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UNIVERSITY OF SOUTHAMPTON
FACULTY OF BUSINESS AND LAW
School of Law

Rules of Causation under Marine Insurance Law
From the Perspective of Marine Risks and Losses

by

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ABSTRACT

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Causation is a crucial issue in ascertaining whether certain loss or damage is covered in an insurance policy. Although marine insurance is well-known for investigating the “proximate” cause of loss in order to determine the insurers’ liability, decisions by English courts are far from reconcilable. The problem has been suggested to be the inference of matters of fact, and consequently, causal connection is deemed as a complex and uncertain issue.

In the light of incoherency and uncertainty of law in this respect, the value of this research lies in the effort to conceptualize and develop a set of consistent causation rules in the marine insurance context and to explore how perils themselves would affect the formation and application of causation rules. Essentially, the proximate cause in law should not remain as a mere open question of fact.

In order to achieve the merits, this dissertation scrutinises the causation theory itself and also the correlations between the perils involved in the policy. Introduction presents the legal problem of causation in marine insurance law and stresses the importance of setting up coherent and certain rules. The research on the pure causation theory consists of two chapters: Chapter One regarding the test of causation, i.e. the doctrine of proximity; and Chapter Two on concurrent causes. The subsequent three chapters concentrate on identifying the cause of loss from the nature and concepts of different marine risks. Chapter Three introduces marine perils and examines how causation rules apply in the case of a few typical insured and uninsured perils; Chapter Four and Chapter Five are concerned with exclusive researches on inherent vice and seaworthiness respectively. Apart from the substantive analysis on causation, burden of proof is addressed in the last chapter. Finally, the Conclusion provides a summary of the issues and the set of causation rules.

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DECLARATION OF AUTHORSHIP

I, Meixian Song, declare that this thesis and the work presented in it are my own and have been generated by me as the result of my own original research.

"Rules of Causation under Marine Insurance Law -- From the Perspective of Marine Risks and Losses"

I confirm that:

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Three years ago, I made one of the most important decisions of my life. I left my family and friends in my home city, Dalian, for the first time, to go to England for further education.

I spent the first year studying the LL.M at the University College London, where I got to know English Law, especially maritime law. Thanks to Mr Peter Macdonald Eggers, who gave excellent lectures on marine insurance law, I became particularly interested in English marine insurance law and began thinking of pursuing a PhD. on the subject.

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Meixian Song

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Introduction

Causation is central to various types of liabilities: criminal liabilities, tortious liabilities and contractual liabilities.¹ Divergent theories of causation have been proposed due to the different orientations and insights of every branch of law. The answer to any question of causation is dependent on the purpose and reason for asking the question.² In the law of insurance, a sustainable claim requires three basic elements, namely, a valid policy, an incidence of loss and a legal causal link between an insured peril and the loss. It has been held that ascertaining the cause of loss is believed to be the common concern of the parties to a contract of insurance, thus, it has been and always should be rigorously applied in insurance cases.³ Moreover, the English Marine Insurance Act 1906 (hereinafter “the 1906 Act”) s 55 provides that

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

Per Roskill L.J., in marine insurance cases, the doctrine of proximity is a statutory requirement while in non-marine insurance that has always been the rule at common law.⁴ Thus, undoubtedly, the regime of causation is a crucial issue for ascertaining whether certain loss or damage is covered in a given policy.

The proximate cause in law differs from the causes in philosophical terms and the explanations developed in the natural sciences.⁵ Specifically, causes in the philosophical view focus on the universal and inherent essence of phenomenon, while scientific explanations demonstrate how general conditions result in certain types of events. All the inherent reasons or necessary conditions are treated as being equally important in causing the consequential events. However, in the legal sense, especially under the insurance liability mechanism, only the “fire-starter” cause matters for determining a liability, rather than all the elements that have contributed to the fact of burning. Identifying the particular cause among the others usually leads to disputes and arguments.

¹ Michael S Moore, *Causation and responsibility: an essay in law, morals, and metaphysics* (Oxford University Press, 2010) 1

² Jenny Steele, *Tort law: text, cases, and materials*, (2nd edn, Oxford University Press, 2010) 176. The learned author came into the proposition based upon the explanations by Lord Hoffmann in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22 in terms of causation from the prospective in the tort of negligence and upon Hart and Honore’s *Causation in the Law* (2nd edn, Clarendon Press, 1985).

³ Becker, *Gray v London Insurance Corporation* [1918] A.C. 101

⁴ *Wayne Tank and Pump Co. Ltd. V Employers Liability Assurance Corporation Ltd.* [1974] Q.B. 57,71

⁵ Hart and Honore’s *Causation in the Law* (2nd edn, Clarendon Press, 1985)

The issue of causation in English law can be traced back to 1630; the Bacon's Maxim stated that cases should be judged upon the immediate cause without looking to any prior circumstances. Thereafter, during the Victorian era from 1837 to 1901, the test of the last cause in time order was formed. However, in the last few years of the 19th century and in the beginning of the 20th century, the law stepped into a transition period from the time-order test to the modern test by assessing efficiency in contributing to the loss. The 1906 Act has ultimately affirmed the doctrine of proximity by statute, but without any detailed explications. The most remarkable explanation of proximity has been provided by the decision of *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*.⁶ The House of Lords clearly pronounced that the real proximate cause under the Act should not be solved by the mere point of time but the one proximate in efficiency. Hence, "the nearest in time" has become an obsolete test. After this case, various approaches of measuring "efficiency" have been generated and adopted.

Moreover, the recent case, *The Cendor Mopu*,⁷ has highlighted the issue of causation in the context of marine insurance and it has led to broad and heated discussions. In this case, three legs of an Oil rig insured under a voyage policy incorporating the Institute Cargo Clauses (A) broke off due to fatigue cracking on a barge. The Judge at first instance considered that the efficient cause of loss was inherent vice, while the Court of Appeal disapproved of the earlier decision and held that the loss was proximately caused by perils of the sea, and therefore the insurer should be liable. The Supreme Court sustained the judgment of the Court of Appeal and articulated a detailed comparison between inherent vice and perils of sea under marine cargo insurance. As a result, the market should now see fewer coverage disputes about the law regarding inherent vice in terms of causation, despite some difficulties remain.

However, Akenhead J commented that the courts over the years have not set up any strict rule of causation as to the proof of the cause of loss.⁸ It is also apparent that the authorities in this regard have been and continue to be difficult to reconcile. Inconsistency arising from the decisions was blamed on inferences of fact without considering the matters of law behind;⁹ whereas, there was also the judicial view that proximity is ultimately a matter of law so that the precedents could be applied consistently, though some are neither convenient nor logical.¹⁰

Although every case must be determined on the basis of its own factual grounds, leaving the issue to a determination of fact will leave the law in an indefinite state. It will not facilitate

⁶ [1918] A.C. 350

⁷ *Syarikat Takaful Malaysia Berhad v Global Process Systems Inc* [2011] UKSC 5

⁸ *Fosse Motor Engineers Limited v Conde Nast and National Magazine Distributors Limited* [2008] EWHC 2037

⁹ Sir M.D. Chalmers, *Chalmers' Marine Insurance Act 1906* (9th edn, Butterworths, 1983) 78

¹⁰ *Liverpool & London War Risks v Ocean S.S. Co* [1948] A.C. 243

the formation and development of law, nor enable the courts to follow precedents. Taking tort law as an example, both the courts and academics have expressed an increasing concern and have put significant effort into creating certainty on causation rules presently.¹¹ Likewise, it is necessary and appropriate to rethink and draw legal coherence and consistency in the principles of causation in the law of marine insurance.

In light of the confusion regarding causation issues under the law of marine insurance, this dissertation attempts to introduce a systematic theory of causation in the marine insurance context, extracting from extensive English cases.

In order to achieve this aim, the research explores the parameters of the causation theory itself and the correlations between different perils in terms of causal effect. This research begins with the test of causation, i.e. the doctrine of proximity. This chapter primarily aims to unveil and flesh out the abstract expression “proximate” from its use in statutory provisions and contractual terms, followed by a historic review of the change of the standards by which proximate causes in marine insurance cases have been decided. Since many doctrines originate in tort law and the rules are comparatively certain in tort, a comparison between the tests in tort law and marine insurance law is conducted in this section in order to figure out whether the principles can be borrowed or merged between the two laws.

As the thesis proceeds, it will come to the question of whether a loss could be caused by more than one proximate cause. In the context of the sole-cause model, the terms of the insurance contract and statutory instruments will be relied upon for ascertaining the insurer’s liability. In contrast, where the loss is attributable to concurrent proximate causes, in the absence of a statutory indication, numerous cases have provided authority to determine the allocation of risk. However, the rules established by these landmark decisions have been reviewed and questioned by some of the cases after *The Cendor Mopu*. Therefore, Chapter Two answers the question of whether room for “concurrent causes” situations are and ought to be accepted under English marine insurance law.

The research on marine perils is of equal importance to the issue of causation and to define the insurers’ scope of liability. Good definitions and understanding of marine risks, whether insured, non-insured or excluded, will provide substantial help in identifying the efficient cause to a loss. Thus, a number of specified marine perils are employed to demonstrate the application of a set of causation rules and to examine whether a uniform theory can be concluded. Specifically, Chapter Three refers to marine perils in general and also some

¹¹ *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32; *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 W.L.R. 523. Jane Stapleton, “Cause-in-fact and the Scope of Liability for Consequences” [2003] 119 L.Q.R. 388

specific perils, addressing the point from the perspective of causal effect rather than a mere study on the definition of the risks. Chapter Four and Chapter Five look further into the issues of inherent vice and seaworthiness respectively, which are two most common defences of insurers.

Apart from the substantive analysis on causation, burden of proof determines whether the assured can succeed in his claim in the proceedings. The balance of the onus on each party is worth examining by investigating and observing the remarkable authorities in the last chapter. Most importantly, the difficulties in proving an unexplainable loss or an unascertainable cause are addressed and settled.

In addition, it should be noted here, having the modest ambition of comparing English marine insurance law in this respect with the operations of a few other jurisdictions' such as Belgium, the US, Australia, etc., this dissertation adopts comparative methodologies in numerous areas merely for the purpose of illustrating and enhancing a number of concrete propositions. In brief, the focus of this research is on English marine insurance law and its contribution is an attempt to address the issue of causation and to suggest a novel way in which to approach the question of causation in a consistent manner.

Chapter 1 Doctrine of Proximity in Marine Insurance Contracts

Invariably, it is hardly possible to lay down a precise yet succinct rule of law which is applicable to all kinds of circumstances;¹² the issue of causation is not an exception. Although persistent efforts to find and follow a clear principle to ascertain the causal link between losses and insured risks have been made throughout the last two centuries, the test has been dramatically changed and the decisions made by English Courts are still far from easy to reconcile.

Causa proxima non remota spectatur has been frequently quoted as the fundamental principle in the law of marine insurance which is embodied by the doctrine of proximity.¹³ The maxim means that it is the proximate cause, not the remote one that should be looked at in determining the insurer's liability of indemnity. The English Marine Insurance Act 1906 has stipulated the doctrine in a statutory form, however, the courts still have to exercise their discretion in seeking a fair and reasonable answer to the causation question in every single case, which is usually recognised as a matter of fact or "common sense" eventually.

Aiming for a better understanding of the doctrine of proximity and its application in the law of marine insurance, this chapter will first give an overview of the causation requirement from the aspects of statutes and the contractual variations respectively. It will proceed to a research on English case law to see how the test of causation has been changed from "the nearest one in time chain" to "the efficient one". More importantly, the review of numerous landmark cases will be undertaken in order to exemplify and clarify the abstract term of "proximity". In conclusion, applying the test of causation ought not to be described simply as a matter of fact; instead it ought to be a logical application of law.

1.1 An Overview on Legal Causation in Marine Insurance Contracts

1.1.1 Statutory Requirement

Most jurisdictions, irrespective of common law or civil law, have widely recognised the doctrine of proximity in relation to causation in the form of statutes. Specifically, as provided in s 55(1) of the English Marine Insurance Act 1906,

¹² Malcolm Clarke, *The Law of Insurance Contracts*, (6th edn, Informa, 2009) para. 25-5

¹³ Jonathan Gilman *et al*, *Arnould's Law of Marine Insurance and Average*, (17th edn, Sweet & Maxwell, 2008) 900

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

The New Zealand Marine Insurance Act 1908 and the Australian Marine Insurance Act 1909 follow the same provision and wordings in s 55 and s 61 respectively as s 55 of the 1906 Act. Despite the fact that the provision is headed “included and excluded losses”, it is designed to require a causal link between an insured peril and the loss. It is noteworthy that there are two conditions which override this provision, namely, “the provisions of this Act” and “the policy otherwise provides”. So far as the former phrase is concerned, the provisions affecting the validity of the policy may prevent courts from inquiring the causality, for instance, lack of an insurable interest, breaches of utmost good faith or warranties. Under these circumstances, insurance contracts will be avoided or terminated and accordingly the insurer will not be liable for any loss, even though the loss is proximately caused by an insured peril. In respect of the other phrase, “unless the policy otherwise provides”, as one of the opening words of s 55, it indicates a possibility of contractual deviation from the doctrine of proximity.¹⁴ Therefore, the insurer may agree to undertake a narrower or a wider scope of obligations and liability by explicitly altering the expressions.

Moreover, the California Insurance Code specifies the sole legal effect of the proximate cause and also excludes the remote ones. As provided in s 530:

Proximate cause

An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

The provision emphasises that attention must be paid to the proximate cause, regardless of the ancillary contribution and influence of the remote ones. Furthermore, this provision reveals that the “but for” test is not the test for ascertaining the proximate cause since the remote ones can also meet this test but remain irrelevant to the decision of the liability.

In contrast, the Chinese Maritime Code simply infers a causal link in the provision defining a contract of marine insurance. According to Chapter XII Contract of Marine Insurance Section 1 Basic Principles Article 216,

¹⁴ Donald O’May and Julian Hill, *O’May on Marine Insurance* (Sweet & Maxwell, 1993) 317

[*Sic*] A contract of marine insurance is a contract where by the insurer undertakes, as agreed, to indemnify the loss to the subject matter insured and the liability of the insured caused by perils covered by the insurance against the payment of an insurance premium by the insured.

Although in the absence of an expression referring to “the proximate cause” in the definition, the requirement of a proximate causal link has still been recognised and applied in Chinese law in the same approach as English law, which is more frequently addressed as “the cause of the closest connection to the loss”.¹⁵

1.1.2 Contractual Variations on Doctrine of Proximity

As indicated above, although the doctrine of proximity is provided statutorily in the 1906 Act, the requirement is still subject to the parties’ agreement in the policy. That is to say, the parties have freedom either to affirm or to exclude the effect of the doctrine of proximity through clear expressions. Basically, it is a matter of construction and interpretation of the wording of the policy. Most insurance contracts are more likely to be interpreted as requiring the insured peril to be the proximate cause of the insured loss. However, some expressions have been held to have succeeded in reflecting otherwise intention by English courts.

Currently, modern standard forms of marine policies provide cover for losses “caused by”¹⁶ or “attributable to”¹⁷ certain insured perils. Aikens J, notwithstanding the absence of “proximately”, held that the perils following the phrase of “caused by” would be subject to the general rule of proximity in *The Vergina* (No.2),¹⁸ where the assured took four marine insurance policies with the insurers on hull and machinery, all subject to the terms of the Institute Time Clauses (Hulls) dated Oct. 1, 1983. The same conclusion can be found where the loss is “attributable to” the insured perils, although there remain divergent opinions.¹⁹ In *The Salem*,²⁰ the cargo owner of oil entered into an open cover Lloyd's S.G. policy added with the Institute Cargo Clauses (F.P.A.), the Institute War Clauses and the Institute Strikes Riots and Civil Commotions Clauses. Clause 8 of the Institute Cargo Clauses provided that in the event of loss the assured's right of recovery was not to be prejudiced by the fact that the loss *might have been attributable to* the “wrongful act or misconduct of the shipowners or

¹⁵ Pengnan Wang, *The Law of Marine Insurance Contract* (2nd edn, Dalian Maritime University Press, 2003) 114

¹⁶ See Institute Time Clauses Hulls cl.6; Institute Voyage Clauses Hulls cl.4; International Hull Clauses (01/11/03) cl.2; Institute Cargo Clauses (B) (1/1/82) cl.1.2 and Institute War and Strikes Clauses Hulls-Time cl.1

¹⁷ Institute Cargo Clauses (B) (1/1/82) cl.1.1

¹⁸ *Seashore Marine S.A. v Phoenix Assurance plc (The Vergina)* (No. 2) [2001] 1 Lloyd's Rep 698, 703

¹⁹ It is arguable whether the use of “attributable to” in s 55(2) concerning wilful misconduct indicates an avoidance of proximate causal link than other expressions in this provision.

²⁰ *Shell International Petroleum Co. Ltd. v Gibbs* [1982] QB 946

their servants." [Emphasis added] When addressing the issue of causation, Lord Roskill in the House of Lords completely agreed with the decision of the Court of Appeal. As held in the Court of Appeal, Kerr L.J. contemplated that those words in Clause 8 are "neutral words which cannot be read as intended to alter the well-established principles of causation in this field."

A few more expressions have also been construed to require an insured peril to be the "proximate cause". For example, the phrase "results from" is held to reinforce the doctrine of proximity between the loss and the named perils by the House of Lords.²¹ Likewise, phrases, such as, "due to"²² and "consequent upon"²³ and "the consequences of"²⁴ do not indicate the parties' intention to deviate from applying the common doctrine of proximity in looking into the cause of loss.

However, the law seems less clear when the phrases "arising from" and "arising out of" are used in contracts. Per Scrutton J, the words in the condition "caused by" and "arising from" had always been construed as relating to the proximate cause.²⁵ In contrast, concerning the construction of "arising from" in an exception clause, Lord Diplock in *The Playa de las Nieves*²⁶ considered it as an expression to contemplate a chain of events, which introduced the presence of intermediate events into the operation of the clause between the statutory proximate cause and its loss. That is to say, "arising from" justifies the legal effect of the intermediate cause in determining the insurer's liability instead of the proximate cause.

In comparison, a few recent cases show that courts hold a lesser standard in respect of the two phrases in non-marine policies. In a motor vehicle insurance case,²⁷ the insurer insured against third parties liability for death or bodily injury 'caused by or arising out of the use of the vehicle', the Court of Appeal reaffirmed that the phrase "arising out of" contemplates more remote causal links than "caused by" in this context. Likewise in the Australian jurisdiction, the Supreme Court of the Australian Capital Territory has produced a common interpretation in terms of "personal injuries caused by, or arising out of the use of, the vehicle": In *Casalino v Insurance Australian Ltd*,²⁸ a compulsory third party insurance policy

²¹ *Lloyds TSB General Insurance Holdings & Ors v Lloyds Bank Group Insurance Co Ltd*. [2003] UKHL 48, Para. 45

²² *Kamilla Hans-Peter Eckhoff KG v AC Oerssleff's EFTF A/B (The Kamilla)* [2006] EWHC 509 (Comm); [2006] 2 Lloyd's Rep 238, para. 13-15

²³ *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Ltd* [2002] Lloyd's Rep IR 113, 123; *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2003] EWHC 1771 (Comm); [2004] Lloyd's Rep IR 22, para. 117

²⁴ *Ionides v Universal Marine Insurance Co* (1863) 14 CB (NS) 259; this proposition has also been affirmed by a New Zealand insurance case, *Bridgeman v Allied Mutual Insurance Limited* (1999) 10 ANZ Insurance Cases ¶61-448.

²⁵ *Coxe v Employers Liability Assurance Corp Ltd* [1916] 2 KB 629, 634

²⁶ *Nacional v Hispanica Aseguradora SA* [1978] AC 853, 881-882

²⁷ *Dunthorne v Bentley* [1999] Lloyd's Rep IR 560

²⁸ [2007] ACTSC 25

was issued to the assured who was a young female driver. She claimed for damages thereupon, as she was forced to drive at gunpoint and got assaulted by an unknown offender. When answering whether it was personal injuries arising out of the use of vehicle, the Court relied upon the judgment of *Government Office of New South Wales v RJ Green & Lloyd Pty Ltd*,²⁹ which is worth citing in length:

... The words "arising out of" in s 10 of the Act and in the indemnity clause of the policy are not merely, if at all, explicative of the words "caused by", they are really used in contrast to them; and in the total expression are extensive in their import. Bearing in mind the general purpose of the Act I think the expression "arising out of" must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words "caused by". It may be that an association of the injury with the use of the vehicle while it cannot be said that that use was causally related to the injury may yet be enough to satisfy the expression "arise out of" as used in the Act and in the policy.

Moreover, a very recent case has settled the question in terms of defining "arising out of" contained in s 145(3) (a) of Road Traffic Act 1988.³⁰ In this case, the defendant was accused of a number of offences including administering a substance with intent, sexual assault while acting as a taxi driver. The victims brought up claims against the defendant and the insurers of the taxi in private and public hire motor insurance. Both parties cited a number of authorities in respect of the construction of "arising out of" in marine context and non-marine context.³¹ Silber J articulated that marine insurance precedents are not helpful in answering whether the phrase in statute indicates a lesser test of causation than "caused by or not", as constructing contractual variations in marine cases is not equated with constructing the parliament's intent in legislation. Relying upon the aforementioned motor cases, the court reaffirmed that the term "arising out of" refers to a more remote causal connection between *the injuries* and the *use of vehicles* than those indicated by the phrase "caused by" under the Act.

An even more flexible standard can be found in *Kajima UK Engineering Ltd v Underwater Insurance Co Ltd*,³² a case of a professional indemnity policy. When addressing the claim which arose from the notified circumstances, the court simply held that "there had to be some causal, as opposed to some coincidental link". On the contrary, also in the context of

²⁹ [1966] HCA 6

³⁰ *AXN & Ors v Worboys & Ors* [2012] EWHC 1730 (QB)

³¹ The conflicting decisions under marine cases and non-marine cases in this respect has been recognised and demonstrated in the late case *British Waterways v Royal & Sun Alliance Insurance Plc* [2012] EWHC 460 (Comm)

³² [2008] Lloyd's Rep IR 391

professional indemnity insurance, it was held that in general both “arising from”³³ and “arising out of”³⁴ refer to the ordinary causation test of the proximity requirement. Nevertheless, it was stated in the latter case that the term “arising out of” may have a wider significance and indicate a weaker causal connection, subject to the interpretations of the terms in policies.

It should be remarked that the approach of such interpretation may be subject to the condition that the phrases “caused by” and “arising out of” are used together. Furthermore, it may be able to venture that when more than one causation expression is inserted in a term, courts are prone to define them as twofold meanings, instead of stressing an identical meaning. Alternatively, the lesser test laid down by the courts may originate from the special consideration of liability insurance for the purpose of enlarging the scope of coverage. Regardless, tenuous the link may be, the limitation still exists and applies. It was eventually held by the Courts that the real cause, such as the threat of violence and poisoning for assaults, were “incidental or ancillary to the normal and legitimate use of the motor vehicle so that it cannot be said to arise out of the use of the motor vehicle.”

Therefore, the current view in non-marine insurance law on the phrases “arising from”/“arising out of” seems to be a matter of construction depending upon the context, despite the fact that “it had always been construed as relating to the proximate cause” in marine cases. It should be reemphasised that the interpretations of the phrases regarding causation may vary in different branches of law and in different wordings.

Besides the aforementioned phrases, the clauses against certain consequences, such as ingress of water, fire and jettison, have been proposed to be an approach not requiring a causal link on the ground that such marine insurance policies insures not against causes, but against consequences of losses.³⁵ As long as the form of the loss insured against occurs, such as fire and jettison, the insurer’s indemnity liability arises regardless of its cause, unless otherwise expressly indicated in the policy. Literally speaking, this proposition appears to suggest skipping the enquiry on the proximate cause due to the “true” mutual intention of the parties. However, the aforementioned proposition is hard to sustain for two reasons. On the one hand, the mechanism of insurance is based upon risks, and it is designed to cover against agreed perils and *their* consequent loss.³⁶ That is why, for instance, the policy is agreed to cover all risks instead to cover “all losses”. Such a contractual term should not be interpreted in a contrary manner to the essential nature of

³³ *Sutherland Professional Funding Ltd v Bakewells* [2011] EWHC 2658 (Comm)

³⁴ Per Christopher Clarke J in *Beazley Underwriting Ltd v Travelers Companies Inc* [2011] EWHC 1520 (Comm)

³⁵ Proposed by D. Roger Englar, a distinguished American Attorney; as cited in Buglass, Leslie J, *Marine Insurance and General Average in the United States*, (2nd edn.,Cornell Maritime Press, 1981) 68

³⁶ *Supra* 13, p 898

insurance regime. On the other hand, notwithstanding terms to cover against some kinds of “losses”; the courts will still pay special attention to defining the concept of the loss and seeking its real cause, as the clause introduces ambiguity in expressing the intentions and expectations of the parties.³⁷ Such phrasing may simply be an example of an ill-drafted clause, and the way the courts define the perils and adopt the causation rule may expose the underwriters to the risks which they do not expect. In one word, clauses which seemingly provide cover against certain losses do not naturally infer that the underwriter has waived the entitlement to query the proximate link between the loss and an insured peril.

Paradoxically, it is noteworthy that *The Cendor Mopu*³⁸ has further ascertained the underwriter’s liability more depending upon the consequence of an unordinary loss caused by an ordinary yet fortuitous “leg-breaking wave” during the voyage. “Leg-breaking wave” is somewhat bizarre to be used as an expression to describe a form of perils of the sea, as it tries to create a cause on the basis of a fact of consequence. It may find an underwriter equally reluctant to accept a loss proximately caused by a “vessel-sinking weather”, no matter how ordinary the weather is. It should always be borne in mind that the insurance regime is established upon the basis of risk theory and orients to cover against risks. Only risks can produce losses, whereas losses cannot make up risks in reverse. It is not only unsatisfying to explain the proximate cause of a loss in the approach of “leg-breaking wave”, but also it is worthy warning of a trend to pay excessive attention to the consequence of loss or damage in marine insurance, as much as life insurance does, in ascertaining the insurer’s liability based on the present case. It seems inappropriate to take advantage of the consequence of loss as an excuse to imbalance the interest of equal parties in a commercial contract from the legal perspective.

Nevertheless, the parties are entitled to preclude the application of the doctrine of proximity by virtue of explicitly phrasing the clauses. The alteration of the adverb “proximately” may restrain the insured perils to a more strict level than the ordinary standard to constitute the proximate cause.³⁹ For instance, the effect of exclusionary clauses can be extended or the insured scope is narrowed down. It has to be remarked that this approach is completely distinct from adding more exclusionary perils or deleting insured perils in the clauses. Nevertheless, it should be remarked that explicit words are required in order to deviate from the doctrine of proximity.⁴⁰ Otherwise, courts will insist on applying the principle of

³⁷ *Lawrence v Aberdein* 106 E.R. 1133; (1821) 5 B. & Ald. 107, the court held “mortality” to be one caused by natural reasons, excluding death caused by insured perils. Mortality itself is a form of loss rather than an insurable peril. It seems implausible to contend that mortality causes the loss in insurance claims.

³⁸ *Supra* 7

³⁹ Rob Merkin, *Colinvaux’s Law of Insurance* (9th edn, Sweet & Maxwell, 2010)180-181

⁴⁰ *Supra* 25

proximity and intend to construe the clause based upon the doctrine of *contra preferentem*.⁴¹

The most classic form of variation incorporated into a policy is the expression “directly and indirectly caused by” an excepted peril. The authority related to this phrase, *Coxe v Employers Liability Assurance Corp Ltd*,⁴² concerned a life cover excluding death “directly or indirectly” caused by war risks. The assured, a military officer, was accidentally killed by a train while he was walking along the railway in the course of duty. The court held that the words “directly and indirectly” denied the application of the doctrine of proximity in this case. Consequently, the indirect effect of the war discharged the insurer’s liability, despite the fact that the assured was proximately killed by the train accident. Per Scutton J, the words “arising from” and “caused by” did not give any difficulty in applying the doctrine of proximity, however, so far as “directly and indirectly” is concerned, it was impossible to reconcile with the doctrine. Thereby, it is ascertained that the insurer succeeds in expressing his intention not to indemnify losses occurring indirectly by certain perils, without reference to the doctrine of proximity. Moreover, having reaffirmed the position held in the former case, Mustill J in *The Spinney’s*⁴³ further elaborated and contemplated that:

In essence, the task is to assess whether the particular act of violence simply takes place against the background of a “warlike” state of affairs, or whether it has itself (even if in a rather remote way) a warlike aspect of its own.

Although the parties and courts need not look into the question of the proximate cause of the loss, the causation issue is still relevant when deciding coverage. Remote as it may be, the indirect cause must at least still be a cause.⁴⁴ Accordingly, the question of causal link remains crucial in defining the insurer’s liability by limiting the boundary of “indirect” causes.

⁴¹ *Lawrence v The Accidental Insurance Company (Limited)* (1880-81) L.R. 7 Q.B.D. 216

⁴² *Supra* 25

the special condition inserted was as follows:

“. . . Condition 6. This insurance does not cover any loss or damage occasioned by or through or in consequence *directly or indirectly* of any of the following occurrences: (a) . . . civil war; (b) . . . civil commotion assuming the proportions of or amounting to a popular rising . . . insurrection, rebellion, revolution military or usurped power or any act of any person acting on behalf of or in connection with an organisation with activities directed towards the overthrow by force of the Government de jure or de facto or to the influencing of it by terrorism or violence. In any action . . . where the company alleges that by reason of the provision of this Condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the Insured . . .” [emphasis added]

⁴³ *Spinney’s (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd’s Rep 406, 441-442

⁴⁴ John Lowry and Philip Rawlings, *Insurance Law Doctrines and Principles* (2nd edn, Hart, 2005) 230

Furthermore, it was held that the more frequent expression “directly caused by” does not always have to look into the proximate cause in some occasions.⁴⁵ According to this judgment:

A direct cause need not be the immediate cause or the last step in the chain of events leading to the consequence in question. There can be more than one direct cause for a particular consequence. One looks at the efficiency of the cause in causing the consequence to determine whether the cause is a direct cause. *A direct cause need not be the most important cause in causing a particular consequence, so long as it is a substantive cause for the consequence.* [Emphasis added]

In *Merchants' Marine Insurance Company v Liverpool Marina & General Insurance Company*⁴⁶, a dispute arose between two English insurers under a reinsurance contract which contained a continuation clause stating that “If the insured object is in a damaged condition at the time the insurance expires, and the damage comes within the underwriters' responsibility, the risk should continue for the immediate consequences of such damage until the object, without unnecessary delay, has been repaired or sold.” In construing the effect of “immediate”, Sankey LJ said:

The real point for determination is whether the damage which was sustained by the vessel when she took the ground at Angra Reef was the immediate cause of her loss on Possession Island. I think that it was. Fortunately, we have not got to speculate here upon the meaning of the words “proximate cause” or to add anything to the numerous words which have been used to elucidate the meaning of it, such as efficient or effective cause, real cause, proximate cause, direct cause, decisive cause, immediate cause, *causa causans*, all of which have been used in one or other of the cases to which our attention has been directed. All we have to decide is whether it was the immediate consequence of the damage. I am clearly of opinion that it was.

The Court of Appeal did not hesitate in holding an immediate link between the earlier damage and the final damage based upon the evident facts in the case. No outstanding distinction can be drawn between a causal link of an earlier damage and a later one, and causation regarding an insured peril and the loss. However, this clause should be regarded as a measure of indemnity in the event of successive losses, but requiring a further causal link between the losses. Therefore, due to the construction of the whole clause, the immediate consequence is confined with an obvious and simple factual occasion; it is not

⁴⁵ *Supra* 7, p 181, as cited in *Vastgrand Industrial Ltd v Avon Insurance Plc* [2004] H.K.C.U 475

⁴⁶ (1928) 31 L.L.Rep. 45

conclusive to say that the phrase “immediate consequence” is effective to express an intention not to follow the doctrine in any event.

In comparison, it is more ascertained if the words “solely and independently”⁴⁷ are used in order to emphasise an intention to establish a stricter causation standard. The word “solely” was held to mean “without any intervention of other perils” in *The Miss Jay Jay*.⁴⁸

In summary, the doctrine of proximity is an important and common principle provided by the 1906 Act, however, the Statute has provided room for the parties’ mutual intention to agree to a different standard of causation, so long as a clear expression can be found in the policy. As the expressions in describing the causal link between the perils and losses determine the scope of coverage, the parties, especially the assured, should be made aware of the meaning and effect of the expressions. As for the underwriters, ambiguity arising from the wordings ought to be managed and reduced in order to avoid unexpected expansion of his coverage by the courts.

1.2 Doctrine of Proximity in English Marine Insurance Cases

Before the codification of the 1906 Act, the law of marine insurance in England depended mainly on common law and customary commercial usage.⁴⁹ Per Willes J in *Ionides v The Universal Marine Insurance Co*⁵⁰, “you are not to trouble yourself with distant causes or to go into a metaphysical distinction between causes efficient and material and causes final; but you are to look exclusively to the proximate and immediate cause of the loss.” The immediate or direct cause of the loss in time order used to be recognised as the test of materiality in determining the underwriter’s liability. However, the approach has changed dramatically in the early 20th century, as the concept of causation gradually developed. On the basis of the landmark cases, Sir Mackenzie Chalmers eventually adopted the words “proximate cause” in describing the cause of legal significance in the 1906 Act. In the absence of a further statutory interpretation, it being an abstract and complex term, proximity has been construed by a subsequent leading case to be the efficient cause to the loss accrued. Henceforth, the test of efficiency is applied as good law in ascertaining the proximate cause. In the meantime, the test of common sense has been employed in assisting and monitoring the test laid down by case law constantly. Courts take account of both tests to justify and determine the insurer’s indemnity liability.

1.2.1 Prior to the Marine Insurance Act 1906

⁴⁷ *Southampton Leisure Holdings Plc v Avon Insurance Plc* [2004] EWHC 571 (QB)

⁴⁸ [1987] 1 Lloyd's Rep. 32

⁴⁹ Leslie J Buglass, *Marine Insurance and General Average in the United States* (2nd edn, Cornell Maritime Press, 1981) 4

⁵⁰ *Supra* 24, p 289

The legal theory of causation has a remarkable history through a few centuries.⁵¹ Historically, the general formulation in distinguishing remote and proximate causes in the legal perspective relied upon Francis Bacon's maxim⁵² arising from early common law:

[Sic] It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree.

The specific application of this principle in the law of marine insurance in determining the insurer's indemnity liability was to only look at the nearest cause in time to the damage or loss. *Lucena v Craufurd*,⁵³ a classic case regarding insurable interest, has also reflected an early position in the beginning of 19th century of the approach to ascertain the cause of loss. The commissioners of Admiralty obtained insurance cover on a few Dutch vessels and cargoes to the ports of the United Kingdom, before the outbreak of war declared between Britain and the United Provinces. They were on statutory duty to take care of these properties by virtue of the issue of the commission. The vessels were lost majorly on the voyages from St. Helena to Britain by perils of sea. Consequently, the commissioner claimed for the indemnity under the policy but failed on the grounds of lacking insurable interest in terms of a proprietary or possessory right. Nevertheless, it is suggested that against a complex factual matrix, the judges looked no further than the direct cause of the loss, as the concept of causation in insurance law was not refined at that stage.⁵⁴

During the Victorian era (1837-1901), the tendency of the courts to ascertain the cause relevant to deciding the recovery still related to the last one in the "time chain". Per Erle C J. in *Ionides v The Universal Marine Insurance Company*:⁵⁵

The maxim causa proxima non remota spectatur is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually ascertained: but, if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established.

In *Taylor v Dunbar*,⁵⁶ the vessel carrying meat from Hamburg to London encountered tempestuous weather. As a result, the meat became putrid and was thrown overboard at sea

⁵¹ *Athel Line Ltd v Liverpool & London War Risks Insurance Association Ltd* [1946] K.B. 117, 122

⁵² Francis Bacon, *The Elements of the Common Lawes of England* (1630) 1

⁵³ *Lucena v Craufurd* (1802) 3 Bos. & Pul. 75, Exch; (1806) 2 Bos. & Pul. N.R. 269, HL; (1808) 1 Taunt. 325, HL

⁵⁴ Chris Nicoll, "Insurable interest: as intended?" [2008] Journal of Business Law, 5, 432-447

⁵⁵ *Supra* 24

out of necessity. The judges unanimously agreed that the loss was solely caused by the retardation and delay, although such delay was occasioned by the adverse weather conditions encountered. The decision was reaffirmed by *Pink v Fleming*,⁵⁷ where a portion of goods had gone bad on arrival after the vessel collided with another one. The court held that the loss was due to the handling which took place in discharge and re-shipment for the repairs and delay consequent on collision, accordingly. In these cases, the sea risks were merely regarded as the earlier components of the time chain, without any legal effect.

Apart from the examples relating to delay situations, the approach was also demonstrated in other occasions. In *Dudgeon v Pembroke*,⁵⁸ an iron steamer, *the Frances*, was insured under a time policy. On her voyage from Gothenburg to London carrying oats and loads of iron and timber, she encountered heavy rolling sea and caught fire. After the fire was put out, she forwarded to Hull but failed to reach port and ran aground ashore. The ship became total wreck eventually in spite of the endeavours and measures to rescue her. The underwriter sought to reject the recovery on the grounds of unseaworthiness. However, the House of Lords conclusively held that the loss was immediately caused by perils of sea after the fire, notwithstanding the contributions of some other facts such as the outbreak of the fire. Another application is typically exemplified by the decision of *Cory v Burr*,⁵⁹ where the ship was insured against ordinary perils including barratry of the master in a time policy of marine insurance. It was warranted "free from capture and seizure and the consequences of any attempts thereat." The ship was seized by the Spanish revenue officers owing to the master's smuggling act. Consequently, proceedings were taken in order to procure her condemnation and confiscation. The owner tried to get the expenses for releasing the ship recovered. However, the insurer defended against the liability by contending that the loss was caused by the peril excepted by the warranty. It was again held by the House of Lords that the immediate cause of the expenses was the capture and seizure, which was not within the scope of cover. A chain of facts was established and recognised unanimously by the Lords that the barratry of the master gave rise to the seizure, and subsequently to the loss of the ship and expenses occurred. Per Lord Fitzgerald,

There was no loss occasioned by the act of barratry. The barratry created a liability to forfeiture or confiscation, but might in itself be quite harmless; but the seizure, which was the effective act towards confiscation, and the direct and immediate cause of the loss...

Although that Lord Fitzgerald had held that the seizure to be an *effective* cause, the approach complies with the last in time order, still. Had the ship been confiscated for other

⁵⁶ (1868-69) L.R. 4 C.P. 206

⁵⁷ (1890) L.R. 25 Q.B.D. 396

⁵⁸ *Alexander John Dudgeon v E. Pembroke* (1876-77) L.R. 2 App. Cas. 284

⁵⁹ *John Cory & Sons v Albert Edward Burr* (1882-83) L.R. 8 App. Cas. 393

reasons without reference to the smuggling, or if the assured was able to prove that the smuggling was a mere excuse for the local authorities' intentional confiscation, it would be accurate to maintain that the barratry was irrelevant or harmless. However, as a direct consequence of the barratry, it is bizarre to blame the loss on the seizure instead of the barratry itself, which is simply a performance of a legally authorised duty in the modern context. For instance, if a driver with a higher intake of alcohol over the legal limit has been fined by the police, it is implausible to contend that the proximate cause of the penalty is the police's exercise of duty, i.e., checking the driver and his car. According to Arnould's, the barratrous act of smuggling is a direct and natural cause of forfeiture as the proximate cause, when it is detected.⁶⁰ However, it has to be noted that this decision still remains good law and has been relied upon as a case cited in *The Salem*. In order to reject the barratry of the crew to scuttle as the proximate cause, Lord Roskill in *The Salem* reasoned that:

No doubt the balance of the cargo would not have been lost but for the fraud or fraudulent conspiracy. But that alone does not make either of those causes the proximate cause of that loss any more than the fact that the seizure of the ship in *John Cory & Sons v. Burr* (1883) 8 App.Cas. 393 would not have happened without the prior barratrous acts of smuggling by those on board the ship made the loss of the ship a loss by barratry and not by seizure.

Moreover, in terms of freight policies, the test of time chain was also applied. It is frequent that a freight policy is closely concerned with the clauses which are contained in the charterparties. For instance, in *Mercantile Steamship Co. v. Tyser*,⁶¹ the charterer was entitled to cancel the charterparty where the vessel failed to arrive at the port of New York on or before 1 September, 1875 in compliance with the charterparty. The vessel lost time and arrived delayed due to failure of machinery on the voyage, which required the vessel to be returned for repairs. The charterer cancelled the charterparty thereupon. It was held that the loss of freight was not caused by any peril insured against but the exercise of cancelling the contract. It was reiterated in *The Alps*⁶² by the same token, that

Here the loss arose, not from perils of the sea, but because it fell within the clause in the charter. The fire created the want of repair, but it was the want of repair that made the clause operate. Time may be lost by the shipowner, and yet the hire not be lost, if it does not fall within the clause....

It shows that in freight policies, courts also looked for the direct cause of the loss in time sequence.

