
**What constitutes ‘property damage’
under an commercial general liability insurance policy?**

Reported Case: Wawanesa Mutual Insurance Company v. Beaverdam Pools Ltd.
Citation: 2010 NBCA 1
At Issue: Whether an insurance policy that provides coverage for ‘property damage’ will trigger a duty to defend where property is not physically damaged, but is otherwise made useless for its intended purpose by the insured’s negligence.

The Court: Court of Appeal of New Brunswick
Judgment Rendered: January 7, 2010
Factual Summary: The respondent was hired to construct a pool, and the property owner constructed a deck on his property which was level with the top of the pool. Later that year, the pool began to fall apart. A new pool had to be installed on higher ground. The property owner sued the respondent, and the respondent notified its insurer. The insurer denied that it had a duty to defend the respondent.

The respondent’s Commercial General Liability policy provided coverage for “property damage” caused by an “occurrence”. Property damage’ was defined as “physical injury to tangible property, including all resulting loss of use of that property” or “loss of use of tangible property that is not physically injured”.

Although the policy excluded coverage for damage to the pool, the trial judge found that the insurer did have a duty to defend with respect to the property owner’s claim for the cost of raising his deck to be level with the pool. On appeal, the insurer disputed that there was any ‘property damage’ to the deck, as no actual physical damage to the deck occurred. The insurer also argued that if there was damage, it was not caused by an ‘occurrence’ in the sense of a specific accident.

Disposition: The appeal was dismissed. The court upheld the trial judge’s decision that the insurer did have a duty to defend in this situation.

Although ‘occurrence’ was defined as an ‘accident’ in the insurance policy, the court ruled that the word ‘accident’ in consumer general liability policies can include acts of negligence.

The court furthermore ruled that where defective work makes property useless for its intended purpose, it can constitute “physical injury” to the property, notwithstanding that the property itself was not actually damaged. Additionally, the loss of use of the deck would fall within the scope of “loss of use of tangible property” under the policy in this case.

See: <http://www.canlii.org/en/nb/nbca/doc/2010/2010nbca1/2010nbca1.html>