

# The 'But For' Test in Proving Causation in Insurance Claims in Uganda

*Emmanuel Okurut\**

**Abstract:** *Causation in insurance law refers to the cause-and-effect relationship between an event and the resulting loss or damage. Causation is an important concept because it determines whether an insured party is entitled to coverage under a particular policy. There are several legal principles that are used to evaluate causation in insurance disputes, including the proximate cause rule and the 'but for' test. The 'but for' test, which inquires whether the loss would not have occurred 'but for' the occurrence of the covered event, has been criticized for its oversimplification of the causation analysis and its failure to adequately consider the complex causal chain that often underlies loss. In addition, the 'but for' test tends to draw a number of false negatives while taking into account certain irrelevant considerations. In contrast, the proximate cause rule, which requires that the covered event be the primary cause of the loss or damage, offers a more nuanced and comprehensive approach to causation analysis. It considers the full range of factors that may have contributed to the loss or damage and allows for a more flexible and context-specific analysis of causation. This article argued that the 'but for' test is an unreliable method for proving causation in insurance law and that the proximate cause rule is more appropriate. This article concluded that the proximate cause rule is a more reliable method for proving causation in insurance law and should be adopted as the standard for determining coverage under an insurance policy.*

**Keywords:** *But For' Test, Causation, Insurance Claims, Insurance Law, Proximate Cause Rule*

---

\* LL.B., LL.M., LL.D. (Pretoria). Lecturer, Faculty of Law, Gulu University (Uganda). e.okurut@gu.ac.ug.

I. Introduction.....	52
II. The proximate cause rule .....	54
i. One proximate cause of the loss.....	56
ii. Multiple proximate causes of the loss .....	59
III. The ‘but for’ test: a new standard? .....	64
IV. The proper standard for causation .....	69
<b>V. Conclusion.....</b>	<b>71</b>

## I. Introduction

In insurance law, the concept of causation is crucial in determining whether a policyholder is eligible for indemnification. Causation is a challenging legal concept to prove since it must be proven that there was a direct and causal connection between the insured occurrence and the subsequent loss or damage. The general rule regarding causation is that a loss suffered by the insured should be directly attributable to the risk(s) that is covered under the insurance policy.<sup>1</sup> While the insured may have an insurance policy and may suffer some loss, it is not automatic that all losses are covered by the said policy. Therefore, the question of causation of a loss is central to any determination of the insurer’s liability to pay indemnity in accordance with the policy of insurance. Understanding the principles of causation is important to both insurance companies and policyholders because it aids in determining the scope of coverage under a particular policy and ensures that claims are handled fairly and appropriately.

Insurance contracts often include exclusionary clauses also known as limitations that might restrict an insured party’s ability to recover indemnity for a particular loss or damage. These exclusions may be based on causation which may be founded on considerations such as moral hazard, negligence, intentional exposure to risky activities, and criminal actions to mention but a few. It is therefore important for policyholders to carefully review the wording

---

<sup>1</sup> Plummer AL, ‘The Anatomy of an insurance claim’ 33 *Insurance Counsel Journal*, 1966, 123; Padfield AQC, *Insurance claims*, Bloomsbury Academic, 2021, 2; Zalma B, *Insurance claims: A comprehensive guide part 103: Duties of the insured and the insurer*, 2018, 148.

of their policy, and to understand the specific exclusions and limitations that may apply to their coverage. When making a claim for a loss or damage, the burden of proof typically rests on the policyholder to prove that the loss is covered by the policy. This means that the policyholder must provide plausible evidence that the loss or damage was directly caused by an insured event, as defined in the policy. If the policyholder is unable to prove causation, their claim will most likely be denied.<sup>2</sup> However, it must also be noted that if the insurer disputes the policyholder's claim and argues that the policy does not cover the specific loss or damage, the burden of proof shifts to the insurer to establish that the policy excludes indemnity for that particular loss. In this situation, the insurer must provide evidence that the policy excludes or limits coverage for the specific loss or damage being claimed.<sup>3</sup>

The proximate cause rule has long been used as a principle of causation in insurance law, with the goal of determining whether an insured party is entitled to coverage for a particular loss or damage.<sup>4</sup> However, recent authorities have supported the use of the 'but for' test as an alternative method for evaluating causation.<sup>5</sup> The 'but for' test is based on the idea that the loss or damage would not have occurred 'but for' the occurrence of the covered event. It appears to be a simpler and more straightforward approach for causation analysis, as it only requires a determination of whether the loss or damage would have occurred in the absence of the covered event. For example, if a homeowner has a policy that covers fire damage to their home, they would likely be entitled to compensation if their home is damaged by fire because the damage would not have occurred 'but for' the fire. On the other hand, if the homeowner's home is damaged by a flood, they would likely not be entitled to coverage under the same policy unless the flood was directly caused by the fire (for example, if the fire caused a dam to break, leading to the flood).

This article examines the appropriateness of using the 'but for' test for establishing the causation of loss in insurance claims. It begins by examining

---

<sup>2</sup> Song M, *Causation in Insurance contract law*, Informa Law from Routledge, United Kingdom, 2014, 2.

<sup>3</sup> Leitner DL, *Recurring issues in insurance disputes: A guide for insurers and insureds*, Tort and Insurance Practice Section: American Bar Association, 1996, 213.

