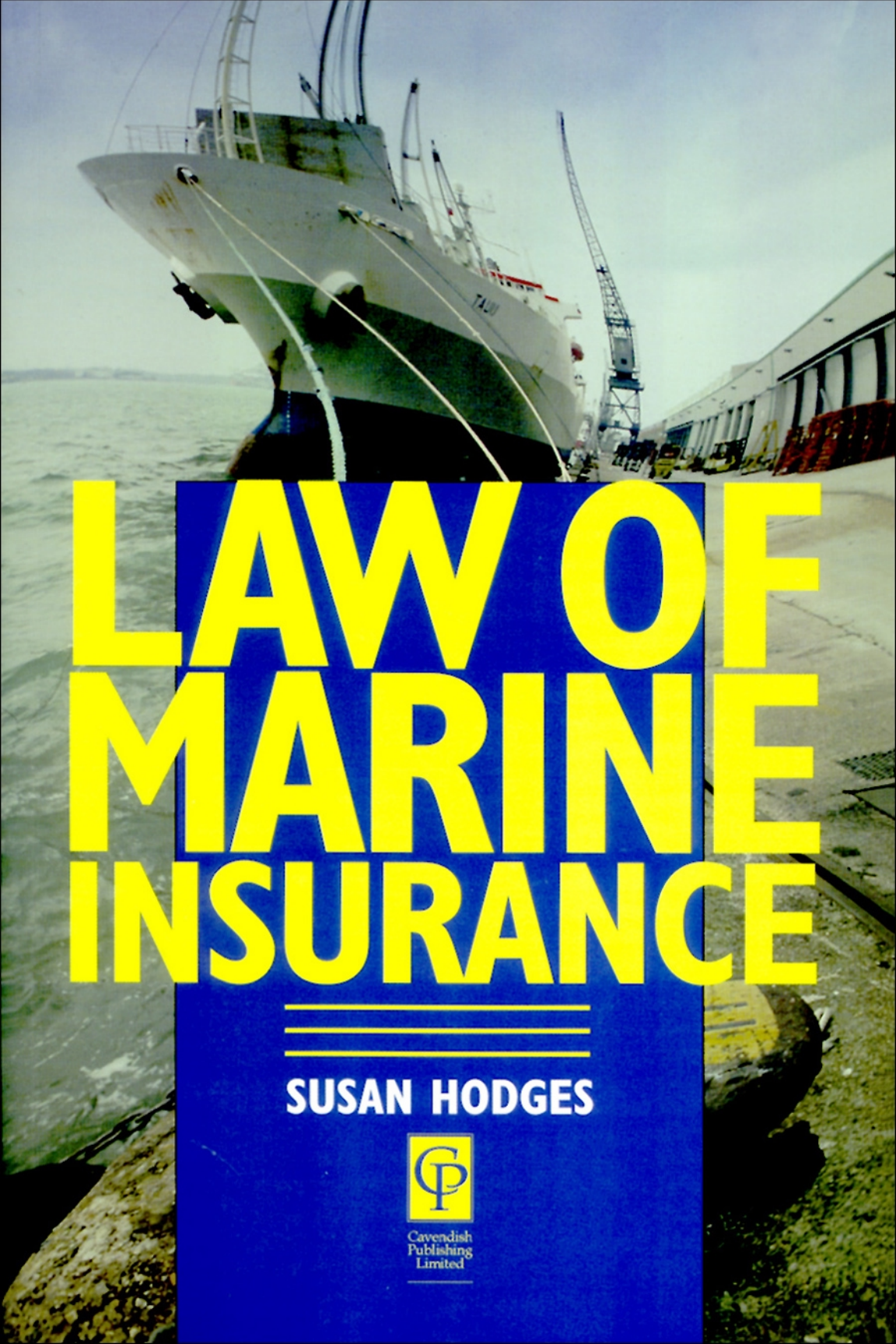

LAW OF MARINE INSURANCE

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CHAPTER 16

PARTICULAR AVERAGE LOSS

MEANING OF 'PARTICULAR AVERAGE LOSS'

Section 64(1) declares that: 'A particular average loss is a *partial loss* of the subject-matter insured, caused by a peril insured against, and which is not a general average loss'. The term 'partial loss' is generic[1] and should not be loosely used to refer to a 'particular average loss'. Thus, if one wishes to be precise or pedantic, the terms should not, strictly speaking, be used interchangeably as if they are synonymous. The Act, though it has taken care to distinguish between the different types of partial losses,[2] is nevertheless itself guilty of using the terms indiscriminately.

General average losses, salvage charges, and particular charges (sue and labour charges) are all examples of a partial loss. However, general average and particular charges have been expressly excluded from the umbrella of a 'particular average loss' by ss 64(1) and 64(2) respectively. The former states that a particular average loss is a partial loss which is not a general average loss. And s 64(2) states that, 'Particular charges are not included in particular average'. Thus, it is fair to say that with the exception of general average and particular charges, all partial losses (including salvage charges) are particular average losses. On an even higher level, one could go further and deduce that all losses, except a total loss, a general average loss and a particular charge, are particular average losses.

It would appear from the above sections that the expression 'particular average loss' was coined simply to distinguish it from general average and particular charges, both of which are extraordinary expenses incurred for the preservation of the maritime property from loss at sea. Thus, it is necessary to distinguish these special types of losses from a particular average loss; and to facilitate a proper understanding of this chapter, a very brief comparison of a particular average loss with these special types of losses will first have to be undertaken.

Particular average loss and general average loss

The main difference between a particular average loss and a general average loss was described in simple but clear language in *Hingston v Wendt* as follows:[3]

> 'In insurance law, the phrase "general average" is commonly used to express what is chargeable on all, ship, cargo, and freight, and "particular average", to express a charge against some one thing.'

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1 This is also made obvious by the main heading of the Act which reads as: 'Partial Losses (*including* Salvage and General Average and Particular Charges)'.

2 See, eg, ss 64(2), 65(2), 76(2) and 78(2). It is interesting to note that under its rules relating to the measure of indemnity, the Act has carelessly used the term 'partial loss' in ss 69–71 when, in effect, they can hardly be relevant to a general average loss where the measure of indemnity is specifically laid down in s 73(1). See also s 77(2), discussed below.

3 (1864) 1 QBD 367 at p 371.

Though both must be caused by an insured peril,[4] the fundamental distinction between them lies in the fact that in the case of a particular average loss, there is no question of contribution because the loss lies where it falls – entirely upon the person who has actually suffered the loss. A general average loss (expenditure or sacrifice), however, is a loss voluntarily incurred for the common safety of the adventure. As such, any interested party who has derived benefit from the general average act is legally obliged to make a (rateable) contribution to the party(ies)[5] who has/have suffered the loss.

The operative words are 'particular' and 'general'. In the case of a particular average loss, the liability is 'particular' to the interest which has sustained the loss; whilst in a general average loss, it is 'general' in the sense that all the interested parties must make a contribution to the loss.

Particular average loss and particular charges

The first part of s 64(2) defines 'particular charges' as:

> 'Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges.'

That a 'particular charge' is distinct from a 'particular average loss' is made clear in the last sentence of s 64(2).

The key word is 'charges' which are expenses incurred for the preservation of the subject-matter insured. Such charges (or expenses) may be incurred only after an insured peril has caused some damage to the subject-matter insured. The word 'loss' (in the term 'particular average loss'), on the other hand, connotes damage directly sustained by the subject-matter insured caused by a peril insured against.

