto:m.song@soton.ac.uk) Thanks to Dr Johanna Hjalmarsson for their helpful comments on an earlier version of this article. All remaining errors rest with me.

1 Marine Insurance Act 1906 s.55(1).

2 Jonathan Gilman et al, *Arnould’s Law of Marine Insurance and Average* 19th edn (London: Sweet & Maxwell, 2020), para.22-04. *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] Q.B. 57.

cause, although outside the scope of the policy, is not expressly excluded (“*The Miss Jay Jay* principle”).3

In *The Kos*,4 Lord Mance considered that, although two causes may be so closely matched that both are identified as effective causes, “concurrent causation” is a largely theoretical analysis which finds little practical application in the authorities.5 Many writers and lawyers practising English insurance law see causation findings as little more than an interpretative exercise of insurance contractual terms and the legal definition of an event. The vast majority of cases have been decided by English courts by ascertaining one single cause, either on factual grounds or as a result of contractual interpretation; principles of concurrent causes have been considered only briefly in obiter dicta.6 Courts in other common law jurisdictions7 have decided not to follow or be limited by the *Wayne Tank* and *The Miss Jay Jay* principles, adopting a more contextual approach rather than accepting a rule that the exclusion will generally prevail as settled law.

Drawing on case law and seeking illumination from academic theories and writings, particularly those found in Hart and Honoré’s *Causation in the Law*,8 this article investigates whether and why concurrent causation and its principles are a “largely theoretical analysis”, and what the true interpretation of the *Wayne Tank* and *The Miss Jay Jay* principles should be.

In the following, this article will first explore some elementary and central causation questions pertaining to both theoretical analysis and the juridical doctrine of causation. This lays the groundwork for a discussion regarding the roles that causal notions and the interpretation of policy wording play in the process of assessing insurance indemnity. Part II will continue to examine the historical development of both proximate causation and concurrent causation in English insurance case law. It will highlight that concurrent causation has, so far, not been effectively defined and developed, and that the *Wayne Tank* and *The Miss Jay Jay* principles ought to be interpreted more rigorously before English courts. It will then provide a further critique of the difficulty in defining and categorising concurrent causes both in fact and in law, and argue that the notion that *Wayne Tank* and *The Miss Jay Jay* are settled law is a misconception. This article will end with a further reflection on the judgments of the FCA business interruption insurance test case.9

3 *Halsbury’s Laws*, 5th edn. (London: LexisNexis Butterworths, 2018), vol.60, p.327. *JJ Lloyd Instruments v Northern Star Insurance Co (The Miss Jay Jay)* [1987] 1 Lloyd’s Rep. 32; [1987] Fin. L.R. 120.

4 *Petroleo Brasileiro SA Petrobras v ENE 1 Kos Ltd (The Kos)* [2012] UKSC 17; [2012] 2 A.C. 164.

5 *The Kos* [2012] UKSC 17 at [40].

6 See recent cases *Navigators Insurance Co Ltd v Atlasnavios-Navegacao Lda (formerly Bnavios-Navegacao Lda) (The B Atlantic)* [2018] UKSC 26; [2019] A.C. 136; *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor Mopu)* [2011] UKSC 5; [2011] 1 All E.R. 869. These decisions will be discussed in detail.

7 *AMI Insurance Ltd v Ross John Legg* [2017] NZCA 321; *Derksen v 539938 Ontario Ltd* [2001] SCC 72. This will be discussed in detail.

8 H. L. A. Hart and T. Honoré, *Causation in the Law*, 2nd edn (Oxford: Clarendon Press, 1985).

9 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] 2 W.L.R. 123. This case put the spotlight on issues of contractual construction and causation. The case was brought to resolve contractual uncertainty around the validity of business interruption insurance claims due to the outbreak of the coronavirus pandemic. The judgment will be analysed in detail.

# Some elementary and central questions of causation

To avoid confusion in the reasoning of doctrinal problems regarding concurrent causes, it is, from the outset, necessary to clarify a few elementary and central questions.

Firstly, there is a need for clarity regarding the terminology used in this article. In Hart and Honoré’s work, and in academic literature on causation in tort law, “proximate cause” or “proximate causation” refers to a “legal cause”, as opposed to factual causation, and is the legal principle for determining liability in various areas of law.10 This usage differs from the concept of proximate cause in the context of insurance law. In English insurance contract law, the proximate cause is the effective cause for determining insurance liability.11 In the following, “proximate cause” only refers to the test of causation in insurance law, while “legal cause” or “legal causation” will be used as the counterpart to factual causation, as per Hart and Honoré.

With regard to the academic discussion on factual causation and legal causation, scholars including Stapleton and Wright claim that there is a significant and sharp separation between causal enquiry in fact and non-causal normative assessment. According to Stapleton, the legal liability, especially in tort, is determined in two steps. Cause-in-fact is a purely factual inquiry with causal notions, whereas “scope of liability” or cause-in-law is completely non-causal.12 Wright also describes “scope of liability” as “non-causal principles of attributable responsibility”.13 However, although Hamer accepts the basic two-step approach he argues that such a sharp distinction is an overstatement. Hamer states, in my view correctly, that “scope of liability”, being a causation-free zone, is largely unsubstantiated, and that factual causation also involves normative assessment in law.14 This article adds and explores the separation and interplay between causal questions (both in fact and in law) and non-causal normative assessment in the insurance context.

The second question concerns the judicial approach to questions of causation. Lord Hoffmann argued that the way the law uses causation, as described by academic writers, is often not particularly illuminating at explaining how courts approach questions of causation.15 He suggested that most cases that come before the House of Lords involve difficult choices regarding what the correct rule of law should be, and that courts make the effort to identify and justify the standard criteria in which the question involves the limits of legal liability.16 According to Lord Hoffmann, instead of identifying the cause-in-fact and cause-in-law, judges follow a natural process of decision-making when applying any legal rule, namely; you find the fact and decide as a matter of interpretation the answer to the requirements of the legal rule, or (which amounts to the same thing) the interpretation of the

10 Hart and Honoré, *Causation in the Law*, 2nd edn (1985), Chapter IV.

11 *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] A.C. 350.

12 Jane Stapleton, “Cause in Fact and the Scope of Liability for Consequences” (2003) 119 *Law Quarterly Review*

388, 392.