⁶⁰ *Supra* 13, p 927

⁶¹ (1880-81) L.R. 7 Q.B.D. 73

⁶² [1893] P. 109

Although the “nearest in time” test had been set up and followed for judicial convenience and certainty in identifying the proximate cause to some extent, it lacks accuracy and fairness in certain cases where an earlier event had exerted a more substantial influence on the consequence of loss. The emphasis on the legal effect of breaching warranties, such as unseaworthiness in a voyage policy, justly reflects the judicial attention to avoid the inflexibility and constringency arising from the last cause in time. Per Lord Mance in *The Cendor Mopu*⁶³:

A historical riposte might then be that the famously and sometimes unfairly stringent principles governing insurance warranties were themselves the product of the Victorian view of causation referred to in para 56 of this judgment. If the only relevant cause is the last cause in time, then a prior breach of a simple contractual obligation regarding fitness could have been regarded as irrelevant. Hence, the development of the concept of a warranty which, if broken, automatically discharged from liability for loss or damage, irrespective of how such loss or damage was in law to be regarded as caused.

As courts increasingly paid attention to the requirement of proximate cause, the test was gradually changed towards the end of the 19th century. In *Reischer v Borwick*,⁶⁴ the vessel was covered merely against the risk of collision rather than perils of sea. It ran into a snag which resulted in leakage. Temporary repairs had been taken in case of immediate danger. However, the vessel was aground and abandoned finally due to the motions of the sea while it was tugged to the nearest dock for further repairs. The Court of Appeal held that the loss was recovered as the proximate cause was the collision rather than subsequent perils of sea. Although per Lindley L.J., his decision was consistent with *Pink v Fleming*, it has to be noted that the judgment did not follow the early test literally. Lopes L.J. articulated that the consequences of the collision “never ceased to exist, but constantly remained the *efficient and predominating* peril to which the damage now sought to be recovered was attributable.” [Emphasis added]

1.2.2 After the Marine Insurance Act 1906

The 1906 Act has affirmed the principle of proximity in the statutory form, which is of great significance. Before the usage of “proximately” in the 1906 Act, the causal link is described in various ways, for instance, *causa causans*⁶⁵; *immediate cause*⁶⁶; “*direct and immediate cause*”⁶⁷. After the Act came into effect, the House of Lords preferred to equate it with “*direct*

⁶³ *Supra* 7

⁶⁴ [1894] 2 Q.B. 548

⁶⁵ *Gordon v. Rimmington* (1807) 1 Camp. 123, per Lord Ellenborough

⁶⁶ *Walker v. Maitland* (1821) 5 B. & Al. 171 per Abbott C.J

⁶⁷ *Supra* 59

cause" as a better expression.⁶⁸ However, the expression as to the terminology of causation in English law is not an ideal one, as a plainer one is always desired for the handling of the disputes. It was stated by Lord Macmillan in *The Coxwold*⁶⁹ that the adverb "proximately" does not supply a sound and perfect solution to the cause and effect problem, however, at least it has been emphasised that it is the predominant and determining cause that is to be sought for. Moreover, according to Halsbury's, 'proximate cause' means the same thing as 'dominant' or 'effective' or 'direct' cause. Thus, the term 'proximate' is the safest word to describe the requirement for a legal causal relationship between the risk and loss, which evidently requires further explications.

The most remarkable explanation of proximity, the test of efficiency, has been established in the decision by the House of Lords in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*.⁷⁰ In this case, the ship insured, *The Ikaria*, was torpedoed by a German submarine at 25 miles away from its destination on her voyage from South Africa to Havre. The explosion seriously disrupted its bulkhead so that she began to settle down by the head. Nevertheless she did not sink immediately, but managed to arrive at Havre by the aid of tugs soon. She was asked to berth in the outer harbour for repair when a gale sprung up and a swell ensued. The ship began to bump. The port authorities feared the ship would sink and block the quay, therefore, ordered her to moor inside the outer breakwater. At last, the ship grounded there and sank by the head after the two days' unavailing effort, mere a small part of cargo was saved. The policy contained an express term of warranty free from all consequences of hostilities. The assured, accordingly, claimed the total loss of the ship caused by the perils of sea within the insured perils. However, the House of Lords approved the decision of the Court of Appeal and the Commercial Court, holding that proximate cause of the loss was the torpedo, otherwise the sea conditions afterwards, the real proximate cause under the 1906 Act should not be solved by the mere point of time but the one proximate in efficiency. Hence, the age of "the nearest cause in time" has become a mere legal history. It is worth quoting Lord Shaw's explanation on the meaning of 'proximate' in length:

To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but - if this metaphysical topic has to be referred to - it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely. At the point where these various influences

⁶⁸ *British & Foreign Marine Insurance Co v Samuel Sanday & Co* [1916] 1 A. C. 650, 659. See also *Becker, Gray v London Assurance* [1918] A.C. 101

⁶⁹ *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] A.C. 691

⁷⁰ *Supra* 6

meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

What does “proximate” here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

Moreover, it is noteworthy that Lord Shaw articulated that “the chain of causation is handy express, but the figure is inadequate. Causation is not a chain, but a net.” When a voyage commences, the subject-matter insured may be endangered by various situations, even if they can be listed orderly on a time arrow. Each occurrence may spread out several incidents which may have contributory effect on the final loss, and each event may involve a cause-and-effect link to some other. The expression seems simply effective and satisfactory in a mere event of successive causes of loss. However, for most occasions, a combination of facts is far more complex than a chain. Therefore, the proximate cause of the loss in English law should lie in the most material and efficient knot in the net.

The doctrine of proximity requires the event to play an active role, which is the most striking distinction from a condition necessary to the occurrence of the loss in the legal sense. The proximate cause is a risk, which arises independently, that triggers and leads to the loss ultimately. Two material indicators in evaluating efficiency must be taken into account. First, having been established, proximity is not restricted to the last in time order. By the same token, the remote causes are not logically those earlier in time. Frequently, the starting point of the hazard is the most efficient cause leading to the consequence of loss. The inception of the high incidence of loss is more likely to be the proximate cause, though not as far as being inevitable. It should be noted here that the first peril to be considered in the “net of efficiency” is determined by the possibility of the loss, which has nothing to do with time order. Secondly, after the triggering risk occurs, a few natural events or even passive conditions may contribute to the occurrence of the loss ultimately; whereas, some of the incidents are more active. If the triggering risk has been effective in the process of loss constantly without intervening new causes, the loss should be regarded as the result proximately caused by the risk. Hence, in the absence of any other outstanding peril which cuts off the earlier causal link, the insurer should be liable as long as the triggering risk is agreed or deemed to be agreed in compliance with the parties’ intention or the common sense construction.

(a) Necessary Condition and Inevitable Consequence

It used to be one of the prevailing approaches to identify the proximate cause of loss by virtue of the “but for” test. On applying this test, the proximate cause is deemed to be the peril without which the loss would not have happened. It is suggested that this test is more effective in finding out all the conditions necessary for the loss, including the indispensable yet auxiliary elements. Opposite to the “but for” test, a notion focusing on the “inevitable consequence” relation is also raised when looking for the proximate cause. It has been stated by MacGillivray and Parkington⁷¹ that “if the loss or damage is the necessary consequence of the peril insured against under the existing physical conditions, there is, *prima facie*, damage by that particular peril”. However, both “but for” test and “inevitable consequence” test are not able to provide a precise method in evaluating the efficiency of the peril.

The “but for” test is a usual method of ascertaining factual causation especially in tort law, known as a test of necessity. It has been widely recognised that this test is far from satisfactory in identifying the most efficient cause in tort law and other branches of law, as all the necessary causes of divergent extents will answer this test.⁷² In relation to carriage by sea, the proximate cause test was held to replace the “but for” test. In *The Kamilla*,⁷³ the insured vessel was chartered under a time charterparty in the form of NYPE incorporated with the Inter-Club Agreement. A minor amount of the cargo of lentils was damaged by the ingress of seawater due to unseaworthiness in the No. 2 hold, whose hatch covers were not completely watertight. The local Authorities of the discharging port arrested the vessel on the report of the cargo receiver, who sought to reject the entire cargo due to the minor damage. The shipowner claimed an indemnity for the financial loss arising from the arrest against the charterer under the Inter-club Agreement; whereas, the charterers contended that the loss was proximately caused by seaworthiness which is the entire liability on the shipowner. Having sustained the arbitration award, Morison J dismissed the shipowner’s appeal by holding that unseaworthiness was the effective cause of the whole loss. In particular, the Judge contemplated that although the ‘but for’ test is appropriate to establish whether there is a causal link between the act or default and the alleged damage, the “but for” test, is a necessary but insufficient test in looking for the proximate cause.

⁷¹ MacGillivray *et al*, *MacGillivray and Parkington on Insurance Law*, (6th edn, Sweet & Maxwell, 1975) 1752

⁷² Hart and Honore argued in their influential work, *Causation in the Law* (2nd edn, Clarendon Press, 1985) that although the “but for” test is useful and effective in most cases in answering whether the defendant’s conduct is a cause of the loss or damage as required in tort law, it is not, however, a sound test as a method of finding a mere causal element or one of the normal conditions in the loss. Under maritime commercial law, this argument is also plausible in terms of causation. More detailed comparison on the tests of causation between tort law and marine insurance is provided in the following subsection.

⁷³ *Supra* 22

Furthermore, the “but for” test has been thoroughly discussed in a recent insurance case, *Orient-Express Hotels Ltd v Assicurazioni Generali SpA (UK) (t/a Generali Global Risk)*⁷⁴. In order to prove that the test is not applicable in the issue of causation, the assured provided legal authorities of the US and English law from the perspective of tort law and contract law. The assured suffered substantial physical damage on the property insured and business interruption losses due to the effects of Hurricane Katrina and Hurricane Rita in New Orleans. Initially, the arbitral tribunal held that the assured could only recover the loss which it could be shown would not have occurred but for the physical damage of the Hotel. The assured appealed for one of the grounds that the Tribunal erred in law in applying the “but for” causation test. In answering this contention, Hamblen J approved the approach of the Tribunal but explained that, not limited to tort, the test is a necessary condition for establishing causation in fact, and the Tribunal was correct in applying this test, owing to the interpretation of the express wordings under this policy and facts.

Prof Rob Merkin has suggested an insightful angle in interpreting the result and the authoritative effect of applying the “but for” test in this judgment from the principles of procedural law.⁷⁵ The decision might not be persuasive in substantive law, as Hamblen J was being asked to challenge a factual finding that it was appropriate “in the circumstances” to apply the “but for” test. According to s 69 of the Arbitration Act 1996 (England), an appellate court is allowed to overturn an appeal only if the arbitrators have erred in law, and they cannot be said to have so erred if the point in question was not raised before them. Thus, the award and the test had to be sustained on the procedural ground.

Moreover, assuming that the hurricane and the curfew are consecutive but not concurrent causes, one cause cannot prevail over the other. However, the two losses have an overlap in time. And time is the only material factor in determining the indemnity in Business Interruption claims. The essential issue is how to deal with the overlap loss which is not apportionable in Business Interruption Claims. The solution in this case resorts to the construction of the policy in the literal manner. Thus, the “but for” wordings and the test seem to answer the question as if the uninsured peril prevails. In light of the peculiar character of Business Interruption claims, it is still in essence concerned with the drafting of

⁷⁴ [2010] EWHC 1186 (Comm), [20] –[41], The Policy's Insuring Clause:
“In consideration of the Insured ... paying the premium ... the Insurers ... agree ... to indemnify the Insured
a) under the Material Damage and Machinery Breakdown Sections against direct physical loss destruction or damage except as excluded here in to Property as defined herein such loss destruction or damage being hereafter termed Damage
b) under the Business Interruption Section against loss due to interruption or interference with the Business directly arising from Damage and as otherwise more specifically detailed herein.”

⁷⁵ Rob Merkin, “The Christchurch Earthquakes Insurance and Reinsurance Issues”, forthcoming in the Canterbury Law Review

the policy in the first place. One cannot say the court or tribunal has erred in law on the ground that it interprets a clause by adopting a literal approach. Accordingly, in principle, the “but for” test can be applicable in the causation question only if the policy and the fact unequivocally indicate.

On the other hand, as the proximate cause is a necessary condition in the first place, the “but for” test may be an effective defence for the underwriter in order to detach the consequence of the loss from certain perils if he succeeds in proving that the loss would still have happened in the absence of the causal element. Irrespective of various forms of a necessary condition, the proximate cause of efficiency, as one of them, still meets the “but for” test.

In respect of the “inevitable consequence” test, Prof Malcolm Clarke contends that “the loss of the kind covered must be inevitable, but the extent of the loss need only be such as would have been within reasonable contemplation or not unlikely to occur.”⁷⁶ This proposition seems to be an appropriate understanding of the decision of *The Leyland Shipping* by merging the tests of inevitability and reasonable contemplation of the loss. Logically speaking, if the proximate cause sufficiently leads to the loss, it means the loss is a necessary consequence of the cause. However, as a matter of fact, the loss cannot result solely from the proximate cause without the assistance of a series of *causa sine qua non*. An *efficient* cause is hardly a sufficient cause of loss on its own. Therefore, in this context it ought not to follow the aforementioned logic rule. Moreover, the operation of different combinations of factors may lead to divergent kinds and extents of loss. Thus, necessary consequence or inevitable consequence cannot be adopted as a universal test in identifying the proximate cause in insurance cases.

Professor Clarke also warns that a broad test of connection should not be allowed, which means that a mere foreseeable consequence is not able to provide sufficient help in isolating the proximate causes from a complex factual matrix, as the connection is too tenuous. It was affirmed in *The Kamilla*⁷⁷ that foreseeability is not the criterion for ascertaining a causal relation at all. It seems more precise to regard the loss as the natural consequence⁷⁸ of the insured peril in compliance with the cause-and-effect theory, without reference to inevitability or foreseeability.

In summary, although the proximate cause is one of the necessary conditions, it is of the most efficiency for the occurrence of loss. The loss does not have to be the inevitable and predictable consequence of the proximate cause, which is taken as if a test of causation.

⁷⁶ Malcolm Clarke, “Insurance: The Proximate Cause in English Law”, Cambridge Law Journal 40(2) Nov. 1981

⁷⁷ *Supra* 22

⁷⁸ Right Honorable Lord Justice Mance, Iain Goldrein QC, Prof Robert Merkin, *Insurance Disputes* (2nd edn, LLP, 2003) p167

Both the “but for” test and “inevitable consequence” tests alone are not sufficient or effective in ascertaining the proximate cause under the law of marine insurance.

(b) Successive Causes—A Chain of Efficiency

Timing, although it is not always accurate, has provided a clear clue in seeking the proximate cause. In the occasion of successive causes, the time chain is a plausible and convenient expression in describing the successive link in time among the relevant causes. It should be remarked that the terminology of “successive causes” is entirely distinct from “successive losses” which is provided by s 77 of the 1906 Act.⁷⁹ Successive losses refer to the circumstances in which a partial loss is followed by another or a total loss, which is designed to be measure of indemnity.⁸⁰ Whereas, successive causes consist of a series of related *perils* occurring one after another in a time order, finally leading to the consequence(s) of loss. Successive losses are normally independent events which are proximately caused by different incidents of perils. In most cases, the term “successive” as to losses simply indicates a literal meaning of time sequence without more. In contrast, the chain of causes infers an inter-dependent connection among the subsequent cause and the previous one. Thus, it is more accurate to describe the successive link as a chain of efficiency which the earlier event passes on the efficiency of the later one.

The chain of efficiency starts from the point when the real risk arises, rather than when the first necessary condition comes up. That is to say, the first peril which introduces the actual substantive hazard of loss is very likely to be the proximate cause of the loss initially. In *The Toisa Pisces*,⁸¹ the assured took a loss-of-hire marine policy on the vessel *Toisa Pisces*, incorporating Institute Time Clauses Hulls (1/10/83) and also insured against breakdown of machinery unless it not resulting from wear and tear or want of due diligence by the assured. A propulsion breakdown occurred on 25 February 2009 and resulted in a loss equivalent to 30 days’ off-hire. It was held by Blaire J that in pure causation terms, after the failure of the port motor on that day, one thing led to another. In other words, the whole process of loss of hire was a chain of reaction of the first breakdown. In this case, the proximate cause for

⁷⁹ 77. Successive losses

(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been re- 301 paired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss: Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

⁸⁰ *Kusel v Atkin* [1997] C.L.C. 554; *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] 2 C.L.C. 68

⁸¹ *Sealion Shipping Ltd v Valiant Insurance Co (The Toisa Pisces)* [2012] EWHC 50 (Comm), para 136

determining the recovery was the machinery breakdown, unless it was caused by want of diligence of the assured or wear and tear.

The exception to the rule applies where an ensuing event, also known as *novus actus interveniens*, breaks the initial proximate causal relationship. A new intervening cause does not only end the former chain of causation but also gives rise to an independently new chain of efficiency in causation. Therefore, it is necessary to take account whether an independent subsequent occurrence takes over the earlier ones to be attributed, but no more than an exceptional rule. Additionally, it may be plausible to suspect that one of the rationales to adopt the historic test of last one in time may be the excessive concern of the possibility and effect of intervening events at that time, so that it was legally presumed that the later incident had cut the causal link of the earlier one as a principle.

Frequently, the later risk or occasion is strongly connected to the previous one in various forms, in particular, in the event of an inevitable consequence of the earlier one, which is known as "inevitable cases".⁸² The earliest event has been recognised to be the proximate cause. That is to say, the only ground to determine whether the underwriter is liable is the proximate cause in the earlier stage irrespective of the subsequent risks occurring inevitably or naturally. Specifically speaking, where the first cause is an insured peril and leads to an excluded (or a non-covered) peril, the loss is to be covered. On the contrary, where the first cause is an excepted peril and leads to an insured peril, however, the loss is unlikely to be covered.

However, the connection between the successive causes does not have to be so close as to be inevitable; whereas, if the link is too vague and distant, the later incident may amount to a new intervening peril. This situation is perfectly demonstrated by the case of *Fooks v Smith*.⁸³ The assured, a hide merchant, shipped his goods on a voyage from Calcutta to Bourgas. He took out a policy against marine risks and also a Lloyd's policy against war risks, including restraint of princes. Goods were reshipped on an Austrian vessel on the transit at Trieste. On her subsequent way to Bourgas, the master returned to Trieste since he received the shipowner's order to follow the general instructions issued by the Austrian Government to Austrian shipowners to get their vessels into a place of safety in anticipation of a declaration of war. The voyage was frustrated and the goods were landed in Trieste. About one year later, the goods were requisitioned and sold by the Austrian Government. Consequently, the assured raised a claim on constructive total loss (CTL) due to the restraint of princes, or alternatively, an actual total loss (ATL) as a result of the confiscation. The Court held although there was a CTL caused by the restraint of princes, the assured did not deliver notice of abandonment which is a requirement to claim for a CTL. In respect of the

⁸² Rob Merkin, *Colinvaux & Merkin's Insurance Contract Law*, vol. 2 (Sweet & Maxwell, 2002-) p 20358

⁸³ [1924] 2 K.B. 508

subsequent ATL, it was proximately caused by an ensuing event, i.e. confiscation, which was incurred beyond the duration of the cover. Therefore, the court held that the underwriter was not liable for the loss on either ground.

One of the significance of the decision is that it has clarified the correlations between successive losses and successive causes. In the first place, successive losses may arise from a series of successive incidents or from different and independent events such as two non-related partial losses. In determining which type of situation it falls under, each/every loss should be examined in compliance with its individual causation rules respectively. In the case of a series of successive incidents, as a second step, it needs to be figured out whether it is a chain of efficiency or intervened by new causes in a successive time order. Under the former circumstance, the conclusion of causation is the same as if the losses are proximately caused by one peril. On the contrary, in the later occasion as the fact of this case, the intervening cause resulted in an unconnected event of loss, where the rules of the measure of indemnity followed as if the losses were caused by totally different and independent events. In the instant case, per Bailhache J.:

...if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss - as, for instance, if there is a capture followed by confiscation - the underwriter is liable in respect of the total loss. If, however, the ultimate total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against, but is the result of some supervening cause, the underwriter is not liable. That is an illustration of the doctrine *Proxima causa non remota spectatur*.

Another contribution of the judgment is that it has established a test for identifying an intervening cause from the successive causes on the chain of efficiency. The question of materiality, per Bailhache J, is whether the new cause is a necessary and direct result of the earlier insured peril. If the result is a natural, necessary and direct result of the earlier peril, it is just one of the causes passing on the efficiency of the triggering peril on the chain. In that case, the proximate cause is the earlier cause. It also means that the later event does not have to be as strict as an inevitable consequence of the earlier one. In essence, the connection is also a cause-and-effect link with incidence. However, unlikely, the test of this type of causal link ought to follow the decision of *Merchants' Marine Insurance Company v Liverpool Marina & General Insurance Company*⁸⁴, a lower standard than the principle of proximity (i.e. immediate consequence). In contrast, if the answer is negative, the new event intervenes over the old causation chain and leads to its own consequence of effect, which constitutes a different causation chain.

⁸⁴ *Supra* 46

In addition, it should be emphasised that notwithstanding the ensuing event, without a consequence of loss, the ensuing event cannot amount to a cause at all. For example, in *Andersen v Marten*,⁸⁵ a neutral ship was insured against perils of sea and warranted free from capture during the Russo-Japanese war. It was captured by the Japanese and on the way to the Court of Prize it was wrecked and became a total loss as a result of heavy weather. It was held in the first trial that the total loss was proximately caused by the capture which was affirmed by the Court of Appeal and the House of Lords. Per Channell J., the assured lost his vessel at the time of capture and the capturer lost his prize subsequently, therefore under this marine policy the insurer was held not liable for the total loss which was proximately caused by an excluded peril. In this case, although perils of sea led to the physical loss of the vessel, the assured's loss accrued at the time of the seizure, and the chain of efficiency ended. In this insurance claim, the incident of heavy weather had no consequence of legal effect. Therefore, the ensuing event could not be considered as the proximate cause or even a contributing factor.

In summary, as the nearest cause in time order is no longer a valid test in law, the expression of "chain of time" should be replaced by "chain of efficiency" and a new set of rules are established accordingly. The efficient cause should be the peril which profoundly inserts the incidence of the loss at the starting point of the chain. On the other end, the chain of efficiency will be ended either by the consequence of loss or by an intervening cause. Under the latter circumstance, if the intervening event contributes to the ultimate loss or a new loss, a new chain of efficiency is set up and it should be the proximate cause in the claim. In this regard, the causation rules should be applied in each causal link respectively for the purpose of ascertaining the scope of the underwriter's liability.

1.2.3 Test of Common Sense

Compared with the test regarding the time order, efficiency seems to be a more accurate and plausible approach in seeking the proximate cause of the loss. Nonetheless, such criterion has been criticised on the grounds of having produced arbitrary decisions in identifying the cause. A test of common sense is demanded and complied with where the decisions are prone to be beyond a rational and commonly acceptable scope. After all, the causal issue in law does not seek the impersonal actual physical causes in the technical sense exclusively; rather, it asks whether the loss is the consequence of the risks within the limit which the insurer agreed to assume under the policy.⁸⁶ Accordingly, besides the "efficiency" test affirmed by the *Leyland* case, the "common sense test" has played a supplementary yet important role for an even longer time. Overall, the efficiency test aims to

⁸⁵ [1907] 2 K.B. 248; [1908] 1 K.B. 601 [1908] A.C. 334

⁸⁶ Peter Muchlinski, 'Causation and Proof of Loss in Marine Insurance', in F. D. Rose (ed.) *Current Legal Problems*, (1987) p 82

specify the single or concurrent causes of the loss in every individual case, whereas, the test of common test purports to ensure the approach within general legal and common rationales, which avoids arbitrary judgments owing to the excessively strict analysis on isolating the proximate cause from the complex factual matrix.

It has been stated that a philosophical refinement would be adopted in judging the issue of causation since 19th century, in the form of ‘the commonplace test’ based upon which an ordinary businessman is familiar with on such issues.⁸⁷ It was reaffirmed by Lord Denning a century later that causation questions should be answered based on common sense.⁸⁸ This proposition has been clarified and elaborated by Bingham LJ, to the extent that the ascertainment of the proximate cause should apply the common sense of a business or seafaring man in the context of the marine insurance.⁸⁹ Likewise, it does not require the courts to act as experts in the scientific aspects of maritime scope. What can merely be expected from the courts is the judgment or construction of law in practical language upon particular circumstances under a commercial contract.⁹⁰

As “commons sense” connotes a general and indefinite meaning, it is very likely there would be arguments on defining what falls within common sense or not. It has to be borne in mind that common sense is not a subjective test, although it remains flexible in the courts’ discretion. In *The Sivand*,⁹¹ which was concerned with damages due to a collision between a tanker and harbour works, Evans LJ articulated that common sense:

...is not a subjective test, which would be an unreliable guide. It implies a full knowledge of the material facts and that the question is answered in accordance with the thinking processes of a normal person. The reference to “material” facts means that some mental process of selection is required.

Paradoxically, common sense cannot be equated with common conclusion. The test has to rely on the explanation and reasoning of the judges based upon the facts in every case. It is inevitable that not all judges consider the common sense test as a solution to lead them to a common conclusion.⁹² Common sense can only be reached on the assumption that the decision is not subject to the judges’ own cognition but in a common manner as a normal

⁸⁷ *Dudgeon v Pembroke* 1874 L.R. 9 Q.B 581, 595

⁸⁸ *Gray v Barr* [1971] 2 QB

⁸⁹ *Noten v Hardings* [1990] 2 Lloyd's Rep. 283

⁹⁰ *Harrison v Shipping Controller (The Inkonka)* [1921] 1 K.B. 122 per McCardie J, the merchant vessel under the order of the Admiralty, The Inkonka was damaged, owing to stranding on a voyage carrying hospital stores for the British Government without material arms on board. It was held that the Admiralty was not liable for the damage as it was a consequence of the hostilities or warlike operations. See also *The Coxwold*.

⁹¹ *Humber Oil Terminal Trustee Ltd v Owners of the Sivand* [1998] 2 Lloyd's Rep. 97, 102

⁹² *Galoo Ltd. (in liquidation) and Others v Bright Grahame Murray (a firm) and Another* [1994] 1 W.L.R. 1360

person. On this basis, common sense can be adopted as a supporting approach of processing and identifying the proximate cause of the loss or damage.

How can common sense apply in law? Common sense is not confined by rules of law; it assists to reach the conclusion which the law does not allow.⁹³ Common sense has established the bottom line of making good law and its proper application. In other words, the proper application of a good law should be at least within the scope of general common sense. Although the law would be made sophisticatedly and precisely and complied with coherently, it might still fall into the question of common sense as a result of the unsatisfactory outcome. The reason for introducing this method into resolving the issue of causation is to fill the blanks of the rule and to cope with the conflicts between the common ground and law owing to the constraint in application or defective rules. Therefore, the common sense test can apply under the circumstance that rules of law cannot answer effectively and reasonably. In general, however, common sense should not be relied upon solely as an authoritative ground, where valid legal rules are still available under common law. In the case of causation in marine insurance, the doctrine of proximity remains the paramount test to apply unless otherwise provided in the policy. The common sense test should be regarded as a supplementary test in case of an unreasonable and unexpected conclusion.

The common sense test may be applicable in cases where the courts are faced with the possibility of making an arbitrary or unjust decision, if strictly following the causation rules established in law. Nevertheless, the test should not be availed as an obstruction to apply the legal causation rules simply because a decision appears to imbalance the interest between the two parties. Viscount Simonds in *Mcwilliams v Sir William Arrol & Co. Ltd*,⁹⁴ where an experienced steel erector fell from a height at work, held that the employer was not liable for his breach of duty of not providing a safety belt, as it had not caused the death on the balance of probability. Notwithstanding the effect of the “but for” test in tort law, the learned Judge and Steele in her book warned that a causal link must be established between the conduct and the consequence for a valid claim, in spite of the occurrence of an adverse consequence on the victim, as causation is related to responsibility to the consequence only.⁹⁵ Moreover, although common sense principles have a moral basis and accords with ordinary moral notions of when someone should be considered responsible for some occurrences, they may not serve equally well in the event of liability without reference to fault.⁹⁶ Accordingly, under the insurance law, the common sense test is only effective in the

⁹³ *Total Transport Corporation v Arcadia Petroleum Ltd. (The “Eurus”)* [1998] 1 Lloyd’s Rep. 351 at 362

⁹⁴ 1962 S.C. (H.L.) 70

⁹⁵ *Supra* 2, p 180

⁹⁶ Leonard Hoffmann, “Causation”, *Law Quarterly Review*, 2005 121(Oct), p 594

process of selecting the proximate cause of a causal link in law, but not as a ground for making a decision favourable to the assured, as long as an insured peril is involved.

It is also noteworthy that both *The Inkonka*⁹⁷ and *The Coxwold*⁹⁸ were held to remove the need for metaphysical analysis of causation; however, it is interesting and appears to be somewhat controversial that *The Cendor Mopu*,⁹⁹ which also involved a metaphysical question on ascertaining the proximate cause of the broken legs of the oil rig, depended heavily on the expert evidence to conclude that the leg-breaking wave was the proximate cause eventually. On the other hand, in the same case, holding that the fortuitous external accident or casualty should not have to be exceptional or extraordinary, the House of Lords have denied the authoritative effect of the *The Mayban*,¹⁰⁰ which indicates that the complex expert evidence on the weather conditions during the designated voyage is not necessary and material any more. The common sense test seemingly sets a low threshold for the courts to process the selection of the proximate cause, but it does not prevent the courts from exploring and figuring out the proximate cause of efficiency to the loss incurred on a legal level, nor purports to reduce the burden of proof on either concerned party. It should be clarified that in the context of the law of marine insurance that the common sense of the marine professionals, along with the expert evidence upon particular facts, should jointly assist the courts in finding the efficient cause.

1.3 Comparison: Causation Tests in Marine Insurance Law and Tort Law

Tort law and insurance law are both classified as branches of civil law.¹⁰¹ The law of tort purports to provide a remedy in order to protect certain rights or interests against civil wrongdoings. In contrast, marine insurance law essentially has its origin and basis in the law of contract, where the insurer and the assured come into an agreement upon the recovery of certain loss or damage by virtue of a policy. The law of tort is frequently combined with liability insurance, playing a role in distributing losses and compensating injuries.¹⁰² For instance, the system of compulsory third-party insurance to cover liability for road accidents, and of compulsory insurance to cover liability of employers to their employees, are designed to facilitate the operation of the accident compensation system in tort law. In the case of subrogation, an insurance claim may be followed by a tort one.

⁹⁷ *Supra* 90

⁹⁸ *Supra* 69

⁹⁹ *Supra* 7

¹⁰⁰ *Mayban General Assurance BHD v Alstom Power Plants Ltd* [2004] 2 Lloyd's Rep. 609

¹⁰¹ Peter Cane, *The Anatomy of tort law*, (Oxford Hart, 1997) 11-13. These pages of the book discuss the similarities and distinctions between the law of tort and other branches of law including contract law and the law of property.

¹⁰² *Ibid*, p 15

It appears plausible to propose to adopt the same approach for addressing the causal question in tort law and insurance law, as there is an overlap in the process of ascertaining the party's liability in tort claims and liability insurance claims. Specifically, the named defendant, who is also known as the alleged tortfeasor, is simply a nominal party in many tort claims. The disputes are frequently conducted and settled by his insurer under a liability policy.¹⁰³ The question whether the underwriter is liable for the damage depends upon the answer to the question whether the insured is liable to the claimant, i.e. the injured party, under the law of tort in the first place. As aforementioned, if the assured seeks a valid claim on the recovery of loss or damage from his insurer, one should prove the occurrence of an insured peril and his loss of the subject-matter insured. Also, a proximate causal link between the peril and the loss has to be established, unless otherwise provided in the policy. Likewise, such a link is required between the alleged tortious conduct and the damage occurred in order to find the defendant is liable under both strict liability and fault-based liability.¹⁰⁴ In comparison, the incidence of certain tortious conduct is equal with the insured risk; damage and loss both refers to an adverse consequence which triggers the enquiry about responsibility and liability. The causal requirement between them is naturally to be established in the same method in order to obtain consistent decisions of liability in one trial depending upon two distinct branches of law. Therefore, the interaction in terms of liability insurance between insurance and tort provides a powerful support for adopting an identical approach for the causal requirement.

Nevertheless, it is worth mentioning the commercial court decision of *Lloyds TSB General Insurance Holdings and Others v Lloyds Bank Group Insurance Company Limited*,¹⁰⁵ which discussed the difference between tort law and insurance law in ascertaining the proximate cause. The assured in this case was seeking to recover against a sum paid out due to his failure of financial advice under a policy of professional indemnity insurance. The commercial court held that the proximate cause of the bank's liability to his investors was the negligence in providing inadequate advice, and the assured's failure to provide proper training to his employees (the consultants) was irrelevant. In particular, the underwriter sought to distinguish the insurance test from the tort test in this regard, however, Moore-Bick J disagreed that a different and more restrictive approach to causation applies generally in the case of contracts of insurance than the case of tort law. Accordingly, the underwriter was held liable to the indemnity. This decision was affirmed by the Court of Appeal¹⁰⁶ but reversed by the House of Lords.¹⁰⁷ Having construed the aggregation clause differently from

¹⁰³ *Ibid*, p 6

¹⁰⁴ Peter Cane, *Atiyah's Accidents, compensation and the law* (7th edn. Cambridge University Press, 2006) 110

¹⁰⁵ *Supra* 21

¹⁰⁶ [2001] EWCA Civ 1643; [2002] 1 All E.R. (Comm) 42; [2002] C.L.C. 287; [2002] Lloyd's Rep. I.R. 113; [2002] Lloyd's Rep. P.N. 211; [2001] Pens. L.R. 325

¹⁰⁷ [2003] UKHL 48; [2003] 4 All E.R. 43; [2003] 2 All E.R. (Comm) 665; [2004] 1 C.L.C. 116;

the Court of Appeal, the House of Lords considered the failure to provide proper training as an essential fact which entitled the underwriter to deduct his liability of indemnity under each claim rather than aggregate all the claims as a “result from any single act or omission (or related series of acts or omissions)”. Although the concern of the dispute shifted from the causation issue to the construction of terms in the contractual framework eventually, the initial decision made by the commercial court has addressed and expressed an intention for convenience to follow the same causation rule in tort law in the context of liability insurance. On the other hand, the appellate decision, however, has revealed that different facts may be looked into and considered to be relevant and may come to opposite conclusions in answering the two distinct questions: is the alleged tortfeasor liable and is the insurer liable.

As an independent category of insurance from liability insurance,¹⁰⁸ so far as the marine insurance including the hull and cargo policies are concerned, the approach of causal requirement in tort law can even hardly be introduced and applied. In essence, the two laws protect the rights of different natures. The underwriter’s liability under the marine insurance law derives from the basis of contractual obligations and from the perspective of commercial sense, while tort law has an independent source and provides protections to civil legal rights and interests from unlawful human acts. Consequently, there are a few remarkable distinctions in terms of causation between the two branches of law. In the first place, the most striking difference resides in the approaches and tests to establish the causal link of legal effect. Tort law depends more upon the factual basis of the civilian’s conduct and the damage or injury, which means when referring to causation, the judges rest their concerns equally or even more on the factual links.¹⁰⁹ Whether the allegedly tortious conduct really caused the damage is the key question in establishing the causal relation. The mode in tort law can be perceived and concluded as that the defendant is liable in the event that the conduct contributed to the consequence of the damage in fact with the exceptions that the link is too weak because of remoteness or the lack of foreseeability.¹¹⁰ Accordingly, there have been proposed three divergent tests in tort law, namely, the “but for” test, the test of remoteness and the test of foreseeability. In contrast, in shipping cases, the tendency is to address the causation issue within the legal scope, as the liability of

[2003] *Lloyd's Rep. I.R.* 623; [2003] *Pens. L.R.* 315; (2003) 153 *N.L.J.* 1270; (2003) 147 *S.J.L.B.* 935;

¹⁰⁸ There are a variety of ways in classifying different forms of insurance covers. In respect of marine insurance, it normally refers to marine hull policy and cargo policy, which are also property insurance essentially. In contrast, non-marine insurance includes life and accident insurance, liability insurance, financial insurance, motor vehicles insurance, etc. These policies insure divergent insurable interests against the loss and damage caused by different perils and risks.

¹⁰⁹ Even some arguments contend that the only question of causation in tort law is related to the factual causation according to The Steele’s.

¹¹⁰ A three-step analysis (*sine qua non*, causal connection, scope limitations) has been suggested in Hart and Honore’s tort-law based book *Causation in Law*, 2nd edition, and commented in J. Stapleton’s article “Law, Causation and Common Sense” (*Oxford Journal of Legal Studies* Vol 8, 1988, p 116).

indemnity is created by contract with mutual intentions, even though courts have sometimes commented that the causal question is a matter of fact. It is natural that no decision can be made by not relying upon the facts. However, in the context of marine insurance, it has been well-established by law that the cause of efficiency is the proximate cause and only relevant cause in ascertaining the underwriter's liability. Logically, it seeks the very cause through several factual contributing events by examining the proximate or remote links to the loss rather than to being confined in establishing and checking ONE causal link between one targeted conduct to the damage. All kinds of causal factors insured or non-insured are required to be considered before coming to the conclusion, unlike the tendency in tort law to treat or presume the human conduct as the "operative" or "effective" cause.¹¹¹ In essence, the causation issues in these two laws are starting from different points and experiencing divergent logical processes, even though leading to a common effect to ascertain the liability of one side of the parties.

In general, tort academia used to analyse the tortious scenarios by the "but for" test, which is the same point shared in insurance law.¹¹² Also, the test of direct consequence has been fully considered and relied upon in cases decided under the law of tort.¹¹³ Apart from the fact that two tests can be observed under both laws, the issue of causation in tort law is also resolved by answering whether the loss is foreseeable and reasonably resulting from the prospective proximate cause.¹¹⁴ In effect, the "but for" test itself as discussed above is no longer a sound test both in marine insurance law and in tort law, and the foreseeability between the risk and the loss is not traceable in marine insurance cases. Regardless, the notion of "remoteness" as opposed to proximity is the statutory test shared in the law of marine insurance but with different implications and application.

Specifically, the proximate or direct cause and the "foreseeability" test have exerted substantial influence on the decisions in tort law. Defendants frequently take advantage of either of them as a defence to detach the causal link from his conduct and the loss in order to discharge his liability.¹¹⁵ Also, these two approaches in argument contribute to support and value in addressing the same question in the context of marine insurance law. A remarkable case of the first of two approaches is *Re Polemis and Furness Withy & Co Ltd*,¹¹⁶

¹¹¹ *Supra* 101, p 169

¹¹² Rob Merkin, "Tort and Insurance: some insurance law prospective", *Journal of Professional Negligence* 2010, 194-218; Prof Andrew Burrows, *Remedies for Torts and Breach of Contract*, (3rd edn, Oxford University Press 2004)

¹¹³ *Re Polemis and Furness Withy & Co* [1921] 3 KB 560

¹¹⁴ *Supra* 76

¹¹⁵ For example in *The Sivand* [1998] C.L.C. 751, the vessel Sivand damaged harbour installations owned by the respondents, as the result of negligent handling. The owner appealed unsuccessfully to the Court of Appeal for the reason that the extra loss was not foreseeable and too remote, therefore, he should not be liable for the additional loss of the barge due to the accident occurring in the process of repairing the harbour.

¹¹⁶ [1921] 3 K.B. 560

where a charterer was held by the Court of Appeal to be liable for the total loss of the ship in a devastating fire which was caused by his employee's negligence in dropping a board into the hold during the loading operation with inflammable cargo on board. Having reversed the decision of the trial judge which was on the grounds of the test of foreseeability, the Court of Appeal reasoned the loss to be as a direct consequence of the negligent conduct, even though it was not foreseeable. As a case closely related to the carriage of goods by sea in terms of charterparty, this decision has reflected the considerations in the shipping industry instead of being a mere negligence claim in tort.¹¹⁷ As commented by Davis,¹¹⁸ the decision is acceptable and popular in the shipping world given the social context of the time; while tort law developed it, it is no more than a "self-applying" rule. In particular, another landmark case in tort law, *The Wagon Mound (No. 1)*¹¹⁹ which overturned the former case, is frequently cited as an authority for returning to the "foreseeability" test. The charterer's servant negligently allowed bunkering oil to spill into the sea, which flowed to water underneath a wharf by wind. Not bound by the decision in *Re Polemis*, the Privy Council (Australia) found the charterer of the vessel was not liable for the damage to the wharf caused by the fire in the absence of foreseeability that the spilt oil would contribute to the outbreak of the fire.

Nevertheless, the two decisions can be understood from a comparison vision. The causal link in tort law does not require as close and direct a connection as the one required in shipping law, in particular the law of marine insurance. A weaker form of causal link may satisfy the legal requirement of tort liability, for example, employer can be held vicariously liable if one of his employees harm another on the grounds that he contributed to the opportunity to the consequence.¹²⁰ However, if a remote link is too weak in effect to cause the damage, it will not establish a liability thereupon. Accordingly, the satisfaction of the test of "remoteness" not only embraces the situations of direct and effective causes but also indirect but reasonable contributory ones. At the same time, foreseeability, as another limit of equal importance in ascertaining the defendant's liability, must be satisfied in the same case. In other words, although the direct consequence test may not be preferable in the tort law context, a cause in fact¹²¹ (normally refers to the allegedly tortious conduct) must be

¹¹⁷ MacNair affirmed that the cause of action in *Re Polemis* was in tort rather than in contract law, according to his article "This Polemis Business" (1931) 4 CLJ 125. However, it was discussed later in *Beven on Negligence* (4th edition, 1928, Vol 2, p 967) that the duty of care can arise from both contract and tort.