It is generally accepted that particular charges are recoverable from the insurer by way of the sue and labour clause,[6] even though there is nothing in the Act (not even in s 78 containing the law on sue and labour) which expressly declares that expenses incurred for suing and labouring are recoverable as 'particular charges'. But as the expense to sue and labour is by definition (s 78(4)) one incurred to 'avert or minimise' a loss, it also falls within the scope of the words 'expenses incurred ... for the safety or preservation of the subject-matter insured …' appearing in s 64(2). Sue and labour charges are thus deemed to be 'particular charges'. But whether there are, besides sue and labour, any other types of particular charges is unclear. The term 'particular charges' is indeed elusive.[7]

4 See ss 64(1) and 66(6).

5 See s 66(3).

6 Discussed in Chapter 17.

7 Arnould, at para 1132, states that 'It is not specified anywhere in the Act whether an expense which falls within the definition of "particular charges" may be recovered as a partial loss otherwise that under the suing and labour clause'.

Section 78(1), which confirms that sue and labour charges are recoverable '… notwithstanding that the insurer may have paid for a total loss or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage …' gives another hint (besides s 76(2)) that a particular charge is not the same thing as a particular average loss.[8]

Particular average loss and salvage charges

Salvage charges are, however, particular average losses. Though salvage charges are very much like general average and particular charges in the sense that they are also extraordinary expenses incurred to save maritime property from loss at sea, they are also distinct and exist as a separate type of loss. This is clarified by ss 64(2) and 65(2).

Types of partial loss

The term 'partial loss' is simply a handy and general expression used to embrace any loss which is not a total loss. The expression 'particular average loss' covers all types of partial loss, except a general average loss and a particular charge. For the purposes of clarity and discussion, it is necessary to divide partial losses into two classes:

- A loss which arises when the subject-matter insured sustains direct *physical* damage caused by a peril insured against: this type of loss may be described as a true particular average loss; and
- A loss engendered by *extraordinary expenses* incurred, after the casualty had arisen, for rescue operations undertaken to prevent further losses from taking place. General average losses (expenditure or sacrifice), particular charges (and sue and labour charges) and salvage charges[9] are all partial losses, but of an extraordinary nature in the sense that they represent expenses specially incurred for the preservation of the insured subject-matter and/or maritime property, as the case may be, from loss at sea. The nature, incidence, and method of payment of these extraordinary expenses will be discussed in the next chapter.

This chapter will only concentrate on the first type of partial loss where physical damage is sustained by the subject-matter insured. It will cover all the various forms of particular average losses (except salvage charges) on ship, goods and freight.

PARTICULAR AVERAGE LOSS OF SHIP

The divide between certain types of constructive total loss and a particular average loss of a ship may not initially appear to be clear-cut. This is because in

8 The engagement to sue and labour is 'supplementary' to the contract of insurance: see s 78(1) and cl 11.6 of the ITCH(95) and cl 9.6 of the IVCH(83).

9 General average and particular charges are not particular average losses.

both cases the damage sustained by the ship is repairable.[10] The extent of the damage[11] and the cost of repairs will, however, determine whether a loss is a constructive total loss or a particular average loss. Should the cost of repairs exceed the value of the ship when repaired,[12] the law would be prepared to regard her as a constructive total loss, but only if her owner chooses to make a claim on that basis.[13] But should the cost of repairs be not commercially prohibitive, the loss to her owners will be for particular average, and the total sum which they are entitled to recover under the policy is known as the 'measure of indemnity'[14] Before embarking upon an analysis of this subject, it is necessary to say a few words about the deductible clause.

The deductible clause

The deductible clause (cl 12.1 of the ITCH(95))[15] is a simplified version of the Common Memorandum under the old SG policy,[16] the purpose of which was to exclude small claims and certain inevitable losses in relation to goods of a perishable and wasteful nature. Instead of being worded as under the common memorandum as 'free from average warranty' (with exceptions), which was indeed a clumsy and contrived formula, the deductible clause of the ITCH(95) states that:

> 'No claim arising from a peril insured against shall be payable ... unless the aggregate of all such claims arising out of each separate accident or occurrence ... exceeds *the deductible amount agreed* in which case this sum shall be deducted.'

The deductible clause is applicable to all claims for a partial loss arising from a peril insured against. To remove all doubts, cl 8 (3/4ths collision liability), cl 10 (general average and salvage), and cl 11 (duty of assured – sue and labour) of the ITCH(95) are specifically included as being governed by the deductible clause.[17]

It also clarifies that it does 'not apply to a claim for total or constructive total loss of the vessel, or in the event of such a claim, to any associated claim under

10 The purpose of the opening words of s 69 – 'Where a ship is damaged, but is not totally lost …' is to eliminate an actual and a constructive total loss from the scope of the section.

11 If a ship is destroyed or so damaged as to become a total wreck, her owners will be entitled to claim for an actual total loss. If the damage sustained by the ship is irreparable, rendering her to 'cease to be a thing of the kind insured', she would be classified as an actual total loss.

12 See s 60(2)(ii), or the insured value as is the case under cl 19 of the ITCH(95) and cl 17 of the IVCH(95).

13 See s 61. *Pitman v Universal Marine Insurance Co* (1882) 9 QBD 192; *The Medina Princess* [1965] 1 Lloyd's Rep 361; and *Peele v Merchants Insurance Co* (1822) 3 Mason R 27 at p 64, where Story J observed that: 'The insured is in no case bound to abandon. He may in all cases elect to repair the damage at the expense of the underwriter …'. On the law of constructive total loss, see Chapter 15.

14 See s 67.

15 Corresponding cl 10 of the IVCH(95). Note that under the old cl 12.1 of the ITCH(83), the deductible amount had to be inserted in the space provided. The practice under the new cl 12.1 is to state the deductible in the schedule attached to the policy.

16 In relation to ship, the Memorandum stated: '... this ship warranted free from average, under three pounds per cent, unless general, or the ship be stranded'.

17 Corresponding cll 6, 8 and 10 of the IVCH(95).

clause 1 arising from the same accident or occurrence'. The expense of 'sighting the bottom after stranding, if reasonably incurred specially for that purpose ... and even if no damage be found' is also excluded from the scope of the clause.

The deductible clause has also settled beyond doubt the question of whether the amount was an excess or a franchise. Under the common memorandum, it was construed as a franchise by which the insurer is liable for the full amount of the loss incurred. The deductible clause, however, has by the use of the words 'this sum shall be deducted' made it clear that it is an excess clause meaning that the assured has to bear the loss up to the amount stated in the clause.

Measure of indemnity

Section 69 stipulates three sets of rules for computing the measure of indemnity for a particular average loss in relation to:

- A ship which has been wholly repaired;
- A ship which has been only partially repaired; and
- A ship which has not been repaired, and has not been sold in her damaged state during the risk.

There is, however, a fourth category of loss which is overlooked by the Act, namely, where a ship has not been repaired and has been sold in her damaged state during the risk. For convenience and to avoid repetition, the statutory provisions are divided into two main parts, namely, repaired damage and unrepaired damage, for the purpose of the ensuing discussion. The fourth class of loss will be examined separately.

Repaired damage

An owner may chose to repair either the *whole* or only part of the damage sustained by his ship. Should he elect to repair the whole of the damage, the measure of indemnity for such a particular average loss is spelt out in s 69(1) which states that:

> 'Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.'

