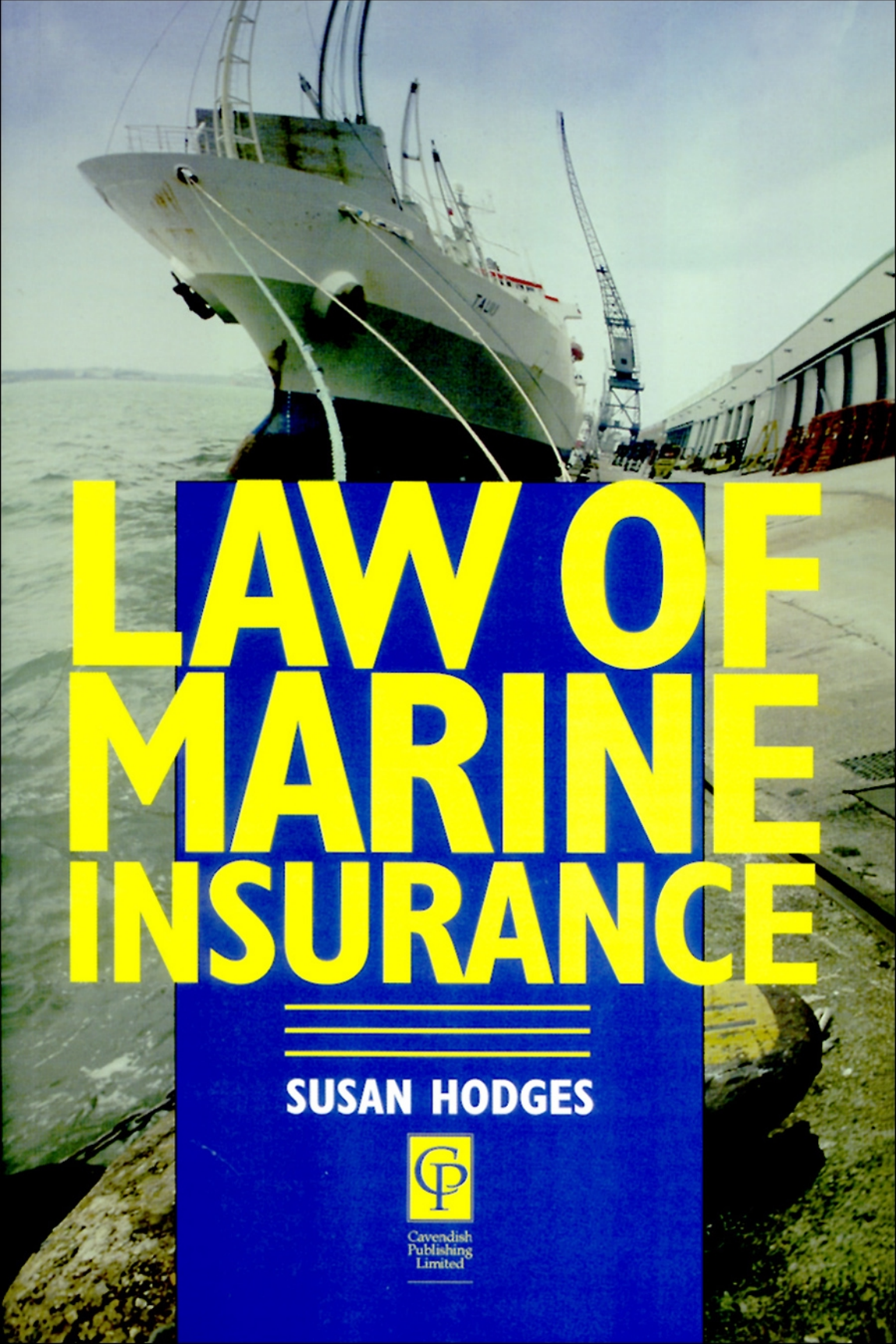

LAW OF MARINE INSURANCE

SUSAN HODGES

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CHAPTER 9

MARINE RISKS

INTRODUCTION

In marine insurance, the insured risks on hulls and cargo may be divided into two broad categories, namely, marine risks and war and strikes risks. The term 'marine risks' is a handy expression commonly used to refer to any risks other than war and strikes risks. Marine risks may be further sub-divided into:

- The traditional risks, such as perils of the seas, fire, theft, jettison, and piracy insured under the old SG policy; together with other recent additions, which are not strictly speaking marine risks,[1] they are now insured under cl 6.1 of the ITCH(95) and cl 4.1 of the IVCH(95); in relation to cargo, some of these perils are specially insured under the ICC (B) and (C), and are generally covered by the ICC (A) by reason of the policy being for all risks. This chapter examines the risks insured under cl 6.1 of the ITCH(95) and cl 4.1 of the IVCH(95); their counterparts in the ICC (B) and (C); and the scope of the 'all risks' cover of the ICC (A);
- Additional or special risks insured under cl 6.2 of the ITCH(95) and cl 4.2 of the IVCH(95), commonly referred to as The Inchmaree clause[2] which was introduced as a result of the case of the same name;[3] and
- The 3/4ths Collision Liability of cl 8 of the ITCH(95) and cl 6 of the IVCH(95) previously known as 'the running down clause'.[4]

A separate chapter is also devoted to the statutory excluded losses;[5] the problematic but important area of the law on burden and standard of proof in relation to a claim of loss by perils of the seas, barratry, and fire, and the defence of wilful misconduct;[6] and war and strikes risks.[7]

A – PERILS OF THE SEAS RIVERS LAKES OR OTHER NAVIGABLE WATERS

The very purpose of marine insurance is obviously to secure the assured with an indemnity for loss of or damage sustained by the subject-matter insured during the course of a marine adventure. A 'marine adventure', as defined in s 3, occurs when any ship, goods, or other moveables are exposed to 'maritime perils' of which 'perils of the seas' is not surprisingly named as one of the perils.

1 Eg, 'contact with land conveyance, dock or harbour equipment or installation'; earthquake volcanic eruption or lightning' and 'accidents in loading discharging or shifting cargo or fuel.'

2 Also sometimes called the negligence clause; discussed in Chapter 12.

3 *Thames & Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484, HL.

4 See Chapter 13.

5 See Chapter 10.

6 See Chapter 11.

7 See Chapter 14.

'Perils of the seas' was specifically insured against under the old SG policy applying to both ship and goods, and is also an insured peril under the current Institute Hulls Clauses.

Clause 6.1.1 of the ITCH(95) and cl 4.1.1 of the IVCH(95) provide coverage for loss of or damage to the subject-matter insured caused by 'perils of the seas rivers lakes or other navigable waters'. We are now no longer left in doubt that loss or damage caused by perils of the 'rivers, lakes or other navigable waters' are also covered by the said Clauses.

With regard to insurance of cargo, perils of the seas, and of rivers lakes and other navigable waters are under the ICC (A) covered by virtue of the policy being for all risks. The ICC (B) and (C), however, have adopted a different scheme in this regard: instead of employing the traditional concept of 'perils of the seas', as understood under the common law, the old SG policy and the Institute Hulls Clauses, the ICC (B) and (C) do not provide for insurance against 'perils of the seas' as such. As the words 'perils of the seas' are not used, it is best in order to avoid confusion that they be left for discussion separately.

The vast number of cases which have come before the courts for the purpose of determining the meaning and scope of the phrase 'perils of the seas' has clearly demonstrated the fact that the term is not as simple or as straightforward as it may seem. Distinctions have been drawn, and the line between 'perils of the seas' and other concepts such as unseaworthiness, wear and tear, negligence, barratry and wilful misconduct, is sometimes, as will be seen later, not so readily apparent.

Sea water could be intentionally let into a ship, with or without the connivance of the shipowner. It could also be allowed entry into the ship by the negligence of the crew, as, for example, in leaving a valve or port hole open when it should have been kept closed. The sea could also find its way into a ship by reason of her unfit condition due to wear and tear, unseaworthiness, or a latent defect. That the ingress of sea water into a ship need not necessarily be the result of a peril of the seas is clear. In order to be able to discern 'perils of the seas' from other causes, it is necessary to elicit the characteristics of the concept. Interestingly, judges have employed various means for the purpose of determining whether a loss was caused by a peril of the seas; these devices will be discussed after a study of the legal definitions of the term has been undertaken.

DEFINITIONS OF 'PERILS OF THE SEAS'

Rule 7 of the Rules for Construction is the statutory definition of 'perils of the seas'. It is restricted:

> '... only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.'

Terms such as 'marine risks', 'the hazards of the sea' and 'external accidental means'[8] have been used in the past in non-standard marine polices to describe either an exception of liability or a risk insured against under the policy. All these terms have been construed by the courts as synonymous with 'perils of the seas'.[9]

However, the most comprehensive of the judicial definitions is that approved by Lord Bramwell in *Thames and Mersey Marine Insurance Co v Hamilton, Fraser and Co, The Inchmaree* to the effect that:[10]

> 'Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance.'

The term 'perils of the seas' naturally conjures up in one's mind a picture of a turbulent sea, violent storms, forceful gales,[11] hurricanes, excessive squalls, large washes of waves, tempestuous weather and the like. In this context, Mr Justice Mustill (as he was then), in the court of first instance, in *The Miss Jay Jay*[12] gave an interesting meteorological account of the range of weather conditions which a ship could encounter during the course of a voyage. The types of weather which a ship may be exposed to were categorised as follows:

- abnormally bad weather;
- adverse weather;
- favourable weather; and
- perfect weather.

Indeed, it would almost be impossible to attribute a loss to 'perils of the seas' if the weather conditions to which the ship was exposed to, at the time of loss, were favourable or perfect. Inevitably, in such a situation, some other cause or causes of loss, for example, unseaworthiness, wear and tear, or the wilful misconduct of the assured would most probably be found to be responsible for the loss.

The distinction between 'abnormally bad' and 'adverse' weather, according to Mr Justice Mustill, lies in the fact that the former falls 'outside the range of

8 See *E D Sassoon v Western Assurance Co* [1912] AC 563, PC, where insurance was effected against marine risks. In *Miss Jay Jay* [1985] 1 Lloyd's Rep 264 at p 271; [1987] 1 Lloyd's Rep 32, CA, Mustill J remarked that there is 'no material distinction between 'perils of the seas' and 'external accidental means'.

9 See *Trinder, Anderson & Co v Thames and Mersey Mar Insurance Co* [1898] 2 QB 114, where it was said that 'perils of the seas' has the same meaning in marine insurance as in the law of carriage of goods by sea.

10 (1887) 12 App Cas 484 at p 492, HL: Lord Bramwell also approved the definition provided by Lopes LJ in the *Hamilton, Fraser and Co v Pandorf & Co*, 16 QBD 629 at p 633: 17 QBD 670, CA; (1887) 12 App Cas 518, HL: 'In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody, is a damage from a peril of the sea.'

11 In *Willmott v General Accident Fire & Life Assurance Corpn Ltd* (1935) 53 Ll L Rep 156, the court pointed out that even if the vessel was 'tight' (ie, seaworthy), she still could not have ridden out the considerable gale.

12 [1985] 1 Lloyd's Rep 264 at p 271; [1987] 1 Lloyd's Rep 32, CA.

conditions which the assured could reasonably foresee that the vessel might encounter on the voyage in question', whilst the latter, 'within the range of what could be foreseen, but at the unfavourable end of that range'.

Ordinary action of the winds and waves

The exclusion of 'ordinary action of the winds and waves' from the definition of the 'perils of the seas' in r 7 could tempt one to deduce that only weather which is extraordinary or abnormal falls within the scope of the definition. This is clearly a mistaken point of view. In *Skandia Insurance Co Ltd v Skoljarev*,[13] Mr Justice Mason, who was aware of this misconception, pointed out that: 'The old view that some extraordinary action of the wind and waves is required to constitute a fortuitous accident or casualty is now quite discredited.'

In *The Miss Jay Jay*,[14] Mr Justice Mustill, who was not quite so direct, observed that the fact that the 'adverse' weather could reasonably have been anticipated makes no difference, if the action of the wind or sea is the immediate cause of the loss. In his survey of weather conditions, he explained that the adjective 'ordinary' qualifies the word 'action', not the winds and waves. Thus, not only extraordinary, but also ordinary winds and waves could fall within the ambit of 'perils of the seas'.

In the recent case of *CCR Fishing Ltd and Others v Tomenson Inc and Others, The La Pointe*,[15] the Canadian court pointed out that there are two elements to the term 'perils of the seas': the cause of the loss must be 'fortuitous' and it must be 'of the seas'.

The word 'fortuitous' clearly excludes any loss which has been intentionally caused by any person,[16] and any loss resulting from inevitable deterioration generated by the ordinary action of the winds and waves.[17] The cause of the loss must not be intentional or inevitable.

For the purpose of determining whether an event is or is not fortuitous, the distinction between, on the one hand, what is regular and normal, and on the other, the unusual and unexpected, was used in *Popham and Willett v St Petersburg Insurance Co*.[18] The issue at hand was whether obstruction by ice was or was not a peril of the seas. It was held that, as the annual regular obstruction of the port by ice in winter was in 'no sense an accident being part of the ordinary course of things, like the ebb and flow of the tides – the loss was not caused by a peril of the seas'. Thus, to fall within the scope of this peril, the ice encountered has to be 'unusual' at that time of the year, creating extraordinary difficulty or danger to navigation.

13 [1979] 142 CLR 375 at p 385, High Court of Australia.

14 [1985] 1 Lloyd's Rep 264.

15 [1991] 1 Lloyd's Rep 89, Supreme Court of Canada.

16 See *Samuel v Dumas* [1924] 18 Ll L Rep 211 HL, which has overruled *Small v United Kingdom Marine Mutual Insurance Association* [1897] 2 QB 311, CA on the issue of perils of the seas.

17 See *Existological Laboratories Ltd v Century Insurance Co of Canada (The Bamcell II)* (1983) 2 SCR 47.

18 (1904) 10 Com Cas 31 at p 34.

To amplify this point, the ancient case of *Magnus v Buttemer*[19] needs to be mentioned. The ship in question was in the harbour for unloading when she was damaged as a result of taking the ground on the natural falling and rising of the tide. The court held that as there was 'nothing unusual, no peril, no accident'; the damage fell within the description of ordinary wear and tear.

Reference should also to be made to the House of Lord's decision of the case *Mountain v Whittle*,[20] where damage sustained as a result of an influx of water into the ship caused by a wash of extraordinary size and dimension, created by the tug employed to tow the insured vessel, was held to be a loss through a peril of the seas.

Distinction between sea and land risks

A comparison which has frequently been drawn to facilitate the understanding of the concept is that between sea risks and land risks. It has been said that the requirement of 'of the seas' will be met if the loss would not have occurred on land. The test may be simply expressed as whether the accident is one which could only occur at sea. *The Inchmaree*[21] is, of course, the classic case on this subject. Lord Bramwell's description of the position read as follows:

> 'The damage to the donkey-engine was not through its being in a ship or at sea. The same thing would have happened had the boilers and engines been on land, if the same mismanagement had taken place. The sea, waves and winds had nothing to do with it.'

The reverse position was encountered in *The Stranna*,[22] where the sea had everything, and the land had nothing to do with the loss. The heeling of the ship was 'wholly unexpected' and was just an 'unfortunate accident'. The court noted that the loss was not only a peril of the seas, but also a peril *on* the seas. But as 'it could not have happened on land' the court had to hold that the loss was caused by a peril of the seas.

The same line of argument was recently applied in *The La Pointe*.[23] As the ship sank as a consequence of the ingress of sea water into the ship – an event which could not occur on land – the accident was held to be 'of the seas'. The fact that the accident would not have occurred but for the negligent act of the crew in leaving a valve open did not detract the loss from being caused by a peril of the seas.

The case of *Grant, Smith & Co v Seattle Construction and Dry Dock Co*[24] is a particularly important case for the purpose of illustrating the point that the sea,

19 (1852) 11 CB 876.

20 [1921] AC 615, HL.

21 *Thames & Mersey Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484, HL. Lord Halebury LC at (p 491) remarked that, 'Sea perils or the like become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships'.