¹¹⁸ Martin Davies, "The Road from Morocco: Polemis through Donoghue to No-Fault", 45 Mod. L. Rev. 534 (1982)

¹¹⁹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co* [1961] A.C. 388

¹²⁰ *Supra* 105, p 234

¹²¹ There is a distinction drawn between "cause-in-fact" and "cause-in-law", which is suggested to be over-complication in the causation issue, according to Lord Hoffmann's speech "Causation" (*Supra* 94). He also commented that the creation of this concept, which is defined as an act which has some historical connection with the event one is alleged to have caused in Prof. Stapleton's article "Cause-in-fact and the Scope of Liability for

neither too remote nor unforeseeable in order to find the defendant is liable for the injury. Thus, *The Wagon Mound (No.1)* should not be cited as an authority for exaggerating the effect of the “foreseeability” test as the sole limit excluding the limit of remoteness; or even to be treated as the prevailing test in tort law over the fact-based test. It is a decision which has also drawn our attention to the limitation of foreseeability, but not a symbol returning to the so-called *TEST of Foreseeability*. Its emphasis should be understood to have been simply put on the correctness of the “direct consequence” instead of the test “not too remote” applied in *Re Polemis*. Although it may be inaccurate to treat the “direct consequence” as a rule or general test which leads all the direct consequence to be the liability of the defendant, however, an attention in remoteness of the causal link should be paid independently. It should be remarked that remoteness in causal effect is a distinct concept from unforeseeability, even though they may overlap in some occasions when the consequence is too remote to anticipate. For instance, interventions of new causal factors typically demonstrate the earlier conduct to be a cause of remoteness, but remaining foreseeable. An evident margin is perceptible between the consequences which are not remote in tort law but not foreseeable as a matter of fact and vice versa. Therefore, it is better to treat both remoteness and foreseeability as two independent limits to the principle rule of cause in fact.

Furthermore, the maritime law style reflected in *Re Polemis* is not simply a need in history. The concepts of remoteness and foreseeability are traditionally distinct and even contradicted in tort law and in contract law in the maritime context. From the perspective of carriage of goods by sea, the cause of action in *Re Polemis* in relation to the charterparty was dropped by the time the case reached the court. However, it seems indefinite yet unlikely whether the decision would be different in having ascertained the charterer’s liability of recovery had the shipowner insisted on claiming in contract. The charterer is basically obliged to properly use the vessel, which is implied in the contract. Remoteness under contract law has been defined in *Hadley v Baxendale*¹²² of carriage of goods by sea

Consequences” (2003, 119 L.Q.R.,388), is not justified and necessary. Lord Hoffmann has presented sufficient reasons to regard this distinction as an example of over-complication of causation questions. However, for the convenience of comparison, in this part of the Thesis, “cause in fact” is used, referring to the real and actual causal link between a human tortious conduct and the consequence, for the purpose of describing and emphasising that the tort law test is fairly fact-based and fault-based. It does not aim to make a distinction in terms of legal concepts.

¹²² 156 E.R. 145. The principles established in this case remain good law till now and have been applied, for instance, in *The Sylvia* [2010] EWHC 542 (Comm), when the loss naturally caused by the breach, it should be recoverable. However, in some unusual cases regarding the assumption of responsibility, such as *The Achilleas* [2008] UKHL 48, applying the test of remoteness may lead to an “an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there was clear evidence that such a liability would be contrary to market understanding and expectations.” Under this circumstance, English courts protect the party in breach from a wider responsibility in the commercial sense and in contract law, unlike the result of applying the legal test of foreseeability in tort.

that damages recoverable for a breach of contract should be such as might fairly and reasonably be considered as arising naturally from the breach or might reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. A consequence is highly probable to be a direct one if it has naturally arisen from the breach, while remoteness can be found where the party in breach can prove his lack of information so that he cannot reasonably be aware of the counter party's contemplations at the time of concluding the contract. It should be remarked that the awareness is based upon the parties' disclosure of information rather than general common sense. In *Re Polemis*, having known benzine was on board and possessing a duty of care to conduct safely, a fire was triggered naturally when the board negligent fell into the hold. Consequently, strict liability arises on the part of the charterer as the situation does not satisfy the remoteness exception in the contract law context.

Under the law of marine insurance, it reveals a more significant style of maritime law as to the concepts of remoteness and foreseeability. Only the direct and efficient cause meets the statutory test, subject to the parties' contractual agreement to the contrary; and the marine insurance market concerns itself with the question of foreseeability in terms of both the incidence of perils and loss from the opposite side of tort law. Insurance contract is a contract based upon fortuity, which excludes voluntary conduct and inevitable and naturally occurring losses which can certainly be foreseeable from the coverage. Therefore, the foreseeability test seems even unpopular in the marine insurance context, as foreseeability might diminish the fortuity of the risk and loss. For instance, in *The Cendor Mopu*, it was argued that only the losses proximately caused by the *unforeseeable* perils of sea should be recovered; and the loss caused by inherent vice is not insured as it is too foreseeable almost to be inevitable. In addition, since tort law is fault-based essentially, a consideration of the subjective factors should be taken into account when ascertaining the defendant's liability, which is not shared with contract claims, in particular with marine insurance. Therefore, a subjective judgment in common sense of the moral impact has been introduced into the decisions so that the defendant will not be liable for the loss beyond foreseeability, owing to his behaviour. In contrast, the insurer agrees to undertake the liability of indemnity of the loss solely for the "consideration" of premium of the policy. The question of foreseeability is simply a matter of construction of the literal terms, if any arise. An arguable test of common sense, as discussed above, exerts a rather flexible limit on the statutory test of proximity in efficiency. Hence, the tests of causation in tort law are strikingly different from the operation under the law of marine insurance.

Will the causation question be simpler in insurance cases if it confines itself to inquiring only about the link between the perils which are agreed and listed in the policy and the loss, as the approach in tort? Obviously, the answer is positive. Once one of the insured perils is efficient in causing the loss, irrespective of how much it contributes to the loss, the causal

link is established and the underwriter is liable. However, what is more important and tricky is whether it should be. As discussed and concluded above, unlike tort law, there is no fault on the insurer's part when deciding the liability of indemnity, therefore, as a contractual party, the insurer is entitled to the equal right in establishing another causal link of a non-insured or excluded peril in order to discharge his liability, so long as he can prove it to be the proximate cause of efficiency. If following the tort model of causation, the underwriter loses the ground of defence by contending that the proximate cause is a non-insured or excluded peril; and the rules regarding concurrent causes are also meaningless. To make it worse, the underwriter will almost be liable in every case, as he can only discharge the liability when the loss is remote and unforeseeable from all the insured perils or all the contributing factors are non-insured or excluded perils. Thus, the causation rules in marine insurance should not follow the rules in tort.

In summary, in spite of the convenience of applying the same causation rules between tort law and insurance law in the form of liability insurance, the law of marine insurance has established and followed a set of causation rules which is influenced by other types of insurance and tort law. However, the causation rules which are essentially shared in common in insurance law are radically different from those under the law of tort, owing to the fundamental difference between contract law and tort law. Starting from the well-established statutory test, the law of marine insurance concentrates on the occurrence of the peril which introduces the risk of the loss most effectively. The limit of the statutory principle of proximity is the common sense test for the purpose of avoiding unpractical and irrational decisions. In reverse, tortious liability is on a factual basis, from the common sense perspective, with the limits of remoteness and foreseeability in the legal sense. In general, both laws take account of the factors of legal cause and cause in fact, however, compared with the insurer's liability of indemnity, tortious liability requires a lower threshold in establishing a legal causal link but, pays more attention to the contributing cause in fact. Therefore, the causation rules in the law of marine insurance are distinct and should be applied independently.

Chapter 2 Concurrent Causes

“Concurrent causes”, interchangeably referred to as “combined causes” and “multiple causes”, is an arguable term in the marine insurance context. It has been disputed by some early cases whether there is room for a principle that ‘concurrent causes’, as opposed to a sole cause, can result in the consequence of a loss or damage in law. There used to be the mainstream view of English courts that in the case of two causes, one or other of them must be closer as the proximate cause.¹²³ Despite the fact that the House of Lords showed an intention of not supporting the submission on the existence of more than one proximate cause of the loss,¹²⁴ however, the notion of concurrent proximate causes in English law can be tracked from nearly two centuries ago,¹²⁵ and has been legally accepted subsequently. A set of rules concerning concurrent causes has been established by several remarkable precedents.¹²⁶ Until recently, the judgment of *The Cendor Mopu*¹²⁷ provided a review on the recognition of ‘concurrent causes’ in marine insurance cases, Lord Mance expressing doubt on the occasion of concurrent proximate causes in the legal sense, yet leaving the question open in his decision.

It has been suggested that there are concurrent causes where the two causes are of equal efficiency to the loss.¹²⁸ Per Lord Mance in *The Cendor Mopu*, to constitute concurrent causes, a loss should be attributable to two concurrent risks arising independently but combining to cause a loss. It seems, along with the development of the causation rules, that “concurrent causes” embraces a more sophisticated connotation. On the basis of a review of the English precedents in the first place, it is challenging yet essential to seek and to conclude a clear and accurate definition of “concurrent causes” in the modern law context. This work purports to provide a clear standard to ascertain such, given that there is legal room for concurrent causes.

Notwithstanding the obscure status of concurrent proximate causes before English courts, in every case, initially, the efficient cause is selected among numerous relevant facts, which the first chapter helps in understanding. Subsequently, in the majority case of a sole cause, a conclusion is reached by determining whether the cause is within the insured perils or excluded. In contrast, where courts consider a possibility of concurrent causes, each/every cause will be tested respectively in the manner as a sole cause. The rules as to concurrent

¹²³ *Supra* 70, Per Lord Dunedin

¹²⁴ *Liverpool & London War Risks v Ocean S.S. Co.* [1948] A.C. 243

¹²⁵ *Hadedorn v Whitemore* 1816, 1 Stark, 157

¹²⁶ For instance, *J.J. Lloyd Instruments Ltd. v Northern Star Insurance Co. Ltd. (The Miss Jay Jay)* [1987] 1 Lloyd's Rep. 32 and *Wayne Tank and Pump Co. Ltd. v Employers Liability Assurance Corporation Ltd.* [1974] Q.B. 57

¹²⁷ *Supra* 7, Para 88

¹²⁸ *Supra* 82, p 20368

causes have been set up and should be applied under this circumstance. Therefore, it is worth studying these specific rules by virtue of looking into the relevant English cases.

2.1 Concurrent Causes and Sole Cause

It is quite usual that a few causes on the factual basis may be the competing candidates for the proximate cause. However, concurrent causes are somewhat rarely recognised by the courts, due to their preference of isolating a single peril as the dominant cause.¹²⁹ For one reason, it has to be admitted that a real “concurrent causes” situation is practically rarer. Moreover, it would simplify the process of determining the insurer’s liability of indemnity by avoiding the application of the rules of concurrent causes by holding a sole proximate cause, even though such decision is prone to produce an arbitrary outcome.

In the light of various considerations, English courts have changed their mild attitudes in recognizing a loss arising from more than one proximate cause and they seem to have set up a rather harsh standard. Consequently, doubt as to whether there is still room for cases of concurrent causes has been raised. Therefore, this concept should be clearly defined in the modern context in order to ascertain the underwriter’s liability and to acknowledge the defences.

2.1.1 Room for “Concurrent Causes”

The English Marine Insurance Act 1906 merely provides the doctrine of proximity in s 55, without the indication of room for concurrent proximate causes. Should the 1906 Act apply in a strict manner, a single cause must be isolated in any event due to the singular wording used in the provision. However, it seems that the literal application and interpretation of this section is far from satisfaction for the courts. From the aspect of the provision itself, it seems that it merely aims to emphasize the term “proximately”, regarding the standard of the causal connection. It is logical to assume that if a loss was proximately caused by two insured perils, pursuant to s 55(1), the loss should be recovered by the insurer. Therefore, the provision does not deny the possibility of the existence of more than one proximate cause. Chalmers’ explanation in this respect affirms that “there may be more than one proximate (in the sense of effective or direct) cause of loss”.¹³⁰

Undoubtedly, in practical scenarios, the situations are more divergent and complex. Different types of risks, whether insured or non-insured or even excluded, may combine and merge to the occurrence of the loss. Although English courts may frequently be encountered with the net of facts and intend to simplify the situation by isolating one cause of all causes,

¹²⁹ Parks, *The Law and Practice of Marine Insurance and Average* (Cornell Maritime Press, 1987) 416

¹³⁰ Sir Chalmers, M.D., *Chalmers’ Marine Insurance Act 1906* (9th edn, Butterworths, 1983) 78

a few landmark precedents have set up and been decided upon the rules regarding concurrent causes, and no decisions nor dicta can be found in respect of s 55(1) to exclude the justification of the admittance of two concurrent causes in marine insurance cases.

In retrospect, rules of causation in English marine insurance law have experienced remarkable developments, not only in terms of the test of proximate cause, but also in the recognition of concurrent causes. It is maintained that the view that a loss may have more than one proximate cause has been authoritatively accepted in English law in compliance with the decision of *Hagedorn v Whitemore*,¹³¹ as early as a historical case in 1816. In this case, a vessel carrying the insured cargo was taken in tow by a British vessel of war on concealment of the British license under a mistake. The cargo on board was damaged by exposure to the tempestuous sea. Lord Ellenborough held that it was proximately caused by perils of sea; moreover, “the loss might have been alleged to have been occasioned by capture and detention”. From his learned judgment, Lord Ellenborough seems solely to show his concern on the allegation of capture and detention, otherwise than on whether there was the possibility of concurrent causes of detention and perils of seas. The trace of the recognition of concurrent causes is relatively vague and indefinite. It is more appropriate to be taken as a case of how to exclude one of the competing causes. Although this ancient judgment failed to provide strong support in acknowledging the concurrency of proximate causes under marine insurance cases, it might be a good starting point for looking into the legal acceptance of concurrent causes.

In the judgment of the latter case, *Reischer v Borwick*,¹³² where the ship was insured against damage caused by collision with any object, perils of sea not included, and ran against a snag, Lindley L.J. advocated that the sinking was proximately caused by injuries by the collision and by the ingress of water while being towed for repair. In contrast, although Lopes L.J. admitted that “this [towing after the collision] may have been a concurrent cause, and one without which the loss would not have happened”, he held that the broken condenser resulting from the collision was the sole proximate cause of the loss finally. Whether the loss was caused by perils of sea and the collision jointly and proximately would not alter the result of the decision in compliance with “good sense”, per Lindley L.J. and under modern rules,¹³³ since collision was an insured peril and perils of sea was non-included. Although the concurrent causes of the sinking have not been unanimously recognised by the judges, this decision can be deemed as a significant trace of the consideration and room in respect of the notion of “concurrent causes” by courts.

It is particularly noteworthy that two strikingly contrary attitudes have been held in this case. Although it is a case prior to the enactment of the 1906 Act, the judges in this case were not

¹³¹ *Supra* 125

¹³² [1894] 2 Q.B. 548

¹³³ Detailed modern rules in this respect will be discussed in the next part.

confined to merely looking at the last cause occurring in time order. Both Lindley L.J. and Lopes L.J. considered the indispensable effect of each cause. On account that the sinking was due equally to one of these causes as the other, Lindley L.J. held a rather open attitude by admitting that the loss would be indemnified in a cover for perils of sea as well. However, Lopes L.J. emphasised that

In cases of marine insurance it is well-settled law that it is only the proximate cause that is to be regarded and all others rejected, although the loss would not have happened without them.

Literally, this proposition seems to indicate that once a proximate cause is found, it automatically excludes the circumstance of concurrent causes. That is to say, the proposition seems to allow no room for a second proximate cause in one case. However, it is illogical and implausible to disregard all other contributory causes of efficiency but for which the loss would not have happened, since all other “but for” causes cannot be self-proved to be proximate or not. The doctrine of proximity in determining the marine underwriter’s liability should be applied in a neutral manner with an equal preparedness to find the possibility of concurrent causes as with a sole cause.¹³⁴ Although the test of efficiency may have not come into the minds of the judges at the time of making the decision, the contribution in efficiency, no matter how minor it turns out eventually, should always be material to the courts, until reaching a conclusion by an overall evaluation.

The *Leyland Shipping*,¹³⁵ which is the leading decision on the test of proximity, appears to have shown a unanimous intention by the House of Lords in ascertaining a sole proximate cause irrespective of the complexity of the facts at that period. Confronted with the thorny question as to which was the proximate cause, perils of sea or man-of-war, Lord Dunedin suggested that the question should be resolved as a matter of fact by identifying the dominant cause of the two. Likewise, Lord Shaw of Dunfermline articulated that “where various factors or causes are concurrent, *AND* one has to be selected” [emphasis added], the matter should be determined by efficiency as a matter of fact. It has to be admitted that the core attention of the Lords rested on the test of efficiency in order to replace the test of time order in this case. However, according to the judgment, it seems the Lords showed less concern on whether there would be any possibility of concurrent causes. Since it abandoned the last ONE in time order test by looking into efficiency instead, it is possible that the House of Lords was not prepared to abandon the obligation (or a habitual thought perhaps) of seeking the one cause as a result of the influence of the old test. Nevertheless, the new test concerning efficiency literally embraces the possibility of equal efficiency in causation, which is distinct from the last ONE test. Thus, it would be arbitrary if one comes to the

¹³⁴ Howard Bennett, *the Law of Marine Insurance* (2nd edn, Oxford University Press, 2006) 309

¹³⁵ *Supra* 71

conclusion that a sole cause must be chosen as the proximate one, solely based upon this decision.

Furthermore, still in this case, Lord Atkinson criticised the tendency or an approach to divide concurrent causes into a preceding and a succeeding cause by establishing a sequence between them, the latter being proximate and the former is remote. It implies that at least a possibility remains by measuring efficiency of competing causes and owing to common sense and parities agreement in marine insurance law. Therefore, in the law of marine insurance, *The Leyland Shipping* cannot and should not be treated as a definite authority for answering the question as to the room of “concurrent causes”.

In contrast, the decision of a non-marine insurance case which is concerned with liability insurance has given enlightenment to the question by citing a marine insurance case. In *Wayne Tank and Pump Co. Ltd. V Employers Liability Assurance Corporation Ltd.*,¹³⁶ the assured entered a public liability policy with the underwriter indemnifying the accidental damage to property, excluding the damage caused by the nature or condition of any goods sold or supplied by the insured. A fire broke out and destroyed the factory. On appeal, it was held that the underwriter was not liable for the indemnity on account of the exception clause. It was interesting that Lord Denning M.R. and Roskill L.J. were attempting to assume both the condition of the goods and negligence of the servants as the concurrent proximate causes, however, neither relied on this assumption to produce their judgments. Instead, both of them insisted that the proximate cause of the fire was the defective material of the goods, which has been excluded in the cover.

Nevertheless, Cairns L.J. admitted the possibility of having two proximate causes by considering the decision of *Board of Trade v Hain Steamship Co. Ltd.*¹³⁷ That was a special case having gone through arbitration and court decisions. Finally, the House of Lords upheld the award and dismissed the appeal by holding that the loss was proximately caused by warlike operations solely. A collision occurred, the negligent navigation of both vessels, being equally to blame. The counter-vessel, otherwise the appellant's which was under requisition to the Government upon a charterparty, was belonging to the United States Navy during the war time. Accordingly, the government was held to be liable for the loss in the collision in light of the warlike operations. Viscount Sumner held that every collision loss should be regarded as the result of two causes jointly and simultaneously, namely, the operations of the two vessels respectively. This proposition has been relied upon by Cairns L.J. in *Wayne* case for the recognition of two proximate causes to one loss. However, it seems to be not within the conventional scope of “concurrent causes” in a collision context, looking into the fault of the two vessels respectively. The so-called concurrent causes are

¹³⁶ *Supra* 4

¹³⁷ [1929] A.C. 531

the quantitative base to ascertain the apportionments of liability between the two vessels, which directly determines the amount that each one's underwriter may recover against to his vessel insured. An affirmative answer can hardly be reached as to whether the underwriters are entitled to defend themselves from the liability of the indemnity against the assureds on the same basis. The policy is concluded between the insured and the underwriter under the protection of the doctrine of privity. The rights and liabilities of each party are subject to the terms of the policy. Whether the collision falls within the scope of the insured perils of the policy determines the underwriter's liability of recovery. It is impossible to define one collision both to be peril at sea and war risk notwithstanding two parties involved. By the same token, a collision cannot be both wilful and negligent to the assured. Accordingly, the context of collision between two vessels should not be regarded as an example of the allowance of concurrent causes in marine insurance.

Notwithstanding the defect of this collision case upon which Cairns L.J. reached the conclusion that a loss could be proximately attributed to concurrent causes in insurance cases, the decision of the *Wayne* case has been reaffirmed by *Midland Mainline Ltd v Eagle Star Insurance Co Ltd*¹³⁸ which is in respect of business interruption losses under an insurance policy (the "CGNU" policy). In particular, the judge in the Court of Appeal, Sir Martin Nourse, contemplated and held that the authorities which provided that there can be more than one proximate cause of loss have been already well established by the marine cases such as *Leyland Shipping* and *The Miss Jay Jay*.¹³⁹

The decision of *The Miss Jay Jay* has been recognised as the long-awaited landmark authority of the "concurrent causes" situation under the law of marine insurance. Not only the judgment holding that the damage to the yacht, *The Miss Jay Jay*, was proximately caused by the concurrent causes, i.e. the ill-designed and ill-constructed hull and actions of adverse sea, but also the construction of the exclusion clause as to the norm 'solely' have taught the marine insurance industry that 'proximity' in causation does not always contain the indication of being a sole cause. In respect of the finding on equal efficiency of unseaworthiness and perils of sea, the judges relied radically upon the reasoning in *Dudgeon v Pembroke*,¹⁴⁰ in which it was held that the loss was recoverable due to the immediate cause of perils of sea, though it might not have happened but for the concurrent action of some other cause which was not within the policy. The reason for excluding the relevancy of the seaworthiness status of the vessel resides in the test of immediate cause in time sequence in the 1870s, when *Dudgeon v Pembroke* was decided. The nearest cause test provides the evident grounds to the courts to overlook the possibility of concurrent causes. Until *The Miss Jay Jay*, the judges moved further so as to find the equal efficiency of both

¹³⁸ [2004] 2 C.L.C. 480

¹³⁹ *Supra* 48

¹⁴⁰ *Supra* 58

causes, but for which the cause would not have occurred to be the proximate causes to the loss. Although this decision has been repeatedly followed by cases lately,¹⁴¹ per Lord Mance in *The Cendor Mopu*,

...the Court of Appeal was not presumably suggesting that, where initial unseaworthiness or unfitness and unfavourable weather conditions beyond the ordinary action of wind and waves have both played a role, the court must always treat both as equal or nearly equal proximate causes.

In light of the absence of a clear approach on how to weigh and conclude the equal efficiency of two separate causes in *The Miss Jay Jay*, Lord Mance adopted the formulation of Lord Diplock in *Soya v White*¹⁴² regarding the concept of inherent vice instead for his final judgment. It has been suggested that such treatment indicates that it could be proximate cause only if the loss was attributed to such debility or similar occasions listed in s 55(2)(C)¹⁴³ of the 1906 Act, without any fortuitous external accident or casualty in compliance to the approach by Lord Diplock.

Interestingly, although it seems *The Cendor Mopu* did not reverse back as far as the traditional standpoint of *Dudgeon v Pembroke* with reference to immediateness, it rejects the concurrency of causes under the circumstance of *The Miss Jay Jay*. It should be remarked that the formulation upheld in *The Cendor Mopu* rejects the concurrency of inherent vice and perils of sea to one loss, as if two sides of a coin. Lord Diplock's formulation with reference to inherent vice complies with the long-established test of efficiency. An insurance policy does not purport to insure what the vessel or the cargo is in itself, but to insure what they are likely to encounter at sea. The risk attributed to the inherent characteristics of any cargo essentially undergoes from the first minute from the commencement of the policy to the end. The losses in various levels take place only under certain fortuitous surrounding conditions known as *causa sine qua non*. Although it has been beyond discussion that the causation in the legal sense focuses on the *causa proxima*,¹⁴⁴ provided that the external requisite condition occurs in form of an insured peril, it turns to be the proximate cause in efficiency in the legal context as an intervening cause against the gradual effect of the inherent characteristics. In *The Cendor Mopu*, the efficient trigger was the leg-breaking wave which is a peril of sea, though the factor of inherent vice increased the adverse condition of the cargo continuously. It is within common sense that

¹⁴¹ *Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd* [2006] SGCA 28; [2007] 1 Lloyd's Rep. 66; [2007] Lloyd's Rep. I.R. 383; CA (Sing), *Martini Investments v McGuin* [2001] Lloyd's Rep. I.R. 374

¹⁴² [1983] 1 Lloyd's Rep 122

¹⁴³ "Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils."

¹⁴⁴ *Supra* 5

the trigger takes the most efficient part in the loss. Accordingly, per Lord Clarke, this policy was held to cover the rigs against the leg breaking, but not against every metal crack as a result of inherent vice. The two causes operate independently to divergent losses; to each loss, there is solely one proximate cause. Therefore, it seems from now on unlikely to find a case in which a loss is proximately caused by the equal co-operation of inherent vice and perils of the sea.

Another question has been raised as to whether the decision would be different by holding the sole proximate cause of the loss of the yacht to be perils of sea, had the formulation of Lord Diplock applied to *The Miss Jay Jay*. In other words, it becomes doubtful whether *The Miss Jay Jay* would still be good law as to concurrent causes in the law of marine insurance. *The Cendor Mopu* may be deemed as authority to reject concurrency between internal risks and external ones; in the meantime, it warns about the rarity of real concurrency of causation. However, the improbable concurrency of inherent vice and perils of sea is not the whole story of the concurrent causes in the marine insurance context. Lord Diplock's approach may apply to every occasion in s 55(2)(C). However, it may be incorrect to extend this formulation to a case of seaworthiness. The risk of loss due to unseaworthiness cannot expose and take place without the action of seas. That is to say, unseaworthiness cannot lead to the loss "without any intervention of any fortuitous external accident or casualty", since unseaworthiness is unfitness "to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage".¹⁴⁵ A loss of an unseaworthy ship ought to be attributed to both factors. On the contrary, the permanently intrinsic nature of the cargo can independently cause loss, regardless of locations and time. Accordingly, it is apparent that Lord Diplock's approach is not applicable to the case of unseaworthiness and perils of seas. In particular, it is quite reasonable for the courts to accept the concurrency of causes when faced with an unusual case, such as *The Miss Jay Jay* where the debility to encounter a certain peril at sea and that peril at sea cooperated interdependently to the loss.

On the other hand, *The Miss Jay Jay* was concerned with the matter of construction, as the term stated that "No claim should be allowed in respect of (i) any loss or expenditure incurred solely in remedying a fault in design or in the event of damage resulting from faulty design . . ." The proximate cause does not have to be the sole cause.¹⁴⁶ The matter of construction in this case indicates that the proximate cause is not a sole cause for granted. This proposition can be amplified from two aspects. First, "solely" indicated in the term may refer to a more rigorous standard than proximity in efficiency as to the causal relationship, which excludes the existence of other contributory factors. This interpretation is in line with the narrow formulation of inherent vice, which is determined by the nature of the risk. If a

¹⁴⁵ *Kopitoff v Wilson* (1875-76) L.R. 1 Q.B.D. 377

¹⁴⁶ *Supra* 78, p 165

loss is exclusively caused by one risk, naturally, that risk should be regarded as the proximate cause to the loss. However, the counter proposition does not invariably sustain this, since the proximate cause(s) can be selected from a few contributory causes as well. On the other hand, since the doctrine of proximity in causation is a statutory rule applied by the courts, this term should be construed as “any loss or expenditure incurred solely *proximately* in ...”¹⁴⁷ Logically, the possibility of concurrent proximity in the general meaning has been implied in the term by the insertion of “solely”. However, from the perspective of the insurer’s intention, what he sought to emphasize was the discharge of his liability where one of the listed causes contributed to the entire efficiency to the loss without any contributory factor, let alone the case of concurrent causes. Therefore, either the loss was caused solely by perils of sea or concurrently by unseaworthiness and perils of sea, the result would remain the same that the insurer should cover the loss. *The Miss Jay Jay* is typically in line with Lord Atkinson in *Leyland Shipping* in finding concurrent causes based on the parties’ intention by virtue of construing the clause. It indicates that the proximity does not equate with a singular cause, nor contains the element of singularity necessarily. In light of the complex practical occasions and legal justifications, there should and is the room for concurrent causes in marine insurance cases.

Very recently, In *Petroleo Brasileiro S.A. v E.N.E. Kos 1 Limited*,¹⁴⁸ the Supreme Court provided a direct judicial pronouncement on the rights of the owner of a time-chartered ship after the ship had been lawfully withdrawn for non-payment of hire for the first time. It is noteworthy here that the causation test of the employment and indemnity clause has been analysed and highlighted in comparison with the context of marine insurance law.

The ship owned by E.N.E. Kos 1 was time chartered to Petroleo Brasileiro S.A on the Shelltime 3 form. The time charterparty contained a standard form of indemnity clause (clause 13), which read: “charterers hereby indemnify owners against all consequences ... that may arise from the master ... complying with charterers' order ...” Due to non-payment of hire on 31 May 2008, the owner served a notice of withdrawal three days later when the ship had just loaded a cargo on the charterer’s order. The charterer attempted to persuade the owner to revoke the withdrawal, but failed. Ultimately, the charterer discharged the cargo; however, the ship was detained in the port for 2.64 days during the negotiation and discharging operations. The shipowner claimed from the charterer for the remuneration arising from the service of the ship for the 2.64 days at the market rate and the bunkers consumed in the same period. The Supreme Court found the owners’ claim was recoverable on the basis of the indemnity clause (Lord Mance dissenting) and bailment.

¹⁴⁷ *P. Samuel and Company, Limited v Dumas* [1924] A.C. 431

¹⁴⁸ [2012] UKSC 17

It has been affirmed by both courts below that the principle of remoteness and proximity of causation apply when determining whether a loss is a consequence of the charterer's order. The same principle was recognised by the Supreme Court as well. As far as concurrent causes is concerned, having cited numerous cases in marine insurance law (most of them have been addressed earlier in this chapter) and carriage of goods by sea, Lord Mance concluded that *the cause* should be sought needless of a consideration of concurrent causes. However, Lord Clarke articulated:

It is not I think helpful to use other adjectives to describe the cause. Different adjectives have been used over the years, including "proximate cause", "dominant cause" and "direct cause". To my mind they are somewhat misleading because they tend to suggest that the cause must be the most proximate in time or that the search is for the sole cause. Lord Mance says at para 37 that the search is for "the 'proximate' or 'determining' cause". However, I respectfully disagree because such a formulation suggests that there can be only one such cause, whereas there may, depending upon the circumstances, be more than one effective cause.

In his later judgment, he continued:

However, in my opinion, they clearly show that two effective causes can, in principle, exist. To my mind this can be clearly seen from *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57, *Lloyd (JJ) Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32 and *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042, [2004] 2 Lloyd's Rep 604.

As to the academic view, the prevailing view admits to concurrent causes in marine insurance law. For instance, Arnould's approves of the existence of the concurrent proximate causes,¹⁴⁹ and Halsbury's supports the existence of more than one proximate cause as per Lindley L.J, in *Reischer v Borwick* mentioned above.¹⁵⁰

2.1.2 The Definition of "Concurrent Causes"

On the basis of above analysis on the recognition of "concurrent causes" in marine insurance, it can be perceived that at present the notion of "concurrent causes" has not been provided with a unified definition yet. This notion has been adopted basically in three manners in

¹⁴⁹ *Supra* 13, p 932; see also F. D. Rose, *Marine Insurance: Law and Practice*, 2nd edition (Informa 2012) para 19.23-19.24

¹⁵⁰ *Halsbury's Laws of England/Insurance*, vol 25 (2003 reissue) 357

accordance with the O'May,¹⁵¹ namely, (a) the loss could be attributed to any one of the combined causes; (b) a single cause which could be described under two different heads of perils; and (c) concurrent causes of equal efficiency to the loss. Similarly, Prof Hart and Honore in *Causation in the Law* divided concurrent causes into three groups as well, which are: contributory causation, additional causation and alternative causation. Contributory causes are the necessary conditions of the loss but for which the loss would not happen, while an additional cause resides where some other independent cause is sufficient to cause the damage, while alternative causation refers to the situation of two or more alternative sets of conditions sufficient to cause the loss. These categorisations have covered and explained for all the inconsistent understandings and attitudes of the courts towards the concurrency of proximate causes for long. It should be noted that divergent understandings of this notion are the root of the different attitudes of the court. A clear and uniformed definition of "concurrent causes" seems to be the most essential work which requires completing in order to resolve the confusion in applying the relevant rules of concurrent causes in the practice of marine insurance.

(a) A combination of all competing causes in general

As discussed previously, the causative facts combine and operate as if knots on a net. Every knot may have contributory effect on different scales to the occurrence of loss. It is quite usual for the courts to select the effective and predominant one from a few co-operating causes. Accordingly, it becomes frequent that the courts, academics and practitioners' works use the notion "concurrent" and similar wordings to describe a mere chaos of factual materials. For instance, Parks¹⁵² seems to define a series of relevant causes, i.e. the whole net of causes to be concurrent causes before the real proximate sole cause is isolated. Precisely speaking, the early stage of a rough selection of relevant events before analysing and reconsidering can hardly amount to the terminology of concurrent causes in the legal sense. The contribution of every element is necessary but not sufficient to constitute one of the concurrent proximate causes. Hence, even though a loss would not have happened but for a few incidents, it should be noted that it is not accurate to use notions such as multiple causes, combined causes or even concurrent causes to describe the co-operation.

(b) One peril which falls into more than one heading of perils

There may be the event that a loss is attributed to a single cause proximately, however, that cause is capable of being categorised into two headings of perils. *Kuwait Airways Corp v Kuwait Insurance Co SAK*¹⁵³ is a case concerned with a single cause which could be described in two ways. The Iraqi forces took control of the Kuwait airport in August 1990 while they

¹⁵¹ Donald O'May and Julian Hill, *O'May on Marine Insurance* (Sweet & Maxwell, 1993) 320

¹⁵² *Supra* 129, vol.1, p 410

¹⁵³ [1999] C.L.C. 934

invaded Kuwait. There were 15 airplanes under the entitlement of the assured KAC, which were taken possession of and transited by the forces, away from Kuwait along with KAC's aircraft spares stored on the site of the airport. KAC had concluded and renewed the aviation hull and spares war risks and allied perils insurance, which covered against all risks listed in Section 1 specifically including war, invasion in para. (a) and seizure in para. (e). However, the extension clause in respect of the spares merely stated the cover against the risks started from letters (b) to (f) apart from (a) as listed in Section 1.

One of the main issues of the dispute was which perils listed were the aircrafts and spares lost, which were directly connected to the scope and amount of the indemnity. The insurer argued that par. (a) was excluded perils in the cover as to the spares. With respect to the question of causation particularly, the Commercial court held that the loss was only caused by the peril in par. (a) so that there was no recovery for the loss of the spares. Whereas, the Court of Appeal in majority reversed the decision by holding the loss was within both categorisations, which was affirmed by the House of Lords. The Lords approved that the perils listed in every paragraph are not mutually exclusive, except Lord Browne-Wilkinson. The Lords found in favour of the assured on the ground that he succeeded in proving the loss was proximately caused by any one of the insured perils, but not an excluded one. It is interesting that there is, as a matter of fact, only one incident to give rise to the loss. The overlap of the connotations of the perils in law creates a situation of concurrency. It is in essence a question of defining the risks. It is fairly controversial if the House of Lords treated the failure to insert para. (a) as an exclusion, since both the assured and the insurer would succeed in proving this loss was caused by a proximate cause both insured and excluded under the cover respectively. In this case, it seems not a good answer or even bizarre to apply the rule where an insured peril is concurrent with an excluded one. Instead, critical consideration has to be taken by courts in construing the clauses from the intentions of the parties, and they ought to look deep into the natures and concept of the perils. It is no longer a question of causation concerning efficiency to the occurrence of the loss or damage, rather, a question of distinguishing the specific risks.

Similarly, an incident arising from a marine risk under some circumstances may convert into the immediate consequence of a war risk.¹⁵⁴ The difficulty in distinguishing the marine risk from war operations remains constantly, which is apparently a matter of sole proximate cause. In some unusual cases such as *Board of Trade v Hain Steamship Co. Ltd*, the collision happens to be war-like operation which falls into the scope of another type of peril. There was only one cause as a matter of fact; however, it overlapped between two scopes of risks in the legal sense. From causation in law, such a situation applies to sole-cause rules rather than rules as to "concurrent causes".

¹⁵⁴ *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] A.C. 691

In essence, concurrent causes literally require at least more than one incident or event in fact. One peril which falls into more than one heading of perils is not regarded as a “concurrent causes” situation as well, under the law of marine insurance.

(c) Two independent perils of equal efficiency

Viscount Sumner in *Board of Trade v Hain Steamship Co. Ltd* described the notion of concurrency to be two causes jointly and simultaneously leading to the loss. In spite of the emphasis on the combinations of effect and timing, the description still misses some indispensable elements to define a situation of more than one proximate cause. Since the efficiency test has been established and recognised by English courts in identifying the proximate causative link between the incidents and losses, the test is the sole prime rule to be applied as well as to ascertain the possibility of concurrent causes. Slade LJ in *The Miss Jay Jay* and Lord Denning in the *Wayne* both recognised that “concurrent causes” referred to two causes which were equal or nearly equal in their efficiency in bringing about the damage. Moreover, Cairns L.J. preferred to say that unless one cause is clearly more decisive than the others, it should be made to give one of them the quality of dominance. It should be remarked that the evaluation on the equal efficiency is not a mathematical issue; instead, the approach of common sense applies in this regard. The requirement of equal efficiency has been demonstrated fully in *The Kastor Too*.¹⁵⁵ The vessel *Kastor Too* was on a voyage during which the engine room caught fire. However, it was found that the vessel sunk in fifteen hours due to the entry of seawater due to unexplained causes. Although the judge was entitled to find there were two independent causes, namely, the fire and ingress of water by unexplained cause, as a matter of fact, since the amount of the seawater for the purpose of putting out the fire was far less than the amount sufficient to sink the vessel, the fire was not able to contribute equal efficiency in causing the loss of the vessel. Therefore, it was held that the entry of water due to unexplained cause was the proximate cause of the loss.

Recently, Lord Mance in *The Cendor Mopu* emphasised the element of independent operation to be part of the definition. It is suggested that the real situation of concurrent causes refers to two perils operating independently which are able to cause the loss of its individuality.¹⁵⁶ How far should the independence in operation be interpreted? Although two risks of separate and independent operation may amount to concurrent causes to one loss, it would be too far to require each of the co-operating causes to be capable of causing the loss by the operation of each alone. As aforementioned, concurrent causes are the causes of equal or nearly equal efficiency to the loss. The ‘equal efficiency’ does not mean that either

¹⁵⁵ *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd (The Kastor Too)* [2004] 2 C.L.C. 68

¹⁵⁶ “Perils of the seas, inherent vice and causation”, Insurance Law Monthly, 08 Mar 2011, available at <http://www.i-law.com/ilaw/doc/view.htm?id=263919> [last time access: 07/10/12]

one of the concurrent cause gives rise to the loss with entire efficiency literally. Rather, where the causes are independent in that one does not lead to the other, but interdependent in that neither would lead to the loss but for the other, such typical concurrent causes situations as the *Miss Jay Jay* and the *Wayne* case should be and have been well recognised, upon which a set of rules related in this regard have been established in the law of marine insurance.

Compared with the definition provided by the US jurisdiction, *New Appleman Insurance Law Practice Guide*¹⁵⁷ defines concurrent factors as two events of independent origin which combine to cause a loss that would not have occurred unless both events had taken place. This definition explains the independence and concurrency of two or more causes clearly, which is worth considering and introducing into the English law. However, this definition is contradictory to Lord Mance's view in the way that it emphasises the necessity of *independable* contribution of each cause. If each concurrent cause is able to result in the loss by itself independently, it means the loss will still occur, but for the other concurrent cause. As mentioned in the first chapter, the "but for" test is a necessary but not a sufficient test to ascertain a proximate cause, which means the proximate cause should still meet with the test primarily, as one of the necessary conditions of the loss. That is to say, in order to constitute a concurrent proximate cause, each peril must also be a necessary condition to the loss as well.

Moreover, if two causes act independently in causing a loss, according to the view in *Insurance Disputes*,¹⁵⁸ the insured may recover the loss which he can prove was caused by the insured one. For example, taking inherent vice and perils of sea in *The Cendor Mopu* as two completely independent perils causing the loss of the cargo, the assured succeeded in establishing that the loss of the broken rig was caused proximately by perils of the sea, accordingly, the Supreme Court found in favour of the assured in recovery. By the same token, the Court rejected the contention that the damage of the metal cracks mainly resulted from inherent vice.