Should he decide to repair only *part* of the damage sustained by the ship, the measure of indemnity as regards *that* part which has been repaired is contained in the first limb of s 69(2) which reads as follows:

> 'Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above ...'

This clarifies that the legal principles to be applied for that part of the damage which had been repaired is the same as in the case where the ship had been wholly repaired. As the measure of indemnity for both s 69(1) and the first part of s 69(2) is the same, they will be examined together.

It is noted that the above subsections do not specify a time factor as to when the repairs have to be made.[18] As the Act is silent on the subject, it can be assumed that her owner is at liberty to have her repaired at any time after the accident, during, and even after the termination of the risk. But once she has been repaired, whether wholly or partially, during the risk the following rules will apply to the repaired damage.

'Reasonable cost of the repairs'

That an assured is entitled to the 'reasonable cost of the repairs' is clear. The only issue which is likely to arise in such a case is, what may and may not be included in the cost of repairs. Fortunately, the matter is now reasonably well-settled by case law and the Institute Hulls Clauses.

Expenses of docking

Pilotage, towage, and dock dues, are all recoverable from the insurer, if the ship must be docked for repairs. It would appear from *Ruabon SS Co v London Assurance*[19] that an assured may take advantage of the fact that the ship is docked, to have her surveyed and to effect necessary improvements. Provided that he does not lengthen her stay at the dock or cause any increase in docks dues, the cost will have to be borne by the insurer.[20]

Bottom treatment

With exceptions, cl 15 of the ITCH(95) states the general rule as: 'In no case shall a claim be allowed in respect of scraping gritblasting and/or other surface preparation or painting of the Vessel's bottom …'.[21]

Wages and maintenance

The general rule in cl 16 of the ITCH(95) is that: 'No claim shall be allowed ... for wages and maintenance of the master, officers and crew ...'.[22]

Surveyor's fees

Agenoria SS Co Ltd v Merchants Marine Insurance Co Ltd[23] and *Helmville Ltd v Yorkshire Insurance Co Ltd, The Medina Princess*[24] have allowed reasonable fees for classification and other surveyors fees to be included in the cost of repairs.

18 In the case of a ship which has not been repaired and has not sold, a time is expressly specified in s 69(3) by the words 'during the risk'.

19 [1900] AC 6, HL.

20 *Cf Marine Insurance Co v The China Transpacific SS Co, The Vancouver* (1886) 11 App Cas 573, HL, where the House of Lords was prepared to apportion the dock charges, to repairs for particular average damage, and to scraping and painting. Arnould, para 1124, states that *The Vancouver* would probably not be followed.

21 Clause 13 of the IVCH(95).

22 Clause 14 of the IVCH(95).

23 (1903) 8 Com Cas 212.

24 [1965] 1 Lloyd's Rep 361 QBD (Com Ct).

Consequential damage

On the subject of consequential damage, the case which immediately springs to mind is *Field v Burr*,[25] where the cost of removing a putrid cargo in order to enable repairs to be carried out was held not recoverable as particular average. The court canvassed the possibility of a cargo, for example of cement which had adhered to the hull and had to be removed because it was not only causing damage to the ship, but was also preventing repair works on the ship from being carried out. In such a situation, it is said that the cost of removing and cleaning the solidified cargo may properly be regarded as part of the cost of repairs to the hull. But whether the cost of removal or disposal of the cargo may be included in the repair bill is questionable.

'Less customary deductions'

This rule contemplates the 'one-third new for old' rule which was commonly applied to wooden ships. As a rough guide, one-third used to be subtracted from the cost of repairs to take into account the benefit which the owner had perceived to have derived from the new materials replacing the old.[26] This somewhat arbitrary rule of thumb can no longer be applied because of cl 14 of the ITCH(95) which declares that 'Claims [are] payable without deduction new for old'.[27] Such a departure from the general rule is permissible because of the words 'subject to any provision in the policy' appearing in s 69.

'Not exceeding the sum insured'

There is nothing in the Act or the policy which prevents an assured from claiming the total sum insured as indemnity for a particular average loss. He is entitled to utilise the whole sum, for one casualty, for a particular average loss. This is spelt out in s 69(1).[28]

Unrepaired damage

The law on the measure of indemnity for unrepaired particular average damage is contained in s 69(2) (the second part) and s 69(3). The former declares that the assured is entitled:

> '... also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.'

An assured is, of course, entitled to be indemnified for that *part* of the damage which is unrepaired. The purpose of this part of the subsection is to compensate him for any 'reasonable depreciation' arising from the unrepaired damage.

The maximum amount which an assured is allowed to recover for the repaired and the unrepaired damage must not exceed the cost of repairing the whole damage. This is a reasonable and sensible rule, for he should not be

25 [1899] 1 QB 571.

26 See r D7 of the Rules of Practice of the Association of Average Adjusters.

27 The same rule appears in cl 12 of the IVCH(95).

28 See *Goole & Hull Steam Towing Co v Ocean Marine Insurance Co Ltd* (1929) 29 Ll L Rep 242.

allowed to benefit by not repairing the whole of the damage sustained by the ship.

The 'reasonable depreciation' rule also applies where no repair at all has been made to the damage. Section 69(3) provides that:

> 'Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage computed as above.'

'Reasonable depreciation'

A comparison of the above statutory provisions will reveal that the legal principles for adjustment applicable to that part of the damage which has not been repaired is the same as in the case where the whole of the damage has not been repaired. The 'reasonable depreciation' rule can be found in both s 69(2) (the second part) and s 69(3). The Institute Hulls Clauses have, however, not surprisingly, incorporated both circumstances under one provision – cl 18 of the ITCH(95) – named as the 'unrepaired damage' clause, which reads as follows:

> 'The measure of indemnity in respect of claims for unrepaired damage shall be the reasonable depreciation in the market value of the Vessel at the time this insurance terminates arising from such unrepaired damage, but not exceeding the reasonable cost of repairs'.

It echoes parts of ss 69(2) and 69(3), but the legal principles laid down therein are by no means identical.

Neither the Act nor the Clauses have defined how 'reasonable depreciation' is to be calculated and quantified in monetary terms. As can be seen shortly, this is indeed a very difficult task. Under English law, there are essentially four cases which have dealt with the subject of 'reasonable depreciation'. The first was *Pitman v Universal Marine Insurance Co.*[29] As it is largely concerned with the fourth situation mentioned earlier, where the ship has not been repaired and has been sold during the risk, it is best that it be left for discussion separately at a later stage.

Irvin v Hine,[30] was the first authority to interpret s 69(3). The vessel sustained a particular average damage when she stranded, and as her owners (the plaintiffs) were unable to make out a case of a constructive total loss, they had to rely on their alternative claim for a partial loss. As the ship was neither repaired nor sold, they pleaded s 69(3) in support their claim for indemnity for the unrepaired damage. The figures which the Court of Appeal had to consider were:

Agreed or insured value:	£9,000
Cost of repairs:	£4,620
Sound or undamaged value:	£2,000[31]
Damaged value:	£ 685

29 (1882) 9 QBD 192, henceforth referred to as *The Pitman Case*.

30 [1950] 1 KB 555.

31 £3,000 was the court's estimate.

