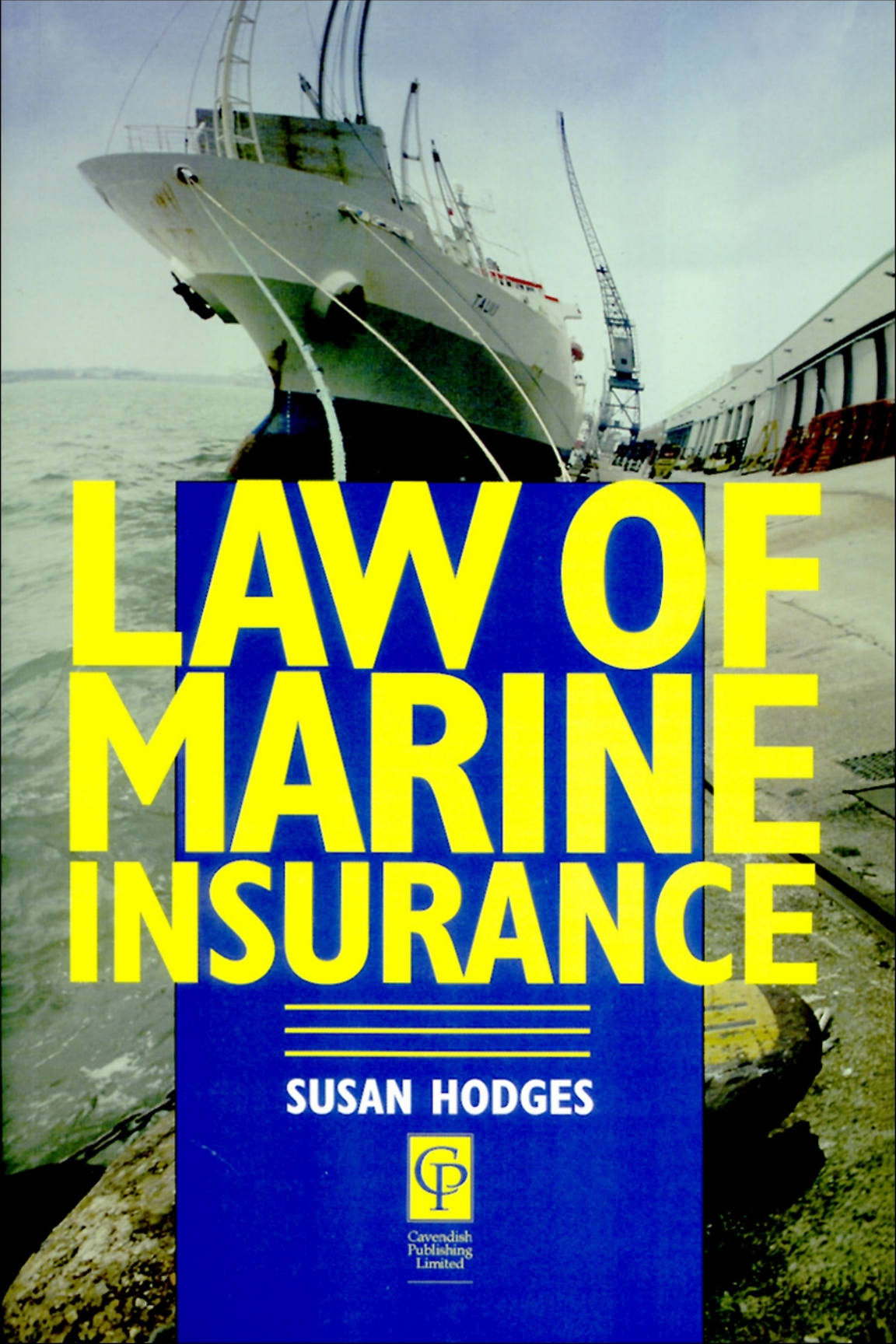

LAW OF MARINE INSURANCE

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CHAPTER 11

BURDEN AND STANDARD OF PROOF

INTRODUCTION

A ship with cargo on board sinks to the bottom of the sea, and whereupon a claim for the loss is instituted under the policy either by a shipowner, cargo owner, mortgagee, assignee and/or other interested parties is a scenario all too familiar in shipping. In such an event, should the circumstances of the case so permit, the plaintiffs would almost invariably plead fire, barratry and/or perils of the seas as the cause or causes of loss;[1] and the defendants, with the same degree of predictability, would rest their defence on the ground that there was no case to answer and/or that the loss was caused by the wilful misconduct of the plaintiffs – the two strings to their bow.

This pattern of proceedings is evident in a large number of cases all dealing with the thorny but important question as to the burden of proof. As the following discussion of the authorities will reveal, a case could be won or lost simply on this premise. Lord Brandon in *Rhesa Shipping Co SA v Edmunds, The Popi M* warned that:[2]

> 'No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.'

The notion of 'burden of proof' carries two obligations: the burden of producing evidence and the burden of persuasion.[3] The former refers to the practical process of adducing enough evidence to allow the trier of fact to find for him on the issue in question. This burden may shift from one party to the other during the trial.[4] The latter, however, which is what Lord Brandon was referring to in the above remark, remains constant on one side throughout the litigation. The burden of persuasion requires the burdened party to persuade the trier of fact to find for him on the issue. In simple terms, it means that he must prove his case.

The general rule on the burden of proof in marine insurance is stated by Mr Justice Greer in *Banco De Barcelona and Others v Union Marine Insurance Co Ltd* as follows:[5]

> 'It is indisputable that marine insurance cases afford no exception to the general rule that before a plaintiff can become entitled to judgment he must prove his

1 The most recent case to have received the attention of the Court of Appeal on these issues is *The Ikarian Reefer* [1995] 1 Lloyd's Rep 455, CA in which the decision of the trial judge was overturned on a different finding of fact.

2 [1985] 2 Lloyd's Rep 1 at p 6, HL.

3 The distinction was drawn in *Northwestern Mutual Life Assurance Co v Linard, The Vainqueur* [1973] 2 Lloyd's Rep 275, USDC.

4 In *The Vainqueur*, *ibid*, at p 280, the burden of producing evidence shifted to the defendants after the plaintiffs had made out a *prima facie* case.

5 (1925) 30 Com Cas 316 at p 317. See also *The Vainqueur*, *ibid*, at p 279, *per* Ward, DJ: 'Generally, the burden of proof in an action on marine insurance is to show that a loss arose from a peril covered by the policy is on the plaintiff.'

> case, that is to say, he must establish his cause of action to the reasonable satisfaction of the tribunal.'

Where the defendants are concerned, all that they have to do is to deny the plaintiffs' allegations; they are by no means obliged to plead an affirmative defence. This was made perfectly clear in *The Popi M* by Lord Brandon as thus:[6]

> 'Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.'[7]

With these general principles in mind, it is proposed that the burden and standard of proof in relation to a plaintiff's claim for a loss by perils of the seas, barratry, or fire will each be discussed separately. In the process, the burden of proof in relation to the defence of wilful misconduct would, needless to say, also arise naturally for consideration.

A – PROOF OF LOSS BY PERILS OF THE SEAS

Like any other civil action, the burden of proof of a claim under a marine policy of insurance lies with the plaintiffs. They have to prove to the satisfaction of the court that the loss was caused by a peril insured against. Where perils of the seas is asserted as the proximate cause of loss, they would have to make out a *prima facie* case of an accidental or fortuitous loss before the defendants would be called upon to present their defence. As a general rule, the plaintiffs have to provide direct proof pointing to a *specific* accident or casualty responsible for the loss. However, as will be seen, this may not always be possible in which case they would wish to rely on the presumption of a loss by an unascertainable peril of the seas.

This part on perils of the seas will first discuss the burden of proof of the plaintiffs and then of the defence. As regards the position of the plaintiffs, first, the general principle of proof will be discussed; secondly, the presumption of a loss by an unascertainable peril of the seas – by which an unexplained loss and the case of a missing ship may be proved – will be examined; and finally, the standard of proof will be considered. The position of the defendants requires a consideration of the defence of wilful misconduct and the application of a rule known as the 'third alternative'.

BURDEN OF PROOF ON THE PLAINTIFFS

That the plaintiffs have to prove that the loss was proximately caused by a peril of the seas is incontrovertible. In *The Tropaioforos*,[8] Mr Justice Pearson remarked:

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6 [1985] 2 Lloyd's Rep 1 at p 3, HL. See also *The Lakeland* (1927) 28 Ll L Rep 293, US Court of Appeals.

7 Except, it would appear, when he pleads the defence of wilful misconduct as a defence to a claim of loss by barratry: see *Elfie A Issaias v Mar Insurance Co Ltd* (1923) 15 Ll L Rep 186, CA which is fully discussed below.

8 *Compania Naviera Santi SA v Indemnity Marine Assurance Co Ltd* [1960] 2 Lloyd's Rep 469 at p 473. See also *The Vainqueur* [1973] 2 Lloyd's Rep 275 at p 279, USDC.

> 'As to the burden of proof, the whole question has been reserved in the House of Lords; but, subject to that reservation, it has been established decisions of courts of first instance and the Court of Appeal (with some support from dicta in the House of Lords) that the plaintiffs have the burden of proving, in a case such as this, that there was an accidental loss by perils of the seas …'

Mr Justice Brandon in *Compania Naviera Vascongada v British and Foreign Marine Insurance Co Ltd, The Gloria*[9] was also clear in his mind that 'the onus of proof that the loss was fortuitous lies upon the plaintiffs …'. And recently, the same was reiterated by Mr Justice Bingham in *The Zinovia*[10] to the effect that: 'To succeed in their claim for a loss by perils of the seas, the owners must prove that the loss of the vessel was proximately caused by such a peril.'