Therefore, independence requires each peril having an independent origin and contribution, which means one ought not to be an inevitable result of the other and simply passes on its causal efficiency; whereas, concurrency indicates a combining and indispensable effect of each cause. In one word, concurrent causes should operate independently and concurrently.¹⁵⁹

(d) Cumulative contributions of two causes

¹⁵⁷ 2011 ed, vol. 3 p 31-17

¹⁵⁸ *Supra* 78, p 167

¹⁵⁹ *Supra* 76

Literally, the meaning of “concurrent” may embrace the element of “simultaneous”, which is easily assumed to mean that the two causes to the loss must happen at the same time. However, according to the Black’s Legal Dictionary, “concurrent” also means having the same authority; acting in conjunction, agreeing in the same act and *contributing to the same event* [emphasis added].¹⁶⁰ In the causation context, the connotation of the word “concurrent” should be interpreted as an equal contribution of the causal factors to the consequence of loss, which emphasizes the same efficiency and operation at the point when the loss occurs, rather than the same timing of occurrence of the two risks, which is also in line with the genuine test of efficiency in terms of causation in insurance cases.

Comparatively, it is rare and exceptional that two causal events occur at the same or almost at the same time as a matter of fact, and then contribute to the same loss jointly and equally. Even if the simultaneous events both contribute to the loss, there is no certainty that both of them can meet with the test of efficiency to be concurrent proximate causes. On the opposite end, it is much more frequent that one risk occurs in the first place and the other follows, whether immediately or not. Generally speaking, there may turn out to be three kinds of cases. Most frequently, it may be simply a sole proximate circumstance, where only one of the causes contributes the prevailing efficiency to the loss. Secondly, the ultimate loss cannot accrue without either incident of the causes, which means neither of the causes can lead to the loss independently without each other.

Compared with the former two circumstances, the third situation is much more confusing where the later risk exerts a cumulative effect on the loss based upon the earlier one. Under such circumstances, Risk A has occurred in the first place and is able to cause the loss alone; subsequently, the incident of Risk B has caused the ultimate loss in conjunction with Risk A with equal efficiency. Doubts may arise as to whether they can be described as concurrent, as well as whether this is in essence a situation of two independent causes giving rise to two independent losses of the same kind, yet maintaining a certain link between each other. The main difference between the two situations is whether the initial loss caused by the earlier risk can be calculable and separable from the cumulative loss. For instance, where a loss caused by a fire and explosion, and the “fire” leads to an explosion, and the explosion leads to further damage. In principle, any damage caused by that explosion will be covered, unless cover for explosion is excluded. In *Stanley v Western Insurance Co*,¹⁶¹ the judges unanimously distinguished the loss caused by the following explosion from the loss caused by the initial fire, having regarded them as two independent losses. Likewise, a similar situation was confronted with in the recent case which has been mentioned in Chapter One in terms of the “but for test”, *Orient-Express Hotels Ltd v Assicurazioni Generali SpA (UK) (t/a*

¹⁶⁰ Black’s Law Dictionary, 2nd ed., p 238

¹⁶¹ (1868) LR 3 Ex 71

Generali Global Risk)¹⁶², where Hurricane Katrina and Hurricane Rita led to physical damage to the hotel, whilst a subsequent official curfew affected the hotel's business to a further extent. In both cases, although the two risks were closely connected, they occurred at different times and also contributed to a final loss which consisted of two independent losses of the same kind, but occurring at different time. The cumulative effect of the later risk is merely quantitative. In contrast, in the case of the aforementioned second type, the later concurrent risk works in a qualitative way along with the earlier risk. For example, a few employers were all held responsible for their common employee's industrial disease, owing to an unknown apportion of efficiency to the outbreak of the disease.¹⁶³ All the cumulative and inseparable contributions took effect at the same point of time when the employee caught the disease.

Therefore, concurrent causes do not need to happen at the same time, but are required to cause the final loss at the same time with equal effort. In the event of cumulative effects of two risks, the test should be set up as whether the equal efficiency of both relevant risks operates and contributes to the loss at the same time. It is very likely that a mere cumulative contribution to the amount of the loss cannot be in line with the refined definition and the connotation of "concurrent" in the legal causation context.

In summary, independence and concurrency are both part of the real definition of "concurrent causes" in the context of modern marine insurance law. This concept includes the requirements and characteristics of contributory causation or additional causation in terms of Hart and Honore's categorisation. In one word, concurrent causes under the law of marine insurance refer to two or more independent perils of equal or nearly equal efficiency to the loss or damage, without either of which the loss would not have happened.

2.2 Rules Established by the Landmark English Cases

On reviewing the landmark cases in English law, the rules of causation are notably concerned with the natures of the perils of concurrency, i.e., insured, uninsured or excepted perils. Where one proximate cause has been identified, only the insured peril entitles the assured to be indemnified. Provided concurrent causes are of the same nature, it would be simplified, as the situation can be essentially equated to the sole cause circumstance. In contrast, the combination of two or more causes of proximity requires further contemplation in order to ascertain insurers' liability, where concurrent causes may belong to different kinds categorised by their natures according to the terms in the policy or the statutory provisions of the 1906 Act. Therefore, purporting to cope with the questions arising from the different natures, a set of causation rules have been made and followed by English courts.

¹⁶² *Supra* 74

¹⁶³ *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32

2.2.1 Insured Peril Concurrent with Uninsured Peril

Where the subject-matter insured is encountered with an insured peril concurrently with an uninsured peril under the policy, the assured is entitled to recover. This rule was affirmed in *Halsbury's Laws*,¹⁶⁴ which provides firm authority for the decision of *The Miss Jay Jay*. It is also suggested that the basis of the rule is that the loss should be regarded as the result of the operation of an insured peril.¹⁶⁵

This rule is normally applicable to uninsured perils, simply referring to the limit of the description concerning the insurer's liability. It is noteworthy that uninsured perils beyond the duration of the policy do not apply in this regard. It is universally accepted that the underwriter is merely liable for, unless otherwise agreed, loss occurring within the period of the policy and its developed loss subsequently, which is known as "death blow" in property insurance.¹⁶⁶ However, insurers will basically reject liability for the events and its losses before his cover comes into effect. The underlying rationale is that what matters to indemnity is the happening of the perils within the policy period, rather than the occurrence of the consequences of loss simply.¹⁶⁷ Lately, on the application of *Knight v Faith*,¹⁶⁸ it was reaffirmed, in *Wasa International Insurance Co Ltd v Lexington Insurance Co*,¹⁶⁹ that the insurer or reinsurer is liable to indemnify the insured or reinsured in respect of loss or damage occurring during the policy period, but not that discovered due to earlier perils under English law.

In *Kelly v Norwich Union Fire Insurance Ltd*,¹⁷⁰ a householder's policy, which was the first one of the assured, was taken out to cover the insured's home in October 1977. The insurer agreed to indemnify the loss or damage caused by the bursting of pipes in a domestic water system and landslip or subsidence, not including heave in respect of the events occurring during the period of insurance. The court found that the damage occurred as a result of heave in the clay soil which had been caused by two incursions of water, and it was impossible to apportion the damage between each of them. The later incursion was insured within the cover period, whereas the earlier one which took place in the summer before the policy was affected, was not insured. Per Croom-Johnson, "...it might be possible to ask the judge to apportion the blame between the two", had it been possible to apportion and accordingly demanded by the assured. The expert evidence showed that it was totally impossible to apportion the responsibility for the final damage to whichever of the two causes, which the judge found were operative. Although the indispensable contribution

¹⁶⁴ *Halsbury's laws*, (4th ed. 1980) vol 25, para 181

¹⁶⁵ *Supra* 39, p 182

¹⁶⁶ *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 690

¹⁶⁷ *Supra* 82, p 20040

¹⁶⁸ *Knight v Faith* (1850) 15 QB 649

¹⁶⁹ [2009] UKHL 40

¹⁷⁰ [1990] 1 W.L.R. 139

could be denoted from the expert evidence, the judgment never indicated that the two causes were concurrent causes of equal efficiency explicitly, which remains the actual cause or causes unascertained. Eventually, the judges in the Court of Appeal held that the loss was caused by the incursion outside the period; accordingly, the insurer was not liable. Thus, the dispute seems no more than an issue of the cover period. Causation questions should be distinct from the problem emphasising the time when the insurance is effective, a problem which is simply inquiring into the application of the contract to normal existing conditions.¹⁷¹ Accordingly, the judges regarded the rule of concurrency less relevant in deciding this case; instead, the insurer's knowledge and awareness of the risks before the commencement of the policy took priority as the major ground of their judgment. In essence, insured perils and uninsured perils are normally referred as those simply with reference to the express coverage or not when applying *The Miss Jay Jay* rule.

Assuming that the assured enters into multi policies covering different perils, there may be an overlap in recovery under the circumstance of concurrent causes, but not an overlap in coverage by means of applying *The Miss Jay Jay* rule. This is distinct from double insurance but leads to the same result. Therefore, an assured appears to be in a more favourable position since the loss may be recovered under both policies. The rule established by case law provides a legal authority to extend the coverage to some non-insured perils. However, a further operation as to the share of indemnity between the underwriters will arise. The equal efficiency also provides the legal ground for the contribution by equal apportion between the insurers. However, it is the assured's choice and right to decide how many policies and what the coverage is respectively, subject to compliance with the doctrine of utmost good faith. Nevertheless, the overlap of coverage due to concurrent causes enables underwriters to reduce the risk and the amount of the indemnity on account of the doctrine of indemnity in insurance law. However, in light of the harsh standard of the recognition of concurrent causes, it is still plausible for assureds to look for coverage on uninsured perils by another policy, if demanded.

2.2.2 Concurrency between Insured Peril and Excluded Peril

Where there are two effective causes of the loss, one within the general words of the policy and one within an exception term, the exception prevails over the insured peril and discharges the insurer's liability of indemnity. Per Lord Sumner in *Samuel v Dumas*,¹⁷² "where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates". The essential rationale in law

¹⁷¹ William Conant Brewer, Jr. "Concurrent Causation in Insurance Contracts", Michigan Law Review, June 1961, Vol. 59, p 1142

¹⁷² *Supra* 148, p 468

lies in the fact that the exception takes priority over the general words.¹⁷³ Moreover, the exclusion clauses in policies define the extent of the insurer's liability of indemnity explicitly based upon mutual agreement. However, two different situations should be distinguished, namely, interdependent concurrent causes and independent combined causes, since it has been suggested and discussed that where two causes are independent of each other and cause part of the loss without the contribution of the other, the insurer will merely be found liable for the insured part. In contrast, in the event of real concurrent causes with an interdependent nature, for instance, in the *Wayne* case, the Judges unanimously agreed that the only way to give effect to the exclusion terms was by exempting the two causes altogether.¹⁷⁴

It appears that the judicial inclination of English courts is to protect the expectation of the insurers in undertaking the liability of indemnity, compared with the courts in California where it was held in the case of two proximate causes, where one was insured against, that the insurer was liable regardless of the fact that the policy excluded liability for the other cause in a liability insurance dispute.¹⁷⁵ However, the rule upheld by English courts is not to be simply read in this manner. Conversely, the rule established in the *Wayne* case, although a liability insurance case, has provided a better solution for marine insurance cases.

In the first place, the argument in the rule is more connected to the nature of liability insurance, rather than a general question as to all insurance policies or even the judicial intentions.¹⁷⁶ Per Judge Lucas, "*Partridge* never considered in what manner concurrent causation could apply in the first party property insurance context". Also, the scope of coverage and the operation of the exclusion clauses are to be treated differently in these types of policies accordingly, since property insurance are unrelated to establishing negligence for the purpose of assessing tort liability.¹⁷⁷ It is interesting that the US courts have shown reluctance in finding more than one proximate cause under property insurance covers as well, for instance, the California Supreme Court has never found that there can be concurrent legally causes of loss in a property insurance case,¹⁷⁸ which is echoed with the standpoint in Parks.¹⁷⁹ Thus, it can be remarked that the argument on the opposite operation established by the California courts should not be considered in general marine insurance cases. Moreover, Judge Clark in this American case dissented by taking the view that the

¹⁷³ Rob Merkin, *Marine Insurance legislation*, (4th ed, Lloyd's List Group, 2010) 74

¹⁷⁴ *Supra* 4, at 67, per Lord Denning MR

¹⁷⁵ *State Farm Mutual Auto Ins Co v Partridge* 10 Cal3d 102(1973)

¹⁷⁶ *Supra* 44, p 234

¹⁷⁷ Bragg, "Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers" (1985) 20 Forum, p 386

¹⁷⁸ *Ibid* p 389

¹⁷⁹ According to Parks, in the event of two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate cause when the damage caused by each cannot be distinguished or segregated

excluded cause should stand out according to the obvious parties' expectation from the principle of contract, which agreed with English law's standpoint.

In particular, Roskill LJ in *Wayne* has concluded and emphasised that the law on exception clauses is the same both for marine and non-marine insurance. In the marine insurance context, majority of the policies, including hull policies and cargo policies, are property insurances. The parties' agreement on coverage and exclusion is crucial in construing the policy and defining the insurer's undertaking. The freedom of contract is the root of the policy. Ambiguity may exist where the wording or the definition of the excluded perils is unclear. However, whether the underwriter is liable in the event of concurrent causes with one excluded is not ambiguous. When the parties' intention is clear and explicit, the courts should respect and comply with it. Accordingly, it is well established by law in the case of marine insurance that the exclusionary cause prevails so that the policy will not answer.

A concern on fallacy has been presented in Colinvaux's stating that if the excluded element discharges the underwriter under one policy, another underwriter based upon a different cover may take advantage of the other concurrent cause to defend him against the liability by applying this rule. Consequently, there is a gap between the mutually excluding policies, despite the fact that the assured attempted to obtain the most sufficient cover the risks. On the contrary, as above mentioned, the court concluded in *Partridge* that the coverage was available in both automobile and the homeowners' policies, in spite of the exclusion against each other in policies in concurrent causation. Similarly, in Colinvaux's, special attention has been drawn by the decision of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*¹⁸⁰ in respect of causation in tort, where there was no means to determine during which employment the employee's disease was caused on a balance of probability. All the employers involved under the employer's liability insurances were held to be liable for the damage. Although the same risk has been covered in all policies of different periods respectively, and it has been ascertained that the insurer was not liable for the loss before the commencement of the policy even resulting from the insured risk, immaterial of it being uninsured or excluded risk, the *Fairchild* rule imposes upon the underwriter the obligation to undertake his apportion by equal division. The judicial protection of the employees is fairly obvious and apparent in this case, which abandons ordinary causation principles.¹⁸¹

Generally, damages occurring in tort law is divisible in some cases between different tortfeasors or even between the claimant and the defendant in terms of fault, whereas in the absence of double insurance, only the underwriter(s) in the policy undertakes liability in

¹⁸⁰ *Supra* 163

¹⁸¹ *Supra* 82. The *Fairchild* liability is unique in the sense that no scientific evidence or explanation is available for ascertaining which employment increased the risk and resulted in the broke out of the disease. The causation issue in this case is largely regarded as inventive.

marine insurance claims on the basis of a single causal link between the proximate cause and the loss. Tort law aims to penalise as many tortfeasors as possible so long as they are negligent or have fault in causing the damage in order to indemnify the innocent victim to the best extent. However, marine insurance seems more like a settlement of loss between the two parties. The insurer agrees to cover the entire loss caused by certain perils, and the assured agrees to bear the whole loss which he does not insure on his own. Therefore, more than one causal link may need to be established concurrently in one tort claim for the damage, as the liabilities may be divided and undertaken by more than one tortfeasor, and each link is confined to one of the specified defendants' acts and the damage. However, liability under a marine insurance claim is not apportionable between the assured and insurer by weighing the insured perils and the others. Concurrent causes do not amount to identical meaning and no comparable rules can be borrowed in this respect under the two laws.

Had the *Partridge* rule or the *Fairchild* rule applied, the concern over the excessive pressure put on the assured would be dispelled,¹⁸² since the insurer could not escape liability on the ground of exclusion. However, on the contrary, the insured would be encouraged to conclude only one policy to covering more risks than agreed dispense with more policies in applying *Partridge* rule, which is likely to exert more unfavourable impact on the insurance industry both in commercial and legal sense. Moreover, applying the *Fairchild* rule in insurance law would increase the communications and disputes between the insurers. Being well established and recognised, the *Fairchild* rule becomes highly important for businessman; the policy, as a type of contract, is subject to the terms mutually agreed by the parties. The concern can be perfectly resolved by virtue of freedom of contract, without the need for law. Thus, the extent of coverage and exclusion can be delicately phrased and worded in order to fulfil the blank coverage between the policies. In particular, a term dealing with concurrent causes can be introduced into the policy in order to ascertain the allocation of the risk and the liability of the insurer.

2.3 The Significance and Future of “Concurrent Causes”

The “winner-takes-all-principle” is introduced by Prof Marc A. Huybrechts as a comment on the harsh and inconsistent decisions made by English courts as to the assured’s attempt for recovery compared with the causation rules of Belgium.¹⁸³ From the Belgian position, “theory of the equivalent causes” (*équivalence des conditions*) requires the courts to take into account all relevant circumstances, without which the loss would not have occurred. This approach has similarity to the ‘but for’ test under English law. Moreover, the Belgian position contains a more striking distinction in ascertaining the underwriter’s liability in the

¹⁸² John Lowry and Philip Rawlings, “Comment on Proximate Causation in Insurance Law”, *Modern Law Review* 2005, p 316

¹⁸³ Prof Rhidian Thomas (ed), *Marine Insurance: The Law in Transition* (Informa, 2006)

event of combined causes. The Belgian courts allocate the percentage by calculating apportions of every contributed peril, which allows the apportionment of liability between the underwriter and the assured. It is arguable that this approach produce a more equitable and flexible resolution of insurance disputes between the underwriter and the assured.¹⁸⁴ Similarly, the formulation to apportionate the loss can be observed in *The Norwegian Marine Insurance Plan of 1996, Version 2010*:¹⁸⁵

§ 2-13. Combination of perils

If the loss has been caused by a combination of different perils, and one or more of these perils are not covered by the insurance, the loss should be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss, and the insurer should only be liable for that part of the loss which is attributable to the perils covered by the insurance....

Is there a possibility of reconciliation between the assured and the underwriter by splitting the bills of indemnity by means of taking account of all the relevant causative facts?¹⁸⁶ Evidently, it should be noted that such reconciliation is not intended to be availed as a tool to blur or ignore the real proximate cause of the loss. Nonetheless, as a means of the settlement of disputes and the balancing of interests, is this approach plausible and justified in ascertaining the liability of indemnity?

The mechanism of insurance has been created for risk allocation in the commercial sense between the parties to the policy. From the theoretical view under the contract law, it is hard to find justification for splitting the bill. An insurance policy, as a contract in general terms, is concluded with the mutual intention of allocating risks in the manner that the insurer undertakes the liability of indemnity on the perils he agrees to insure, while the assured bears the non-insured risks and the excluded ones. The essential intention of the underwriter is to share certain risks but not to share the loss. It was clearly held by Viscount Sumner in *Wayne* that loss is not apportionable. When the circumstance is consistent with the terms agreed in the policy, the contract should be performed accordingly and stringently. In contrast, from the tort law theory or liability insurance perspective, it seems easier to accept the approach upheld in Belgium. However, so far as marine policies are concerned, the express terms prevail over apportion of liability by the degree of negligence between

¹⁸⁴ *Ibid* p 173

¹⁸⁵ <http://www.norwegianplan.no/eng/index.htm>, (accessed 08 June 2011)

¹⁸⁶ It has to be stated here that the proportion issue is only discussed in terms of causation, despite the fact that proportionate remedies may be a solution in the case of the assured's dishonest conduct under utmost good faith, as provisionally proposed by the Law Commissions in the Insurance Contract Law Reform Paper. Such remedy is not available for the question of the proximate cause of loss.

counterparties. Thus, the proximate cause(s), as the only indicator to ascertain the entire liability, are of material significance under English law.

In spite of the lack of legal grounds for apportioning the indemnity, the notion of “concurrent causes” and its rules in English law is operated as the regime for guaranteeing the reasonableness and justification of the seemingly rigorous attitudes of English courts in term of ascertaining the liability. On the one hand, the real sole proximate cause depending upon the matter of fact and law will be identified on a thorough and concise consideration of all contributory factors. On the other hand, it enables courts to avoid arbitrary decision in equal efficiency situation so that the courts do not feel obliged to identify one proximate cause.

The rules as to concurrent causes under insurance contracts reflect the intention of the courts to balance the status of insurer and assured, which is common in the UK and the US irrespective of their differences in this respect. English courts attempt to interpret the exclusionary clauses narrowly, while they broadly interpret the coverage scope, which is significantly reflected in *The Cendor Mopu*.¹⁸⁷ Likewise, US courts support the same rules of construction.¹⁸⁸ However, it would be partial to maintain that English courts intend to protect the insurer’s benefit and expectation more than those of the assured, merely because of the *Wayne* rule in concurrent causation situations. As mentioned above, the rules of concurrent causes include both the *The Miss Jay Jay* rule and the *Wayne* rule, which should be regarded in tandem. As far as the policy is concerned, the insurer will not be liable for the uninsured perils or the excluded ones. Under *The Miss Jay Jay* rule, the insurer has been held to be liable for the uninsured risks which he had not expected to cover, although it appears that it is the case of the concurrency of an insured peril and an excluded one that reveals more the conflict of competing benefits of the insurer and the assured. From the viewpoint of the consequences, however, uninsured perils are equated with excluded perils for avoiding the insurer’s liability. *The Miss Jay Jay* rule denotes a favourable intention to expand the reasonable expectations of the assured on the policy coverage; whereas, when an excluded proximate cause operates, English courts choose to take account of the insurer’s benefit whether on the grounds of mutual intention or merely based on the insurer’s intention. It is true that the English insurance market deals with the policy by focusing on the freedom of the contract in the commercial sense, instead of solely paying attention to the individual assured based on private insurance.¹⁸⁹ On the one hand, unlike social insurance, marine insurance policies serve commercial functions, essentially. On the other hand, the imbalance

¹⁸⁷ Although *The Cendor Mopu* refers to inherent vice which is held to be the uninsured peril, exclusionary clauses should not be limited to the express terms of excluded perils. Uninsured perils which may discharge the underwriter’s liability have exclusionary effect as well.

¹⁸⁸ *Garvey et al. v State Farm Fire and Casualty Company*, 48 Cal. 3d 395

¹⁸⁹ R. Hasson, “The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance” [1984] MLR 505

of power between the insurer and the assured seems less severe in the maritime field. Therefore, concurrent causes rules have reached a fairly balanced point by looking into the intentions of both parties, rather than imposing more risks and pressure on the side of the assured.

Nonetheless, the concurrent causation in the marine context remains quite a few arguments and leaves some important questions open currently, which demand dealing with in the future, for instance, perceptible narrow acceptance and room for concurrent proximate causes and the overlap and blank in the coverage of more than one policy. Clarification of the concept and nature of every risk is the fundamental basis for the issue of concurrent causation in particular. From the legal facet, a definite and clear recognition by case law or statutes should be suggested and considered in order to respond to the universal doubt and hesitation in finding and applying the set of rules. Upon a legal acceptance and recognition of “concurrent causes”, the incorporation of new clauses concerning concurrency turns to be justified and helpful in identifying the liability of the underwriters between the policies for different coverage.

The wording and phrasing of such a clause has to be precise and critical, since a third party, namely another policy underwriter is likely to be influenced or involved. A typical example is where the insurer agrees to undertake more liability on covering the perils in concurrency with uninsured or even excluded ones by charging a higher premium, immaterial of whether the assured has placed other policies. While, it should be noted, if the insurer agrees with ‘held cover’ in the *Wayne* situation, he is quite likely to lack legal grounds to recover his payment of indemnity from other insurer.

In contrast, assuming that the insurer is aware of other relevant policies and regards it material, if the insurer expressly states that he is not liable for uninsured perils concurrent with insured perils which is contrary to the rule established by the courts, he initially has to notify the assured explicitly, otherwise, the courts can hardly find in favour of the insurer on the grounds of the basic principle of insurance law. However, despite the fact that the insurer has performed in compliance with the aforementioned requirements, he is still bound to encounter with the courts’ rigorous construction of *contra proferentem* if there is any ambiguity therein.

In conclusion, not only can a few legal authorities in the law of marine insurance be found in support of room of “concurrent causes”, but it also has substantial commercial and practical significance. However, a conservative judicial attitude towards the recognition of causes in concurrency is perceptible in English marine insurance law. Generally speaking, it mainly arises for two reasons. On the one hand, the incidence that one loss can be proximately attributed by more than one cause based upon the complex and strict test of equal efficiency is rare in practical scenarios. On the other hand, the natures of every risk may

determine that one cannot jointly contribute to a loss with some other peril for deciding the indemnity, such as inherent vice. Consequently, there underlies some logical fallacies if courts hold them combining as proximate causes to the loss. Therefore, although the test as to evaluate equal efficiency in causing the loss seemingly resolves the difficulty to ascertain the situation of concurrent causes, the perils and risks have to be taken into account as well, before coming to a conclusion.

Along with the development of the doctrine of proximity and the clarification of the nature of the perils, the insurance market in practice will certainly react and reconsider the forms and clauses accordingly. Moreover, the specific rules established in terms of concurrent causes involved with non-insured perils and excluded perils respectively avoid the arbitrary judgment based upon a well-balanced judicial consideration of the sides of both parties. Therefore, a relative mature mechanism of causes in concurrency can be conceived in English law of marine insurance.

Chapter 3: Identifying the Causes

Compared with the pure causation rules as discussed above, much more arguments arise from the question in respect of the insured coverage. In general, the more types of marine perils that are included, the wider the scope of the insurer's liability and the more likely the underwriter is liable. On the contrary, the more specific and narrow the policy describes, the more restricted the recovery will be. If one of the insured perils responds to the test of causation, a *prima facie* liability of indemnity is established subject to the insurer's contrary defences.

Identifying the scope of coverage and narrowing the range of competing causes are preliminary questions before applying the doctrine of proximity in order to isolate the very "efficient" cause. It has been shown in *The Cendor Mopu*¹⁹⁰ that the Supreme Court has taken considerable length of pages to explain the meaning of inherent vice and perils of the sea before deciding which one was the proximate cause of the broken legs of the insured oil rig. It was also indicated in the judgment that the meaning and nature of perils can considerably determine and affect the result of applying the test of causation. Presumably, the different concepts of perils may be the essential reason for the inconsistency of English legal authorities in this respect.

Therefore, this chapter primarily aims to explore an explanation for the inconsistency of the precedents and to systematise the modern rules of causation through conceptualising the term "marine risks" and defining the main forms of perils exemplified in standard policies or by statutes. Accordingly, the first section will outline the notion of "marine risks" and specify the relevant provisions of the main modern standard policies. The proceeding parts will elaborate numerous typical perils, particularly in respect of the meaning and application of causation rules.

3.1 Coverage of Marine Policies

On the outset, marine perils had been stated and exemplified in the Lloyd's SG Policy. The wordings have been retained and codified in the First Schedule to the English Marine Insurance Act 1906. Some of these perils have been retained in the modern Institute Clauses, for example, clause 6 of the Institute Time Clauses -Hulls (1995) and clause 1 of the Institute Cargo Clauses (B). Besides, marine policies may also agree to insure some risks which lack a marine character in the strict sense. Generally speaking, these clauses provide the basis to ascertain the insured scope and exceptions in terms of the insurer's liability of indemnity without prejudice to the statutory stipulations and the fundamental principles and

¹⁹⁰ *Supra* 7

purposes of insurance law. Various methods have been adopted by courts in order to interpret these provisions and to define the relevant perils in the most rational and accurate manner in every single dispute. Therefore, before looking at any particular peril, this chapter begins with a snapshot on the term “marine risks” and the terms employed in the practical field and the courts’ approaches to interpret the ambiguity arises thereof.

3.1.1 The Scope of Marine Risks

The statutory definition of the term “marine risks”/“maritime perils” can be found in s 3(2) of the 1906 Act, stating that:

“Maritime perils” means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

This definition provides a series of illustrations as to the forms of maritime perils, which may be decisively determined by the SG Form. As evidenced by the words “that is to say”, the definition of “maritime perils” is not exhaustive.¹⁹¹ Ending with the words “*and other perils, either of the like kind or which may be designated by the policy*”, it appears the definition not only refers to risks with marine connections but also extends to those designated by the policy but lacking this element. However, the final words have been construed by the Court as restricted to perils in respect of the navigation of the sea; that is, they should not be read widely;¹⁹² and it is not possible, despite the concluding words of the definition, to convert a non-marine risk into a marine risk merely by designation.¹⁹³

Usually, the marine-related nature of the peril determines whether it falls into marine category or not. The various standards to define the “marine element” lead to the inconsistent usages of the term. The terminology “marine risks” can be somewhat confused when it is used in various contexts. For instance, Arnould’s uses “marine risks” as opposed to war risks. Traditionally, war risks were excluded from the cover of an ordinary marine policy by way of the “free of capture or seizure” warranty. In the modern context, there are express war risks exclusions in the standard forms of marine policy¹⁹⁴ and war risks are ordinarily insured against by virtue of the war and strikes standard clauses exclusively. Nevertheless, there has been a great interrelation between these two categories of risks in

¹⁹¹ *Supra* 173, p 6

¹⁹² *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67

¹⁹³ *The Captain Panagos DP* [1985] 1 Lloyd’ Rep 625, p 631

¹⁹⁴ Clause 24 of the Institute Time Clauses - Hulls (1995); clauses 29 and 30 of the International Hull Clauses 2003; clause 6 of the Institute Cargo Clauses (B)

early 20th century, which has provided a lot of valuable precedents in defining the scope and concepts of specific marine perils.

Alternatively, it may simply refer to all the insured perils in a marine policy in the broad sense.¹⁹⁵ In contrast, for convenience, it may designate the perils of strict marine character,¹⁹⁶ excluding the Inchmaree Clause and similar contingencies which simply happen on the sea. Moreover, it was even held that '*It was to insure against 'marine risk', which cannot be better described than as against 'the hazards of the sea.'*'.¹⁹⁷ This interpretation simply equates marine risks to perils of the sea. In principle, as long as the standard is clearly specified in a certain context and in line with the paramount definition provided by s1 and s 3 of the 1906 Act, one cannot say the usage of the terminology is simply wrong.

Moreover, the definition of marine insurance extends the scope of maritime perils to the risks incident to the activities analogous to marine adventures.¹⁹⁸ For instance, a shipbuilding insurance contract may be categorised as a marine policy, and the risks defined thereunder will be deemed as marine perils.¹⁹⁹ Moreover, a fixed platform standing at sea, which is not technically navigating at sea, has been assumed to be a marine adventure covered by a marine insurance contract.²⁰⁰ Furthermore, a contract insuring a pure navigation of inland waters has been held to be analogous to a marine adventure in *Gibbs v Mercantile Mutual Insurance*.²⁰¹ Hayne J & Callinan J, having considered that "maritime perils" is a wider concept than "perils of the sea", iterated that:

What mattered was whether an insured risk had occurred. That did not turn on where the event occurred but on what happened and why. Was what happened a peril consequent on, or incidental to, the navigation of the sea - a fortuitous or unexpected event consequent on, or incidental to, the operation of the vessel?

Very recently, it was held that marine insurance cover even extends to risks occurred on land in a Morocco factory, in which clothes would be manufactured and packed for carriage by sea.²⁰² Non-marine risks were insured under a marine policy; however, the English court was not bothered by the question whether the risks which occurred were maritime perils and whether the 1906 Act should be applied at all. It seems that where the risk happens is less relevant than the reason and context of the incidence. As concluded in the Law

¹⁹⁵ *Supra* 82, Vol. 2, p 20486

¹⁹⁶ *Supra* 134, p 331

¹⁹⁷ *Grant, Smith and Company and McDonnell v Seattle Construction and Dry Dock Company* [1920] A.C. 162

¹⁹⁸ S 2(2) of the 1906 Act

¹⁹⁹ *James Yachts v Thames & Mersey Marine Insurance Co* [1977] 1 Lloyd's Rep. 206

²⁰⁰ *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep. 146

²⁰¹ [2003] HCA 39

²⁰² *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727 (QB)

Commissions Paper,²⁰³ it would be open to parties to apply the 1906 Act as if the contract were one of marine insurance, as far as it falls within the scope of s 2.

In this thesis, the term “marine risks” is mainly used for indicating those risks under marine policies: the insured, uninsured or excluded perils enumerated in the policy and those referred to in the 1906 Act.

3.1.2 Contractual Coverage of Major Standard Forms

The old SG Form, which had come into use since 1779 until 1980s, amplified its coverage by the following phrase:

... they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or should come to the hurt, detriment, or damage of the said goods and merchandises, and ship, to the charges whereof...

It seemingly provided the cover against typical marine risks, war risk and all other related perils in the absence of an express provision in respect of exclusions. An analogy can be drawn between the wordings of the SG Form and the definition of “maritime perils” provided by the 1906 Act as above-cited. The open words “all other perils” does not mean the scope is as wide as it has appeared to be.²⁰⁴ In the ancient case of *Cullen v Butler*,²⁰⁵ the ship and its cargo, which were insured under the common form, were fired upon by another ship by mistaking it as an enemy ship and sunk at sea. The question before the court was whether this was a loss covered by the policy, on the count of “perils of the seas,” or under “all other perils”. It was held that this particular circumstance fell in the “all other perils” category, but not perils of the sea. Although the Court had recognised it was damage at sea by collision, the case could not be attributed to the perils of the seas due to its limited construction. In terms of “all other perils”, Lord Ellenborough addressed these broad and general words as in the following paragraph, which is worthy citing in length:

The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our Courts of Law. As they must, however,

²⁰³ The Law Commission, *Insurance Contract Law: Post Contract Duties and other Issues* (Consultation Paper No 201, 2011) 172, available at <http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm> (last time accessed 11/05/12)

²⁰⁴ *Supra* 82, Vol. 2 p 20469

²⁰⁵ (1816) 5 M & S 461

be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes.

This statement has in essence adopted a literal and contextual approach, which was also known as "*noscitur a sociis*" and "*ejusdem generis*". On the one hand, the other perils should embrace the circumstances more/other than the preceding itemised ones. On the other hand, its meaning is to be confined within the scope of the similar class. This interpretation has been followed by numerous leading cases²⁰⁶ and has even been reflected in the English Marine Insurance Act 1906. In accordance with Sch. 1 r. 12 of the 1906 Act, the open words 'all other perils' herein refers only to perils similar in kind to the perils specifically mentioned in the policy.

Moreover, although the SG Form did not contain an exclusionary provision in itself, after the enactment of the 1906 Act, the insurer's liability is limited by the exceptions enumerated under S 55(2) including wilful misconduct, delay, and internal causes of the subject-matter insured. Also, the parties may place an insurance cover in the SG Form in conjunction with an agreement particularly excluding certain perils listed in the SG Form such as war risks; and this modification prevails over the original clauses in the Form. This operation is quite popular by virtue of a series of standard terms established by the Institute of London Underwriters since 1884. Thus, the coverage of the SG Form used to include marine risks and war risk and their similar kind, subject to the statutory exceptions and the parties' contrary agreement.

After the old SG form was replaced by the modern institute clauses in 1980s, the basic division of these policy forms is between those risks in the basic hull, freight and cargo clauses, which are practically known as "marine risks", and the separated risks relating to war and strikes.²⁰⁷

Hulls and machinery are usually insured by one of the Hull Clauses including Institute Time Clauses Hull 1982 (CII 6-8) or 1995, Institute Voyage Clauses Hulls (CII 4-8) and International Hull Clauses 2003 (CII 2-6) with or without amendments subject to the assured's demand. The International Hull Clauses are divided into three parts: part one

²⁰⁶ *Butler v Wildman* (1820) 3 B. & Ald. 398; *West India Telegraph Company v. Home, &c., Insurance Company* (1880) 6 Q. B. D. 56; *The Inchmariet* (1887) 12 App. Cas. 484; *The Xantho* (1887) 12 App. Cas. 509

²⁰⁷ F. D. Rose, *Marine Insurance: Law and Practice*, 2nd edition (Informa 2012) para 13.2

contains the principal insuring conditions; part two presents a range of additional clauses that were frequently required by assureds and added to ITC separately. Part three contains provisions for claims handling and sets out the rights and responsibilities of underwriters and assureds. These standard forms notably provide cover under four heads, namely, the loss caused by traditional “marine risks”, the Inchmaree Clause, liabilities arising from collision and pollution hazard and aversion and minimisation of loss.

In comparison, the Institute Freight Clauses, Time (Cl. 7) and Voyage (Cl. 5) embrace basically the same content as the Hull Clauses with common exclusions of discord (war and strike) risks and malicious acts and nuclear explosions.

In respect of cargo policies, there are three forms with differentiated range of coverage, which are Institute Cargo Clauses A, B and C (1982 or 2009). The Institute Cargo Clauses (A), which is also known as “all-risks” policy, contains such an extreme comprehensive phrase that the underwriters are basically liable for all fortuitous events except for a few named ones. Institute Cargo Clauses (B) and (C) provide covers on a named peril basis, in which a list of insured perils are specified in Cl. 1; however, Form (C) contains a narrower cover than Form (B).

It can also be observed that these modern forms of policy adopt two main manners to describe the scope of liability: either the insured and excluded perils are both itemised or the insured scope is entitled as “all risks” with exceptions itemised. Evidently, it is radically simpler in ascertaining the coverage in the first occasion in comparison with the latter. Notwithstanding comprehensive cover, it can still be defined by courts by adopting a sound method.

A few conventional approaches are regularly adopted by English courts in marine insurance cases, which may be in a sequential manner. Initially, courts attempt to construe the contract terms in line with the intention of the two parties, which may reflect the commercial sense. It should be emphasised that this approach aims not to find the expectation of one side with a judicial preference. Moreover, a literal interpretation of the wordings may also be pursued. If the terms are provided by the insurers where the conditions are satisfied, a less favourable construction against the insurer may occur by following the principle *contra proferentem*. Sometimes, as a last resort, the courts may simply conclude and attribute the issue to a question of fact in a particular case.

In general, the UK courts’ attitude in ascertaining the proximate cause relies on an indication of what commercial men would have expected, notwithstanding that the UK courts seems to unsurprisingly show a tendency to favour the assureds. In some cases concerning life insurance as well, some courts when seeking a particular result will resort to

contra proferentem, which derives from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)", to take a strict approach against insurers and go so far as to interpret terms of the contract in favour of the other party, even where the meaning of a term would appear clear and unambiguous on its face. It seems that English courts do not equally support that approach in the modern marine insurance context. Freedom of contract has consistently been upheld by the English courts, and it has been suggested that English courts have adhered to the idea to construe the ambiguous term according to the reasonable expectations of the assured and insurer in the commercial sense more than adopting *contra proferentem*.²⁰⁸ It is even suggested that the English courts put priority on construing the risk coverage in policies by means of the contractual intentions of the parties in particular with the awareness of the insurer.²⁰⁹ Nevertheless, in principle, both the coverage clause and exception clause are intended to be interpreted in a rational and broad way before the courts, no preference is granted to either party.

The question of construction merely arises where a provision in the policy contains ambiguity and the parties in dispute maintain opposite understandings and explanations. For instance, for the doctrine of *contra proferentem*, as Lindley LJ stated in *Cornish v Accident Insurance Co*,²¹⁰

...in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

It has been doubtful whether the perils specified in exclusion clauses are ambiguous, as the mutual intention of the parties is quite self-evident: NOT COVERED. The exclusions seem more concerned with the legal meanings of the perils instead of the construction of the clause itself. There should not be a dispute as to whether such a peril is insured or not, but it merely requires a judgment on whether the scenario in question amounts to one of the so-defined perils. The process of classifying the incident in dispute under a type of peril is invariably tangled with definitions and interpretations by virtue of the approaches mentioned above. Therefore, these approaches are important in causation terms in order to enlarge or narrow down the scope of the covered situations and their effect will be demonstrated in the following research on the typical marine perils.

²⁰⁸ *Supra* 182. The New Zealand court also adopted the same approach in *Trustees Executors Ltd v QBE Insurance (International) Ltd* (2010) 16 ANZ Insurance Cases ¶61-832.

²⁰⁹ *Supra* 86, p 82

²¹⁰ (1889) L.R. 23 Q.B.D. 453, 456

3.2 Typical Insured Risks in Marine Policies

It is noteworthy that basically all of the peril clauses are prefaced by the opening words or similar wordings, stating that “the insurance covers loss of or damage to the subject-matter insured caused by...” The coverage of the policy along with the legal definition of the perils is inextricable when looking into the causation issue. In this section, a few typical insured perils will be discussed from the perspective of being a cause of loss in order to envisage the application of causation rules under every circumstance respectively.

3.2.1 All Risks

Coverage of The Institute Cargo Clauses (ICC) is provided on an A, B, or C basis, A having the most extensive coverage and C the most restricted. The mainstream operation in practice is to write cargo policies on “all risks” terms in the form of Institute Cargo Clauses (A) (1/1/1982). This expression has been introduced for the assured’s demand for a general and wide coverage; likewise, it has given rise to many disputes between the two parties as to the width of the coverage.