Altogether, three proposals, two of which were offered by the insurers, were tendered to the court for consideration:

- The assured argued that they were entitled to be indemnified the sum of £8,315, which was arrived at by subtracting the damaged value of £685 from the insured value of £9,000 [£9,000 – £685 = £8,315].
- The insurers contended that the court should simply subtract the damaged value of £685 from the undamaged value of £2,000, leaving the sum of £1,315 [£2,000 – £685 = £1,315].
- Alternatively, the insurers suggested that 'reasonable depreciation' was to be calculated as a percentage, which was then to be applied to the insured value. To ascertain the extent or rate of reasonable depreciation, a comparison was to be made between her true undamaged value of £2,000 and her true damaged value of £685. On this basis, she had depreciated in value by approximately two-thirds. The formula was:

$$\frac{£2,000 - £685 \text{ x } £9,000}{£2,000} = £5,917.50$$

This sum was, of course, subject to the overriding maximum of the cost of repairs.

The second of the above methods was swiftly rejected by Mr Justice Devlin, who found it totally unacceptable on the ground that it infringed the principle contained in s 27(3) that: 'the value fixed by the policy is, as between the insurer and the assured, conclusive of the insurance value of the subject intended to be insured, whether the loss be total or partial.'

As regards the first and third methods of calculation, he was not prepared to commit himself as to which one was to be applied. Fortunately for Mr Justice Devlin, it was unnecessary for him in the circumstances of the case to express his preference for one or the other, because they both produced a sum well in excess of the reasonable cost of repairs. The plaintiffs were accordingly awarded the sum of £4,620 (reasonable cost of repairs) as compensation for the unrepaired particular average loss. The proper ceiling has to be the 'reasonable cost of repairs': for any larger sum would place the assured in a more advantageous position than if he were to repair the damage.

At about the time when *Irvin v Hine* was being heard, the same problem was encountered by the court in a non-marine case,[32] *Elcock and Another v Thomson*,[33] where the court had effectively applied the third method of calculation described above. Mr Justice Morris, referring to s 69(3) of the Marine Insurance Act for guidance, observed that: 'Indemnification for reasonable depreciation must ... take into account any agreed valuation. Such agreed valuation is the *corpus* out of which depreciation takes place and by reference to which the depreciation must be measured.'[34]

32 The principle of the law of reasonable depreciation should be the same whether the policy be marine or non-marine, both being contracts of indemnity.

33 [1949] 2 All ER 381. It is interesting to note that Morris J found support also in s 71(3) which applies to goods.

34 *Ibid*, at p 386.

In 1965, the issue arose again in *The Medina Princess*,[35] where the vessel was insured for an agreed value of £350,000. Her sound value was £65,000, and her damaged value was nil. In terms of percentage, her rate of depreciation was 100%. Once again, no solution to the problem was given: for, as in *Irvine v Hine*, both the first and the third methods of calculation produced a sum greater than the reasonable cost of repairs. Mr Justice Morris was content to let matters rest by saying that: 'Its solution must wait until the occasion for its decision arises.'

In the ultimate analysis, it is fair to say that the English authorities are all in agreement that the insured value has a role to play in the calculation of reasonable depreciation. What exactly this role is, is unclear.[36] The choice has been narrowed down to either the first or the third method of calculation.

The unrepaired damage clause

Clause 18.1 of the ITCH(95)[37] has introduced the 'market value' of the vessel (at the termination of the risk) for the calculation of 'reasonable depreciation'. There is nothing in the clause to suggest that the 'insured value', or a percentage of it, is to be applied in the equation. The method proposed in cl 18.1 is, in effect, not dissimilar to the second method of assessment described above;[38] instead of the sound or undamaged value, the 'market value' is to be used. It has to be pointed out that the sound or undamaged value may or may not coincide with the 'market value' which, as its name suggests, would take market forces into account.

There are two ceilings imposed by cl 18. First, in relation to the question of 'reasonable depreciation', the highest figure that may be taken is the 'reasonable cost of repairs'. Secondly, the uppermost limit of the 'insured value' spelled out in cl 18.3 relates to the overall *liability* of the insurer for the unrepaired damage.[39] The phrase 'at the time this insurance terminates' (qualifying the insured value) creates the impression that the insured value could vary or fluctuate during the course of the policy. This, however, is not the case for, as a rule, the original insured value is rarely altered. One author suggests that the phrase relating to time has been inserted in order to take into account cl 1.3[40] which provides that 'the original insured value may be reduced if the ship sails to be broken up'.[41] If anything, cl 1.3 is an exception to the general rule.[42]

35 [1965] 1 Lloyd's Rep 361.

36 It would appear that in the United States in the case of *Compania Maritima Astra SA v Archdale, The Armar* [1954] 2 Lloyd's Rep 95, the Supreme Court had interpreted *Irvin v Hine* as having approved the third as the correct method for calculating 'reasonable depreciation'.

37 Corresponding cl 16.1 of the IVCH(95).

38 Which it is to be recalled was disapproved in *Irvin v Hine* [1950] 1 KB 505, because it did not taken into account the insured value of the ship.

39 Emphasis added. Clause 18.3: 'The underwriters shall not be liable in respect of repaired damage for more than the insured value at the time the insurance terminates.'

40 Now cl 1.5 of the ITCH(95).

41 See O'May, p 448.

42 It is to be noted that there is no equivalent to cl 1.5 in the IVCH(95).

The final sum which an insurer can be made liable for an unrepaired damage is, assuming that the vessel is fully insured,[43] the agreed or insured value. Thus, if the reasonable depreciation, however computed, is more than the cost of reasonable repairs, the latter applies. And should the reasonable cost of repairs be higher than the insured value, then the insured value has to prevail. Howbeit, it is also important to remember that the assured can never recover, whether the loss be partial or total, more than the sum insured.[44] It is worthwhile recalling the words of Jessel MR in *The Pitman Case*:[45]

> '... as a general rule in no case can the insured become richer by reason of these perils, or in other words … the insured ought not to be entitled to receive from the insurer a larger sum for a single partial loss than if the ship was wholly lost.'

'During the risk'

In *The Medina Princess*,[46] Mr Justice Roskill said that the point in time at which the measure of indemnity for an unrepaired damage is to be ascertained and quantified can to be found in the words 'during the risk'. Right up until the time the policy expires, an assured may repair the damage. This necessarily means that an adjustment cannot be undertaken until the expiry of the policy when the matter is clinched or finalised.[47] Mr Justice Roskill's interpretation of the section is as follows:

> 'But if "during the risk" which I construe as meaning "during the peril between the casualty and the expiry of the policy whether by effluxion of time or otherwise" she is neither repaired nor sold, then subsection (3) comes into operation. Until the moment when the risk expires, the ship might be repaired or indeed might be sold.'

Whilst the policy remains in force, there is always the chance of a change in circumstance: the damage might be partially or wholly repaired; the ship might not be repaired and not sold during the risk; or she might be sold in her unrepaired state during the risk.

Where the ship has not been repaired and has been sold during the risk

The Act is silent as to how this contingency is to be resolved. It is somewhat surprising, not to mention the least regrettable, that parliament had deemed it fit to ignore the subject when the problems associated therewith, which were all brought into the open by *The Pitman Case* in 1882, were staring at them in the face when s 69 was enacted. In the said case, the ship was sold in her damaged state during the risk for £3,897. Her sound value was taken at £4,000, and the cost of repairing her assessed at about £5,300.

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43 The measure of indemnity is always based on the hypothesis that the subject-matter insured is to be regarded as fully insured. See s 67(1).

44 See s 81.

45 (1882) 9 QBD 192 at p 204.

46 [1965] 1 Lloyd's Rep 361, QBD (Com Ct).