<sup>4</sup> *Khan v Heywood & Middleton Primary Care Trust* (2006), Court of Appeal of England and Wales.

<sup>5</sup> *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* (2010), High Court of England and Wales. (This decision has been overruled by the Supreme Court in the case of *Financial Conduct Authority v Arch Insurance (UK) Ltd & Others* (2021), Supreme Court of the United Kingdom.

the proximate cause rule and its application in insurance law and then compares the two approaches to determine which is the more reliable and accurate method for evaluating causation in insurance disputes. The article considers the strengths and weaknesses of each approach and evaluates the potential implications for policyholders and insurers.

## II. The Proximate Cause Rule

Under the proximate cause rule in insurance law, the insured must show that the loss they experienced was caused by a risk that was covered by the policy. In the case of *Johnston v West of Scotland Insurance*,<sup>6</sup> a house was insured against damage by fire. When the property caught fire, the firemen used high-pressure water from their hosepipes which resulted in greater damage to the house. The insurer argued that the actions of the firemen in extinguishing the flames resulted in greater damage than the fire and therefore, the fire was no longer the proximate cause. The court disagreed with the insurers and held that the fire was the actual proximate cause because, without the fire, the firemen and their hosepipes would not have been required at the property. However, in instances where it is found that the cause of the loss is not specifically attributable to an insured risk, or if the loss experienced is caused by a risk that is expressly excluded by the policy, the insurer will not be held liable under the terms of the policy.<sup>7</sup> The proximate cause rule is based on the idea that an insured party must show that the loss or damage that is being claimed was directly caused by the covered event, rather than by some other intervening event. In the majority of insurance policies, the cause of the insured event is frequently illustrated using phrases like ‘caused by,’ ‘attributable to,’ ‘as a result of,’ or ‘arising from.’ These expressions are used to define the scope of coverage and to specify the types of losses or damages that are covered under the policy. For example, if an insurance policy covers losses or damages ‘caused by’ a fire, it only provides coverage for losses or damages that are directly attributed to a fire outbreak. This might include damage to the insured property as a result of the fire, as well as any additional costs or expenses

---

<sup>6</sup> *Johnston v West of Scotland Insurance Co* (1828) 7 Sh. (Ct of Sess), 52.

<sup>7</sup> Plummer ‘The Anatomy of an insurance claim’, 124.

incurred in connection with the fire (such as temporary housing or clean-up costs). Similarly, if an insurance policy covers losses or damages that are ‘attributable to’ an accident, it would provide coverage for losses or damages that can be directly traced back to the accident. This might include medical expenses or lost income as a result of injuries sustained in the accident, as well as damage to the insured property.

As early as 1894, the Court of Appeal of England established the proximate cause rule for proving causation in insurance claims. In the case of *Reischer v Borwick*,<sup>8</sup> the Court of Appeal was called upon to determine whether the initial collision or the subsequent towing through rough waters, was the proximate cause of the loss of a damaged water vessel named *Rosa*. The court held that the water vessel’s condenser that was broken in the collision was the proximate cause of the loss. According to Lopes LJ, it was well-established law in marine insurance cases that only the proximate cause would be taken into account and all others would be rejected, even though the loss would not have occurred without them. His Lordship stated that the damage from a collision had to be the proximate result of the loss in order for the plaintiff to be entitled to compensation. The Learned Judge further reasoned as follows in relation to the proximate cause rule:<sup>9</sup>

... The damage received in the collision was the breaking of the condenser, and it was the broken condenser which really caused the proximate loss. The tug was continuously in danger from the time the condenser was broken, and the broken condenser never ceased to be an imminent element of danger, though the danger was mitigated for a time by the insertion of the plug in the outside of the vessel. The cause of the damage to the condenser was the collision, and the consequences of the collision—that is, the broken condenser—never ceased to exist, but constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable.

During the arguments, the insurers raised a contention that towing of the tug through the rough water after the collision was supposedly the proximate cause of the loss which was sought to be recovered. However, it was admitted by both parties that the consequential towing of the vessel after the

---

<sup>8</sup> *Reischer v Borwick* (1894), The Court of Appeal of the United Kingdom.

<sup>9</sup> *Reischer v Borwick* (1894), The Court of Appeal of the United Kingdom, 552.

accident was the proper, reasonable, and unavoidable course of action in the circumstances. His Lordship reasoned that although the towing may have also contributed to the final loss, and perhaps without which the loss might not have occurred, the proper conclusion in those circumstances was that the broken condenser resulting from the accident was the proximate cause of the loss.<sup>10</sup>

It is quite clear from the case discussed above that an insurer will only be liable to indemnify the insured for losses that are proximate to the insured risk. To illustrate the operation of proximate cause, we can consider an example where a policyholder insures a motor vehicle against accidents. If an accident occurs, it will be considered to be a proximate cause that is recoverable under the policy. On the other hand, if the motor vehicle is destroyed by a landslide, that risk cannot be treated as a proximate cause because it is not covered under the policy. A determination of the proximate cause is also dependent on the number of causes that might be judged to be responsible for the loss.