The construction of “all risks” in English case law can be tracked back to the early 20th century. *Jacob v. Gaviller*²¹¹ is suggested to be the first dispute arising on “all risks” coverage cited in English case law. A clearer standpoint has been provided by *Schloss Brothers v. Stevens*,²¹² which has been cited more frequently. Having adopted the approach of the intention of the policy, the court held that that the words “all risks by land and by water” must be read literally as meaning all risks whatsoever. The words were intended to cover all losses by any accidental cause of any kind, and as the damage to the goods was a loss within that category the underwriters were liable for it. It can be summarised from the judgment that two elements must be acquired in order to sustain a loss of “all risks”, namely, there must be a casualty and the damage is from some accidental cause.

Such an extensive coverage has largely influenced the decisions in the following cases.²¹³ It is doubtless that the judicial attitude at that time towards “all risks” seemed very favourable to the side of the assureds. However, after the codification of the 1906 Act, S 55(2) specifies a few perils which the insurer should not be liable for statutorily. Also in practice, insurers began to insert exclusionary clauses into policies in order to protect themselves from unexpected perils.

²¹¹ (1902) 7 Com Cas 116

²¹² [1906] 2 KB 665. In this case, the policy provided a cover against “all risks by land and water and by any conveyance”.

²¹³ *British & Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 A.C. 41, p 57; *London & Provincial Leather Processes Ltd v Hudson* [1939] 2 K.B. 724

In *Tekrol Ltd v. International Insurance Co of Hanover Ltd*,²¹⁴ concerning the construction of an “all risks” business loss policy, Carnwath LJ commented on the use of extensive exclusions in an “all risks” policy that:

Although it is described as an ‘all risks’ policy, one has to search long and hard, through a bewildering and apparently comprehensive list of exclusions, to discover the extent to which any risks are in fact covered... I agree with Buxton LJ that the exclusions should, where possible, be narrowly construed. One should start from the presumption that the parties intended an ‘all risks’ policy to cover all risks, except when they are clearly and unambiguously excluded.

The judicial attitude of Chinese maritime courts may worth mentioning here for a better knowledge of “all risks”. Beginning with a brief history of standard cargo clauses in China, in the 1950s when the new Chinese government was established, the insurance market in China adopted the Lloyd’s policy of the London market until 1963. Although a replacing form was created afterwards, the terms and coverage in respect of “all risks” were basically identical to the Lloyd’s form. A substantive change in the scope of “all risks” took place in 1972, as the clause explicitly specified a group of perils under the name of “all risks” and the industry and courts seemed to deem it as an exhaustive definition. The Clause stated that, besides the coverage of two other basic forms of cover which are equivalent to ICC (B) and (C), the “all risks” cover also insures against 15 named losses, including discrepancy, rust, mew and heated and etc., caused by external accidents in the voyage. The cargo clauses were revised in 1981 and in terms of “all risks” the named forms of losses were omitted, simply saying that the policy covers any total or partial losses caused by external incidents. Having been influenced by the previous form’s wording and phrasing, an argument was brought up on whether “all risks” is still confined within the scope of the additional specified perils, or whether it is an open coverage subject only to certain exclusions as English law provides.

This question has been finally settled by a leading case decided under Chinese insurance law known as “*M.V. Ramdas*”.²¹⁵ The case was decided before Guangzhou Maritime Court in 1999 and the appeal was closed in 2000 by Guangdong (Canton) Provincial High Court. A quantity of soya was carried from India to China in *M.V. Ramdas* on November 1997 and insured under a PICC “all risks” cover (1/1/1981). However, on its arrival, the stevedores found that the cargo had turned red and had deteriorated. The assured cargo owner claimed for the indemnity before Guangzhou Maritime Court. One of the three defences proposed by the insurer was concerned with the coverage of the “all risks” policy. Having relied upon a

²¹⁴ [2005] 2 Lloyd’s Rep 701

²¹⁵ The Judgment in Chinese is included in Pengnan Wang *et al*, “Outline and Comment upon Chinese Marine Insurance Cases” (Dalian Maritime University Press 2003) Vol 2, pp 299-312. (Translated by the Researcher)

restricted interpretation made by the People's Bank of China, the central governing and supervising body of the institutions and organisations of the insurance industry of China, the insurer argued, accordingly, that "all risks" are limited to a series of named perils. Therefore, the assured ought to that prove the cause of loss fell within the group, which the assured failed to do. Meanwhile, the insurer did not contend nor prove that the cause of loss was excluded from the policy.

As to the judgment of the first trial judge, it was held, notwithstanding the interpretation of the People's Bank of China, the "all-risks" term ought to be construed by a conventional and common approach, taking account of people's knowledge, other than insurance professionals. Moreover, as People's Bank of China lacks the judicial authority to provide legal construction, as their opinion is only of instructive or persuasive effect within the insurance industry, therefore, it should not be applied in this case. Furthermore, according to Article 30 of Chinese Insurance Law²¹⁶ regarding the doctrine of *contra proferentem*, the court found a construction more favourable to the assured on the ambiguity of the coverage of "all risks". Accordingly, "all risks" is an expression for a wide-range of risks subject to certain exclusions. However, as the insurer did not contend any excluded peril as the cause of the loss, and based on the evidence showing a probability of the external source of cause, on balance, the insurer could not discharge his liability on this ground. The High Court dismissed the appeal, sustaining the first judgment.

The "all risks" cover in China has been somewhat dissimilated from the Llody's form in the process of the evolution, for instance, Chinese policy defines "all risks" from the aspect of an "external" cause instead of an "accidental" cause in English law.²¹⁷ However, the basic legal rules and principles are commonly applied before Chinese courts. Two outstanding issues can be extracted from the case in pure causation terms and should be highlighted.

Although "all risks" has the same effect as if all insurable risks were separately enumerated and does not alter the general law,²¹⁸ so comprehensive as it is, "all risks" may require the cause of loss simply being a (external) risk subject to the exclusions. Thus, it determines a lower threshold of the assured's burden of proof and more attention is paid to the excluded perils. Consequently, the causation rules are applied and examined to the insurers' defence by contending that an uninsured/excluded peril has proximately caused the loss. One of the main reasons why The *M.V Ramdas* did not come to the same conclusion as *Soya v white*, notwithstanding a similar factual basis, was that the insurer did not argue and establish a

²¹⁶ This Act has been replaced by Chinese Insurance Law Act (2009), nevertheless, Article 30 remains without amendment.

²¹⁷ However, the Arnould's has also used the expression "external cause" in its latest edition.

²¹⁸ 17th edn, p 1059

²¹⁸ *British & Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 A.C. 41, p 57

proximate causal link between an exclusion and the loss. Regardless, the proximity rules still apply not only to the “all risks” as the cause of loss, but also to the defences of the insurers.

As to the other issue, “all risks” ought to be strictly distinguished from “all losses/damage” cover, as the former has a narrower scope than the latter.²¹⁹ It may worth reiterating that “all risks” indicates cover for “all (external) causes” except for a few. A question of proximate cause ought to always be looked into, unless otherwise agreed. On the contrary, where a policy covers all losses/damage, the material question to determine the insurer’s liability would simply be whether there is a casualty. If there is one, the policy should respond.

Taking *Lawrence v Aberdein*²²⁰ as an example, a policy insured on living animals provided to be warranted free from mortality and jettison. However, during the voyage, the living animals were killed owing to the storm. The courts held that the underwriter was answerable to the total loss by construing the notion “mortality” in this exception clause. The judges respectively adopted the approach of common sense and the literal interpretation from the entire contract and *contra proferentem*. Nevertheless, it seems that this clause has an inherent mistake rather simply a question of construction on the ambiguity of “mortality”. Holroyd J stated in the decision that “death may have been the immediate cause of the loss”. However, in this case, death itself is the loss. It is not an unusual mistake in the context of the insurance law, whether marine or non-marine, that clauses concerning perils are confused with the consequences and effects. The underwriter purported to avoid some circumstances which they refused to cover, however, the circumstances were not correctly described in the terms of the perils, but in the forms of the consequences.

Likewise, it is perceptible that the 15 perils which used to be enumerated in the Chinese standard terms consist of both risks and forms of losses. The ill-drafted wordings may be the root cause of the ambiguity of the coverage and confusion of the concepts. To solve the causation question, the very first and basic step is to identify what the loss is and what the competing causes are. Therefore, it should be clarified by the contract, clearly, whether it covers “all risks” or “all losses/damage”.

3.2.2 Perils of the Sea

Perils of the sea is the most typical and widely-covered marine peril. There are various forms of perils of the sea, for instance, unordinary wind and wave including bad weather and storms,²²¹ incursion of sea water,²²² collision²²³, etc. As summarised by Prof Howard Bennett,

²¹⁹ Philip Yang and Pengnan Wang, *The Institute Clauses* (1996, 2 edn. 2006), p 460

²²⁰ 106 E.R. 1133; (1821) 5 B. & Ald. 107

²²¹ *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* [1941] AC 55, 70; *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32

²²² *Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd* [2006] SGCA 28; [2007]

the question of the proximate cause has been illustrated in the context of perils of the sea in two aspects: the definition of the peril itself and whether the loss was proximately caused thereby.²²⁴ Therefore, initially, the legal definition of the peril should be looked into through English case law.

A statutory definition is laid down by the 1906 Act Sch.1 r. 7. It states “The term ‘perils of the seas’ refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.” Undoubtedly, the statutory definition connotes both core characteristics of a marine risk, namely being “of the sea” and being fortuitous.

The expression “perils of the sea” is sometimes interchangeably addressed as perils at sea or perils on the sea. However, they are not the same concept in the law of marine insurance. Simply because the peril occurs whilst the vessel is at sea does not mean that it is a peril of the sea. Per Lord Ellenborough in *Cullen v Butler*:²²⁵

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

However, on the other side, in *Thompson v Whitmore*,²²⁶ where a ship hove down on a beach within the tide-way and got bilged and damaged, it was held not to be a loss occasioned by the perils of the sea, as the damage happened on land. On balance, ‘perils at sea’ and ‘perils of the sea’ share a considerable overlap in the practical scenarios. After all, perils of the sea ought to be perils at sea in the first instance. However, a clear distinction in concept ought to be and has been drawn between the concepts of perils of the sea and perils at sea. ‘Perils at sea’ or ‘perils on the sea’ define the perils from the aspect of the location where the perils and losses have occurred. While, “perils of sea” requires the peril to have a closer link to the adventure. It may be sensible to read “perils of sea” equivalent as “perils arising of the sea”.

Notwithstanding the *obiter* statutory definition, it seems not to have succeeded to conceptualise the term clearly so as to prevent the unsteady judicial attitudes in defining a loss caused by perils of the sea. As to fortuity, the test in relation to perils of the sea has been repeatedly varied in the long term before English courts. Case law in this regard has

¹ Lloyd's Rep 66

²²³ *The Xantho* (1887) 12 App Cas 503

²²⁴ Howard Bennett, ‘Causation in the Law of Marine Insurance: Evolution and Codification of the Proximate Cause Doctrine’ in D. Rhidian (ed) *The Modern Law of Marine Insurance*, (London : LLP, 1996) vol 1, pp 183-187

²²⁵ *Supra* 205

²²⁶ (1810) 3 Taunton 227

unsurprisingly flourished, and was well analysed in the recent leading case, *The Cendor Mopu*.

In retrospect, it has long been established in the leading case *The Xantho*²²⁷ that “perils of the sea” has no different meaning in the law of contract of carriage and marine insurance, but the distinction lies in the terms of causation. In a purely conceptual context, Lord Herschell upheld that there must be something which could not be foreseen as one of the necessary incidents of the adventure; however, an extraordinary violence of the winds or waves is too narrow a construction of the words. This view has been complied with by many pre-act cases²²⁸ and constantly mentioned by cases thereafter.

Tucker J in *N. E. Neter & Co., Ltd. v. Licenses & General Insurance Co., Ltd*²²⁹ read and applied *The Xantho* as follows:

I think it is clearly erroneous to say that because the weather was such as might reasonably be anticipated there can be no peril of the seas. There must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss...

The Judge correctly interpreted that Lord Herschell did not intend to set up a test of fortuity as to foreseeability, but to emphasise the part of “necessary incidents”. In other words, it is the necessary incident to the adventure that fails the test of fortuity without reference to the anticipation to its occurrence. The Judges in the Court of Appeal of *The Miss Jay Jay* reaffirmed that:

The fact that the sea was not exceptional and could have been anticipated did not stop the loss being adjudged to have been caused by “external accidental means”; it was not caused by “the ordinary action of the wind and waves” but by the frequent and violent impacts of a badly designed hull upon an adverse sea.

Therefore, a conclusion can be drawn that foreseeability and the exceptional condition of the sea or weather are not the genuine tests of perils of the sea. Instead, perils of the sea may exist in diversified forms, just like the meaning of “marine risks”, it is impossible and implausible to provide an exhausted definition in a direct and straight manner. Therefore, more attention has been paid to the opposite side, namely, “the ordinary action of the wind and waves”.

²²⁷ (1811) 4 Taunton 126

²²⁸ *Hamilton, Fraser & Co. v. Pandorf & Co* 12 App. Cas. 518; *The Inchmuree* (1887) 12 App. Cas. 484

²²⁹ (1943) 77 Ll.L.Rep. 202

Lord Saville in *The Cendor Mopu*, contemplated that the word “ordinary” attaches to “action”, not to “wind and waves”, so that if the action of the wind or sea is the proximate cause of the loss, a claim lies under the policy notwithstanding that the conditions were within the range which could reasonably have been anticipated.²³⁰ A prime example of an ordinary action of waves can be found in an old case, *Magnus v Buttemer*,²³¹ where the vessel insured went up the river, and due to the rising and falling of the tide, it rested upon the river bed and was damaged. The Judges held that there was nothing unusual, no peril, no accident, in which case the loss was not caused by perils of the sea.

Often, the courts intended to connect or even equate the ordinary action to an internal cause, such as wear and tear or debility of the vessel. In *Grant Smith & Co v Seattle Construction & Dry Dock Co*,²³² as the harbour was peculiarly quiet, the Court considered that it was plain that it was not conditions of wind or wave that caused the dock to capsize. Accordingly, it was destroyed because of its own inherent unfitness for the use to which it was put.

Moreover, per Viscount Finlay in *Mountain v Whittle*,²³³ if the water was in a normal condition and got into the houseboat simply owing to the defective character of the seams there would be no loss by peril of the sea; instead, the loss would have been by the defective condition of the vessel. It was also articulated in the judgment that a loss caused by the ingress of sea water is not necessarily a loss by perils of the sea. There must be some special circumstance such as heavy waves causing the ingress of the sea water to make it a peril of the sea.²³⁴

This complex question has finally been settled by *The Cendor Mopu* and the spectrum of perils of the sea has been enlarged *obiter* in two ways. The phrase “an ordinary action of the wind and waves” has been clarified. It is suggested by Prof Rob Merkin that an ordinary action of wind and waves is better to be described as an ordinary consequence of wind and waves.²³⁵ Attention used to be drawn to the “phenomenon” of the wind and waves in order to establish fortuity. This way to define perils of the sea seems to effect a second chance to survive a requirement of fortuity, which means although the peril itself, it is difficult to

²³⁰ *The Miss Jay Jay* [1985] 1 Lloyd's Rep 264, p 271 considered.

²³¹ (1852) 138 E.R. 720

²³² *Supra* 197

²³³ [1921] 1 A.C. 615

²³⁴ Lord Mersey in *E. D. Sassoon & Co. v. Western Assurance Co* [1912] A.C. 561 delivered: “*There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea.*”

²³⁵ Rob Merkin ‘The true scope of inherent vice - The Cendor Mopu’.

<http://www.nortonrose.com/knowledge/publications/34560/the-true-scope-of-inherent-vice-the-cendor-mopu>
(accessed 07 November 2011)

remark as a fortuitous incident in an ordinary form, that the unordinary consequence can also contribute to the requirement of fortuity. This approach happens to be in line with the proposition of Prof Howard Bennett in terms of the doctrine of fortuity, saying that “In insurance contract law, fortuity is a variable concept that addresses questions of both the likelihood of loss and the cause of loss”.²³⁶

As to the other method, in pure causation terms, it should also be noted that as an external cause, perils of the sea cannot legally lead to a loss concurrent with an internal cause, due to the vessel or the cargo insured. In view of *The Cendor Mopu*, the defence as to an internal-triggered proximate cause should be critically limited and excluded from the existence of perils of the sea. Accordingly, *The Cendor Mopu* has reversed the *Mayban*²³⁷ case as to the rule that if the conditions of sea encountered by the vessel were no more severe than could reasonably have been expected, the inherent inability of the goods to withstand the ordinary incidents of the voyage must outweigh and be the real cause of loss. Therefore, the current rule is that an element of external fortuitous accident will enable the assured to recover the loss, irrespective of the contribution of some internal factors.

On balance, it may be a good conclusion on how to define a loss proximately caused by perils of the sea by quoting Lord Clarke’s statement in *The Cendor Mopu*:

... at any rate in a perils of the seas case, the critical question is whether or not the conditions of the sea were such as to give rise to a peril of the seas which caused some fortuitous accident or casualty. It is important to note that the cases show that it is not the state of the sea itself which must be fortuitous but rather the occurrence of some accident or casualty due to the conditions of the sea.

3.2.3 Collisions

Collision happens in various forms, for instance, two floating or navigable objects coming into contact, or extending to harbours, wharves, piers, wreck and ice or the like.²³⁸ Determining the cause of loss in the context of one vessel hit into a structure or an obstruction is self-evident and simple, *viz*, the collision; while, the causation question in respect of the collision between two vessels is much more complicated.

Initially, a set of legal rules of the Court of Admiralty has been laid down on a fault-basis between the two colliding vessels before resorting to their underwriters respectively. *The*

²³⁶ Howard Bennett, “Fortuity in the Law of Marine Insurance” [2006] L.M.C.L.Q 315

²³⁷ *Supra* 100

²³⁸ *Supra* 13, p 991

*Woodrop-Sim*²³⁹ has been regarded and largely cited as the prime authority in this regard. It is worthy of quotation in length here:

There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other vis major : in that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.—Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides: in such a case, the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them.—Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.

This rule was also referred in another leading case *De Vaux v Salvador*,²⁴⁰ where the insured vessel “La Valeur” came into collision with a steam vessel called the “Forbes” and both suffered serious damage. The assured ship owner claimed for general average and an average loss to his underwriter. Lord Denman C.J. delivered a very interesting judgment on the application of the proximity rule:

...[Sic]“It were infinite” (says Bacon) “for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree.” Such must be understood to be the mutual intention of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite

²³⁹ 165 E.R. 1422

²⁴⁰ 111 E.R. 845

consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the Revenue laws of any particular State, which was rendered inevitable by perils insured against.

Three points are noteworthy from this paragraph. The first one is to define what kind of loss that the insurer agrees to cover in the policy. As the judgment presented, two types of losses may occur upon a collision between two vessels, which are the physical loss of its own and the loss of the counter vessel incurred by this vessel itself, which is classified as damage arising from liability of the said vessel. As a matter of fact, the rules of Admiralty provide an approach which merges these two forms of losses and apportions liability accordingly between the ship owners. However, how far has the rule of Admiralty affected the operations and coverage of the insurance industry? Modern standard clauses which include $\frac{3}{4}$ Collision Liability and Sistership have responded to this question.²⁴¹ The terms indicate that insurers agree to undertake the liability based on the decision made by the maritime rules with the enumerated exceptions. Nevertheless, it is believed that the force of the doctrine of proximity is never diminished even in the cases of collision.²⁴²

This, therefore, leads to the second question, is it possible that negligence or fault in navigation outweighs the causal effect of a collision itself? Technically speaking, a collision is a form of perils of the sea. It was held once in an old bill of lading case, *Woodley & Co v Michell & Co*²⁴³ that a collision between two vessels by their respective negligence, without the waves or wind or difficulty of navigation contributing to the accident, is not "a peril of the sea" within the terms of that exception in a bill of lading. However, a distinction with insurance policy was drawn due to the requirement of the doctrine of proximity instead of the *causa causans* in the case of bills of lading. *Smith v Scott*²⁴⁴ has established and affirmed in the context of marine insurance, that a loss occasioned by another ship running down the ship insured, through gross negligence, is a loss by perils of the sea. Moreover, the aforementioned bill of lading case has been overruled by the latter landmark case, *The*

²⁴¹ ITCH Cl. 8. 3/4THS COLLISION LIABILITY

8.1

8.2 The indemnity provided by this Clause 8 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions:

8.2.1 Where the insured vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 8 shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision.

...

²⁴² Philip van Huizen, 'Some General Principles of Insurance Law: Causality, Retro/active Coverage and Uncertainty of the Event Covered' in M. Huybrechts (ed) *Marine Insurance at the turn of the Millennium* (Intersentia 2000) vol 1, p 38

²⁴³ (1882-83) L.R. 11 Q.B.D. 47

²⁴⁴ (1811) 4 Taunton 126

Xantho, the House of Lords iterating that foundering caused by collision with another vessel is within the exception “dangers and accidents of the sea” in a bill of lading. Therefore, as the parties’ fault or negligence will not alter the nature of collision as a form of perils of the sea, it seems also sound to venture that negligence is equally not efficient enough to constitute a competing cause against perils of sea in terms of causal effect. Nevertheless, the negligence of the vessels exerts the efficiency in a quantitative manner in applying the admiralty rule. The fault of the counter vessel has been deducted from the measure of indemnity, though not as a causal factor in the insurance claim.

Moreover, taking account of the counter vessel, are their causal factors relevant to the said vessel in determining the cause of loss? A discussion has been undertaken in Chapter Two Concurrent Causes arising from the case, *Board of Trade v Hain Steamship Co. Ltd.*²⁴⁵ In this case, two vessels ran into each other by negligent navigation during war time. One of the vessels, the *Trevanian* was under the requisition of the Government and the Admiralty agreed to be liable for the loss arising out of warlike operations. The other vessel was employed by the United States Navy as a mine planter and officered and manned by a crew of that Navy. It was disputed whether the latter vessel had undertaken a warlike operation. The House of Lords ultimately held that the proximate cause of the loss of the former said vessel was a warlike operation; therefore, the admiralty should be liable for the vessel’s loss.

It is indicated in the decision that the cause of the loss of the counter vessel may be relevant and material in the way that it may determine the nature of the collision, either a war risk or a marine risk. However, when looking into the claim between the vessel and its insurer, the proximate cause ought to concentrate on the vessel itself. That is to say, the insurer’s defences in terms of the insured coverage and exceptions should be restrictively applied without reference to a third party. Therefore, as concluded in the previous chapter, the causal factor of the counter vessel cannot be considered or even amount to a concurrent cause to the loss of the said vessel.

In summary, collision is generally a form of perils of sea in marine insurance law. The rule of admiralty law has considerable impact on the terms of policy and the legal approach to ascertain the insurer’s liability scope and measure in marine insurance cases. Nevertheless, the causation rules, in particular the doctrine of proximity, are constantly applied.

3.2.4 The Inchmaree Clause –“Due Diligence Proviso”

“Inchmaree clause” includes the risks which have no connection with conventional marine characters, but are insured in marine policies, such as clause 6.2 in Institute Time Clauses

²⁴⁵ *Supra* 139

Hulls (1/10/83).²⁴⁶ It notably consists of two kinds of events: losses caused by machinery breakdown,²⁴⁷ or by the negligence or barratry²⁴⁸ of people other than the assureds. This clause was designed and inserted into major modern standard forms in response to *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co (The Inchmarae)*.²⁴⁹ The case was concerned with a marine time policy in the old SG Form protecting against perils of the sea and all other perils under the general words. The donkey-engine of the insured vessel, *The Inchmarae*, was damaged either due to the negligence of one of the engineers or by mere accident with reasonable care. It was admitted that the loss was not due to ordinary wear and tear. Having realised that the same incident would have happened on land without any marine character, the Lords unanimously limited the perils *ejusdem generis* by a narrow interpretation. In particular, Lord Bramwell suggested and found this definition sufficient: “*All perils, losses and misfortunes of a marine character, or of a character incident to a ship as such.*” Accordingly, the machinery breakdown did not fall into perils of the sea or any of the other perils; the assured was unable to get indemnified under the SG Form. As soon as the judgment came out, the earliest form of the Inchmarae clause was inserted as an additional cover by the Lloyd’s insurance market.

Besides the Inchmarae clause being featured as non-marine related risks, it is also famous for “the due diligence proviso”. Although the negligence and even barratry of the master or crew are insured against under the Inchmarae Clause, the negligence of the assured is explicitly excluded herein.

It has long been held that the negligent navigation of the assured should not release the insurer from his liability to indemnify the loss caused by perils of the sea in *Trinder*,

²⁴⁶ Clause 6.2 of Institute Time Clauses Hulls (1/10/83) states:

6.2 This insurance covers total loss (actual or constructive) of the subject-matter insured caused by

6.2.1 bursting of boilers breakage of shafts or any latent defect in the machinery or hull

6.2.2 negligence of Master Officers Crew or Pilots

6.2.3 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder

6.2.4 barratry of Master Officers or Crew

6.2.5 contact with aircraft, helicopters or similar objects, or objects falling therefrom
Provided such loss or damage has not resulted from want of due diligence by the Assured, Owners, Managers or Superintendents or any of their onshore management.

²⁴⁷ For the legal meaning and interpretations of the terms, latent defect, see *The Caribbean Sea* [1980] 1 Lloyd's Rep 338; *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146; as to bursting boilers and breaking shafts, see *Thames & Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484.

²⁴⁸ A statutory definition is laid down in rule 11 of the Rules of Construction in the 1906 Act; “The term ‘barratry’ includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.” For more details, see Hazelwood, S “Marine Perils and the Burden of Proof” in Thomas, D.R (ed) *The Modern Law of Marine Insurance*, (London : LLP, 1996) pp156-172.

²⁴⁹ (1887) 12 App Cas 484

*Anderson & co v Thames and Mersey Marine Insurance Company.*²⁵⁰ In this case, a marine freight policy against perils of the sea was effected by the defendant insurer. The master of the ship insured happened to be a part owner of the ship. Owing to his negligent navigation, the ship stranded upon a reef and the ship and the cargo were wetted and damaged to a critical extent. Accordingly, the cargo was sold at once. All the owners including the master claimed for total loss of freight against the insurer. In terms of the negligent navigation of the assured master, Smith L.J. stated:

...so in a marine policy sea perils are what are insured against. The risk undertaken by an underwriter upon a policy covering perils of the sea is that, if the subject-matter insured is lost or damaged immediately by a peril of the sea, he will be responsible, and, in my judgment, it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew, or of the assured himself, always assuming that the loss is not occasioned by the wilful act of the assured.

Moreover, per Collins L.J., "His [Assured's] negligence does not, any more than that of his servants, alter the character of the sea peril, which still remains the *causa proxima*,...." Thus, it becomes a general rule that the assured's negligence cannot justify his insurer's defence on this ground, with an exception of the "Inchmaree Clause".

Very recently, *The Toisa Pisces*,²⁵¹ addressed an unresolved issue under English law as to the exact meaning and test of the "due diligence proviso" in the Inchmaree clause. The insurer issued a loss of hire marine policy incorporating Institute Time Clauses Hulls (1/10/83) and also insured against breakdown of machinery unless it was not resulted from wear and tear or was by want of due diligence by the assured. A propulsion breakdown occurred on 25 February 2009 and resulted in a loss equivalent to 30 days' off -hire. A dispute arose as to the standard of care and the assured suggested a test equivalent to recklessness which could amount to a want of due diligence; whereas, the insurer's submission rested mainly upon the authoritative treatise and stated a lower standard as to negligence, which was a lack of reasonable care in this case.

Blair J noted that it is necessary to read the provision as a whole, in conjunction with the terms relating to "negligence" as a matter of defining the extent of the indemnity. Negligence is a covered peril in its own right pursuant to the Inchmaree clause, but is limited to the negligence of the person named in the relevant clause. Evidently, the assured is not one of them; therefore the negligence of the assured cannot be indemnified under the clause. Moreover, a proper definition of "due diligence" in the context of marine insurance law had been affirmed by a Canadian decision, *Secunda Marine Services Ltd. v. Liberty*

²⁵⁰ [1898] 2 Q.B. 114

²⁵¹ *Supra* 81, para 136

Mutual Insurance Company,²⁵² which was followed by Blair J. As stated by Strathy and Moore:

²⁵³

“Due diligence” is a legal term used in a variety of contexts, including marine insurance. It essentially means “reasonable care in the circumstances”. In determining “due diligence”, the court will consider all the surrounding circumstances, including those known or reasonably to be expected. In setting a standard of due diligence, the court will consider the practice of others involved in the same industry, although a court may find that the industry practice is itself negligent.

Ultimately, the applicable legal test in English marine insurance law in respect of the “due diligence proviso” was established by Blair J, which is that “want of due diligence” is lack of reasonable care.

Regardless of such a clarified test of negligence now, in pure causation terms, a question may remain as to whether the “due diligence proviso” expressly indicates the parties’ intention to opt out of the application of the doctrine of proximity to a lower benchmark. In comparison with the similar term contained in the charterparty or bill of lading, according to Article IV- (2) of The Hague Visby Rules, for instance, the carrier or ship will not be liable for loss or damage arising or resulting from “(c) perils, dangers and accidents of the sea or other navigable waters” if without the actual fault and privity of the carrier and his servants/agents. Therefore, in light of the similar expression used in the “due diligence proviso”, does it indicate that the assured’s negligence will debar himself from the indemnity as long as the negligence remotely contributes to the loss or damage?

The tests of causation under the two branches of law have been distinguished in the ancient case, *Hamilton, Fraser & Co v Pandorf & Co*.²⁵⁴ This case was concerned with rats in the context of carriage of goods by sea, the ingress of water through the hole in a bath pipe gnawed by rats was considered as a case of perils of the sea, whereof the ship-owner was not liable for the loss of the cargo spoilt by the sea water in accordance with the exceptions in the bill of lading and charterparty. It was unanimously held by the House of Lords that in a contract of affreightment, if necessary, the court should go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowners or of those whom he is responsible; whereas in the context of marine insurance, had perils of sea been regarded as the proximate cause

²⁵² *Secunda Marine Services Ltd. v. Liberty Mutual Insurance Company* [2006] NSCA 82

²⁵³ Strathy and Moore, *The Law and Practice of Marine Insurance in Canada* (LexisNexis Butterworths, 2003) 120-121

²⁵⁴ 12 App. Cas. 518

of loss, the remote causes, such as the negligence of the assured would be irrelevant in determining the indemnity.

In principle, the *Inchmaree* clause should apply the doctrine of proximity unless the policy otherwise explicitly indicates in marine insurance law. It seems the most plausible explanation of such phrasing may be that the parties agree that the “due diligence” proviso has a prevailing effect over the enumerated incidents or risks in the clause; therefore, the assured’s negligence should be regarded as the proximate cause of loss over, but limited to, the enumerated causes.

3.3 Statutory Exclusions of Coverage

S 55(2) of the 1906 Act provides that the insurer is not liable for any loss attributable to the wilful misconduct of the assured; any loss proximately caused by delay unless the policy otherwise provides; any loss resulting from the nature of the subject-matter insured or not proximately caused by maritime perils.

Although it has been stated in *The Cendor Mopu*, per Lord Clark and Lord Mance, that these subsections are merely amplifications of S 55(1) rather than exclusions, the “exclusions” in this chapter exclusively refer to the perils *not insured* as provided by s 55(2) of the Marine Insurance Act 1906. Certainly, more perils can be added under this heading by appropriate drafting in the policy. This part concentrates on the causal link which ought to be inquired invariably in terms of the effect of such an “exception”, without reference to the recognition of their legal nature.

3.3.1 Wilful Misconduct of the Assureds

Wilful misconduct of the assureds has been put in the first place as an illustration of when the insurer will not be liable for the loss. This risk is somewhat peculiar from the perspective of causation. Before looking into this point, it is worth reviewing the concept of wilful misconduct in the marine insurance context briefly.

Julian Hill’s article “*Wilful Misconduct*”²⁵⁵ has unequivocally analysed the concept of wilful misconduct; in particular, two basic yet essential questions have been clarified in terms of its legal meaning. One question focuses on the forms and definition of “wilful misconduct” and the other question purports to define who the “Assureds” are. The most popular occasions involving wilful misconduct are fraudulent claims, particularly in the form of scuttling and breaches of safety regulations. Arnould’s classifies two types of courses of actions as a wilful misconduct, namely, the assured deliberately or recklessly undertaking a

²⁵⁵ Julian Hill, ‘Wilful Misconduct’ in D. Rhidian (ed) *The Modern Law of Marine Insurance* (London: LLP 1996) 243-252

wrongful action.²⁵⁶ The authors have quoted a case of carriage by air²⁵⁷ and one of carriage by road,²⁵⁸ which are equally applicable to marine insurance cases, to define and explain wilful misconduct. The most material question in ascertaining such a case, as concluded by the authors from the cited judgments is that "Has the owner deliberately taken a risk of loss or damage of which he is aware when it is unreasonable to do so?" If the answer is affirmative, it is very likely to constitute a case of wilful misconduct subject to other factual basis.

Wilful misconduct is exclusively limited to the "Assureds" by the wordings of S 55(2)(a). Taking account of insurable interest, S 23 provides that "a marine policy must specify the name of the assured, or of some person who effects the insurance on his behalf. In this case, it is quite straightforward and obvious to recognise the assureds. However, there remain two problems. Firstly, not every party named in the policy may be subjected to the defence and the consequence of wilful misconduct. Technically speaking, "Assureds" includes only the particular assured who made the claim, those with true joint interest in the property insured,²⁵⁹ as opposed to the co-assureds with separate insurable interests, and their alter egos.²⁶⁰ Therefore, extra attention ought to be paid when ascertaining who are the real assureds in question. The other concern might appear in light of the Insurance Law Reform Proposals of the Law Commissions. The Law Commissions in their recent Consultation Papers²⁶¹ which was published on 20 December 2011 have concluded that S 22 regarding the formality of marine policy should be repealed, and that would also entail the repeal of S 23 and S 24. A marine insurance contract may be enforced although it is not embodied in a formal policy document, and the legislation should not require a marine insurance contract to be in any particular form. However, even if it becomes good law in future, it may not give rise to any difficulty in identifying the assured, where the policy does not specify the assureds. Other contractual documents, such as slips, will normally contain the names of the assureds as well. Otherwise, the person who brings up the claim is always a good indicator to target the "assured" in the dispute. Therefore, reform in this regard will not directly affect identifying the assured in the case of wilful misconduct.

One unique characteristic of S 55(2)(a) is that the stipulation regarding wilful misconduct of the assured has to be applied without room for contractual variations. Compared with all the other subsections of S 55, the phrase "unless the policy otherwise provides" is missing, which means this risk is strictly uninsurable by statute. Two reasons have been given in the

²⁵⁶ *Supra* 13, p 959

²⁵⁷ *Horabin v British Overseas Airway Corporation* [1952] 2 Lloyd's Rep. 450

²⁵⁸ *Laceys Footwear Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369

²⁵⁹ For instance, see *P Samuel & Co Ltd v Dumas* [1924] A.C. 431 and *Netherlands v Youell* [1998] 1 Lloyd's Rep. 236

²⁶⁰ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1

²⁶¹ *Supra* 203

old leading case of *Trinder Anderson & Co v Thames and Mersey Marine Insurance Co*,²⁶² which is worth quoting in length:

The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds, either of which would suffice to defeat his right: first, because no one can take advantage of his own wrong, using the word in its true sense which does not embrace mere negligence (see per Bramwell B. in *Thompson v. Hopper*); secondly, because the wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the sea.

In pure causation terms, wilful misconduct is also special as the mainstream view is that it can discharge the insurer's liability needless of a proximate causal link to the loss.²⁶³ In the afore-cited case, Smith L.J. contemplated that the doctrine of proximity does not apply in the case of wilful misconduct, because not only does proximity, in this case, contravene the principles of insurance law and the manifest intentions of the parties, but is qualified by another legal maxim, "*Dolus circuitu non purgatur*". Furthermore, the Article "Wilful Misconduct" concludes that a "but for" test would seem to be the most appropriate test in determining the causal effect of wilful misconduct. This proposition indicates that wilful misconduct must be at least one of the competing causes, but need not be the (most) efficient one.

Literally speaking, the phrase of "attributable to" does not aggregate the argument whether wilful misconduct applies a different standard from the rest of the named statutory exclusions. As addressed in Chapter One, the precedents in case law support that the "attributable to" indicates the application of the doctrine of proximity without more. In the legal sense, wilful misconduct seems to still be in line with the test of proximity instead of the "but for" test, which can be explained as follows:

For one aspect, no strong authority in case law can be dependent upon modern law to support the "but for" test instead of the test of proximity. It is suggested in Arnould's that per A.L. Smith L. J. in the aforementioned *Trinder* case, the proximate rule does not apply to a loss occasioned by the wilful misconduct of the assureds. This case is a classic demonstration of the pre-Act judicial attitude towards the wilful misconduct of the assured. The predominant method to determine the relevant cause of loss in the pre-Act times is the last event before the loss. Apparently, the wilful misconduct of the assured cannot meet with this test, as it requires a certain form of consequent operation. Accordingly, wilful misconduct of the assured could not amount to the proximate cause at that time. Therefore,

²⁶² *Supra* 250

²⁶³ *Supra* 13, p 958

the judgment found the wilful misconduct of the assured did not apply to the proximate rule. As a different test of rule has been established and applied in modern law, the main consideration and rationale of this statement seems unnecessary. Accordingly, it is questionable whether this decision should be relied upon as authority for the notion that the wilful misconduct of the assured does not follow the test of proximity.

Moreover, the learned Author of “*Wilful Misconduct*” cited and relied upon the judgment of *Netherlands v Youell*,²⁶⁴ where the Dutch navy purchased two submarines which were insured under separate policies, and in the course of their construction and trials the submarines suffered debonding and cracking in their paintwork. Precisely speaking, this judgment focused on the negligence and misconduct of the agents, which is the second part of the subsection. Unlike the wilful misconduct of the assureds, these occasions will not debar the assured’s claim. Per Phillips L.J.:

I do not believe it is normally helpful, when considering the effect of negligence or misconduct on the cover afforded by a policy of marine insurance, to ask whether or not the negligence or misconduct is the “proximate cause” of the loss. Negligence and misconduct are generic terms that apply to acts or omissions that are coupled with a particular mental element. *Where such an act or omission results in loss or damage to property insured, this will be because the act or omission causes or permits a more direct physical cause of loss or damage to occur.* ... A policy of marine insurance can provide cover against “negligence” or “misconduct” (*other than of the assured*) or exclude cover for losses attributable to such causes. In either case the cover or exclusion will apply whether or not the negligence or misconduct is the proximate cause of the loss. There was a time when it was not clear that a policy of marine insurance provided cover where loss was *attributable to the negligence or misconduct of an agent of the assured*. Section 55(2)(a) demonstrates that by 1906 it was established that where such negligence or misconduct caused or permitted a peril insured against to impact on the property insured, the negligence or misconduct in question would not be a bar to a claim. [Emphasis added]

It is doubtful whether the wilful misconduct of the assured should apply this decision, as the issue in dispute surrounded the wilful misconduct of the agent rather than the assured. Furthermore, the cited judgment seems to indicate that the physical cause of loss driven by the mental factor intervenes and it determines the latter cannot amount to the proximate cause of the loss. Therefore, negligence and wilful misconduct can only be “but for” causes which is one of the necessary causal factors to the loss. However, this should not be a sound presumption, at least in the context of wilful misconduct of the assureds, as the effect of

²⁶⁴ *Netherlands v Youell & Others* [1998] 1 Lloyd's Rep. 236

this element is undoubtedly overridden any other causal factor. It was said in *Samuel v Dumas*²⁶⁵ that the possibility of scuttling makes the peril of the wickedness of man instead of perils of the sea. It fundamentally challenges the basis of the insurance policy. Although the final physical act appears to be more direct and nearer to the loss in time order, it is not efficient enough to cut down the proximate causal link between wilful misconduct and the loss, especially the wilful misconduct of the assured.

On the basis of above grounds, wilful misconduct of the assureds should still apply and be deemed as in line with the test of proximity when determining the cause of loss. Therefore, it seems more appropriate to consider that the overriding effect of wilful misconduct of the assureds makes it the proximate cause, rather than to say “wilful misconduct overrides considerations of proximate cause”.

3.3.2 Delay

Delay was not an insured peril in the old Lloyd's SG Form. S 55(2) of the 1906 Act stipulates that delay discharges the underwriter's liability on the loss arising thereof proximately. It can unequivocally read from the phrase “the insurer on ship or goods” that this provision is applicable to hull and cargo policies but freight policies. Therefore, delay remains out of coverage in modern cargo clauses as an affirmation and emphasis of this statutory rule; a standard hull policy is also bound by this stipulation unless it is otherwise altered particularly.