47 What an assured does with his ship after the termination of the risk is his own business, and no concern to the insurers. See *Knight v Faith* (1850) 19 LJ QB 509 at p 518, on the question of a sale (by the master) after the expiration of the policy; Lord Campbell CJ commented that: '... there is no such loss known in insurance law as a sale by the master, unless it be barratrous …'.

'Fixes his loss'

First, it has to be pointed out that there is nothing in the Act nor the Institute Hulls Clauses prohibiting an assured from selling the ship during the risk. However, certain consequences flow from such a sale.[48] In relation to a claim for particular average, the effect of a sale was summed up by Lord Justice Cotton in *The Pitman Case* as follows:[49]

> 'Where, as in the present case, there is not a constructive total loss, he is not against the insurers entitled to sell so as to bind them by the loss resulting therefrom; but when he elects to take this course ... he, as against himself, *fixes* his loss, that is, he cannot, as against the underwriters, say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale.'

What this means is that an assured is bound by the consequences of the sale. He 'cannot possibly increase his actual loss by saying that he would have lost more if the ship had not sold for so much as she in fact realised'.[50] The price for which the ship was sold for will affect the measure of indemnity for the particular average loss. It will 'fix' the amount recoverable, and the assured is bound by any gain or loss resulting from the sale.

Measure of depreciation

In *The Pitman Case*, all the judges agreed that where an owner has not repaired the vessel, '... he is entitled to have made good to him the depreciation at the end of the risk in the value of his vessel, so far as this is caused by the peril insured against'.[51] That the principle of reasonable depreciation applied to unrepaired damage even before the Act was not in dispute. The controversy centred around the measure that was to be used to ascertain the extent of the deterioration. The assured argued that the estimated cost of repairs was the measure of indemnity; whilst the insurer naturally went for the lesser sum – the difference between the sound value and the damaged value, namely, the sale price. The court, therefore, had to decide which was the correct method to employ to ascertain the depreciation in the value of the ship.

Lord Justice Cotton commenced his judgment by comparing the legal position of a ship which has been repaired to one which has not been repaired:[52]

> 'As a general rule where there is a partial loss in consequence of injury to a vessel by reason of perils insured against, the insured is entitled to recover the sum properly expended in executing the necessary repairs, or, if the work has not been done, the estimated expense of the necessary repairs ...'

Not only did he stress that: 'As a general rule the estimated cost of the repairs is the measure of deterioration …', but he also made it perfectly clear that this is not the 'only', but 'a' method of estimating the deterioration of the vessel. In the present case, he felt that if he were to apply the general rule, and allow recovery to be based on the estimated cost of repairs, the assured would

48 See, eg, cl 5.2 of the ITCH(95). No corresponding clause in the IVCH(95).

49 (1882) 9 QBD 192 at p 218.

50 *Ibid*, at p 202, *per* Lindley J.

51 *Ibid*, at p 216, *per* Cotton LJ.

52 *Ibid*, at p 215.

in the end be able to recover more than the loss which he had actually sustained. Such a method of calculation would be contrary to the cardinal principle of insurance law that a contract of insurance is a contract of indemnity. With this in mind, he accordingly concluded that the amount of deterioration is to be fixed by subtracting the proceeds of the sale from the value of the ship when uninjured.

Having said that, it is observed that the majority of the court agreed that the decision of the judge in the court below, Mr Justice Lindley, was 'substantially right'.[53] Mr Justice Lindley had held that the proportion of loss sustained by the assured – by reason of the depreciation – was to be calculated by subtracting her damaged value, being what she sold for, from the sound value of the ship. This proportion must then be applied to the declared or insured value. He had effectively applied the principles of the third method described above. In the circumstances of the case, it was unnecessary for him to ascertain the damaged value of the ship, which was taken as the nett proceeds of the sale.

The next question which arises is: is there is a ceiling to the amount recoverable? The answer can perhaps be found in the following statement made by Lord Justice Cotton, often cited by writers as laying down the formula to be applied in such a case:[54]

> 'Probably the most accurate way of stating the measure of what, under such circumstances, he is to recover is that it will be the estimated cost of repairs, less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale.'

Arnould[55] construes the decisions of both the lower court and of the Court of Appeal as limiting the assured to the depreciation or the estimated cost of repairs 'whichever should be the less'.[56] 'That', he said, 'certainly, is the effect of s 69(3) of the Marine Insurance Act 1906 in cases where the ship is not sold.' It would appear that the result is the same whether the cost of repairs or the depreciation in value is named as the ceiling. As only two figures are involved, the lesser of the two is the measure of indemnity.

The sale of the ship will alter the complexion of the case in so far as the sale price is to be taken as the damaged value. As was seen, depreciation in value may be measured in one of two ways. According to *The Pitman Case*, the general rule, under the common law, is to use the estimated cost of repairs as the measure of indemnity. However, in certain circumstances, a court may be minded not to apply the general rule, and may prefer to subtract the nett proceeds of the sale from the undamaged value, and then apply this figure to the insured value.

However, it has to be said that the dissenting judgment delivered by Lord Justice Brett is equally persuasive. He held that the assured was entitled to the cost of repairs, and any loss or gain resulting from the sale was outside the

53 *Ibid*, at p 205, *per* Jessel MR.

54 *Ibid*, at pp 218– 219.

55 Arnould, para 1131.

56 In the present case, the lesser sum is the depreciation in value as ascertained by the sale.

contract of insurance and, therefore, irrelevant as between the assured and the insurer in the adjustment of a partial loss of the ship. A straightforward application of the estimated cost of repairs as the measure of indemnity has its appeal.

At the end of the day, it could be said that parliament had probably left the matter open with the intention of leaving the courts with the discretion to choose the method of calculation which would produce the most equitable result. The lesson, if any is to be learnt from *The Pitman Case*, is that the principle of indemnity should always be borne in mind in any adjustment of loss. In each case, whether the general rule or the exception to the rule is to be employed depends largely on the circumstances of the case: the principle of indemnity has to be the guiding star.

Successive losses

A ship could well encounter a number of accidents, and thereby sustain several particular average losses during the currency of a single policy. Provided that the limit declared in the deductible clause (cl 12) of the ITCH(95)[57] is complied with for each separate accident, s 77(1) allows an assured the right to be indemnified for each of the successive partial losses.

Claims for several accidents are, by cl 12.2, to be treated as being due to one accident if they are sustained by reason of heavy weather during a single passage between two successive ports. There is no definition given for 'heavy weather'; the clause merely states that the expression 'shall be deemed to include contact with floating ice'. 'Heavy weather' has presumably to fall within the definition of 'perils of the seas'.[58] It is pertinent to note that cl 12.2 is limited in scope and is not concerned with, for instance, successive losses caused by fire, theft or barratry, occurring in a single passage between two successive ports.

An assured is, by s 77(1), to be indemnified for each and every accident 'even though the total amount of such losses may exceed the sum insured'. He may thus claim the whole of the sum insured (insured value)[59] for each separate accident.[60] He is not, however, permitted to add up all the separate partial losses sustained during the currency of the policy in order to make up a constructive total loss. This is expressly prohibited by the constructive total loss clause, cl 19.2 of the ITCH(95), which states that: '... only the cost relating to a single accident or sequence of damage arising from the same accident shall be taken into account' for the purpose of determining whether there is a constructive total loss.[61]

57 Corresponding cl 10 of the IVCH(95).

58 See Chapter 9.

59 Note, however, the Institute Dual Valuation Clause (see Appendix 15) where there is an insured value for a total loss, and one for 'other than total loss'.