22 [1937] P 130; [1938] P 69.

23 [1991] 1 Lloyds Rep 89.

24 [1920] AC 162 at p 171.

wind or wave has to play a part in causing the loss. After acknowledging the fact that it was 'not desirable to attempt to define too exactly a "marine risk" or a "peril of the seas"', Lord Buckmaster proceeded to lay down the law as follows: 'it is some condition of sea or weather or accident of navigation producing a result which, but for these conditions would not have occurred'. It was not at all difficult for the court in this instance to find that a peril of the seas did not cause the loss of the dry dock which had capsized in the harbour by reason of her inherent unfitness for the work.

In similar, but more graphic terms, the Privy Council in *Sassoon & Co v Western Assurance Co*[25] pointed out that 'there was no weather, nor any other fortuitous circumstances, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening of the decayed wood', the damage to the opium was not a loss caused by a peril of the seas.

That the sea or land criterion is neither fool-proof nor altogether easy to apply may be gathered from a speech delivered by Lord Atkinson of the House of Lords in *Stott Steamers Ltd v Marten*:[26]

> 'A peril whose only connection with the sea is that it arises on board ship is not necessarily a peril of the seas nor a peril *ejusdem generis* as a peril of the sea. The breaking of the chain of a crane, or of a shackle of that chain, if overloaded or subjected to too severe a strain, is not more maritime in character when it occurs on board a ship than when it occurs on land.'

The celebrated case of *Hamilton, Fraser & Co v Pandorf & Co*,[27] a case in relation to a contract of affreightment (which excepted the carrier from liability from 'dangers and accidents of the seas') is frequently referred to as the authority laying down the rule that damage caused by sea water, which escaped because rats had gnawed a hole in a pipe connecting the bath-room with the sea, is a loss caused by a peril of the seas. As sea-water, and not tap-water, had caused the mischief, albeit with the help of rodents, the loss was accidental and fortuitous. The outcome of the case would almost certainly have been different if the damage had been caused by the escape of tap-water from a water-closet, such an incident could also occur on land.

Perils *of* the seas and perils *on* the seas

The subtle distinction between a peril of the seas and a peril on the seas has invariably been ascribed to the case of *The Xantho*.[28] But, in fact, the distinction was referred to, though not in such bold terms, as early as 1816 in *Cullen v Butler*.[29] This case is better known as the authority which has established the rule that a ship which is sunk due to being fired upon by another ship (mistaking her for an enemy) is not a loss caused by a 'peril of the seas', but one

25 [1912] AC 561 at p 563.

26 [1916] AC 304 at p 311.

27 (1887) 12 App Cas 518; 6 Asp MLC 212, HL.

28 *Wilson, Sons & Co v Owners of Cargo per The Xantho* (1887) 7 HL Cas 504, HL.

29 (1816) 5 M & S 461.

which falls within the general words of 'all other perils, losses'. The logic of Lord Ellenborough's arguments is, indeed, worthwhile noting:

> 'If it be a loss by perils of the sea, merely because it is a loss happening upon the sea, as has been contended, all the other causes of loss specified in the policy are, upon that ground, equally entitled so to be considered; and it would be unnecessary as to them ever to assign any other cause of loss, than a loss by perils of the sea.'

Therein lies the beginning of the distinction between a peril *of* the seas and a peril *on* the seas.

In *The Xantho*,[30] Lord Herschell of the House of Lords, though he did not approve the outcome of *Cullen v Butler*,[31] nevertheless emphasised the importance of the word 'of ' in the term 'perils *of* the seas'. It would seem that no work on the subject can be described as complete without a quotation of the famous words of Lord Herschell:

> 'I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril "of" the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear.'

Frost damage

It would be difficult to argue that damage by frost is a peril of the seas because it could also occur on land. Thus, with the exception of the ICC (A), it would not, unless specifically otherwise stated, be covered under any of the standard Institute Clauses.

Collision is a peril of the seas

The Xantho[32] is also to be credited for laying down the rule that a collision is a peril of the seas. The House declared that a collision, whether 'caused by a sunken rock, or by an iceberg, or by another vessel, or whether that other vessel is or is not in fault', is a peril of the seas.

To be accurate, it was *Smith v Scott*[33] (a less well-known case) in 1811, which had pronounced that a loss occasioned by another ship running down the insured ship, through the gross negligence of the crew of that other ship, is a loss by a peril of the seas: that 'still the sea did the mischief' was a fact which Mr Justice Mansfield found difficult to ignore.

The rationale for the common law rule is best explained in the case of *Davidson v Burnard* as follows:[34]

30 (1887) 7 HL Cas 504 at p 517.

31 (1816) 5 M & S 461.

32 (1887) 11 PD 170.

33 (1811) 4 Taunt 126.

34 (1868) LR 4 CP 117 at p 121.

> '... unless some distinction can be made between a loss from an accident happening through the negligence of the crew of another vessel and a loss from an accident happening ... from such negligence of the crew ... the loss would be a loss occasioned by the perils of the sea.'

Thus, no distinction is drawn between a loss caused by the negligence of the crew of the insured vessel and one caused by the negligence of the crew of another vessel.[35] With regard to the former, the assured is protected by the words 'even though the loss would not have happened but for the misconduct or negligence of the master or crew' in s 55(2)(a).[36]

Unascertainable peril of the seas

There is a species of loss known as an 'unascertainable' or 'unspecified' peril of the seas described in *Lamb Head Shipping Co Ltd v Jennings, The Marel*.[37] It is a form of loss which is proved by the drawing of inferences when a shipowner is unable to pinpoint an event or an accident to show that the loss was accidental or fortuitous. Unlike the usual claim for a loss by a peril of the seas (as traditionally understood), the courts would allow an inference to be drawn, where the loss is unexplained or where the ship is missing, that the ship was lost by reason of an unascertainable peril of the seas.[38] The manner and extent of proof in such cases can be more appropriately discussed elsewhere.[39]

PERILS OF THE SEAS AND NEGLIGENCE

A loss proximately caused by a peril of the seas could well be precipitated by the negligence of the master, crew, pilot, charterer, shipowner, repairer, engineer, stevedore, or any person.[40] Provided that the loss is proximately caused by a peril insured against, an assured may, by reason of s 55(2)(a), recover for the loss 'even though the loss would not have happened but for the misconduct or negligence of the master or crew'.[41] Attention has to be drawn to the following: first, that only the conduct of the 'master or crew', and not that of the assured, is expressly excused under the said section; and secondly, that the first limb of s 55(2)(a) prevents recovery for any loss 'attributable to the wilful

35 See *The Woodrop Sims*, (1815) 2 Dod 83, on collision.

36 The assured would, of course, be claiming for the loss of or damage sustained by his vessel as a loss by a peril of the seas. With regard to the damage sustained to the other vessel for which the assured, if held responsible, would be able to claim under the 3/4ths collision liability clause: cl 8 of the ITCH(95) and cl 6 of the IVCH(95). The assured's liability to a third party arising out of a collision at sea will be discussed later: see Chapter 13.

37 [1992] 1 Lloyd's Rep 402.

38 In *Munro, Brice & Co v War Risk Association Ltd & Others* [1918] 2 KB 78 at p 86, Bailhache J held the view that, 'A plaintiff who alleges that his vessel was lost by a peril of the sea cannot be ordered to state how the sinking came about'.

39 See Chapter 11.

40 Even rodents can cause the entry of sea water into the ship: see *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, where rats gnawed a hole in a pipe which passed through the cargo of rice, with the result that sea water entered and damaged the rice.

41 A loss proximately caused by an act of wilful misconduct committed by the master or crew would be recoverable as barratry: cl 6.2.4 of the ITCH(95) and cl 4.2.4 of the IVCH(95).

misconduct of the assured' but is silent on a loss attributable to the negligence of the assured.

Negligence of the master or crew

Negligence as a remote cause of loss

It is interesting to note that even before the promulgation of the Act, as early as 1821 in the case of *Walker v Maitland*,[42] it was decided that insurers were liable for a loss proximately caused by a peril of the seas, but remotely by the negligence of the master and crew.[43] Chief Justice Abbott held that 'the winds and waves caused the loss'; and the fact that they 'would not have produced that effect, unless there had been neglect on the part of the crew' was considered irrelevant.[44]

Seven years later, the same principle was again applied in *Bishop v Pentland*[45] when the vessel stranded as the rope with which she was fastened broke; although the stranding was occasioned indirectly or remotely by the negligence of the crew in not providing a rope of sufficient strength, the loss was nonetheless held recoverable.

In another much celebrated case, *Davidson and Others v Burnand*,[46] the court was prepared to overlook the negligence of the crew who, in having left some cocks and valves opened when they should have been kept shut, caused water to enter the ship and damaged a cargo of produce. Mr Justice Willes, who could see no distinction between a loss caused by the negligence of the crew of the vessel insured and one caused by the negligence of the crew of another vessel, decided that the damage was caused by a peril of the seas.

Similarly, in *Redman v Wilson*,[47] the insurers were also held responsible, as the judges felt that they could not 'distinguish between the negligence of the master and mariners, and the negligence of the natives (if they were negligent, and remotely gave occasion to the loss) who were employed to put the cargo on

42 (1821) 5 B & Ald 171 at p 175.

43 The sloop being left to herself, as the entire crew were asleep, ran ashore and was beaten to pieces by the sea.

44 An earlier case which had applied the same principle, but in relation to a loss by fire started by the negligence of one of the crew, is *Busk v The Royal Exchange Assurance Co* (1818) 5 B & A 171.

45 (1827) 7 B & C 219.

46 (1868) LR 4 CP 117. The same rule applies in the law of carriage of by sea: see, eg, *Blackburn & Another v Liverpool, Brazil & River Plate Steam Navigation Co* [1902] 1 KB 290 where damage to cargo caused by the influx of sea water by an engineer opening of a wrong valve was held to have been due to a peril of the seas. Similarly, in *The Stranna* [1938] 1 All ER 458, the lost of a cargo of wood which shot overboard during loading was held to have been occasioned by a peril of the seas, and 'none the less so because it was the negligence of those who were concerned with the work of loading the ship that brought the peril into operation'.

47 (1845) 14 M & W 482.

board'. The loss of the ship was held to have been caused by perils of the seas even though she was, to prevent her from sinking, deliberately ran ashore.[48]

Another often cited authority is *Dixon v Sadler*,[49] which explained the basis for the rule as follows:

> '... an assured makes no warranty to the underwriters that ... the master and crew shall do their duty during the voyage, and their negligence or misconduct is no defence to an action on a policy, where the loss has been immediately occasioned by the perils insured against.'

In this case, the master and mariners threw overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the seas. She would have encountered and overcome the perils of the seas if it were not for the wrongful, negligent and improper act of the master and crew.

In the more recent case of *Lind v Mitchell*,[50] the unreasonable conduct of the master in prematurely abandoning and setting fire to a ship, which leaked badly after a collision with ice, was held to constitute negligence. On these facts, the Court of Appeal had no doubt that the loss was caused by a peril of the seas. It, however, preferred to rely on s 55(2)(a), rather than the Inchmaree clause,[51] as the main ground for its decision. According to Lord Justice Sankey:[52]

> '... those perils of the sea were the dominant cause, and, having regard to section 55(2) ... I think the underwriters are liable in this case, because there was a loss proximately caused by a peril insured against, although perhaps the loss would not have happened but for the misconduct and negligence of the master or crew.'

Once again, the negligence of a master acting as a remote[53] cause of the loss was considered inconsequential.[54]

A slightly different approach was, however, taken by the court in *Baxendale v Fane, The 'Lapwing'*,[55] where bottom-damage sustained by a yacht, as a result of having been negligently docked, was held as a loss caused by stranding, a peril of the seas. Interestingly, s 55(2)(a) was not mentioned by the judge, who chose to rest the matter simply on the basis that the loss was fortuitous. Fortunately for the assured, the negligence committed by those responsible for the docking operation was the 'intervention' which provided the fortuitous circumstances which entitled them to recover under the terms of the policy: the loss was indemnifiable as a loss by a peril of the seas.

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48 See *McAllister & Co v Western Assurance Co of the City of Toronto* (1926), 27 Ll L Rep 109, where a loss was held to have been caused by a peril of the seas even though the opening in the ship, which allowed the entry of the sea, was made by the negligence of stevedores in unloading the ship.

49 (1839) 5 M & W 405 at p 414; (1841) 8 M & W 895, Ex Ch.

50 (1928) 45 TLR 54, CA.

51 The current equivalent is cl 6.2 of the ITCH(95) and cl 4.2 of the IVCH(95).

52 (1928) 45 TLR 54 at p 57, CA.

53 Describing negligence as a remote cause of loss was considered by Arnould as a 'misuse of language'. He thought that it would be more appropriate to regard negligence as 'part of the chain of events': see para 763A. However described, it has to be distinguished from the proximate cause of the loss.

54 But 'if necessary', Scrutton LJ was prepared to offer recovery under the then equivalent to cl 6.2 of the ITCH(95). On this point, see Chapter 12.

55 (1940) 66 Ll L Rep 174.

Negligence as the proximate cause of loss

A master or member of crew could also, by his negligence, and without the aid of the sea or the elements, directly or proximately cause the loss of a ship and/or her cargo. If negligence, and not perils of the seas, is regarded as the proximate cause of loss, then the above discussion on s 55(2)(a) is irrelevant. Such a cause of loss is now specifically insured under cll 6.2.2 and 4.2.2 (commonly referred to as the Inchmaree clause) of the ITCH(95) and the IVCH(95) respectively. These provisions are more fully discussed elsewhere.[56]

Negligence of the assured

Negligence as a remote cause of loss

As pointed out earlier, s 55(2)(a) expressly overlooks the negligence (and wilful misconduct) of the 'master or crew', but not that of the assured. The question which now arises is: what is the position as regards a loss proximately caused by a peril insured against, for example, a peril of the seas, but remotely caused by the negligence of the assured? Can an assured, whether or not acting as master or crew, be prevented from claiming under a policy for a loss proximately caused by a peril of the seas, which he himself has remotely occasioned by his negligence?[57] Section 55(2)(a) expressly forbids recovery only for 'any loss attributable to the wilful misconduct of the assured'. No mention, however, is made of a loss 'attributable to' the negligence of the assured. As both the Act and the Institute Hulls Clauses are silent on this point, reference to case law has to be made in order to ascertain the legal position under the common law.

Assured acting as master or crew

In the old days, before corporate ownership became established, it was not uncommon for a shipowner, whether a sole or part-owner, to act as the master (or member of crew) of his own ship. Acting in this capacity, he could, through negligent navigation or the mishandling or mistreatment of the cargo, indirectly cause the loss of property.

Trinder, Anderson & Co v Thames and Mersey Marine Insurance Co,[58] decided before the enactment of the Act, is by far the most illuminating authority on the subject. The stranding of the vessel, which brought about the loss of freight sued for, was caused by the negligent navigation (though not the wilful act) of one of the assured who was a part-owner and captain of the ship. One of the main issues was whether an assured, who was personally guilty of negligent navigation during the voyage covered by the policy, could recover for the loss.

56 A loss caused by 'the negligence of master officers crew or pilots'; and of 'repairers or charterers provided such repairers or charterers are not an Assured hereunder' are now specifically insured against. For a study of these clauses, see Chapter 12.

57 Short of holding a position on board the ship, it is difficult to envisage how an assured, such as a mortgagee, can negligently or otherwise, cause the loss of the insured property.

58 [1898] 2 QB 114, CA, hereinafter referred to as *The Trinder Case*.

Lord Justice Smith in the Court of Appeal was adamant that the loss was 'none the less a peril of the sea though brought about by negligent navigation'. 'Negligent navigation', he said, 'has never been held to be equivalent to "*dolus*" or ... "misconduct"'.

In similar vein, Lord Justice Collins, referring to the act of the assured (who was shipowner and master) remarked that: 'His negligence does not, any more than that of his servants, alter the character of the sea peril, which still remains the *causa proxima* …'. In unequivocal terms, he concluded that:

> 'Nothing short, therefore, of *dolus* in its proper sense will defeat the right of the assured to recover in respect of a loss of which but for such *dolus* the proximate cause would be a peril of the sea.'

