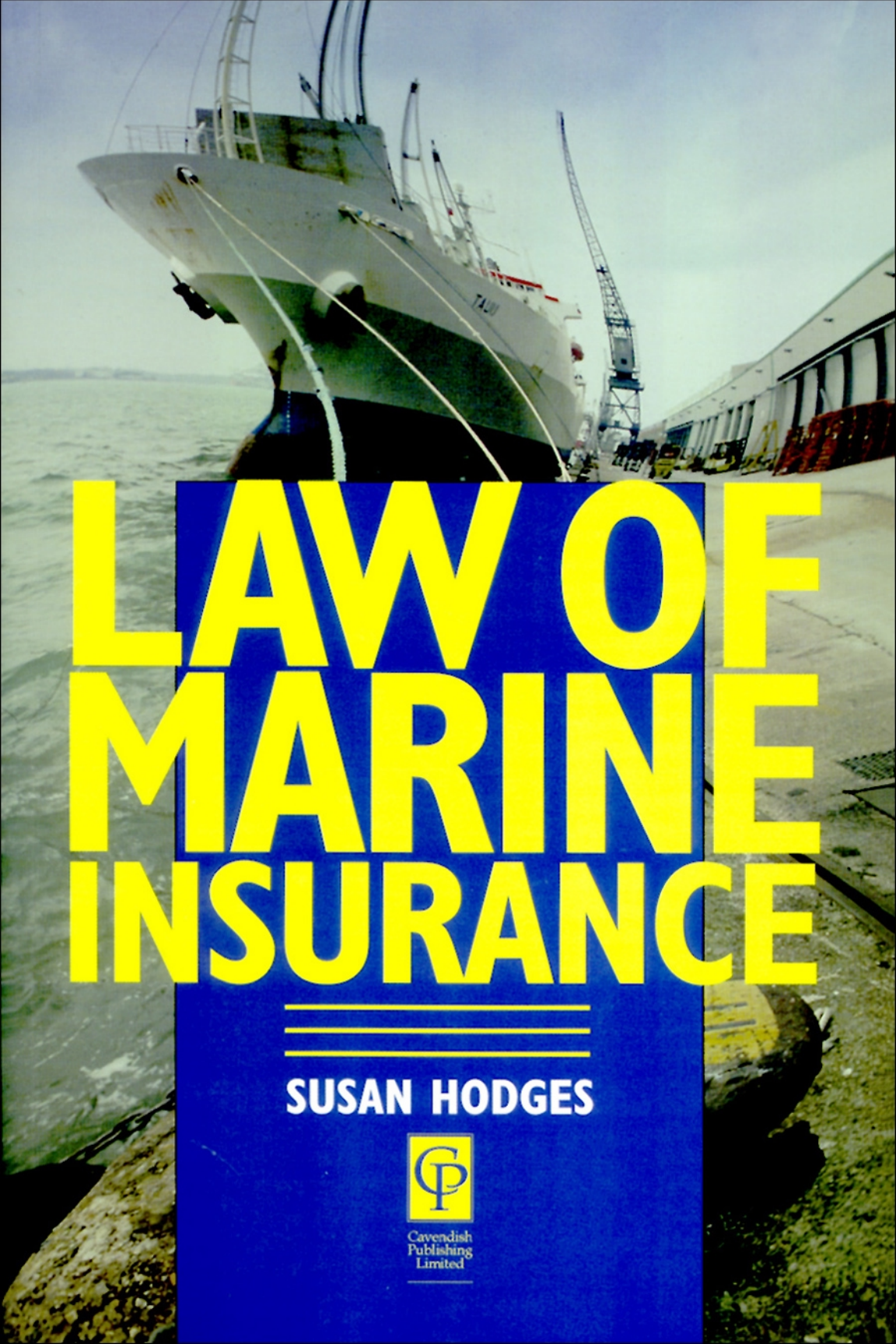

LAW OF MARINE INSURANCE

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CHAPTER 8

THE CAUSE OF LOSS

INTRODUCTION

The legal theory of causation has always been regarded as one of the most troublesome areas of the law. This was pointed out in *Ashworth v General Accident Fire and Life Assur*ance *Corpn*[1] by Mr Justice Black, who said: 'I know of no problem in the whole science of the law more abstruse than that of causation. The philosophers have had much to say about it.' Furthermore, the matter is aggravated by the fact, as one Law Lord has observed, that 'the terminology of causation in English law is by no means ideal. It would be the better for a little plain English'.[2] The excessive use of Latin terms to describe the legal principles has not helped matters.[3]

It is necessary at the outset to mention that this chapter is concerned with the case where only one single loss is sustained during one accident or casualty, and that loss is brought about by the operation of more than one cause, that is to say, by a combination of causes. We are not concerned here with the problem of separate successive losses, each caused by a distinct peril operating independently to occasion the losses. In short, damage or loss sustained in two distinct incidents is outside the scope of the ensuing discussion.

THE RULE OF PROXIMATE CAUSE

The law on the subject of causation in marine insurance is contained in s 55(1) which declares in a somewhat tediously repetitive manner that:

> 'Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, as subject as foresaid, he is not liable for any loss which is not proximately caused by a peril insured against.'

According to Chalmers:[4] 'No principle of marine insurance law is better established than the rule of *causa proxima, non remota, spectatur*'. Section 55(1), which is a statutory declaration of this principle,[5] has been translated to mean that 'the immediate, not the remote, cause is to be considered'.[6]

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1 [1955] IR 268 at p 295, Supreme Court, hereinafter referred to simply as *The Ashworth Case*.

2 *Per* Lord Sumner in Becker, *Gray & Co v London Assurance Corpn* [1918] AC 101 at p 114, HL.

3 Eg, *causa proxima non remota spectatur*, *causa causans*, *causa sine qua non*, and *novus actus interveniens*.

4 Chalmers, p 78.

5 See Lord Brightman's judgment in *The Salem* [1983] 1 Lloyd's Rep 342 at p 350, HL.

6 As defined in PG Osborn, *A Concise Law Dictionary*; a similar definition given in Mozely & Whiteley, *Law Dictionary*. The word 'immediate' has been used in two senses, as a synonym to 'proximate' and also to denote the cause which is last in point of time. See eg, *Ionides v The Universal Marine Insurance Co* (1863) 14 CB (NS) 259, where both words were used without any explanation as to their meanings.

In marine insurance, the law of causation has 'in the course of years had a remarkable history'.[7] For a considerable period of time the principle of *causa proxima* was applied in different ways. However, the turning point in its history occurred in 1918 in the celebrated case of *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*,[8] where the House of Lords conclusively settled the law of proximate cause under s 55(1). Before proceeding to analyse the legal principles laid down in *The Leyland Case*,[9] it is necessary for the purpose of comparison (and to avoid confusion when reading earlier cases) briefly to comment on the law which existed before 1918.

The law before 1918

Before *The Leyland Case*, there were essentially two methods used by judges to ascertain 'the' cause of a loss. As in the Act, the common law has always recognised that only the *causa proxima* is to be considered; however, over the years, two sets of rules have been employed for determining the proximate cause in marine insurance.

According to one point of view, that applied in *Pink v Fleming*,[10] 'the *last* cause only must be looked to and the others rejected, although the result would not have been produced without them'. Worded in a different way, Lord Justice Lindley stated that:[11] 'It has long been the settled rule of English law with regard to marine insurance that only the *causa proxima* or *immediate* cause of the loss must be regarded.'[12] The last or immediate cause in point of time was for convenience selected as the *causa proxima*: simply taking the last event in point of time as the proximate cause is not a judicious, but a mechanical, process of making a selection. Rejecting all preceding links, the *last* link in the chain of causation was regarded as *the* cause of loss. This appears to be the rule favoured by most of the earlier judges.

Instead of using *time* as the criterion, another school of thought had looked for what was 'efficient' and 'predominant' as the *causa proxima*. This was applied by the Court of Appeal in *Reischer v Borwick*.[13] For a proper understanding of the rule, it is necessary briefly to refer to the facts of the case. As a result of a collision, the insured vessel, which sprang a leak, was anchored and temporarily repaired in order to take her out of immediate danger. Later, the effect of the motion of the water created by a tug sent to tow her to the

7 *Athel Line Ltd v Liverpool & London War Risks Insurance Association Ltd* [1946] 1 KB 117 at p 122, *per* Lord Greene MR.

8 (1918) AC 350, HL, hereinafter referred to as *The Leyland Case*.

9 *Ibid*.

10 (1890) 25 QBD 396 at p 397, CA, *per* Lord Esher MR.

11 *Ibid*, at p 398.

12 This rule, it would appear was founded upon the well-known maxim of Lord Bacon, cited in *De Vaux v Salvador* (1836) 4 Ad&E 420 at p 431 by Chief Justice Lord Denman: 'It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree.'

13 (1894) 2 QB 548, CA; 7 Asp MLC 493.

nearest dock for repairs caused the leak to resume, and the vessel sank and was abandoned.

Lord Justice Lopes, firmly rejecting the 'last' cause, perils of the seas, which was not an insured peril under the policy in question, held that 'the cause of the damage ... was the collision, and the consequences of the collision ... never ceased to exist, but constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable'.[14]

One cause of loss

There can be no problem when only one cause is identifiable to have occasioned a loss. For example, in *Ballantyne v Mackinnon*,[15] the defects in the design and construction of the vessel; and in *Wadsworth Lighterage and Coaling Co v Sea Insurance Co*,[16] the general debility of the barge was held to be the sole cause of loss. Obviously, the only question to be determined in such a case is whether such a cause of loss is covered by the policy.