60 This is consistent with the fact that he may treat a constructive total loss as a partial loss: s 61.

61 Because of cl 19.2 of the ITCH(95), the possibility raised by Roskill J in *The Medina Princess* [1965] 1 Lloyd's Rep 361 at pp 514–515, of adding up several partial losses in order to make a claim a constructive total loss cannot now arise.

The doctrine of merger

Section 77(2) is the statutory version of the doctrine of merger which was first enunciated in *Livie v Janson*[62] and later affirmed by the House of Lords in *British and Foreign Insurance Co Ltd v Wilson Shipping Co Ltd*,[63] Section 77(2) states:

> 'Where under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss ...'

The same principle is reiterated in cl 18.2 of the ITCH(95).[64]

It is to be noted that the section is applicable only if the damage is unrepaired, and that both the partial loss and the subsequent total loss occur under the same policy.

Unrepaired damage

First, as noted earlier, any expense actually incurred to repair a particular average damage is always recoverable.[65] This right stems from the fundamental principle of insurance law, the doctrine of indemnity. As can be seen in *Le Cheminant v Pearson*,[66] the cost of repairs actually expended is recoverable under the policy, even though the assured may also have been indemnified for the total loss. Any repair cost expended is recoverable either as a loss caused by the insured peril, or as a sue and labour charge for which the liability of the insurer therefor is expressly preserved by the proviso to the section.[67]

In *Livie v Janson* and *The Wilson Case*, the vessel sustained a particular average loss (caused by a peril of the seas), which was then followed by a total loss (caused by an uninsured risk) during the currency of the policy. Viscount Finlay in *The Wilson Case* said that:[68]

> 'If the damage resulting from the sea perils had been repaired the amount disbursed for that purpose would have been recoverable on the policy in spite of the subsequent loss. But if the repairs have *not* been executed the liability cannot accrue until the termination of the risk under the policy, and if, before that happens, there is a total loss, the partial loss is "swallowed up" in the total.'

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62 (1810) 12 East 648.

63 [1921] 1 AC188, HL, hereinafter referred to as *The Wilson Case*.

64 'In no case shall the underwriters be liable for unrepaired damage in the event of a subsequent total loss (whether or not covered under this insurance) sustained during the period covered by this insurance or any extension thereof.' Corresponding cl 16.2 of the IVCH(95). It is noted that s 77(2) uses the term 'partial loss' when in fact it refers to a particular average loss. This is an example of the danger, which has been described earlier, of using these terms as if they are synonymous. A general average loss, salvage and a particular charge are partial losses, but they are clearly not envisaged by the subsection because they are not losses which are repairable as such. The direct and simple expression 'unrepaired damage' used in cl 18.2 of the ITCH(95) is thus preferred. Unrepaired damage, 'made good' (that is, indemnified) by the insurer before a total loss would not be affected by the doctrine of merger laid down in s 77(2).

65 See s 69.

66 (1812) 4 Taunt 367.

67 The proviso states: 'Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.'

68 [1921] 1 AC 188 at p 202, HL.

In *Livie v Janson*,[69] Lord Ellenborough explained that the unrepaired partial loss, having been absorbed by the total loss, was not recoverable because it had become a matter of indifference to the owners. In similar terms, Lord Campbell in *Knight v Faith*[70] expressed the view that the assured were 'not in any degree prejudiced by the partial loss ... [he] being in the same situation as if the partial loss had never occurred'.

It is on these bases that unrepaired partial losses which have been absorbed by a total loss are not recoverable. This is regardless of whether the total loss is or is not indemnifiable under the policy. Clause 18.2, however, has made this point patently clear by stating that an insurer is not liable for the unrepaired damage in the event of a subsequent total loss 'whether or not covered under this insurance'. Needless to say, in so far as the liability of the insurer for the total loss is concerned, it is dependent upon whether it is caused by a peril insured against. This means that if the subsequent total loss is caused by an uninsured peril, neither the unrepaired damage nor the later total loss is recoverable.

In *Woodside v Globe Marine Insurance Co*,[71] the vessel, by perils of the sea, was driven ashore and sustained such damage that the cost of repairing her would have been greater than her value when repaired.[72] Thirty-six hours after the stranding, she was totally destroyed by fire. Both parties agreed to argue the case on the assumption that the vessel was, as a result of the stranding, a constructive total loss. The plaintiffs claimed for a total loss of the ship by fire, to which the insurers denied liability on the ground that the ship was already a constructive total loss at the time of the fire. The insurers had endeavoured to apply the doctrine of merger in reverse, to the effect that the damage by fire had merged with the previous (constructive) total loss by stranding, a peril of the seas.

Mr Justice Mathew held that the loss by stranding would only become a total loss if the assured gave timely notice of abandonment, and as none was given the loss would be for particular average. The doctrine of merger does not apply in the reverse: a later actual total loss is not absorbed by an earlier constructive total loss. Provided that the claim for the (earlier) constructive total loss has not been accepted, there can be no question of the assured being allowed to recover twice over. The judge observed that:[73] 'A particular average loss, however serious, could not impair the right of the assured to recover for a subsequent total loss …'.

'Where under the same policy'

First, it is to be observed that the opening words of s 77(2) – 'Where under the same policy …' – are significant. The same point is made in cl 18.2 of the ITCH(95) by the phrase 'sustained during the period covered by this insurance

69 (1810) 12 East 648.

70 (1805) 15 QB 649.

71 [1896] 1 QB 105.

72 On this basis, the assured could have by tendering a notice of abandonment claimed for a constructive total loss: see s 60(ii).

73 [1896] 1 QB 105 at p 107.

or any extension thereof'. On this requirement, it is necessary to refer to *Lidgett v Secretan*,[74] where the vessel sustained a particular average damage which was only partially repaired when, after the expiration of the first policy, she was totally destroyed by fire which broke out during the currency of the second policy. As two policies were involved, there was no question of the merger of the losses. The cost incurred to repair part of the damage was naturally recoverable. As regards that part of the damage which was not repaired, the court made an allowance for the diminution in the value of the vessel.[75] The insurers were held liable under the first policy for both the repaired and unrepaired damage. The fact that they were also the insurers for the second policy did not exempt them from liability for the total loss. For all intents and purposes, the claims were treated as if the insurers of the two policies were different persons.

The death blow theory

A ship may well sustain a particular average damage during the currency of one policy only to become a total loss, by reason of the damage sustained during a later policy. In such a situation, she is described to have sustained her 'death blow' during the first policy and for which damage the insurers for that policy is liable. Such an event occurred in *Knight v Faith*,[76] where the vessel in question stranded during the currency of the policy. Eight days after the policy had expired, the extent of the damage was ascertained. The severity of the damage rendered it impossible for her to be repaired or to be taken to any port where she could be repaired. For the benefit of all concerned, the master and part-owner sold her for a meagre sum.

Clearly, there was not an actual total loss.[77] And if there was a constructive total loss, the insurers were not liable for the assured had failed to tender notice of abandonment. So at best, the assured could only claim for a particular average loss. The circumstances was described as thus: 'But here the insurers have not paid, and they deny their liability to pay a total loss; and they are not at liberty to allege that the partial loss is merged in a total loss, from which they are exempt'.

As the doctrine of merger did not apply, the judge held the insurers liable on the basis of a partial loss – which was calculated on the same principle as if she had actually been repaired and proceeded on her voyage or had foundered at sea without having been repaired soon after the policy expired.