The legal position may be briefly summarised as follows: provided that the act of the assured is negligently and not wilfully committed, the loss would retain its 'fortuitous' character which is essential to constitute a peril of the seas. As far as navigational matters are concerned, his act is no different from that of any other master.

It is necessary, at this juncture, to refer to *Westport Coal Company v McPhail*,[59] which, though a bill of lading case, is nonetheless useful for the purpose of highlighting the difference between the conduct of the shipowner acting in the capacity of master and of owner. *The Trinder Case*,[60] decided in the same year and also by the Court of Appeal, was cited with approval.

The Court of Appeal in *The Westport Case*, relying on the fact that as 'it was the negligence of the master in the sphere of his duty as master which caused the loss', held that the exception[61] was adequate to protect the defendant shipowner for the loss of the cargo. According to Lord Justice Collins, 'the negligence which caused the damage was exclusively master's, as distinguished from part-owner's, negligence, within the meaning of the exception'.

The above remarks, however, imply that if the conduct of the shipowner was committed in the capacity of owner or part-owner, and not as master or crew, the result could well be different. In the particular circumstance when a shipowner-assured acts as master, or a member of crew, of his own ship, as in *The Trinder Case*,[62] the position is straightforward: wearing the hat of the master, his act of neglect falls squarely within the terms of the said section.[63] The question which now has to be considered is whether the outcome would be different if the assured did not hold any position on board the ship, but has, through his neglect, remotely caused the loss of the subject-matter insured. Arnould, relying on the *The Trinder Case* and by drawing an inference from the

59 [1898] 2 QB 130, CA.

60 [1898] 2 QB 114, CA.

61 The exception was in respect of 'the neglect and default of master in navigating the ship'.

62 [1898] 2 QB 114, CA.

63 The distinction between a negligent and a wilful act has to be borne in mind: any loss attributable to the wilful act committed by an assured (in this case a shipowner acting as master) would in relation to his co-owners (if any) constitute barratry. As far as he (the assured shipowner) is concerned, such a loss is not recoverable for two reasons. First, the loss is not caused by a peril insured against; but more importantly, it is specifically excluded by s 55(2)(a).

language of s 55(2)(a), is of the view that the assured would be able recover for such a loss.[64]

Such a cause of loss clearly does not fall within the wording of the last limb of s 55(2)(a), namely, 'even though the loss would not have happened but for the ... negligence of the master or crew'; and the principle laid down in *The Trinder Case* has, it is contended, to be confined to the special circumstances of the case: the fact that the assured was acting as master when the act of neglect was committed was the main reason for the decision. There are, however, other grounds upon which the court could have applied to support its decision. First, the rationale for disregarding negligence operating as a remote cause lies in the law of causation – though this was not pointed out in any of the cases cited above, remote causes, whether committed by an assured (acting in whatever capacity), a member of crew or any person(s), have never played a part in the equation of the rule of *causa proxima*. The only remote cause of loss which would prevent an assured from recovering under a policy is that of the wilful misconduct of the assured. The term 'attributable to' in s 55(2)(a) has made this very clear;[65] Secondly, s 55(2)(a) expressly excludes recovery only for any loss attributable to the wilful misconduct, but not for the negligence, of the assured. This is probably the inference Arnould had in mind.

In conclusion, a loss proximately caused by a peril insured against, but remotely by the negligence (whether or not committed whilst acting in the capacity of master) of an assured is, as a general rule, recoverable. He could, however, be precluded from recovery if the insurer is able to rely upon s 39(5)[66] or s 78(4) of the Act.[67]

PERILS OF THE SEAS AND WILFUL MISCONDUCT

Scuttling is not a peril of the seas

Before the decision of the House of Lords in *Samuel v Dumas*,[68] it was at one time thought that any loss or damage caused by the entry of sea water into a ship was a loss caused by a peril of the seas.[69] The celebrated case has, however, dispelled this mistaken belief by declaring that a loss caused by the wilful

64 Arnould at para 763A: '... it may be inferred from the language of the subsection [referring to s 55(2)(a)], although it is not expressly so provided therein, that, even where the peril occasioning the loss has been due to the negligence (not amounting to wilful misconduct) of the assured himself, the underwriter will not, on account of such negligence, be relieved from liability. It was so decided before the passing of the Act, in *Trinder, Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114 (CA)'.

65 See Chapters 8 and 10.

66 See Chapter 7.

67 See Chapter 17.

68 [1924] 18 Ll L Rep 211, HL.

69 See *Small v United Kingdom Marine Mutual Insurance Association* (1897) 2 QB 311, CA; *Chartered Trust & Executor Co v London Scottish Assurance Corpn Ltd* (1923) 39 TLR 608, which had held that an innocent mortgagee is entitled to succeed for a loss caused by scuttling is now overruled; and *Graham Joint Stock Shipping Co Ltd v Merchants' Marine Insurance Co* (1923) 17 Ll L Rep 44, 241, HL.

misconduct of the shipowner in scuttling his ship is not a loss caused by a peril of the seas, even though the sea may have played a part or lent a helping hand in causing the loss.

The reasons for the rule that scuttling is not a peril of the seas are twofold. First, the loss or damage is, in so far as the wrongdoer is concerned, clearly not fortuitous: a deliberate and an intentional act has caused the loss, and the sea was able to play its part only because it was allowed to do so by man. Such a loss is neither accidental nor fortuitous: it is a certainty. Secondly, equity would not allow a wrongdoer to take advantage of his own wrongful act.[70]

The position of an innocent cargo owner and of an innocent mortgagee

One could, however, be tempted to argue that, in relation to an innocent third party, such as a cargo owner or a mortgagee, the wilful act committed by the shipowner is fortuitous. The act of the shipowner is *vis-à-vis* a cargo owner or a mortgagee that of a stranger. In *Small v United Kingdom Marine Mutual Insurance Association*,[71] it was held that, in so far as the mortgagee, an innocent party, was concerned, the loss was recoverable as a loss by perils of the seas. *Samuel v Dumas*[72] has, however, overruled this aspect of the judgment of the case.[73]

In this regard, a cargo owner is in the same position as a mortgagee; this was pointed out by Lord Justice Scrutton in the Court of Appeal in *Samuel v Dumas*[74] in the following terms:

> '... I know of no case ... where an owner of goods has recovered for damage to his goods by sea water intentionally admitted by the owner of the ship, either for perils of the sea or barratry.'

A loss or damage caused by sea water intentionally admitted into a ship, whether by a shipowner, master or crew, or even a stranger, is not a loss by perils of the seas. The 'wilful' nature of the act negates 'fortuity' which is an essential ingredient of the peril. Regardless of whether the claim is brought by a shipowner, cargo owner or mortgagee, the nature or character of the act is the same:[75] as there is no 'element of chance or ill-luck', the loss cannot be described as accidental or fortuitous.[76] Nobody can recover for such a loss as a loss by a '*peril of the seas*'.

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70 One of the maxims of equity is 'he who comes into equity must come with clean hands'.

71 (1897) 2 QB 311, CA.

72 [1924] 18 Ll L Rep 211, HL.

73 To protect himself from being excluded for such a loss, a mortgagee should take up the Institute Mortgagees' Interest Clauses Hulls: see Appendix 23.

74 [1923] 1 KB 592 at p 620. Scrutton LJ's remarks in reference to goods must be confined to a cargo policy in which 'perils of the seas' is an insured risk. It has, it is submitted, no relevance to an all risks policy. The position of a cargo owner whose cargo (insured under the ICC(A)) has been damaged or lost as a consequence of scuttling is discussed below.

75 In *Pateras & Others v Royal Exchange Assurance* (1933) 49 Ll L Rep 400 at p 407, Roche J, relying on *Samuel v Dumas* [1924] 18 Ll L Rep 211, HL, held that 'nobody could recover because the wilful throwing away of the ship was not a fortuitous circumstance …'.

76 Naturally, the position is different in the case of a loss caused by fire which, as a matter of construction, does not contain the element of 'fortuity'. As such, a loss caused by fire is recoverable even if it was deliberately started by a stranger, a third party to the contract of insurance. For a discussion on the right of a cargo owner or a mortgagee to sue for a loss by a fire deliberately started by a shipowner, see below.

The ICC (A), (B) and (C)

With regard to cargo insured under the ICC (B) or (C), a loss caused by a wilful act committed by any person is expressly excluded by cl 4.7. The words 'any person or persons' are wide enough to include a loss caused by the shipowner in scuttling the ship.

In contrast, the absence of the deliberate damage or destruction exclusion clause in the ICC (A) could be read to mean that, as there is no express exclusion for such an event, a loss resulting from scuttling is covered. Moreover, the fact that the ICC (A) is an all risks policy supports this assumption. It is important to bear in mind that the claim of the cargo owner is not based on 'perils of the seas', but on the term 'risks'. It is submitted that in so far as the cargo owner is concerned, the loss, though not caused by a 'peril of the seas', is recoverable as a 'risk' which may or may not happen during the course of transit. In the words of Lord Sterndale of the Court of Appeal in *The Gaunt Case*,[77] 'it is a danger or contingency which might or might not arise'. As far as the cargo owner is concerned, the loss is not a certainty, but a risk.

PERILS OF THE SEAS AND BARRATRY

Whenever a ship is lost at sea by reason of the entry of sea water, barratry and a peril of the seas are often pleaded in the alternative as causes of loss.[78] This is because sea water could accidentally or fortuitously enter a ship and cause a loss, or could be 'invited' to enter a ship to cause a loss.[79] In the case of the former, the action of the winds and waves – that is, perils of the seas – would be regarded as the proximate cause of loss; whilst in the latter, either barratry or wilful misconduct on the part of the shipowner would be considered as the proximate cause of loss. In any event, scuttling[80] a ship, whether done with or without the knowledge or consent of the shipowner, is not a peril of the seas: this has been settled beyond doubt by *Samuel v Dumas*.[81] It is suffice to mention here that the distinction between a peril of the seas and barratry is well defined. The former is a fortuitous act, whilst the latter is an intentional act committed by man, the master or crew:[82] they are mutually exclusive.

77 (1920) 1 KB 903 at p 910.

78 See eg, *La Compania Martiartu v Royal Exchange Assurance* [1923] 1 KB 650, CA; *The Michael*, [1979] 2 Lloyd's Rep 1, CA – where the shipowners originally claimed for loss by a peril of the seas, but when fresh evidence came to light, the plea was changed to barratry; and *Banco de Barcelona & Others v Union Marine Insurance Co Ltd* (1925) 30 Com Cas 316.

79 Sea water could be intentionally admitted by the master or crew, with or without the knowledge or consent of the shipowner. Such an act is known as scuttling. In the case of the former, the cause of loss is wilful misconduct, whilst in the latter, it is barratry.

80 Defined in *The Concise Oxford Dictionary* as: 'let water into (a ship) to sink it, esp by opening the seacocks'.

81 [1924] 18 Ll L Rep 211, HL.

82 For a discussion of the law of barratry, see Chapter 12.

PERILS OF THE SEAS AND WEAR AND TEAR

Unless the policy otherwise provides, loss or damage caused by 'ordinary wear and tear' is as a general rule excluded by s 55(2)(c) as a risk insured against.[83] Clause 4.2 of all the ICC expressly provides that ordinary wear and tear of the subject-matter insured is not covered.

Loss or damage caused by the ordinary actions of the winds and waves, which has been expressly excluded by r 7 of the Rules for Construction from the definition of 'perils of the seas', is a loss caused by ordinary wear and tear. As mentioned earlier, the word 'ordinary' qualifying the actions of the winds and waves appearing in r 7 was inserted for the purpose of eliminating losses resulting from ordinary wear and tear. In *The Miss Jay Jay*,[84] Mr Justice Mustill pointed out that 'the principal object of the definition (r 7) is to rule out losses resulting from wear and tear.'

Loss or damage caused by ordinary wear and tear is not covered by reason of the fact that it is an inevitable loss – a certainty – and, therefore, not a peril.

The difference between a loss caused by a peril of the seas and one by wear and tear is best illustrated by Mr Justice Lush in his direction to the jury in *Merchants' Trading Co v The Universal Marine Insurance Co*:[85]

> '... "perils of the sea" denoted all marine casualties resulting from the violent action of the elements of the wind and waters, lightning, tempest, stranding, striking on a rock, and so on – all casualties of that description as distinguished from the silent natural gradual action of the elements upon the vessel itself, though the latter properly belonged to wear and tear, and that what the underwriters insured were casualties that might happen, not consequences which must happen, casualties which might occur and were incident to navigation arising from the violent action of the elements upon the ship.'

In *Wadsworth Lighterage and Coaling Co Ltd v Sea Insurance Co Ltd*,[86] the sinking of the ship, through general debility, was held not to have been occasioned by perils of the seas, although she had been sunk by the entry of sea water.

PERILS OF THE SEAS AND UNSEAWORTHINESS

The seaworthiness of a ship is frequently brought into question and raised as a defence by an insurer whenever a claim is made for loss of or damage sustained by the subject-matter insured by reason of either the entry of sea water into the ship or the violent action of the elements. It is to be noted that, regardless of the nature of the subject-matter insured, an insurer has always the right to plead

83 See Chapter 10.

84 [1987] 1 Lloyd's Rep 264 at p 271, QBD; [1987] 1 Lloyd's Rep 31, CA.

85 (1870), reported in a footnote in *Anderson v Morice* (1870) 2 Asp MC 431n, cited in (1876) 1 App Cas 713 at p 716, HL. The defence raised by the underwriter was that the loss resulting from the sudden eruption of water into the ship was caused by the unseaworthy condition of the vessel, the subject-matter insured. For an analysis of this defence, see Chapter 7.

86 (1929) 45 TLR 597, CA. For a discussion of law relating to the exclusion of ordinary wear and tear, see Chapter 10.

unseaworthiness as a defence to an action brought by an assured claiming that perils of the seas has caused the loss or damage.[87]

The general legal principles relating to seaworthiness vary with whether the policy is a voyage or a time policy. Furthermore, they could be modified by the terms of the policy, as in the case of the ICC.[88] In view of the fact that there is a fundamental distinction under English law between time and voyage policies in so far as the issue of seaworthiness is concerned,[89] it is necessary, in order to avoid confusion, to divide the ensuing discussion of the relationship between perils of the seas and unseaworthiness into three parts. The first part will deal with voyage policies; the second, with time policies; and the third, with the position under the ICC. But before so doing, it would be helpful to illustrate the relevance of seaworthiness in relation to the subject of perils of the seas.

A seaworthy ship, as defined by case law[90] and s 39(1), is one which is 'reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured'. This necessarily means that if she is incapable of enduring even the most 'ordinary' of sea perils, she cannot be said to be seaworthy and, consequently, the loss cannot be attributed to perils of the seas.[91]

On the subject of weather conditions, a ship is expected to be able to 'deal adequately with adverse as well as favourable weather'.[92] 'Adverse' weather falls within the scope of 'ordinary' perils of the seas if it is weather which could reasonably be foreseen that the vessel might encounter on the voyage in question. In this context, the definition proposed in *Steel v State Line SS Co*[93] is perhaps preferable: a vessel is unseaworthy if she is unfit to endure all the hazards which 'a ship of that kind, and laden in that way, *may fairly be expected to encounter*' on the voyage.

It would be very difficult indeed to argue that a loss is proximately caused by the sea if the ship is unable to endure the 'expected', 'ordinary', and 'foreseeable' perils of the seas of the adventure insured. In such a case, a judge would be more inclined to find that some aspect of her physical condition – for example, latent defect, wear and tear or unseaworthiness – must have caused the loss. The case of *Merchants' Trading Company v The Universal Marine Insurance Co*[94] may be referred to illustrate this point. The defence of a breach of the implied warranty of seaworthiness was, in this action, successfully raised by the insurer, as the ship lying quietly at anchor was unable to keep herself afloat in still water. Accordingly, the court had no alternative but to rule that her unfit

87 As a general rule, it is for the insurer relying on unseaworthiness as a defence to prove that the vessel was unseaworthy: see *Lamb Head Shipping Co v Jennings, The Marel* [1992] 1 Lloyd's Rep 402, at p 412. For a fuller discussion of the subject of burden of proof, see Chapter 11.