Under this heading, reference must next be made to *Atlantic Maritime Co Inc v Gibbon*,[17] which has been discerned as the authority illustrating the fact that it is possible for a single cause of loss to be covered by two heads of claim.[18] The Court of Appeal held that the 'real' and 'efficient' cause of the loss was the restraint of princes and not civil war, and that it was 'immaterial that the restraint was also an incident of a civil war, as the civil war, *per se*, was not responsible for the loss'. Whether regarded as one cause falling within two heads of claim or as two causes, the effect is the same: a court has still to decide which one of the two heads of claim (or two causes) is the proximate cause of loss. In effect, the same matter is being looked at, but from a different angle.

More than one cause of loss

A casualty at sea is more often than not precipitated by a combination of causes. Perils of the seas, for instance, may initially appear to have caused a loss, but there is generally another force (or forces) which could oust or prevail over perils of the seas, or any insured peril, as the proximate cause of loss. It has been said that a cause rarely operates by itself to occasion a loss: there is almost invariably an array of contributing factors and influences working behind the

14 *Ibid*, at p 553. O'May, *Marine Insurance* (1993, 1st edn), p 320, hereinafter referred to simply as O'May, following Arnould, para 775, has, it would appear, erroneously reported that collision and perils of the sea were both held as proximate causes. Lord Lindley pointed out that the loss was 'proximately, though not exclusively, caused by the collision'. None of the judges, though they had acknowledged the fact that perils of the seas was a cause of loss, had attributed it as another proximate cause of the loss. If perils of the seas was held also as a proximate cause, the loss would not have been recoverable because it was expressly excepted under the policy.

15 (1896) 2 QB 455.

16 (1929) 34 Ll L Rep 285. See also *Fawcus v Sarsfield* (1856) 119 ER 836, where unseaworthiness was the sole cause of loss.

17 [1953] 2 All ER 1086, CA.

18 See Arnould, para 77; and O'May, p 320.

scene, and this has led to metaphors such as 'beads in a row' and 'links in a chain' being used to describe the successive events leading to the loss.

In *The Leyland Case*,[19] Lord Dunedin had aptly described the situation as follows: 'But there are certain perils which, so to speak, pray in aid the perils of the sea.' Unseaworthiness, for example, 'which may assume according to the circumstances an almost infinite variety, can never be the sole cause of the loss'. According to the learned Lord Wright, it must 'always be only one of several co–operating causes'.[20] A peril is required in order to evince that the vessel, or some part or quality of it, is less fit than it should have been and hence the casualty ensues.[21] A combination of causes can often be expected to be responsible for a casualty.[22]

When two or more causes are seen to operate to occasion a loss, controversies and differences in opinion often arise as to how one cause is to be singled out, in preference to another cause (or causes), as 'the' cause of the loss. By what criterion is the choice to be based on? The common law (and s 55(1)) has always employed the rule of *causa proxima* to resolve such a dispute. But, as the above discussion has revealed, different rules have been applied in the law of marine insurance for the purpose of determining the proximate cause of a loss. The question which has now to be considered is: which of the two theories, namely that proposed in *Pink v Fleming*[23] or that in *Resicher v Borwick*,[24] is to be applied to s 55(1)?

Meaning of 'proximately'

What exactly does the word 'proximately', appearing in s 55(1), mean? The perplexed question as to whether a judge should trouble himself with 'distant causes' and 'go into a metaphysical distinction between causes efficient and material and causes final' or 'look exclusively to the proximate and immediate cause of the loss'[25] again reared its head, but this time in the House of Lords in *The Leyland Case*,[26] the facts of which are as follows: *The Ikaria* was insured, *inter alia*, for perils of the seas, but was warranted against 'all consequences of hostilities'. After she was torpedoed, she was taken alongside a quay in the outer harbour. There she sustained more damage when she bumped against the quay and sprang a leak. She was then ordered to a berth where she was moored. But eventually, her bulkheads gave way, she sank and became a total

19 [1918] AC 350 at p 363, HL.

20 *Per* Lord Wright, *Smith, Hogg & Co Ltd v Baltic Insurance Co* (1940) 19 Asp MLC 382 at p 384, HL.

21 Per Lord Wright, *A/B Karlshamns Oljefabriker & Another v Monarch SS Co Ltd* 82 Ll L Rep 137 at pp 155-156, HL.

22 According to Arnould, para 775, a hint that more than one cause could be attributed to a loss is traceable, as early as 1774, to the celebrated case of *Vallejo v Wheeler* (1774) 1 Cowp 143; but *Hagedorn v Whitmore* (1816) 1 Stark 157, however, has been identified as the first case to recognise this possibility.

23 (1890) 25 QBD 396.

24 (1894) 2 QB 548, CA; 7 Asp MLC 493.

25 *Per* Willes J, *Ionides v The Universal Marine Insurance Co* (1863) 14 CB (NS) 259 at p 289.

26 [1918] AC 350, HL.

loss. The shipowners claimed for a loss by perils of the seas. In ascertaining the relative rights of the parties, the court had to determine the proximate cause of loss. The obvious choices were 'perils of the seas' and 'consequences of hostilities'.

Lord Shaw, in a graphic and informative speech, illustrated his understanding of the law of proximate cause with the following comment:[27]

> 'To treat *proxima causa* as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of a fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause … What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency.'[28]

Though proximity in time was emphatically rejected, 'this does not mean, however, that the last cause necessarily can never be the real cause of any loss or injury'.[29]

Lord Dunedin further clarified matters by stating that the solution lay in:[30]

> '... settling as a question of fact which of the two causes was what I will venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two. In other words, you seek for the *causa proxima*, if it is well understood that the question of which is *proxima* is not solved by the mere point of order in time.'

The principle of *The Leyland Case* was subsequently applied[31] in two more House of Lords decisions, namely, *Board of Trade v Hain SS Co*[32] and *Yorkshire Dale SS Co Ltd v Minister of War Transport, The Coxwold*,[33] both of which were concerned with war risks. In the latter, Lord Wright was again given the opportunity to refer to his hobby-horse:[34]

> 'This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or metaphysician, would understand it. Cause here means what a business or

27 *Ibid*, at p 369.

28 *Resicher v Borwick* (1894) 2 QB 548, CA; 7 Asp MLC 493 was approved by the House of Lords.

29 *Per* Salmon LJ, *Gray & Another v Barr* [1971] 2 Lloyd's Rep 1 at p 14, CA.

30 [1918] AC 350 at p 363.

31 For a concise summary of the legal position before and after *The Leyland Case*, see *Gray and Another v Barr* [1971] 2 Lloyd's Rep 1 at p 5, CA; and *Wayne Tank & Pump Co Ltd v Employer's Liability Assurance Corpn Ltd* [1974] QB 57 at pp 66–67, CA.

32 [1929] AC 534, HL.

33 (1942) 73 Ll L Rep 1 at p 10, HL.

34 See also Lord Wright's comments on causation in *Smith, Hogg & Co Ltd v Baltic Insurance Co* (1940) 19 Asp MLC 382 at p 384, HL.

> seafaring man would take to be the cause without too microscopic analysis but on a broad view ... The question always is what is *the* cause, not merely what is *a* cause.'

Both cases have confirmed beyond doubt that *The Leyland Case* had stated the correct legal principle of causation in marine insurance. For emphasis, reference may be made to the succinct words of Lord Shaw in the said case:[35]

> '... proximate cause is an expression referring to the efficiency as an operating factor upon such the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of *reality, predominance, efficiency*.'

It is now conclusively settled that 'proximately' in s 55(1) denotes that which is proximate in efficiency rather than in time.[36]

For completeness, it has to be mentioned that under the rule of *causa proxima* as defined by *The Leyland Case*, there is no room for the application of the principle of the *novus actus interveniens*. In *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd*,[37] Lord Denning MR showed his intolerance of this concept in the following comment:

> 'I must say that I do not care for this emphasis on *novus actus interveniens*. It seems to me to be going back to the old and forsaken test of the latest in time. I would reject *novus actus*. I would ask, as a matter of common sense, what was the effective or dominant cause ...?'

A common sense approach

Adjectives such as 'direct', 'directly caused',[38] 'dominant',[39] 'effective', 'efficient',[40] 'predominant', and 'real' have been used by judges to assist them in their task of identifying the proximate cause of a loss. At best, they serve merely as a guide or yardstick, for ultimately, and most of the judges are in agreement on this, common sense has to prevail and this seems to be the best, and perhaps most reliable, measure for determining the proximate cause of a loss.

In *Athel Line Ltd v Liverpool & London War Risks Insurance Association Ltd*,[41] Lord Greene MR was resigned to the fact that: 'the point at which it appears to

35 [1918] AC 350 at p 370.

36 More light is shed on the subject in *The Ashworth Case* [1955] IR 268 at p 289, where Black J of the Irish Supreme Court said that: 'It was made clear in *The Leyland Case* that proximate cause has a special connotation in marine insurance cases. It does not mean the cause nearest in time. The cause which is truly proximate is that which is proximate in efficiency …'

37 (1974) QB 57 at p 67, CA, hereinafter referred to as *The Wayne Tank Case*.