### **i. One Proximate Cause of the Loss**

In cases where the insured suffers a loss due to only one cause, the evaluation of whether that cause is proximate or not is typically rather straightforward. This is because the proximate cause rule is based on the idea that an insured party must show that the loss or damage that is being claimed was directly caused by the covered event, rather than by some other intervening event. When there is only one cause of the loss or damage, the court only has to determine whether that cause is the proximate cause or not. If the cause is found to be proximate, then the insured party would typically be entitled to coverage under the policy. If the cause is not found to be proximate, then the insured party would likely not be entitled to coverage.

There are several cases involving only one cause in which the courts have been called upon to determine whether that cause is proximate or not. For example, consider a case where an insured party has an insurance policy that covers destruction to his or her property as a result of fire. In an instance where the property is damaged due to a fire, the court will determine that the proximate cause of the loss was the fire which entitles the insured to

---

<sup>10</sup> *Reischer v Bornwick* (1894), The Court of Appeal of the United Kingdom, 552.

compensation. To illustrate this point, reference is made to two cases decided by the Queen's Bench and the Court of Appeal of the United Kingdom.

In the case of *Ballantyne v MacKinnon*,<sup>11</sup> the plaintiff was the owner of the steamer named *Progress*, which was covered by a time policy with the defendants. A trawler towed the steamer into port after it ran out of coal while sailing from Hamburg to Sunderland and was awarded a salvage fee of £350. The plaintiffs paid the award and then sought compensation from their insurance. The Court of Appeal upheld the trial judge's decision, holding that because salvage costs were not caused by a peril or risk covered by the insurance, the insurers were not liable for them. There were no reports of collisions or fatalities throughout the entire adventure, and the vessel's loss was completely due to the lack of coal. According to the judgment, the loss could not be categorized as a peril of the sea as required by the policy. In arriving at this decision, Smith LJ noted that:

...Upon this evidence how can this court find, as we were invited to do by the plaintiff, that the Lord Chief Justice [the trial judge] came to a wrong conclusion upon the question of fact as to the non-existence of a sea peril when the towage services were rendered to *Progress*? There was no weather, no sea on, no accident or casualty of any kind to the ship, no incursion of salt water into the ship, which could have completed the voyage under sail, and no reasonable apprehension of danger...As before stated, we agree with the Lord Chief Justice when he held upon the evidence before him that the loss sustained was not occasioned by a peril of the sea, for in our judgment the loss complained of arose solely by reason of the inherent vice of the subject matter insured: we mean the insufficiency of coal with which the ship started upon her voyage, the consequence of which was that what in fact did happen must have happened, namely, that the ship ran short of coal, no sea peril bringing this about in any shape or way, or placing the ship in a position of danger thereby.

Similarly, in *Young v Sun Alliance & London Insurance Ltd*,<sup>12</sup> the plaintiff's home was constructed on meadow land, and he insured it under a homeowner's insurance with the defendants. Losses caused by 'storm, tempest, or flood' as well as 'escape of water from or frost damage to any water, drainage, or heating equipment' were covered by the policy. The downstairs bathroom was flooded with water, which rose to a three-inch depth. It was

---

<sup>11</sup> *Ballantyne v MacKinnon* (1896), The Queen's Bench of England.

<sup>12</sup> *Young v Sun Alliance* (1976), The Court of Appeal of England and Wales.

determined that the water came from a natural water supply that had been channelled under the toilet. The plaintiff had costly repairs made and then sought compensation from the defendant insurer, claiming that the water had the characteristics of a flood which was provided for under the insurance policy. It was further argued that the water intrusion was the sole cause of the property damage in this incident. To determine the insurer's responsibility, the court had to decide whether this kind of water intrusion qualified as a flood. The Court of Appeal found that although the water damaged the property, it did not fall under the category of a flood and was not covered by the policy. In this regard, Shaw LJ held as follows:

...it seems apparent that what the policy was intending to cover, whatever may be the colloquial use of the word 'flood' in common parlance, were three forms of natural phenomena which were related not only by the fact that they were natural, but also that they were unusual manifestations, certainly of those phenomena: that is to say, 'storm' meant 'rain accompanied by strong wind'; 'tempest' denoted an even more violent storm; and 'flood' was not something which came about by seepage or by trickling or dripping from some natural source, but involved 'an overflowing or irruption of a great body of water' as one of the definitions in the Shorter Oxford English Dictionary puts it. The slow movement of water, which can often be detected so that the loss threatened can be limited, is very different from the sudden onset of water where nothing effective can be done to prevent the loss, for it happens too quickly... It is because the word 'flood' occurs in the context it does, ...which has some element of violence, suddenness or largeness about it. So 'flood' is something different for the purposes of this policy from an 'escape of water.'

These two cases illustrate that in situations when there is only one cause of the loss, the challenge before the court is to determine whether the loss resulted from the insured risk. Such an evaluation is conducted through an assessment of the evidence and the law applicable in those circumstances. However, when it comes to losses that can be attributed to two or more causes, this determination becomes much more complex. In such cases, it can be more challenging to determine which of the possible causes is the proximate cause of the loss. This may pose a challenge in determining whether the loss is covered by the insurance policy. To address this issue, courts have developed different legal standards, such as the 'last cause in time' and the 'effective or predominant' test, to help determine which of the possible causes is the proximate cause of the loss as discussed in the next section.