13 Richard Wright, “The Nightmare and the Noble Dream: Hart and Honoré on Causation and Responsibility” in

M. H. Kramer, C. Grant, B. Colburn and A. Hatzistavrou (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford: Oxford University Press, 2008), pp.165 and 177.

14 D. Hamer, “‘Factual Causation’ and ‘Scope of Liability’: What’s the Difference?” (2014) 77(2) *Modern Law Review* 155.

15 Leonard Hoffmann, “Causation” in Richard Goldberg (ed.) *Perspectives on Causation* (Oxford: Hart Publishing, Oxford, 2011), p.5.

16 Leonard Hoffmann, “Causation” (2005) 121 *Law Quarterly Review* 592, 594.

rule goes first before deciding whether the facts satisfy those requirements.17 In particular, Lord Hoffmann observes that courts focus on engaging in a legitimate argument over the interpretation of a rule containing causal requirements and do not introduce a philosophical doctrine of causation that satisfies criteria not required by the law before the question of interpretation arises.18 However, Lord Hoffmann recognises that academic analysis may cast useful light upon judicial decisions, especially borderline cases.19

As will be discussed in the next part, English courts have identified contractual limitations and causal requirements as decisive components of an insurer’s liability. Contractual limitations have been approached by the courts from two perspectives: the judicial interpretation of the relevant risks (the scope of contractual coverage) and the required causal connections as circumscribed in insurance contracts. In essence, the courts usually focus on engaging in a legitimate argument over the interpretation of a rule or a contractual term containing a causal requirement.

Thirdly, causation and the allocation of liability have traditionally been viewed as different in insurance law when compared to criminal or the law of tort, because liability doctrines in criminal law and tort typically require that the defendant has caused harm to the claimant.20 This is in contrast to insurance law which provides for the payment of a sum of money to an insured for a loss or detriment that may be suffered upon the occurrence of an event.21 It becomes natural that the formation and development of causation in the different areas of law will, accordingly, not provide the same answers to causal enquiries nor follow exactly the same path at both conceptual and practical levels.

However, this article will proceed from the assumption that it is not a necessary schism to isolate causation in insurance contracts from the central debate surrounding the common question regarding the roles of causation in ascertaining and truncating legal liability. Rather, such schism has highlighted the importance of both the contractual nature and normative value of insurance and insurance law in the determination of an insurer’s duty to pay an indemnity. As Moore argues, depending on what sort of policies lie behind legal doctrines, the use and meaning of causal language in different areas of law does not necessarily equate the causal relationship to a real and natural relationship in the world.22 Therefore, when discussing causation issues in insurance law, it is important to bear in mind that insurance contract law is most directly reflective of the autonomy of contracting parties and their contractual intentions.

17 Hoffmann, “Causation” in Richard Goldberg (ed.) *Perspectives on Causation* (2011), p.2.

18 Hoffmann, “Causation” in Richard Goldberg (ed.) *Perspectives on Causation* (2011), p.2.

19 Hoffmann, “Causation” in Richard Goldberg (ed.) *Perspectives on Causation* (2011), p.602.

20 Jane Stapleton, Tort, Insurance and Ideology (1995) 58 *Modern Law Review* 820.

21 The leading definition of insurance is usually said to be that of Channell J. in *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 K.B. 658.

22 Michael Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2009), p.3. A simple example of such a distinction is offered by *Sabella v Wisler* 59 Cal. 2d 21, 377 P.2d 889,27 Cal. Rptr. 689 (1963), cited from Douglas G. Houser and Christopher H. Kent, “Concurrent Causation in First-Party Insurance Claims: Consumers Cannot Afford Concurrent Causation” (1985) 21 *Tort and Insurance Law Journal* 573, 577. In this decision of the California Supreme Court, a home had been damaged by extensive settling caused by a leak in a sewer pipe which was attributed to the fault of the builder. The insured sought coverage under the homeowners’ policy and also brought a tort action against the contractor who built the house based upon the inadequately compacted fill. Ruling on the property insurance claim, the Court held that the leaking pipe was the proximate cause of the loss. In the tort action, the Court found that the contractor’s negligence was the proximate cause of the loss, resulting in the insured also being able to recover against the contractor because of his negligent construction.

In summary, as will be shown in the next part, this article observes that a fusion and confusion of causation and the interpretation of policy wording in English courts has developed when determining the proximate cause or concurrent causes of a loss, which seems to, to a great extent, result in concurrent causation and its principles being a largely theoretical analysis. Therefore, while noting and accepting the divergence of juridical and academic viewpoints regarding the concept and application of causation, as well as the different norms and values behind causation analyses in various fields of law, this article adopts Hart and Honoré’s theoretical apparatus regarding the interplay between causation and non-causal assessment as the main basis to analyse the problems of concurrent causation in English insurance cases. The adaptation of that apparatus in an insurance context will be developed in the following part.

# Concurrent causation in English insurance case law

Generally, the paradigm route in the determination of insurance coverage involves the following questions.23 First, a chain of factual causes is required to be established. The insured must then prove a causal connection between the trigger and any losses that have been incurred, and that the causation test may, depending upon the wording of the insurance policy, be more or less restrictive than the usual proximate cause doctrine. For example, the contractual term may specify that the loss must be “solely” or “indirectly” caused by the trigger. On passing the causal connection requirement, insurance claims will finally focus on the amount recoverable. The measure of indemnity is assessed and limited by factors including the specific rules of insurance law, the intentions of the parties and the commercial purpose of the insurance contract.

With regard to causation, *Causa proxima non remota spectatur* has been recognised as the fundamental principle in English insurance contract law.24 The specific application of this principle in the law of marine insurance was to look only at the proximate cause of loss in determining an insurer’s indemnity liability. Section 55 MIA 1906 thereafter affirmed the test of “proximate cause” without mentioning concurrent proximate causes. However, the codifier of the statute, Sir Chalmers, noted that “there may be more than one proximate (in the sense of effective or direct) cause of loss”.25

*Reischer v Borwick*26 is one of the early cases that touches upon concurrent causes. Lopes LJ held that it is only the proximate cause that is to be regarded and all others are to be rejected, although there may have been a concurrent cause and one without which the loss would not have happened. Lindley LJ, however, considered that the sinking in the same case was due as much to one of the contended causes as to the other; each was therefore as much a proximate cause as the other.27

23 Robert Merkin, “The Christchurch Earthquakes Insurance and Reinsurance Issues” (2012) 18 *Canterbury Law Review* 119, 137.