38 Lord Sumner in *Becker, Gray and Co v London Assurance Corpn* [1918] AC 101at p 113, (decided three months before *The Leyland Case*) thought that 'direct cause' would be a better expression than *causa proxima*. In *JJ Lloyd's Instruments Ltd v Northern Star Insurance Co Ltd, The Miss Jay Jay* [1987] 1 Lloyd's Rep 32 at p 39, Slade LJ stated that the same meaning must be attributed to the phrase 'directly caused' as to the phrase 'proximately caused' in s 55(1).

39 See *Gray & Another v Barr* [1971] 2 Lloyd's Rep 1 at p 5.

40 See *Atlantic Maritime Co Inc v Gibbon* [1953] 2 All ER 1086 at p 1099, CA, where restraint of princes, and not civil war, was held to be the 'real, efficient' cause of the loss.

41 [1946] 1 KB 117 at p 122.

have come to rest at the moment, is that which lays it down that this type of question of causation is really a matter for the common sense and intelligence of the ordinary man ...'.

More recently, in *Gray v Barr, Prudential Assurance Co Ltd (Third Party)*,[42] Lord Denning MR summarised the legal position thus:

> 'Ever since [*The Leyland Case*] in 1918 it has been settled in insurance law that the "cause" is that which is the efficient or dominant cause of the occurrence or, as it is sometimes put, what is in substance the cause; even though it is more remote in point of time, such cause to be determined by commonsense.'

In *Heskell v Continental Express Ltd and Another*,[43] Mr Justice Devlin, though clear about the fact that common sense is a 'blunt instrument', nevertheless, had a great deal of faith in it. He said:

> '... I cannot believe that if the ordinary man thinks that two causes are of approximately equal efficacy, he cannot say so without being interrogated on fine distinctions.'

The last word on the subject has to be as expressed by Lord Shaw in *The Leyland Case*:[44]

> 'In my opinion … too much is made of refinements upon this subject. The doctrine of cause has been, since the time of Aristotle and the famous category of material, formal, efficient, and final causes, one involving the subtlest of distinctions … I will venture to remark that one must be careful not to lay accent upon the word "proximate" in such a sense as to lose sight of or destroy altogether the idea of cause itself.'

It is probably easier to state the legal principles relating to causation than to apply them. As 'questions of causation are mixed questions of fact and law' differences in opinion are bound to arise.[45]

More than one proximate cause of loss

That it would only be necessary to invoke *The Leyland* rule when there are several causes operating to occasion a loss is obvious. By equating the proximate cause with that which is efficient, real and dominant, the law has in effect invited judges to weigh the causes of a loss to determine their strength, influence and predominance. Under the old rule of taking the event which is last in point of time, there could only be one proximate cause of loss.[46] Under *The Leyland* rule, however, it is possible for there to be more than one proximate

42 [1971] 2 Lloyd's Rep 1 at p 5, CA. The words uttered by Lord Sumner in *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* [1941] AC 55 at p 71 that '*causa proxima* in insurance law ... is "in substance" the cause ... or the cause "to be determined by common-sense principles" …' were cited with approval.

43 [1950] 1 All ER 1033 at p 1048.

44 [1918] AC 350 at p 370.

45 *Per* Lord Brightman, *Shell International Petroleum Co Ltd v Caryl Anthony Vaughan Gibbs, The Salem* [1983] 1 Lloyd's Rep 342 at p 350, HL.

46 In this context, one can appreciate the advantages and convenience of choosing the immediate or last event as the proximate cause.

cause; and this was perceived by Mr Justice Black (dissenting) in *The Ashworth Case,* where he pointed out that:[47]

> '... the word 'dominant' was applied ... as denoting persistence and not exclusiveness. The dominance of the first cause, so understood, did not prevent the action of the sea from being also a real and effective co-operating cause.'

Two proximate causes of equal or nearly equal efficiency

That it is possible for there to be two proximate causes which are of equal or nearly equal efficiency was recently confirmed in *JJ Lloyd's Instruments Ltd v Northern Star Insurance Co Ltd, The Miss Jay Jay*,[48] where unseaworthiness due to design defects and an adverse sea were both held to be the proximate causes for the loss. In *The Wayne Tank Case*,[49] Lord Denning MR had also acknowledged the fact that it was possible for there to be 'not one dominant cause, but two causes which were equal or nearly equal in their efficiency in bringing about the damage'. In such a case, the problem which is likely to arise is when one of the proximate causes is covered by the policy and the other is not.

One included loss and one not expressly excluded loss

In recognising that it is possible for there to be two proximate causes of loss, the law has generated a further problem for itself. This was encountered in *The Miss Jay Jay*,[50] where Lord Justice Lawton observed that:

> 'It now seems settled law, at least as far as this court is concerned, that, if there are two concurrent and effective causes of a marine loss, and one comes within the terms of the policy and the other does not, the insurers must pay.'

And as the defendants did not expressly provide for the exclusion of unseaworthiness or design defects, the plaintiffs were able to recover under the policy.

In much simpler terms, Lord Justice Slade phrased the legal position as follows:[51]

> 'As there were no relevant exclusions or warranties in the policy the fact that there may have been another proximate cause did not call for specified mention since proof of a peril which was within the policy was enough to entitle the plaintiffs to judgment.'

Halsbury's *Laws of England* has summarised the law in a concise statement as follows: 'If one of these causes is insured against under the policy, and none of the others is expressly excluded from the policy, the assured will be entitled to recover.'[52]

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47 [1955] IR 268 at p 299.

48 [1987] 1 Lloyd's Rep 32 at p 36, CA. See also *Heskell v Continental Express Ltd & Another* [1950] 1 All ER 1033 at p 1048, though the dispute was in relation to a bill of lading, the remarks uttered by Devlin J on causation regarding 'co-operating' causes and causes of 'equal efficacy' are nevertheless relevant. See also the first instance judgment of *Wood v Associated National Insurance Co Ltd* [1984] 1 Qd R 507.

49 (1974) QB 57 at p 67, CA.

50 [1987] 1 Lloyd's Rep 32 at p 36, CA.

51 *Ibid*, at p 37.

52 4th edn, vol 25, para 181.

It has to be pointed out that the insurance under consideration in *The Miss Jay Jay* was a time and not a voyage policy. This fact was, of course, critical to the defendant's case. As distinct from a voyage policy, there is no implied warranty of seaworthiness in a time policy, which meant that unless the insurers were able to prove that *The Miss Jay Jay* was sent to sea in an unseaworthy state with the privity of her owners, and that that unseaworthiness caused the loss, they were liable for the loss. In so far as unseaworthiness is concerned, causation is of utmost importance in a time policy. Under a voyage policy, however, whether unseaworthiness did or did not cause the loss is irrelevant: the defense is essentially premised on a breach of a warranty, rather than on unseaworthiness as having caused the loss.

One included loss and one expressly excluded loss

The other side of the coin can be seen in the case of *Board of Trade v Hain SS Co Ltd*,[53] where Viscount Sumner of the House of Lords, in relation to a dispute under a charterparty, expressed the view that if a loss is 'the product of two causes, joint and simultaneous', and one of the causes is expressly excluded by an exception clause, the insurers are not liable. As they have expressly stipulated for freedom, the loss is not apportionable, and 'hence no part of it can fall on the policy'.

In a case concerned directly with insurance, albeit not marine, *The Wayne Tank Case*,[54] an exception was held to take priority over the general words of a policy. Lord Denning MR said that 'general words always have to give way to particular provisions'. In more positive terms, Lord Justice Roskill remarked:[55] 'I think the law in this respect is the same both for marine and non-marine, namely, that if the loss is caused by two causes effectively operating at the same time and one is wholly expressly excluded from the policy, the policy does not pay'. Arnould's observation that the above principle is now established 'virtually beyond doubt' has to be correct.[56]

The celebrated pre-statute case of *Cory v Burr*[57] is, of course, an authority directly in point, as a marine policy of insurance was under scrutiny. The House of Lords was confronted with the problem of having to determine which of the following causes was the proximate cause of the loss – barratry and/or seizure.[58] As the case was decided at the time when the rule of the immediate or

53 [1929] AC 534. Lord Sumner said much the same thing in his dissenting speech in *Samuel v Dumas* [1924] AC 431 at p 467: 'Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates'. This passage was approved by Morris LJ in *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, at p 138.

54 [1973] 2 Lloyd's Rep 237; [1974] QB 57. *Board of Trade v Hain SS Co Ltd* [1929] AC 534 was cited with approval by Lord Denning MR.

55 (1974) QB 57 at p 75, CA.

56 See Arnould, para 777.

57 (1883) 8 App Cas 393, HL.

58 The insured vessel was seized by Spanish revenue officials because of the barratrous acts committed by the crew who were engaged in smuggling.

last in point of time prevailed, seizure, which was an excepted peril, was declared as the proximate cause of the loss. Today, a court could well hold both as the proximate causes of loss. The result, however, would be same: as seizure was *expressly* excepted, the loss would not have been recoverable even if barratry was held as another proximate cause of loss.[59]

The first step is to determine what the proximate cause(s) of loss is. If, after weighing the relative efficiency of the causes, only one proximate cause is identified, the next step is to determine whether it is a peril insured against. If, however, more than one proximate cause of equal efficiency is ascertained, the progression from here is to determine whether either of the proximate causes is expressly excluded by the policy. Naturally, if none of the two proximate causes is expressly excluded by the policy, the loss would be recoverable. On the other hand, if one or both of the proximate causes is expressly covered by an exclusion, the loss would not be recoverable.[60]

The 'Paramount Clause'

The War Exclusion, Strikes Exclusion, and Malicious Acts Exclusion of the ITCH(95) and the IVCH(95); the Radioactive Contamination Exclusion of the ITCH(95); and of the IVCH(95) are all made subject to a clause, referred to as the paramount clause, which states:[61] 'The following clauses shall be paramount and shall override anything in this insurance inconsistent therewith'. The aim of this clause is to clarify that, in the event of a conflict between any of these exclusion clauses and 'anything' in the insurance, the exclusion clauses are to prevail.