In 1985, the long-awaited House of Lords ruling arrived with *The Popi M*,[11] which has established beyond doubt that, in relation to a claim for a loss by perils of the seas, the burden of proof is and remains throughout on the plaintiffs.[12] This necessarily means that they have to satisfy the court, regardless of the nature of the defence raised, that the subject matter-insured was lost by a peril of the seas. If the court is, at the conclusion of the hearing, left in doubt as to whether the loss was or was not so caused, the plaintiffs have failed to prove their case.[13]

That the mere entry or incursion of sea water is not in itself sufficient proof of a loss by perils of the seas is now a well established rule of law.[14] Thus, in order to succeed in a claim for a loss by such a peril, an assured has to adduce evidence to prove that the loss was accidental or fortuitous. And if he is unable to provide clear proof of a casualty or accident to demonstrate this fact, he has failed to prove his case. The facts and circumstances of a loss may sometimes render it difficult, if not impossible, for a shipowner to provide direct, affirmative or positive proof[15] of a loss by a peril of the seas. Should he find himself in such a dilemma, he has another route by which he could take to prove his case: he could, by the process of elimination of other possible causes, endeavour to persuade the court to draw the inference that the loss was caused by an 'unascertained' or 'unspecified' peril of the seas.

9 (1936) 54 Ll L Rep 35 at p 50.

10 [1984] 2 Lloyd's Rep 264 at p 271, QBD.

11 [1985] 2 Lloyd's Rep 1, HL.

12 The Court of Appeal had earlier in *Miceli v Union Marine & General Insurance Co Ltd* (1938), 60 Ll L Rep 275 applied the same rule. See also *La Compania Martiartu v The Corpn of the Royal Exchange Assurance, The Arnus* [1923] 1 KB 650, CA: it would appear that all the insurer has to do is to offer a reasonable explanation of the loss and show that it was probably due to an event not insured against; *The Lakeland* (1927) 28 Ll L Rep 293, US Court of Appeals; *The Gloria* [1936] 54 Lloyd's Rep 55; and *The Vainqueur* [1973] 2 Lloyd's Rep 275.

13 A justification for this rule can be found in *Compania Naviera Santi SA v Indemnity Marine Assurance Co Ltd, The Tropaioforos* [1960] 2 Lloyd's Rep 469 at p 473, discussed below.

14 *Samuel & Co v Dumas* (1924) 18 Ll L Rep 211, HL.

15 As opposed to inferential evidence.

Presumption of loss by an unascertainable peril of the seas

The concept of 'perils of the seas' is wide enough in scope to embrace a class of loss known as an unascertainable or unspecified peril of the seas. Proof of this type of loss is achieved by way of inference drawn by reason of the circumstances relating to the loss. An assured has to adduce sufficient relevant circumstantial evidence for the court to make the inference that the loss was caused by an unascertainable peril of the seas.[16]

There are two sets of circumstances under which a court may be prepared (in the absence of direct proof) to depart from the general rule as regards the burden of proof in order to draw the inference that the loss was due to an unascertainable peril of the seas. One relates to unexplained losses and the other to missing ships. As an exception to the general rule of proof, the plaintiffs, on satisfying certain conditions, are allowed to rely on the drawing of an inference to prove his case.

Unexplained loss

The problems on the question of proof and the principles relating to the presumption of loss by an unascertainable peril of the seas in relation to unexplained losses of ships were examined in detail in the recent case of *The Marel*.[17] The owner of a ship which sinks at sea in unexplained circumstances would find it extremely difficult to provide concrete proof that the loss was caused by a peril of the seas. If the loss occurred shortly after sailing or happened in calm ordinary weather conditions,[18] his task is even all the more onerous, as a presumption of unseaworthiness is likely to be raised against him if no other explanation is forthcoming to account for the loss.

Mr Justice Mason in *Skandia Insurance Co Ltd v Skoljarev*[19] was prepared to draw the presumption on the ground that it:

> '... arises from the fact that the immediate cause of the loss is the foundering of the ship and, if that is not due to unseaworthinesss at the inception of the voyage, it is difficult to perceive how the foundering could have been caused otherwise than by a fortuitous and unascertained accident of the seas, or perhaps a latent defect.'

In the light of *The Marel*,[20] a shipowner in such a case has to adduce proof to eliminate not only unseaworthiness, but also all other possible causes of loss. With regard to the former, he has to rebut any presumption of unseaworthiness that, by reason of the facts of the case, may be raised against him.

16 *Per* Mason J, in *Skandia Insurance Co Ltd v Skoljarev* [1979] 142 CLR 375 at p 393, High Court of Australia: 'The extensive concept of "perils of the sea" is an important element in the existence of the presumption.'

17 [1992] 1 Lloyd's Rep 402.

18 See eg, *Skandia Insurance Co Ltd v Skoljarev* [1979] 142 CLR 375, [1979] 26 ALR 1; High Court of Australia, where the vessel sank in a calm sea after rapid entry of sea water into the engine room. The point and cause of entry of sea water into the ship were unknown.

19 *Ibid*, at p 377, hereinafter referred to as *The Skandia Case*.

20 [1992] 1 Lloyd's Rep 402.

Elimination of unseaworthiness

As a general rule, the unseaworthiness of a ship has to be proved by the insurer if he wishes to raise this as a defence.[21] The general principle (of he who alleges must prove) may, however, be set aside if a presumption of unseaworthiness is made available to him. There are essentially two occasions in which a plaintiff may be confronted with a presumption of unseaworthiness:

- In the absence of any external circumstances to account for the loss or damage, a presumption that the ship must have set sail in an unseaworthy condition may be drawn if she is by reason of her disability unable, soon after sailing, to proceed with her voyage; this is the presumption of a breach of the implied warranty of seaworthiness in a voyage policy.
- The 'irresistible' presumption that unseaworthiness has *caused* the loss – as discussed by Mr Justice Brett (as he then was) in *Anderson v Morice*.[22]

These presumptions would have to be rebutted by the plaintiff if he wishes to rely on the presumption of a loss by an unascertainable peril of the seas to prove his case.

Rebuttal of the presumption of breach of the implied warranty of seaworthiness in a voyage policy

An attempt to elicit a presumption of unseaworthiness at the commencement of the voyage, on the basis of the maxim *res ipsa loquitur*, was successfully made in *Pickup v Thames Insurance Co*,[23] where the vessel (insured under a voyage policy) unable to prosecute her voyage had to return to port 11 days after sailing. On the subject of burden of proof, Lord Justice Brett of the Court of Appeal summarised the legal principles as follows:

> 'The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant, and ... it never shifts, it always remains upon him. But when facts are given in evidence, it is often said certain presumptions, which are really inferences of fact, arise, and cause the burden of proof to shift; and so they do as a matter of reasoning, and, as a matter of fact, for instance, where a ship sails from a port, and soon after she has sailed sinks to the bottom of the sea, *and there is nothing in the weather to account for such a disaster*, it is a reasonable presumption to be made that she was unseaworthy when she started ...'

Later, in the case of *Ajum Goolam Hossen & Co v Union Marine Insurance Co*,[24] heard before the Privy Council, the shipowner, who was able to rebut the presumption of unseaworthiness, recovered for a total loss even though the loss did not appear to be traceable to any specific or particular peril of the seas. The legal position was described as follows:

> 'The real cause of the loss is unknown, and cannot be ascertained from the evidence adduced in this action. But underwriters take the risk of loss from

21 'It has been universally stated that the onus of proof of unseaworthiness is on the insurer': *per* Mason J, in *The Skandia Case* [1979] 142 CLR 375 at p 387.

22 (1874) LR 10 CP 58. See below.

23 (1878) 3 QBD 594, CA. Emphasis added.

24 [1901] AC 362, PC.

> *unascertainable* causes; and after carefully weighing all the evidence and bearing in mind the presumption of unseaworthiness on which the underwriters rely, their Lordships have come to the conclusion that unseaworthiness at the time of sailing is not proved.'

It has to be said that it is generally not for the shipowner to prove that his ship was seaworthy.[25] However, where the facts of the case warrant the drawing of the presumption of unseaworthiness, he would have no choice but to furnish proof of the condition of his ship if he is effectively to rebut this presumption. A judge cannot draw the inference (that the loss was caused by an unascertainable peril of the seas) upon which the assured relies on in order to make out his case unless he is satisfied that the ship was seaworthy at the commencement of the voyage. The possibility of unseaworthiness as a cause of loss has to be eliminated. If the plaintiffs are able to show that the ship was seaworthy at the commencement of the voyage, the court may well find that she was lost by a peril of the seas.

In *The Skandia Case*,[26] Chief Justice Barwick in the High Court of Australia remarked that the shipowners:

> '... not being able to point to any contribution of the elements to account for the entry of water into the hull of the vessel, had perforce to rely on the inference that that entry into a seaworthy vessel was due to, or itself amounted to, a peril of the sea. That is to say, to attribute the loss of the vessel to a peril of the sea necessarily involved ... a conclusion that the vessel was seaworthy.'

Such a presumption of unseaworthiness at the commencement of the voyage is to the insurer, under a voyage policy, *prima facie* proof of a breach of a warranty which is his defence to the shipowner's claim for indemnity. But as there is no implied warranty of seaworthiness in a time policy, 'the mere fact that the vessel was unseaworthy at the commencement of the voyage will not afford any defence to the underwriters'.[27] The issue is not one of determining whether the ship was unseaworthy when she set sail or, to put it in another way, whether a warranty of seaworthiness has been breached (as there is none in a time policy), but one of identifying whether unseaworthiness or a peril of the seas (ascertainable or unascertainable) is the proximate cause of loss.

Rebuttal of the presumption of unseaworthiness as the cause of loss

A similar presumption of unseaworthiness, but drawn under a different set of circumstances was advocated by Mr Justice Brett in *Anderson v Morice*:[28]

> '... in the absence of any other evidence as to the condition of the ship, the fact of her sinking in smooth water without any apparent cause would create an irresistible presumption of unseaworthiness.'

Again, it is clear from this statement that it is only upon proof of seaworthiness[29] that a court is able to prevent the operation of the presumption

25 In law, there is no *prima facie* presumption of seaworthiness in favour of the assured on the issue of causation.

26 [1979] 26 ALR 1; [1979] 142 CLR 375 at p 377.

27 *Per* Judge Diamond in *The Marel*, [1992] 1 Lloyd's Rep 402 at p 426.

28 (1874) LR 10 CP 58.

29 As a general rule, it is not the duty of the assured to prove that his ship is seaworthy.

of unseaworthiness, and to make the necessary inference of a loss by an unspecified peril of the seas.

In *The Skandia Case*,[30] the above process of elimination was applied by Mr Justice Mason, whose comments on the subject are indeed lucid and helpful. They read as follows:

> 'Although there is nothing in all this to throw the burden of proof of seaworthiness onto the insured, there is one class of case in which the insured will find it necessary to establish seaworthiness in order to prove his case. This is where the insured, having no direct evidence of loss due to a fortuitous event, seeks to establish by inference a case of loss due to an *unascertained peril of the sea*. To justify this inference he will seek to exclude the possibility of loss caused by unseaworthiness by calling evidence as to the condition of the ship.'