24 Jonathan Gilman et al., *Arnould’s Law of Marine Insurance and Average*, 19th edn (London: Sweet & Maxwell, 2020), para.22-03.

25 Sir Chalmers, M.D., *Chalmers’ Marine Insurance Act 1906*, 9th edn (London: Butterworths, 1983), p.78.

26 *Reischer v Borwick* [1894] 2 Q.B. 548.

27 *Reischer v Borwick* [1894] 2 Q.B. 548, 551.

In *Leyland Shipping*, the House of Lords approved *Reischer v Borwick*, affirming that,

“to treat proxima causa as the cause which is nearest in time is out of the question. The cause which is truly proximate is that which is proximate in efficiency.”28

The House of Lords explained that the threshold question in the causation analysis should be the identification of the proximate cause on the basis of the intentions of the contracting parties in insurance contracts.29 Their Lordships, however, showed a unanimous intention of ascertaining a sole proximate cause.30 *Wayne Tank*31 has been widely treated as a substantial development of concurrent causation in insurance law. Lord Denning M.R. and Roskill LJ were attempting to assume both the condition of the goods (excluded) and the negligence of the servants (insured peril) as the concurrent proximate causes; however, they concluded that the proximate cause of the fire was the defective material of the goods, which had been excluded in the insurance cover. Lord Denning expressed the same view as that held by the House of Lords in *Leyland Shipping*, namely that he approached the case by asking which of the two causes the dominant cause was. Only Cairns LJ preferred a clear analysis of “approximately equal” causes.32 Lord Denning M.R added a statement before the end of his judgment which has subsequently become known as the *Wayne Tank* principle:

“But I will assume, for the sake of argument, that I am wrong about this: and that there was not one dominant cause, but two causes which were equal or nearly equal in their efficiency in bringing about the damage. One of them is within the general words and would render the insurers liable. The other is within the exception and would exempt them from liability. In such a case it would seem that the insurers can rely on the exception clause. There is not much authority on it, but it seems to be implied in *John Cory & Sons v. Burr* (1883) 8 App.Cas. 393, especially from what Lord Blackly Burn said at pp. 400, 401. …”

The Court of Appeal in *Midland Mainline Ltd v Eagle Star Insurance Co Ltd*33 followed the approach of Lord Denning, M.R and Lord Justice Roskill. Sir Martin Nourse held that the wear and tear was the proximate cause of the loss; alternatively, that they were both proximate causes, in which event the insurers could still rely upon the exception.34

28 *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] A.C. 350 at 369.

29 *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] A.C. 350, per Lord Atkinson at 365, “it is well always to bear in mind the warning given by Lindley L.J. in *Reischer v. Borwick*, that this rule of maritime insurance must be applied with good sense to give effect to, and not to defeat the intention of the contracting parties.”

30 *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] A.C. 350, Lord Shaw of Dunfermline (at 370) held that, “Where various factors or causes are concurrent, and one has to be selected, the matter should be determined by efficiency as a matter of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency.”

31 *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] Q.B. 57.

32 *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] Q.B. 57 at 68–69. Lord Justice Cairns did not consider that the Court should strain to find a dominant cause if, as here, there are two causes both of which can be properly described as effective causes of the loss.

33 *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042; [2004] 2 C.L.C. 480; [2004] 2

Lloyd’s Rep 604.

34 *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] 2 Lloyd’s Rep 604 at [12].

In the other landmark decision relating to concurrent causes, *The Miss Jay Jay*,35 it was held that the damage to the yacht was proximately caused by two concurrent causes, the ill-designed and ill-constructed hull and the actions of adverse sea conditions, and that both causes were equal or nearly equal in their efficiency in bringing about the damage.36 Known as the *Miss Jay Jay* principle, the insured was entitled to recover where the subject-matter insured encountered an insured peril concurrently with an uninsured peril under the policy.

The Supreme Court has, since then issued decisions on a number of cases regarding causation in insurance law. In *The Cendor Mopu*,37 Lord Mance commented that the Court of Appeal in *The Miss Jay Jay* should not be read as suggesting that, where initial unseaworthiness or unfitness and unfavourable weather conditions beyond the ordinary action of wind and waves have both played a role, the Court must always treat both as equal or nearly equal proximate causes, and that, in circumstances like those in *The Miss Jay Jay* or the present case, it is unclear how, in practice they would be weighed and balanced.38 Consequently, the Supreme Court relied upon a non-causal approach focusing on the judicial definition and interpretation of the risks in question, namely inherent vice and perils of the seas. It was held that “inherent vice” has been defined in opposition to perils of the seas, thereby avoiding multiple causes involving both inherent vice and perils of the sea. That is to say that, where, as here, a proximate cause of the loss was perils of the seas, there was no room for the conclusion that the loss was concurrently caused by inherent vice.39

Moreover, in *The Kos*,40 Lord Mance considered that, although two causes may be so closely matched that both are identified as effective causes, “concurrent causes” is a largely theoretical analysis which finds little practical application in the authorities.41 His Lordship also iterated that the courts in both *Reischer v Borwick* and *Wayne Tank* had noted that merely because one can identify concurrent causes in fact does not mean that both are proximate causes in law.42

Although *The B Atlantic*43 appears to provide welcome clarity by reaffirming the long-established position set out in *Wayne Tank*, the Supreme Court, as in *The Cendor Mopu*, did not consider concurrent causation as a substantial subject in its decision. Instead, the Court emphasised that, what is required before applying the causation principles, is an exercise of construction of the particular wording, giving effect at each stage to the natural meaning of the words in their context.44 In *The B Atlantic*, the ship was confiscated by Venezuelan authorities following the discovery of drugs fixed to the hull of the vessel. The Court of Appeal concluded that the loss was caused concurrently by both the concealment of the drugs and the detention. As such, the insurers were entitled to rely on the excluded peril, namely the detention, and deny coverage for the claim. The Supreme Court finally dismissed the insured’s appeal through the interpretation of the insuring clause.

35 *The Miss Jay Jay* [1987] 1 Lloyd’s Rep 32.

36 *The Miss Jay Jay* [1987] 1 Lloyd’s Rep 32 at 37.

37 *The Cendor Mopu* [2011] UKSC 5.

38 *The Cendor Mopu* [2011] UKSC 5 at [79].