More than two proximate causes of equal or nearly equal efficiency

The question as to whether it is possible for there to be more than two proximate causes, all of equal or nearly equal efficiency, has yet to be considered by a court of law. There does not appear to be any reason why this should not be possible or why such a case could not be resolved by invoking the principle proposed in *The Wayne Tank Case*. Should one of the proximate causes (be it out of three or more) be expressly excluded by the policy, an insurer should not, for the same reasons given above, be made responsible for the loss.

'Subject to the provisions of this Act'

The general rule of proximate cause under s 55(1) is subject to two overriding considerations. It is subject to the provisions of the Act and to any express term

59 Suffice it is to mention here that as seizure is expressly excluded by the War Exclusion Clause of the ITCH(95) and the IVCH(95), a loss caused by a barratrous seizure is not recoverable even if barratry is considered as another proximate cause of loss. It would appear that the loss would be recoverable only if barratry is the sole proximate cause of loss in which case the war exclusion clause and its paramount clause are inapplicable. See *The Hai Hsuan* [1958] 1 Lloyd's Rep 578.

60 In the court of first instance in *Wood v Associated National Insurance Co Ltd* [1984] 1 Qd R 507, the judge held unseaworthiness and wilful misconduct as the proximate causes for the loss; on appeal [1985] 1 Qd R 297, only the latter finding was affirmed.

61 But not in the ICC.

of the policy which provides otherwise. This necessarily means that the general rule may well be displaced by statutory and/or contractual exceptions.

Section 55(2)(a) uses a different causative expression, 'attributable to', to qualify the exception of wilful misconduct of the assured. The wording of this provision has to be compared with those in s 55(2)(b) which spells out that an insurer is not liable for any loss 'proximately' caused by delay. Whether any significance should be placed upon the difference in the use of terminology has to be explored. It is noted that s 39(5) has also, in relation to unseaworthiness under a time policy, employed the term 'attributable to' to describe the cause of loss. Does this mean that the general rule of proximate cause is to be set aside whenever the term 'attributable to' appears in the Act?

'Attributable to' wilful misconduct

The phrase 'attributable to' may at first sight appear to be 'neutral'[62] and innocuous. But as the following discussions will reveal, the matter is far from straightforward. Surprisingly, there is hardly any post-1906 authority dealing directly with the causative aspects of the defence of wilful misconduct: *Samuel v Dumas*[63] appears to be the only case which has shed some light on the subject, albeit from the dissenting judgment of Lord Sumner.[64]

Wilful misconduct as the proximate cause of loss

The majority of the House of Lords in *Samuel v Dumas*, after having firmly established that scuttling is not a peril of the sea, held that, as the loss was *proximately* caused by an act of wilful misconduct committed by the shipowner,[65] the loss was not recoverable.[66] As this was essentially the basis of the decision, there was no need for the majority of the House to examine the meaning of the words 'attributable to' in s 55(2)(a). The insurers' defence was based simply on the fact that the loss was not caused by an insured peril.[67] They could not rely on s 55(2)(a) because the plaintiff-mortgagee was not in any way involved in scuttling the ship.

62 *Per* Kerr LJ in *The Salem* [1982] 1 Lloyd's Rep 369 at p 381.

63 [1924] AC 431, HL.

64 In a different context, Kerr LJ of the Court of Appeal in *The Salem* [1982] 1 Lloyd's Rep 369 at p 381, in reference to the old 'seaworthiness admitted clause' (where the word 'attributable' was used to qualify the wrongful act or misconduct of the shipowners), was content with simply stating that 'these are neutral words which cannot be read as intended to alter the well established principles of causation in this field'. It is submitted that this remark should not be taken at its face value: what the judge had probably intended to say was that the proximate cause of a loss has first to be determined before any question relating to the applicability of the above clause can be considered.

65 See also *Wood v Associated National Insurance Co Ltd* [1985] 1 Qd R 297, where the Australian Appeal Court held that an act of reckless disregard could constitute wilful misconduct.

66 And this is so whether the action is brought by the shipowner, who is himself guilty of wilful misconduct, or by an innocent assured (such a mortgagee or a cargo owner) who is not in any way to be blamed for the loss.

67 If the shipowner was bringing the claim, the insurer would have an added reason for not settling the claim. The insurer would also plead the general defence that no man can take advantage of his own wrong. But in so far as an innocent party is concerned, the insurer can only rely on the ground that the loss was not covered by the policy.

Wilful misconduct as a remote cause of loss

The dissenting judge, Lord Sumner, however, appears to be the only member of the House to have taken a keen interest in the wording of s 55(2)(a).[68] He had to rely on the difference in wording between ss 55(1) and 55(2)(a) to support his point of view. In a lengthy speech, the most part of which need not concern us here, he alone held that the loss was proximately caused by perils of the seas, even though sea water was deliberately let into the ship by the orders of her owners and there was nothing accidental or fortuitous about the loss. Boldly he asked:[69] 'Why is the language varied and the words "attributable to" used instead of "proximately caused by"?' He pointed out that the legislature, if it had wanted to, could have easily added (in s 55(2)(b)) wilful misconduct to delay as a proximate cause of loss, for which it expressly states that the insurer is not liable. After holding that the loss of the ship was proximately caused by a peril of the seas, which meant that the loss was recoverable, he then went on to explain how the defence of wilful misconduct, as stated in s 55(2)(a), was to be employed'.[70]

First, he rationalised that parliament did not have to legislate for the event of a loss proximately caused by the wilful misconduct of the assured. Such a loss is never recoverable because it can never be an insured peril.[71] Furthermore, in relation to an assured who is himself guilty of wilful misconduct, the loss is also governed by the cardinal principle that a man cannot take advantage of his own wrong. From this he concluded that s 55(2)(a) could not have been enacted to cover the case where wilful misconduct was the proximate cause of the loss. On this point, it is necessary to refer to a concise and perceptive statement made by Arnould to the effect that: '... the misconduct need not be the proximate cause in order for the subsection [s 55(2)(a)] to operate, for if this were so it would be largely superfluous.'[72]

Lord Sumner was, however, also conscious of the fact that a loss proximately caused by an insured peril (for example, fire or perils of the seas) could also be attributed to an act of wilful misconduct committed by the assured. He had no doubt that such a loss, though proximately caused by an insured peril, would not be recoverable if the assured himself was guilty of wilful misconduct. He had carefully avoided describing the assured's act of wilful misconduct as a remote cause, and his reason for so doing can be gleaned from the following comment he made:[73]

68 See also his remarks in *Britain SS Co v King (The Petersham)* and *Green v British India Seam Navigation Co Ltd (The Matiana)* [1921] 1 AC 99 at p 131, HL, where the term 'attributable' was interpreted as referring to a remote cause.

69 [1924] AC 431 at p 471.

70 Naturally, the majority view does not have to involve itself with such arguments, as once scuttling is held not to be a peril of the seas, the subject is immediately brought to a close. No one, not even an innocent party, such as a mortgagee, would be able to recover for such a loss which is not insured against.

71 Note that s 55(2)(a), unlike (b) and (c), is not qualified with the term 'unless the policy otherwise provides'.

72 Arnould, para 786.

73 [1924] AC 431 at p 472.

> 'It is to be observed that the whole section is framed to state for what an insurer is liable ... and is not framed as a definition of proximate or of remote causes .... the object of the section is to declare for what the insurer is liable and for what he is not.'

Lord Sumner obviously held the view that s 55(2)(a) was concerned with liability rather than causation. Nevertheless, his interpretation of s 55(2)(a) is informative:

> 'As a matter of construction s 55 seems to me to prescribe that the assured's wilful misconduct is a ground for refusing to him, but to him only, the indemnity, which the proximate origin of the loss would otherwise have brought about … I cannot see any need for introducing this question of misconduct, unless it is first assumed that the loss has been brought within the policy by being proximately caused by perils mentioned therein.'

According to Lord Sumner, a loss has to be *prima facie* recoverable before the assured could be disentitled of his right to indemnity under the policy: the giving with the one hand and taking away with the other was Lord Sumner's perception of the section.

He had earlier in the House, in *The Petersham and The Martiana*,[74] postulated that there was no connection between ss 55(1) and 55(2)(a). The latter, he said, 'precludes the implication of resort to the origin, to which a loss is "attributable" …'. He then went on to say that:

> 'I see no connection between expressly disabling an assured from recovering for a loss which, though in itself the proximate consequence of perils by the seas, is really self-inflicted by his ulterior wilful misconduct, and interfering with the statutory rule prescribed in s 55(1) in a case where an event has happened without fault in any one, and the only question is whether or not it is within the insurance effected.'