The purpose of adducing evidence to establish that his ship was seaworthy is obviously to eliminate unseaworthiness as the proximate cause of loss. Unseaworthiness, however, is not the only cause of loss which the shipowner is required to eliminate. According to *The Marel*,[31] he would also have to discount other possible causes of loss not covered by the policy before he would be allowed to claim the benefit of the presumption of a loss by an unascertained peril of the seas.

Elimination of all other possible causes

In *The Marel*,[32] Judge Diamond pointed out that a court may be prepared to draw the inference that a ship was lost through an unascertainable peril of the seas only if it is satisfied that all other possible relevant causes of loss, including unseaworthiness, which are not insured by the policy, such as ordinary wear and tear and wilful misconduct, are not responsible for the loss. He explained that the concept of 'perils of the seas', though wide, does not cover loss by wear and tear or a case where the vessel has been deliberately sunk by her owner.[33]

A rebuttable presumption of fact

It is pertinent to note that, though it is possible to achieve with the aid of inference (if direct proof is not available) that the vessel was lost due to some unascertained peril of the seas, the burden of proof still remains throughout with the plaintiffs: it remains their duty to satisfy the court on the balance of probabilities, even if the evidence be circumstantial, that the ship was lost by an unascertained peril. And if in the end a court is, as in *The Marel*,[34] doubtful as to whether the casualty was caused by some unascertainable peril or accident, it would be disinclined to draw the inference in favour of the shipowner.

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30 [1979] 26 ALR 1 at p 13; [1979] 142 CLR 375 at p 390, High Court of Australia. Emphasis added. A most enlightening and exhaustive summary of all the relevant cases pertaining to the law of perils of the seas and the burden of proof in respect thereof can be found in this interesting case.

31 [1992] 1 Lloyd's Rep 402.

32 *Ibid*, at pp 424 and 425.

33 If she was deliberately sunk by the master or crew without the connivance of the owner, it would constitute an act of barratry which in any event is a peril insured against, unless specifically excepted by the policy.

34 *Ibid*, at p 427.

The inference of fact, if drawn, is only *one* factor amongst others which the court has to consider. It is to be taken into account with all the other circumstances of the case that the loss of the vessel was due to an unascertainable peril of the seas. *The Marel*[35] has also made it clear that the inference is a rebuttable one. This means that an insurer is always entitled to adduce evidence to negate it.

At a trial, the sequence of events would basically be as that described by Lord Anderson in *The Spathari*.[36] First, the plaintiffs have to prove that the ship sank by reason of the influx of sea water; the defendants would then have to adduce evidence to explain how that inflow might have been occasioned. If they are unable to do so, the plaintiffs would have been regarded as having proved the proximate cause of the sinking, and 'they would have been entitled to found on the presumption that the unascertained peril which occasioned the inflow of water was a peril covered by the policy'. On the other hand, if the evidence led by the defenders is of 'such potency as to create a doubt which the Court is unable to solve as to the cause of the influx of water, the presumption which favours the pursuers is displaced'.

Missing ships

Green v Brown[37] is the case responsible for the formulation of the rule that 'a ship never heard of is presumed to be foundered at sea'. That the vessel sailed out of port on her intended voyage and was since never heard of was all the evidence available to the court. Under the circumstances, the Chief Justice felt that 'it would be unreasonable to expect certain evidence of such a loss, as where everybody on board is presumed to be drowned; all that can be required is the best proof the nature of the case admits of, which the plaintiff has given'. This case was approved by Lord Justice Scrutton of the Court of Appeal in *La Compania Martiartu v Royal Exchange Assurance*.[38]

It is important to note that a court has to be satisfied that the ship had, in fact, sailed on her intended voyage before it would allow the plaintiffs to pray the aid of the presumption. Though this was not distinctly couched as a legal prerequisite in *Green v Brown*,[39] nevertheless, the rule was confirmed by Lord Abbott CJ in *Koster v Innes*.[40] As no evidence was adduced to prove that the vessel had ever sailed for the port of destination, it was not possible for him, in this case, to invoke the presumption.

A year later, the presumption was applied in *Koster v Reed*,[41] where it was proved that the ship sailed on the voyage insured with the goods on board, but

35 *Ibid*.

36 (1923) 17 Ll L Rep 66, Court of Session.

37 (1743) 2 Str 1199.

38 [1923] 1 KB 650 at p 657; hereinafter referred to as *The Martiartu Case*. 'The presumption may well be, when nothing is known except that the ship has disappeared at sea, that her loss was by perils of the sea': *Green v Brown*, *ibid*.

39 (1743) 2 Str 1199.

40 (1825) Ry & Mood 334. See also *Cohen v Hinckley*, (1809) 2 Camp 51.

41 (1826) 6 B & C 19.

never arrived at her port of destination; shortly after sailing, a report was heard at the port of departure indicating the ship had foundered at sea but that the crew were saved.[42] These facts were considered sufficient *prima facie* evidence of a loss by perils of the seas.[43] Though the crew members survived, they were not called to give evidence. The court held the view that it was not incumbent on the plaintiffs to scour all over Europe in search of the crew, who were presumed to be foreigners, as the ship was foreign and was trading between foreign ports. Moreover, it was impossible to compel the attendance of witnesses resident abroad.

As the evidence is regarded only as *prima facie* proof it is of course rebuttable. One of the judges, however, was careful to remind us of this in his judgment, and another pointed out that his decision was influenced by the fact that 'the plaintiff was owner of the goods, not of the vessel, and the underwriters might have just as good means of inquiring about the crew as the plaintiff had'.

As the decision was delivered in 1826, it has, of course, to be viewed with a degree of caution. With the advancement of technology in means of communication, it is unlikely that the presumption will in the present day be applied lightly; unless there are strong reasons for so doing, it would not be unreasonable to say that judges would be more inclined to enforce the general principles on the burden of proof. Naturally, it would be easier, in conjunction with the presumption of an actual total loss provided for by s 58 in relation to missing ships, to invoke the presumption in a case where there are no survivors.

Standard of proof

Having established that the burden of proof rests with the plaintiffs, it is now necessary to consider the degree or standard of proof required to satisfy the court. The law in this regard is no different from the general rule applicable to all civil actions: The plaintiff has to prove *on a balance of probabilities* that the ship was lost by a peril of the seas. That this legal requirement of proof on a balance of probabilities is to be applied with common sense was advocated by the Law Lords in *The Popi M*.[44] Thus, a judge must, on the evidence, be satisfied that the event, as alleged, is more likely to have occurred than not; if the occurrence of the event is extremely improbable, he would, on the basis of common sense, have to find for the defendant. In *The Tropaioforos*,[45] Mr Justice Pearson stated that: '... the degree of proof required is only to show a balance of probabilities in favour of an accidental loss by perils of the seas.'

42 See also *Twemlow v Oswin* (1809), 2 Camp 85, where Mansfield, CJ held that 'it is enough to prove that she was not heard of in this country after she sailed, without calling witness from her port of destination to shew that she never arrived there'.

43 If the ship should by chance turn up after the underwriters have paid up as for a lost ship, she is to be considered as abandoned, and will belong to the underwriters: *Houstman v Thornton* (1816) Holt NP 242; 171 ER 229.

44 [1985] 2 Lloyd's Rep 1, HL.

45 [1960] 2 Lloyd's Rep 469 at p 473.

The principle enunciated in *The Popi M* was recently applied in *The Ikarian Reefer*[46] when it went to the Court of Appeal. After spending a great deal of time examining the evidence given by the master and the expert witnesses, the Court of Appeal decided to make its own finding of facts. It overturned the decision of Mr Justice Cresswell, who held that the loss was caused by the grounding of *The Ikarian Reefer* due to the negligent navigation of the master. Lord Justice Stuart-Smith summarised the law on the burden of proof as follows:[47]

> 'For the shipowners to succeed, the evidence has to establish that the grounding probably was fortuitous; this conclusion can co-exist with a residual possibility that it was deliberate (or in scientific terms, a low order of probability) because the plaintiffs are required to prove their case on "balance of probabilities" only.'

The order of probability may be 'low', but the court must never be left in doubt as to the cause of loss; otherwise, it may be forced to invoke the rule of the 'third alternative,' discussed below, to dismiss the plaintiffs' case.

The 'Third Alternative'

In *The Popi M*, Lord Brandon reminded the court that a judge is clearly not obliged to make a finding one way or the other with regard to the facts adduced by the parties. He pointed out that in reality the position is often 'not just a simple choice between the cause of loss relied on by the shipowners and the alternative cause of loss put forward by underwriters'. There is a third alternative always available to him:[48]

> 'He has open to him the *third alternative* of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden.'

If the evidence as regards the proximate cause of loss is at the conclusion of the trial doubtful and uncertain, a judge would have no choice but to find for the defendants. The reason being that the plaintiffs have failed to discharge the persuasive burden of proof which rests on them throughout.[49]

It is to be noted that in *The Popi M*,[50] the plaintiffs' claim was based on perils of the seas (alternatively negligence of the crew), and the defence was essentially one of denial that the loss was so caused. The defective condition of the ship was also raised, though not seriously. It is also to be noted that scuttling with the connivance of the shipowner was not pleaded as a defence. Thus, whether the decision of *The Popi M*, and the rule of the third alternative therein proposed is to be confined to its own facts, and should not be applied to a case where scuttling with the connivance of the shipowner is pleaded as defence, is a matter which has to be considered. In other words, is the third

46 [1995] 1 Lloyd's Rep 455, CA.

47 *Ibid*, at p 459.

48 [1985] 2 Lloyd's Rep 1 at p 6, HL. Emphasis added.

49 In *The Vainqueur* [1973] 2 Lloyd's Rep 275, judgment was awarded to the insurers even though the proof adduced by them was not sufficient to find that the vessel was scuttled. The plaintiffs failed to discharge the burden of proving that the loss fell within the policy. See also *The Lakeland* (1927) 29 Ll L Rep 293 at p 296.

50 [1985] 2 Lloyd's Rep 1, HL.

alternative applicable when the defence of wilful misconduct of the assured is pleaded by the defendants?