39 *The Cendor Mopu* [2011] UKSC 5 at [111].

40 *The Kos* [2012] UKSC 17.

41 *The Kos* [2012] UKSC 17 at [40].

42 *The Kos* [2012] UKSC 17 at [41].

43 *The B Atlantic* [2018] UKSC 26.

44 *The B Atlantic* [2018] UKSC 26 at [40].

Lord Mance affirmed a strict definition of malice and held that the factual cause contended by the insured did not fall into the contractual meaning of the insured peril, “any person acting maliciously”. It was eventually held that the proximate cause was only the detention.

Following along the same line as *Wayne Tank*, in *The B Atlantic*, Lord Mance only mentioned the *Wayne Tank* principle in obiter.45 However, *The B Atlantic*, as well as *The Cendor Mopu*, did not reject the argument of concurrent causes as two incidents/factors in fact; both judgments simply relied upon the further contractual interpretation of the risks in question in order to exclude concurrent causation in law.

Most recently, in the FCA test case, Flaux LJ and Butcher J held that the issues of causation were largely answered by the construction that was to be placed on the cover provided.46 However, the Supreme Court drew a clear distinction between the issue of contractual interpretation of the policy wording and causation. Their Lordships concluded that the clauses only covered the effects of cases of COVID-19 occurring within the specified radius of the insured premises. The question of what connection must be shown between any such cases of disease and the business interruption loss for which an insurance claim is made therefore becomes critical.47 This article accepts that the precise demarcation of perils by way of definition and construction has, to some extent, alleviated the issue that the test of proximate cause is often seen as a complex and uncertain issue due to the inference of various matters of fact.48 However, drawing a clear line between the interpretation of insured risks and the question of causation is equally important. On this point, the Supreme Court has finally made it clear that whether that causal connection is sufficient to trigger the insurer’s obligation to indemnify the policyholder is a different question of interpretation to that of defining a particular risk or event.49 Therefore, it should be emphasised that the goal of this article is not to criticise the courts’ approach to interpreting contractual insurance terms in the process of determining insurance indemnity, but to explore and qualify the interplay of the questions of interpretation and causation in the determination of insurance

indemnity.

The perhaps surprising position, based on this analysis, is that, while the principles of concurrent causes are taken to be well settled law, they have in effect not been applied nor substantially developed since the *Wayne Tank* line of authority. In the above cases, it seems that the courts intended to mesh the separate concepts of proximate and concurrent causation in the sense that concurrent causation, for the most part, is simply treated as an alternative ground to reach the same conclusion as that which would be reached under a proximate cause analysis. Moreover, concurrent causation has often been avoided or excluded by a judicial interpretative exercise of the relevant risks when justifying the proximate cause analysis for the determination of insurance liability, under circumstances where it cannot be denied that there were two outstanding events, in fact, that jointly led to the occurrence

45 *The B Atlantic* [2018] UKSC 26 at [49].

46 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) at [523] and [524].

47 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) at [161]. The judgments on the causation issue will be discussed in detail.

48 Chalmers, *Chalmers’ Marine Insurance Act 1906*, 9th edn (1983), p.78.

49 The FCA test case Supreme Court judgment (see fn.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [191].

of the loss. Thus, in contrast with concurrent causes in fact, it is important to discover how concurrent causes are defined in law. Therefore, the next part will examine the different types of concurrent causation in fact and in law, and more importantly, discuss whether *Wayne Tank* and *The Miss Jay Jay* principles should be narrowly applied.

# Concurrent causes in fact and in law

Proximate cause presumes that there is one efficient and dominating cause for the purposes of ascertaining insurance liability, whereas concurrent causation theoretically presumes the lack of a dominant force. However, the fact that it is not unusual to have more than one necessary or sufficient condition that satisfies the legally required test does not mean that the law has commonly relied upon concurrent causation for determining liability. This part compares the different meanings of “concurrent causes” as defined by Hart and Honoré and in insurance law, and explains that concurrent causes have been defined in a narrow, yet unclear way in English insurance law.

Concurrent causes generally exist when an insured risk joins with one or more uninsured or excluded risks to cause a loss. In accordance with the editors of *O’May*,50 concurrent causes in the insurance context are defined as, (a) a loss that could be attributed to any one of the combined causes; (b) a single cause which could be described under two different heads of perils; and (c) concurrent causes of equal efficiency to the loss. Both Slade LJ in *The Miss Jay Jay* and Lord Denning

M.R. in *Wayne Tank* recognised that “concurrent causes” referred to two causes which were equal or nearly equal in their efficiency in bringing about the damage. Hart and Honoré use the phrase, “multiple causation” to describe the not uncommon situation when each of two wrongful acts, which together produce some particular harm on a given occasion (though each of them would be insufficient without the other), can be “a cause” of that harm for legal purposes.51 Where more than one event is selected from a set of jointly sufficient conditions, each may be dignified with the title of a “cause” of a single harm.52 Instead of focusing on the efficiency of each cause, Hart and Honoré categorised concurrent causes for tort claims53 into three groups, namely: contributory causation; additional causation; and alternative causation.54 This classification takes account of the causal relationships in fact between each cause as well as those between the causes and consequences.

## Contributory causation and “concurrent interdependent causes”

Contributory causation refers to a situation where two or more necessary conditions of the loss have occurred, but for which the loss would not have happened in fact. In tort, the main examples of this occur in the case of joint tortfeasors and

50 Donald O’May and Julian Hill, *O’May on Marine Insurance* (London: Sweet & Maxwell, 1993), p.320.

51 Hart and Honoré, *Causation in the Law*, 2nd edn (1985), p.20.

52 Hart and Honoré, *Causation in the Law*, 2nd edn (1985).

53 *McWilliams v Sir William Arrol and Co Ltd* [1962] 1 W.L.R. 295; [1962] 1 All E.R. 623. With regard to concurrent causation in tort claims, especially in the form of concurrent tortfeasors and contributory negligence, the “but for” test in tort requires that the breach of duty must have a necessary contribution to cause the loss or damage, without which the damage would not have happened.