If one is to go a little further back in time,[75] a more cogent explanation of the law in this regard can be found in the judgment of Lord Campbell in another important case, *Thompson v Hopper*,[76] where he pronounced that:

> 'We are of opinion that the maxim relied upon can never be applied where it contravenes the fundamental rule of insurance law that the assurers are not liable for a loss occasioned by the wrongful act of the assured ...

The most forceful and instructive part of his judgment, however, lay in his rhetorical question:

> 'Is it to be said, then, that, to exempt the assurers from liability, the misconduct of the assured must be the direct and proximate cause of the loss? We think that, for this purpose, the misconduct need not be the *causa causans*, but that the assured cannot recover if their misconduct was *causa sine qua non*.'

74 [1921] 1 AC 99 at p 132, HL.

75 One should not be too hasty in referring to pre-1906 case law for the purpose of aiding in the construction of the provisions of the Act. However, unless a particular section (eg, s 60) has gone further than simply to consolidate the pre-existing law, reference to antecedent law may indeed be necessary if there is a doubt about what the language of the statute means. As s 55(2)(a) has not gone further, but is an enactment of pre-existing law, one is justified in referring to past cases: See *Bank of England v Vagliano Brothers* [1891] AC 107, at pp 144–145.

76 (1856) 6 E & B 937 at p 949; (1858) EB & E 1038.

The *causa sine qua non* or remote cause of a loss is, as a general rule, irrelevant. This is embodied in the heart of the maxim *causa proxima non remota spectatur*. But when a remote cause takes the form of an act of wilful misconduct, the rule of *causa proxima* has to give way, and rightly so, to another fundamental principle of English law, that a man shall not take advantage of his own wrong.

This was later made clearer in *Trinder, Anderson & Co v Thames & Mersey Marine Insurance Co*,[77] where Lord Justice Smith, after acknowledging the fact that remote causes were generally inconsequential, reminded the court that the maxim *causa proxima non remota spectatur* was qualified by a well established legal maxim, *dolus circuitu non purgatur*. This simply means that a loss, even though proximately caused by a peril insured against, would not be recoverable if it was also occasioned, albeit remotely, by the wilful misconduct of the assured.

The above discussion has clearly demonstrated the fact that the rule of proximate cause does not fit neatly within the scheme of things under s 55(2)(a). The arguments proposed in the pre-1906 cases cited above are equally relevant to the statutory defence under s 55(2)(a) as they were to the same defence under the common law. Lord Sumner's interpretation of the section, though it has not as yet been endorsed by a full court as stating the correct principle of law, is nonetheless rational and convincing. Its logic will become more apparent if one is to consider the case of a ship which has been intentionally set alight by or at the instigation of the shipowner. In such a circumstance, fire would invariably be regarded as the proximate cause,[78] and wilful misconduct of the shipowner, the remote cause of the loss.[79] Provided that the plaintiff himself is not guilty of wilful misconduct, he would be able to claim under the policy. For example, an innocent mortgagee would be able to recover for such a loss, but not the shipowner who is instrumental in causing the loss.[80]

Section 55(2)(a) does not say that an insurer is not liable for a loss proximately caused by the wilful misconduct of the assured; such a provision would be stating the obvious. If wilful misconduct committed by the shipowner is regarded as the sole proximate cause of a loss, the insurer would not be liable by reason of the fact that such a cause of loss is not a peril insured against. No one, not even a blameless plaintiff, will be able to claim for such a loss. Should the assured himself be guilty of wilful misconduct, the insurer would have an added reason for not settling the claim. He would also plead the maxim *dolus circuitu non purgatur* to free himself from liability.

The word 'attributable', which is not as specific or as direct as the term 'proximately caused by', was chosen for a purpose: the contingency which the

77 [1898] 2 QB 114 at p 124, CA.

78 See *Gordon v Rimmington* (1807) 1 Camp 123, *per* Lord Ellenborough: '... if the ship is destroyed by fire .... Fire is still the *causa causans* and the loss is covered by the policy'. See also *Slattery v Mance* [1962] 1 All ER 525; and *Schiffshypothekenbank Zu Leubeck AG v Norman Philip Compton, The Alexion Hope* [1988] 1 Lloyd's Rep 311, CA.

79 There is no reason why wilful misconduct cannot be regarded as 'a' (one of two or more) proximate cause of loss. But so far, there is no direct authority on this point.

80 See *The Alexion Hope* [1989] 1 Lloyd's Rep 311, CA.

section was specifically enacted to cover is where the proximate cause of the loss is a peril insured against, and the remote cause is wilful misconduct. Such a loss is only *prima facie* recoverable, as the assured would be stripped of his right to claim under the policy if his act of wilful misconduct is found to have remotely caused the loss. Viewed in this light, one could say that the phrase 'attributable to' was specifically chosen by parliament in order to displace the general rule of *causa proxima*.

Wilful misconduct as a proximate cause of loss

None of the above comments has touched upon the possibility of wilful misconduct acting as a proximate cause of loss. In the light of recent developments in this area of the law,[81] there is no reason why, for example, fire and wilful misconduct could not both be regarded as the proximate causes of a loss. Is s 55(2)(a) applicable to such a circumstance?

The last part of Lord Sumner's remark, cited earlier, could well accommodate the situation where an insured peril and wilful misconduct are both proximate causes of a loss. Such a loss would be brought within the policy by being proximately caused by the former. Even though one of the proximate causes (fire) may be covered by the policy, the loss is, nonetheless, irrecoverable. It could be argued that if wilful misconduct operating as a remote cause is sufficient to deprive an assured of his right to indemnity, he would, *a fortiori*, be denied recovery if it was a proximate cause of the loss.

Whether the section has contemplated the legal position of a loss where there are two proximate causes, one of which is wilful misconduct and the other a peril insured against, is doubtful. The term 'attributable to', however, is wide and neutral enough to apply to such a contingency. It would appear that if wilful misconduct of the assured can be ascribed to a loss, whether acting as a remote cause or as one of two or more proximate causes, the loss would not be recoverable. In any causative form, it is fatal to the case of an assured who has himself committed an act of wilful misconduct.[82]

The above reasons have obviously influenced the draftsman of the Institute Cargo Clauses to adopt the expression 'attributable to' in relation to the exception of a loss occasioned by the wilful misconduct of the assured.[83]

81 See, eg, *The Ashworth Case* [1955] IR 268; *The Wayne Tank Case* (1974) QB 57, CA; and *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32, CA discussed above.

82 It is significant to note that s 55(2)(a) will only prevent recovery for a loss attributable to the wilful misconduct of the 'assured'. Thus, an innocent mortgagee, whether suing as an original assured or as assignee, would not be able to recover under the policy, if the wilful misconduct of the shipowner is held to be the sole proximate cause of the loss: such a cause of loss is not insured peril. This is so even though he himself may have been free from blame. However, the position is different if one of the proximate causes of the loss is an insured peril; such a loss would, in so far as an innocent mortgagee is concerned, be recoverable even though the wilful misconduct of the shipowner in scuttling the ship may have operated as a remote cause or as another proximate cause of loss.

83 See cl 4.1 of the ICC (A), (B) and (C): 'In no case shall this insurance cover loss damage or expense attributable to wilful misconduct of the Assured.'

'Attributable to' unseaworthiness

Whether the above interpretation of the causative effect of the term 'attributable to' given to s 55(2)(a) in relation to the defence of wilful misconduct should also be given to s 39(5) on the issue of unseaworthiness in a time policy is another question which has to be examined.[84] In a time policy, the insurer is not liable for any loss 'attributable to' such unseaworthiness to which the assured is privy. The scope of s 39(5) and, in particular, the legal implications and causative effects of the term 'attributable to' have to be analysed.

Section 39(5) is of general application. It applies to all subject-matter insured under a time policy. As the Institute Hulls Clauses, both for voyage and time, do not have a specific clause on the subject of seaworthiness, s 39 applies. In all the ICC, however, there is the unseaworthiness and unfitness exclusion clause which bears a principle similar to that stated in s 39(5). As its name suggests, it is worded as an exception of liability for unseaworthiness and unfitness of the vessel. As cl 5 of the ICC has taken the matter out of s 39(5), it is best that it be left for discussion separately. This part will, therefore, concentrate only on the scope of s 39(5) as applied to a standard time policy on hulls.

Unseaworthiness, whether in a voyage or time policy, can occasion a loss either as:

- the sole proximate cause;
- a proximate cause; or
- a remote cause.

Unseaworthiness as the sole proximate cause of loss

One has to begin with the premise that a policy of insurance is to provide an assured with indemnity for losses caused by 'risks', and only for risks which are insured against. Unless specifically insured, a loss solely caused by unseaworthiness is not an insured risk under the Institute Hulls Clauses. As such, it should not be recoverable whether the assured is or is not privy to such condition of unseaworthiness.

This was the law before the passing of the Act. In *Fawcus v Sarsfield*,[85] the vessel, insured under a time policy, without encountering any more than ordinary risks, was obliged, owing to her defective state when she set sail, to put into a port for repair. The court ruled that, 'unless this loss arose from perils insured against, it cannot be cast upon the underwriters'.[86] The assured, although he was unaware of the existence of the defect and was not in any way blameworthy, could not recover the expenses of such repairs as were rendered

84 Under a voyage policy, an insurer would simply rely on breach of the implied warranty of seaworthiness (s 39(1)) to defend his case: the insurer is discharged from liability as from the date of the breach and does not, as in a time policy, have to show that the loss, or for that matter, any loss was caused by unseaworthiness.