## ii. Multiple Proximate Causes of the Loss

### a. *The Last Cause in Time*

In several circumstances, losses may be caused by a combination of causes or a so-called chain reaction of occurrences culminating in the insured event. The application of the *proximate cause* rule has undergone significant development over time. Given the practical challenges of determining whether there was causation, especially in losses involving more than one cause, Victorian courts adopted the ‘last cause’ rule as being the most proximate cause.<sup>13</sup> In this assessment, the courts determined that the last cause in time was to be considered to be the most proximate to the loss regardless of the severity of its impact.

In the case of *Winspear v Accident Insurance Association*,<sup>14</sup> the insured party had purchased personal accident insurance for death and injury resulting from accidents that were attributed to external forces. While crossing a water stream, the insured had a seizure and fell in, subsequently drowning. The cause of death was attributed to drowning, but the insurer attempted to avoid liability by claiming that the seizure, rather than the accidental drowning, was the proximate cause of the death. To determine causation in this case, the court applied the ‘last cause in time’ rule, which required that where there were two causes of a loss, the last in time would be the most proximate cause.<sup>15</sup> In this case, the court determined that the unintentional drowning was actually the proximate cause of death, as it occurred last in time and this rendered the insurer liable for compensation. This ruling established that, in cases involving multiple causes, the ‘last cause in time’ rule should be used to determine the proximate cause and assess coverage under an insurance policy.

Similarly, in the case of *Lawrence v Accidental Insurance Co Ltd*,<sup>16</sup> the insured had purchased an insurance policy for death and personal injury arising from accidents. One day during the insurance period, the insured experienced a seizure while waiting for the train at the station. He lost consciousness and fell on the train tracks at the same time when a train was passing. Unfortunately for

---

<sup>13</sup> *Everrett v London Assurance* (1865), The Court of Common Pleas of England and Wales.

<sup>14</sup> *Winspear v Accident Insurance Association* (1880), The Court of Appeal of England.

<sup>15</sup> *Winspear v Accident Insurance Association* (1880), The Court of Appeal of England, 42.

<sup>16</sup> *Lawrence v Accidental Insurance Co Ltd* (1881), The Queen’s Bench Division.

the insured, he was run over by the train and passed away. The insurer attempted to deny liability claiming that the seizure, which was not covered by the accident policy, caused the death rather than the accident involving the train. The court disagreed with the insurer's argument and instead found that the proximate cause of the insured's death, which also coincided with the last cause in time, was the train accident.<sup>17</sup> It was held that the insurer was liable to pay the terminal benefits under the insurance policy.

The application of the 'last cause in time' rule to prove proximate causation has sometimes been problematic for example in cases where the order of occurrence of multiple risks cannot be reasonably ascertained, or in cases where the first risk that occurred contributed a greater part to the loss. This is because accepting the last cause in time as the most proximate can unreasonably imply that it had a larger effect than all other causes in the series of events leading up to the loss. For example, consider a case where an insured party suffers a loss due to a fire that was caused by an electrical malfunction and a gas leak. If it is not possible to determine the order in which these two risks occurred, applying the 'last cause in time' rule may not be a reliable method for determining proximate causation. This is because it is possible that the gas leak, which may have occurred first, could have contributed a greater part to the loss than the electrical malfunction, which occurred later.

In these cases, other legal tests, such as the 'effective or predominant' test, were consequently developed to determine proximate causation. The 'effective or predominant' test looks at which of the possible causes had the greatest impact or influence on the loss, rather than simply considering the order in which they occurred. Ultimately, the determination of proximate causation in cases involving multiple causes will depend on the specific circumstances of the loss and the applicable legal principles.

### ***b. From the 'Last Cause' to the 'Effective or Predominant Cause'***

The classic case of *Leyland Shipping Co v Norwich Union Fire Insurance Society*<sup>18</sup> illustrates the shift from the 'last cause in time' rule to the 'effective or

---

<sup>17</sup> *Lawrence v Accidental Insurance Co Ltd* (1881), The Queen's Bench Division, 216.

<sup>18</sup> *Leyland Shipping Co v Norwich Union Fire Insurance Society* (1918), The House of Lords of the United Kingdom, 35.

predominant cause' rule in determining proximate causation in insurance law. In this case, a ship was insured under a marine insurance policy against perils at sea, which excluded risks associated with war or hostilities. While at sea, the ship came under attack and was hit by a torpedo. The damaged ship was subsequently towed to a French port and moored at the outer harbour due to low water levels. However, when the weather deteriorated, the French port authorities feared that the ship would sink and obstruct the quay. As a result, the ship was ordered to move to a particular berth where it was battered by the waves and eventually sank.<sup>19</sup>

The insurer argued that the sinking of the ship was not covered under the policy because it was not caused by a covered peril at sea, but rather by the waves at the berth. However, the court disagreed with this argument and instead found that the proximate cause of the sinking was the torpedo attack, which was a covered peril under the policy. The court reasoned that the torpedo attack was the 'efficient cause' or 'dominant and most important cause' that set-in motion the chain of events leading to the sinking of the ship. As a result, the court held that the insurer was liable under the policy and the insured party was entitled to coverage for the loss. This case marked a significant shift in the way proximate causation was evaluated in insurance law, as it moved away from the traditional 'last cause in time' rule and instead adopted the 'effective or predominant cause' rule. This approach is now widely used in insurance disputes to determine causation and assess coverage under insurance policies.