54 Hart and Honoré, *Causation in the Law*, 2nd edn (1985), Chapter VIII.

contributory negligence. For example, a stevedore was injured because ship repairers left the cover of a hatch off and removed the lights at the side of it whilst the shipowners, during the lunch interval, failed to inspect the deck and discover the absence of the hatch cover and light.55 In an insurance law context, putting the “equal efficiency” test aside, both *Wayne Tank* and *The Miss Jay Jay* fell into the category of contributory causation in the terms set out by Hart and Honoré. In *Wayne Tank*, both the condition of the goods (excluded) and negligence of the servants (insured peril) were necessary conditions of the loss. Similarly, in *The Miss Jay Jay*, the loss of the yacht was due to the joint effect of the action of adverse weather conditions, albeit not exceptional, on an ill-designed and ill-made hull. Both factors were necessary conditions to the actual occurrence of the damage. The concurrent causes were independent, in that one did not lead to the other, but also interdependent, in that neither would have led to the loss but for the other.

In *The Cendor Mopu* and *The B Atlantic*, having rejected the argument of concurrent proximate causes, the Supreme Court did not completely reject that there were two contributory causes in fact. In *The Cendor Mopu*, the Supreme Court accepted that the loss was caused by a combination of the physical condition of the insured goods and the conditions of the sea. In *The B Atlantic*, it is even clearer that the two causes in dispute were contributory causes to the loss. There was an interdependent relationship between the two candidate causes, namely the concealment of drugs by unknown third parties and the detainment by the local authority, and that the two events constituted two necessary conditions for the detainment of the ship.

In the FCA test case, the issue was whether the “but for” test was an essential test that must be satisfied before a circumstance could be regarded as a cause in law or before, in the insurance context, the occurrence of an insured peril could be regarded as a proximate cause.56 The insurers’ argument was that the principles had arisen from a context involving two interdependent causes, so that the insured cause that failed to satisfy the “but for” test should not constitute a proximate cause in the first place. The Court rejected the insurer’s argument on the basis that it had long been recognised that, in law the “but for” test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event.57 In concurrent tort cases, the inherent deficiency of the “but for” test is apparent.58 By contrast, before the FCA test case there has been few unequivocal authorities, in applying the “but for” test, when defining and categorising concurrent causes in insurance law.59

The majority view given by Lord Hamblen and Lord Leggatt (with whom Lord Reed agreed) was that, in both *Wayne Tank* and *The Miss Jay Jay*, both concurrent causes satisfied the “but for” test, which is distinguishable in fact from the cases where a loss or event would still have occurred anyway, irrespective of the

55 *Grant v Sun Shipping Co* [1948] A.C. 549; [1948] 2 All E.R. 238.

56 The FCA test case Supreme Court judgment (see fn.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [178].

57 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [182]. This will be discussed further in the next section on concurrent independent causes.

58 Michael Jones et al., *Clerk and Lindsell on Torts*, 23rd edn (London: Sweet & Maxwell, 2020), paras 2.51–2.72.

59 See *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32 and *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)* [2010] EWHC 1186 (Comm); [2010] Lloyd’s Rep. I.R. 531.

occurrence of one of the multiple causes.60 Their Lordships held that there was no reason in principle why such an analysis could not be applied to multiple causes which act in combination to bring about a loss.61 Different types of multiple causes, interdependent or independent, exist as a matter of fact, and what facts are recognised as concurrent causes in law is a matter of legal definition. Although *Wayne Tank* and *The Miss Jay Jay* are viewed as the cases that lay down the principles of concurrent causation, the two cases have not been recognised as providing a sweeping definition of concurrent causes in law. Therefore, it must be noted that the judges, distinguishing the facts of *Wayne Tank* and *The Miss Jay Jay*, were not for questioning the *Wayne Tank* and *The Miss Jay Jay* principles. Rather, the issue was simply to focus on the legal tests and the definition of concurrent causes.

## Additional causation and “concurrent independent causes”

Hart and Honoré defined additional causation as two or more factors, each being sufficient with normal conditions, to bring about certain harm.62 In the insurance context, the equivalent is “concurrent independent causes”. In *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)*,63 Hamblen J64 made a distinction between “concurrent interdependent causes” and “concurrent independent causes” based upon Hart and Honoré’s categorisation of contributory causation and additional causation. As Hamblen J said, “there is an important difference between a case involving two concurrent interdependent causes and one involving two concurrent independent causes. In the former case, the ‘but for’ test will be satisfied; in the latter it will not.”65 In this case, the insured’s claim for business interruption loss was proximately caused by the damage to the hotel after Hurricanes Katrina and Rita in 2005, whilst further losses were inflicted by state action (a curfew) due to the damage to the city. The two causes in question were the interruption resulting from the physical damage to the hotel and/or from the damage to the city of New Orleans and the want of demand because of the damage to the city.

It should be clearly noted that *Orient Express* is only discussed here as an illustration of the point regarding the distinction between “concurrent interdependent causes” and “concurrent independent causes”. The Supreme Court in the FCA case confirmed that *Orient Express* should be overruled with regard to trends

60 The FCA test case Supreme Court judgment (see fn.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [175] and [180].

61 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [176].

62 Hart and Honoré, *Causation in the Law*, 2nd edn (1985), p.123. Hart and Honore’s “alternative causation”, refers to the situation of two or more alternative sets of conditions sufficient to cause the same or similar result. The difference between an alternative and an additional cause is that alternative causation considers a hypothetical scenario which did not occur in fact. This part will not address alternative causation, as it is suggested that alternative causation is not directly relevant to defining concurrent causes in the context of insurance law.

63 *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)* [2010] EWHC 1186 (Comm); [2010] Lloyd’s Rep. I.R. 531 (“Orient Express”) The reasoning of the entire judgment turned on the wording of the policy; the precise causation argument that the insured wished to raise was not one which was open to the Court to consider as a result of a strict application of the principle of non-intervention in the arbitral process. This decision has been the subject of academic criticism, and has been overruled by the Supreme Court in the FCA test case.

64 Two members of the Supreme Court panel were involved in the case. The arbitral tribunal panel included Mr George Leggatt QC, as he then was, and the judge who decided the appeal was Hamblen J, as he then was.

65 *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)* [2010] EWHC 1186 (Comm) at [32].

clauses.66 The Court pointed out that trends clauses are part of the machinery contained in insurance policies for the purpose of quantifying loss. They do not address or seek to delineate the scope of the indemnity.67 The Court went on to hold that the correct approach should ensure that the trends clause be construed consistently with the insuring clause, and not so as to take away cover prima facie provided by that clause.