Virtually, delay is not a welcoming issue before English courts and the decisions in this regard are not as flourished as other perils in the same kind in cargo and hull cases. A few historic judgments have provided limited authorities in terms of delay as a cause of loss. In *Taylor v Dunbar*,²⁶⁶ the vessel carrying meat from Hamburg to London was encountered with tempestuous weather. As a result, the meat became putrid and was thrown overboard at sea in necessity. The judges unanimously agreed that the loss was solely caused by the retardation and delay, although such delay was occasioned by the adverse weather condition. The decision was reaffirmed by *Pink v Fleming*²⁶⁷ where a portion of goods had gone bad on arrival after the vessel collided with another one. The court held that the loss was due to the handling which took place in discharging and re-shipment for repairs and delay consequent on collision accordingly.

Moreover, it is explicitly demonstrated in *Shelbourne & Co. v Law Investment and Insurance Corporation*²⁶⁸ how delay could result in the remoteness between an insured peril and the

²⁶⁵ *Supra* 147, per Viscount Findlay

²⁶⁶ *Supra* 56

²⁶⁷ *Supra* 57

²⁶⁸ [1898] 2 Q.B. 626

loss. Two barges insured by river insurance collided and led to damage of each barge. The insured claimed damages for loss in consequence of detention for repair after the collision. The Judge followed the well-known principles of marine insurance that "no allowance for time is recoverable" and concluded that the claim was too remote from the insured perils and unrecoverable accordingly. It may be observed from these decisions that delay entitles underwriters to a powerful defence to exclude their liability.

A typical scenario can be drawn in these cargo cases: the adventure designated for carrying the cargo insured meets with adverse sea conditions, which leads to unreasonable delay and causes a physical loss of the cargo ultimately. In pure causation terms, a causation chain may be established starting from perils of sea to delay to inherent vice sometimes and finally to the physical loss of the cargo. So far, dependent upon *The Cendor Mopu*, if inherent vice, as a risk form, is triggered by an external source, the case cannot be regarded as a loss proximately caused by inherent vice. Therefore, the competing causes remain perils of the sea and delay. Which one contributes more efficiency to the loss? The literal reading of S 55(2)(b), "although the delay be caused by a peril insured against", seems to provide an answer that delay overrides the perils of the sea in the chain and courts should pay more attention to the result of delay. English courts have basically complied with this reading and have not looked to a further degree beyond delay itself. Technically speaking, it is not a product of the obsolete test "nearest cause in time"; rather, it is in line with the efficiency standard. Physical loss is mainly and directly caused by *loss of time*, instead, perils of the sea only affects the adventure but not to the extent as serious as to endanger the physical safety of the hull and cargo. Accordingly, delay succeeds in interrupting and cutting the causal link between perils of sea and the physical loss of cargo. However, if delay is no more than a consequential one and has no independent contribution to the loss, there is hardly an efficient causal link between such delay and the loss. In particular, in a case where a peril by definition includes loss of time, such as captures, seizures and detention, the effect of such delay should be absorbed by the initial risk.²⁶⁹

Besides the physical loss or damage of the subject-matter insured, a policyholder often claims for financial loss in the form of loss of market value due to delay, in addition. One of the unresolved issues in the decision of *Masefield v Amlin*²⁷⁰ relates to the loss of market value resulting from delay in causation terms. The Somalia pirates took possession of the vessel and cargo on board for the purpose of ransom in this case. The assured cargo owner claimed for an actual total loss, alternatively a constructive total loss. The Court of Appeal held that the assured's claim in either form was defeated based on the fact that the vessel was released after the payment of ransom. No physical loss of the cargo had been incurred. Additionally, the assured contended that the biodiesel cargo had dramatically lost its

²⁶⁹ *Supra* 224, p 190

²⁷⁰ *Masefield AG v Amlin Corporate Member Ltd* [2011] 1 Lloyd's Rep. 630

economic value due to the delay caused by the piratical seizure and had taken this part into the sum of claim. However, the court did not respond to this issue, as it became irrelevant as the claim lacked a fundamental ground-a factual loss-in the first place. Nonetheless, it was held in *Federation Insurance Company of Canada v Coret Accessories Ltd*²⁷¹ that the assured only insured goods by an ordinary form of open cargo policy against a permanent loss; it did not insure any goods which were delayed in transit or temporarily lost but which were subsequently delivered to the owner. On balance, unless the policy clearly indicates to the contrary, the physical loss as well as a financial loss directly attributable to the loss of time will not be recovered in hull policies and cargo policies.

In relation to freight policy, a freight policy is designed to insure the loss of freight when the adventure is frustrated, interrupted or delayed as the result of insured perils. In this context, delay is treated more as a form of consequence than acting as a cause of loss, as the loss in this type of case is ascertained, i.e. loss of freight. It is suggested in Arnould's that the problem with this type of dispute is mostly in determining whether the proximate cause of the loss of freight is the initial operation of an insured peril or the decision of the charterer in cancelling the charter.²⁷²

However, it is also maintained that a "Time Charter" Clause or a "Loss of Time" Clause containing in a freight policy and a "Frustration" Clause contained in a war risks policy may debar the claim "consequent on the loss of time, whether arising from a peril of the sea or otherwise".²⁷³ The authoritative construction of these clauses has been given by the House of Lords in the leading case, *The Playa de Las Nieves*.²⁷⁴ The question for the House of Lords was "Does the time charter clause in the Institute Time Clauses: Freight excludes a claim by the assured for chartered freight lost under the off-hire clause in his time charter?" Per Lord Diplock, this Clause does not concern the question of the "proximate cause" at all by using the phrase "consequent on":

It contemplates a chain of events expressed to be either "consequent on" or "arising from" one another. It expressly makes the operation of the clause dependent upon the presence in the chain of an intermediate event (viz. "loss of time") between the loss for which the claim is made (viz. loss of freight) and the event which in insurance law is the "proximate cause" of that loss (viz. a peril insured against). The intermediate event, "loss of time", is not itself a peril though it may be the result of a peril. That is why the words "whether arising from a peril of the sea or otherwise" are not mere surplusage as was suggested

²⁷¹ [1968] 2 Lloyd's Rep.109

²⁷² *Supra* 13, p 956

²⁷³ ITC(1983)-Freight, Cl 14 and Institute War and Strike Clauses (Freight)

²⁷⁴ *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1977] 1 Lloyd's Rep. 457

obiter by Mr. Justice Bailhache in *Russian Bank for Foreign Trade v. Excess Insurance Co. Ltd.*, [1918] 2 K.B. 123 at p. 127. They are there to make it plain that the clause is concerned with an intermediate event between the occurrence of a peril insured against and the loss of freight of which the peril was, in insurance law, the proximate cause.

The true interpretation of Lord Diplock's judgment is the need to distinguish the loss of freight proximately caused by an insured peril from those relating to delay. It can be understood from two aspects: on the one hand, the purpose of the underwriters inserting such a clause is literally to exclude any liability connected to the loss of time. The way Lord Diplock to interpret is in line with the insurer's intention. On the other hand, although Lord Diplock has described the loss of time as an intermediate event and intended to rule a tenuous causation test in this regard, the phrase "consequent on" does not provide any contrary agreement than the doctrine of proximity and it essentially comes to the same conclusion as S 55(2)(b). This clause will not allow the insurer to abuse his exemption as long as a minor delay occurs or where a peril by definition includes a loss of time. In contrast, as aforementioned, the effect of a significant delay with independent causal effect normally overrides the efficiency of its earlier insured peril. Lord Diplock's judgment supports the view that the loss of freight arising from delay will not be recovered in compliance with "Time Charter Clause" and S 55(2)(b), on the condition that delay efficiently contributes to the frustration of the voyage or loss of freight. In one word, under the freight policy, the insurer's liability is equally restricted within the scope of the insured perils in the case of delay.

3.3.3 Nature of the Subject-matter Insured

S 55(2)(c) notably refers to a group of internal causes arising from the nature of the insured property, which retains no feature of being "marine related". As the most typical example of internal causal factors, the definition of inherent vice has been conclusively provided by the Supreme Court's judgment on *The Cendor Mopu* in 2011. Thereupon, the marine insurance market should now see fewer coverage disputes on inherent vice issues.²⁷⁵ Inherent vice will be addressed in detail in the next chapter, taken as the most typical example of this kind.

It is worth citing in length from *The Cendor Mopu* in this regard that, per Lord Mance:

In the scheme of the 1906 Act, that would not appear to me surprising, bearing in mind the case law against the background of which the Act was enacted and

²⁷⁵ For instance, Blair J in *The Toisa Pisces*, resolved allegation regarding tear and wear by stating: "It was not in dispute that the effect of the provision in the policy in respect of wear and tear is to be construed as set out by Lord Mance in *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor Mopu)* [2011] 1 Lloyd's Rep 560 at para 81..."

the juxtaposition in section 55(2) (c) of “ordinary wear and tear, ordinary leakage and breakage” with “inherent vice or nature of the subject matter insured” as well as with “any injury to machinery not proximately caused by maritime perils”. While not myself attempting any exact definition, ordinary wear and tear and ordinary leakage and breakage would thus cover loss or damage resulting from the normal vicissitudes of use in the case of a vessel, or of handling and carriage in the case of cargo, while inherent vice would cover inherent characteristics of or defects in a hull or cargo leading to it causing loss or damage to itself — in each case without any fortuitous external accident or casualty.

Shortly after the decision of *The Cendor Mopu*, the Supreme Court of Victoria, Australia, similarly provided a clear definition of “wear and tear” in *JSM Management Pty Ltd v QBE Insurance (Australia) Ltd*.²⁷⁶ In this case, QBE issued an industrial special risks insurance policy on JSM’s trucking depot. JSM leased it to GLP and the hardstand was damaged by improper usage by GLP. The assured (JSM) claimed for the damage but got rejected by the insurer by reason of the exclusion clause including wear and tear. In the first trial, the court reasoned the case constituted wear and tear; therefore, the insurer should not be liable. The assured appealed and raised a substantive point of law: what was the meaning of “wear and tear”? The Supreme Court of Victoria reversed the earlier decision, which had defined the phrase in a narrow manner, referring merely to losses which are the ordinary results of use or natural forces. On the contrary, extraordinary losses are not within the scope of cover.²⁷⁷

In comparison, the aforementioned Australian decision is in line with the English judgment in *The Cendor Mopu*; moreover, an analogy can also be found between the interpretations of an internal cause due to the nature of subject-matter insured. At present, the mainstream view is that the risks provided in s 55(2)(c) ought to be given a narrow meaning, which must be confined within the “ordinary” scope. That is to say, as long as the consequences of loss surpass the extraordinary extent, the proximate cause must be something more than a mere internal factor, such as perils of the sea. In this case, the underwriters’ defence in this regard should not be sustained by courts.

On balance, the internal risks have gradually become an important group of competing causes which leads to disputes between insurers and assureds. Therefore, the next Chapter will specifically look into the internal causes, taking inherent vice as the example, in causation terms.

²⁷⁶ [2011] VSC 339

²⁷⁷ “Wear and Tear”, Insurance Law Monthly, 01 Jan 2012, available at <http://www.i-law.com/ilaw/doc/view.htm?queryString=wear+and+tear&citiPub=Insurance+Law+Monthly&sort=date&sort=date&searchType=advanced-search&se=1&id=278603&searched=true> [last time access: 07/10/12]

3.4 Apprehension of Peril and Mitigation Measures

When a voyage is under the threat of perils, measures are ordinarily taken in order to avoid or reduce the extent of the loss or damage, which is also a statutory duty under s 78 of the 1906 Act. The measures are sometimes ineffective or even contribute to new losses or more severe losses. In terms of the timing of the actions, apprehension of perils may stimulate the crew on board to conduct themselves proactively before the actual peril effects; in contrast, mitigation measures take place in the process of the occurrence of the peril and onwards. The courts have completely opposite attitudes towards identifying the proximate cause in such "state of affairs"²⁷⁸ under the two different situations.

Apprehension of a peril cannot be regarded as the peril itself in terms of the causal link to the loss which has occurred. Unless otherwise provided in the policy, the mere apprehension of a peril is not sufficient for the assured to obtain recovery.²⁷⁹ The peril merely induces the assured to alter his conduct which new peril inserts under such apprehension. Normally, the peril occurring subsequent to the apprehension is deemed as the proximate cause, but not the one which the assured attempts to escape from. In *Becker, Gray and Company v London Assurance Corporation*,²⁸⁰ the assured insured his cargo for a carriage from Calcutta to Hamburg against perils of the sea and men of war, restraints of princes by a consideration of a higher premium. During the voyage, war broke out between Britain and Germany. The captain feared the vessel would be captured by the British Authorities due to its destination being a German port. Consequently, he voluntarily deviated to a neutral port in Italy in order to avoid the potential risk of capture, which led to the failure of the designated voyage. The cargo owner accordingly claimed for constructive total loss against his insurer on delivering a notice of abandonment, which was declined by the insurer. The House of Lords affirmed the decisions of the Court of Appeal and the Commercial Court by holding that there is a definite distinction between losses by an insured peril and turning aside to avoid the peril. A certainty in existence or at least being imminent is necessary in establishing the causal link between the peril and the loss. Hence, the apprehension of a peril prior to the actual incident of the risk is not within the scope of cover in principle, owing to its efficient contribution in creating a new state of affairs and perils.

²⁷⁸ *Supra* 39, p 180

²⁷⁹ According to Arnould's, the cases concerning the apprehension of perils are mostly associated with the restraints of princes and similar perils. The underwriters, such as the mutual war risks associations, have freedom to cover the loss resulting from measures to avoid the operation of insured perils as expressly indicated in the policy. For the cases of apprehension of perils: *Butler v Wildman* 106 E.R. 708; *Hadkinson v Robinson* (1803) 3 B.&P. 388; *Blackenhagen v The London Assurance Company* 170 E.R. 1019; *Kacianoff v China Traders Insurance Co Ltd* [1914] 3 K.B. 1121; *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 32 Ll. L. Rep. 287

²⁸⁰ *Supra* 3

In contrast, according to Arnould's, losses caused by measures taken to avert or minimise the effect of an insured peril should be distinguished from the case of the apprehension of an uninsured peril. In general, a better view is maintained by the Editors to regard the cases of loss as proximately caused by the peril which is attempted to be averted.²⁸¹ As a matter of fact, there is merely one line between the apprehension of a peril and the averting measure. The line is whether the peril has been ascertained or is pre-existing. In particular, a statutory duty to avert and minimise the loss arises after an insured peril struck.²⁸² Accordingly, the underwriter is normally liable for losses including those proximately caused by the averting measure. Taking the leading case of *Canada Rice Mills v Union Marine and General Insurance Company*,²⁸³ as an example it was held that the heated cargo of rice was recoverable within the insured scope of the policy including perils of the sea, as the loss was proximately caused by closing of ventilators in order to prevent the ingress of seawater. In this case, the action was deemed as necessarily and reasonably taken to prevent the peril of the sea. Therefore, it is less doubtful that the losses occurring owing to the mitigating conduct of the assured or those of people acting on behalf of the assured are recoverable.

However, it is also frequent that the loss has happened or is aggravated as the master and crew failed to take any proper measure on the occurrence of the perils. Such negligence may trigger an adverse effect against the assured in compliance with the duty to "sue and labour" provided by s 78(4) of the 1906 Act.²⁸⁴ There used to be interactions between the legal effect of breaching the duty and the insurer's liability of indemnity under S 55(2)(a), which is demonstrated in the decisions of *National Oilwell (UK) Ltd v Davy Offshore Ltd*²⁸⁵ and *Netherlands v Youell & Others*. In the first case, Colman J contemplated his view on the effect of breaching the duty that the failure to do so would lead to the assured's inability to establish that the loss was proximately caused by an insured peril rather than by his own wilful misconduct; in other words, the insurer will undertake the indemnity only if such breach of duty does not proximately contribute to the loss in accordance with S 55(2)(a). Consequently, the Judge resolved the alleged conflict between the two provisions by treating the misconduct or negligence as an issue of causation which is addressed in the 16th edition of Arnould's.²⁸⁶ In summary, the main question is whether the breach of the duty is so serious as to break the chain of causation of the insured peril itself. If the failure of taking measures is not the proximate cause, the underwriter does not have the defence and should

²⁸¹ *Supra* 82, p 918-919

²⁸² *Netherlands v Youell & Others* [1998] 1 Lloyd's Rep. 236

²⁸³ [1941] A.C. 55

²⁸⁴ 78. — Suing and labouring clause.

.....
(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

²⁸⁵ [1993] 2 Lloyd's Rep. 582

²⁸⁶ Sir Michael J. Mustill and Jonathan C.B. Gilman, *Arnould's Law of Marine Insurance and Average*, (16th ed. London: Stevens, 1981) 620

be liable. On the contrary, if the breach proximately causes the entire or part of the loss, the underwriter is not liable for the respective loss pursuant to S 55(2)(a).

This approach has been reaffirmed in the subsequent case *Netherlands v Youell & Others*. Philip LJ concluded that:

the principle embodied in s. 55(2)(a) applied before and after a casualty and the duty referred to in s. 78(4) would only have significance *in the rare case where breach of that duty was so significant as to be held to displace the prior insured peril as the proximate cause of the loss*; even in that rare case the breach of s. 78(4) was unlikely in practice to afford a defence to underwriters because such breach was unlikely to constitute a separate insured peril under the express cover that had been given by the standard form of policies of marine insurance against negligence of the masters, officers and crew. [Emphasis added]

Most recently, the afore-cited judgment in respect of "*the rare case where breach of that duty was so significant as to be held to displace the prior insured peril as the proximate cause of the loss*" has been reviewed and applied in *Clothing Management Technology Ltd v Beazley Solutions Ltd (t/a Beazley Marine UK)*.²⁸⁷ In this case, the assured brought a claim against his insurer for the invoice value of garments which were manufactured in a factory in Morocco. The factory owner disappeared leaving the worker unpaid there. As a result, the workers occupied the factory and refused to finish the work. The assured paid the workers directly in order to resume the work. More fabric was sent into, and some garments were shipped back to the UK. A second demand for an immediate payment equivalent to some £80,000 was made by the workers, but this time the assured refused. The assured entered into a marine policy in terms of the Institute Cargo Clauses (A) (1982) and the Institute Strikes Clauses (Cargo) (1982). The policy covered finished and semi-finished garments while in store and it was agreed that the provisions of the Marine Insurance Act 1906 would apply, even though the policy covered some non-marine risks.

The Court felt that it might have been unwise to send more fabric into a factory as part of a strategy whose purpose was to get fabric out of it. That was in hindsight a mistake but at the time it was a step taken as the result of a reasonable and informed judgment by the assured who was trying to deal with unusual circumstances. Therefore, there was no failure to take measures to avert or minimise loss as required by section 78(4) of the 1906 Act; moreover, the loss was not proximately caused by assured's failure to take reasonable steps.

However, whether that principle can be extended to contractual suing and labouring clauses

²⁸⁷ *Supra* 202

remains obscure. This issue has been proposed in a recent well-known case *Melinda v Hellenic*.²⁸⁸ The assured's vessel, *The Silva*, got arrested in Egypt for an unpaid judgment and court dues in previous proceedings relating to another vessel, *The Safir*, which had grounded off the coast of Egypt causing environmental damage. In fact, the assured is not related in any respect to the grounded vessel and the debtors of the Egyptian judgment, which had been approved by Burton J in the Commercial Court. The assured had challenged the arrest but those proceedings had been dismissed and the arrest upheld. An appeal against that decision was pending. As *The Silva* had been detained for more than two years in Egypt, the assured made a constructive total loss claim on its war risks insurance against the insurer. However, the insurer contended that the loss was excluded under its rules as it was a claim arising out of ordinary judicial process or because there had been a breach of the "sue and labour" clause.

Burton J made a brief comment on the interplay between the proximate cause rule and suing and labouring, as he found there were no breach and no need to elaborate. The principle held in *Netherlands v Youell* was reaffirmed by Burton J that the "sue and labour" duty imposed by the S 78(4) of the 1906 Act requires the breach to be the proximate cause of loss. In comparison, however, Burton J pointed out a controversial situation in the case of a contractual provision in respect of "sue and labour". It is undoubted that the *obiter* principle can be extended to cover a contractual provision in very similar terms to the statutory duty in *The Aliza Glacial*.²⁸⁹ However, shortly before *The Aliza Glacial* was decided, Colman J in *The Grecia Express*²⁹⁰ expressed a more open view on interpreting a contractual "sue and labour" clause:

That [the obiter principle] would be the position under s. 78(4), but r. 3.14 is not the 1906 Act, but a contractual condition. As such its construction is at large and does not need to be identical to that of similar words in the statute unless there is some compelling reason for the meanings to coincide.... That being so, I see no reason why the contractual condition should not bear that meaning which is what the words suggest when they are taken out of the intricate context of the 1906 Act. [Brackets added]

It is far from easy to conclude that Colman J was holding an opposite view to *The Aliza Glacial*, although Burton J regarded it so. For one reason, the expression in the paragraph is somewhat subtle and it did not firmly iterate that the contractual term *must not* apply for the principle. Moreover, as Burton J observed, Colman J did not provide any justification in

²⁸⁸ *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2011] 2 Lloyd's Rep. 141

²⁸⁹ *The Aliza Glacial* [2002] 2 Lloyd's Rep 421

²⁹⁰ *Strive Shipping Corporation v Hellenic Mutual War Risks Association* [2002] 2 Lloyd's Rep 88

support of why the principle should not be applicable. What the paragraph simply delivered and emphasised is the contractual nature of the condition, which *may* provide an different test or operation by unequivocal wordings. It is just in line with the doctrine of proximity, which is also subject to otherwise indication in the policy. Whether contractual expression is able to replace the proximate cause test is determined by the court's interpretation. Nevertheless, Burton J in *Melinda v Hellenic* refused to give a clear answer in this respect, as it was unnecessary to do so. Therefore, *The Grecia Express* may continue to be taken advantage of as support for an automatic rejection to apply the proximate cause rule in the case of a contractual "sue and labour" clause.

Therefore, in principle, losses arising from the reasonable and necessary measures taken for avoiding an insured peril or its further loss are recoverable. Likewise, failure to perform the duty of "sue and labour" will not protect the underwriter against the liability of indemnity unless, in exceptional occasions, such breach contributed significantly to the loss in rare cases which breaks the causal link between the insured peril and the loss. In contrast, the apprehension of an insured peril creates new perils which are not within the scope of the cover. Consequently, the underwriter is discharged from liability. Noting that there is only a narrow gap in time between the measures taken owing to the apprehension of an insured peril and to avert or minimise the loss, it is for the assured's benefit not to take actions proactively. Instead, the decision of taking actions should be made after the insured peril is imminent or ascertained.

Chapter 4 Inherent Vice

Inherent vice is a complex yet crucial concept in the law of marine insurance. Under s 55(2)(c) of the 1906 Act, an insurer is not liable to indemnify the loss proximately caused by inherent vice. Modern standard cargo policies also display inherent vice in the exclusionary clauses. In insurance claims, it is not unusual for insurers to attempt to take advantage of the cargo's internal risks, particularly in form of inherent vice, for the purpose of discharging indemnity liability. Therefore, various arguments concerning the legal meaning and effect of inherent vice have been commonly raised, which are normally formulated as questions of causation between the perils and the consequence of loss.

Till recently, Lord Clarke expressed that *The Cendor Mopu*, being an unusual case on the facts, dealt with and contemplated the issue of inherent vice in the context of marine insurance. Based upon this judgment, this chapter will present a research on inherent vice on the basis of numerous English precedents, in conjunction with a few cases of other jurisdictions for comparison. Specifically, the definition provided by the English cases will first be reviewed and then followed by some specified forms of inherent vice. The question that whether inherent vice is an uninsured peril or an excluded one, owing divergent understanding and interpretations of the 1906 Act, will be addressed. The second part comes to the insurability of inherent vice as a peril in marine insurance law, which will be reaffirmed in order to criticise the wrongly-recognised test of inevitability. In the end, the test to ascertain the proximate efficiency of inherent vice in terms of causation will be analysed and concluded. In particular, room for concurrent causes involved with inherent vice and external causes such as perils of sea will be reviewed from historic and current judicial views.

4.1 Overview of Inherent Vice

In English law, the recognition of inherent vice has derived from late 18th century. The cases decided at this early stage were basically relied upon observations of factual phenomenon and common sense without specific reasoning processes. There was no proper legal definition provided either by precedents or by the 1906 Act until that the House of Lords has provided a benchmark definition in *Soya v White*.²⁹¹ This descriptive definition has been widely cited by the subsequent cases. However, it still contained ambiguity which has led to dissenting interpretations and understandings. As implied in *The Cendor Mopu*, the causation issue regarding inherent vice in essence turns out to be a matter of definition in law. Therefore, the meaning of inherent vice in the law of marine insurance should be

²⁹¹ *Supra* 141

thoroughly clarified in the first place in order to unveil its application of the legal test of causation.

4.1.1 The Meaning of Inherent Vice

As the modern insurance regime is strikingly different from what it used to be two centuries ago, English courts hold completely divergent attitudes in identifying and construing the cover scope than they used to do. Although some ancient cases are poorly reconciled with the modern law, they may be still worth mentioning, as they show the historical view that an internal cause could outweigh perils of sea as the proximate cause. In particular, in an old case²⁹², the insured cargo consisting chiefly of slaves was insured against perils of sea. The voyage was prolonged due to tempestuous weather and the slaves died during the delay resulting from lack of provision. In 1796, an Act of Parliament stated that “no loss or damage should be recoverable on account of the mortality of slaves by *natural* death”. [Emphasis added] The court recognised this was a case due to natural death as a form of inherent vice but not perils of sea. On the one hand, the judgment aimed to discourage the ship from being equipped with insufficient and low quality provisions. On the other hand, the internal unfitness of the “cargo” was deemed to be a more effective cause in order to narrow down the insurers’ scope of liability.

In terms of conventional goods, it was held in *Boyd v Dubois*²⁹³ that the insurer was not liable for the loss caused by the damaged quality of the goods itself. Furthermore, in *Koebel v Saunders*,²⁹⁴ Byles J. declared that a loss of goods which perish by some inherent vice or weakness, as in this case tender animals unfit to bear the agitation of the sea, or in the more ordinary cases of fruit, flour or rice damaged by heat or perish is not an insured loss as caused by perils of sea. It is also worth mentioning that both cases have provided that the assured should not be required to warrant that the goods are able to withstand the ordinary course of the designated voyage. It is such a long term that unfitness or unseaworthiness of cargo has been differentiated from the concept of inherent vice. Furthermore, in *Blower v The Great Western Railway Company*,²⁹⁵ a carriage by rail case, Willes J interpreted the expression of “vice” in the manner that:

By the expression “vice” is meant only that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried.

²⁹² *Tatham v Hodgson* (1796) 6 TR 656

²⁹³ [1811] 3 Campbell 133, 170 E.R. 1331

²⁹⁴ (1864) 17 CB(NS)71

²⁹⁵ (1871-72) L.R. 7 C.P. 655

These statements have built a basis upon which to conclude a general legal definition by having exemplified the forms of a loss which might be caused by inherent vice.

A development was achieved in the early editions of Arnould's, which broadly defined inherent vice as a

...source of decay or corruption inherent in the subject matter, or, as the phrase is, from its proper vice; as when food becomes rotten, or flour heats, or wine turns sour, not from external damage, but entirely from internal decomposition.²⁹⁶

The latest edition of Arnould's²⁹⁷ retains these lines but regards them as no more than a description of or an introduction to inherent vice. Nevertheless, in the modern view, this "definition" has at least succeeded in presenting and emphasising two important elements of this concept. Either the cause of loss is utterly internal and permanently attached to the cargo as part of its nature, or the goods are damaged to a certain extent, which has amounted to a primary "vice" condition. In the first instance, the risk of being deteriorated is not a risk exclusively to the marine context. It is a permanent and essential risk arising from the nature of the subject-matter insured. That is to say, the effect of inherent vice is not because of the ship or the sea.²⁹⁸ On the other hand, the goods on board do not have to be in a perceptible bad state or quality initially, even though inherent vice is by definition a risk that the goods are of lower quality than otherwise identical property without such defect.²⁹⁹ If a cargo was shipped in a good quality of the kind by evidence, courts seems to exclude the possibility of inherent vice as the cause to the loss or damage.³⁰⁰ On the contrary, if the cargo had been shipped in bad order, it may provide *prima facie* evidence for finding in favour of the insurer's contention of inherent vice.³⁰¹

Subsequently, in early 20th when the Marine Insurance Act 1906 was codified and came into effect, however, the Act paid no concern to providing a statutory definition of inherent vice. On the contrary, "perils of sea" has been clarified as the most important insured risk, which has assisted the judiciary to ascertain a case of perils of sea and somewhat reduced the

²⁹⁶ Joseph Arnould, *Arnould's Treatise on the Law of Marine Insurance and Average* (2nd edn, Stevens & Norton, 1857), vol II, 782-783

²⁹⁷ *Supra* 13, p 943

²⁹⁸ *Associated Metals & Minerals Corp. v. M/V OLYMPIC MENTOR* 1997 A.M.C. 1140. This is an American case under carriage of goods by sea.

²⁹⁹ Kenneth S. Abraham, "Perils and Fortuity in Property and Liability Insurance" [2001] *Tort & Insurance Law Journal*, Volume 36, p 785

³⁰⁰ *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* [1941] A.C. 55

³⁰¹ *Supra* 292

number of arguments on inherent vice. The prevailing view at that time is Lord Sumner's judgment in *British and Foreign Marine Insurance Company Ltd. v Gaunt*,³⁰²

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

Accordingly, inherent vice has been regarded as something happening from "the natural behaviour of that subject-matter, being what it is in the circumstances under which it is carried" and some lack of fortuity.

*E.D. Sassoon & Co., Ltd. v Yorkshire Insurance Company*³⁰³ is the case most worth mentioning case to illustrate the judicial trends and the application of Lord Sumner's formulation. A quantity of cigarettes was insured upon a marine insurance policy against the perils including damage by fresh water, mould and mildew, but excluding inherent vice. The assured found the goods damaged by mildew on arrival after a considerable delay. It was decided that the insurer's contention regarding inherent vice was not sound and justifiable; therefore, the loss was recoverable. Having relied upon Lord Sumner's judgment as cited above, Bankes LJ found the loss was contingent on account of the evidence as to the good quality and packing. Any external factor or contingency would deny the insurer's defence by virtue of inherent vice. Therefore, the damage was not caused by its natural behaviour or the circumstance of carriage. However, Scutton LJ declined to follow the *Gaunt*'s case as a direct authority, since it was a case regarding "all risks" coverage, which was not the same position in this case where a specific risk was involved and insured against. So long as the assured was able to prove the loss was caused by an external reason under an "all risks" cover, the claim should be responded. Nevertheless, the Judge was still inclined to find in favour of the assured in the end after weighing the evidence. Moreover, the carriage conditions and manners also needed to be considered in order to introduce a possibility of inherent vice. Therefore, it seems it used to be difficult to establish a case of inherent vice as it had a comparatively narrower scope than perils of sea by the influence of *Gaunt*'s case.

Ultimately, a thorough and authoritative definition of inherent vice was provided in the case *Soya v White* by Lord Diplock:

This phrase (generally shortened to "inherent vice") where it is used in s. 55 (2) (c) refers to a peril by which a loss is proximately caused; it is not descriptive of the loss itself. It means the risk of deterioration of the goods shipped as a

³⁰² [1921] 2 A.C. 41, p 57

³⁰³ [1923] 16 L.L.R. 129

result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.

In this case, the cargo owner took place a cover against heat, sweat and spontaneous combustion on his large quantity of soya beans. The cargo arrived at the discharging port in a heated and deteriorated condition which amounted to a partial depreciation. One of the grounds upon which the insurer sought to deny the liability was that the proximate cause of the damage was inherent vice, as the soya beans were not shipped in a condition to enable them to withstand the ordinary incidents of the designated voyage. The Court of first instance held the insurer was liable for the loss which was not proximately caused by inherent vice. The Court of Appeal³⁰⁴ sustained the conclusion; however, relying on different grounds, despite the fact that the proximate cause of the loss was not unanimously agreed. Donaldson LJ remarked that "a loss was proximately caused by inherent vice if the natural behaviour of the goods was such that they suffered a loss in the circumstances in which they were expected to be carried". He held that the proximate cause in this case was the condition under which the soya beans were carried and he followed the definition and test of contract of affreightment. This is an external factor as opposed to the moisture content of the cargo itself which was considered to be the proximate cause by Waller LJ. The House of Lords left the question of proximate cause untouched but concluded that in either case the insurer should be liable as a matter of construction. Consequently, the obiter definition given by Lord Diplock becomes a landmark precedent in law of marine insurance. However, the relationship between the ordinary course of voyage and the cargo's inherent unfitness has remained unclear.

Regardless, this definition was adopted and reaffirmed in a later case, *Noten v Harding*.³⁰⁵ Four shipments of leather gloves were made and insured on the terms of the Institute Cargo Clauses (all risks) with an excluded peril of inherent vice. In each shipment on arrival, the gloves were found on overturn wet, stained, mouldy and discoloured. Both the first trial and the appeal found that the gloves were damaged by excessive moisture contained inside of them. However, the judge at first instance paid more attention to the process of condemnation and attributed the damage to the dropping of water from container roofs as an external source. Therefore, the Judge found in favour of the assured by considering that despite the fact that the cargo's characteristics have assisted in producing the final damage, the situation in question still failed to meet with Lord Diplock's definition in *Soya v White*. In contrast, the Court of Appeal recognised that it was inconsistent with the common sense of business or seafaring man to think the moisture was from an external source. Per Bingham LJ., the distinction between the intermediate migration of moisture to and condensation of

³⁰⁴ [1982] 1 Lloyd's Rep. 136

³⁰⁵ *TM Noten BV v Harding* [1990] 2 Lloyd's Rep. 283

moisture on the roofs of the containers was suggested owing more to the subtlety of the legal mind than to the common sense of the mercantile.

Noten v Harding has changed the older judicial attitudes towards inherent vice to some extent. For instance in *Whiting v New Zealand Insurance Co Ltd*³⁰⁶, it was used to reject the insurer's contention of inherent vice on the ground that

There were too many sound shipments not only in that autumn but over a large period of time, 20 years and more, in which these hats have been good, to admit of the conclusion that it was something wrong with the manufacture or something inherent in the goods themselves. The occurrence of mould is a matter of extreme rareness. It is a rare exception to the rule of soundness.

It has been clearly indicated in *Noten v Harding* that fortuitous accidents cannot be certainly inferred from the fact that only a minority of a numerous consignments in comparable conditions suffered such damage. Moreover, *Noten v Harding* has reaffirmed the standpoint in Arnould's and *Soya v White* that inherent vice may cause loss or damage without being inevitable. This conclusion has directly rebutted the formulation established in *The Gaunt* and the cases following it, which sought for a certainty to prove the causal effect of inherent vice. However, this decision mainly concerned the matter whether the moisture was internal or external, but still addressed nothing in respect of unfitness to withstand the ordinary journey.

In addition to Lord Diplock's formulation, Donaldson LJ's statement in the Court of Appeal judgment of *Soya v White* was considered and followed by Moore-Bick J in *The Mayban*.³⁰⁷ A large electrical transformer was shipped on board at Ellesmere Port to Rotterdam; on its transit at Rotterdam to Malaysia, it was transferred to a container vessel. When it arrived at the discharging port, it was discovered that the transformer was seriously damaged and required repairs at an expense of more than £1 million. A project policy had been taken out containing a clause that the underwriter would not be liable for the loss proximately caused by inherent vice and also incorporated the Institute Cargo Clauses (A) (1982) with the same clause as well. The assured and insurer had opposing views on whether the loss was proximately caused by unusual events in the voyage or by inherent vice. As held by Moore-Bick J, it can be assumed that if "the conditions encountered by the vessel no more severe than could reasonably have been expected, the conclusion had to be that the real cause of the loss was the inherent inability of the goods to withstand the ordinary incidents of the voyage".

³⁰⁶ [1932] 44 LI LR 179

³⁰⁷ *Supra* 100

This approach went too far in the sense of finding a wider scope of inherent vice. In the first place, the judge erred in holding that if the conditions are not exceptional to an unpredictable extent, there is no peril at sea. Since there are various forms of peril at sea which are hardly able to be enumerated in an exhausting manner such as the “maritime perils” defined under s 3(2)(c) in the 1906 Act,³⁰⁸ inherent vice and perils of sea can hardly constitute a “one or the other” situation in the absence of a test of causation. It is evident and doubtless that perils of sea in extreme forms, such as storms and collisions, will assume the position of proximate cause as they fundamentally change the ordinary condition requisite to the effect of inherent vice. However, as a matter of fact, some forms of perils of sea which are less unusual and exceptional still exist and affect a voyage. Under such circumstances, it is crucial yet perplexing to distinguish whether the voyage is in an ordinary course beyond the coverage or in fact an occasion of perils of sea.

Furthermore, it is wrong to presume that in the absence of “perils of sea”, the proximate cause must be inherent vice, as this misses the requirement of an independent causal link of “sufficiency” between inherent vice and the loss. It should be noted that “ordinary course of voyage”, as part of Lord Diplock’s definition, is merely a necessary element of inherent vice. It does not imply that it would be a case of inherent vice as long as the voyage appears ordinary and normal even without relevant and sufficient proof. In essence, it is a matter of burden of proof. It should be correct to say that the insurer will not be liable on the grounds that the assured fails to undertake the primary burden to prove that the loss is proximately caused by an insured peril in spite of not specifying and proving an exact form of cause. However, it seems erroneous to say that as the assured fails to prove the loss is caused by perils of sea, the proximate cause is inherent vice naturally. It can be observed that the judgment was also based upon one presumption that inherent vice and perils of sea are two sides of coin, which means if the peril at sea is not satisfied with the test of causation, and then it must be the other one, i.e. inherent vice.

In one word, the *Mayban* test has wrongly widened the scope of inherent vice by excluding the opposite contribution of perils of sea by applying an incorrect rule for recognising perils at sea. Consequently, the requirement of an unexpected element on perils of sea, which has been overruled by the Supreme Court decision of *The Cendor Mopu*, is no longer good law, nonetheless, the view that inherent vice and perils of sea are opposite as two sides of a coin was sustained in the same case.

In *The Cendor Mopu*, the legs of the insured Oil rigs which were insured under a voyage policy incorporating the Institute Cargo Clauses (A) broke off due to fatigue cracking on a barge. The first instance Judge considered it to be a case of inherent vice which was considerably affected by the decision of *The Mayban*; while the Court of Appeal disapproved

³⁰⁸ *O’Kane v Jones (The Martin P)* [2003] EWHC 3470 (Comm); [2004] 1 Lloyd’s Rep. 389

of this decision and held that the proximate cause was perils of sea, and therefore the insurer was liable. The Supreme Court sustained the judgment of the Court of Appeal and undertook a detailed comparison between inherent vice and perils of sea in the area of marine cargo insurance. It has given a most thorough analysis so far on the term “inherent vice” in the process of identifying the proximate cause of loss.

Two points should be emphasised in the Supreme Court’s decision of *The Cendor Mopu* in respect of the meaning of inherent vice. Per Lord Clarke, the proposition maintained by Donaldson LJ should not be deemed as an inconsistent definition from Lord Diplock’s, as he had no intention to provide a definition at all.³⁰⁹ Therefore, when looking into the meaning of inherent vice, Lord Diplock’s formulation should be the sole authority without more. It has been reaffirmed that inherent vice is not identical to the cargo’s unfitness. The other point is that inherent vice can be the proximate cause only if the loss or damage is solely and entirely caused by it. The scope of inherent vice has been confined and narrowed down again, however, compared with the era of *The Gaunt*, the loss by inherent vice is not a certainty but must be purely internally caused.

In light of the absence of a definition provided in the 1906 Act, Lord Diplock’s definition has been considered and followed by several influential cases. The submission of the underwriter in *The Cendor Mopu* stated that it is a well-known danger to treat judicial dictum, in this case the definition provided by Lord Diplock in case law, as if a statutory definition, therefore, a possibility of an intermediate situation may be neglected by solely applying this definition.³¹⁰ Nonetheless, the judicial effect of this definition remains unaffected. This alleged possibility has been rejected by the Supreme Court by comparing and interpreting the definition in question and the statutory definition of “perils of sea” on the basis of case law and the 1906 Act. Hence, this definition can be recognised to be good authority in identifying the case of inherent vice in marine insurance cases.

4.1.2 Illustrations of Inherent vice

Inherent vice does not only refer to the natural deterioration of the defective goods themselves as exemplified by above cited cases (such as decay, heating, rotten and internal combustion), but also include inadequate or bad packaging of cargo. For example, in *Gee & Garnham, Ltd v Whittall*,³¹¹ the assured bought and insured a large quantity of aluminium kettles which were carried in numerous consignments from Hamburg to the United Kingdom. The policies covered against all risks except for inherent vice. A proportion of the kettles were found dented and/or water-stained at discharging port. The insurers rejected liability

³⁰⁹ *Supra* 7, p 585

³¹⁰ *Ibid* p 570

³¹¹ [1955] 2 Lloyd’s Rep. 562; see also *F.W. Berk & Co., Ltd. v Style* [1955] 2 Lloyd’s Rep. 382, which is concerned with a faulty packing requiring re-bagging for the operation of discharge.

for damage owing to inherent vice in the form of inadequate method of packing. The court approved the submission of the underwriters in respect of inherent vice on the basis of a handful of scientific evidence, demonstrating the defective method of packaging and excluding bad weathers, moving of cargo and other external causes. The judge reasoned that “inadequate packing, *of course*, brings the case under the plea of inherent vice in the goods.” [Emphasis added]

By the same token, the American Maritime Cases included a case report concerning inherent vice, which was decided by the court of South Africa.³¹² In the absence of South African authority relating directly to the issues in the claim, the Judge made the decision based upon numerous English cases of persuasive authority. The assured purchased a second-hand printing machine and insured it against all risks with an exception of inherent vice. The machine was transported and shipped from Norway to South Africa. On arrival it was found that it was unpacked and extensively damaged. It turned out the proximate cause of the damage was “the movement of various parts of the machine in the containers and crate occasioned by reason of defective packing”. In answering the question whether defective package is within the meaning of inherent vice, the Judge agreed with the view of Donaldson, L.J. in *Soya v White*:

... I also disagree with their view that to regard the unfitness of the packing of goods as constituting inherent vice is an unjustifiable extension of the concept. The subject-matter of the insurance includes the materials in which the goods are packed. A bagged cargo is wholly different from a bulk cargo, and it would be absurd to contend that where a bagged cargo ends the voyage as a bulk cargo, the subject-matter insured has suffered no loss.