88 See cl 5 of the ICC (A), (B) & (C).

89 For a discussion on this aspect of the law, see Chapter 7.

90 See Chapter 7.

91 *A fortiori*, if her structure or condition is unfit to withstand perfect weather conditions, she would undoubtedly be classified as unseaworthy.

92 *Per* Mustill J in *The Miss Jay Jay* [1985] 1 Lloyd's Rep 265 at p 271, QBD; [1987] 1 Lloyd's Rep 32, CA.

93 (1877) 3 App Cas 72 at p 77. Emphasis added.

94 (1870) 2 Asp MLC 431 at p 432.

condition caused the loss. The test used by the trial judge, which was approved by the Appeal Court, was worded as follows: 'whether the leak was attributable to injury and violence from without or to weakness within.'

Similarly, in *E D Sassoon & Co v Western Assurance Co*,[95] a cargo of opium, the subject-matter insured, stored on a wooden hulk was damaged by sea-water percolating through a leak. The Privy Council held that as the damage was not caused by perils of the seas, but by the decayed and infirm condition of the vessel, which was not an insured risk, the insurer could not be held responsible for the loss.

The latest comment on the subject was expressed by Lord Justice Croom-Johnson in *The Miss Jay Jay*[96] to the effect that:

> 'If at the start of a voyage a vessel is in such a state of general debility that the ordinary action of the winds and waves in any type of sea is bound to cause her damage and such action duly causes her damage, common-sense may dictate that the condition of the vessel rather than the action of the winds and waves shall be treated as the sole proximate cause of the damage.'

To conclude this discussion, reference should be made to the case of *Dudgeon v Pembroke*,[97] where Lord Coleridge, Chief Justice, who clearly had a deep and profound understanding of this branch of the law, summarised the position as thus:

> 'Seaworthiness and power to encounter ordinary perils are convertible terms. But the underwriter does not insure against ordinary perils; he indemnifies only against the extraordinary and unforeseen perils of the sea ... He does not insure against inherent vice, or – what is the same thing in other words – against ordinary perils.'

Voyage policies

Section 39(1) of the Act, relating to the implied warranty of seaworthiness, is applicable to all voyage policies regardless of the nature of the subject-matter insured. If the ship is unseaworthy 'at the commencement of the voyage', this would constitute a breach of the implied warranty of seaworthiness for which the insurer is automatically discharged from liability as from the date of breach. On such an occasion, it would not be necessary for a hulls insurer to show the cause of loss or, for that matter, that unseaworthiness caused the loss.[98] His defence would simply rest on the premise that a warranty has been breached and, consequently, he could not be made liable for any loss or damage however caused.[99]

95 [1912] AC 563, PC.

96 [1987] 1 Lloyd's Rep 32 at p 41, CA. Citing as authority *Fawcus v Sarsfield* (1856) 6 E & B 192; and *Wadsworth Lighterage & Coaling Co v Sea Insurance Co* (1929) 45 TLR 597, CA.

97 (1875) 1 QBD 96 at p 127.

98 Now automatically discharged from liability in the light of the ruling in *The Good Luck* [1991] 2 Lloyd's Rep 191, HL.

99 See s 33(3).

This matter was raised in *The Miss Jay Jay*[100] by Mr Justice Mustill who, with commendable clarity, analysed the relationship between perils of the seas and the defence of unseaworthiness in voyage and time policies. As his comments are particularly succinct and helpful, it is worthwhile reciting them in full:

> 'Under a voyage policy, the assured warrants that the vessel will be seaworthy *at the commencement of the voyage*. If the warranty is broken, any claim in respect of a casualty occurring during the voyage will inevitably fail, without the need for any complex analysis of the nature of a peril of the sea, or of the doctrine of causation.'

It is observed that these remarks are relevant only in relation to unseaworthiness constituting a breach of the implied warranty which is applicable only 'at the commencement of the voyage'. An insurer would not be able to plead breach of the implied warranty of seaworthiness as a defence, if the condition of unseaworthiness arises *after* the commencement of the voyage. On the occurrence of such an event, his plea can only rest on the ground that the unfit or infirm condition of the vessel caused the loss. In this regard, the court would have to determine whether perils of the seas or unseaworthiness was the proximate cause of the loss.

Time policies

According to Mr Justice Mustill, the defence of unseaworthiness is liable to raise problems of causation in time policies. He warned that:

> 'Certainly the absence of an implied warranty of seaworthiness, combined with the principle that a "peril of the seas" involves an element of fortuity, does create difficult problems in the field of causation ...'

The reasoning of the trial judge was as follows:[101]

> '… when the vessel succumbs to debility, the claim fails, not because the loss is quite unattended by fortuity, but because it cannot be ascribed to the fortuitous action of the wind and waves.'

In the final analysis, the consideration is really one of fact: the court has to find, as it would have to in any other cause of action, the proximate cause of loss, be it perils of the seas, unseaworthiness, or any other cause. Even though *Miss Jay Jay* was found to be 'plainly' unseaworthy by reason of defects in design and construction, her physical condition did not cause the loss.[102]

In each case, the task is purely one of determining the proximate cause of loss: Inert or passive unseaworthiness is inconsequential. Bramwell B in

100 In the court of first instance [1965] 1 Lloyd's Rep 265 at p 270. In similar terms, Lord Coleridge CJ in *Dudgeon v Pembroke* (1874), 1 QBD 96 at p 128 said: 'In a voyage policy it is true the assured warrants power to encounter ordinary perils. Such perils, therefore, are not perils which, if they cause loss, give a right of recovery under such a policy, not merely because they are not within the words of the policy, but because a condition has not been complied with, *viz*, that the ship shall be fit to meet them.'

101 [1965] 1 Lloyd's Rep 265 at pp 270 and 271.

102 The assured had no idea that she was unseaworthy because the defects in design were latent. In *Frangos & Others v Sun Insurance Office Ltd* (1934) 49 Ll L Rep 354, the fact that the vessel was unseaworthy was held to be inconsequential because perils of the seas was held to have *proximately* caused the loss.

Thompson v Hopper[103] illustrated this point effectively with a series of rhetorical questions:

> 'How, on any theory of causation, can that [unseaworthiness] be a cause with or without which the effect would equally have happened? Suppose she had been struck by lightning while lying there, would the plaintiff have caused her loss by unseaworthiness?'

As perils of the seas was held the 'immediate'[104] cause, the loss was recoverable, in spite of the fact that the plaintiffs had knowingly, wilfully, and improperly sent the ship to sea in a condition which was dangerous to go to sea. The decisive consideration rested in the finding that unseaworthiness was in no sense a cause of the loss.[105]

A similar approach was adopted after the passing of the Act in *Willmott v General Accident Fire and Life Assurance Corpn Ltd*,[106] where the insured vessel, which sank in harbour during a strong gale, was held to have been lost by perils of the seas. The court relied heavily on the fact that, as there was evidence to the effect that the vessel could not have ridden out the sea even if she had been fit, it would be difficult to hold that her defective condition was in any way responsible for the loss.

The 'Unseaworthiness and Unfitness Exclusion Clause' of the ICC

The implied warranty of seaworthiness, declared in s 39(1) of the Act, has been expressly waived by cl 5.2 of the ICC. The position regarding seaworthiness (and unfitness) of the carrying ship is now governed by cl 5.1. By cl 5.1, any loss or damage arising from the unseaworthiness or unfitness of the vessel or craft is covered unless the 'Assured or their servants are privy to such seaworthiness or unfitness, at the time the subject-matter is loaded therein.'[107]

THE INSTITUTE CARGO CLAUSES

The ICC (A)

The ICC (A) is an all risks policy and, therefore, unlike the ICC (B) and (C), there is no specific provision enumerating the perils insured against. As the policy covers *all* risks of loss or of damage to the subject-matter insured, there is no need to provide a specific clause for perils of the seas. Provided that the loss does not fall within one of the exclusions listed in cll 4 to 7, a loss caused by a

103 On appeal, (1858) El Bl & El 1033 at p 1045. See also *Ballantyne v Mackinnon* (1896) 2 QB 455 at pp 460–461, CA.

104 It is to be noted that the last or 'immediate' cause of loss was the law applicable before the decision of *The Leyland Case* [1918] AC 350, HL.

105 Unseaworthiness here was not even a remote cause.

106 (1935) 53 Ll L Rep 156.

107 See Chapter 7.

peril of the seas is recoverable. Though a loss caused by an intentional act, such as scuttling, is not a loss caused by a 'peril of the seas', it is nonetheless a 'risk' in so far as a cargo owner who has taken out an all risks policy is concerned. And as there is no express exclusion clause prohibiting recovery for loss caused by deliberate damage or destruction of the subject-matter insured, other than the exclusion of wilful misconduct of the assured, such a loss should be recoverable.

The ICC (B) and (C)

A legal regime somewhat different from the conventional notion of 'perils of the seas' operates under the ICC (B) and (C). Both sets of Clauses have conspicuously avoided the use of the expression 'perils of the seas' which, over the years, has been awarded an almost precise meaning in law. In view of the fact that the draftsmen of the said Clauses have deliberately chosen not to adopt the term in any of their provisions, it is fair to say that 'perils of the seas', as commonly understood, is not an insured peril under them. Accordingly, the whole system of law associated with the concept should not, strictly speaking, apply or be allowed to apply in relation to these Clauses.

Instead of examining the conditions to which the ship is exposed to at sea, as is the case whenever 'perils of the seas' is pleaded as the cause of loss, cl 1.1.2 of the ICC (B) and (C) gives importance to certain events, namely, the act of being 'stranded, grounded, sunk, or capsized' for the purpose of determining liability. Under cl 1.1.4, 'collision or contact of vessel ... with any external object other than water' is another peril insured against in both sets of the Cargo Clauses. Whereas 'jettison or washing overboard' is a peril insured against under the ICC (B), only 'jettison' is insured under the ICC (C). 'Entry of sea lake or river water into vessel …' is insured under the ICC (B), but not under (C).

But as these clauses are concerned with the 'entry of sea', 'water', 'collision'[108] and incidents of navigation such as 'stranding, grounding, sinking and capsizing', all of which are traditionally associated with the concept of 'perils of the seas', it would be appropriate to discuss them under this part.

'Stranded grounded sunk or capsized'

Clause 1.1.2 of the ICC (B) and (C) insure against any '... loss of or damage to the subject-matter insured reasonably attributable to vessel or craft being stranded grounded sunk or capsized'.

First, it is observed that 'craft' is included in this peril, and therefore any loss sustained by cargo whilst being conveyed in a lighter which has stranded is covered.[109] Secondly, it would appear that the scope of this clause is in one

108 Collision is a peril of the sea: *The Xantho*, (1887) 12 App Cas 503.

109 See *Hoffman & Another v Marshall* (1835) 2 Bing NC 383, where a particular average loss incurred by the stranding of a lighter conveying goods from ship to shore was held not recoverable: a stranding of craft was not mentioned in the common memorandum. *Cf The Thames & Mersey Marine Insurance Co v Pitts, Son & King* [1893] 1 QB 476, a policy which covered all risks in craft, and contained a warranty against particular average, unless, 'the ship or craft should be stranded'.

sense wider, but in another narrower, than the concept of 'perils of the seas'. This, it is hoped, will become apparent from the ensuing discussion.

The last four words of the above clause denote the requirement of simply the occurrence of an event or incident. On a strict interpretation, it would seem that a vessel, even if seriously damaged in a storm, but which does not actually strand, ground, sink or capsize, would not attract the operation of this clause. Under common law, however, such damage is, provided that the element of fortuity is satisfied, generally regarded as a loss caused by a peril of the seas.

The facts of *The Stranna*[110] are particularly suitable to illustrate the restrictive aspect of the clause. The vessel heeled temporarily as a result of the negligence of those involved with the loading of the ship. The loss of the cargo, which shot overboard, was held to have been occasioned by a 'peril of the seas'. Under the ICC (B) and (C), such a loss is unlikely to be considered as falling within the scope of cl 1.1.2 because the ship did not actually 'strand, ground, sink or capsize'. In this sense, its scope is narrower than 'perils of the seas'. Unless one of the events stipulated actually occurred, any loss of or damage to insured cargo caused by the mere rolling of a ship in a storm will not fall within the clause.

By not calling the risk insured against 'perils of the seas', the element of 'fortuity' – an essential feature of the concept – should be irrelevant. In the majority of cases, the element of fortuity would probably be satisfied. However, as pointed out earlier, a ship may strand, ground, sink or capsize as a result of causes other than perils of the seas: Unseaworthiness, wear and tear, wilful misconduct of the shipowner, barratry, fire, and negligence are but a few examples of causes which could lead to the stranding, grounding, sinking or capsizing of a ship. On a literal construction, cl 1.1.2 is not concerned with the cause of, but rather with the fact of, the stranding, grounding, sinking or capsizing of the ship. Provided that the loss does not fall within one of the exceptions listed in the general exclusions clause,[111] it would appear that it will be recoverable, regardless of whether a 'peril of the seas' or 'fortuity' plays a part.

To illustrate the converse, that the peril insured under cl 1.1.2 is wider in scope than the term 'perils of the seas', the situation encountered in *Magnus v Buttemer*[112] could be cited. Whilst in harbour, the ship took to the ground on the falling of the tide. The loss was held not to have been due to a peril of the seas, as nothing unusual or fortuitous happened. It is usual and natural for a ship in the ordinary course of a voyage to rise and fall with the tide. But because the ship did in fact strike the ground (but did not strand), it would not, in such a case, be difficult to argue that the loss falls within the named peril of 'grounding'. Under common law, stranding has always been regarded as a peril

110 [1938] 1 All ER 458, CA.

111 *Wadsworth Lighterage & Coaling Co Ltd v Sea Insurance Co Ltd* (1929) 45 TLR 597, CA is particularly relevant for this point. Though loss or damage caused by 'sinking' was a peril insured against, nevertheless, the insurers were held not liable: she had been sunk by the entry of sea water by reason of her general debility.

112 (1852) 11 CB 876.

of the seas, but not grounding occurring in the usual course of a voyage without the occasion of an extraordinary casualty. Under cl 1.1.2, there is no need to distinguish between the two, as both are risks insured against.

As the words 'perils of the seas' are not used, one could be tempted to argue that the element of fortuity is not an essential element for this insured risk. Furthermore, support for this could be drawn from the fact that the clause itself does not state that the events have to occur accidentally. Does this mean that if a ship is wilfully 'stranded grounded sunk or capsized' by the shipowner, the cargo owners would be able to claim for the loss of their cargo? In such a circumstance, the exclusion relating to 'deliberate damage or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons' would apply. The words 'any person or persons' are wide enough to include the shipowner. Thus, it would appear that by reason of cl 4.7, such a loss is not recoverable under the ICC (B) and (C). These arguments do not apply to a claim for a loss under the ICC (A) because such a cover is for all risks; moreover, there is no exclusion for deliberate damage under the ICC (A).

In the light of this, the deletion of the Seaworthiness Admitted clause, in particular the second part of the clause,[113] which was specially framed in the aftermath of *Samuel v Dumas*[114] for the protection of an innocent cargo owner, is indeed most damaging to the cause of a cargo owner who has taken out the ICC (B) or (C). However, to overcome these problems he can now take out the Institute Malicious Damage Clause to cover for such a loss – in which case cl 4.7 would be deemed to be deleted from the policy, and he would also be insured for 'malicious acts vandalism or sabotage'.

'Stranded'

The common memorandum of the old SG policy,[115] – the equivalent of the current deductible clause (cl 12 of the ITCH(95)) – had used the word 'stranded' for the purpose of excepting certain losses from the 'free from average' warranty. The word 'stranded' is defined in r 14. But the definition therein provided was to be used in relation to the legal effects of a loss under the memorandum occasioned by the stranding of a ship, and not as to the factual meaning of the word.