85 (1856) 6 El & Bl 192 at p 204.

86 See also *Ballantyne v Mackinnon* [1896] 2 QB 455, where the Court of Appeal held that, 'the loss complained of arose solely by reason of the inherent vice of the subject-matter insured …'.

necessary in consequence of the unseaworthy state of the vessel. As the sole proximate cause of loss was unseaworthiness, which was not a peril insured against, the plaintiffs failed in their claim.

Another reason why a loss solely caused by unseaworthiness is not recoverable is that, as pointed out by Lord Justice Sumner of the House of Lords in *Samuel v Dumas*,[87] such a cause of loss is not a risk:

> 'So it is in cases on time policies, where the loss is directly caused by unseaworthiness, for then it is plain that the loss was a certainty, whatever the state of the weather or the sea ...'.[88]

The next question which arises is whether s 39(5) has altered the common law existing before 1906. More pointedly, can an assured now, by reason of s 39(5), recover under a time policy for a loss which is solely caused by 'such'[89] or the particular aspect of unseaworthiness to which he is not privy?

The three main English authorities concerned with s 39(5) are: *The Thomas and Son Shipping Case*,[90] *The Thomas Tyne and Wear Case*,[91] and more recently, *The Eurysthenes*.[92] Though not directly relevant to the issue at hand, these cases are, nevertheless, informative. In the first pair of cases, the loss was not exclusively caused by unseaworthiness, and in the last case, the policy under consideration was special, as by the Rules of the Association, the Club had agreed to indemnify the shipowner (a member) even for damage to cargo 'arising out of ... unseaworthiness or unfitness of the entered ship'. This case has, therefore, no bearing to the present discussion, as unseaworthiness which caused the loss was specifically covered by the said Rules.[93]

The Supreme Court of Ireland, however, in *The Ashworth Case*,[94] was squarely confronted with this problem. The facts of the case were not very much in controversy: as a result of unseaworthiness the vessel had to be beached during the course of a voyage. The trial judge found that she was sent to sea in an unseaworthy state with the knowledge of her owners, but as he had regarded a peril of the seas as the proximate cause of loss, the shipowners were to able to recover for the loss. On appeal, all the judges were in agreement that the loss was proximately caused by unseaworthiness and not by a peril of the

87 [1924] AC 431 at 468, HL.

88 Cited with approval by the trial judge in *Coast Ferries Ltd v Century Insurance Co of Canada and Others, The Brentwood* 23 DLR (3d) 226 at p 230, who said: '... due only to unseaworthiness, water had to come in, not by accident or by chance, but to be expected.' His decision was reversed on appeal on a different finding of fact; on appeal [1973] 2 Lloyd's Rep 232.

89 It is now accepted that s 39(5) has to be read as if the word 'such' had been inserted before the word 'unseaworthiness': see *Thomas & Son Shipping v The London & Provincial Marine & General Insurance Ltd* (1914) TLR 595, CA; and *Thomas v Tyne & Wear SS Freight Insurance Association* [1917] KB 938.

90 (1914) TLR 595, CA.

91 [1917] KB 938.

92 *Compania Maritime San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] 1 QB 49, CA.

93 As the loss which was caused by unseaworthiness was specifically insured against the shipowner's claim was prima facie recoverable.

94 [1955] IR 268.

sea, but differed in their finding as regards the question of privity. The majority, which found that the assured was aware of the condition of the ship in all the aspects which made her unseaworthy, held that the loss was not recoverable.[95]

The majority could have rested its decision on either or both of the following grounds:

- that unseaworthiness was not an insured risk under the policy in question; and/or
- that the assured was privy to the vessel's condition of unseaworthiness when she was sent to sea.

Mr Justice O'Byrne, in somewhat imprecise terms, said that, 'the unseaworthy condition of the ship was the dominant and effective cause of the loss ... and that the loss is attributable to that condition within the meaning of s 39(5) …'. Regrettably, the judgment delivered by Chief Justice Maguire is equally vague. What is clear, however, is that all the judges had taken great pains to inquire whether the ship was 'with the privity of the assured' sent to sea in an unseaworthy condition. From this, one can only deduce that if they were of the opinion that the first ground alone was sufficient to disentitle the assured of the right of recovery, it would not have been necessary for them to investigate further on the question of privity. From the tenor of the majority judgment, one is somehow led to believe that the decision was based on the second, rather than the first, of the two grounds. Otherwise, the inquiry as regards the question of privity would be superfluous. It would not be unreasonable to assume that, like Mr Justice Black, dissenting, the majority would have awarded judgment in favour of the plaintiffs if they had not been privy to the vessel's condition of unseaworthiness. 'Privity' was obviously the decisive consideration.

A similar approach was taken by the trial judge in the Canadian case *Coast Ferries Ltd v Century Insurance Co of Canada and Others, The Brentwood*.[96] Even after acknowledging the fact that it was unseaworthiness 'alone' which had occasioned the loss; that it was 'the proximate cause' of the loss; and (agreeing with Lord Sumner) that a loss 'directly caused by unseaworthiness ... was a certainty',[97] he nevertheless deemed it fit to award judgment in favour of the plaintiffs because they were found not to be privy to the vessel's condition of unseaworthiness. Surely, the corollary of this is that if the plaintiffs were aware of the vessel's condition, they would not be allowed to recover for the loss.

It is interesting to note neither of the cases has placed any importance on the fact that unseaworthiness was the sole proximate cause of loss, or that it was not

95 The dissenting judge, Mr Justice Black, held that, as the assured was not privy to the vessel's condition of unseaworthiness, which was the dominant cause of the loss, the loss was recoverable. It is important to note that he was not averse to holding both peril of the sea and unseaworthiness as 'co-operating proximate' causes of the loss. This aspect of his decision is discussed below.

96 [1973] 2 Lloyd's Rep 232, hereinafter referred to as *The Brentwood*.

97 Lord Sumner's comments were cited earlier.

an insured peril under the policy, or to the words 'attributable to' appearing in s 39(5) (or its equivalent).

Admittedly, with the exception of this first instance Canadian judgment, which has been overturned on a different finding of fact and on, what seems to be, a different ground,[98] none of the above decisions has expressly pronounced, though they might have implied, that provided that an assured is not privy to the vessel's condition of unseaworthiness, a loss solely caused by unseaworthiness is recoverable.

Arnould, citing *The Thomas and Son Shipping Case*[99] as authority, has, however, interpreted s 39(5) as follows:[100]

> 'It is not necessary, in order to exonerate the insurer from liability under the above proviso, that the unseaworthiness should be the sole cause of the loss; it is sufficient that the unseaworthiness was a *proximate* cause of the loss.'

The second part of this statement is supportable. But, with due respect, it is submitted that the opening words are by no means easy to sustain, as they seem to suggest that the section is applicable not only when unseaworthiness is a proximate cause of loss, but also when it is the sole cause of loss. Indeed, no British judge has yet directly ruled that a loss caused solely by unseaworthiness, to which the assured is not privy to, is recoverable under a standard form time policy on hull.

Section 39(5), it is observed, does not openly state that an insurer is to be made liable for a loss proximately caused by a condition of unseaworthiness of which an assured has no knowledge. Nor does it say, from the point of view of the assured, that he is to be conferred with the right to be indemnified for a loss which is solely caused by unseaworthiness. It is argued that such a loss, unless specifically insured against, is not indemnifiable, regardless of whether the assured is or is not privy to the vessel's condition of unseaworthiness.

On this point, the dissenting judgment of Mr Justice Black in *The Ashworth Case* is clearly worthy of attention:[101]

> '... whether the action of the sea upon the ship in question at any material time constituted a peril of the sea at all; for if it did not, no time need be wasted on the other question, since the loss would not be covered by the policy.'

Any statutory provision stating that an insurer is not to be made liable for any loss proximately caused by unseaworthiness would, as in the case of the defence of wilful misconduct discussed earlier, be superfluous for stating the obvious. If Parliament had intended to render an insurer liable for a loss 'proximately caused' by unseaworthiness in the event that the assured is not privy to such unseaworthiness, it would have said so in much clearer and more

98 The Appeal Court found that because the assured (shipowner) was guilty of the want of due diligence, and was therefore in breach of the proviso to the Inchmaree clause, they could not rely on the said clause.

99 (1914) TLR 595, CA, and see *George Cohen, Sons & Co v Standard Marine Insurance Co Ltd* (1925) 21 Ll L Rep 30.

100 Arnould, para 718.

101 (1955) IR 268 at p 293.

positive language.[102] The expression 'attributable to' must have been chosen for a good reason.

This area of law is in urgent need of clarification. It is submitted that s 39(5), as worded, should not be read as capable of imposing a liability upon an insurer for a risk which he has not, under the contract of insurance, specifically agreed to insure. Its use, as the next part of this discussion will reveal, has to be limited to the particular case where the loss is prima facie recoverable under the policy in question.

Unseaworthiness as a proximate cause of loss

An observation of Lord Justice Buckley of the Court of Appeal in *The Thomas and Son Shipping Case*[103] is particularly pertinent to this aspect of s 39(5). In terms very similar to that used by Arnould, he said: 'The question was not whether it was the sole cause, but whether it was a cause, in the sense of being a *proximate* cause'.