THE DEFENCE

The defendants would be called upon to answer only if the plaintiffs have made out a *prima facie* case of a fortuitous or accidental loss by perils of the seas. Should there be a case to meet, the defendants, according to Lord Justice Cairns of the Court of Appeal in *The Dias*, can either:[51]

> '... simply traverse the allegations in the points of claim or they can make an affirmative allegation of scuttling. If they adopt the former course they can cross-examine and call evidence to show that the vessel was not lost by a fortuitous accident, but cannot set up an affirmative case that she was cast away with the privity of the owner.'

If the case for the defendants is to rest solely on the first ground, they would not be allowed to surprise the plaintiffs at the trial with allegations of fraud and criminal conduct. Provided that the defences are properly pleaded, there is nothing to prevent a defendant from taking both courses, denying that the vessel was lost as a result of perils of the seas *and* alleging that the vessel was wilfully cast away with the connivance of the owner. A defendant has two strings to his bow and both may be put into use at the same time.[52]

That the 'third solution' may only be invoked if the court is, at the end of the trial, doubtful as to the cause of loss is obvious. It has, of course, no relevance to a case such as *Samuel v Dumas*,[53] where the defence of scuttling with the connivance of the owner was conclusively proved by the defendants.

The defence of wilful misconduct

Case law has demonstrated that the defence of wilful misconduct is invariably pleaded by underwriters as a defence to a claim for a loss by perils of the seas. Whether the third alternative may be employed by the court when an allegation of scuttling is raised against a claim of loss by perils of the seas has to be explored. For the purpose of comparison and for a proper understanding of the ensuing discussions in relation to a claim of a loss by barratry and of fire, an insight into this area of law is necessary.

The problem began in 1923 with an *obiter dictum* uttered by Lord Justice Scrutton of the Court of Appeal in *The Martiartu Case*.[54] In a suit by a shipowner against the underwriters on a policy of marine insurance, perils of the seas and barratry were alleged as alternative causes of loss. The defence was that the

51 [1942] 2 QB 625 at p 647.

52 See, eg, *The Gold Sky* [1972] 2 Lloyd's Rep 187 at p 192; appeal on a procedural issue [1972] 1 Lloyd's Rep 331; *The Michael* [1979] 1 Lloyd's Rep 55; [1979] 2 Lloyd's Rep 1; and *Michalos (N) & Sons Maritime SA v Prudential Assurance Co Ltd, The Zinovia* [1984] 2 Lloyd's Rep 264.

53 [1924] AC 431; 29 Com Cas 239. See also *The Cruz, Banco De Barcelona & Others v Union Marine Insurance Co Ltd* (1925) Com Cas 316, where scuttling with the connivance of the plaintiffs was also proved; *The Tropaioforos* [1960] 2 Lloyd's Rep 469; and *The Eftychia, Bank of Athens v Royal Exchange Assurance* (1937) 57 Ll L Rep 37, on appeal, 59 Ll L Rep 67.

54 *Ibid*, at p 657.

vessel had been intentionally scuttled by the master and crew with the connivance of the plaintiffs. Both the trial and appeal courts had no doubt whatsoever that, on the evidence, the vessel was deliberately scuttled with the connivance of her owners. In the light of this, it was really quite unnecessary for the court to make any comment on the burden of proof. Nevertheless, Lord Justice Scrutton could not restrain himself from offering his opinion on the matter. He said:[55]

> '... if ... an examination of all the evidence and probabilities leaves the court doubtful what is the real cause of the loss, the assured has failed to prove his case … for he has not proved a loss by perils insured against.'

As the defendants in this case were able to offer a *reasonable explanation* showing that the loss was probably due to the scuttling of the ship with the connivance of the owners, the court found in their favour.

It is interesting to observe that the above comments made by Lord Justice Scrutton were given express approval by Lord Brandon in *The Popi M*,[56] even though the defence of wilful misconduct was not raised as a defence in the case. The seeds of the 'third alternative' were obviously sown in *The Martiartu Case*. Lord Brandon had apparently considered Lord Justice Scrutton's *dictum* to be of general application.

In *Pateras and Others v Royal Exchange Assurance, The Sappho*,[57] Mr Justice Roche, citing *The Martiartu Case*[58] with approval, stated that:

> '... although there is, of course, and must be a strong presumption against the commission of an act so criminal as the wilful throwing away of a ship, yet if the matter be really uncertain as between that explanation of the loss and a fortuitous explanation of the loss, the onus is on the plaintiffs.'

The third alternative was also applied, perhaps unwittingly,[59] by Mr Justice Branson in *The Gloria*.[60] As his remarks are well known and were frequently cited by judges, it would be helpful to cite them:

> 'The onus of proof that the loss was fortuitous lies upon the plaintiffs, but that does not mean that they will fail if their evidence does not exclude all reasonable possibility that the ship was scuttled. Before that possibility is considered, some evidence in support of it must be forthcoming … If ... the Court ... is not satisfied that the ship was scuttled, but find that the probability that she was is equal to the probability that her loss was fortuitous, the plaintiff will fail.'

Following the usual sequence of play, the plaintiffs alleged that *The Gloria* was lost by a peril of the seas, to which the defendants pleaded, *inter alia*, that she was scuttled with the privity of her owners. As the plaintiffs had

55 *Ibid*, at p 657.

56 [1985] 2 Lloyd's Rep 1 at p 3, HL.

57 (1934) 49 Ll L Rep 400 at p 407, QBD. Here, wilful misconduct was pleaded as a defence to a claim of loss by perils of the seas.

58 [1923] 1 KB 650.

59 Branson J did not cite any authority to support his opinion.

60 (1936) 54 Ll L Rep 35 at p 50, KBD. See also *The Eftychia, Bank of Athens v Royal Exchange Assurance* (1937) 57 Ll L Rep 37 at p 56, where Branson J referred to his own judgment in *The Gloria*.

successfully discharged the onus of showing that the loss was fortuitous, judgment was awarded against the defendants. The evidence adduced by the defendants was clearly not strong enough to cast sufficient doubts upon the plaintiffs' claim.

An equally instructive authority is *The Dias*,[61] where Mr Justice Cairns, citing some of the above cases[62] with approval, succinctly summarised the legal position as follows:

> 'If scuttling is alleged and the insurers are going to ask the court to find positively that the vessel was scuttled, then they must discharge the onus of proving their allegation ... If, where loss by peril of the seas is alleged by the plaintiff and scuttling by the defendant, the court at the end of the day is not satisfied that either story is more probable than the other, then the plaintiff fails ...'

Another recent authority on the subject is *The Zinovia*,[63] where the plaintiffs' action for loss by perils of the sea was met with the defence of wilful misconduct with the connivance of the owners. On this occasion, the defendants were unable to satisfy the court, according to the high standard of proof required, that the vessel was deliberately cast away. Judgment, however, was entered for the plaintiffs, not because the defendants had failed to prove their case, but because the plaintiffs themselves were able to convince the court that the loss was proximately caused by a peril of the seas, namely, by grounding. By way of *obiter*, Mr Justice Bingham stated his view in the following manner:[64]

> 'Nonetheless, if at the end of the case the court considers a loss by perils of the sea to be no more probable than a loss caused by another, uninsured peril, then the owners must fail'.

It would seem that Mr Justice Bingham, if he had to, would not be adverse to applying the third alternative.

In *The Gold Sky*,[65] however, the plaintiffs could not discharge the onus of proving that the loss was fortuitous. Wilful misconduct was pleaded as an affirmative defence to the plaintiffs' claim of loss by perils of the seas. After declaring his support for *The Gloria* and *The Dias*, Mr Justice Mocatta applied the third alternative to resolve the dispute.

The best explanation of all is perhaps that offered by District Judge Ward in *The Vainqueur*.[66] In a short but helpful comment, he pointed out that 'if the evidence of scuttling is in balance or equipoise ... it becomes crucial which party

61 *Palamisto Geberal Enterprise SA v Ocean Marine Insurance Co Ltd* [1972] 2 Lloyd's Rep 60 at pp 75 and 76, CA.

62 Cairns, LJ relied on *La Compania Martiartu v Royal Exchange Assurance* [1923] 1 KB 650; *The Tropaiforos* [1960] 2 Lloyd's Rep 469; and *The Gloria*, 54 Ll L Rep 35.

63 [1984] 2 Lloyd's Rep 264, QBD.

64 He also expressed his approval of the remarks made by Cairns, LJ in *The Dias, Palmisto General Enterprises SA v Ocean Marine Insurance Co Ltd* [1972] 2 Lloyd's Rep 60 at pp 75 and 76, CA.

65 [1972] 2 Lloyd's Rep 187 at p 192; appeal on a procedural issue, [1972] 1 Lloyd's Rep 331, CA.

66 [1972] 2 Lloyd's Rep 60, CA. Judgment was awarded to the insurers even though the proof adduced by them was not sufficient to find that the vessel was scuttled. The plaintiffs failed to discharge the burden of proving that the loss fell within the policy. See also *The Lakeland* (1927) 28 Ll L Rep 293 at p 296.

has the burden of persuasion that the loss was an insured event'. Unlike *The Gloria*,[67] the evidence of scuttling which the defendants had tendered, though found not to be substantial enough for the court to make a positive finding that the vessel was scuttled, was nevertheless perfectly adequate for the purpose of throwing doubts on the plaintiffs' case (of a loss by perils of the seas or an explosion). The defendants had obviously done enough, in a manner of speech, to tip the scale in their favour; and as the ultimate burden of persuasion lies with their opponents, judgment was awarded against the plaintiffs.

To use the words of Lord Justice Bankes in *The Martiartu Case*,[68] the defendants had 'put forward a reasonable explanation of the loss' causing the 'superstructure' of the plaintiffs' case to collapse. Even more generous is the judge in *The Lakeland*,[69] who was prepared to accept 'any evidence of circumstances tending to support [the defendants'] theory of scuttling with the connivance of the owners'.

There was clearly a group of judges who supported the rule of the 'third alternative' even when the defence of wilful misconduct was pleaded. The rule of the third alternative complements the general principle of proof that the ultimate burden of persuasion lies with the plaintiffs. In relation to a claim of loss by perils of the seas, it is pertinent to recall that 'fortuity' is an essential ingredient.[70] Thus, any evidence suggesting that the cause of loss is other than fortuitous would result in the plaintiffs having failed to prove their case.