In deciding this case, the House of Lords held that in determining the real *proximate cause*, it should not be resolved by mere reference to time, but by the effective predominant cause. This judgment henceforth rendered the *last cause rule* obsolete in favour of the *dominant or effective cause*. Court consequently held that if the torpedo had not hit and damaged the vessel, it would not have sunk. As such, the insured was not entitled to indemnity because the torpedo attack was an act of hostility that was excluded from coverage under the policy. Lord Shaw noted that:

To treat *proxima causa* as the cause which is nearest in time is out of the question. Causes are spoken of as if they were distinct from one another as beads in a row or

---

<sup>19</sup> *Leyland Shipping Co v Norwich Union Fire Insurance Society* (1918), The House of Lords of the United Kingdom, 35.

links in a chain ... The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net ... What does 'proximate' here mean ...? The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

In the case of *Yorkshire Dale SS Co Ltd v Minister of War Transport, 'Coxwold'*,<sup>20</sup> the House of Lords also held that the proper evaluation of the proximate cause involving multiple risks was the 'effective and predominant cause'. In this case, a water vessel named *Coxwold* which was insured against war risks was sailing during nightfall in bad weather with very poor visibility. To make matters worse, the ship was not displaying her navigation lights. Due to the haphazard motion, she lost contact with the ship in front of her and lost her bearings. As a result, the vessel ran aground causing a partial loss which was claimed by the owners from the insurers who denied liability. The owners argued that they were entitled to indemnity under the policy because they were involved in a warlike mission. However, the insurers contended that the loss was caused by negligent navigation of the crew members. As a result, the court had to determine whether the loss was a result of the negligence of the crew or bad weather.

The House of Lords held that the effective and predominant cause of the loss was the warlike mission in which the ship was required to navigate in a convoy. Viscount Simon LC made an observation that, regardless of the type of accident, one must ask oneself what was the primary and effective cause of the incident. It is widely accepted that a marine risk does not turn into a war risk only because the advent of war may increase the likelihood that it may manifest itself and result in a loss. Because of this, circumstances such as sailing in a convoy or without lights are not considered to be ones that transform maritime risks into war risks. However, if the judge's findings of fact show that the operation of a war risk is the 'proximate' cause of the loss in the sense described above, it is then clear that the loss was caused by war risks.<sup>21</sup>

---

<sup>20</sup> *Yorkshire Dale SS Co Ltd v Minister of War Transport, 'Coxwold'* (1942), The House of Lords of the United Kingdom.

<sup>21</sup> *Yorkshire Dale SS Co Ltd v Minister of War Transport, 'Coxwold'* (1942), The House of Lords of the United Kingdom, 6.

Lord Wright added that there must necessarily be a process of selection from among the contributing causes in order to determine what is the proximate cause. His Lordship made reference to the case of *Leyland Shipping Company v Norwich Union Fire Insurance Society* in which the court held that the word ‘proximate’ does not automatically mean the last in time, but it refers to the cause that is dominating in efficiency.<sup>22</sup> Lord Wright also referred to *Phillips on Insurance*, 5th edn, 1867, Cambridge (Mass), Vol II, p 678 which states as follows:

In the case of concurrence of different causes to one of which it is necessary [that is, because of the nature of the contract] to attribute the loss, it is to be attributed to the efficient predominating peril whether it is or is not in activity at the consummation of the disaster.

Lord Wright emphasized the importance of using common sense principles to determine the proximate or effective cause out of a number of possible or contributing causes. He argued that it is important to understand causation from the perspective of the average person, rather than from the perspective of a scientist or metaphysician. Lord Wright’s approach was intended to provide a more practical and realistic approach to evaluating proximate causation in insurance disputes. Rather than relying on technical or abstract principles, Lord Wright argued that the proximate cause should be determined based on the perspective of a reasonable person in the circumstances. This approach has been widely adopted in insurance law and has been influential in shaping the way proximate causation is evaluated in insurance disputes. It is now widely accepted that the proximate cause of a loss or damage should be determined based on common sense principles and the perspective of a reasonable person in the circumstances. This approach allows courts to more accurately assess causation and coverage under insurance policies in a practical and realistic manner.

It is, therefore, clear that the courts have rejected the ‘last in time cause’ in favour of the ‘effective and predominant cause’ in determining the causation of loss in insurance claims as illustrated in the cases discussed above. This is attributed to the challenges associated with the determination of the sequence

---

<sup>22</sup> *Yorkshire Dale SS Co Ltd v Minister of War Transport, ‘Coxwold’* (1942), The House of Lords of the United Kingdom, 10.

of events. However, a reading of more recent English cases reveals a consideration of the ‘but for’ test as a criterion for establishing the most effective proximate cause. The next subsection examines the authorities that establish the ‘but for’ test in an effort to determine its appropriateness for determining the causation of loss.

### III. The ‘But For’ Test: A New Standard?

Recent English cases illustrate that there has been an attempt at a shift from the proximate cause rule to the ‘but for’ standard for establishing causation in insurance claims. In 2010, the High Court of England in the case *Orient-Express Hotels Ltd v Assicurazioni Generali SpA*,<sup>23</sup> which has since been overruled, had occasion to determine the appropriate test for causation and its applicability to the insurance business. In this case, the insured was a hotel owner in New Orleans, United States, whose business was covered by an all-risks (comprehensive) insurance policy. After Hurricanes Katrina and Rita caused severe damage to the hotel, the insured filed a claim for property damages and business interruption. While the insurers acknowledged coverage for material damage, they claimed that compensation for business disruption was not activated since the bulk of the damage was to the city, which was not covered. The insurers further argued that even if there had been no damage to the hotel, business would still have been disrupted since most of the city was destroyed. The insurers proposed to isolate the claim for damage to the hotel from the business interruption to which the High Court agreed. Court further agreed that since business disruption would still have happened if there was no damage to the hotel, there would not have been insurance coverage.