Briefly, the facts of the case are as follows. The ship was unseaworthy in two respects: first, the condition of her hull was defective – a fact to which the assured was not privy; and secondly, her crew was insufficient, of which the assured was aware. On this occasion,[104] the court held that unseaworthiness arising from the insufficient crew was 'a' cause of the loss. What the other proximate cause(s) of loss was was not discussed. The circumstances of the accident, however, seem to point to perils of the sea, an insured risk, as another proximate cause. If such were the case, the decision would clearly be supportable; the loss was *prima facie* recoverable by virtue of the fact that it was caused by a peril of the seas, but as the assured was privy to the particular aspect of unseaworthiness, namely, the insufficiency of her crew, which was another proximate cause of the loss, he had, because of his own blameworthy conduct, to be disentitled of his right to indemnity.

Lord Justice Buckley clearly supported the view that it was possible for there to be more than one proximate cause for a loss.[105] Mr Justice Black, the dissenting judge in *The Ashworth Case*,[106] was of the same mind; both perils of the sea and unseaworthiness were held as proximate causes of the loss. His application of s 39(5) was as follows:

> '... if the action of the sea – a peril of the seas – was a proximate cause of the loss, that loss was covered by the policy, notwithstanding that the unseaworthiness of

102 If this was the intention of parliament, it could have easily used the term 'proximately caused by', rather than 'attributable to' in s 39(5).

103 (1914) TLR 595, CA.

104 *Cf The Tyne and Wear Case* [1917] KB 938 where, in a suit arising out of the same accident, the court arrived at a different finding of fact: the loss was held to have been caused by reason of her defective hull.

105 In *Wood v Associated National Insurance Co Ltd* [1984] 1 Qd R 507, the trial judge found both unseaworthiness and wilful misconduct as the proximate causes of the loss. However, on appeal, [1985] 1 Qd R 297, only the latter was affirmed as the proximate cause of the loss.

106 (1955) IR 268 at p 300. Black J said that: '... Mr Justice Davitt [trial judge] seems to me to have thought that if the action of the sea was a proximate cause of the loss (as he held it was), the unseaworthiness of the ship could not have been equally a proximate cause (as I think it was).'

> the ship was a co-operating cause, unless the plaintiff shipowner was privy to the unseaworthiness at the time of sailing.'

Having attributed one of the proximate causes of the loss to a peril insured against, a recoverable loss, he felt justified in investigating further to determine whether the assured could be deprived of the right of recovery under the policy by reason of being privy to the vessel's condition of unseaworthiness, which was another proximate cause of loss.

That two proximate causes of loss can exist side by side to occasion a loss is now an accepted rule of law. Recently, it was applied in *The Miss Jay Jay*,[107] where both perils of the seas and unseaworthiness were held to be proximate causes of equal or nearly equal efficiency. As the former was an insured peril and the latter was not expressly excluded, the assured was able to recover under the time policy. The court would not have hesitated to strip the assured of his right to claim under the policy if he had been found to have been privy to the vessel's condition of unseaworthiness. Similar issues will also arise if negligence covered by cl 6.2.2 (the Inchmaree clause) of the ITCH(95) and unseaworthiness are both proximate causes of the loss.[108]

Such a construction would not only place s 39(5) in harmony with s 55(1) on the rule of proximate cause, but also in line with s 55(2)(a) on the defence of wilful misconduct. After all, s 39(5) is a specie of the defence of wilful misconduct. The difference in the law before and after the enactment of the Act was pointed out by Mr Justice Atkin in *The Tyne and Wear Case* as follows:[109] 'It was always necessary to show that the loss was the result of some misconduct. Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured.' It is submitted that, as in the case of s 55(2)(a) discussed earlier, s 39(5) should rightly be brought into play only if the proximate cause or one of the proximate causes of the loss is a peril insured against.

Unseaworthiness as a remote cause of loss

None of the above cases has considered the possibility of unseaworthiness conducing as a remote cause of loss. Would an insurer be exempted from liability for a loss which is proximately caused by a peril insured against, but remotely by unseaworthiness to which the assured was privy when the ship was sent to sea?

One could easily dismiss this question with the reply that the law of proximate cause is not concerned with remote causes: the very essence and objective of the rule of proximate cause is to eliminate remote causes when determining 'the' cause of the loss. But as the rule on proximate cause contained in s 55(1) is made 'subject to the provisions of this Act', of which s 55(2)(a) is one, it is necessary to inquire whether s 39(5), with identical causative language, is to be construed as another exception to the general rule.

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107 [1987] 1 Lloyd's Rep 32, CA.

108 See *The Brentwood* [1973] 2 Lloyd's Rep 232, BC CA.

109 [1917] KB 938 at p 941.

The courts have not, since the passing of the Act, been asked to make a ruling on this question. A pair of pre-1906 authorities, namely *Thompson v Hopper*[110] and *Dudgeon v Pembroke*,[111] have, however, dealt with this point. But as the principles laid down in s 39(5) were not then in existence,[112] these cases are not relevant to the present discussion.[113]

Perhaps, the answer can be found in the remarks made by Mr Justice Roche in *Cohen, Sons and Co v Standard Marine Insurance Co Ltd*,[114] who had given the decision of *The Thomas and Son Shipping Case*[115] a broad and generous interpretation:

> '... it is enough if a matter of unseaworthiness, being a matter to which the assured is privy, is a cause or part of the cause of the loss. I adopt the principle of Thomas's case ... that it is enough if the unseaworthiness to which the assured forms part of the cause of the loss.'

No qualification or restriction – that unseaworthiness has to be a proximate cause – has been imposed.[116]

Arnould states that, 'the proximate cause rule does not apply to a loss occasioned by the wilful act of the assured'. And as s 39(5) has been regarded by him as 'analogous' to s 55(2)(a) and by Mr Justice Atkin as an off-shoot of the defence of wilful misconduct, there is no reason why the same cannot be said about s 39(5).[117]

A time policy insurer does not have to rely on s 55(2)(a) to exempt himself from liability.[118] To free himself from liability for a loss which is 'attributable to' unseaworthiness, he does not have to go so far as to prove the commission by the assured of an act of wilful misconduct. Proof of a lesser degree of fault, that

110 (1856) 6 E & B 172, 937; (1858) EB & E 1038, where perils of the seas was held to be the proximate cause of loss. The Exchequer Chamber was, however, prepared for the sake of argument to assume that unseaworthiness had contributed as a remote cause of the loss. And even then, it held that such a remote cause was, regardless of whether the assured was or was not privy of the defect which rendered the ship unseaworthy, inconsequential.

111 (1877) 2 App Cas 284, HL. In this case, unseaworthiness was not even a remote cause.

112 Before the enactment of s 39(5), only the defence of wilful misconduct (now contained in s 55(2)(a)) was available to an insurer. In *Thompson v Hopper* (1856) 6 E & B 172, 937; (1858) EB & E 1038, the Appeal Court had correctly held the view the act of knowingly sending an unseaworthy ship to sea did not, *per se*, constitute an act of wilful misconduct.

113 In fact, Roskill LJ in *The Eurysthenes* [1977] 1 QB 49 at pp 74–75, had issued serious warning of the danger of relying on pre-1906 cases for the purpose of interpreting sections of the Act.

114 (1925) 21 Ll L Rep 30.

115 (1914) TLR 595, CA.

116 *Frangos & Others v Sun Insurance Office Ltd* (1934) 49 Ll L Rep 354, decided after the passing of the Act, is of little help: Even though the proximate cause of the loss was a peril insured against, the assured was not privy to the vessel's condition of unseaworthiness, the remote cause of the loss.

117 Arnould, para 718: 'It is submitted that, as in the analogous case of s 39(5), it is only necessary that the misconduct of the assured should be one of the effective causes of the loss.' Read in its proper context, it is clear that the word 'effective' was used in a general sense to mean a contributing (but not necessarily a proximate) cause.

118 In fact, an insurer would not be able to rely on this defence unless there is proof of fraud, a violation of the law, a breach of contract, an evil or a sinister intention, or reckless disregard.

of just being 'privy' to the particular feature of the vessel's condition of unseaworthiness to which the loss is attributable, will be sufficient to disentitle an assured of his right to recovery under the policy.

Just as unseaworthiness and perils of the seas are capable of generating problems relating to causation, so can unseaworthiness and negligence operating as contributory causes of loss.[119] Undoubtedly, these issues which have so far eluded judicial attention will one day have to be settled by a firm ruling from the bench.

'Unless the policy otherwise provides'

Lord Justice Slade in *The Miss Jay Jay*[120] pointed out that the words 'unless the policy otherwise provides' in s 55(1) have left the matter open to the draftsman of a policy to restrict or exclude the application of the subsection. The Institute Clauses have used a variety of causative expressions to qualify the terms of some of their perils: words such as 'attributable to'; 'reasonably attributable to'; 'arising from'; 'caused by'; 'proximately caused by'; and 'resulting from' are employed.[121] The question which has to be considered is whether such terms are to be awarded a meaning different from 'proximately caused', referred to in s 55(1). One could argue that because a different expression has been chosen, a different meaning must be intended. However, most judges would probably adopt the same approach as Mr Justice Scrutton and 'start with the consideration that to all policies of insurance, whether marine or accident, the maxim *causa proxima non remota spectatur* is to be applied if possible'. Another point he made is that when in doubt – where vague words have been used – they must be 'strictly' read 'in accordance with the ordinary maxim'.[122]

'Caused by'

Both the ITCH(95)[123] and the IVCH(95)[124] employ the term 'caused by' in the opening words of the 'perils' clause. In fact, this term is commonly used in all the Institute Clauses. Even though the words 'directly' or 'proximately' do not appear, it has always been understood that it has to be read as if the word 'proximately' was inserted before it.