Consequently, the Judge declared that defective packing of the machine amounted to inherent vice, upon which the underwriters were not liable. Therefore, from the English judicial view in the marine insurance law, the concept of inherent vice also embraces the inadequate or defective package of the goods insured. Nonetheless, it should be noted that the Institute Cargo Clauses (A) both 1982 and 2009 versions separate the defence of insufficient packing from inherent vice in Clause 4.3 and 4.4 respectively. It indicates to the Courts that they should be treated separately and therefore that insurers could not avail themselves of inherent vice to avoid a claim where any insufficiency of packing lay outside the scope of Clause 4.3.³¹³

³¹² *Blackshaws (PTY) Ltd. v. Constantia Ins. Co., Ltd.* 1984 A.M.C. 637 Sup, 1982

³¹³ Clause 4.3 of the Institute Cargo Clauses (A, B and C) reads:

In no case shall this insurance cover loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject matter insured ...

Moreover, compared with insufficient packing or coverage of goods, it may go further to the extent that the condition and method to carry the cargo, for instance, containerization, on-deck and refrigeration, may not be as seriously defective as unseaworthiness (uncargoworthiness) which constitutes an implied warranty under cargo policies in accordance with s 40(2) in the Act, but is remarkably inappropriate so as to facilitate the effect of its natural defects. Often, the underwriters may allege it is the manner of transportation that leads proximately to the result of loss or damage for which they should not be liable, as it is suggested that

What the underwriter in a policy of this sort insures against is the physical happening. He is not insuring against the risk of a shipper miscalculating the degree of safety which he should exact in the goods, or the degree of their adaptability to the adventure on which he is embarking them, still less would he be insuring the shipper against a conscious shipment of goods which were unfit.³¹⁴

From the perspective of construction of intention of underwriters, there may be a sound reason for explaining their unwillingness to cover certain types of incidents or risks. So far as causation is concerned, the underwriters are required to identify an uninsured or excepted peril and establish its proximate causal link to the loss in order to discharge their indemnity liability. Thus, in the case of the inappropriate methods of transport of certain types of cargo, the prevailing view of English courts seems to recognise the peril as inherent vice unless there is intervention of fortuitous external causes such as perils of sea, and without reference to the assured's fault or negligence. It is worth mentioning in particular that Donaldson LJ in the Court of Appeal of *Soya v White* distinguished the condition in which the cargo has been carried as an external cause from inherent vice. This conclusion was not affirmed when the case came to the House of Lords. In contrast, the case was eventually considered as a leading authority of the loss caused by inherent vice. The current position in the law of marine insurance in respect of an improper choice of manner of transport is not regarded as a prevailing external cause over the efficiency of inherent vice. This view leads to a result which is essentially in line with the underwriters' intention not to insure against the loss purely arising from what the cargo is in essence.

4.1.3 Uninsured Peril or Excluded Peril or Something Else?

Sub-section (2) of s 55 of the Marine Insurance Act 1906, which is entitled as "excluded losses", includes inherent vice. Chalmers' states that s 55(2) embodies the deductions of the general rule established in sub-section (1).³¹⁵ It has been followed and contemplated in *Soya v White* that the sub-section, which is introduced by "in particular", aims to set out examples

³¹⁴ *CT Bowring & Co Ltd v Amsterdam London Insurance Co Ltd* (1930) 36 L. L. Rep. 309

³¹⁵ Sir Chalmers, M.D., *Chalmers' Marine Insurance Act 1906* (9th edn, Butterworths, 1983) 78

of the application of the sub-section (1) which is the general rule for ascertaining the underwriter's liability. The aim is to clarify the scope of cover rather than import exclusions. That is to say, the risks itemised in sub-section (2) are uninsured circumstances under for which the underwriter is not liable, provided that the risk is determined to be the proximate cause. However, a particular rule of construction was laid out by virtue of the clause "unless the policy otherwise provides", which leaves room to alter the scope of coverage. According to Lord Diplock in this regard, "The question whether particular kinds of inherent vice are covered is simply one of construction of the policy concerned."³¹⁶ Therefore, pursuant to this provision, inherent vice is not an insured peril but subject to otherwise agreement.

The same position can be found in the jurisdiction of Australia. In *HIH Casualty and General Insurance Limited v Waterwell Shipping Inc and Anor*,³¹⁷ a fishing vessel sank at berth in Kenya as a consequence of incursion of sea water during the operation of fumigation. It turned out that the starboard sea water suction valves were left open due to the negligence of the master and his crew and the wall of strainer box failed to prevent the sea water due to corrosion. The assureds claimed for a constructive total loss, which had been approved by the initial trial judge on the ground that the loss was proximately caused by an insured peril, namely, the master and the crew's negligence. However, the underwriter appealed by alleging that he was not liable as the proximate cause of the sink was wear and tear which is excluded pursuant to s 61(2) of the Marine Insurance Act 1909,³¹⁸ alternatively, wear and tear and negligence. The Supreme Court of New South Wales excluded the situation of competing/concurrent causes in this case and affirmed that the proximate cause was the insured peril of negligence. Therefore, the Court dismissed the appeal.

With the construction of s 61, the Court emphasised in particular that those itemised risks are not excluded perils but uninsured ones, which is in line with the prevailing opinion in English courts:

Section 61(1) describes the ambit of the insurer's liability by reference to a particular loss, namely one "proximately caused by a peril insured" and goes on to describe a loss for which the insurer is not liable, namely one "which is not proximately caused by a peril insured against". One limb is the converse of the other; neither intrudes upon the other.

Section 61(2) begins with the words "In particular". Those words suggest that what follows in subs (2) does not add to or detract from the ambit of the insurer's liability described in subs (1). Rather, it exemplifies losses for which,

³¹⁶ *Supra* 230, p 126

³¹⁷ [1998] NSWSC 436

³¹⁸ S 61 under Australian Marine insurance Act 1909 is completely identical to s 55 of the English Marine Insurance Act 1906, which is in respect of the doctrine of proximity and insured and excluded losses.

in accordance with subs (1), the insurer is or is not liable. Paragraphs (a) and (b) speak of liability for loss. Paragraph (c) speaks also of liability "for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured."

The court held that the expression in Sub-section 2 including inherent vice and wear and tear *not only* includes the loss in itself, in this case the loss due to wear and tear, *but also* extends to the loss caused by those perils. Therefore, an underwriter is not liable for the loss proximately arising therefrom "unless the policy otherwise provides".

An interesting question is how to interpret the word "otherwise" in this provision. Evidently, if the clause expressly states that inherent vice is within coverage, notwithstanding subject to a restrictive construction on such terms,³¹⁹ the underwriter will be liable for the losses proximately caused by inherent vice in this regard. For instance, the "latent defect" afforded by the Inchmaree Clause is such an agreement to cover loss caused by inherent vice³²⁰. Similarly, an insurance against loss by "heating or sweating" may be sufficient to displace the "inherent vice" exception.³²¹ However, besides insured perils and uninsured perils, there is also a third type of excluded perils in marine insurance. In the event that inherent vice is listed under "exclusions" in the policy, such as Institute Cargo Clauses, does the provision mean to clarify the liability scope of the insurers in an "otherwise" manner? In other words, does this clause have the effect of altering the insurer's liability of indemnity by the expression of "exclusions" relying on the condition that the policy "otherwise" indicates?

Before answering this critical question, it is worth reiterating the distinction between uninsured perils and excluded perils and emphasizing the legal significance of such distinction. The loss proximately arising solely from a peril of either category will not be recoverable by the insurers, while under the circumstances of concurrent causes, the rules and legal consequences are different as discussed in the Chapter 2. The insurer will be liable if the loss is concurrently caused by an insured peril and an uninsured peril. In contrast, the insurer will not liable in the situation of a concurrency of an insured peril and an excluded peril. It is not rare in practice that the counsel's submissions on both sides may address a situation of concurrent causes in respect of inherent vice or wear and tear. Accordingly, it is important to identify the effect of such a clause in order to ascertain the insurer's liability when the concurrent causality issue has been raised. Although it may be unnecessary to distinguish whether inherent vice is uninsured or excluded peril in the context of marine insurance law, as it has been ascertained by the Supreme Court that it cannot be one of the concurrent proximate causes, this question is concerned with the legal nature of all the risks listed under s 55(2) as a matter of interpretation of the statute. Therefore, it is still of

³¹⁹ *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546, 560

³²⁰ *The Caribbean Sea* [1980] 1 Lloyd's Rep 338, 347

³²¹ *Supra* 291

significant importance to identify the legal nature of these perils and to find out the proper construction of s 55(2) by taking inherent vice as an example.

Returning to the question proposed above, if inherent vice, etc. are listed as exclusions in the policy, on the grounds of the general rules which take account of the legal connotation, *viz.*, intention of parties and commercial sense and the purpose of the policy to construe the contract terms, there is no doubt that the word “exclusion” articulates the insurer does not insure against those perils and, in the literal manner, the risks should be excluded as they are entitled. However, in the current judicial view, the effect of such a clause is no more than a provision of uninsured perils, which means “exclusion” is not an otherwise agreement. It has been clarified in the judgment of *The Cendor Mopu* by the Supreme Court: Lord Clarke considered that the exclusion of inherent vice by s 55(2)(c) was not exclusion at all. It is merely an amplification of the proximate cause rule and thus is an example of a circumstance of a loss not proximately caused by a peril insured against. Also, Lord Mance added that the exclusion of inherent vice in the contract ought not to alter its status as merely an uninsured peril under section 55(2)(c) of the 1906 Act.

Therefore, it seems that, taking Institute Cargo Clauses (B) as an example, inherent vice is equivalent to the unmentioned risks in the “Risks Covered” Clause, even though it is listed in the Exclusions. Even though the Institute Cargo Clause (A) 2009 has replaced the wording “except as *provided* in Clauses 4, 5 6 and 7 below” used in 1982 version with “except as *excluded* by the provisions of Clauses 4, 5 6 and 7 below” in the risk clause in order to give a clearer indication that the clauses referred to are exclusions, it may still be faced with the same obstacle in attempting to make inherent vice as an exclusion on account of *The Cendor Mopu*. As a result, if an underwriter genuinely intends to escape from such risks under this provision, an exclusion clause may be not sufficient and requires more explicit emphasis. Alternatively, he may resort to warranty clauses in order to avoid the legal effect of inherent vice as uninsured peril or avoid alleging a case of concurrent causes in terms of causation.

4.2 Insurability of Inherent Vice

Inherent vice has been historically mismatched with the events of certainty when it comes to the identification of the proximate cause. It is even suggested that the provision in the 1906 Act also in general reflects the position under American law and all the “amplifications” therein losses which are inevitable and not fortuitous in nature.³²²

³²² Buglass, Leslie J, *Marine Insurance and General Average in the United States* (2nd edn., Cornell Maritime Press, 1981) p 81, 85

However, an analogy can be drawn between inherent vice of ordinary goods and the risk insured against under a life insurance policy from these cases. Under life insurance, it is without any doubt that the assured will be sick and pass away ultimately; however, the timing of death and the external impact on the consequence of death are uncertain and fortuitous. Similarly, nature determines that a cargo will be inevitably deteriorated or consumed, the timing and triggering of inherent vice is unlikely to be accurately measured and under control. In this regard, although the insurance market rarely covers inherent vice of the goods, however, the insurability of inherent vice as a cause of loss should not be challenged or denied upon any ground, notably, lack of fortuity or pre-existence before the cover commences.

4.2.1 Inherent vice and Fortuity

Fortuity is one of the classic characteristics of a valid and effective marine insurance contract. It has been long held that the creation of insurance "is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case where the loss or injury must inevitably take place in the ordinary course of things."³²³ The purpose has been reflected by the definition provided in s 1 of the 1906 Act.³²⁴ The requirement of fortuity has been addressed in a leading life insurance case, stating that "the event should be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen."³²⁵

It has been suggested that in insurance contract law, fortuity is a variable concept that addresses questions of both the likelihood of consequence of loss and the cause of loss.³²⁶ As a result, fortuity may be challenged in either aspect. This proposition has been affirmed in the case of *CA Blackwell (Contracts) Ltd v Gerling Allegemeine Versicherungs AG*³²⁷ in which the concept of fortuity was recently revisited. The insured contractor claimed for damage to road construction works caused by heavy rainfall. The insurer argued that he was not liable because the losses claimed were inevitable and the loss was owing to the assured's wilful misconduct and the defective condition of the property arising from such wilful misconduct was excluded from the cover. Although the *Blackwell* case was on appeal, the Court of Appeal did not overrule the judgment in respect of fortuity but only construed the exclusion term in dispute. The case affirms that, for a loss to be recoverable under an all

³²³ *Paterson v Harris* (1861) 1 B & S 336, page 353, per Cockburn CJ

³²⁴ **1. Marine insurance defined**

A contract of marine insurance is a contract whereby the insurer under takes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, *the losses incident to marine adventure*

³²⁵ *Prudential Insurance Company v Commissioners of Inland Revenue* [1904] 2 K.B. 658, 669

³²⁶ *Supra* 236

³²⁷ [2007] Lloyd's Rep IR 511; [2008] Lloyd's Rep IR 529

risks policy, the following factors should be present in terms of fortuity: i) that loss or damage should be accidental; and ii) the accident must be fortuitous and unexpected. Marine insurance is not unique in this regard so that fortuity is a fundamental principle and the issue of fortuity/ certainty should be addressed from both aspects of causes and consequences.

It used to be the mainstream view of English courts that inherent vice was certainty, which were not within the scope of the underwriter's undertake. For example, in *The Gaunt*,³²⁸ Lord Sumner iterated, which is worth quoting in length again, that:

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

Even in a recent Australian case in respect of an industrial special risks insurance policy, the Supreme Court of Victoria has relied upon these lines and recognised that the concept of risk is indicated in contradistinction to inherent vice and wear and tear.³²⁹

According to Arnould's, although several cases have been suggested that the underwriters were not liable for certainty in the form of inherent vice, no case has been in fact decided on this ground.³³⁰ It is difficult or even unpractical to determine whether some event is bound to happen in all senses of the word. In the context of marine insurance, the purpose behind the underwriters' attempts to equate inherent vice with inevitable events is to prevent them from being liable for the loss to an extreme degree. Nevertheless, the confusion does not overdue the modern awareness that inherent vice is a *peril* in insurance and losses caused by inherent vice in a designated voyage at sea are not inevitable losses.³³¹

Before illustrating and rationalizing the differentiation between the two concepts in the legal sense, it has to be clarified whether there is an overlap between inherent vice and inevitable occurrences as a matter of fact. If the answer is affirmative, it may be sound and reasonable to test inevitability in order to affirm the proximate efficiency of inherent vice in terms of causation. Otherwise, it seems appropriate to define inherent vice as a peril in the insurance mechanism. Therefore, not only is this question the origin of the confusion but also

³²⁸ *Supra* 218

³²⁹ *Supra* 276, *JSM Management Pty Ltd v QBE Insurance (Australia) Ltd* [2011] VSC 339. The legal term "tear and wear" has been deeply discussed in this case.

³³⁰ *Supra* 13, p 941. E.g. *The Xantho* (1887) 12 App.Cas. 503; *E.D. Sassoon & CO., LTD. v Yorkshire Insurance Company* [1923] 16 Ll.L.Rep.129, etc.

³³¹ *Supra* 82, p 20518

considerably affects the legal rules in respect to inherent vice. Reviewing a few landmark decisions³³² concerning inherent vice, a factual model can be inferred that there is normally a technical indicator involved which plays a key role in determining the proximate cause in calculating the possibility of the occurrence of the damage or loss. If the data of the indicator is below a certain standard, it will be suggested by the experts that the goods are safe for transport in the ordinary course. In these cases, the quality of the goods is at or above an average standard, which is in line with the underwriter's expectation in selecting the cargo insured. It normally means no certain internal defect creates the risk of deterioration without external intervention. Therefore, technically, this should not be case concerning inherent vice. In contrast, if the indicator shows otherwise, a (extreme) high probability may be inferred relying upon such observations, which means the goods are already in a defective or even damaged order. Based upon common sense, the scientific high probability may be recognised as a certain event.³³³ Prof Malcolm Clarke in his book, "The Law of Insurance Contracts", indicated that the loss due to inherent vice is always going to happen, sooner or later, during the period of cover in a particular case. Prof Clarke is perfectly correct to say that fortuity should be examined in a particular case rather than the carriage of a kind. However, the loss to which he referred belongs to this kind of event. Furthermore, besides the two situations, the data may fall into a grey area which is at the border of the standard. Under such circumstances, legal disputes regarding whether the loss is fortuitous or inevitable arise and directly increase the difficulty in making decisions about the proximate cause.

Although Arnould's indicates that there is an overlap in some cases, it may be better to confine such a possibility to facts and technical abstracts rather than expand it to a legal concept. On the one hand, Lord Diplock's definition has emphasised that inherent vice is "a risk of deterioration" owing to the natural characteristics. Risk and certainty have no overlap whatsoever like two sides of a coin. When it is defined as a risk, it is reasonably excluded from certainty. On the other hand, where the vice is beyond the standard level, a vice or damage may be irreversible and evident to the extent of certainty before the commencement of the policy. Given that the policy agrees to cover the loss arising from inherent vice as an insured peril by virtue of express terms, the insurer is still not liable on the ground of doctrine of fortuity. In light of the above analysis, it seems more accurate and convenient to remove the possibility of an overlap between inherent vice and inevitable occurrences which relieve the insurers of liability on either ground, at least in respect of indemnity insurance.

³³² *E.D. Sassoon & CO., LTD. v Yorkshire Insurance Company; Soya v White; Noten v Harding; The Cendor Mopu, etc.*

³³³ *Supra* 236, p 331

In English case law, it has been held in *Soya v White* that inherent vice is itself a risk and its test has no reference to the inevitability of the consequence of damage or loss. In the initial judgment,³³⁴ it was held that as the loss of deterioration was not inevitable, the underwriters' plea in respect of inherent vice, therefore, failed. This conclusion was not sustained by the Court of Appeal in this regard; on the contrary, the Court reasoned that both parties had to be taken to have regarded inherent vice as a risk under the policies. When the case came to the House of Lords, a more explicit explanation and construction was given to ascertaining the underwriter's liability. It should be stressed that the House of Lords reaffirmed the Court of Appeal's view that inherent vice was a risk rather than an inevitable event based upon a thorough analysis on inherent vice in length. It can be inferred from the decision that the main purpose of mentioning the issue of inevitability was to prove the fundamental requirement of fortuity by taking account of the moisture content of the soya beans. Whether the proximate cause was inherent vice and whether inherent vice was within the underwriter's liability were questions on a deeper level based upon fortuity. Therefore, it is determined that inherent vice is a risk and inevitability is not even part of the definition of inherent vice.

In line with the legal nature of inherent vice in the law of marine insurance, Lord Saville stated in *The Cendor Mopu* that

By inherent vice, insurers do not mean some characteristic of the rig which was bound to lead to the loss of its legs. Inevitability is not the test of inherent vice, just as lack of inevitability is no proof of a fortuitous external accident or casualty.

Likewise, an inevitable loss is by no means the correct test for determining inherent vice as the proximate cause. In contrast, a lower standard of proof on the side of underwriters should be imposed. In an "all risks" cargo policy with an exception for inherent vice, the onus is on the insured to establish that the loss occurred accidentally; once he had done so, the burden of proof was on the insurers to bring themselves within any exception in the policy.³³⁵ It is logical and straightforward to require the underwriters to prove that the loss occurred inevitably in order to challenge assureds' primary burden of proof and deny their liabilities. However, it is an extremely high standard, even more restrictive than the one of criminal law, i.e. beyond reasonable doubt.

Furthermore, with respect to the connection between the doctrine of fortuity and exclusions, it has been suggested that the peril-based regime is one of the reasons to introduce excluded perils into insurance; however, exclusions are not directly affected by this doctrine. This doctrine of fortuity does not and cannot provide a rationale for a precise

³³⁴ [1980] 1 Lloyd's Rep. 491

³³⁵ *AXL Resources Ltd v Antares Underwriting Services Ltd* [2010] EWHC 3244 (Comm)

dividing line between insured loss by insured perils and excluded loss by excluded perils.³³⁶ A fortuitous loss caused by accidents does not necessarily and conclusively determine the insurer's liability; it is subject to the insurer's defence in respect of exclusions. Also, being an excluded peril does not imply that this cause itself lacks fortuity, nor does the loss arising therefrom.

Overall, the excessive concern about the purpose of cargo insurance makes the scope of inherent vice narrower³³⁷ and basically confined to the cases which are almost certain to happen. It leads us to misjudge that the losses lack of fortuity as part of inherent vice, which has overlooked its nature being a risk. This decision may be understood as having established a presumption that the situation in a grey area is a case of perils of sea, as it is always subject to some fortuitous external factors, and the *loss* is fortuitous. It should be emphasised again that the final loss of deterioration due to inherent vice in various forms is unavoidable; however, there is no necessary overlap between the *risk* of inherent vice and inevitable events in the context of insurance law. The real distinction is drawn between damage caused by an external fortuity or resulting solely from the internal factors of the insured cargo.³³⁸

In the light of such a judicial attitude, as Lord Mance suggested, insurers may seek alternative resorts such as special provisions or amendments of standard conditions in order not to expose themselves to their unexpected and unaccepted risks.³³⁹ For instance, at the time of placing the policy, the underwriter may require the assured to warrant that the relevant indicator regarding inherent vice should be at a relatively safe point under the grey area. In this case, it would prevent the insurer from insuring low quality goods and choosing an inappropriate method of transport for the purpose of saving freight.

In conclusion, the doctrine of fortuity is the foundation of insurance regime not only in the commercial sense but also a matter of public policy. Inherent vice has been questioned as an event lacking fortuity in the long term. However, a conceptual distinction has to be made in the first place that inherent vice is not a loss itself which cannot be avoided ultimately; instead, it is a peril which may cause certain loss in the context of insurance, not limited to marine insurance. As an uninsured peril provided in the Marine Insurance Act 1906, inherent vice is a risk that the natural characteristics of the goods has the effect of causing damage in the ordinary and general condition, rather than in marine conditions specifically. Accordingly, underwriters do not have to prove a loss to a standard as stringent as inevitability in order to establish inherent vice as the proximate cause. In one word, there is a hierarchy in the legal sense that the doctrine of fortuity is fundamental, while where a loss

³³⁶ *Supra* 299

³³⁷ *Supra* 235

³³⁸ *Supra* 7, per Lord Clarke, p 585

³³⁹ *Ibid* p 577

is proximately caused by inherent vice, it is pursuant to the statutory provision and policy terms upon that statute, which shares the common legal ground with insured perils and other uninsured perils.³⁴⁰

4.2.2 Inherent Vice and the Risks that Attach before the Policy Effects

Every insurance policy has a point at which the coverage begins to insure against the agreed risks, no matter whether it is a voyage policy or a time policy or cargo policy.³⁴¹ A well-known principle is that an insurer will not be liable when a peril occurs before commencement of the policy and the loss occurs during that period of the policy.³⁴² A policy aims to limit its coverage to certain events taking place during an agreed period of time. The conventional construction of this requirement is that the peril must occur during the insurance period even though it may occur without anyone's knowledge.³⁴³ For example, although underwriters normally are concerned with whether the loss occurs within the cover period, a policy may contain a clause stating that in addition to or instead of the loss having to be suffered within the period of the policy, the cause must have occurred within the policy period.³⁴⁴

This is in essence an issue of attachment of risk and duration of cover. The effect is not only to exclude the loss suffered before the date at which the element of risk is assessed, but also to exclude the loss directly caused thereby at that date, though it has not actually occurred yet.³⁴⁵ However, given that inherent vice is recognised as a risk in insurance, inherent as it is, unlike most of the perils, it is a risk that attaches before the policy commences to be effective and continuously endangers the goods thereafter at sea. It is probably one of the reasons that contribute to the mistaken understanding that the peril of inherent vice is an event of certainty. Indeed, the underwriters do not favour a pre-existing risk as it significantly increases the risk of loss and liability.

It is worth mentioning here that Insurance Contracts Act 1984 of Australia, s 46³⁴⁶ has provided a rule on pre-existing defect. This Act covers the field of insurance generally but

³⁴⁰ *Supra* 39, p 352

³⁴¹ Under cargo insurance, the duration of cover is named as "transit clause" under the Institute Clauses. See Clause 8 in the Institute Cargo Clauses (A), (B) and (C) respectively.

³⁴² *Supra* 207, para. 10.38

³⁴³ *Supra* 12, p 568

³⁴⁴ *Supra* 78, Chapter 7.9. See *Nicholas Christopher Kelly v. Norwich Union Fire Insurance Society Ltd.* [1989] 2 Lloyd's Rep. 333

³⁴⁵ *Supra* 12, p 494

³⁴⁶ **Pre-existing defect or imperfection**

(1) This section applies where a claim under a contract of insurance (other than a contract of insurance that is included in a class of contracts declared by the regulations to be a class of contracts in relation to which this section does not apply) is made in respect of a loss that occurred as a result, in whole or in part, of a defect or imperfection in a thing.

(2) Where, at the time when the contract was entered into, the insured was not aware of, and a reasonable person in the circumstances could not be expected to have been aware of, the

does not apply to marine insurance, such that the Marine Insurance Act 1909 continues to operate in that field, which is essentially modelled on the English Marine Insurance Act 1906.³⁴⁷ Regardless, the provision referred has no parallel in English law and lays down the principle that an insurer may not rely upon exclusion for loss caused by a hidden defect which existed before the policy was entered into and of which the assured was not, and a reasonable person in his position would not have been aware.³⁴⁸ This provision pays considerable attention to the assured's awareness of the risks, which is somewhat similar to considerations as to the "lost or not lost" clause³⁴⁹ contained in the old SG form under English law. It seems that an uninsured occurrence became an acceptable insured risk to the insurers, provided that the assured lacks of knowledge. Nevertheless, in respect to the reliance on hidden defect or inherent vice, the fact that the assured is unknown about their existence is still not sound legal grounds on which deprive the insurer of such defence in the context of marine insurance law under both jurisdictions.

Although inherent vice is an evident risk attaching to the subject-matter insured before the commencement of the cover normally, it simply rationalizes why the underwriters intend to exclude such a peril based upon the consideration of the high likelihood of occurring a loss. Regardless, the attachment of inherent vice as a peril seems to be generally a question of agreement. Lack of insurability cannot prevent the parties from agreeing on insuring against inherent vice, either on the ground of fortuity or time of attachment

4.3 Inherent Vice as the Proximate Cause

Although it should doubtlessly comply with its legal definition when sustaining a case proximately caused by inherent vice, inherent vice is not self-evident in terms of causation issue. It has been discussed above that the test of certainty is by no means the test of inherent vice. Whereas, it has been suggested that the real question is whether the loss was the result of external forces or whether it was caused by the nature of the subject matter.³⁵⁰

defect or imperfection, the insurer may not rely on a provision included in the contract that has the effect of limiting or excluding the insurer's liability under the contract by reference to the condition, at a time before the contract was entered into, of the thing.

³⁴⁷ Rob Merkin, "Reforming Insurance Law: Is there a Case for Reverse Transportation?" <http://www.justice.gov.uk/lawcommission/areas/insurance-contract-law.htm> (last time access 03/11/11) The Author undertook this legal and practical analysis for the reference of insurance contract law reform to The Law Commission and Scottish Law Commission.

³⁴⁸ Rob Merkin, "Australia: Still a Nation of Chalmers?" (2011) 30(2) UQLJ 189. This paper is based upon the author's Richard Cooper Memorial Lecture, sponsored by the University of Queensland and delivered at the Federal Court of Brisbane on 13 October 2011.

³⁴⁹ The Marine Insurance Act 1906- Rules For Construction Of Policy

1. Where the subject-matter is insured 'lost or not lost', and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not.

³⁵⁰ *Supra* 173, p 78

This question is always concerning incompatibility and joint contribution of inherent vice and other risks.

The term “perils of sea” is the typical kind of insured risks in marine insurance covers. Compared with inherent vice, there is no doubt that perils at sea are fortuitous external causes if any loss or damage arises due to them. Until recently, the issue concerning whether inherent vice and perils of sea can constitute concurrent causes has been increasingly heated. In retrospect of English cases, one cannot absolutely say that there could be no possibility that inherent vice and perils of sea concurrently and proximately cause losses or damage until *The Cendor Mopu* in 2011 provided a conclusive authority for objecting this possibility in the legal sense.

At an early stage after the enactment of the 1906 Act, as revealed by *Bird's Cigarette Manufacturing Co Ltd v Rouse*,³⁵¹ English courts did not have much difficulty at least in recognising the interaction between inherent vice and perils of sea as co-causal factors to the loss. In this case, the assured claimant took out several marine insurance policies and a warehouse policy after the expiration of those marine policies. Some of the cigarettes were found being soaking wet by salt water and part of the cigarettes suffered mildew after the goods were stored in warehouse for a period of time. In terms of mildew, which was covered against under the warehouse policy, the underwriter alleged that the damage was caused before the duration of his policy and it was due to inherent vice if any damage accrued. In determining the proximate cause of mildew was by the excessive moisture in the cigarettes, Bailhache J accepted that the goods were damaged by both internal and external causes and rendered that “there is no doubt that the sea water damage accelerate the destruction of these cigarettes as well as caused the destruction of the cigarettes which contained less than there proportion of water”. In consequence, it was held that due to the time of damage, the warehouse policy was not effected to recover the loss without reference to the defence of inherent vice. In contrast, all the underwriters under marine insurance contracts were liable for the sea-water damage at a rate of 80% reduced on equitable grounds. It is interesting that Bailhache J granted such an apportionment of loss, not on the ground of concurrent causes, but the insurer succeeded in establishing a portion of loss purely due to its internal cause.³⁵² Therefore, this decision is not an authority of concurrent causality of inherent vice and perils of sea to a loss, nor does it change the rule that no apportionment is permitted in the case of concurrent proximate causes in marine cases. However, the joint contributions in causing a loss has been considered and addressed in this case.

Subsequently, the “sole effect” of inherent vice as a proximate cause in the context of marine insurance is discussed in *CT Bowring & Co Ltd v Amsterdam London Insurance Co*

³⁵¹ [1924] 19 LI L Rep 301

³⁵² *Supra* 134, p 475

*Ltd.*³⁵³ In this case, a series of shipments carrying ground nut kernels from China to various destinations in Europe. All the goods were found damaged in a state of fermentation on delivery in every shipment. The goods were insured by the defendant underwriters under policies of marine insurance covering against "average and/or damage from sweating and/or heating when resulted from external". Based upon scientific evidence on the cause of the damage, Wright J found that the goods, being damp, mouldy and excessively moist, were not fit for the shipping voyage, and therefore, the damage was caused by inherent vice for which the underwriter was not liable, apart from a minor damage proximately caused by sweating due to external factors. Three conditions had enabled the Judge to conclude that the damage arose from the nature of the cargo. First, all the voyages were basically performed in ordinary circumstances except for a short-term strike occurred during the transit of one voyage, which was irrelevant to the cargo fermentation. Secondly, the holds were kept with constant ventilation and there was no other moist cargo in the same holds. Thirdly, substantial scientific evidence showed the crop in question, grown in 1926, was excessively moist than other time due to the extraordinary rainfall in its country of production, China. Also, as the severest part of damage by heating was in the centre of the goods and expanding to the sides, moisture, which is one of the prerequisites of the heating damage, was highly probable from the cargo itself. Accordingly, Wright J found no difficulty finally in holding the heating damage was caused by inherent vice.

It is noteworthy in this case that the Judge found the damage was "solely" and entirely due to the condition in which the goods were shipped apart from the minor part of sweat damage caused by the moisture from external source such as air, even though it was impossible to trace its specific origin. In respect of the loss due to inherent vice, the Judge stated:

Now, that is all very problematical, and even if there were such causes in operation, and effective operation, the degree of their operation would be quite incalculable. I very much doubt whether any such effect is even theoretically possible, because if you have two wet parcels, both heating, both sending out heat and moisture, each would contribute its part to the result, but it is not at all clear to me that you would get in the resultant atmosphere a source of damage to the plaintiffs' parcel beyond what would be caused to it by the effect of its own operations...So far as the question of the extra heating of the hold is concerned, it would be negligible in its effect unless there were sufficient moisture in the plaintiffs' parcel.

It seems that the Judge inferred that as long as the cargo itself contained sufficient moisture, the damage should be attributed to its inherent vice in spite of an incalculable effect of the

³⁵³ *Supra* 314

outside factors. As the scientific evidence narrowed down the focus to the origin of the moisture, the material question was whether inherent vice provided sufficient moisture on its own, notwithstanding the fact that external surroundings might in the meantime provide an equally sufficient condition for triggering the inherent defect to the same type of loss of a certain extent.

The step of excluding the effect of relevant fortuitous external facts is indispensable in the process of proving the proximate efficiency of inherent vice in general. According to the findings in the contract of affreightment, where the carriers seek to discharge his liability, "proof of the existence of the excepted peril or cause may and often will involve disproof of the possibility of the operation of other and unexcepted perils and causes."³⁵⁴ Also, there is no doubt the intervention of fortuitous external accidents has to be excluded as a major requirement in establishing the proximate status of inherent vice in the law of marine insurance. It is noteworthy here that in the process of excluding all the other explanations on the cause of the damage from the scientific view, Wright J mentioned an assumption or hypothesis about whether a concurrent operation of other cargo's moisture would aggravate the heating damage would be considered an external cause. As a matter of fact and scientific theory, the possibility of actual concurrent operations was not within the consideration of the Judge in his final decision. Although this decision provides little authoritative support in respect of concurrent causal contributions between inherent vice and another external cause, a more valuable proposition that may be concluded from the few lines of reasoning, as quoted above, is that inherent vice should at least have sufficiently and efficiently resulted in the loss without greater intervention or assistance from the external factors, if it is impossible to prove inherent vice is absolutely the sole source in fact.

How to distinguish internal factors and external ones has been further clarified and exemplified by the landmark case *Noten v Harding*. It can be concluded from this precedent that the test of inherent vice should not be overly restrictive to the extent beyond common sense. Inherent vice does not necessitate providing all the conditions by the goods itself. Therefore, it has been accepted that some external factors invariably exist in any event; the evaluation on the causal links to the loss should at least be in line with common sense, instead of seeking a situation strictly free from external factors.

In the decision of a non-marine insurance, *Wayne Tank and Pump Co. Ltd. v Employers Liability Assurance Corporation Ltd*,³⁵⁵ where a fire broke out and ruined the property insured, Cairns LJ concluded the loss was proximately due to the nature or the condition of goods and the negligence of the assured's servants concurrently. On the basis of this

³⁵⁴ *Jahn (t/a CF Otto Weber) v Turnbull Scott Shipping Co Ltd (The Flowergate)* [1967] 1 Lloyd's Rep. 1, citing *Albacora SRL v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep. 53

³⁵⁵ *Supra* 4

proposition, *The Miss Jay Jay*,³⁵⁶ albeit a case of a marine hull policy, has introduced a similar precedent into the law of marine insurance. The policy was covering loss or damage "directly caused by external accidental means" and excluding "any part condemned solely in consequence of a latent defect or fault or error in design or construction". The Court of Appeal held that the debility of the vessel, whether referred to as "faulty design and/or construction" or as "unseaworthiness", was one of the concurrent causes in conjunction with perils of sea to the loss of the vessel. It has been widely recognised that latent defect is a form of inherent vice.³⁵⁷ This case has been extensively cited as it has established a rule that where two causes concurrently contributed to the loss, one is insured and the other is not insured, the insurer should be liable. Apart from this rule, this case has explicitly shown that inherent vice and perils of sea could be concurrent causes, which has been questioned by the Supreme Court in *The Cendor Mopu* in this regard.³⁵⁸

A conclusion has been drawn ultimately in *The Cendor Mopu*, per Lord Clarke:

In referring to "any fortuitous accident or casualty", Lord Diplock must I think have had in mind the definition of perils of the seas in schedule 1 to the Act which I have quoted above, namely that it refers "only to fortuitous accidents or casualties of the seas". ... As I see it, by in effect invoking the statutory definition of perils of the seas, he was defining "inherent vice" in opposition to perils of the seas, thereby avoiding any overlap between the insured risk and the excluded risk. Thus where, as here, a proximate cause of the loss was perils of the seas, there was no room for the conclusion that the loss was caused by inherent vice.³⁵⁹

Lord Clarke has focused on the term "any", but rejected the Insurer's emphasis on "intervention". However, "intervention" is still worth mentioning as a key word in the definition, which should not be overlooked. It should fall back to the essential question of the principle of proximity. It is always a battle between the internal and the external causes. Which one is the most efficient cause to the loss? Have the external causal factors taken over the internal ones to be the primary contribution to the loss? Has an alleged intervening cause succeeded in breaking the initial chain of causation? These are the real questions to measure the remoteness of various causal links, rather than to pursue for a mutually immune condition. "Intervention" should not be equated with "existence". So far as causation is concerned, "intervention" should be interpreted to be a more efficient effect in causality which is much more than a mere fact of "existence".

³⁵⁶ *Supra* 48

³⁵⁷ Chris Zavos, 'The International Hull Clauses 2003' in D. Rhidian Thomas (ed), *Marine Insurance: The Law in Transition* (Informa 2006)

³⁵⁸ *Supra* 12, p 576

³⁵⁹ *Ibid* p 583

In line with the principle of proximity in Chapter 1, “the intervention of any fortuitous external accidents or casualty” should terminate the efficiency chain in respect of inherent vice and replace it as the proximate cause. Since inherent vice is a complete and relatively independent process of natural internal change, it is natural that a single effect of a fortuitous external accident will directly exert a substantial influence on the inner activities and final consequences. It should be noted that this standpoint is strikingly different from the early cases when the internal causes were more often blamed and the insurers were more often protected. Therefore, nowadays, it is more logical to assume that the new external event will efficiently affect and change the loss or damage. Also, Lord Clarke is accurate to perceive that there is no room for both perils to be concurrent proximate causes in the legal sense by virtue of a comparison of the statutory definition of perils of sea and Lord Diplock’s definition of inherent vice.

Despite the recognition of the English courts in *The Cendor Mopu* in this respect at present, it is unsatisfactory that Popplewell J recently justified such elimination of the room of concurrency as being a lack of fortuity in the case of inherent vice and the fortuity of an external cause in *European Group v Chartis*.³⁶⁰ It is noteworthy that it is not the fortuitous element that makes the two causes impossible to be equally efficient in causation terms. Rather, the doctrine of proximity determines internal causes can only be proximate when they independently result in the loss. Concern should be paid to whether there is external cause and whether the external cause is fortuitous.

Being typical internal causes as well, in light of the discussion on inherent vice as an example, the other risks named in s 55(2)(c) seem to be unable to prevail over the efficiency of perils of sea in causing the eventual loss by the same token. Lord Mance has suggested that ordinary wear and tear, ordinary leakage and breakage and the nature of goods would also be not covered provided without any fortuitous external accident or casualty. In particular with ordinary wear and tear, it is noteworthy that in *JSM v QBE*,³⁶¹ the Australian case mentioned above, has affirmed that:

...the words ‘wear and tear’ mean simply and solely that ordinary and natural deterioration or abrasion which an object experiences by its expected contacts between its component parts and outside objects during the period of its natural life expectancy.

This definition is of great similarity with Lord Diplock’s definition of inherent vice, both of which have stressed their sole internal efficiency to the change of the subject-matter insured respectively. Under the law of marine insurance, it seems that inherent vice and other

³⁶⁰ [2012] EWHC 1245 (QB)

³⁶¹ *Supra* 276

internal causes provided cannot be concurrent causes along with perils of sea for the purpose to ascertain insurers' liability of indemnity.