There is, however, no scarcity of case law interpreting the meaning of the word 'stranded' used in relation to the memorandum.[116] One of the earliest cases to comment on the word is *Harman v Vaux*[117] where 'merely touching the

113 The relevant part of the clause read as follows: 'In the event of loss the Assured's right of recovery hereunder shall not be prejudiced by the fact that the loss may have been attributable to the wrongful act or misconduct of the shipowners or their servants, committed without the privity of the Assured.'

114 [1924] AC 431, HL.

115 'Corn, fish ... are warranted free from average, unless general, or the ship be stranded …'. See Appendix 1.

116 There is no reason why the word 'stranded' when used in relation to describe a risk insured against should be given a different meaning from that under the memorandum.

117 (1813) 3 Camp 429.

ground' was held not to constitute a stranding. It was pointed out that, 'If the ship touches and runs, the circumstance is not to be regarded. There she is never in a quiescent state. But if she is forced ashore, or is driven on a bank and remains for any time upon the ground, this is stranding, without reference to the degree of damage she thereby sustains'.

The case of *M'Dougle v Royal Exchange Assurance Co*[118] provides the most comprehensive description of the term. A ship must be aground for an *appreciable* period of time before she can be considered to have 'stranded'. If it was merely a case of 'touch and go' without the ship remaining 'fixed' upon an obstructing object (whether rock, bank, reef, or of whatever other nature) for a period of time, that will not constitute a stranding.[119]

'Grounded'

A ship touching ground is generally regarded as a phenomenon which is expected to occur during the ordinary course of navigation. In the absence of some accidental occurrence or extraneous cause, any damage sustained by a ship as a result of an ordinary grounding is, as far as a hull policy is concerned, a loss by wear and tear of the subject-matter insured.[120] Whether the same rule should be applied to the ICC is, it is submitted, questionable. First, it is noted that the exception of 'wear and tear' refers to the subject-matter insured and not the wear and tear of the carrying ship.[121] Secondly, as pointed out earlier, in view of the fact that 'fortuity' is not a part of the equation of this risk, any loss or damage suffered by cargo caused by the ship touching ground should be recoverable regardless of whether the loss was or was not fortuitous.[122] And even if fortuity is to be considered as an essential requirement for this risk the loss is, as far as a cargo owner is concerned, fortuitous.

'Sunk or capsized'

The word 'sunk' is self-explanatory. This, perhaps, explains the absence of authority offering a definition of the word. In *Bryant and May v London*

118 (1816) 4 Camp 283; 4 M & S 503.

119 See also *Carruthers v Sydebotham* (1815) 4 M & S 77 where the 'tumbling over' of a ship was held to have stranded; *Baker v Towry* (1816) 1 Stark 436, where the vessel which struck a rock and remained fixed for about 20 minutes was held to have stranded; *Hearne v Edmunds* (1819) 1 Brod & B 381; *Rayner v Godmond* (1821) 5 B & Ald 225, where a vessel by accident, and not in the ordinary course of the voyage was rendered immovable on the strand; *Kingsford v Marshall* (1832) 8 Bing 458; *Corcoran v Gurney* (1853) 1 E & B 456; *De Mattos v Saunders* (1872) LR 7 C 570; and for a thorough study of case law on stranding, see *Letchford v Oldham* (1880) 5 QBD 538.

120 See *Wells v Hopwood* (1832) 3 B & Ad 20 at p 23 where it was accepted that stranding is a peril of the seas, but not 'where a ship takes the ground in the ordinary and usual course of navigation and management in a tidal river, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of the tide'. See also *Popham & Willett v St Petersburg Insurance Co* (1904) 10 Com Cas 31; and *Magnus v Buttemer* (1852) 11 CB 876, where a ship taking ground during unloading on the natural falling and rising of the tide was also held to be a loss by wear and tear.

121 Clause 4.2 of the ICC (A), (B) and (C) refers to '… ordinary wear and tear of the subject-matter insured'.

122 Provided, of course, that the loss does not fall within one of the exclusions listed in the policy or the Act.

Assurance Corpn,[123] the matter was considered, albeit in a most superficial and unsatisfactory manner, in relation to a clause which warranted the insurer from liability from particular average 'unless the ship were stranded, sunk or burnt'. The fact (admitted by the assured) that the ship could have gone down further in the water seems to have influenced the jury in arriving at its decision that the ship had not sunk

'Capsized' is a relatively modern concept in marine insurance law and has not, as yet, been subjected to judicial scrutiny. In lay terms, it is used to describe a ship which has overturned or completely heeled over. A ship which has capsized does not necessarily mean that she has 'sunk'.[124]

'Collision or contact of vessel ... with any external object other than water'

Clause 1.1.4 of the ICC (B) and (C) cover 'collision or contact of vessel craft or conveyance with any external object other than water'.

As discussed earlier, the classic case of *The Xantho*[125] has ruled that a collision is a peril of the seas. Consequently any loss or damage sustained by cargo caused by a collision was under the old SG policy brought as a claim based on a peril of the seas. But as 'collision' is expressly stated as a peril insured against under cl 1.1.4, it now stands in its own right as a head of claim.[126] The fact that the vessel did not actually strand, ground, sink or capsize, as a result of the collision, is irrelevant.

Contact of a vessel with a lighthouse, iceberg, wreck, jetty, pier, cable, or any other external object 'other than water' is covered. The word 'external' has to be in relation to the ship: that is, an object outside the ship.[127] Thus, any damage sustained by cargo caused by contact of the cargo with the hold of the ship, parts of the ship, or her equipment, would not fall within the meaning of the words 'contact with any external object'.

The exception of 'contact with water' may, on first reading, appear to be incongruous and peculiar: in a marine adventure, contact of the vessel with water is an inevitable phenomenon. If this exception were not inserted, one could be tempted to argue that any damage brought about by the mere contact of the vessel with sea water – an 'external object' – which is a natural and obvious course of events, is covered. The exception is worded to exclude damage arising from the ordinary action of the sea coming into contact with the vessel. It is significant to note that it is the contact of the vessel – *not of the cargo* – with water which is not covered under the policy.

123 (1866) 2 TLR 591.

124 O'May, p 177, cited an American case, *Share & Triest Co v Fireman's Fund Insurance Co* (1919) 261 F 777, to illustrate the point that a barge which was towed upside down to port was held not to have 'sunk'.

125 (1887) 12 App Cas 503.

126 This necessarily means that any doubts as to the correctness of the decision of *The Xantho* (1887) 12 App Cas 503 can no be longer an issue.

127 In *Reischer v Borwich* [1894] 2 QB 548, CA, the ship was insured against damage from 'collision with any object …'. The Court of Appeal held that damage sustained as a result of a collision with a snag was covered by the policy.

It is important to recall that damage to cargo caused by contact with 'derelict mines, torpedoes, bombs or other derelict weapons of war' is expressly excluded by the war exclusion clause (cl 6.3) of the ICC.[128]

'Jettison or washing overboard'

The ICC (B) provide coverage for loss of or damage to the subject-matter insured caused by 'jettison or washing overboard' whilst the ICC (C) insure only against a loss by 'jettison'. Jettison is also a peril insured under the old SG policy, the ITCH(95) and the IVCH(95).[129]

At a time of emergency, cargo is often thrown overboard for the safety of the whole adventure. The jettison of cargo, or part of a vessel's equipment or furniture, is commonly associated with general average; as such, the loss is invariably recovered as general average sacrifice.[130] In view of the fact that a peril of the seas is responsible for causing the ship to be at risk, it should not come as a surprise for such a claim to be declared upon as a loss by 'perils of the seas'.

As 'jettison' is insured as a separate and independent peril, it is not dependent upon other heads of claim for sustenance: it is neither confined to circumstances of general average nor to an action based on 'perils of the seas'.

The fundamental distinction between 'jettison' and 'washing overboard' lies in the fact that the former is a deliberate act committed by man throwing cargo overboard, whilst the latter is an act of the sea. A loss of cargo which falls overboard as a result of rolling in heavy sea or of a sudden listing of the ship does not constitute 'jettison'. The act of throwing the cargo overboard has to be performed by man, not by natural forces.

The word 'jettison', though unqualified, does not cover the throwing of cargo overboard *without lawful cause*. In *Butler v Wildman*,[131] Mr Justice Bayley remarked that:

> 'Jettison, in its largest sense, means any throwing overboard ... But its true meaning, in a policy of insurance, seems to me to be any casting over board *ex justa causa*.'

In the said case, a quantity of money was deliberately thrown overboard by the master of the vessel in order to prevent it falling into the hands of the enemy. The court held that in the circumstances of the case, the master was in fact under a 'duty' to throw the money overboard. The loss was held to be

128 This was specially inserted to clarify the situation encountered in *Costain-Blankevoort (UK) Dredging Co v Davenport, The Nassau Bay* [1979] 1 Lloyd's Rep 395 where 'contact with any fixed or floating object (other than a mine or torpedo)' was expressly excluded from the then fc and s warranty. The loss of the dredger, which exploded after having sucked up a number of Oerlikon shells (derelict weapons of war), was held not to fall within the warranty and was therefore recoverable as a marine risk. As the dredger was in contact with a 'fixed or floating object' which was neither a mine nor a torpedo, the marine insurers were held liable for the loss.

129 See cl 6.1.4 of the ITCH (95) and cl 4.1.4 of the IVCH(95). Jettison is a 'maritime peril': see s 3.

130 See s 66 & cl 2 of the ICC (B) and (C).

131 (1820) 3 B & Ald 398 at p 403.

recoverable within the perils of 'jettison', enemies, and the general words of 'all other losses and misfortunes'.

The case of *Taylor v Dunbar*[132] has often been cited as authority for establishing the rule that the loss of a cargo which has been jettisoned because it had become putrid as a result of delay in the voyage (brought upon by tempestuous weather) is not recoverable as a loss by the peril of 'jettison'. It is submitted that this is not an accurate interpretation of the outcome of case. The loss of the meat was not recoverable by reason of the fact that delay, which was not a peril insured against, and not jettison or a peril of the seas, was held to have proximately caused of loss.

Livestock and perishable cargoes are often thrown overboard *after* they have perished. In such a case, the act of jettison cannot be regarded as the cause of loss, as the loss had already been sustained before the cargo is jettisoned. Throwing overboard in such a case is simply an act of disposal of decayed property.

The act has to be justifiable. If not, it would, as far as the ICC (B) and (C) are concerned, fall within the exclusion of 'deliberate damage' under cl 4.7. There is no equivalent to cl 4.7 under the ICC (A). This and the fact that it is an all risks policy suggest that such a loss, though committed without lawful excuse, is recoverable. In so far as the innocent cargo owner is concerned, the loss is a 'risk' insured against.[133]

'Entry of sea lake or river water into vessel '

Loss or damage sustained to cargo caused by the entry of sea-water into the ship is recoverable under the ICC (B), but not (C). This clause may be invoked when a loss is caused by the mere entry of sea-water into the vessel without necessarily the occurrence of a casualty such as a 'stranding, grounding, sinking or capsizing', or a 'collision or contact of vessel ... with any external object'.

Damage caused by the *intentional* admission of sea-water in the ship would be governed, as in the case of cl 1.1.2, by the exception of deliberate damage or destruction under cl 4.7 of the ICC (B) and ICC(C).

The question which arises is whether the loss of or damage to cargo has to be caused by the physical contact of sea water with the cargo. Under common law, the position in relation to a cargo claim under 'perils of the seas' is clear. A few well-known cases have established the rule that actual contact with sea water is not an essential ingredient for an action under 'perils of the seas'. It is submitted that the same rule should apply to a claim under this clause.

In *Gabay v Lloyd*,[134] for example, horses, in consequence of the agitation of the ship in a storm, kicked and wounded each other so much so that they all died. This was held to be a loss by a peril of the seas.

In *Montoya and Others v The London Assurance Co*,[135] a cargo of hide and tobacco was shipped; the entry of sea water into the hold caused the hides to

132 (1869) LR 4 CP 206.

133 See *The Gaunt Case* [1921] 2 AC 41, HL.

134 (1825) 3 B & C 791; see also *Lawrence v Aberdein* (1821) 5 B & Ald 107.

135 (1851) 6 Exch 451, hereinafter referred to simply as *The Montoya Case*.

ferment. The putrefaction of the hides imparted an ill flavour and thereby damaged the tobacco. Though sea water did not come into contact with the tobacco, nonetheless it was held to be a loss by perils of the seas. The court applied the 'mischief' rule to arrive at its decision. In the words of Pollock CB:[136]

> 'As a general rule, where mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters in such case, are responsible for the further mischief so occasioned.'

That it was not necessary that the sea-water be in 'absolute contact' with the injured article was the view held by Martin B.

The case of *Cator v Great Western Insurance Co of New York*[137] may initially appear to be in conflict with the decision of *The Montoya Case*.[138] In *The Cator Case*, 449 packages out of 1,711 packages of teas shipped were damaged as a result of contact with sea-water. The remaining packages, which had not been in contact with sea-water, were sold for less than their market value by reason of the fact that buyers were suspicious that they might also be tainted. The court held that the assured could only recover in respect of the packages which had actually been in contact with sea-water, but not in respect of the loss of the remainder, which did not suffer any actual physical injury, but only injury to reputation.

The case should not be interpreted as having laid down the principle that actual physical contact of sea-water with the damaged cargo is essential for a loss to be recoverable as by a peril of the seas. Chief Justice Bovill took pains to stress that the cases are distinguishable on the ground that 'here there was no damage whatever to the [remaining] packages of teas, which arrived perfectly sound and untouched, and altogether unaffected by the sea-water'.[139] In contrast, in *The Montoya Case*, the tobacco itself was actually injured, as the stench had affected the flavour and consequently the value of the tobacco.

In the final analysis, it is in each case a question of causation and remoteness of damage: whether the damage arose proximately from sea-water has to be determined. Indirect, collateral and consequential liability arising from suspicion and prejudice are matters which are obviously too remote to be considered. By no stretch of imagination can they be described as the 'natural and almost inevitable consequence' created by the mischief of sea-water.

Loss caused by preventive action

Loss or damage sustained by the subject-matter insured due to action necessarily and reasonably taken to prevent a loss by a peril insured against is recoverable. Such a loss is considered as if it had been caused by that peril and is recoverable as such. For example, in *Canada Rice Mills Ltd v Union Marine and*

136 *Ibid*, at p 458. In similar vein, Platt B stated that, 'whatever mischief is occasioned to the cargo by the shipping of sea-water, is a loss occasioned by the perils of the seas, and that the insurers are liable to make the loss good'.

137 (1873) 8 LR 8 CP 552.

138 (1851) 6 Exch 451.

139 (1853) 8 LR 8 CP 552 at p 558.

General Insurance Co Ltd,[140] a cargo of rice which was damaged by heat caused by action taken to prevent the incursion of the sea was held recoverable as a loss by a peril of the seas. This is the first case in marine insurance to make a ruling on this point of law.[141] That the Privy Council had arrived at its conclusion by applying the rule of proximate cause established by *The Leyland Case*, (now contained in s 55) was made clear: the proximate cause of the loss of the rice was held to be perils of the seas and not the action taken to prevent the loss.[142]

B – FIRE AND EXPLOSION

'Fire' and 'explosion' are specifically insured under cl 6.1.2 of the ITCH(95), cl 4.1.2 of the IVCH(95]), and the ICC (B) and (C). As explosion is now specially named as an insured peril, the question which had so troubled the courts in the past as to whether it was included within the term 'fire' is now academic.[144] These perils are also covered under the ICC (A) by virtue of the policy being for all risks.

ACCIDENTAL, FORTUITOUS AND DELIBERATE FIRE

Unlike perils of the seas, violent theft and barratry, there is no statutory definition of 'fire'.[144] *Gordon v Rimmington*[145] is, perhaps, the first case to describe the limits or, more appropriately, the lack of limits of the peril of 'fire'. Lord Ellenborough said:

> '... if the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor can it make any difference whether the ship is thus destroyed by third persons, subjects of the King, or by the captain and crew acting with loyalty and good faith. Fire is still the *causa causans*, and the loss is covered by the policy.'