It has to be pointed out that, in truth, there was in this case only one accident which had caused the loss of the vessel. And as that was the casualty which inflicted her the death blow, the loss can only be said to have arisen under that policy. The doctrine of merger obviously cannot apply when the death blow theory operates. The former relates to two separate accidents or causes of loss,

74 (1871) LR 6 CP 616.

75 See s 69(2).

76 (1850) 19 LJ QB 509; 15 QB 649.

77 *Ibid* at p 518, *per* Lord Campbell CJ: '... there is no such loss known in insurance law as a sale by the master, unless it be barratrous ...'.

whereas the latter, to only one accident (occurring during the currency of the policy), and the damage which she has sustained therefrom manifested itself as a total loss only after the expiration of the policy.

It is necessary to distinguish *Lockyer v Offley*[78] from the above situation. In this case, the act of barratry was committed during the currency of one policy, and the seizure by the custom authorities for the barratrous act took place after the expiration of the policy. First, even though the seizure was as a result of barratry, nonetheless, it was regarded as a separate accident. Secondly, seizure, not barratry, was held to be the proximate cause of loss. In causative terms, it could be argued that the chain of causation was broken by the seizure. The law of causation has clearly played a critical role in this case. It was not possible to apply the doctrine of merger in the circumstances of this case.

PARTICULAR AVERAGE LOSS OF GOODS

Unlike a partial loss of ship and of freight,[79] there is no minimum limit, such as an excess or franchise, which a partial loss of goods has to be attain before a claim would be entertained. There is no warranty, either wholly or under a certain percentage, free from particular average. But presumably, the courts would, if necessary, invoke the *de minimis* rule in order to dismiss petty and small claims. The parties are, of course, free to insert a special clause into the contract of insurance if they so wish to restrict the liability of the insurer for a total loss only.

Goods are capable of sustaining any of the following types of particular average loss:

(1) there may be a total loss of part of the goods;

(2) the whole of the goods may be partially damaged;

(3) part of the goods may be partially damaged; or

(4) goods may become incapable of identification because of obliteration of marks.

As the same principles of law apply to (2) and (3) above, they will be discussed together under the heading 'Damage to the whole or part of the goods'.

Total loss of part of the goods

It is not always easy to discern whether a loss is a total loss of part or a partial loss of the whole of the goods. Whether a total loss of part of goods is to be considered as a partial loss or a total loss depends largely upon the terms of the policy: unless the goods are separately insured, identified and packed separately,[80] the loss will not as a general rule be treated as a total loss of part. It

78 (1786) 1 TR 252, See also *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68; [1995] 1 Lloyd's Rep 455, CA, where the plaintiffs claimed for a total loss by fire and/or perils of the sea. The advantages for resting a claim by fire, as opposed to a peril of the seas, are discussed in Chapter 9.

79 There is the deductible clause in the case of ship and the franchise clause for freight; see cl 12 of the Institute Time Clause Freight.

80 Eg, 100 bags of rice insured under one policy for £5,000, valued at £50 per bag.

is pertinent to note that this relates to goods of the same specie insured under a single valuation, and not goods of different species insured under a single valuation, which is governed by s 72.[81]

If a loss is not apportionable, it will be regarded as a particular average loss and will not be recoverable if the policy contains a free from particular average warranty. Such a warranty, however, will not prevent recovery for 'salvage charges', 'particular charges' and expenses properly incurred under the suing and labouring clause.[82] The distinction between a total loss of part, and a partial loss of the whole is of importance only if the policy contains such a warranty. This can be seen in s 76(1) which states that:

> 'Where the subject-matter insured is warranted free from particular average, the assured cannot recover for loss of part … unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.'

The effect of the above section is to allow an assured the right to be indemnified for a total loss of any apportionable part of the subject-matter insured, in spite of the fact that the policy contains a warranty free from particular average the purpose of which is to restrict recovery under the policy only for total losses. Provided that the contract is apportionable, s 76(2) will treat such a partial loss as if it were a total loss, albeit of a part.[83] But if the contract be not apportionable, then the loss is partial, and would not be recoverable by reason of the warranty. As the warranty is now rarely found in cargo policies, the above problem is in practice unlikely to arise. In the absence of the warranty, such partial losses would be recoverable in accordance with s 71(3) described below.

The measure of indemnity for a total loss of a part is governed by s 71(1) and 71(2). Subsection (1) applies to a valued policy and sub-s (2) to an unvalued policy. The measure of indemnity for a valued policy is '... such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole …'. In simple terms, the liability of the insurer is the insured value of the part lost. In an unvalued policy, the method of computation is the insurable value of the part lost, ascertained in accordance with s 16(3).

Damage to the whole or part of the goods

Section 71(3), which applies to a particular average loss of goods, is founded upon the cases of *Lewis v Rucker*[84] and *Johnson v Sheddon*.[85] It states that:

> 'Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the

81 Eg, 200 tins of sardines and 100 bags of nuts valued at £2,000.

82 See s 76(2).

83 See *Duff v Mackenzie* (1857) 26 LJCP 313; 3 CB (NS) 16.

84 (1761) 2 Burr 1167.

85 (1802) 2 East 581.

gross sound and damaged values at the place of arrival bears to the gross sound value.'

Percentage of depreciation

As in the case of a ship which is damaged,[86] the measure of indemnity for (part or whole of) goods which are partially damaged is based also upon the principle of depreciation. The measure of indemnity prescribed above, which applies only if the goods arrive 'at its destination', is not difficult to calculate.[87] First, whether the policy be valued or unvalued, the extent of depreciation in value has to be ascertained. This is achieved by comparing the gross sound value with the gross damaged value of the goods. The meaning of the term 'gross value' can be found in s 71(4).

The words 'at the place of arrival' limit the time and place at which the gross sound and the damaged values of the goods are to be ascertained. As the law on the subject is now well settled, it is unnecessary to enter into any in depth discussion of the cases. The problem which arose in the above pair of cases relates to the question as to whether fluctuations in the market value of the goods ought to be taken into account when considering the value of the goods. Suffice it is to say that the guiding principle expressed by Lord Mansfield in *Lewis v Rucker*[88] should be borne in mind. He said that the insurer '... only engages so far as the prime cost or value in the policy, that the thing shall come safe; he has no concern with any profit or loss which may rise to the merchant from the goods; he had no concern with any subsequent value'.

Regardless of a fall or rise in the market, it is the 'arrival' value which is relevant. In *Whiting v New Zealand Insurance Co*,[89] Mr Justice Roche referring to s 71(3) observed that: '... the difference between the gross sound and the damaged values of the goods in question ... means at the place and time of arrival.'

Insured value and insurable value

Once the percentage of the diminution in value is determined, it is then applied to the insured value in a valued policy, and to the insurable value in an unvalued policy. As there is no express valuation of the goods in the case of the latter, reference has to be made to s 16(3) or (4) for the insurable value of the goods. The gross sound value of the goods is the aggregate of 'the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole'. In *Usher v Noble*,[90] Lord Ellenborough CJ noted that in an unvalued policy, '... the invoice price at the loading port, including premiums of insurance and commission, is, for all purpose of either

86 See s 69(2) and (3).

87 There is, it is noted, no provision relating to goods which are delivered damaged at a place short of its proper destination.

88 (1761) 2 Burr 1167.

89 (1932) 44 Ll LRep 179 at p 180.