In *Orient Express* Hamblen J noted that “concurrent independent causes” echoed the additional causation in Hart and Honoré’s terms.68 According to Hart and Honoré, additional causation resides where one act is not a necessary condition of the harm since some other independent cause is sufficient to cause the same damage.69 Also, the two factors must be independent in the sense that neither is a necessary condition of the occurrence of the other, so that both causal factors cannot pass the “but for” test in fact.70 For example, when two persons, *A* and *B* simultaneously shoot at *C*, each shot being sufficient to kill *C*, both *A* and *B* are criminally and civilly liable for *C*’s death.71 The underlying policy limitation is that, with the consequence that the application of the “but for” test would mean that there is no cause of the loss, this is potentially an example of a case in which fairness and reasonableness would require that the “but for” test should not be a necessary condition of causation, particularly where two wrongdoers are involved in tort.72 This is because each shot is sufficient, in conjunction with other normal conditions, to bring about *C*’s death as it occurred (*viz* by shooting) and at the moment when it occurred.

The Supreme Court in the FCA test case noted that, in the example of the two shooters given above, each putative cause, although not necessary, was, on the assumed facts sufficient to bring about the relevant harm. In contrast, the Court paid more attention to a further class of case in which a series of events combine to produce a particular result but where none of the individual events were either necessary or sufficient to bring about the result by itself. Having referred to Stapleton’s work,73 the Court mentioned a hypothetical case adapted from an example given by Stapleton74: 20 individuals all combine to push a bus over a cliff; assume it is shown that only 13 or 14 people would have been needed to bring about that result. It could not then be said that the participation of any given individual was either necessary or sufficient to cause the destruction of the bus.75 The Court considered that under both examples (the two shooters and the 20 individuals pushing the bus), treating the “but for” test as a required threshold would lead to an absurd conclusion that none of the causes should be regarded as

66 The Supreme Court judgment of the FCA test case (see fn.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [261] and [287].

67 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [260].

68 *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)* [2010] EWHC 1186 (Comm) at [32].

69 Hart and Honoré, *Causation in the Law*, 2nd edn (1985), p.235.

70 *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)* [2010] EWHC 1186 (Comm) at [27], cited from Hart and Honoré, *Causation in the Law*, 2nd edn (1985), p.235.

71 Hart and Honoré, *Causation in the Law*, 2nd edn (1985), p.235.

72 For the impact on insurance claims, see Rob Merkin, “Insurance and Reinsurance in the Fairchild Enclave” (2016) 36(1) *Legal Studies* 302.

73 Jane Stapleton, “Unnecessary Causes” (2013) 129 L.Q.R .39 and Jane Stapleton, “An ‘extended but for’ test for the Causal Relation in the Law of Obligations” (2015) 35 O.J.L.S. 697.

74 Jane Stapleton, “Unnecessary Causes” (2013) 129 L.Q.R. 39, 43.

75 The FCA test case Supreme Court judgment (see fn.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [184].

the cause of the loss.76 On this basis, the Court rejected that the “but for” test is, in an insurance context, an essential test that must be satisfied before the occurrence of an insured peril can be regarded as a proximate cause.

However, it is again noteworthy that the “20 individuals case” is distinguishable from the “two shooters case” in the sense that every individual’s action exerts a cumulative effect on the occurrence of the same loss, rather than a completely independent cause on its own, as in the “two shooters case”. Each individual’s action therefore has an undividable causal effect on the loss. Strictly speaking, it is curious whether cumulative multiple causes fall squarely within “concurrent independent causes”. Whether cumulative multiple causes should be categorised as a third type of concurrent causes in insurance law remains unexplored.

In brief, concurrent causes are often difficult to ascertain in fact and to define in law. For both “concurrent interdependent causes” and “concurrent independent causes” in the insurance context, the pertinent inquiry is into the relationship between the (two or more) relevant events, and their links to the occurrence of the insured loss.77 Although the Supreme Court in the FCA test case clearly held that the “but for” test is not required in order to determine concurrent causes in insurance law, there has, as yet, been no thorough examination of the tests and categories of concurrent causes in insurance law.

## Applying the concurrent causes principles

With regard to applying the concurrent causes principles, Hamblen J in *Orient Express* observed that, to date, the rules of concurrent causes have been a principle applied in respect of “concurrent interdependent causes”,78 namely, contributory causation in Hart and Honoré’s terms. The insured submitted that the principles of concurrent causes should be applied equally to “concurrent independent causes”. Regrettably, Hamblen J, in his judgment, did not clearly answer the question of what rules should be made and applied to cases involving concurrent independent causes in insurance law.79 In the FCA test case, Lord Hamblen and Lord Leggatt reaffirmed that there is no reason not to apply the principles equally to “concurrent independent causes”.

It is noteworthy that other common law jurisdictions have also considered the distinction between “independent concurrent causes” and “interdependent concurrent causes” in the application of the *Wayne Tank* principle. Their standpoints provide a clearer revelation of why there is little practical application of the concurrent causes principle in the English courts. In *McCarthy v St Paul Insurance Co Ltd*,80 in the Federal Court of Australia, Allsop J reviewed the line of the *Wayne Tank* authority and explained that, “given that the two causes are interdependent and the loss would not have occurred without the operative effect of the excluded cause, the non-response of the policy can be comfortably and logically accepted

76 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [185].

77 Meixian Song, *Causation in Insurance Contract Law* (Abingdon: Routledge of Informa Law, 2014), Chapter 4.2.

78 *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)* [2010] EWHC 1186 (Comm) at [29].

79 *Orient-Express* [2010] EWHC 1186 (Comm) at [32].