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140 [1941] AC 55 at p 76, PC.

141 The Privy Council had in fact applied the principle as laid down in carriage of goods by sea in *The Thrunscoe* [1897] P 301, where the facts were almost identical.

142 The same principle applies to the peril of 'fire'. *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 approved the decision of *Stanley v Western Insurance Co* (1868) LR 3 Ex 71 at p 74, where a loss caused by spoiling goods by water, as a result of a necessary and bona fide attempt to put out a fire, was held to be a loss caused by fire and recoverable as such. With regard to a claim for a loss caused by preventive actions taken to prevent the spread of a fire, see below

143 Only 'fire' was insured under the old SG Policy. It is now no longer necessary to determine which one of the four types of loss associated with fire and explosion, categorised by Scrutton LJ in *Re Hooley Hill* [1920] 1 KB 257, CA, is the cause of loss. See also *Stanley v The Western Insurance Co* (1868) LR 3 Ex 71 at p 74.

144 Cases on fire such as *Pelly v Royal Exchange Assurance* (1757) 1 Burr 341; *Australian Agriculture Co v Saunders* (1875) LR 10 C. 668; *Niger Co v Guardian Assurance Co of Yorkshire Insurance Co* (1922), 13 Lloyd's Rep 75, HL; and *George Kallis v Success Insurance Ltd* [1985] 2 Lloyd's Rep 8, PC, were mainly concerned with the issue as to whether goods which were destroyed by fire breaking out at the warehouse at which they were stored were covered by a marine policy of insurance.

145 (1807) 1 Camp 123 at p 124.

In *The Alexion Hope*,[146] Lord Justice Lloyd of the Court of Appeal referred to 'fire' as one of the 'intermediate perils ... which can be caused either accidentally or deliberately, and are not subject to the limitation imposed on the meaning of perils of the seas by the definition in the Act'. He also pointed out that the term included '... as a matter of construction, a fire started deliberately by a stranger to the insurance'.[147] As a general rule, the term 'fire' is wide enough to cover all forms of fire, accidentally or deliberately started by any person or persons. But, as can be seen later, a general rule may be modified, qualified or even displaced by the Act (for example, s 55), or by an express term in the policy,[148] if so permitted by the Act.

Fire negligently started by the master or crew

The question as to whether a loss or damage sustained as a result of a fire which has been negligently started by the master or crew is covered by the peril of 'fire' was examined in *Busk v Royal Exchange Assurance Co*[149] by Mr Justice Bayley, who observed that:

> '... there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners ...'

Applying the same principle, the judge in *The Belle of Portugal*[150] held that the electrician's negligence did not defeat the plaintiffs' right of recovery under the policy.

These cases have demonstrated that if a fire has proximately caused a loss, any negligence committed by the master or crew is irrelevant. This rule is now encapsulated in s 55(2)(a). A shipowner could also rely on cl 6.2.2 of the ITCH(95)[151] and cl 4.2.2 of the IVCH(95) to claim for such a loss. However, if he wishes to plead that the loss was proximately caused by the 'negligence of Master Officers Crew or Pilots …' he would have to satisfy the terms of the proviso to the said clause.[152]

A cargo owner who has insured his goods under the ICC (B) or (C) would plead cl 1.1.1 to claim for his loss. An assured who has subscribed to a policy under the ICC (A) would simply plead that it is covered by reason of the policy being for all risks.

146 [1988] 1 Lloyd's Rep 311 at p 317.

147 Cited with approval by Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at p 71.

148 Eg, the General Exclusions clause of the ICC (A), (B) and (C), in particular, cl 4.7 of the ICC (B) and (C).

149 (1818) 2 B & Ald 73 at p 80.

150 [1970] 2 Lloyd's Rep 386, US Court of Appeals.

151 Previously cl 6.2.3 of the ITCH(83).

152 Commonly known as the Inchmaree clause, discussed in detail in Chapter 12.

Fire wilfully started by the master or crew

The position of a shipowner and an innocent mortgagee

Under the ITCH(95) and the IVCH(95), loss of or damage caused by a fire which has been deliberately started by the master or crew, without the connivance of the shipowner, is recoverable under both counts of 'fire' and 'barratry'.[153] Obviously, if the fire was started with the connivance of the shipowner, it would not constitute barratry because barratry is, by definition, an act committed 'to the prejudice of the shipowner'.[154] Neither would the shipowner be able to recover for a loss by fire, for being himself guilty of wilful misconduct, he would be barred from so doing by s 55(2)(a) of the Act.

Like a shipowner, a mortgagee, provided that he himself did not set the ship alight or was a party to the ship being set alight, would also be able to recover for a loss or damage caused by a barratrous fire. He has a right of claim whether he sues as an assignee (of the shipowner's policy) or as an original assured under his own hulls policy or the Institute Mortgagee's Interest Clauses.

The position of an innocent cargo owner

A cargo owner, however, is in a different position. Even though fire is specifically named[155] as a peril insured against under the ICC (B) and (C), nonetheless, he would not be able to recover by reason of cl 4.7. It is to be noted that, though s 55(2)(a) excuses not only negligence but also the misconduct of the master or crew, the provision is prefaced with the words, 'unless the policy otherwise provides'. The ICC (B) and (C) have, through cl 4.7, otherwise provided that loss or damage caused by 'deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of *any* person or persons' is not covered.[156]

A master or crew member who deliberately starts a fire and thereby causes damage to the ship, clearly commits a barratrous act *vis-à-vis* the shipowner. However, in relation to a cargo owner who has taken out a policy in the form of either the ICC(B) or (C), his loss to cargo is not covered for two reasons, First barratry is not a peril insured against under the ICC (B) and (C) and, secondly, cl 4.7 excludes losses caused by deliberate damage or destruction. To insure himself against a loss caused by malicious damage, he would have to take out

153 See Chapter 12.

154 See r 11 of Rules of Construction.

155 Clause 1.1.1 of the ICC(B) & (C).

156 A cargo owner would probably argue that if the intention of the master or crew was to damage or destroy only the ship, and not the cargo, cl 4.7 does not apply. Though it is difficult to see how it is possible to destroy or inflict deliberate damage to a ship without causing damage to the cargo, each case has, of course, to be decided on its own facts. Whether such a strained and narrow interpretation – that it applies only to deliberate damage or destruction aimed directly at the cargo – may be placed on the clause is, it is submitted, doubtful, for the wording of cl 4.7 is wide in scope.

the Institute Malicious Damage Clause, the purpose of which is to 'delete' the exclusion contained in cl 4.7 of the ICC (B) and (C).[157]

The position under the ICC (A) is, however, different. First, as this is an all risks policy, and there is nothing in cl 4 to exclude a barratrous fire, the loss is recoverable. Secondly, support could be drawn from the fact that there is no equivalent to cl 4.7 of the ICC (B) and (C) in the ICC (A). Thirdly, a case could be made of the fact that the Institute Malicious Damage Clause is available to be used only with a policy, such as the ICC (B) and (C), which contains an exclusion for deliberate damage and deliberate destruction of the subject-matter insured. Admittedly indirect and somewhat tenuous, the inference which could be drawn from this is that the Institute Malicious Damage Clause is unnecessary in the case of the ICC (A) because such a loss is already covered by reason of the policy being for all risks. Provided that the assured cargo owner himself is not guilty of any wilful misconduct, a loss by fire, however caused, is a 'risk' insured under the ICC (A). The only defence which could be used by the underwriters to refute a claim for a loss caused by such a deliberate fire is that, though the policy may be for all risks, such a loss is not a risk but a certainty. Against this, it could be argued that though it is not a risk *vis-à-vis* the arsonist, it is a risk in so far as an innocent cargo owner is concerned.[158]

Fire negligently started by the assured

It is difficult to envisage how an assured such as a cargo owner or a mortgagee could negligently start a fire on board a ship. A shipowner, however, could negligently cause a fire if he was to act as master of the ship at the time of loss. Section 55(2)(a) denies an assured the right of recovery only if he was guilty of misconduct, but not negligence.

As early as 1898, in *Trinder Anderson & Co v Thames and Mersey Marine Insurance Co*,[159] Lord Justice Smith pointed out that:

> 'It is not disputed at the bar that negligence of an assured upon a fire policy, whereby the fire was occasioned which caused the loss, affords no defence to the insurer. Why so? Because loss by fire is what is insured against …'

The law in relation to the peril of fire is in this regard the same as that relating to negligent navigation: the loss would still be considered as having

157 The relevant part of the Institute Malicious Damage Clause reads: '... it is hereby agreed that the exclusion 'deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any persons or persons is deemed to be deleted and further that this insurances loss of or damage to the subject matter caused by malicious acts vandalism or sabotage …'.

158 It is important to be reminded of the fact that the ICC (A) do not insure against 'fire' or 'perils of the seas' as such, but against 'all risks'. Thus, provided that the event or casualty which caused the loss is a 'risk' *vis-à-vis* the cargo owner, the damage to or loss of his cargo is recoverable. In so far as the cargo owner is concerned, such a loss is not a certainty, but is unexpected and, therefore, a risk. Support for such a construction of the ICC (A) can be found in *London and Provincial Leather Process Ltd v Hudson* [1939] 3 All ER 857 at p 861, and *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd* [1969] 2 All ER 776, discussed below.

159 [1898] 2 QB 114 at p 124, CA.

been proximately caused by perils of the seas even though the assured, who acting as master, was negligent in navigating the ship.

Fire wilfully started by the assured

It is pertinent to note that s 55(2)(a) excuses only the misconduct of the master or crew, but not that of the assured. Any loss brought about by the wilful misconduct of the assured, whether he be the shipowner, a cargo owner, or a mortgagee, is clearly excluded by s 55(2)(a).[160] The *modus operandi* of scuttling a ship by setting it on fire is a story which is all too familiar with the courts. The defence that the plaintiff has wilfully caused or connived at the destruction of his own vessel is invariably raised whenever fire is pleaded as the cause of loss: *Slattery v Mance*;[161] *The Alexion Hope*;[162] *Continental Illinois National Bank and Trust Co of Chicago and Xenofon Maritime SA v Alliance Assurance Co Ltd, The Captain Panagos DP*;[163] and *The Ikarian Reefer*[164] are classic examples. As these cases are primarily concerned with the issue of burden of proof, it would be more convenient to discuss them in detail later in another chapter.[165]

For the present purposes, it is adequate to cite the lucid remarks made by Mr Justice Salmon in *Slattery v Mance*:[166]

> 'Of course the plaintiff cannot recover if he was the person who fired the ship or was a party to the ship being fired. This result, however, does not depend on the construction of the word "fire" in the policy but on the well known principle of insurance law that no man can recover for a loss which he himself has deliberately and fraudulently caused. It is no more than an extension of the general principle that no man can take advantage of his own wrong.'

Fire wilfully started by a stranger

In *The Alexion Hope*,[167] Lord Justice Lloyd remarked that a fire would still be the proximate cause of loss even if it was deliberately started by a 'stranger' to the insurance. Any person who is not a party to the contract of insurance is a 'stranger'. The same principle, but worded in terms of the 'mischievous person', was proposed by Mr Justice Salmon in *Slattery v Mance*,[168] who pointed out that: 'The risk of fire insured against is quite obviously not confined to an accidental

160 And by cl 4.1 of all the ICC.

161 [1962] 1 All ER 525.

162 [1988] 1 Lloyd's Rep 311, CA.

163 [1989] 1 Lloyd's Rep 33, CA.

164 [1993] 2 Lloyd's Rep 69; [1995] 1 Lloyd's Rep 455, CA. It is observed that the Court of Appeal overturned the finding of Cresswell J, who held that the vessel was lost as a result of a peril of the seas, and that if she had been deliberately set on fire by a member of the crew, the defendants had failed to prove that the owners in any way consented or were privy to that action. After spending a great deal of time examining the evidence given by the master and the expert witnesses, the Court of Appeal found that the vessel was deliberately run aground with the consent of her owners. For a further discussion of this case, see Chapter 11.

165 For the law on the burden and standard of proof , see Chapter 11.

166 [1962] 1 All ER 525 at p 526, QBD.

167 [1988] 1 Lloyd's Rep 311, CA.

168 [1962] 1 All ER 525 at p 526, QBD.

fire. If the ship had been set alight by some mischievous person[169] without the plaintiff's connivance, there could be no doubt that the plaintiff would be entitled to recover'.[170]

The position of an innocent mortgagee

Whether a shipowner could be classed as a 'stranger' *vis-à-vis* a mortgagee was considered in *The Alexion Hope*,[171] where the plaintiffs were mortgagees suing under a mortgagees' interest policy issued by the defendant underwriters. The question raised was whether they could recover under the policy for a loss caused by a fire deliberately started by the shipowner.[172] The Court of Appeal (and Mr Justice Staughton in the court of first instance) held that so long as the plaintiffs-assured-mortgagee were not themselves guilty of any wilful misconduct, they were entitled to succeed under the policy. For all intents and purposes, the act of a shipowner is in relation to a mortgagee the act of a stranger. But, as discussed earlier, if the shipowner himself were to claim for the loss of his ship under his own policy of insurance, he would fail in his action.

It is necessary to recapitulate that the position would be different if a peril of the seas were to cause the loss.[173] To elicit this distinction, it would be helpful to recall the remarks made by Mr Justice Evans in *The Captain Panagos DP*[174] that: '... "Fire", unlike "perils of the sea", does not itself connote a fortuity …'. As fortuity is not an essential ingredient for the peril of 'fire', it means that all forms of fire are covered regardless of whether they were started accidentally or deliberately. In terms of proof, the assured does not have to prove, as in the case of perils of the seas, that the loss is fortuitous. All that he has to show is that the loss is proximately caused by fire, or by precautionary actions taken to prevent the ignition of or the spread of a fire.[175]

To conclude this part of the discussion, it would be helpful to refer to the lucid and instructive summary – describing the position of a mortgagee – delivered by Lord Justice Purchas in *The Alexion Hope*:[176]

> '... as between the mortgagee and the mortgagee's interest insurer, it matters not whether the fire was started by an independent agent, or whether by or with the connivance of the shipowner, the master or the crew, or indeed whether it occurred fortuitously.'

169 Eg, a vandal, a stowaway, or a stevedore who is not a crew member.

170 See also the remarks of Purchas LJ in *The Alexion Hope* [1988] 1 Lloyd's Rep 311 at p 322, CA.

171 *Ibid*.

172 It is to be noted that, with the exception of the wilful misconduct of the assured, there is no exclusion for deliberate damage or deliberate destruction of the subject-matter insured caused by the wrongful act of any person(s) under the ICC (A) and the Institute Hulls Clauses. *Cf* cl 4.7 of the ICC (B) and (C).

173 For a discussion of the position of a cargo owner or mortgagee in relation to a claim for a loss of loss by perils of the seas, see above.

174 [1986] 2 Lloyd's Rep 470 at p 511, QBD.

175 See below.

176 [1988] 1 Lloyd's Rep 311 at p 322, CA.

The position of an innocent cargo owner

A cargo-owner who takes out a policy of insurance under the ICC (B) or (C) is, unfortunately, not placed in the same position as an innocent mortgagee described above. Even though the fire may have been started by a stranger to the contract of insurance subscribed by the cargo owner, he is, for the same reason as in the case of fire wilfully started by master or crew, barred from recovery by cl 4.7. To insure himself against such a cause of loss, he would have to take up the Institute Malicious Damage Clause.

As regards the ICC (A), the reasoning given to the case of a fire wilfully started by the master or crew, discussed earlier, also applies here.

LOSS CAUSED BY PREVENTIVE ACTION

Cargo often suffer damage as a result of actions taken to prevent a loss (by a peril insured against) from taking place.[177] In *Symington and Co v Union Insurance Society of Canton Ltd*,[178] a cargo of cork was damaged when the local authorities, to prevent a fire from spreading, threw some of the cork into the sea and poured water on the rest of the cargo. Even though the cork was not actually on fire, the Court of Appeal was prepared to allow indemnity under the policy. In the words of Lord Justice Scrutton:[179]

> '... there being a fire, goods are damaged not by the fire but by the water used to extinguish the fire, or the water used to prevent the fire from spreading, and that such damage can be claimed as a damage resulting from fire, and in my view, can be claimed under a marine policy as a damage caused by fire.'