In resolving the contention, a test was carried out to see whether the loss would have happened but for the damage. It became clear during the hearing that the application of the ‘but for’ causation test was the key legal issue for the opposing parties in this case. In holding that the ‘but for’ test was the appropriate criteria for determining causation in insurance, Hamblen J noted that:<sup>24</sup>

---

<sup>23</sup> *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* (2010), High Court of England and Wales, 5.

<sup>24</sup> *Yorkshire Dale SS Co Ltd v Minister of War Transport, ‘Coxwold’* (1942), The House of Lords of the United Kingdom, 5-6.

As stated in *Clerk and Lindsell on Torts* (19<sup>th</sup> ed): ‘FACTUAL CAUSATION’ (a) The ‘but for’ test... The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the ‘but for’ test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The ‘but for’ test asks: would the damage of which the claimant complains have occurred ‘but for’ the negligence (or other wrongdoing) of the defendant? ...the ‘but for’ test functions as an exclusionary test, *i.e.* its purpose is to exclude from consideration irrelevant causes. The fact that the defendant’s conduct is found to be *a* cause, applying the ‘but for’ test, is not conclusive as to whether he should be held responsible in law since the function of the causal enquiry in law is to determine which causes have significance for the purpose of attributing legal responsibility. It is sometimes said that the law seeks the *causa causans* (effective factor) rather than the *causa sine qua non* (factor(s) without which damage could not have occurred.’

Hamblen J reasoned that the existence or absence of one specific form of causal connection — namely, whether the wrongdoing was a prerequisite to the harm or loss occurring—was the basis of the ‘but for’ test. The Learned Judge noted that in most cases the application of the ‘but for’ yields satisfactory results. However, His Lordship cautioned himself that in some cases, this test may not be dependable. In fact, some prominent writers such as Professor Fleming in his book, *The Law of Torts*, 9th ed (1998), pp 222-230, and Markesinis & Deacon in their book, *Tort Law*, 4th ed (1999), pp 178-191, had drawn attention to the limitations of the ‘but for’ test in the area of tort. He pointed out that it was unrealistic to assume that even the most advanced versions of the ‘but for’ test could establish a formula whose technical application would offer flawless threshold direction on the causal link for every tort in all situations. The result of this was that the ‘but for’ test had to be applied cautiously because it could be excessively restrictive. Regardless of its limitations, the court applied the ‘but for’ standard in determining the question of causation in this case.

This approach was partly applied in the case of *Financial Conduct Authority v Arch Insurance (UK) Ltd*<sup>25</sup> which was decided before the High Court of England and Wales in 2020. Due to extensive uncertainty about the correct interpretation of the wording in many Business Interruption insurance policies being claimed by policyholders as a result of the economic effects of the

---

<sup>25</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd* (2020), The High Court of England and Wales.

Covid-19 pandemic and governmental quarantine interventions, the Financial Conduct Authority decided to seek a court declaration to resolve the contractual ambiguity. The court reasoned that in determining whether insurers are obliged to reimburse insureds, the law of causation plays a critical role in drawing a connection between the insured risk and the loss suffered. The first test to use when determining causality is the ‘but for’ test. Would the loss have happened if the event had not occurred? The standard is passed if the loss would not have happened if the incident had not occurred. On the issue of causation, the High Court distinguished the *Orient Express*<sup>26</sup> case because the covered risks and wordings in the policies before it, particularly the composite or compound perils, were distinct from the all-risks policies. However, the Court said that if the circumstances in the *Orient Express* case were identical to the case at hand, it would have come to the judgment that it was erroneously determined and refused to follow it.

The High Court noted that the argument in *Orient Express* had two major flaws. First, the Court stated that the insured risk had been misidentified. Harm produced by a covered fortuity was the insured risk, not damaged in the abstract. Hurricanes were an essential element of the insured risk, not something distinct from it, as the source of the harm.<sup>27</sup> The test should have been: would there have been a loss if the storms had not caused damage? The ‘but for’ test should have been met since a loss would not have happened if the storms had not caused damage. However, the Court of Appeal decision in the *Financial Conduct Authority*<sup>28</sup> case was appealed and heard in January 2021 by the UK Supreme Court.

On appeal of the *Financial Conduct Authority v Arch Insurance (UK) Ltd*<sup>29</sup> case, the Supreme Court held that the *Orient case* was wrongly decided and was overruled.<sup>30</sup> The court also strongly criticized the ‘but for’ test for having

---

<sup>26</sup> *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* (2010), High Court of England and Wales, 5.

<sup>27</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd* (2020), The High Court of England and Wales, 2448.

<sup>28</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd* (2020), The High Court of England and Wales, 2449.

<sup>29</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd*, (2021), The Supreme Court of the United Kingdom.