In support of this, reference could be made to a speech delivered by Mr Justice Scrutton in *Coxe v Employers' Liability Assurance Corpn Ltd*:[125] 'The words ... "caused by" and "arising from" do not give rise to any difficulty. They are words which always have been construed as relating to the proximate cause.'

119 See, eg, *The Brentwood* [1973] 2 Lloyd's Rep 232, BC CA.

120 [1987] 1 Lloyd's Rep 32, HL.

121 See cll 1, 3, 5, 6, & 7 of the ICC(B).

122 *In Coxe v Employers' Liability Assurance Corpn Ltd* [1916] 2 KB 629 at pp 633 and 634.

123 Clause 6.1 and 6.2.

124 Clause 4.1 and 4.2.

125 [1916] 2 KB 629 at p 634. The same applies to the expression 'traceable to', but not 'indirectly caused by'.

To go beyond or exclude the maxim *causa proxima non remota spectatur*, more precise language would have to be used.[126]

The expression 'directly caused by' was previously used in the earlier versions of some of the provisions of the Inchmaree clause.[127] The word 'directly' does not add anything, and has the same meaning as 'proximately'.

'Attributable to'

As was seen, the expression 'attributable to' appearing in ss 39(5) and 55(2)(a) has been subjected to a great deal of intense judicial scrutiny. The same term also appears in the ICC (B) and (C), but there does not seem to be any reported case on the Cargo Clauses. There is no reason why the meaning given to the term 'attributable to' used in the Act should not also be given to the ICC (B) and (C) or that the addition of the word 'reasonably' should make any difference to the meaning of the term 'attributable to'.

'Consequences thereof'

The expressions 'consequences thereof' and 'consequent on' used in relation to war risks and insurance on freight, respectively, had caused some interest of whether they should be construed as having displaced the general rule of proximate cause.

The old 'warranted free of capture and seizure' clause had, *inter alia*, excepted the marine risks insurer from liability for 'consequences of hostilities or warlike operations …'.[128] Whether the words 'consequences of' are wide enough to oust the general rule of proximate cause was considered by the House of Lords in a trilogy of war risks cases beginning with the classic authority of *The Petersham and The Matiana;*[129] *Yorkshire Dale SS Company Ltd v Minister of War Transport, (The Coxwold);*[130] and *Liverpool & London War Risks Association Ltd v Ocean SS Co Ltd, (The Priam).*[131] Though the legal principles set out in these cases are now redundant in so far the 'fc and s' clause is concerned, nevertheless, the comments made by the law lords on causation are still relevant for the purposes of the present discussion.

126 The term 'directly or indirectly' caused by was held effective for excluding the rule of *causa proxima*. As Scrutton J was unable to understand what was meant by the expression 'indirect' proximate cause, he felt that it had to be interpreted to mean that a more remote link in the chain of causation was envisaged

127 The term 'caused through' was also used in an earlier version of the negligence cover of the Inchmaree clause; see Lord Justice Scrutton's interpretation of this term in *Lind v Mitchell*, (1928) 45 TLR 54, CA.

128 Commonly referred to as the 'fc and s' clause: 'Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations …'. The objective of the clause was to remove the war perils from the scope of the standard marine policy.

129 *Britain SS Co v The King (The Petersham)* and *Green v British India Steam Navigation Co Ltd (The Matiana)* [1921] 1 AC 99, HL.

130 (1942) 73 Ll L Rep 1, HL.

131 [1948] AC 243, HL.

The natural starting point in considering these cases has to be *The Petersham and The Matiana*. Although the main issue of the case was concerned with whether the loss of the vessels fell within the war or marine policies, some of the judges of the House, in particular Viscount Cave and Lord Sumner, took pains to examine the legal implication of the term 'consequences of'. One of the arguments raised by counsel in the case was to the effect that any loss attributable to warlike operations fell within the war risk policy. To this, Lord Sumner curtly replied:

> 'If that means that a loss, not proximately caused by warlike operations but (remotely) attributable to them, is one for which the insurers are liable, in a case like the present, it is contrary to s 55(1) of the Marine Insurance Act, for the policy contains no special provision to this effect, unless the words "consequences of warlike operations" are pressed beyond anything that they will bear.'

Viscount Cave, however, was content summarily to dismiss the issue with the following remark:[132]

> 'The rule, long established in cases relating to marine insurance ... that an insurer is not liable for any loss which is not proximately caused by a peril insured against, applies with full force to a clause such as that which is now under consideration ...'.

It has been made clear by these statements that the term 'consequences of' does not alter the fact that the rule of proximate cause applies.

In *The Priam*, the crux of the decision, interestingly enough, lies obscurely in Lord Porter's explanation for taking so much time on the subject. As his remarks on causation are particularly informative, it is sensible to quote them:

> 'I have, however, dealt with the question somewhat at length, lest it should be thought that the insurance of the *consequences* of hostilities or of warlike operations or, for the matter of that, of capture seizure arrest restraint or detainment by the King's enemies and the *consequences* thereof in any way abrogated or lessen the effect of the rule stated in s 55 of the Marine Insurance Act that the insurer is not liable for any loss which is not proximately caused by a peril insured against or that it widens the insurance so as to cover the consequences of consequences.'

The House of Lords was given another bite of the cherry to express its opinion on the subject of causation in *The Coxwold*,[133] where Lord Wright, another enthusiast of the law of causation, expressed the view that there was no causative connotation in the term 'consequences'. The remarks made by Mr Justice Willes in the ancient case of *Ionides v Universal Marine Insurance Co*,[134] to the effect that the words 'all consequences of hostilities' refer to the totality of causes, not to their sequence, or their proximity or remoteness, were cited with approval.[135]

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132 [1921] 1 AC 99 at p 107.

133 (1942) 73 Ll L Rep 1, HL.

134 (1863) 14 CB (NS) 259 at p 290.

135 Also cited with approval by Lord Sumner in *The Petersham* and *The Matiana* [1921] 1 AC 99 at p 131, HL.

That the word 'consequences' does not have the effect of reducing or nullifying the rule of proximate cause is now firmly established.[136]

'Consequent on'

Clause 15 of the current Institute Time Clauses (Freight) excepts the insurer from liability for any claim 'consequent on loss of time whether arising from a peril of the sea or otherwise'.[137] This clause was in use even as early as the latter half of the 19th century, as the case of *Bensaude and Others v Thames and Mersey Marine Insurance Co Ltd*[138] bears witness. None of the Law Lords, however, discussed the clause in causative terms. Lord Herschell said:

> 'The whole basis of the claim, of course, must be the loss of the subject-matter insured – that is, the freight. That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability.'

Later, in *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA, (The Playa de las Nieves)*,[139] the subject again came before the House for consideration. Lord Diplock, whose judgment was adopted by all the other law lords, postulated that:

> '... we are not concerned in the instant case with whether the loss of hire was "proximately caused" by a peril insured against in the sense in which that expression is used in s 55(1) of the Marine Insurance Act 1906. What we are concerned with is the construction of an exceptions clause which does not even use the word "cause". It contemplates a chain of events expressed to be either "consequent on" or "arising from" one another … the clause is concerned with an intermediate event between the occurrence of a peril insured against and the loss of freight for which the peril was, in insurance law, the proximate cause.'

The term 'consequent on' was not regarded as a causative, but as a descriptive expression defining the scope or extent of the exception. That it does not have a bearing on causation is now firmly accepted.[140]

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136 Three further House of Lords' decisions on war risks, namely, *Attorney-General v Ard Coasters Ltd (The Ardgantock Case*) and *Liverpool & London War Risks Insurance Association Ltd v Marine Underwriters of SS Richard De Larrinaga (The Richard De Larrinaga Case*) [1921] 2 AC 141; *Attorney-General v Adelaide SS Co Ltd (The Warilda)* [1923] AC 292, and *Board of Trade v Hain SS Co Ltd* [1929] AC 534; and a Court of Appeal decision, *Athel Line Ltd v Liverpool & London War Risks Insurance Association Ltd* [1946] 1 KB 117, CA, have all applied the rule of proximate cause without making an issue of the matter.

137 Commonly known as the 'time charter clause'.

138 [1897] AC 609 at p 614, HL, hereinafter referred to as *The Bensaude Case*. Later in *Turnbull, Martin & Co v Hull Underwriters' Association Ltd* [1900] 2 QB 402, the decision of *The Bensaude Case* was applied.

139 [1978] AC 853, HL.

140 See also *Russian Bank For Foreign Trade v Excess Insurance Co Ltd* [1918] 2 KB 123 at p 127, where the term 'claims due to delay' was held to mean the same thing as 'consequent on loss of time'.

It would appear from the above discussion that expressions such as 'consequences of' and 'consequent on' are evidently not specific enough to cut down or nullify the rule of proximate cause. In fact, the principle of *contra proferentum* is relevant here: In the case of *Coxe v Employers' Liability Assurance Corpn Ltd*,[141] Mr Justice Scrutton did not hesitate to point out that, 'if the defendants choose to employ very vague words of that kind, the words must be read strictly against them and in accordance with the ordinary maxim'.

141 (1916) 2 KB 629 at p 634.