90 (1810) 12 East 639.

total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this [insurable] value'.

Goods incapable of identification

Goods may reach their destination *in specie*, but by reason of obliteration of marks, or otherwise, become incapable of identification. Section 56(5) declares that such a loss is partial, not total. As was seen, *Spence v Union Marine Insurance*[91] has clarified that where marks are so obliterated as to render identification to any particular consignee impossible, the owners become tenants in common of the damaged goods.

PARTICULAR AVERAGE LOSS OF FREIGHT

In *Rankin v Potter*,[92] Mr Justice Brett took time to express his views on the subject of particular average loss of freight even though the facts of the case did not call for its consideration. A partial loss of freight under a general policy, he said, may arise if there was:

- a general average loss caused by a peril insured against giving rise to a general average contribution;
- a total loss of part of a cargo;
- a total loss of the cargo and the ship earns some freight in respect of other goods carried on the voyage insured; or
- a total loss of the ship and the cargo is sent on in a substituted ship.

General average loss and salvage charges

The first situation should also include salvage charges, as both general average contributions and salvage charges are recoverable under s 73 and cl 10.1 of the ITCH(95).[93]

Total loss of part of the cargo

As a general rule, full freight is payable for goods even if they arrive in damaged condition or are short delivered at its proper destination. But if freight is, according to the terms of the contract of carriage, payable for the quantity delivered, then there would be a loss, say, for example, 40% of the freight if only 60% of the goods is delivered at its destination. Presumably, this is what Mr Justice Brett had in mind for his second illustration. Such is a total loss of part of the freight for which an insurer of freight would be liable if the loss of the cargo be caused by a peril insured against. In *Price and Another v Maritime Insurance Co Ltd*,[94] the assured were allowed by Italian law, which applied to the contract, to recover for a loss of freight even though the ship which did not arrive at the

91 (1868) LR 3 CP 427.

92 (1873) LR 6 HL 83 at p 99, HL.

93 Corresponding cl 8 of the IVCH(95).

94 [1900] 5 Com Cas 332; [1901] 2 KB 412, CA.

port of destination because she became a constructive total loss during the voyage. 'Distance' freight was, under Italian law, payable for the part of the cargo that was salved. If it were not for the free from particular average warranty, the assured would have been able to claim for a partial loss of freight.

A policy could provide cover for a percentage of the loss of freight even for goods which are delivered in a damaged condition. In *Griffiths and Others v Bramley-Moore and Others*,[95] for example, the policy provided that: 'If any portion of the cargo be delivered sea-damaged the freight on such sea-damaged portion to be two-thirds of the above rate' and 'To cover only the one-third loss of freight in consequence of sea-damage as per charterparty'. By virtue of these clauses, the assured was able to recover the one-third loss of freight on the sea-damaged portion of the cargo which was deducted by the charterers from the total amount of freight.

Freight at risk

It is to be remembered that only freight which is at risk is covered by the policy. Thus if cargo upon which freight is to be derived is not actually on board, then there cannot be a loss of freight.[96]

Advance freight

Freight paid in advance is not at the risk of the carrier. As he cannot be called upon to refund any or part of it whether the voyage be successful or not, the risk lies obviously lies with the person who had paid the advance freight.[97]

Pro rata freight

Pro rata freight, or freight proportionate to the part of the voyage completed, is generally not payable when goods are delivered short of its proper destination. However, the parties to the contract of carriage could expressly or impliedly agree that *pro rata* freight be payable. Should an insured peril prevent the carriage of the goods to its proper destination, a particular average loss of freight would result for which the carrier could claim from his insurer.

Substituted cargo

Under a general policy, freight may be earned if the assured is able to procure a different cargo for the voyage, and if a lesser sum is earned for the carriage of a substituted cargo, he would obviously suffer a partial loss of freight. In the words of Mr Justice Brett:[98]

> 'An actual total loss of the whole *cargo* will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place and condition, of earning an equal or some freight by carrying other cargo on the voyage insured.'

95 (1878) 4 QB 70.

96 Note the words 'at the risk of the assured' in s 16(2).

97 See s 12 for meaning of advance freight.

98 *Rankin v Potter* (1873) LR 6 HL 83. Emphasis added.

Goods carried in substituted ship

In the fourth situation, freight is payable for the delivery of the cargo which is carried to its proper destination in a substituted ship. An assured, who has incurred additional costs for the hire of a substituted ship, is likely to suffer a particular average loss of freight. Mr Justice Brett explained the position as follows:[99]

> 'An actual total loss of *ship* will occasion an actual total loss of freight, unless when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight.'

Suing and labouring

The expense for procuring a substituted ship is recoverable, if the freight policy does not contain a free from particular average warranty. However, having said that, it is important to recall that, when a substituted ship is procured to carry the cargo to its proper destination the assured is, in effect, suing and labouring: he is endeavouring to prevent a total loss of freight. In such circumstances, reference has to be made to *Kidston v Empire Insurance*,[100] where the court held that a free from particular average warranty would not prevent a claim for suing and labouring. This principle of law is now embodied in ss 76(2) and 78(1).[101] However, it would helpful to quote the relevant part of the judgment of the court on this matter:[102]

> '... the warranty against particular average, does no more than limit the insurance to total loss of the freight by the peril insured against, without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due, by reason of the operation of perils insured against; and that the latter expenses are specially provided for by the suing and labouring clause, and may be recovered thereunder.'

It is to be noted that such an expense is not recoverable, if the policy contains a free from particular average warranty, and does not have a suing and labouring clause. It is interesting to note that there is no suing and labouring clause in the Institute Freight Clauses. Such a loss, therefore, would be recoverable simply as a particular average loss.

Measure of indemnity

The Franchise

First, it is to be noted that, as in the case of policy on ship, there is an express limit (of loss) which has to be complied with before the assured would be allowed to claim for a partial loss of freight. As was seen earlier, the 'deductible' under the Institute Hulls Clauses is an excess clause: under the Institute Freight

99 *Ibid*. Emphasis added.

100 (1866) LR 1 CP 535.

101 On the subject of sue and labour, see Chapter 17.

102 (1866) LR 1 CP 535 at pp 546–547.

Clauses, however, it is a 'franchise'. Clause 12 of the Institute Freight (Time) Clauses states that:[103]

> 'This insurance does not cover partial loss, other than general average loss, under 3% unless caused by fire, sinking, stranding or collision with another vessel. Each craft and/or lighter to be deemed a separate insurance if required by the Assured.'

Certain aspects of the clause resembles the old Common Memorandum. As it is a franchise, the whole of the loss including the 3% is recoverable.

Gross freight

The measure of indemnity for a particular average loss of freight is governed by s 70 read with s 16(2) and cl 14.1 of the Institute Freight (Time) Clauses which states: 'The amount recoverable under this insurance for any claim for loss of freight shall not exceed the *gross freight* actually lost.'

The measure of indemnity is 'such proportion of the sum fixed by the policy' in a valued policy, and of the insurable value in an unvalued policy. Section 16(2) states that 'the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance'.

What may and may not be included in the gross freight was considered in *United States Shipping v Empress Assurance Corpn*:[104] commission upon getting a premium was held recoverable, but not commission paid in obtaining the sub-charterparty.

103 Corresponding cl 9 of the Institute Freight (Voyage) Clause.

104 [1907] 1 KB 259; [1908] 1 KB 115, CA. See also *Palmer v Blackburn* (1822) 1 Bing 61; 7 Moore 339.