The most recent pronouncement as to the standard of proof required for the defence of wilful misconduct pleaded in relation to a claim of loss by perils of the seas can be found in *The Ikarian Reefer*,[71] where the Court of Appeal, through Lord Justice Stuart-Smith, expressed the opinion that:

> 'If the plaintiffs fail to discharge this burden, however, their claim under this head [referring to perils of the seas] must fail, even if the insurers have alleged but fail to prove that the grounding was deliberate and the cause, therefore remains uncertain: *The Popi M* …'.

Having determined that the standard of proof is the *balance of probabilities*, he then proceeded to say that, whether the measure of 'the balance of probabilities is different in practice from the criminal standard of "beyond reasonable doubt" and if so by how much' is a question of semantic. He refused to provide a direct answer to the question but took the safe course by saying that:

> 'The burden of proof is not discharged … if the evidence fails to exclude a substantial, as opposed to a fanciful or remote possibility that the loss was accidental. But we bear in mind that, on the authorities, the burden which rests upon the insurer is derived from the civil, not the criminal standard …'

The only clarification that can be derived from the above observations is that the degree of proof is clearly not the criminal standard, but what the precise standard is remains unclear.

67 (1936) 54 Ll L Rep 35.

68 [1923] 1 KB 650 at p 655, CA 23 1 KB 650.

69 (1927) 28 Ll L Rep 293 at p 296, USCA.

70 For a discussion of fortuity as an essential characteristic of perils of the seas, see Chapter 9.

71 [1995] 1 Lloyd's Rep 455 at p 459, CA.

To conclude this discussion, it is worthwhile referring to the carefully chosen words of Mr Justice Mason of the High Court of Australia in *The Skandia Case*[72] . Citing *The Martiartu Case* as authority, he said:

> '... the insured will fail in an action ... if he does no more than adduce evidence of facts which are equally consistent with the hypothesis that the loss occurred from the defective, deteriorated or decayed condition of the vessel or the inevitable act of the sea, as with the supposition that the loss resulted from a peril of the sea.'

Scuttling with the connivance of the shipowner is, it is observed, conspicuously left out of the above list of possible causes. Reserving this for special treatment, he cautiously pointed out that:[73] 'The onus of proof in such a case has its own difficulties and they have not yet been completely resolved'. Mr Justice Mason obviously had the maze of confusion relating to proof of connivance in cases of barratry in mind when he made this statement.

It is to be noted that none of the above cases has declared that, if wilful misconduct is pleaded as a defence to a claim of a loss by perils of the seas, the standard of proof required to be discharged by the defendant is, as it is sometimes alleged in the case of barratry, to be of the criminal standard of beyond reasonable doubt. On the contrary, the Court of Appeal in *The Ikarian Reefer* seemed to think that it is the civil standard of the balance of probabilities – the same as that expected of the plaintiffs.

There is no cogent reason why the third alternative cannot be invoked merely because wilful misconduct is pleaded as a defence to an action based on perils of the seas. But, as can be seen shortly, it would appear that the law in relation to the burden and standard of proof is different if scuttling with the connivance of the ship owner is pleaded as a defence to barratry. Why and whether this should be so will now be explored.

B – PROOF OF LOSS BY BARRATRY

One of the most problematic areas of the law of barratry is in relation to the question of the burden of proof. There are two sides to the problem: first, as to proof of the ingredients of the peril; and secondly, as to proof of the defence that the loss was caused with the connivance of the shipowner – that the ship was deliberately scuttled – the defence of wilful misconduct. The plaintiffs, of course, have to bear the burden of having to prove that the loss was deliberately caused by the master or crew.[74] But a ship could be intentionally cast away by the master or crew with or without the connivance of her owners. The former is clearly not recoverable, as such an act constitutes wilful misconduct (of the assured) which is not a peril insured against.[75] The latter, however, is a barratrous act and is recoverable if barratry is a peril insured against under the policy.[76] These two forms of loss are distinguishable purely upon the fact of

72 [1979] 142 CLR 375 at pp 391 and 392.

73 *Ibid*.

74 *The Michael* [1979] 1 Lloyd's Rep 55 at p 66, QBD. Proof of scuttling would negate a loss by peril of the seas.

75 See s 55(2)(a).

76 See cl 6.2.4 of the ITCH(95) (previously cl 6.2.5 of the ITCH(83)) and cl 4.2.4 of the IVCH(95).

whether the shipowner has or has not consented to the commission of the act by the master or crew.

With the exception of refuting that the act of the master or crew was not intentionally committed – to which there is always the danger that a peril of the seas could then be regarded as the cause of loss – it is difficult to envisage what other defences the defendants could raise to resist a plaintiff's claim of a loss by barratry other than to plead connivance on the part of the shipowners to the act of scuttling.[77] A claim that a ship has been barratrously scuttled by the master or crew is, therefore, almost certainly to be met with the defence that it occurred with the consent of the shipowners. What the defendants are in effect alleging is that the loss was caused by the wilful misconduct of the shipowner. This has caused the law of barratry and of the defence of wilful misconduct to become inextricably inter-related.

PROOF OF CONSENT OR ABSENCE OF CONSENT

The absence of consent or privity on the part of the shipowners is, as case law has established, an essential ingredient of the peril of barratry.[78] This is entrenched in the definition of barratry in r 11 of the Rules for Construction. For an act to be barratrous, it has to be 'to the prejudice of the owner'. It has also to be proved, whether the act takes the form of delay, deviation, fire,[79] intentional breach of blockade,[80] or scuttling, that it was committed without the privity or complicity of the shipowner.

A 'serious and important question' which now arises is, which party has to prove the issue of consent. Is it for the plaintiffs to prove the absence of consent on their part, or is it for the defendants to prove the plaintiffs' complicity in the loss? The answer to this question is of vital importance, as the outcome of a case is critically dependent upon which party bears the initial persuasive onus of proof.

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77 The defendants do not have a real choice, as they would have if perils of the sea had been pleaded as the cause of loss. In such a case, as mentioned earlier, they can either simply deny the plaintiffs' allegation that a peril of the seas caused the loss and/or resist the claim by providing the court with an alternative affirmative theory as to the proximate cause of loss.

78 See Chapter 12.

79 In the case of a loss by fire, the plaintiffs are strongly advised to rely on fire (rather than barratry) as the cause of loss, as the term 'fire' is wide enough to include all forms of fire, whether or not it was deliberately started by a member of crew. The only defence which the defendants could plead is that the fire was started with the connivance of the owners, in which case they [the defendants] would have to bear the onus of proof: see *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at p 71; [1995] 1 Lloyd's Rep 455, CA; *The Alexion Hope* [1988] 1 Lloyd's Rep 311; and *The Captain Panagos* [1986] 2 Lloyd's Rep 470. Though the act of the crew in deliberately setting the ship on fire also constitutes barratry, it would not be in the interests of the plaintiffs to plead barratry, for in so doing they could well be called upon to prove the absence of privity or consent on their part if the view of Kerr J in *The Michael* [1979] 1 Lloyd's Rep 55 at p 66; was adopted. See also *The Martiartu Case* [1923] 1 KB 650.

80 In *Everth v Hannam* (1815) 6 Taunt 375 the vessel was condemned for breach of a blockade. The plaintiffs' action for the loss of their vessel by barratry failed, as the court was of the view that merely proving that the master had violated the blockade (without more) was not sufficient proof of barratry. It was held that in order to succeed in their claim for barratry, the owners had to disaffirm their privity and consent to the breach: the plaintiffs' had to show that it was not done under their order or direction.

The law in this regard is indeed controversial and unsettling, as there are two conflicting points of view on the matter. For convenience, I shall refer to one school of thought, that expressed by the Court of Appeal in *Elfie A Issaias v Marine Insurance Co Ltd*[81] as *The Issaias* Rule, and the other, as expressed by Lord Justice Scrutton (by way of *obiter*) in the Court of Appeal in *The Martiartu Case*[82] and by Mr Justice Kerr (as he then was) in *The Michael*,[83] as the *The Martiartu-Michael* Rule.[84]

The Issaias Rule

A great deal of controversy centres around the decision of the Court of Appeal in *The Issaias Case*,[85] the facts of which are as follows. The plaintiffs, the shipowners, claimed for a total loss of their vessel by perils of the seas: the defence was a denial with the plea that the ship was wilfully scuttled by the orders and with the concurrence of her owners. Of importance, however, is the fact that it was not contested that the ship was intentionally sunk by the acts of the master and crew. The decision of the case thus hinged primarily upon whether the shipowners had or had not consented to the acts of the master and crew and, more significantly, which party was to prove this fact.

The fact that barratry was not specifically pleaded as an alternative cause of loss did not seem to concern the court, which was prepared to allow the plaintiffs, if it was necessary to do so, to amend their statement of claim during the trial to incorporate barratry as a cause of loss.[86]

All the judges of the court were firmly of the view that the burden of proof of the fact that the owners were privy to the acts of the master rested with the defendants. According to Lord Justice Atkin: 'The charge of privity against the owner makes against him an allegation of what would be a crime ... and in any case a charge of very serious dishonesty'.[87] Due to the seriousness of the

81 (1923) 15 Ll L Rep 186, CA, hereinafter referred to as *The Issaias Case*. Roskill LJ of the Court of Appeal in *The Michael* [1979] 2 Lloyd's Rep 1 at pp 12 and 13 expressed some support for *The Issaias* Rule.

82 [1923] 1 KB 650 at p 657.

83 [1979] 1 Lloyd's Rep 55 at p 66, QB (Com Ct).

84 Support for *The Martiartu-Michael* Rule can be found in *The Spathari, Demetriades & Co v Northern Assurance Co* (1923) 17 Ll L Rep 66; *The Cruz, Banco de Barcelona & Others v Union Marine Insurance Co Ltd* (1925) 30 Com Cas 316, *per* Greer J at pp 317–318; *The Gloria, Compania Naviera Vascongada v British & Foreign Marine Insurance Co Ltd* (1936) 54 Ll L Rep 35 at p 51, QBD; *The Eftychia, Bank of Athens v Royal Exchange Assurance* (1937) 9 Ll L Rep 67, at pp 77 and 83; *The Tropaioforos, Compania Naviera Santi SA v Indemnity Marine Assurance Co Ltd* [1960] 2 Lloyd's Rep 469, *per* Pearson J at p 473, QBD; *The Gold Sky, Astrovlanis Compania Naviera SA v Linard* [1972] 2 Lloyd's Rep 187 at p 192, QBD; *The Dias* [1972] 2 Lloyd's Rep 60 at p 76, CA; *The Vainqueur* [1973] 2 Lloyd's Rep 275, *per* Ward, D at p 282, USDC; *The Zinovia* [1984] 2 Ll L Rep 264, *per* Bingham J at p 272, QBD; and *The Captain Panagos DP* [1986] 2 Lloyd's Rep 470, QBD at p 511, *per* Evans J; [1989] 1 Lloyd's Rep 33 at p 40, *per* Neil, LJ.