Lord Justice Greer expressed his approval of the following remarks made by Kelly CB in *Stanley v Western Insurance Co*:[180] 'I agree that any loss resulting from an apparently necessary and *bona fide* effort to put out a fire ... every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy'. Though the case was concerned with a business premise policy of insurance, nevertheless, the principles in relation to insurance for fire were regarded as of general application.

To recover for such a loss, there has to be either:

- a fire actually in existence, if not in the cargo, near the cargo; or
- 'an actual existing state of peril of fire, and not merely a fear of fire'.[181]

A mere apprehension that a fire might break out is not sufficient proof. It has to be shown that the risk had begun to operate and there was danger.[182] This requirement that there be real and not imaginary danger stems also from

177 In relation to perils of the seas, see above.

178 (1928) 34 Com Cas 23, CA.

179 *Ibid*, at p 31.

180 (1868) LR 3 Ex 71 at p 74.

181 *Per* Gorell Barnes J, *The Knight of St Michael* [1898] P 30 at p 35.

182 See *Kacianoff v China Traders Insurance Co Ltd* [1914] 3 KB 1121, CA, where the risk of capture raised a similar question; *The Knight of St Michael* [1898] P 30; and *Butler v Wildman* (1820) 3 B & Ald 398, were referred to.

the fact that such a claim is often premised as a loss by way of general average.[183] Under the law of general average,[184] it is well established that not only must the loss be incurred for common safety, but that actual danger must exist at the time of loss.[185]

EXCEPTIONS OF LIABILITY

Even though an insurance against fire is wide and does not have, as in the case of 'perils of the seas', the element of fortuity as a component, it is nevertheless governed by the exceptions spelt out in s 55(2) and in the policy.[186] The exception of a loss caused by a fire deliberately started by an assured has already been discussed.[187] Another example which is of particular relevance to fire is when damage is caused to cargo by the inherent vice or nature of the subject-matter insured.

Inherent vice

The inherent vice of the subject-matter insured could be raised as a defence to a claim of loss by fire.[188] This was made clear in *Boyd v Dubois*,[189] where it was queried whether the fire which damaged a cargo of hemp (the subject-matter insured) was generated by the condition of the cargo. But as there was no proof that the fire had originated from the state of the hemp, the plaintiffs succeeded in their claim.

For the purpose of comparison, it is necessary to refer to *The Knight of St Michael*,[190] where the plaintiffs had effected insurances on freight upon the ship against 'fire and all other … losses …'. During the course of the voyage, a portion of a cargo of coal, which was over-heating and liable to combust and cause destruction to both ship and cargo, was discharged and sold entailing a consequent loss of freight. Though no part of the coal was ever actually on fire, it was reasonably obvious to all concerned that if the ship were allowed to continue on her direct voyage, both ship and cargo would almost certainly be destroyed by fire. As the subject-matter insured was not the cargo of coal, but freight, the question of 'inherent vice or nature of the subject-matter insured' could not arise in relation to such an insurance. Thus, the court held that the

183 See *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 34 Com Cas 23 at p 31; and, in particular, *The Knight of St Michael* [1898] P 30, where a claim for a partial loss and for a general average loss of freight were discussed. See also *Papayanni & Jeromia v Grampian SS Co Ltd* (1896) Com Cas 448 where the ship was scuttled after a fire had broken out on board the ship; the scuttling of the ship under such circumstances was held to be a general average act.

184 General average in relation to the law of marine insurance is examined in Chapter 17.

185 Particularly relevant is *Watson v Firemen's Fund Insurance Co* [1922] 2 KB 355.

186 See cll 4 to 7 of the ICC (A), (B) and (C).

187 See above.

188 Clause 4.4 of the ICC (A), (B), and (C) excludes 'loss damage or expense caused by inherent vice or nature of the subject-matter insured'; see also s 55(2)(c).

189 (1811) 3 Camp 133.

190 [1898] p 30.

partial loss of freight was recoverable, if not as a loss by fire, as a loss *ejusdem generis* falling within the general words 'all other losses ...'.

C – VIOLENT THEFT BY PERSONS OUTSIDE THE VESSEL

DEFINITION OF THEFT

Clause 6.1.3 of the ITCH(95) and cl 4.1.3 of the IVCH(95) insure against theft in terms of 'violent theft by persons from outside the vessel'. Theft is not an insured risk under the ICC (B) and (C): to provide coverage for this peril, the assured must seek either an all risks policy in the form of the ICC (A) or the Institute Theft, Pilferage and Non-Delivery Clause.[191]

Rule 9 of the Rules for Construction of Policy states: 'The term "thieves" does not cover clandestine theft, or a theft committed by any one of the ship's company, whether crew or passengers'. The provision in the ITCH(95) and the IVCH(95) is in fact a restatement of this definition. There are essentially two components to the peril: first, it has to be 'violent', and secondly, it has to be committed by 'persons from outside the vessel'.

Violent theft

The exclusion of 'clandestine' theft from the statutory definition is now made clearer by the use of the word 'violent' in the Hulls Clauses. *La Fabrique de Produits Chimiques v Large*[192] is the authority for this requirement. Mr Justice Bailhache had no doubt that, 'in a policy of marine insurance pure and simple the risk of loss by thieves does not cover an ordinary clandestine theft, but only theft accompanied with violence'. In this case, the thieves had smashed two sets of doors in order to gain entry into a warehouse. The case is also an illustration of the fact that to constitute theft, there does not have to be an assault upon some person; violence to property will suffice. To exclude furtive theft, American policies employ the term 'assailing thieves' to describe the risk.

Athens Maritime Enterprises Corpn v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Andreas Lemos[193] illustrates the point that the time at which violence is used or displayed is crucial. On this occasion, the gang armed only with knives used force to make good their escape. As the act of appropriation had already been completed when force or a threat of force was used, the theft was held to be clandestine in nature.[194] Any force or violence demonstrated after the crime had been accomplished does not constitute theft or, for that matter, a riot or piracy.

191 See Appendix 19.

192 [1923] 1 KB 203. As the requirement of violence was satisfied in this case, it was unnecessary for the judge to answer the question which he had raised as to whether in a warehouse to warehouse policy the word 'theft' is also to be limited to theft by violence. He felt inclined that it ought to be so limited.

193 [1982] 2 Lloyd's Rep 483.

194 As violence was not displayed before or during the commission of the crime, the acts of the gang did not constitute a riot, theft, or piracy.

Persons from outside the vessel

Even as early as 1874, the term theft had already acquired a certain fixed meaning in the law of marine insurance. In *Taylor v Liverpool and Great Western Steam Co*,[195] all the judges pointed out that even though the word 'theft' was ambiguous, as to policies of insurance it had always been associated with theft by 'persons outside the ship and not belonging to it'.

The most instructive case on the subject, however, is *Steinman & Co v Angier Line*,[196] where an excellent historical account was given by Lord Justice Bowen, who gave the rationale for the rule as follows:

> 'The broad principle of commercial law was and is that the ship, in the absence of express provision to the contrary, was liable to the cargo owner for losses occasioned by theft committed on board ... Insurers ... are not responsible for simple theft committed on board the vessel, because it is presumed with reason, that the accident has happened through some default of the captain or crew.'

The concept of 'theft' in marine insurance refers to acts of depredators outside the ship, the thief who 'breaks through and steals'.

Dishonest intention

Another requirement, which is not expressly spelled out, but is obviously implied in the statutory definition, is dishonest intention. In *Nishina Trading Co, Ltd v Chiyoda Fire and Marine Insurance Co Ltd*,[197] though the main issue was concerned with the peril of 'taking at sea',[198] the Court of Appeal nevertheless offered its opinion on the subject of theft, as the Institute Theft, Pilferage and Non-delivery Clause was incorporated into the policy. Lord Denning MR had no doubt that the act committed by the shipowner did not constitute theft. He pointed out that:[199]

> 'They only raised money on mortgage. They may have thought that they had some sort of lien on the goods … but if they honestly believed it, they would not be guilty of "theft". No ordinary person would call it "theft" if they honestly thought they had a right to do it.'

All the judges agreed that dishonesty is an essential ingredient for the offence of theft; and 'unless dishonesty is shown, no one should be branded as having committed a theft'.

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195 (1874) LR 9 QB 546 at p 551. A dispute in relation to an exception of theft under a bill of lading.

196 [1891] 1 QB 619, CA.

197 [1969] 2 All ER 776, CA.

198 The court's ruling that the act of master and owner in mortgaging the goods constituted 'taking at sea' is now overruled by the House of Lords in *The Salem* [1983] 1 Lloyd's Rep 342. It is now established beyond doubt that 'takings at sea' does not cover a 'wrongful misappropriation by a bailee, just as much as by anyone else'. In fact, 'any loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel' is now expressly excluded by cl 4.6 of the ICC (B) and (C). Such a loss would naturally be covered by an all risks policy.

199 [1969] 2 All ER 776 at p 779, CA.

INSTITUTE THEFT, PILFERAGE AND NON-DELIVERY CLAUSE

The above clause insures against not only violent, but also furtive theft, and non-delivery of cargo.[200] Cargo could, of course, just simply disappear without trace or explanation. In *Cleveland Twist Drill Co (GB) Ltd v Union Insurance of Canton*,[201] the plaintiff's claim was for the loss of a number of drills which they had shipped from London to New York. When the ship arrived in New York, six cases were missing, eight cases were completely empty and two were partly empty. The drills were insured under a marine policy with a clause covering all risks of theft and pilferage. As no force or violence was used, it was evident that the theft was secret, and on this Lord Justice Scrutton of the Court of Appeal noted that: 'It is one of the peculiarities of secret theft that you do not see it happen; and that being so, when the article has disappeared, how are you going to prove that it is a loss by theft as distinct from a loss by wrong delivery?'

In relation to cargo which has not been delivered at its proper destination or which has mysteriously disappeared, it is necessary in each case to explore the possibility of jettison, pilferage, and misdelivery as the cause of loss. A wrong delivery by accident, mistake or negligence is clearly not theft; and the mere fact that goods are not delivered, or are delivered to the wrong person, will not *per se* found a claim for theft. However, under the circumstances of the case, the court was able to make the inference that they were all pilfered by the same people.

In *Forestal Land, Timber and Railways Co Ltd v Rickards*,[202] Mr Justice Hilbery had occasion to examine the scope of the term 'non-delivery' appearing in a clause which insured against 'damage by hook, oil, theft, pilferage and non-delivery'. He pointed out that the term 'non-delivery' following enumerated perils insured against was not an insurance against an entirely new risk, but is limited by the context in which they are found. He said:

> 'Where such words occur in such a context, the insured need not prove loss by theft or pilferage. It is enough if he proves non-delivery and gives *prima facie* proof that the goods were not lost in any way other than by theft or pilferage.'

Under the current Institute Theft, Pilferage and Non-Delivery Clause, 'non-delivery' is confined to the entire package, and does not apply to a case where a part of the contents of a case or container is missing.

D – JETTISON

Very little need be said about jettison, save that cl 6.1.4 of the ITCH(95) and cl 4.1.4 of the IVCH(95) refer to the jettison of part of a vessel's equipment or furniture. The general principles discussed earlier in relation to cargo are also relevant here. As in the case of goods, a ship's equipment or furniture may have

200 See Appendix 19.

201 (1925) 23 Ll L Rep 50, CA.

202 [1940] 4 All ER 96 at p 110.

to be jettisoned at a time of danger, such a loss incurred by the shipowner is recoverable as a general average sacrifice.[203]

E – PIRACY

'Piracy' has, over the years, been shuttled back and forth – first, as an insured peril under marine risks, then under war risks, and has now reverted back to marine risks policies of insurance. It was an insured peril under the old SG policy, but was later excluded from it by the 'warranted free of capture and seizure clause'.[204] It is now specifically insured under cl 6.1.5 of the ITCH(95), cl 4.1.5 of the IVCH(95), and under the ICC (A) by reason of the policy being for all risks, but is not insured under the ICC (B) and (C). It is to be noted that 'piracy' (and barratry) is specifically *excepted* from the War Exclusion Clause (cl 24.2) of the ITCH(95) and cl 21.2 of the IVCH(95), and cl 6.2 of the ICC (A), but not from the War Exclusion Clause (cl 6.2) of the ICC (B) and (C) because it is unnecessary to do so.[205]

Definition of 'piracy'

Rule 8 of the Rules for Construction states that: 'The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.' The definition, as suggested by the word 'includes', is by no means exhaustive, and case law has to be referred to for a fuller understanding of the concept.

Nesbitt v Lushington[206] is perhaps the earliest of cases to touch upon the subject of piracy. In a violent and unlawful manner, an armed mob attacked, boarded and arrested the ship, and forced the master to sell to them a cargo of corn at a reduced price. The court had no doubt that such an act was piratical in nature. In *Palmer v Naylor*,[207] a group of emigrants murdered the captain and part of the crew, and carried away the ship. The court held that 'the seizure of the vessel ... the taking her out of the possession and control of the master and crew, and diverting her from the voyage insured, were either direct acts of piracy or acts so entirely *ejusdem generis*, that ... they are clearly included within the general words at the end of the peril clause'.

The *locus classicus* on the subject is *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd*,[208] where the Court of Appeal, which had to interpret the meaning of the word 'piracy' – an insured peril under the policy in question – held that it meant 'piracy in a popular or business sense'. A pirate is a man who plunders 'indiscriminately for his own ends, and not a man who is simply

203 See cl 10 of the ITCH(95) and cl 8 of the IVCH(95) on the right of recovery for general average losses

204 Staughton J in *The Andreas Lemos* [1982] 2 Lloyd's Rep 483 at p 486, described this whole process by which war risks insurance was put together as 'convoluted'.

205 It is unnecessary to exclude piracy from the War Exclusion Clause of the ICC (B) and (C) because it is not an insured peril under these policies.

206 (1792) 4 TR 783.

207 (1854) 10 Ex 382.

208 [1909] 1 KB 785, CA.

operating against the property of a particular State for a public end …'. Such a man would satisfy 'his personal greed or his personal vengeance by robbery or murder …'. As the goods intended for the Bolivian government were seized by Brazilian malcontents who were acting purely for public and political motives, the loss was held not to have been caused by pirates.

Later, in *The Andreas Lemos*,[209] it was declared that force or the threat of force is an essential element of piracy, and this has to occur at such a time as to cause the loss. Another issue which concerned the court was whether piracy had to occur within territorial waters.[210]

On the first issue, Mr Justice Staughton held that 'theft without force or a threat of force is not piracy under a policy of marine insurance'. Furthermore, because the act of appropriation had been completed when the force or a threat of force was used, the loss was not a loss by piracy. He pointed out that, 'the very notion of piracy is inconsistent with clandestine theft'. In the light of the fact that both the perils of 'theft' and 'piracy' require the use of force, it may be difficult to distinguish between them. In fact, he acknowledged that 'most, if not all, pirates are also thieves, but the exclusion of the piracy from the marine cover by the fc & s clause refers to pirates who are thieves as well as any other pirates'.[211]

On the second question, as regards the place for the commission of the act, it was decided that there was no reason to limit piracy to acts outside territorial waters. In the context of marine insurance, 'if a ship is, in the ordinary meaning of the phrase, "at sea" ... or if the attack upon her could be described as "a maritime offence" ... then for the business purposes of a policy of insurance she is ... in a place where piracy can be committed'.

An assured who has subscribed to the ICC (B) or (C), but wishes to seek cover for 'piracy,' would have to do so specially, as neither the Institute War Clauses (Cargo) nor the Institute Strikes Clauses (Cargo) insure against 'piracy'.[212] To protect himself against 'piratical' theft (and all other types of theft), he would have to take up the Institute Theft, Pilferage and Non-delivery Clause. [213] And as for malicious damage caused by pirates and others, he would have to take up the Institute Malicious Damage Clause. In this regard, the scope of cover provided by the ICC (B) and (C) is clearly inadequate.

209 [1982] 2 Lloyd's Rep 483, QB.

