

SCC Extends Meaning Of "Property Damage" To Include Damage To Own Property And Faulty Workmanship May Now Constitute An "Accident"

Reported Case	<i>Progressive Homes Ltd. v. Lombard General Ins. Co.</i>
Citation	2010 SCC 33, [2010] 2 S.C.R. 245
The Court	Supreme Court of Canada
Judgement Rendered	23 September 2010
At Issue	Did the insurer owe a duty to defend the insured general contractor under its CGL policy for a claim alleging property damage related to defective building construction?
Factual Summary	Progressive, the general contractor for the construction of several housing complexes, was sued by the developer who alleged that four buildings suffered water ingress damage due to defective workmanship. Lombard insured Progressive under three versions of five successive CGL policies. The policies covered Progressive for "property damage" as defined, and also contained a "work performed" exclusion for the insured's own work once completed. The BC Supreme Court held that Lombard did not have a duty to defend Progressive, based on a line of authority to the effect that defective construction is not an "accident" unless it causes damage to property of a third party. A majority of the BC Court of Appeal dismissed the appeal, holding that damage from faulty workmanship was not "fortuitous".
Decision	<p>The Court took aim at Lombard's arguments that "property damage to one part of a building caused by another part of that same building does not constitute "property damage" but is pure economic loss and that "property damage" is limited to third-party property damage. The Court noted that the property damage vs. pure economic loss distinction is drawn from tort law, that the policy definition of "property damage" provided no basis for such a distinction and that the plain and ordinary meaning of "property damage" does not limit the concept to damage to property of a third party. The Court "construed the definition of 'property damage', according to the plain language of the [policy] definition, to include damage to any tangible property" and there was no restriction in the definition to "damage to third-party property" (at para. 36).</p> <p>This plain meaning approach was seen to be consistent with the policy as a whole. If "property damage" were restricted to third-party property damage, there would be little or no scope for the "work performed" exclusion. The Court further stated, clearly <i>obiter</i>, that "the definition of property damage (physical injury to tangible property or loss of use of tangible property) may not categorically exclude defective property" (at para. 39) and, "where a defect renders property entirely useless it may be arguable that defective property may be covered under 'loss of use', the second portion of the definition of 'property damage'" (at para. 39).</p> <p>The underlying pleadings adequately alleged "property damage" - e.g. water leaking through walls causing damage and adequately described "defective property" ("which may also be 'property damage'") – e.g. improperly built walls (at para. 41). Lombard's argument that defective workmanship is <i>never</i> an "accident" was also rejected: "whether defective workmanship is an accident is necessarily a case-specific determination" depending on the circumstances and the definition of "accident" in the policy (at para. 46). The Court did not consider that this view would convert CGL policies into performance bonds, taking the view that a performance bond "ensures that a work is <i>brought to completion</i>" and that the CGL "picks up where the performance bond leaves off and provides coverage once the work is completed" (at para. 48). The pleadings in this respect alleged Progressive was negligent, and did not allege intentional conduct that would suggest the property damage was expected or intended. Therefore, the fortuity requirement was met.</p>

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Lombard failed to show that an exclusion clearly and unambiguously excluded coverage, so as to negate the duty to defend. The “contract” exclusion, and the “product” exclusion (not having been argued by Lombard), were dismissed in a single sentence.

As for the “work performed” exclusion, there were three versions, because of varied policy language. Under version 1, the relevant endorsement only excluded “work performed by the Named Insured” and did not exclude work performed *on behalf of* the insured (at para. 56). Under version 2, the Court held that it only excluded coverage for defects, and that contemplated “division of the insured’s work into its component parts by the use of the phrase ‘that particular part of your work’” (at para. 62). That is, coverage for repairing defective components would be excluded but coverage would exist for resulting damage. This left some faint hope for Lombard: “If, as Lombard alleges, the buildings are wholly defective, then the exclusion will apply and Lombard will not have to indemnify Progressive” (at para. 65). Finally, version 3, a combination of versions 1 and 2, excluded coverage for defective property but not for resulting damage, and it contained a subcontractor exception, which again expanded coverage. There being a possibility for coverage, the duty to defend was engaged.

“Under the first version of the CGL policy, there was a possibility of coverage for damage to work completed by a subcontractor and for damage resulting from work performed by a subcontractor. Under the second version of the policy, there was a possibility of coverage for damage resulting from the particular part of the insured’s work that was defective. Under the third version of the policy, there was a possibility of coverage both for resulting damage and for any damage to work completed by a subcontractor.” (at para. 72)