85 (1923) 15 Ll L Rep 186, CA.

86 The plaintiffs succeeded in the Court of Appeal without having to amend the pleadings; but in *The Zinovia* [1984] 2 Lloyd's Rep 264 at p 271, Bingham J thought it preferable that an amendment should be made.

87 (1923) 15 Ll L Rep 186 at p 191, CA.

accusation, the judge felt that he had to treat the matter as if it was a criminal charge.[88] Relying on a well established principle of English (criminal) law – the presumption of innocence – Lord Justice Atkin formulated the legal rule as follows:[89]

> 'We have then a case, now admitted by the plaintiff, to be one where the master, intentionally and successfully, let water into the ship for the purpose of sinking her. Unless done with the privity of the owner, this would be barratry … The only issue is whether the owner was privy to the act of the master. I entertain no doubt that the onus of proving this fact rests upon the defendant underwriters … The plaintiff is entitled to invoke in his favour a principle of English law ... the principle of presumption of innocence. I will cite from *Stephen on Evidence* ... "The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action".'

Stating the same principle but with a different slant, the Master of the Rolls invoked the rule that there is *no presumption of complicity* in English law: the fact that a ship has been proven to have been scuttled does not automatically raise a presumption that it took place with the complicity of her owners. In the words of Lord Justice Warrington:[90]

> '*Prima facie* it was an act of barratry and would be one of the perils insured against; and it is for the underwriters to show that the wrongful act of the master was not committed "to the prejudice" of the owner inasmuch as it was connived at by him. I apprehend that to cast away a man's ship without his consent is "to his prejudice"...'

The Issaias Rule, it should be pointed out, has to be confined to its own facts: that is, where the fact that a barratrous act has been committed was *not* an issue, and the defence raised was one of wilful misconduct on the part of the shipowners. In fact, the Law Lords had emphasised that as the cause of loss (a deliberate sinking of the ship by the master or crew) was no longer in dispute, privity was the only issue outstanding.

Lord Justice Atkin has, in the following comment, given us an insight of his opinion on the matter: 'This is not the case of an unexplained loss. I do *not* think the onus would be altered if it were, if the issue raised was scuttling.'[91] He was prepared to apply *The Issaias* Rule regardless of whether the loss was explained or not; he would invoke the Rule whenever wilful misconduct is pleaded as a defence to a claim of loss by barratry.

According to *The Issaias* Rule, the burden of proof shifts to the defendants once the court is satisfied, either by admission or proof, that the ship has been deliberately scuttled. The Court of Appeal has deemed it fit to put the defendants to a strict proof because the nature of the defence was an allegation of the commission of a crime.

88 See *The Tropaioforos* [1960] 2 Lloyd's Rep 469 at p 473, *per* Pearson J '... that scuttling a ship would be fraudulent and criminal behaviour'.

89 (1923) 15 Ll L Rep 186 at p 191.

90 *Ibid*, at p 189.

91 *Ibid*, at p 191.

Some faint support for *The Issaias* Rule can be found in the cautious remarks of Lord Justice Roskill of the Court of Appeal in *The Michael*.[92] It would, however, be more befitting to say that the matter was left open as the issue was not argued on appeal.

The Martiartu–Michael Rule

In an *obiter dictum* expressed by Lord Justice Scrutton of the Court of Appeal in *The Martiartu Case*,[93] where perils of the sea and barratry were pleaded as alternative causes of loss, the burden of proof was said to lie with the plaintiffs. Regrettably, the judge did not, in the context of barratry, make it explicitly clear in his judgment which party has to prove the issue of consent. His Lordship did not go so far as to lay down the rule (as it was unnecessary for him to do so) that it was for the plaintiffs to prove not only that the ship was deliberately scuttled, but that it was scuttled without the connivance of her owners. But this is implicit in his judgment, for he held the view that it is the plaintiffs who have to prove a loss by a peril insured against, and proof of this in relation to barratry would entail proof of the absence of connivance.

The twin burden of proof

The Michael[94] has categorically imposed a twin burden of proof on the shipowner. Mr Justice Kerr, the trial judge, approached the problem, first, without considering any of the authorities. He said:

> 'Apart from authority, the answer seems obvious in principle. The owners must establish a loss by the insured peril of barratry, which involves establishing both a deliberate sinking *and* the absence of the owners' consent. If at the end of the day the court is left in doubt whether the owners consented or not, then it seems to me that the claim must fail.'

Interestingly, Mr Justice Kerr preferred to rely on the Court of Session's decision in *Demetriades v Northern Assurance Co, The Spathari*,[95] rather than *The Martiartu Case*,[96] which was not even mentioned in his judgment, to buttress his stand on the matter. Courageously, he dismissed *The Issaias* Rule as being incorrect in principle.

In *The Spathari*,[97] the ship was proved to have been scuttled by the engineer. As the outstanding fact was not left in doubt – that is, that the ship was scuttled with the connivance of her owners – the statements made by Lord Justice Clerk and Lord Anderson were *obiter*. Lord Justice Clerk said that:[98]

92 [1979] 2 Lloyd's Rep 1 at p 13, CA.

93 [1923] 1 KB 650, CA; The decision of the Court of Appeal was affirmed by the House of Lords (1924) 19 Ll L Rep 95.

94 [1979] 1 Lloyd's Rep 55; [1979] 2 Lloyd's Rep 1, CA.

95 (1923) 17 Ll L Rep 65, Court of Session. When *The Spathari* reached the House of Lords, (1924) 21 Ll L Rep 265, the appeal failed without the question of scuttling, privity or onus being further considered.

96 (1923) 1 KB 650, CA.

97 (1924) 21 Ll L Rep 265.

98 *Ibid*, at p 334.

> 'If the evidence establishes that the ship was scuttled, as I think it clearly does, and leaves it in doubt whether or not the pursuers were parties to the plot, then their actions must fail ... If [*The Martiartu Case* and *The Issaias Case*] be irreconcilable, then I prefer the former and I am prepared to follow it. I respectfully agree with Lord Justice Scrutton ...'

Lord Anderson, who held the same view, showed his preference in the following terms:[99]

> 'If these two decisions are inconsistent with one another I prefer the law laid down in the former case [*The Martiartu Case*] as it seems to me to rest upon the fundamental rule of proof which denies a pursuer success unless he proves his case.'

In *The Zinovia*,[100] the problem was considered by Mr Justice Bingham, albeit in the court of first instance. His sentiments were vividly described in a concise statement: '... it would still seem to me wrong in principle that the onus should be laid on underwriters of disproving an essential ingredient of the owner's claim'. Not surprisingly, following the strategy in *The Issaias Case*,[101] the plaintiffs, though they did not specifically put forward barratry as a head of claim, nevertheless, reserved their right to do so if the evidence turned out to support such a claim. But as the owners had succeeded in showing that the loss was proximately caused by a peril of the seas, namely, the grounding of the vessel, judgment was awarded to them.

To ensure that his decision covered all possible grounds and, more significantly, to pre-empt appeal on the basis of burden of proof, the learned judge delivered a guarded judgment:[102]

> 'The insurers ... have not satisfied me, according to the high standard of proof required, that the owners wilfully cast away the vessel. I am on the contrary satisfied that the owners did not do so ... If, contrary to my conclusion, the vessel ... was deliberately run aground by the master or crew, the insurers had not proved that the owners in any way consented, or were privy, to that action. If the burden of disproving privity lay on the owners, I should hold that they had discharged it.'

The learned judge, who expressed some reservation about *The Issaias* Rule, nevertheless felt bound by it.[103]

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99 *Ibid*, at p 352.

100 [1984] 2 Lloyd's Rep 264 at p 272.

101 (1923) 15 Ll L Rep 186, CA.

102 [1984] 2 Lloyd's Rep 264 at p 303.

103 *Ibid*, at p 272, Bingham J said: '… once the owners have proved a casting away by the deliberate act of the master or crew, it is for the insurer to establish to the high standard required for proof of fraud in a civil case that the owners consent to, or connived at the casting away.'

In *The Captain Panagos DP*,[104] Lord Justice Neill of the Court of Appeal found himself in the same predicament of being bound by authority. However, in the following comment with reference to barratry, he intimated his view on the subject as follows:

> '... it is a necessary ingredient of the definition that the wilful act should have been committed "to the prejudice of the owner". Accordingly, if the primary contention of the owner of a vessel is that the loss was a loss by barratry, I can see great force in the argument that it is for the owner to prove that the wrongful act was committed "to his prejudice" and therefore that it was committed without his consent or connivance.'

Lord Justice Neill would have adopted Mr Justice Kerr's approach in *The Michael*,[105] if he were free to do so.

In *The Tropaioforos*,[106] Mr Justice Pearson offered his opinion on the question of the onus of proof in connection with scuttling in the following terms:

> '... due weight must be given to the consideration that scuttling a ship would be fraudulent and criminal behaviour. No doubt one reason for placing the burden of proof on the shipowners in such a case as this is that they are likely to have all or almost all, the relevant information, and the insurers are likely to have virtually no information initially.'

That these remarks relate to a claim for a loss by a peril of the seas is clear. But, scuttling a ship is criminal behaviour whether it is pleaded as a defence to an action for loss by perils of the seas or by barratry. Admittedly, with regard to the availability of information in relation to the shipowner, there is an element of truth in this statement. The same, however, cannot be said of the position of an assignee, a cargo-owner, a mortgagee or any interested party who is not in any way involved in the management of the affairs of the ship.

Interestingly, Mr Justice Salmon in *Slattery v Mance*[107] was of the opinion that: 'There is no principle of the common law and no authority ... for the proposition that, when the facts are peculiarly within the knowledge of the person against whom the assertion is made, the onus shifts to that person.'