<sup>30</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd*, (2021), The Supreme Court of the United Kingdom, 308. The Supreme Court held as follows: ‘In the present case the court below considered that the *Orient-Express* decision was distinguishable but, if necessary, would have



serious weaknesses and questioned its appropriateness for the determination of causation. The most glaring flaw in the ‘but for’ test, according to Lord Hamblen, is not that it incorrectly excludes instances in which there is a causal connection, but rather that it fails to rule out a significant number of instances in which a risk would not be considered an effective or proximate cause of a particular result.<sup>31</sup> His Lordship conceived of an illustration in which cargo is lost when a ship sinks as a result of any number of factors that may be named, but without which the loss would not have happened. The Learned Judge correctly concluded that those many situations, such as the ship’s unseaworthiness or particularly severe weather conditions, would be credible contenders for selection as a proximate cause. They would also cover an infinite number of other situations. For instance, it is also possible to assert that the loss would not have happened if it had not been for the decision to build the ship, the decision of the owner or charterer to send the ship on this specific route, or the decision of the buyer to buy the cargo and the seller to ship it on that specific vessel.

However, His Lordship pointed out that the fundamental shortcoming of the ‘but for’ test is not that it produces a large number of false negatives, but rather that it produces a considerable number of false positives. He pointed out that the ‘but for’ test’s shortcomings have long been acknowledged across many spheres of life, including the law. This is primarily due to the fact that it includes too many situations and might leave out some in which one event could or would be considered to be the cause of another event. To illustrate this point, His Lordship noted as follows:<sup>32</sup>

An example given by Hart and Honoré in their seminal treatise on Causation in the Law, 2nd ed (1985), p 206 is a case of two fires, started independently of each other, which combine to burn down a property: see *Minneapolis, St P & S S M Ry Co*, 146 Minn 430, 179 NW 45 (1920); *Kingston v Chicago & NW Ry Co* 191 Wis 610, 211 NW

---

reached the conclusion that it was wrongly decided and would have declined to follow it. For reasons already given in addressing the causation and trends clauses issues, on mature and considered reflection we also consider that it was wrongly decided and conclude that it should be overruled.’

<sup>31</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd*, (2021), The Supreme Court of the United Kingdom, 181-184.

<sup>32</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd*, (2021), The Supreme Court of the United Kingdom, 184.

913 (1927). It is natural to regard each fire as a cause of the loss even if either fire would by itself have destroyed the property so that it cannot be said of either fire that, but for that peril, the loss would not have occurred. Another example, adapted from the facts of the decision of the Supreme Court of Canada in *Cook v Lewis* [1951] SCR 830, is a case where two hunters simultaneously shoot a hiker who is behind some bushes and medical evidence shows that either bullet would have killed the hiker instantly even if the other bullet had not been fired. Applying the ‘but for’ test would produce the result that neither hunter’s shot caused the hiker’s death - a result which is manifestly not consistent with common-sense principles.

His Lordship referred to a hypothetical illustration offered by Professor Stapleton that was covered in the appeal’s oral argument. It suggests that if twenty people work together to push a bus off a ledge, the involvement of any one person cannot be determined as either necessary or sufficient to result in the bus being destroyed, even if it is demonstrated that only thirteen or fourteen persons would have been required to achieve that outcome. The loss, however, would seem to have been caused by each person’s individual involvement, which seems acceptable. The erroneous conclusion that no one’s activities caused the bus to be destroyed would result from treating the ‘but for’ test as a minimum bar that must always be exceeded. On appeal, the Supreme Court held that the ‘but for’ test is unreliable for establishing causation because it gives rise to significant undesirable conclusions, not only in insurance law but also in other branches of law.<sup>33</sup>

Cornell Law School’s Legal Information Institute also highlights two key challenges associated with applying the ‘but for’ test as a standard for establishing causation.<sup>34</sup> Firstly, it points out the tenuous relationship between actions. This means that if one analyzes a situation closely enough, it becomes possible to construe almost anything as a cause according to the ‘but-for’ standard. This challenge arises because in some cases, it can be difficult to draw a clear line between actions and their consequences, leading to a subjective interpretation of causation. Secondly, there is a complexity posed by over-causation or merged causes. In some cases, there may be multiple ‘but for’ causes, making it challenging to determine the individual contribution of each

---

<sup>33</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd*, (2021), The Supreme Court of the United Kingdom, 184.

<sup>34</sup> ‘But-for Test’, Cornell Law School, — [https://www.law.cornell.edu/wex/but-for\\_test](https://www.law.cornell.edu/wex/but-for_test) on 11 July 2023.

cause to the overall outcome. Where there are too many concurrent factors that can be attributed to a particular outcome, it becomes difficult to distinguish and assign responsibility to any particular cause. These challenges undermine the simplicity and clarity of the ‘but for’ test, creating complexities in establishing causation in many legal cases. These challenges highlight the necessity for the establishment of the proper standard to be applied in determining causation in insurance claims.

## IV. The Proper standard for Causation

Having established the unreliability status of the ‘but for’ test in the common law, it is important to assess the most appropriate standard for determining causation in insurance. It is important to turn to statute to ascertain the proper standard. Under the law, the proximate cause rule has been recognised as the standard for proving causation upon which the insured’s loss is attributable to the risk that is covered under the policy. Section 55 of the Uganda Marine Insurance Act (2002) states as follows:<sup>35</sup>

Subject to this Act and any express provision in the policy, the insurer is liable for any loss proximately caused by a peril insured against, but he or she is not otherwise liable for any loss which is not proximately caused by a peril insured against.