80 *McCarthy v St Paul Insurance Co Ltd* [2007] FCAFC 28; 157 FCR 402; 239 ALR 527.

as the intended result of the revealed agreement of the parties”.81 Allsop J continued with an analysis of the approach to “concurrent interdependent causes” and said:

“Thus, recognising the limits of the cover agreed upon, the loss fell outside the terms of the policy. *Wayne Tank* has become the best known illustration of this result. But the result is not the consequence of the application of a principle other than that which truly underlay *Wayne Tank*—the ascertainment and application of the contractual intentions of the parties.”82

From Allsop J’s judgment, it seems that *Wayne Tank* should not be regarded as a principle generally applied to cases involving concurrent causes in insurance claims; instead, the real value of *Wayne Tank* is to,

“pay close attention to the terms of any policy and the commercial context in which it was made, for it is out of these matters that the answer to the application of the policy to the facts will be revealed.”83

Moreover, in *Derksen v 539938 Ontario Ltd*,84 the Supreme Court of Canada decided not to follow the *Wayne Tank* principle on the basis that there was no compelling reason to favour the exclusion of coverage where there are two or more concurrent causes. The Court held that the accident resulted from two separate but concurrent acts of negligence. First, there was the non-automobile negligence of the contractor’s failure to properly clean up the work site and secure the steel base plate. Second, there was automobile-related negligence in his having operated the vehicle without first having performed a safety check of the load. As in the case of *Wayne Tank*, there were two contributory causes: they were independent, in that one did not lead to the other, but also interdependent, in that neither would have led to the loss but for the other. However, the Court held that a presumption that coverage is excluded, as laid down in *Wayne Tank*, is inconsistent with the well-established principle in Canadian jurisprudence that exclusion clauses in insurance policies are to be interpreted narrowly and generally in favour of the insured where there is ambiguity in the wording (*contra proferentem*).

Recently, the *Wayne Tank* principle and *Derksen* were considered by the Court of Appeal of New Zealand in *AMI Insurance Ltd v Ross John Legg*.85 The Court found that:

“New Zealand courts have applied the *Wayne Tank* principle in several first instance judgments. … The *Wayne Tank* principle is also consistent with New Zealand courts’ usual approach to insurance contracts, which are interpreted in the same way as any other, the overall objective being to ascertain the mutual intention of the parties. Exclusion clauses are construed narrowly, but not in a strained or artificial way that deviates from this general approach. To follow *Derksen*, then, would be to effect a change of policy toward insurance contracts, going further than the contra preferential rule permits.”86

81 *McCarthy v St Paul Insurance Co Ltd* [2007] FCAFC 28 at [103].

82 *McCarthy v St Paul Insurance Co Ltd* [2007] FCAFC 28 at [109].

83 *McCarthy v St Paul Insurance Co Ltd* [2007] FCAFC 28 at [104].

84 *Derksen v 539938 Ontario Ltd* [2001] SCC 72.

85 *AMI Insurance Ltd v Ross John Legg* [2017] NZCA 321.

86 *AMI Insurance Ltd v Ross John Legg* [2017] NZCA 321 at [51].

In summary, the bifurcation of “concurrent interdependent causes” and “concurrent independent causes” reflects a factual causal connection which has never been denied by the courts. However, the truth is that it is not sufficient to determine insurance indemnity simply based upon the consideration of causes-in-fact alone. The majority view in the FCA test case affirmed that “concurrent interdependent causes,” as in *Wayne Tank* and *The Miss Jay Jay*, is not the only form of fact that can constitute concurrent causes in insurance law, and there is no reason in principle why the concurrent causes principles cannot be applied to multiple causes which act in combination to bring about a loss in fact.87 As Lord Briggs observed, the recognition of a million concurrent causes (namely, every COVID-19 case in the UK) of equal potency is consistent with established authority, albeit this is an extension of it into new territory.88 However, the *Wayne Tank* and *The Miss Jay Jay* principles, effectively being a “largely theoretical analysis” may well be a reason to critically review a principled and extended application of the two cases.

In the final part, this article will advance further arguments and comment on the approaches of the High Court and the Supreme Court in addressing the issues of causation in the FCA business interruption insurance test case, caused by the coronavirus pandemic.

# Contract interpretation and causation in the FCA business interruption insurance test case

The outbreak of COVID-19 and the corresponding government measures have led to widespread disruption and business closures. A large number of businesses have made claims for these losses under business interruption insurance policies, especially those with “non-damage extensions” to their standard cover. Given the contractual uncertainty around the validity of these claims, the FCA, who is representing the interests of a large number of policyholders, has sought court declarations as part of a test case with an eye to the quick and fair handling of claims.

The test case is not intended to cover all possible disputes or any single claim, but to resolve some key uncertainties regarding contractual coverage and issues of causation in claims arising during the exceptional outbreak of coronavirus. With regard to the issue of coverage, whether a policy provides cover for the consequences of outbreaks of disease (COVID-19) and denial of access to premises depends on the policy’s wording. With regard to issues of causation, the key question is, what is the necessary causal link to any loss suffered by policyholders that are the subject of claims under the policies and whether, as a matter of law and fact, these can be established, including the impact, if any, of any trends clauses or similar or equivalent provisions?

Both the High Court and Supreme Court judgments brought welcome news for a significant number of policyholders impacted by COVID-related business interruption losses. The High Court mainly focused on the interpretation of policy

87 The Supreme Court judgment of the FCA test case (see n.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [176].

88 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [321].

wording.89 In a short discussion of the issues of causation, the Court concluded that, the proximate cause of the business interruption was an insured notifiable disease, i.e. the outbreak of COVID-19 in the UK, as one indivisible cause.90 Alternatively (but less satisfactorily) each of the individual occurrences was a separate but effective cause of the actions taken on a national level as a whole.91 The Court did not find that business interruption losses were caused by concurrent proximate causes; according to the judges’ analysis of the policy wording, however many proximate causes there were, they were all insured.92

In contrast, the question of causation received significant attention from the Supreme Court. The majority view of the Supreme Court preferred the alternative approach to focusing on individual occurrences, and held that all the cases of COVID-19 in the country were equal causes of the imposition of national measures. Although Lord Briggs (with whom Lord Hodge agreed) agreed with the conclusions reached in the majority’s judgment and all the reasoning behind it, his Lordship agreed with the High Court’s primary position on construction, namely, that the insured peril is COVID-19 as a whole providing it comes within the relevant radius. Lord Briggs considered that this approach was more in line with the common sense of a hypothetical person, rather than an insurance lawyer.93

Not to provide a thorough analysis of the judgments, the following focuses on the issue of concurrent causation and the courts’ approach to addressing the intersection between issues of causation and the contractual interpretation of policy wording in particular.

As shown earlier, from *Reischer v Borwick* to the FCA test case, the line of authority in English law has been to rely upon and emphasise the interpretation of the scope of cover on the basis of the intentions of the contracting parties. In the FCA case, the Supreme Court rightly grounded their treatment of concurrent causation firmly within the process of construction. Of the greatest importance are three different questions of interpretation that can be drawn from the judgment, and which unpack the sophisticated interplay between contract interpretation and the enquiry of legal causation in determining an insurer’s liability in general.