A solution?

There are clearly two contradictory points of view on the question of the burden of proof when scuttling with the connivance of the shipowner, or effectively the

104 [1989] 1 Lloyd's Rep 33 at p 40, CA. Evans J in the court of first instance [1986] 2 Lloyd's Rep 470 at p 511 who shared the same sentiments stated that: '... if it were necessary to decide the issue in the present case ... I doubt whether it would be my conclusion if unaided by authority. The definition of barratry includes "to the prejudice of the owner" which suggests that the assured must prove that he was an innocent victim. The burden might not be heavy, unless the plaintiff's own evidence raised doubts about his innocence, or the defendant insurer adduced evidence which had that effect.' See also *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, QBD, a case on similar facts where Cresswell J, who also felt bound to apply *The Issaias* Rule, held that the burden of proof that it was deliberately set on fire by or with the connivance of the ship owner was on the defendants. On appeal [1995] 1 Lloyd's Rep 455, the decision of Creswell J was over-turned on a different finding of fact.

105 [1979] 1 Lloyd's Rep 55.

106 [1960] 2 Lloyd's Rep 469 at p 473.

107 [1962] 1 All ER 525 at p 526, QBD.

defence of wilful misconduct, is pleaded as a defence to a claim for a loss by barratry. On one side, there is a host of authorities of first instance judgments and Court of Appeal *dicta* supporting *The Martiartu-Michael* Rule; on the other, an affirmative but almost solitary and much tolerated Court of Appeal ruling of *The Issaias Case*.

In 1924, a year after *The Issaias* Rule was declared, the Earl of Birkenhead of the House of Lords in *Anghelatos v Northern Assurance Co Ltd, The Olympia*[108] predicted that: '... it is almost certain that this matter will one day require careful consideration by your Lordships when it arise as an issue which actually requires decision in this House …'.[109] Lord Sumner, however, in a rather subtle, but most enlightening speech, offered some indication of his perception of the law:[110]

> 'If it is the case that loss by wilful misconduct by the assured is a mere *exception* out of a *prima facie general liability* from loss by stranding or by foundering, then I can well understand why the law says those who allege that exception must prove it, namely, the underwriters, but if it be that the law as I understand it lays down finally that an assured is insured against accidental stranding, but not against designed stranding, then it may well be that the assured only brings himself within the proposition that he has proved a loss by perils insured against, if he proves the circumstances of the loss were circumstances of accidental stranding.'

The distinction as stated lies, on the one hand, between an exception 'out of a *prima facie* general liability' and, on the other, between a peril which is insured and one which is not, (as illustrated by his example of accidental and designed stranding); though fine and intriguing it is, nevertheless, instructive, as it may well be the answer to the problem.

Without reading too much between the lines, it would seem that Lord Sumner, though he had made it perfectly clear that the point should be explicitly kept open for future decision, is supportive of *The Martiartu–Michael* Rule. Approaching the matter in another way, it is submitted that the nature and characteristics of an insured peril have to be closely examined for the purpose of determining whether it falls within the '*prima facie* general liability' class of an insured peril. For example:

- In the case of fire (of which there is no definition), other than proof of loss or damage caused by fire, there is no other requirement such as fortuity or absence of consent for the plaintiffs to prove.[111] There is, thus, a '*prima facie* general liability' for loss by fire, and if wilful misconduct is pleaded, it is pleaded as an 'exception out of a *prima facie* general liability'.

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108 (1924) 19 Ll L Rep 255 at p 256, HL.

109 Neill LJ in *The Captain Panagos DP* [1989] 1 Lloyd's Rep 33 at p 40 CA, was also resigned to the fact that, '... the judgments ... in *The Elias Issais* make it impossible for any court below the House of Lords to conclude that where it is common ground ... that a stranding was caused by a deliberate act, the onus of proving an absence of consent or connivance rests on the owners'.

110 (1924) 19 Ll L Rep 255 at p 262. Emphasis added.

111 See *Slattery v Mance* [1962] 1 All ER 525; *The Alexion Hope* [1988] 1 Lloyd's Rep 311, CA; *The Captain Panagos DP* [1989] 1 Lloyd's Rep 33, CA; and *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, QBD; [1995] 1 Lloyd's Rep 455, CA.

- Where a peril of the seas is concerned, the requirement of 'fortuity' or 'accidental' loss (as set out in r 9) clearly rules out from its scope all forms of loss caused by a deliberate or an intentional act. Proof of fortuity would necessarily entail proof of the absence of consent. The second distinction drawn by Lord Sumner between 'accidental' and 'designed' stranding relating to perils of the seas and wilful misconduct on the part of the ship respectively, highlights this point.[112] In the case of fire, the defendants have to prove connivance.
- In the case of barratry, the absence of consent or privity is an inherent feature of the peril. As an integral element of the peril, it has to be proved by the shipowner as a part of the claim, otherwise, the act committed by the master or crew is not barratrous.

Unlike fire, there is no general liability for a loss by a peril of the seas or barratry. Thus, it does not seem unreasonable to expect the party who seeks to rely on such a peril as the cause of loss to adduce proof to satisfy the specifications of the insured peril, namely, fortuity in the case of perils of the seas, and the absence of connivance in the case of barratry.

It would appear that when one applies the *The Issaias* Rule, there is always a possibility that a plaintiff could win a case by default: the fact that the defence may have failed to prove (to the high standard expected of a criminal proceeding) that the ship was scuttled with the connivance of her owners, does not necessarily mean that the plaintiffs have successfully discharged their duty of proving that the loss was barratrous – that it occurred *without* their connivance – or, in the case of a peril of the seas, that it was fortuitous. Once the defence of wilful misconduct is pleaded, it triggers a series of consequences: first, the burden of proof, according to *The Issaias* Rule, shifts to the defendants to prove that the loss was caused with the connivance of the plaintiffs; and, secondly, as can be seen shortly,[113] the standard of proof changes from a balance of probabilities to one of a higher standard, if not beyond reasonable doubt, almost as high as that standard, depending on the gravity of the allegation of fraud.[114]

In *The Issaias Case*, the Master of the Rolls attempted to distinguish *The Martiartu Case* from the case he had to deal with at hand. *The Martiartu Case*,[115] he said, was not relevant because the issue there was in relation to the cause of loss, and 'it was to that issue that the remarks in question were addressed'; whilst in *The Issaias Case*, however, the cause of loss had been ascertained and was no longer in dispute.

Using the same analogy, Lord Justice Neill in *The Captain Panagos DP*[116] tried to distinguish the cases in the following way: he observed that in *The Issaias*

112 A loss by stranding, if designed by the master or crew, would constitute barratry. Lord Sumner could not have had barratry in mind, as barratry is not an accidental loss.

113 See below.

114 See also *Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA, The Filiatra Legacy* [1991] 2 Lloyd's Rep 337, CA.

115 See below.

116 [1989] 1 Lloyd's Rep 33 at p 40, CA.

Case[117] the sinking was 'held', whilst in *The Michael*,[118] it was 'admitted' by the owners, to be deliberate. Why this should make any difference was not explained.

The distinction is difficult to fathom: it is not quite accurate to say that mere proof of the commission of a deliberate act of scuttling by the master or crew is sufficient to make out a *prima facie* case of barratry. Barratry, by definition, is not only an act which is 'wilfully committed' but also one which is committed 'to the prejudice of the owner'.

From hindsight, it would appear that the defendants in *The Issaias Case* would have been better off if they had not averred wilful misconduct as their defence. After all, as was seen earlier,[119] a defendant is not obliged to provide the court with an affirmative theory for the cause of loss. But, as *The Issaias* Rule has demonstrated, if a defendant elects to take the course of alleging that the ship was scuttled with the connivance of the shipowner, the burden will be cast upon him to prove the allegation, failing which the plaintiffs would succeed in their claim. It would therefore seem that a defendant, unless he is in possession of strong evidence of the commission of a fraudulent or criminal act, would be better off if he were to refrain from pleading the defence of wilful misconduct, and simply endeavour to deny the plaintiffs' claim by whatever other means available to him.

To illustrate this point, reference could be made to the American case of *The Lakeland*,[120] where the defendant simply denied the plaintiffs' allegations (of a loss by a peril of the seas) without pleading any affirmative defence. As this point was summarised with admirable clarity by the judge, it is advisable to quote from it:[121]

> 'The ultimate burden did not shift by reason of the evidence of scuttling presented by defendants; that evidence was not offered in support of any affirmative defence, because there was none; it was offered to sustain the denial of liability to raise at least a question in the jury's mind as to whether or not the sinking was in fact due to a peril covered by the policies; it bore only upon the question as to whether or not plaintiffs had affirmatively made out their case of liability under the policies.'

On this occasion, the defendants, without going so far as to 'accuse' the plaintiffs of wilful misconduct, merely supplied the court with evidence sufficient to throw doubts upon the plaintiffs' claim which was that a peril of the seas caused the loss. Through cross-examination of witnesses, the defendants' strategy was to bring to light some evidence of unseeming conduct so as to implicate the plaintiffs, that they were in some way responsible for the loss: such evidence, the defendants had hoped, as would be sufficient to expose or show up the weaknesses of the plaintiffs' case.[122]

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117 (1923) 15 Ll L Rep 186, CA.

118 [1979] 1 Lloyd's Rep 55; [1979] 2 Lloyd's Rep 1, CA.

119 See above.

120 (1927) 28 Ll L Rep 293, US Court of Appeals.

121 *Ibid*, at p 296.

122 As the issues on the burden of proof were not properly defined at the trial, the Appeal Court ordered that the case be retried.

Whether a British court of law would allow a defendant, who has not pleaded the defence, to proceed with evidence of wilful misconduct is doubtful. In the light of the comments made by Lord Justice Cairns in *The Dias*,[123] direct proof would almost certainly be ruled out. It is, however, anticipated that skilful cross-examination of witnesses is as far as the defendants would be allowed to go.

The Martiartu–Michael Rule is consistent with the general principles of the law relating to burden of proof.[124] As the absence of privity or consent is an essential feature of barratry, the party who alleges that an act of barratry has been committed should therefore have to bear the burden of having to prove this requirement. And if, at the end of the day, the court is uncertain as to the cause of loss, it should apply the 'third alternative', as proposed by the House of Lords in *The Popi M*,[125] to arrive at a decision.