In particular—

(a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured; but unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) unless the policy otherwise provides, the insurer of a ship or goods is not liable for any loss proximately caused by delay, although the delay is caused by a peril insured against;

(c) unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any injury to machinery not proximately caused by maritime perils.

Under section 55 of the Marine Insurance Act of Uganda, the proximate cause rule is the principle that is used to determine whether an

---

<sup>35</sup> Section 55, *Marine Insurance Act of Uganda* (2002).

insured party is entitled to coverage under a marine insurance policy. This provision clearly stipulates that the proximate cause of a loss is the efficient cause, the dominant and most important cause, which sets in motion the chain of events leading to the loss, and without which the loss would not have occurred. In other words, the proximate cause rule requires that the insured event must be the primary cause of the loss or damage, rather than some other secondary or indirect cause.

This interpretation is supported by the decision of the High Court (Commercial Division) of Uganda in the case of *Charita Uganda Insurance company v Insurance Regulatory Authority of Uganda Ltd & Anor*.<sup>36</sup> This case involved an application for Judicial Review seeking various orders against the ruling of the first respondent in favor of the second respondent. The ruling required the applicant to pay the second respondent a sum of Shs 2,386,226,000 arising from an insurance claim. The second respondent, M/s Ntake Bakery & Company Limited, had taken out an insurance policy with the applicant company for their bakery and flour mill. They filed a claim for the aforementioned amount due to damage or loss to one of their silos. However, the applicant rejected the claim based on an adjuster's report by M/s General Adjusters Uganda Ltd. The first respondent had received a letter from the second respondent requesting arbitration on the insurance claim. They subsequently summoned the applicant for meetings to discuss the matter. During a meeting held on the 27<sup>th</sup> of May 2012, it was determined that the main point of disagreement was the cause of the loss, which had not been resolved by the parties' expert advisers before the damaged silo was demolished. In his judgment, Justice Geoffrey Kiryabwire agreed with the position of the first respondent, which is the national insurance regulatory body, that the proximate cause is a fundamental principle of insurance in Uganda.

The proximate cause rule, therefore, remains an important legal principle in the field of insurance law, as it helps to define the scope of coverage under a particular policy and to ensure that policyholders receive the coverage they are entitled to in the event of a loss. This position of the law reflects an endorsement of the proximate cause rule rather than the 'but for'

---

<sup>36</sup> *Charita Uganda Insurance company v Insurance Regulatory Authority of Uganda Ltd & Anor*, (2013), Uganda High Court (Commercial Division), 64.

test. Therefore, the proper standard of proving causation in Ugandan Insurance Law is the proximate cause rule and not the ‘but for’ standard.

## V. Conclusion

In conclusion, causation is a critical concept in the field of insurance law, as it determines whether an insured party is entitled to coverage under a particular policy. Over the years, courts have applied the ‘proximate cause’ rule which itself has undergone some development given the complexities where a loss may be attributed to more than one cause. To address these challenges, the courts made a significant move from the ‘last cause’ rule to the ‘effective or predominant cause’ rule to prove proximity.

In 2010, the High Court of England in the case of *Orient-Express Hotels Ltd v Assicurazioni Generali SpA*<sup>37</sup> attempted to extend the application of the ‘but for’ test from other areas of law to insurance law. However, on appeal of the *Financial Conduct Authority v Arch Insurance (UK) Ltd*<sup>38</sup> case, the Supreme Court held that the *Orient case* was wrongly decided and was overruled.<sup>39</sup> The court also strongly criticized the ‘but for’ test for having serious weaknesses and questioned its appropriateness for the determination of causation. In criticizing the suitability of the ‘but for’ test, Lord Hamblen noted that the most obvious weakness of the ‘but for’ test is not that it wrongly excludes cases in which there is a causal link, but that it fails to exclude a great many cases.<sup>40</sup> His Lordship also noted that the ‘but for’ test tended to include an endless number of other circumstances. However, the main inadequacy of the ‘but for’ test was not that it produces false negatives but that it also gives rise to a countless number of false positives. In light of this, it was held that the ‘but for’ test was not the appropriate standard for determining causation.

In determining the appropriate standard for causation, it was important to turn back to the Marine Insurance Act, Section 55 which provides that an insurer is only liable to pay indemnity where the loss is caused by a loss that is

---

<sup>37</sup> *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* (2010), High Court of England and Wales, 5.

<sup>38</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd & Others* (2021), Supreme Court of the United Kingdom, 1.

<sup>39</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd & Others* (2021), Supreme Court of the United Kingdom, 308.

<sup>40</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd & Others* (2021), Supreme Court of the United Kingdom, 181.

proximate. This clearly shows that the appropriate standard for proving causation is the proximate cause rule. Therefore, the proximate cause rule remains good law in Uganda for the determination of causation in insurance claims.

It is important for both insurance companies and policyholders to understand the principles of causation, as they can have a significant impact on the outcome of an insurance claim. Insurance companies should carefully evaluate the cause-and-effect relationship between a covered event and the resulting loss or damage to determine whether an insured party is entitled to coverage, while policyholders should be aware of the specific exclusions and limitations of their policies and the role that causation plays in determining their coverage.