Firstly, the policy wording of insured and excluded perils is a question of interpretation. According to Hart & Honoré, when making causal statements, we must consult our knowledge of the general cause of events, for example, questions such as under what type of conditions do things of this sort happen, and did some event happen?94 Where the subject-matter insured suffers damage, the factual cause needs to be correctly identified; thereupon courts can define whether the proximate cause is an insured peril or an excepted one. For example, in both *The B Atlantic* and *The Cendor Mopu*, the Supreme Court still excluded concurrent proximate causes in law by more restrictively defining one of the competing risks in question. Moreover, at first instance in the FCA test case, Flaux LJ and Butcher J widened the policy wording of insuring clauses (e.g., “any occurrence of a notifiable disease

89 The High Court judgment of the FCA test case, *The Financial Conduct Authority v Arch Insurance (UK) Ltd*

[2020] EWHC 2448 (Comm) at [503].

90 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) at [532]. The issues of causation are addressed at 141–150 of the judgment.

91 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) at [533]. 92 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) at [535]. 93 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) at [322]. 94 Hart and Honoré, *Causation in the Law*, 2nd edn (1985), p.111.

within a radius of 25 miles”). The judges found that it became unnecessary to consider the detailed questions relating to proximate causation and concurrent causation due to the fact that all the occurrences were considered to be insured. However, the Supreme Court construed the insuring clauses more narrowly and then recognised that the question of causation was a separate and critical issue to the claims.

A second question of interpretation concerns the required causal connection between the insured losses and the insured perils, depending upon the causal expression used in the insurance provisions. For example, “Disease Clauses” under the FCA test case use different words to describe the required connection between the occurrence of a notifiable disease and the interruption of the business, such as “following”, “as a result of”, “arising from” and “in consequence of”. The High Court held that the word “following”, which appears to be a causal connection, denotes a requirement that is less than proximate causation, covering indirect effects of the disease such as the reaction of the authorities and/or of the public.95 In contrast, Lord Hamblen and Lord Leggatt held that the different phrases do not mean a lesser causal connection. This is due to this question of interpretation being distinct from the first question of interpretation with regard to the meaning of risks, for example, notifiable diseases. The interpretation of the required causal connection is the legal effect of the insurance contract, as applied to a particular factual situation.96

Last but not least, it is submitted that the question of whether or not the principle that the exclusion clause should generally prevail should stand, is, fundamentally, a question of contract interpretation. Lord Hamblen and Lord Leggatt stated that, “although it is always a question of interpretation, the exclusion will generally prevail.”97 This article argues that it is the first sentence that is the crux of the law, not the second. It is submitted that, instead of having laid down well-known principles, what has been established and adopted by the English courts is simply the confluence of the assessments of factual causation (“concurrent independent causes” and “concurrent interdependent causes”) and legal causation (the equal efficiency test). As discussed in the earlier part, it has been proposed in other common law jurisdictions that *Wayne Tank* and *The Miss Jay Jay* principles should be confined to their facts where there are two contributory/concurrent interdependent causes and where both causes are necessary conditions to the occurrence of the loss. This is consistent with Allsop’s approach in *McCarthy*,98 in the way that what truly underlined *Wayne Tank* was the ascertainment and application of the contractual intentions of the parties, instead of a principle that could be applied in most cases or to any event.

# Conclusion

For many decades commentators and courts have regarded *Wayne Tank* and *The Miss Jay Jay* as the leading cases that laid down the concurrent causes principles

95 The High Court judgment of the FCA test case, *The Financial Conduct Authority v Arch Insurance (UK) Ltd*

[2020] EWHC 2448 (Comm) at [95].

96 The Supreme Court judgment of the FCA test case (see fn.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [162].

97 (See fn.9) *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [174].

98 *McCarthy v St Paul Insurance Co Ltd* [2007] FCAFC 28 at [109].

in English insurance law. However, as this article has discussed, the courts have often struggled to recognise any real instance of concurrent causes in fact and in law and to apply the principles directly. The recent Supreme Court judgment of the FCA test case is therefore of great importance: it provides a closer examination of the legal definition of concurrent causes and unpacks the interplay between contract interpretation and causation. However, despite the fact that a judicial reinterpretation of both *Wayne Tank* and *The Miss Jay Jay* is long overdue, the courts in the FCA test case did not, regrettably, choose to provide such a reinterpretation.

In the light of Hart and Honoré’s theoretical analysis, this article reaches two main conclusions. First, the proximate cause analysis should not overshadow concurrent causation in insurance cases. However, concurrent causation is a difficult concept because of an infinite variety of situations in fact, and the lack of careful explication of the assessment of “concurrency” and “efficiency” of the causes in insurance law. Secondly, *Wayne Tank* and *The Miss Jay Jay* seem to have been misinterpreted by insurance lawyers: instead of making principles, these are merely cases that exemplify the fundamental judicial approach to causation by interpreting the contractual terms and the intentions of the contracting parties. The concurrent causes principle should be the subject of substantial judicial consideration to look at whether they should only be referred to in cases involving “concurrent interdependent causes”.

However, this is not to say that the so-called principles derived from *Wayne Tank* and *The Miss Jay Jay* are without value. On the contrary, they provide a useful indication for interpreting the purpose of the insurance policy and the intentions of contracting parties. The goal of this article is not to overthrow the concept of concurrent causation in English insurance law, but to unveil and discuss the interplay and separation of the interpretation of contractual provisions and causation issues as two mutually informative components of the determination of an insurer’s indemnity.

Based upon the analysis above, a good start to the sensible doctrinal development of concurrent causation would be the acceptance that the determination of insurance liability involves a combination of enquiries of causal effects in fact, causal requirements in law, and contract interpretation. First, it should be accepted that there is no certain and unified principle which we must struggle to discover and distil. For insurance lawyers, establishing factual causation means arriving at a context-specific understanding of concurrent causation. The pertinent inquiry is into the relationship between the (two or more) relevant events, and their links to the occurrence of the insured loss. Based upon the first question, the second issue is to limit the scope and analysis of causes-in-fact by examining the causal connections, as agreed in the insurance contract or in law, for example, the question concerning how in practice the efficiency of the two competing causes would be weighed and balanced. This process includes both causal and non-causal questions, especially the interpretation of the risks and the parties’ intentions within the exclusion clauses, insuring clauses, and clauses relating to the measure of damages.