It is submitted that 'barratry' and 'perils of the seas' should be placed in the same category in so far as the crucial question of proof of privity or consent is concerned; 'fire' on the other hand could then be seen as an exception to the rule. There would not then be the added advantage of pleading barratry, in preference to perils of the sea, as the cause of loss.

Under current law, the burden of proof varies not only according to the nature of the claim, but also, to the nature of the defence raised. This matter has to be settled, and a general authoritative pronouncement from the House of Lords is now long overdue.

STANDARD OF PROOF OF COMPLICITY

The onus and standard of proof of complicity (or the defence of wilful misconduct) should logically be the same whether the claim of the assured be based on fire, barratry or perils of the seas. But as the preceding discussion has demonstrated, barratry (and fire)[126] is placed in a different category from perils of the seas. In view of the fact that there are two points of view on the question of the onus of proof with the regard to the issue of connivance in relation to barratry, it should not come as a surprise that the standard of proof would vary according to which point of view one adopts.

In *The Issaias Case*,[127] the Court of Appeal, after equating the casting away of a ship by a shipowner as a crime, a fraud and a charge of the gravest kind, had perforce to invoke the criminal standard of proof of beyond reasonable doubt. Accordingly, the Master of the Rolls ruled that: 'Fraud must be brought home to a man with reasonable certainty'; and in an equally informative speech, Lord Justice Warrington said that, 'when the defendants charge the plaintiff with the very serious misconduct of conniving at the casting away of his ship, in other

123 [1972] 2 Lloyd's Rep 60 at p 75, CA.

124 The same general principle applies to perils of the seas: see Chapter 9.

125 [1985] 2 Lloyd's Rep 1.

126 See below.

127 (1923) 15 Ll L Rep 186, CA.

words of being a party to that act, it is incumbent on them to bring his guilt home without reasonable doubt'.

Subsequently, in *Hornal v Neuberger Products Ltd*,[128] the Court of Appeal again had the opportunity to re-examine this question. Though not an insurance case, the principles enunciated therein have been regarded as of general application in civil actions. Lord Justice Denning, after reviewing all the cases and relying on the judgment which he had delivered in *Bater v Bater*[129] arrived at the conclusion that:

> '... the standard of proof depends on the nature of the issue. The more serious the allegation the higher degree of probability that is required; but it *need not* in a civil case, reach the very high standard required by criminal law.'

Recently, the Court of Appeal in *The Filiatra Legacy*[130] reiterated, albeit in a case relating to carriage of goods by sea, that in a case where the assertion of a serious crime is involved, the manner of proof has to be appropriate to the case.

The Issaias Case, amongst others, was criticised as having laid down too high a standard of proof.

No absolute standard of proof

It is fair to say that judges do recognise that there is no 'absolute' standard of proof in a civil case. It would be safer to say that the standard of proof in a civil case is variable from case to case depending on the gravity of the issue or charge.[131] The allegation of a commission of a crime in a civil action would raise the standard from the balance of probability to that of a higher standard. That the highest ceiling of proof of beyond reasonable doubt is not ruled out as a possibility can be seen in the carefully chosen words of Lord Justice Denning.[132] The more serious the charge the higher is the standard of proof.

It is thus not surprising that the judges who felt bound to apply *The Issaias* Rule, such as Mr Justice Branson in *The Gloria*,[133] and Mr Justice Bingham in *The Zinovia*,[134] had no choice but to apply the higher standard of proof attendant to the Rule.

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128 [1957] 1 QBD 247 at p 258.

129 [1951] P 35. He spoke of 'a degree of probability which is commensurate with the occasion' and of 'a degree of probability which is proportionate to the subject-matter'. Emphasis added.

130 [1991] 2 Lloyd's Rep 337 at p 373, CA.

131 See *The Captain Panagos DP* [1989] 1 Lloyd's Rep 33 at p 41, *per* Neill LJ: 'That the burden of proof, though not quite equivalent to that required in a criminal case is a heavy burden commensurate with the gravity of the matter'.

132 He has used the words 'need not' as opposed to 'cannot'.

133 (1936) 54 Lloyd's Rep 35 at p 50, *per* Branson J: 'Scuttling is a crime, and the court will not find that it has been committed unless it is proved with the same degree of certainty as is required for the proof of a crime'.

134 [1984] 2 Lloyds' Rep 264 at p 272, *per* Bingham J, '... it is for the insurer to establish to the high standard required for proof of fraud in a civil case that the owners consented to, or connived at, the casting away'.

On the other hand, as to be expected, supporters of *The Martiartu–Michael* Rule would naturally apply the standard of proof which is consistent with their theory of the onus of proof. Mr Justice Kerr held that 'common sense' required that the plaintiffs satisfy him on a 'clear balance of probability' that the vessel was sunk without their knowledge or consent. As the burden of proof does not shift, but remains with the plaintiffs throughout – regardless of the nature of the defence – they have to satisfy the courts on a balance of probability that the loss was caused by an insured peril.

C – PROOF OF LOSS BY FIRE

The fact that 'fortuity' is not an essential ingredient for the peril of 'fire' renders the onus of proof for the assured that much easier to fulfil. To capture the words of Mr Justice Evans in *The Captain Panagos DP*:[135]

> '"Fire", unlike "perils of the seas", does not itself connote a fortuity ... there is no statutory definition which gives grounds for arguing that the possibility of connivance must be disproved. I therefore conclude that the plaintiffs would have proved a loss by fire, if their claim had not been defeated by the defence of owners' connivance.'

Thus, in comparison with 'perils of the seas', an assured in a claim for loss by fire has a *lesser* burden of proof: *Slattery v Mance*[136] is the authority which has established the rule that '… once it is shown that the loss has been caused by fire, the plaintiff has made out a *prima facie* case, and the onus is on the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff'. Accordingly, if at the end of the day the jury comes to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff would win on that issue.[137]

The above statements have clarified that the initial proof of loss by fire lies with the plaintiffs, but proof of the defence of connivance, and of wilful misconduct, rests with the defendants. It is not for the plaintiffs to prove the absence of connivance, but for the defendants to prove its presence.

In *The Ikarian Reefer*,[138] Mr Justice Cresswell, after citing the above case and *The Captain Panagos DP*[139] with approval, summarised the legal position as regards the burden of proof as follows:

> 'Where the owners have proved a loss by fire, the burden of proving a deliberate fire and connivance lies upon the insurer. If the evidence leaves the court in doubt then the assured is entitled to succeed. Thus the assured in a claim for loss by fire has a lesser burden than one claiming for loss by perils of the sea (who

135 [1986] 2 Lloyd's Rep 470 at p 511, QBD; on appeal [1989] 1 Lloyd's Rep 33.

136 [1962] 1 All ER 525 at p 526.

137 It has to be said that the standard of the 'balance of probabilities' advocated by Salmon J is now, in the light of the Court of Appeal's ruling in *The Captain Panagos DP* [1989] 1 Lloyd's Rep 33 at p 41 *per* Neill LJ, no longer good law.

138 [1993] 2 Lloyd's Rep 68 at p 71, CA. The fact that his decision was overturned on a different finding of facts does not affect his observations on the law on the burden of proof.

139 [1986] 2 Lloyd's Rep 470 at p 510. The remarks of the trial judge, Evans J, were approved.

must prove fortuity); though he is in the same position in this respect as the claimant for loss by barratry.'

In what way the plaintiffs' position is the same as that of a claimant for a loss by barratry is unclear. Admittedly, the burden of proof of a plaintiff claiming a loss by fire is lighter than in the case of a perils of the seas: he does not have to prove fortuity. The similarity referred to by Mr Justice Creswell presumably relates to the question of the burden of proof of connivance as laid down in *The Issaias Case*, to the effect that the defendants have to bear the burden of proof that the ship was wilfully set on fire, or was scuttled by the plaintiffs. In the case of a peril of the seas, however, as the need to prove fortuity entails proof of an absence of connivance, the burden of proof lies with the plaintiffs. In this sense, fire is said to be in the same class as barratry.

Standard of proof

An insurer who alleges that a ship was deliberately set on fire with the connivance of the assured has to prove this fact. This is in conformity with the general principle of the common law: he who asserts must prove.

That the burden of proof of the defence of wilful misconduct, in a case where fire is alleged to have caused a loss, lies upon the defendants is also an indisputable principle of the law of marine insurance.[140] As the peril of 'fire', unlike perils of the seas, does not contain the element of fortuity, the burden of proof of connivance must rest with the defendants. The question which now arises is: what is the standard of proof as regards this defence?

That 'fire' is in the same class as 'barratry' in relation to the onus of proof as regards the defence of wilful misconduct is made clear in the above observations. Lord Justice Neill of the Court of Appeal in *The Captain Panagos DP*[141] was clear that 'the burden of proof, though not quite equivalent to that required in a criminal case is a heavy burden commensurate with the gravity of the matter'. The same criterion was applied by Mr Justice Cresswell in *The Ikarian Reefer*[142] who was, of course, bound by this and the other similar rulings of the Court of Appeal. It is interesting to note that when *The Ikarian Reefer* went on appeal, the Court of Appeal, relying on *The Filiatra Legacy*[143] held that:

> On this issue, the burden of proof rests unequivocally on the insurers, and the degree or standard of proof which the law requires makes the burden heavier than that which rests upon the shipowners. Although the same "balance of probabilities" test applies, the standard of proof required is commensurate with the gravity of the allegation made; and no more serious allegation can be made against the master of a ship, a trained and experienced professional who was responsible for its safety and for the lives and welfare of its crew.'

140 The comments made by the Court of Appeal in *The Ikarian Reefer* [1995] 1 Lloyd's Rep 455 are concerned with the burden and standard of proof in relation to a claim for a loss by perils of the seas.

141 [1989] 1 Lloyd's Rep 33 at p 41, CA.

142 [1993] 2 Lloyd's Rep 68 at p 71, QBD.

143 [1991] 2 Lloyd's Rep 337 at p 373, CA.

In the light of these remarks which are the most recent on the subject, one could safely say that the degree or standard of proof ranges from at its lowest, the balance of probabilities, to its highest, which may come close to, but not quite, the standard of beyond reasonable doubt. The Court of Appeal was quick to remind us that, '… we bear in mind that, on the authorities, the burden rests upon the insurers is derived from the civil, *not* the criminal standard' of proof.