210 For a definition of the crime of piracy under public international law, see In *Re Piracy Jure Gentium* (1934), 49 Ll L Rep 411, PC; [1934] AC 586.

211 Under the old SG policy, it was unnecessary to distinguish between the three forms of forcible robbery, as 'pirates, rovers and thieves' were all insured risks. Under the ITCH(95) and the IVCH(95), piracy and violent theft are both insured marine risks.

212 See Chapter 14.

213 See Appendix 19.

F – CONTACT WITH LAND CONVEYANCE, DOCK OR HARBOUR EQUIPMENT OR INSTALLATION

This was previously part of a larger provision which included 'contact with aircraft or similar objects, or objects falling therefrom' which has now been moved to cl 6.2.5 of the ITCH(95).[214] If it were not for this clause, any loss or damage sustained by a vessel which collides into fixtures or landed objects such as a 'land conveyance, dock or harbour equipment or installation' would not be recoverable, for strictly speaking, such risks are not maritime in character and therefore do not fall within the cover for perils of the seas nor the 3/4ths Collision Liability Clause. If a vessel were to incur damage by toppling over in a graving dock, repair yard, or by colliding into a dock wall, such a loss would be recoverable.[215]

G – EARTHQUAKE, VOLCANIC ERUPTION OR LIGHTNING

Clause 6.1.7 of the ITCH(95) and cl 4.1.7 of the IVCH(95) are self-explanatory, covering damage caused by earthquake, volcanic eruption or lightning. The cost of the removal of volcanic dust immediately comes to mind as a loss falling within this cover.

H – ACCIDENTS IN LOADING DISCHARGING OR SHIFTING OF CARGO OR FUEL

The above clause, now contained in cl 6.1.8 of the ITCH(95)[216] and cl 4.1.8 of the IVCH(95) was originally inserted as a result of the decision of *Stott (Baltic) Steamers Ltd v Marten and Others*,[217] where the House of Lords decided that damage caused to the hull, when a part of the crane's tackle broke causing the boiler, which was being lowered, to fall into the hold of the ship, was not recoverable as a loss by peril of the seas or a peril *ejusdem generis* therewith. As neither sea perils nor any of the then enumerated additional perils of the Inchmaree clause had caused the loss, it was held not indemnifiable. Having been moved from cl 6.2 of the ITCH(83) to cl 6.1 of the ITCH(95) means that it is now no longer subject to the due diligence proviso.

214 Discussed in Chapter 12.

215 See N Hudson, *The Institute Clauses* (1995, 2nd edn), p 91.

216 Previously cl 6.2.1 of the ITCH(83).

217 [1916] AC 304, HL.

I – ALL RISKS: THE ICC (A)

Meaning of 'all risks'

The Institute Cargo Clauses (A) provides, but with exceptions, coverage for 'all risks' of loss of or damage to the subject-matter insured.[218] The meaning of the term 'all risks' was examined in a number of cases,[219] the most notable of which are *Schloss Brothers v Stevens*,[220] and *The Gaunt Case*.[221] Before proceeding to discuss these authorities, it is relevant to note that the statutory and contractual exclusions have to be borne in mind when considering the scope of an 'all risks' or a similarly worded policy. Whether the wording of such a policy is clear and precise enough to override the statutory exceptions listed in s 55(2)(b) and (c),[222] – in which the Act itself allows exceptions to be made to the general rule – is a matter which has to be raised. To put the question in a more direct way: is an insurer of an 'all risks' cargo policy liable for 'ordinary wear and tear';[223] 'ordinary leakage and breakage';[224] 'inherent vice or nature of the subject-matter insured';[225] and for any loss proximately caused by delay,[226] or by rats or vermin?[227]

In the leading authority on the subject, *The Gaunt Case*, Lord Sumner's oft-cited explanation of the term is instructive. After giving examples of what would and would not fall within the concept of 'all risks', he said:[228]

> 'There are, of course, limits to "all risks". There are risks and risks insured against. Accordingly, the expression does not cover inherent vice or wear and tear or British capture. It covers a risk, not a certainty; it is something which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried.

218 The exceptions are contained in cll 4, 5, 6 and 7.

219 See, eg, *Jacob v Gailler* (1902) 7 Com Cas 116 and *Theodorou v Chester* [1951] 1 Lloyd's Rep 204.

220 [1906] 2 KB 665.

221 [1921] 2 AC 41, HL.

222 Which are reproduced in cl 4 of all the ICC.

223 Discussed in Chapter 10,

224 See s 55(2)(b). An assured may, of course, by means of an express clause, insure specifically against ordinary leakage. In *Traders & General Insurance Association Ltd* (1921) 38 TLR, barrels of soya-bean oil were insured as 'To pay average, including the risks of leakage in excess of 2 per cent'; in *De Monchy v Phoenic Insurance Co of Hartford & Another* (1929) 34 Ll L Rep 201, turpentine was insured against 'Leakage from any cause in excess of 1 per cent'; and in *Dodwell & Co, Ltd v British Dominions General Insurance Co Ltd* (note) in [1955] 2 Lloyd's Rep 391, barrels of oil carried in one vessel were insured to include 'risks of leakage irrespective of FPA', and in another, to include '... risk of leakage from any cause whatever'. These cases, and the exception of loss by ordinary leakage, are discussed in Chapter 10.

225 See s 55(2)(c). An assured may insure specifically against a loss by inherent vice: see *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 54, where the policy on a cargo of canned pork butts was insured against 'all risks of whatsoever nature and/or kind ... including inherent vice and hidden defect'. For a discussion of this case, and the exception of inherent vice, refer to Chapter 10.

226 Section 55(2)(b).

227 Section 55(2)(c).

228 [1921] 2 AC 41 at p 57, HL.

> Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally, the description of "all risks" does not alter the general law; only risks are covered which it is lawful to cover ...'

That ordinary wear and tear and inherent vice are not insured under an 'all risks' policy has been made patently clear in the above remarks. However, should a more pointed statement be required, the words of Lord Birkenhead LC may be referred to: '[all risks] cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies.'

In *Schloss Brothers v Stevens*,[229] the insurance was against 'all risks by land and by water'. Mr Justice Walton, whose decision was approved by the Court of Appeal, was clear in his mind that 'effect must be given to the expression "all risks"' and that it 'must be read literally as meaning all risks whatsoever', but proceeded to say that it has also to be qualified:[230] '... they were intended to cover all losses by any accidental cause of any kind occurring during the transit' and that 'there must be a casualty'. On this occasion, the goods which were damaged as a result of exposure to damp, because of an abnormal delay in the transit arising from unusual and accidental causes, were held to be covered by the policy. The abnormal character of the delay rendered the loss fortuitous.[231]

Thus, it would appear that the exclusion under s 55(2)(b) and cl 4.5 excepting the insurer from liability for 'loss damage or expense proximately caused by delay' applies only to normal, but not unusual and abnormal delay.[232] The question as to whether the same holds true for abnormal or extraordinary (as opposed to ordinary) leakage and wear and tear has never been raised. There does not appear to be any reason why such exceptional losses should not be covered by an 'all risks' policy. Guidance on this point may be drawn from an observation made by Lord Sterndale of the Court of Appeal in *The Gaunt Case*:[233]

> '... where the evidence shows damage quite exceptional and such as has never in a long experience been known to arise under normal conditions of such a transit, there is evidence of the existence of a casualty, or something accidental, and of a danger or contingency which might or might not arise, although the particular nature of the casualty was not ascertained.'

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229 [1906] 2 KB 665.

230 *Ibid*, at p 673.

231 See also *E D Sassoon & Co Ltd v Yorkshire Insurance Co* (1923) 16 Ll L Rep 129, CA.

232 The ancient cases of *Tatham v Hodgson* (1796) 6 Term Rep 656; *Taylor v Dunbar* (1869) LR 4 CP 206; and *Pink v Fleming* (1890) 25 QBD 396 on delay have to be read with caution. First, they were decided in the days when the last cause in point of time was prevalent; secondly, and more significantly, the policies under consideration were not for 'all risks' and as such, any loss caused by delay, normal or otherwise, was not covered. Unless delay is specifically enumerated as a peril insured against, the loss would not be recoverable however fortuitous the circumstances of the loss may be. This is also true of the ICC (B) & (C). See also *E D Sassoon & Co Ltd v Yorkshire Insurance Co* (1923) 16 Lloyd's Rep 129, CA, where 'mould or mildew', which was specifically insured against under the policy in question, was held to be the proximate cause of loss of the cigarettes which, after a considerable period of delay during transit, arrived badly mildewed.

233 (1920) 1 KB 903 at p 910, CA; [1921] 2 AC, HL.

A loss may be rendered fortuitous and accidental by reason of the *exceptional* or *extraordinary* character of the delay.

It is to be noted that even if a policy is worded as generously as to insure against 'all and every risk whatsoever however arising', the element of fortuity is still required. This was held to be so by the case of *London and Provincial Leather Process Ltd v Hudson*[234] where the insurance in question, though described as the 'widest possible policy', was nevertheless held to be bound by the requirement that the loss has to be *accidental.* Lord Justice Goddard said that, 'there must be in some form or another a casualty'. And as the firm to which the assured had sent their undressed skins of leather to be processed had become insolvent, and their affairs were taken over by an administrator according to German law, the assured was held to have been deprived by 'some unexpected acts of his property in the goods or of his possession of the goods'.[235]

The same is true, said the judge, with regard to embezzlement by an agent. Feeling somewhat uneasy about the fact that the act which had occasioned the loss was consciously and wilfully committed, and there was nothing therefore fortuitous or accidental about it, nonetheless, he rationalised (citing fire as an example) that in so far as the assured was concerned, the loss was unexpected and fortuitous.

In *F W Berk & Co v Style*,[236] a similar restrictive interpretation was also given to an almost identical clause in a policy insuring against 'all risks of loss and/or damage from whatsoever cause arising'. It was held not to be wide or clear enough to cover a loss, damage or expense proximately caused by inherent vice, a loss which can by no means be described as accidental or fortuitous.

It is evident from the above discussion that the critical and operative word is 'risks', which is commonly understood to be associated with fortuitous and accidental events. In the light of this, one has then to consider whether a clause which refrains from using the word 'risks', but simply states that the insurance covers 'all loss or damage howsoever caused' would be adequate to impose liability on an insurer for all losses, whether fortuitous or not. There is no authority directly in point. It is submitted that in each case, it is a question of interpretation and all the terms of the policy (including exceptions, if any) would have to be considered, together with the intention of the parties, commercial realities and practice. But one point which is clear is that no clause, however widely phrased, would be construed so as to allow an assured the right of recovery for a loss which he has brought about by his own wilful act of misconduct.[237]

234 [1939] 3 All ER 857 at p 861, KBD.

235 The skins were insured against 'all risks' during carriage; and while in Germany, against 'all and every risk whatsoever'.

236 [1955] 1 QB 180. Not surprisingly, a month later, in *Gee Garnham Ltd v Whittall* [1955] 2 Lloyd's Rep 562, a similar interpretation was given to the same clause by the same judge.

237 Note that s 55(2)(b) and (c), but not s 55(2)(a), expressly allow a policy to 'otherwise provide'. This necessarily means that the defence of wilful misconduct can never be overridden by an express term of a policy.

Misappropriation and conversion of cargo

In *Integrated Container Service Inc v British Traders Insurance Co Ltd*,[238] the subject-matter of insurance was containers which were leased to a firm that subsequently became bankrupt. Some of the containers belonging to the assured were lost, some damaged, and some were made the subject of a lien for port dues and warehouse charges. The Court of Appeal could 'see no reason why the risk of unlawful sale by a third party should be excluded. The plaintiffs effectively lose their containers whether the sale is lawful under a lien – port regulations or a process of judicial execution – or unlawful'. The loss caused as a consequence of the insolvency of the lessee of the containers was held to be covered by the 'all risks' policy. The same result was arrived at in *London and Provincial Leather Process Ltd v Hudson*[239] discussed earlier.

Insolvency and financial default of the owners, manager, charterers or operators of the vessel

Whilst on the subject of insolvency, the cases of *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd (The Mandarin Star)*[240] and *The Salem*[241] deserve a mention. By reason of a financial dispute over the payment of charter hire, which were in arrears, between the owners and the charterers of *The Mandarin Star*, the shipowners converted cargo belonging to the assured to their own use. Such a circumstance was held to amount to a 'taking at sea'.[242] This decision has, for reasons which need not concern us here, been overruled by *The Salem*.[243] However, a comment which is particularly relevant to the present discussion is that made by Lord Roskill, who took the opportunity to point out that 'if cargo interests require cover for such a loss, they must seek either an "all risks" policy or some other appropriate form of cover'.[244] But as can be seen in the next paragraph, the truth of this statement was short-lived.

Today, an 'all risks' cover in the form of the ICC (A) would not be adequate to protect an assured for an event such as that which occurred in *The Mandarin Star*. It would now be ensnared by the exclusion of cl 4.6 which appears in all the ICC: the insurer is excepted from liability for 'loss damage or expense arising from insolvency and financial default of the owners managers charterers

238 [1984] 1 Lloyd's Rep 154 at p 162, CA. The second issue of the case on the recoverability of sue and labour charges is discussed in Chapter 17.

239 [1939] 3 All ER 857 at p 861, KBD.

240 [1969] 2 All ER 776, CA.

241 [1983] 1 Lloyd's Rep 342, HL.

242 The Court of Appeal had erroneously held that the peril of 'taking at sea' was not confined to capture and seizure, but covered a case of conversion of cargo provided that it was not committed 'in harbour, nor in port, but "at sea"'. The act of the shipowner could not be classified as 'theft' because, first, there was no violence involved, and secondly, there was no dishonest intention on the part of the shipowners.

243 [1983] 1 Lloyd's Rep 342 at p 349, HL. *The Salem* has re-established the rule that 'taking at sea' involved the deprivation of possession whether by seizure or capture of cargo: the peril did not include the risk of the shipowner misappropriating the goods.

244 It would now have to be an 'all risks' policy but without an exclusion such as cl 4.6 of the ICC (A), (B) and (C).

or operators of the vessel'. The objective of this clause is, obviously, to encourage cargo owners to use reputable, reliable and financially-sound carriers to transport their goods. The terms 'insolvency' and 'financial default' are indeed wide.[245] To be insolvent, one does not have to be declared a bankrupt: simply not being able to pay debts would suffice. The clause, as worded, does not apply to a case where the financial position of a third party is responsible for the loss.

Burden of proof

One of the main advantages of an 'all risks' cover, as opposed to an enumerated risks policy in the form of the ICC (B) and (C), relates to the important question of proof. In the words of Lord Sumner in *The Gaunt Case*:[246]

> 'When [the assured] avers loss by some risk coming within "all risks" ... he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty ... I do not think that he has to go further and pick up one of the multitude of risks covered, so as to show exactly how this loss was caused. If he did so, he would not bring it any the more within the policy.'

In similar vein, the Lord Chancellor said:[247]

> '... the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which in fact occasioned his loss.'

Though the burden of proof is, in some respects, lighter than a policy of enumerated risks, this does not mean that the assured will not be required to disprove any counter theory that may be put forward by the insurer designed to show that the loss was not fortuitous, for example, wear and tear or inherent vice. In *Theodorou v Chester*,[248] the plaintiffs were required to rebut the insurer's defence that the damage sustained by the sponges were due to ordinary and normal risks of transit. As the plaintiffs were able to show that the cargo was damaged as a result of an accidental and extraneous cause, they succeeded in their action.

As regards the standard of proof, we are recently reminded by the case of *Fuerst Day Lawson v Orion Insurance Co Ltd*[249] that the standard is the same as in all civil actions, that of the balance of probabilities.

245 For a detailed account of the pressures put forward by the Federation of Commodity Associations to modify the wording of particular commodity contracts, and other aspects of the clause, see *O'May*, pp 201– 203.

246 [1921] 2 AC 41 at p 58, HL.

247 *Ibid*, at p 47.

248 [1951] 1 Lloyd's Rep 204.

249 [1980] 1 Lloyd's Rep 656.