As cited above, in one of the earliest editions of Arnould's, it has already been indicated that the risk of inherent vice should be entirely attributed to.³⁶² In its phrase, damage owing to inherent vice should be solely from the nature of the thing itself, which means inherent vice cannot be concurrent with any other external perils under marine cargo and hull policies. However, Lord Clarke, in *The Cendor Mopu*, criticised the latest edition of Arnould's has wrongly maintained that there may be a combination of causes of approximate equal efficiency between inherent vice and some fortuitous external accidents, which has been affected by the decision of *The Miss Jay Jay*.³⁶³

In conclusion, in light of the current interpretation and explanation of Lord Diplock's definition on inherent vice, room for a combination of inherent vice and other efficient external causes seems marginally possible under marine insurance. The reason why *The Cendor Mopu* has been regarded as an unusual and difficult case can be explained in this way. The oil rig insured was made in metal and was carried on the barge. The law requires that inherent vice of the oil rig, being a cargo, should be the sole cause without the intervention of fortuitous external cause in order to constitute the proximate cause. While this cargo shared some common natural characteristics and defects with ships in terms of withstanding sea conditions, which makes the loss cannot occur but for either cause, in particular taking account of *The Miss Jay Jay*. Nevertheless, as "but for" test is not the real test and now that *The Miss Jay Jay* has been overruled in respect of finding a situation of concurrent causes involved with inherent vice and perils of sea, it is determined and evident that under marine policies, the real legal test of causation regarding an internal cause is whether it is the sole cause to the loss or damage.

³⁶² *Supra* 296

³⁶³ *Supra* 7, p 586. Also see Arnould's , 17th ed., para 22-26

Chapter 5 Seaworthiness

Two typical methods are widely employed by underwriters in order to define and limit the scope of risks. One has been discussed in the previous two chapters regarding the insured and uninsured perils in the statutes and policies. The other is known as a warranty. The main difference between the two methods lies in the legal effect as an insurer's defence. An excepted risk for the cause of loss may discharge the insurer from the liability to the particular loss, whereas, a warranty is a more serious and strict device, the breach of which may release the insurer from this loss and any further liabilities.

Seaworthiness is a very important concept in maritime law, notably in the field of carriage by sea and marine insurance. Unseaworthiness is a frequently triggered by the insurer in the law of marine insurance based upon either of the two aforementioned legal devices. Pursuant to the English Marine Insurance Act 1906, seaworthiness is an implied warranty in a voyage policy, whereas in a time policy, it is not considered to be a warranty but an uninsured circumstance where the loss is caused by unseaworthiness if the assured is privy to such unseaworthiness.

Based on an analysis of the concept of seaworthiness, this chapter will first review and give a critical analysis of warranty. In particular, insurance law reform proposals regarding a causal link between breach and loss will be examined in order to assess whether the approach would be appropriate and effective. In the section thereafter, the causation rules of unseaworthiness as a mere cause of loss will be addressed and concluded. This chapter primarily aims to draw clear lines between seaworthiness and a few confusing terms in causing the loss. Moreover, the study on the causal link between the risk and loss is expected to assist the determination of the causal link between the breach of warranty and loss.

5.1 Seaworthiness in Maritime Law

The law on seaworthiness can be traced back 2,500 years ago,³⁶⁴ and gradually became a crucial concept in maritime law. The requirement of a vessel being seaworthy occupies is put in a special position in both marine insurance law and carriage of goods by sea. It is an implied warranty in a voyage policy in marine insurance and an implied and paramount obligation in a contract of affreightment. In a marine time policy, seaworthiness is an important factor in determining the proximate cause of loss.

³⁶⁴ A thorough history of the development of the concept of seaworthiness has been sorted and presented in the celebrated book of Dr Baris Soyer, "*Warranties in Marine Insurance*", (2nd ed, London: Cavendish, 2005) pp 47-49

Seaworthiness means precisely the same thing in both marine insurance law and carriage of goods by sea,³⁶⁵ despite differing linguistic formulae. Thus, some dicta in the law of carriage by sea can be relied upon for a better understanding of the meaning and nature of seaworthiness.

It is well recognised that seaworthiness is a fairly comprehensive and extensive concept; this section has no intention of delivering a sweeping concise definition, nor to demonstrate all various scenarios of unseaworthiness. Instead, this section will be more concentrated on the interactions between seaworthiness and other perils in causation of loss, following an overview of the definition of seaworthiness.

5.1.1 The definition of seaworthiness

A seaworthy vessel in a contract of affreightment implies the vessel is “fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of voyage.”³⁶⁶ This renowned definition happens to be in conformity with s 39(4) of the Marine Insurance Act 1906, providing that “A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.” Sir Chalmers relied upon was the ancient case, *Dixon v Sadler*,³⁶⁷ when codifying s 39 of the 1906 Act. Moreover, the ninth edition of Black’s Law Dictionary defines seaworthy as describing a vessel which is “properly equipped and sufficiently strong and tight to resist the perils *reasonably* incident to the voyage for which the vessel is insured [emphasis added].” The only perceptible difference may be the usage of “perils of the sea of necessity” and “ordinary perils of sea” and even “reasonably” in the literal sense.

These expressions indicate that seaworthiness is a matter of defining the scope of “necessity”, “ordinary” and “reasonably”. They all implicate a variable standard in determining whether the vessel is seaworthy or not on a case-by-case basis. After all, the law does not require an absolutely perfect vessel.³⁶⁸ In the light of numerous cases of seaworthiness in maritime law, a few factors related to seaworthiness were summarised and classified in *The Eurasian Dream*,³⁶⁹ including the conditions of the vessel itself, portworthiness, cargoworthiness, etc. These factors provide a reference and basis upon

³⁶⁵ *Ibid*, relying upon *Fireman's Fund Insurance Co Ltd v Western Australian Insurance Co Ltd* (1927) 28 Ll. L. Rep. 243

³⁶⁶ Field J in *Kopitoff v Wilson* (1876) 1 QBD 377 at p 380

³⁶⁷ (1839) 5 M.& W. at P 414, citing from Mackenzie Chalmers, *A Digest of the Law Relating to Marine Insurance*, Chalmers (1901) p 48 and also Chalmers’ *Marine Insurance Act 1906*, 3rd ed (1907), p 54

³⁶⁸ *President of India v West Coast Steamship* [1964] 2 Lloyd's Rep. 443, per District Judge Kilkenny

³⁶⁹ [2002] EWHC 118 (Comm). The cases decided under each head have been provided in details in Prof Rob Merkin, *Marine Insurance Legislation*, 4th ed, p 52-53

which to conclude the particular standard of “necessity” in a case. Certainly, seaworthiness is also contingent on the demands of the designated voyage.³⁷⁰

Moreover, these definitions commonly implicate a relation to “perils of the sea”. An inherent link between perils of the sea and seaworthiness is reflected not only in the definition, but also by the arguments in cases, such as *The Cendor Mopu*, regarding whether the vessel was fit to carry the oil rig insured against ordinary perils of the sea and caused the relevant loss. The legal relationship between seaworthiness and perils of the sea is of supreme importance in ascertaining the proximate cause of loss, especially under a time policy. Therefore, this issue will be discussed in details in the last subsection of this chapter.

5.1.2 Seaworthiness, Inherent Vice and Latent Defect

The Arnould’s suggests that an analogy can be drawn between the principles of the cases arguing that unseaworthiness is the proximate cause under hull policies and those on the ground of inherent vice and wear and tear, and that there is no need to draw any distinction.³⁷¹ Seaworthiness and inherent vice can be both categorised as causes due to the internal characteristics or conditions of the subject-matter insured, in contrast to external causes, such as perils of the sea. Due to the similarities between the two notions, confusion may arise in the cases involving, *inter alia*, unseaworthiness, inherent vice and latent defect. Although the legal principles may be virtually identical, an effort to distinguish the concepts is of some value in order to making sure the principles are applied under the correct heading of defence. Moreover, a snapshot on the concepts will enable us to have a better understanding of the rationale behind the similarity of the principles.

Goods’ seaworthiness is different from inherent vice. S 40(1) provides that there is no implied warranty that goods are seaworthy. In contrast, the duty is imposed upon the ship’s side, which requires the vessel to be cargoworthy. On the other hand, inherent vice is an important concept in both the law of carriage of goods by sea and the law of marine insurance. Specifically, under the carriage scope, the carrier is immune from liability resulting from “inherent defect, quality or vice of the goods” according The Hague Visby Rules Article IV-2-(m), while under the 1906 Act s 55(2), the underwriter is not liable for the loss proximately caused by inherent vice unless otherwise provided for. So far as the definition is concerned, in the carriage of goods by sea, inherent vice means “the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the shipowner is by contract to exercise in relation to the goods”.³⁷² Literally, this definition in the carriage context can be also regarded as “goods’ unseaworthiness”

³⁷⁰ These factors are all clearly stated in s 39(1) to (4) of the 1906 Act

³⁷¹ *Supra* 13, p 950

³⁷² Steward C. Boyd *et al.*, *Scrutton on Charterparties and Bills of Lading* (21st ed. London Sweet & Maxwell 2008) 216

comparable to the definition of “unseaworthiness” in terms of vessels. Therefore, it might appear sound to say inherent vice is equivalent to the notion of “cargo’s unseaworthiness”; however, this is false for the following reasons.

Firstly, inherent vice in the law of carriage and in marine insurance are not completely identical. It has to be admitted that to a substantial extent, the work on definition and application are interchangeable in both branches of law. It was even affirmed by Walker LJ in *The Cendor Mopu* in its Court of Appeal judgment³⁷³ that the exception of inherent vice is the same in both scopes. However, it has been indicated by Prof Tetley that it will be risky to apply identical definitions in the two contexts considering the differences between the two sets of rules respectively.³⁷⁴

Donaldson LJ’s statement, which appeared to be a definition of inherent vice in the Court of Appeal of *Soya v White*,³⁷⁵ was actually describing a case of cargo’s seaworthiness, as viewed from the law of carriage. In the Supreme Court in *The Cendor Mopu*, per Lord Clarke, the proposition maintained by Donaldson LJ should not be deemed inconsistent from Lord Diplock’s, as he had no intention to provide a definition at all.³⁷⁶ Therefore, when referring to the meaning of inherent vice in marine insurance, Lord Diplock’s formulation should be taken as the sole authority.

Secondly, cargo’s seaworthiness is strictly connected to the marine context, while inherent vice is a basic and permanent risk of the subject-matters insured irrespective of whether the vessel is at sea. Cargo’s seaworthiness is considerably dependent upon the ordinary sea conditions, whereas the sea condition is not necessarily important to inherent vice. However, it does not mean inherent vice “pays scant regard as to how and in what circumstances the loss occurred”.³⁷⁷ The consideration of circumstantial conditions is necessary in determining the causal efficiency of inherent vice. In essence, the risk of inherent vice in insurance should be recognised as one of many insurable risks triggering the eventual damage with the assistance of all the basic circumstantial conditions. Such external factors are different from the external accidents mentioned in the Lord Diplock’s definition. As distinguished by Roche J, “Moist Atmosphere is not an accident or incident that is covered. It is more or less a natural test or incident which the goods have to suffer and which the underwriter has not insured against.”³⁷⁸ Those “accidents” are intervening in that they change an ordinary voyage at sea into a higher risk status. While the general

³⁷³ [2009] 2 C.L.C. 1056

³⁷⁴ William Tetley, *Marine Cargo Claims*, (4th edn, Cowansville 2007) 1144

³⁷⁵ [1982] 1 Lloyd’s Rep. 136

³⁷⁶ *Supra* 7, p 585

³⁷⁷ Per Lord Saville in *The Cendor Mopu*, his opinion is “such a definition [of Lord Diplock] pays scant regard as to how and in what circumstances the loss occurred.” Whereas, Lord Clarke stated that external factors are not entirely irrelevant in consideration

³⁷⁸ *Whiting v New Zealand Insurance Co Ltd* (1932) 44 L.J. L. Rep. 179

external factors for inherent vice are the ordinary conditions under which the cargo is carried, the same as those with which the defective cargo may be confronted on land. For instance, without the temperature discrepancy between Calcutta and Rotterdam, the process of water condemnation in container could not happen or be completed. Therefore, inherent vice and cargo's seaworthiness concern divergent external conditions.

Thirdly, consideration of cargo's seaworthiness and inherent vice are provided in different sections in the 1906 Act. Cargo's seaworthiness is referred in s 40(1) of the 1906 Act³⁷⁹ which states that there is no implied warranty requiring cargo to be seaworthy. The absence of such warranty deprives the underwriter of the ability to terminate liabilities automatically. The test of causation, therefore, has to be examined in order to establish the causal link between the cargo's seaworthiness and the consequence of damage or loss.³⁸⁰ In this regard, underwriters attempt to attribute this sort of unsuitableness to inherent vice for which they are not liable according to the 1906 Act and the policies.

Although both cargo's seaworthiness and inherent vice involve a causal link, the legal effect remains different. As for the most essential point, unlike inherent vice s 55, s 40(1) merely indicates that no such warranty is implied by statutes, it does not infer that cargo's unseaworthiness is excluded from recovery. Notwithstanding an established causal link between cargo's seaworthiness and loss, the insurer must also rely upon a risk clause which explicitly excludes the loss arising from "cargo's seaworthiness" in order to discharge his liability of indemnity, especially under an "all-risks" policy. Such phrasing is rarely perceptible among cases so far. Accordingly, the insurers frequently attempt to presume cargo's unseaworthiness to be inherent vice in order to disentitle the assured's recovery, which is, however, entirely a different legal ground. As concluded by Prof Bennett,³⁸¹ and approved in *The Cendor Mopu*,

If, however, goods have to be fit to withstand reasonably foreseeable perils or the loss will be considered to be proximately caused by the inherent vice of the goods, or at least not by a "risk" within the meaning of the "all risks" insuring clause, much of the point of cargo insurance disappears.

In light of the comparison above, inherent vice and cargo's unseaworthiness under the law of marine insurance law are two entirely different concepts and apply to different rules. Additionally, it seems that inherent vice does not denote the same meaning under the law of marine insurance and the law of carriage of goods by sea.

³⁷⁹ Seaworthiness in s 40 bears the same meaning as s 39, according to *ED Sassoon & Co v Western Assurance Co.* [1912] A.C. 561

³⁸⁰ Per Willes J in *Koebel v Saunders* (1864) 17 CB(NS)71,77-78, "in the case of an insurance on goods, it is no answer to say that they were in an unfit condition to be shipped, unless it is shewn that the loss arose from that unfitness."

³⁸¹ *Supra* 13, p 348

A further question may be raised in respect of hull policies. As Lord Diplock's definition simply describes the situation of cargo without mentioning the subject-matter of a vessel, does this mean that inherent vice exclusively applies to cargo losses? It is suggested in *The Colinvaux and Merkin's* that a vessel is also capable of being lost due to its inherent vice.³⁸² In contrast, *Bennett's Law of Marine Insurance* draws the distinction that seaworthiness relates to the vessel, while inherent vice concerns the goods. Moreover, in the view of *Tetley* regarding The Hague Visby Rules in carriage, the exception of inherent vice concerns the goods and latent defects relates to ships, drawing a sharp distinction.³⁸³ Assuming that latent defect is a concept in hull policies equivalent to the risk of loss due to the physical or internal condition of a vessel,³⁸⁴ latent defect has been suggested to be one of the "categories of matters to which seaworthiness extends".³⁸⁵ It means a latent defect in hull and machinery would render a vessel unseaworthy if it effectively affects her capacity to endure the ordinary perils of the sea in a designated voyage.

Unlike inherent vice, latent defect is an insured risk in a marine insurance policy under the heading of the Inchmaree clause. A conflict may arise between the insured coverage on the loss arising from latent defect and the implied warranty of seaworthiness in a voyage policy as provided in s 39.³⁸⁶ Prof Bennett intended to give priority to latent defect based upon a commercially sensible interpretation. In contrast, in the context of a time policy, the conflict is unlikely to occur. Even if the vessel is unseaworthy in a time policy, the assured's knowledge of unseaworthiness implies the defect is not latent and in both cases the insurer should not be liable. By the same token, if the unseaworthiness is due to its severe latent defect, the assured is supposed to be unaware of the defect.

A defect is latent if the defect is not discoverable upon an examination which a reasonably careful skilled person would make.³⁸⁷ The reasonableness here may well be equivalent to the "due diligence" which the assured must exercise in order to ensure his insurance is not prejudiced.³⁸⁸

The determination of seaworthiness limits to a standard of "due diligence" of the shipowner or carrier in the law of carriage by sea. The celebrated standard of due diligence at common law was provided in *McFadden v Blue Star Line*,³⁸⁹ which referred to a degree of fitness

³⁸² *Supra* 82, vol 2, p 20520

³⁸³ *Supra* 375, p 1141

³⁸⁴ *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146, 151

³⁸⁵ *Supra* 365, p 59. Also see *The Miss Jay Jay* [1987] 1 Lloyd's Rep. 32 in terms of a defect in design. However, it has been not fully ascertained that whether latent defect extends to the design. See *The Caribbean Sea* [1980] 1 Lloyd's Rep 338, 345-347.

³⁸⁶ *Supra* 134, p 587

³⁸⁷ *The Caribbean Sea* [1980] 1 Lloyd's Rep 338, 348

³⁸⁸ *Charles Brown & Co Ltd v Nitrate Producers' Steamship Co Ltd* (1937) 58 Ll L Rep 188

³⁸⁹ [1905] 1 KB 697, 706

required by an ordinary careful and prudent owner, although seaworthiness is an *absolute* obligation. In contrast, under a contract of affreightment governed by The Hague Visby Rules, the test is known as “due diligence” of the owner.³⁹⁰ This test is hardly an effective approach to determine seaworthiness, but refers to the heaviness of an owner’s obligation to provide a seaworthy vessel for ascertaining his liability. In particular, it is noteworthy that in a carriage case, *The Hellenic Dolphin*³⁹¹, the court held that if the defect existed before the ship was loaded, it was a true latent defect, and shipowner had discharged the burden imposed on them by Art. IV, r.1 of The Hague Visby Rules which describes a standard of due diligence.

Returning to the context of marine insurance law, s 39(1) does not refer to any limitation to the degree of the claim. Furthermore, it has been ascertained that the ignorance of the assured is immaterial in triggering the provisions of the 1906 Act.³⁹² Therefore, it is clear that marine insurance law and the contract of affreightment are different in this regard,³⁹³ and the implied warranty of seaworthiness imposes a stricter degree of obligation on the assured in a voyage policy.

In addition to the commercially sensible interpretation, the determination of the coverage may be based on whether the assured or the shipowner has performed his duties carefully and prudently. If the answer is affirmative, the risk is transferred to the insured in the head of “latent defect” as agreed in the Inchmaree clause. It fulfils the purpose of introducing “latent” defect into the scope of coverage, which ameliorates the injustice due to the absolute obligation of seaworthiness without reference to the assured’s intentions and capacity. On the other hand, if the assured or shipowner did not exercise due diligence and if the defect is also serious enough to constitute unseaworthiness, it becomes self-evident that the definition of latent defect is not satisfied, and the insurer can rely upon the principles of warranty.

In *The Lydia Flag*,³⁹⁴ a time policy contained an express warranty of seaworthiness at the inception of the policy and a warranty that the owner should exercise due diligence in maintaining seaworthiness thereafter. The policy also insured against loss caused by

³⁹⁰ Art III- (1). Also see *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] A.C. 807

³⁹¹ [1978] 2 Lloyd's Rep. 336

³⁹² *Supra* 13, p 830-831, Lord Elson in *Douglas v Scougall* (1816) 4 Dow 269 was cited and relied upon.

³⁹³ In the carriage case, *Smith, Hogg and Company v Black Sea and Baltic General Insurance Company* [1940] A.C. 997, Lord Wright mentioned and did not deny the first instance decision in the sense that “*The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects.*”

³⁹⁴ *Martin Maritime Ltd v Provident Capital Indemnity Fund Ltd* [1998] 2 Lloyd's Rep. 652

negligence of the ship repairers and by latent defects. The ship in question lost her rudder and suffered damage. In terms of reconciling the conflicts between these terms, Moore-Bick J found the only sensible way to read these terms is that the loss should remain recoverable where the vessel might be unseaworthy at the inception of the policy as a result of latent defect or negligence of the ship repairers provided that the unseaworthiness had not resulted for want of due diligence on the part of the assured.

5.2 Seaworthiness as a Warranty

The first few marine insurance warranty cases appeared in late seventeenth century, concerning "warranty of convoy".³⁹⁵ However, the principle of warranty was not established and formed until the era of Lord Mansfield. His lordship gave a set of definitive analysis of the law of warranty in the law of marine insurance, which substantively affected Sir Chalmers' work on the 1906 Act in this regard.³⁹⁶ Mansfield's doctrines still remain effective, despite a heated discussion of reform.

According to s 33(1), warranty means "a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing should or should not be done, or that some condition should be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts". A warranty can be either express or implied. Regarding express warranties, it is a matter of construction, whether a term amounts to a warranty, and the wording "warranty" or "warranted" is not conclusive.³⁹⁷ Implied warranties were recognised and stipulated by the 1906 Act, including seaworthiness, portworthiness, cargoworthiness and legality.

LC Consultation Paper 2007 summarizes the purposes of using an warranty: "to provide an additional remedy if information given by the proposer was incorrect; as an alternative method of defining the risk; to require the insured to take specified precautions; and to allow the insurer to escape from the contract should there be a change in the risk".³⁹⁸

As a popular form of policy defence, warranty has recently become a heated issue in insurance law, especially in the marine insurance context due to its long-term unique and strict tradition. In England, the rule of law that had been developed in relation to marine

³⁹⁵ *Jeffries v Legandra* 91 E.R. 384; (1690) 2 Salk. 443, *Lethulier's Case* 91 E.R. 384; (1692) 2 Salk. 443

³⁹⁶ Thomas J. Schoenbaum, "Warranties in the Law of Marine Insurance: Some Suggestions for Reform of English and American Law", 1998-1999, 23 Tul. Mar L.J. 267, p277-279

³⁹⁷ *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735

³⁹⁸ Law Commission, *Misrepresentation, Non-disclosure and Breach of Warranty by the Insured* (Consultation Paper No. 182, 2007), available at <http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm> (last time access 08/06/12), p 33

insurance was applied in its full extent to property and life insurance.³⁹⁹ Therefore, the legal effect of warranties and the modification of the law of warranties ought to be critically reviewed, taking seaworthiness as an example in this section.

5.2.1 Seaworthiness in Voyage Hull Policies

S 39(1) of the 1906 Act indicates an implied warranty of seaworthiness in a voyage policy. There are various reasons for stipulating seaworthiness to be an implied warranty by statute. For one reason, seaworthiness is a condition precedent upon which the insurer relies to assess the risk and premium. Moreover, consideration of the safety of the crew, ship and cargo on board demands that the shipowner affirms that the vessel is seaworthy, no matter whether the shipowner can directly control the vessel. Furthermore, in relation to the causation rules in marine insurance the test adopted during the Victorian era to determine the real and immediate cause of loss was the event that occurred last in a time sequence. S 39 was created in order to stop the clock running from time of the breach of a warranty regardless of what happened during the voyage.⁴⁰⁰

The Institute Time Clauses (Hull) 1983 expresses the warranty of seaworthiness in its Cl. 11. Although there is no equivalent clause in the 2003 clauses, the implied warranty of seaworthiness is not excluded or mitigated unless language used clearly indicates this.⁴⁰¹ The duty is restricted in that it must be fulfilled at the commencement of the voyage, which implies that the duty does not continue throughout the whole voyage.⁴⁰² Moreover, if the voyage can and should be divided into a few stages, according to s 39(3), at the commencement of each stage, an implied warranty of seaworthiness is imposed on the ship. It has been well recognised that legitimate call at intervening ports does not necessarily justify a voyage in stages.⁴⁰³ A voyage can be recognised in law as being completed in a few legs in law in tow instances, due to physical factors⁴⁰⁴ and for commercial need^{405, 406}.

The most significant feature of warranty distinguished from other principles is the legal effect when a warranty is breached. Since the first warranty case decided by Lord Mansfield,

³⁹⁹ William R. Vance, "The History of the Development of the Warranty in Insurance Law", *Yale Law Journal*, 1911, May Vol. XX, No.1 p 333

⁴⁰⁰ *Supra* 134, p 572,573 and *Supra* 363, p 72-73

⁴⁰¹ *Supra* 13, para 20-02

⁴⁰² This rule has been laid down by Lord Mansfield in the late 18th century. See *Bermon v Woodbridge* (1781) 2 Douglas 781

⁴⁰³ *Thin v Richards & Co* [1892] 2 Q.B. 141

⁴⁰⁴ Such as stay in port, river voyage and sea voyage in *Bouillon v Lupton* (1863) 15 C.B. N.S. 113, and *Quebec Marine Insurance Co v Commercial Bank of Canada* (1869-71) L.R. 3 P.C. 234

⁴⁰⁵ Per Collins LJ in *The Vortigern* [1899] P. 140, 159: "The custom of a particular trade or the convenience of the parties to a particular adventure, may make it reasonable that the vessel should be equipped up to a different standard at different stages of the voyage, and the warranty of seaworthiness has to be adjusted accordingly."

⁴⁰⁶ *Supra* 364, p 78

Woolmer v Muilman,⁴⁰⁷ where Lord Mansfield held that the policy was unenforceable due to the breach of neutrality, a strict attitude to breaches of warranties had been expressed.⁴⁰⁸ The same judgment had been reproduced in the landmark case *De Hahn v Hartley*,⁴⁰⁹ a vessel was insured for the voyage from Africa to West Indies, warranted that it would sail from Liverpool with 50 hands or upwards; however, the vessel was with 46 hands when sailed from Liverpool, although six additional men were picked up after a mere 6 hours. Lord Mansfield reiterated:

A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with. Now in the present case, the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void.

At that stage, the breach of warranty was able to render the policy void or even void *ab initio*. However, this standpoint was not wholly introduced in the 1906 Act. Although it is affirmed that warranty should be strictly applied, Sir Chalmers preferred the American rule in terms of the effect of breach; thus s 33(3) provides "subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date." He commented that "It is often said that breach of a warranty makes the policy void. But this is not so. A void contract cannot be ratified, but a breach of warranty may be waived."⁴¹⁰

Therefore, according to s 33(3), underwriters are entitled to reject all the claims occurred since the date of the breach. In more recent times, the effect of warranty in marine insurance law has been reviewed and clarified in the leading case *The Good Luck*,⁴¹¹ the assured Bank had taken out mortgagee's interest insurance with the insurer over ships, including The Good Luck, purchased by the Good Faith Group (the owners). Having noted that the owners were chartering ships in a "special risks area" without notifying them as required by the policy, the insurer rejected the constructive total loss of The Good Luck after it was damaged in such an area. The Bank brought the claim against the insurer, alleged that the insurer was in breach of a letter of undertaking which stated that H agreed to advise B "promptly" if they ceased to insure. The Court of Appeal reverted to the avoidance rule and interpreted s 33(3) in such a way that a breach by an insured party of a promissory warranty

⁴⁰⁷ (1762) 1 Wm. Bl. 427

⁴⁰⁸ *Supra* 396, p 277

⁴⁰⁹ (1786) 1 Term Rep. 343

⁴¹⁰ Sir Chalmers and Owen, *A Digest of the Law Relating to Marine Insurance* (1901) p 44 and the following editions.

⁴¹¹ *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233

did not automatically bring a contract to an end but gave the insurer the option to avoid the contract.⁴¹² However, the House of Lords reversed the decision and pronounced that the liability had been automatically discharged at the date of breach; the breach did not concern with the effect of the policy, as the promissory warranty was a condition precedent of the insurer's liability. Although this case was related to an express warranty in the policy, the decision as to effect of breach is universally applicable to both express warranties and implied warranties.

In the light of *The Good Luck*, more recently, *The Copa Casino*⁴¹³ has addressed the issue of waiver of breach provided in s 34. A floating casino was insured for a voyage from Alabama to India and sank in the Caribbean Sea. The marine policy contained a number of warranties, including a "Hold Harmless Warranty" under which the assured, "warranted no release, waivers or 'hold harmless' given to Tug and Towers". The insurer rejected the loss, contending that this warranty had been breached when the assured came into a towage contract in the form of TOWCON, provided for extensive mutual exceptions of liability and cross indemnities between the tug owner and the hirer of the tug. The Court of Appeal reaffirmed the judgment of *The Good Luck*, and held that:

When an assured has been in breach of a warranty in a policy of marine insurance then the breach automatically discharges the insurer from further liability under the policy. No other positive action, whether described as avoidance or acceptance of repudiation or otherwise, is needed to make that discharge of liability effective. Because the discharge of the insurer's liability under the policy takes place automatically upon the breach of warranty and no further positive action is needed to bring about the discharge, the insurer therefore does not need to "elect" whether to terminate the contract or its liability under it, or continue with the contract in being. Thus, logically, when it is alleged that an insurer has "waived" a breach of a warranty in a marine policy by an assured, this must mean that the insurer has waived the breach because the insurer is now estopped from relying upon it. So, where section 34(3) of the MIA 1906 states that "a breach of warranty may be waived by the insurer", this must refer to that type of "waiver" which is concerned with the forbearance from exercising a legal right.

Aikens LJ continued that, to constitute waiver by estoppel, it has to be proved that the other party had relied upon the unequivocal representation and such an unequivocal representation is tested in an objective manner, without reference to the parties' subjective belief or understanding.

⁴¹² [1990] 1 Q.B. 818

⁴¹³ *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWCA Civ 1572

Based upon the above explanation, it should be remarked that no causal link between the breach and the loss is necessitated in triggering the legal effect of breaching the warranty, which also embodies the strict effect of warranty. Regardless, in the current law, the implied warranty of seaworthiness in a voyage policy should still comply with these principles.

5.2.2 Seaworthiness in Cargo Policies

*Koebel v Saunders*⁴¹⁴ laid down the rule that there is no warranty in a cargo policy that the subject-matter insured should at the commencement of the voyage be fit to encounter the ordinary perils of the sea. This rule has been statutorily embodied by s 40(1) of the 1906 Act, followed by a subsection providing that a duty is levied upon the assured to warrant that the ship is fit to carry the cargo. In contrast, s 40(2) provides the vessel for carrying cargo in a voyage policy is warranted to be seaworthy, despite the fact that the cargo owner has little control over and specific knowledge of the condition of the vessel. Therefore, an express waiver of the implied warranty of seaworthiness has been inserted into the cargo policy in order to avoid unexpected and undesired consequence for the assured cargo owner, where the vessel is proved to be unseaworthy at the commencement of the voyage designated.

The prominent “seaworthiness admitted clause”⁴¹⁵ was employed for the aforementioned purpose prior to the modern Institute Cargo Clauses. This form is no longer in common use in English market. Instead, Clause 5 of the Institute Cargo Clauses 1982 is designed to modify s 40(2) currently. Cl. 5.2 contains an express waiver of seaworthiness warranty, reading that “The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.” The 2009 version contains an even broader clause, Cl 5.3, providing that “The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.”

Although Clause 5 has yet to be judicially construed,⁴¹⁶ the clause literally contains two meanings. On the one hand, the privity of either the assured or their servants will revive the effect of the implied warranty. “The servants” must be construed narrowly and as being confined to employees of the assured, excluding independent contractors or agents.⁴¹⁷ On

⁴¹⁴ *Supra* 294

⁴¹⁵ The wording of the Seaworthiness Admitted Clause (cl.8) in the Institute Cargo Clauses (January 1, 1963), the final version prior to the 1982 revision, was “The seaworthiness of the vessel as between the Assured and Underwriters is hereby admitted. In the event of loss the Assured’s right of recovery hereunder shall not be prejudiced by the fact that the loss may have been attributable to the wrongful act of the ship-owners or their servants, committed without the privity of the Assured.”, cited from *The Arnould’s* 17th edition, para 20-38

⁴¹⁶ *Supra* 13, para 20-41

⁴¹⁷ *Ibid*, para 20-41

the other hand, unlike s 39(5), the phrase “at the commencement of the voyage” is absent. It may imply the attachment of the implied warranty is extended to every moment of the voyage.⁴¹⁸ However, as the general principle of contractual construction provides, as there is no express words to indicate an extending implied warranty against the statutory stipulation of the 1906 Act, the judiciary ought not to interpret the term to levy a heavier burden on the assured of the cargo policy.

In addition, Cl 5.1 of the Institute Cargo Clause is also a part of the “Unseaworthiness and Unfitness Exclusion Clause”, yet, unrelated to warranty. The clause focuses upon excluding the loss “arising from” unseaworthiness, subject to a causal link between seaworthiness with the privity of the assured or their servants at the time of loading. It contemplates that despite the insurer waives the right of an implied warranty under certain circumstances, it does not affect the status of unseaworthiness as an uninsured/excluded peril, which is subject to s 55 of the 1906 Act.

5.2.3 Law Reform Proposal: a Causal Connection or Suspensive Condition?

The insurance law reform project has been carried out by the Law Commissions since 2006 in response to the long-standing criticisms of insurance law. The Consultation Paper 2007 pointed out the existing problems of the law of warranty and proposed a set of far-reaching recommendations. It is said that “the greatest and most obvious problem” is that the current law allows the insurer to discharge his liability for technical breaches without reference to the loss itself. S 33(3) permits the insurer to refuse a loss that has arisen, despite there being no connection to the breach of warranty. On the other hand, its effect also expands to further liabilities after the breach, even lacking a more remote connection to the losses. Thus, there is a need to introduce a causal connection between the breach of *future conduct warranties* and the loss in consideration of justice and fairness; whereas, if terms were understood as *suspensive conditions* rather than warranties, the causal connection test would not apply. For consumer insurance, the rule requiring a causal connection is mandatory. For business insurance it would be possible for the parties to agree on the effect a breach of warranty should have, provided they use clear language to express their intentions. Where the insured contracted on the insurer’s standard terms, there would also be controls to ensure that the cover was not substantially different from what the insured reasonably expected.⁴¹⁹ The need of reform has been continuously acknowledged in the latest Consultation Paper 2012;⁴²⁰ however, the Law Commission shows much less

⁴¹⁸ *Supra* 134, p 589

⁴¹⁹ *Supra* 398, p 187

⁴²⁰ Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties* (Consultation Paper No 204, 2012)

<http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm> (last time access: 08/07/12)

enthusiasm for the causal requirement method and proposes a set of different approach. Regardless, both proposals are worthy of detailed scrutinizing.

In the Consultation Paper 2007, however, having noted that the law has traditionally taken a stricter approach to marine warranties, the Law Commission rejected treating the marine insurance differently in terms of proposing reform of warranties. Accordingly, the Law Commission has provisionally proposed that the causal connection test should apply to warranties in marine insurance in the same manner as non-marine insurance. That is to say, the insurer should pay a claim where the assured can prove on a balance of probabilities that the event constituting the breach did not contribute to the loss. Three questions are noteworthy in this recommendation and its implementation, namely, the causation test, the phrasing of the causal requirement and the burden of proof.

Three models have been taken into account in the Consultation Paper for reforming the law of warranty in a general insurance law, including the 1980 Report,⁴²¹ the Australian statutes and the New Zealand model respectively. Additionally, in terms of seaworthiness, the law review of Australia Marine Insurance Act 1909 has referred to the Norwegian Marine Insurance Plan. On balance, every formulation has remarkable advantages but problems remaining. The Consultation Paper preferred to follow primarily the pattern of New Zealand.

Law Commission Report 1980 has summarised four defects in the present law concerning warranty. First, the existence of technical breaches enables the insurer to reject claims without materiality to the risk. Secondly, due to the previous defect, the insurer can escape liability, no matter how irrelevant the breach is to the losses. Thirdly, formality should be required to clarify the legal status of a warranty clause. The last addresses the mischief arising from the phrasing of the terms. In order to resolve the first two, the Report recommended that an assured should be able to challenge the insurer's refusal to indemnify in the absence of links between the breach and the loss. The link suggested in the Report focuses on whether the breach is first "material to the risk" and second "increased the risk".

Before measuring whether a breach increased the risk, it should be noted that, as the Report recommended, a term should only constitute a warranty if it is material to the risk, in the sense that the term would influence a prudent insurer in deciding whether to accept the risk and on what terms. In comparison with the materiality test concerning the breach of the utmost good faith, the recent case *Sealion Shipping Ltd v Valiant Insurance Co (The "Toisa Pisces")*⁴²² expressed a new attitude to the causation test. In a loss-of-hire policy, the alleged inaccurate representations as to a "one-hull claim" and off-hire period have been examined and decided by the Court. The conclusion was neither of the statements was material.

⁴²¹ Law Commission, *Insurance Law, Non-disclosure and Breach of Warranty* (Law Com No. 104, 1980)

⁴²² [2012] EWHC 50 (Comm)

Interestingly, Blair J held that the materiality in term of “one hull claim” was linked to the extent to which they caused loss of hire. Generally speaking, the conventional test of materiality, indicated in s 18(2) and s 20(2) respectively, is that “which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.” The materiality lies in a matter which a prudent underwriter entertaining a renewal would wish to take into account in deciding whether to write the risk and, if so, on what terms.⁴²³ It seems that in the recent case, Blair J has set up a more specific test compared with the well-known “prudent underwriter test”. A certain degree of causal link ought to be considered in deciding the materiality of a nondisclosure or misrepresentation as to the claim record. The proposition reflects a judicial trend of resorting to causation even in a case concerning utmost good faith in order to eliminate unjust rescission.

However, the 1980 Report iterated that a solution depending on a presence of causal connection between the breach and the loss was inappropriate in light of the nature of restricting the effect of a warranty. Attention should always be paid to a particular risk, as the purpose of a promissory warranty is to prevent the risk from unexpected increase by clarifying and confining the basis of the contract. Although it is self-evident that a causative connection between the breach and the loss alone would entitle the insurer to reject the claim, it seems that a causative connection was only regarded as one of various forms of connections, and the test should embrace less direct links as far as the breach is material to and increases the same type of the risk incurred.

Thus, the test suggested that the warranty was intended to reduce the likelihood of a particular type of loss occurring and the actual loss being of a different type; alternatively, though falling in the same type, the breach should not have increased the risk that the loss would occur in the same way in which it did in fact occur. The burden of proof was should be on the assured to rebut the presumption that a warranty should be material to the risk by proving that the breach was irrelevant to the loss in either way mentioned above. However, this approach is not recommended in the Consultation Paper 2007, as the test seems less favourable and practical to the assureds compared with the law of Australia and New Zealand.

S 54 of Australian Insurance Contracts Act 1984 indicates that the insured needs to prove that the breach did not “cause” the loss. The Act is not applicable to marine insurance cases pursuant to s 9, and the marine insurance cases remain governed by the Marine Insurance Act 1909, which adopts almost identical structure and provisions to the English 1906 Act. The English Law Commission interprets the Australian approach as being generous to the policyholders:⁴²⁴ the breach should be the proximate cause in the marine insurance

⁴²³ *Sharp v Sphere Drake Insurance (The Moonacre)* [1992] 2 Lloyd's Rep. 501

⁴²⁴ *Supra* 398, p 195

context⁴²⁵ or one of the “but-for” causes in the non-marine types. According to s 54(4), the loss can be partially recovered subject to the absence of a causal connection to the breach of warranty. That is to say, where it is established that the breach has a minor causative impact on the occurrence of loss in a marine insurance case, the insurer may lose the ground of breach of the warranty and the assured’s claim may stand.

S 11 of the New Zealand Insurance Contracts Act 1977 states that

the insured should not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

Two distinctions between this provision and the Australian one can be observed and they also explain why the English Law Commission is more attracted to the substance of the New Zealand model.⁴²⁶ In the first place, the phrase used in this provision, “caused or contributed to”, literally differs and indicates a broader test than the test of proximity, which does not require the breach to be the dominant cause of loss. Accordingly, it seems sound to say that if the breach satisfies the “but for” test, as one of the necessary causes, the insurer is entitled to reject the claim related thereto. The assured undertakes a fairly heavy burden of proof in the sense that the breach is not even a contributory cause of loss on the balance of probabilities. The other crucial difference is the proportional recovery of a single claim. The New Zealand Law Commission’s reform on s 11⁴²⁷ explicitly pointed out the proportional approach provided by s 54 (4) of the Australian Insurance Contracts Act should not be adopted in New Zealand; instead, the all-or-nothing approach should be insisted. Surprisingly, the English insurance law, though famous for the “winner-takes-all” principle as mentioned in Chapter 2, seems to intend to adopt the proportional recovery in a claim in respect of breach of a warranty on the basis of the statistical likelihood according to the Consultation Paper.⁴²⁸ Leaving aside the problematic methods of calculating proportions in court, this proposal seems incompatible with long-standing English indemnity insurance principles and operations. The least desirable quality in legislation is uncertainty and it may be too ambitious to introduce such provisions into English insurance contract law.

In summary, the English Law Commission in 2007 preferred a lesser test of causation than the proximity test in determining the exclusion of the effect of breach of a warranty by

⁴²⁵ Review of Marine Insurance Act 1909 (2001), No. 91, ch 9. Details will be provided in the following analysis.

⁴²⁶ *Supra* 398, p 194

⁴²⁷ The New Zealand Law Commission, *Report 46*, Ch 3

⁴²⁸ *Supra* 398, p 196

adopting expressions such as “contribute to”. The insurer should bear the primary burden of proof to establish a broken warranty. The assured then undertakes a secondary burden of proof to rebut the rejection of liability by proving there was no causal link between the breach and the loss on the balance of probabilities.

Although the provisional proposal as to the requirement of a connection in causal form has obtained widespread support, several criticisms have arisen in the four years, *viz.*, that the whole set approach was too complicated, particularly in identifying of future conduct warranties and the issue of causation; accordingly, the Law Commission proposed in its Consultation Paper 2012 an even further-reaching recommendations:

1. To abolish the basis of the contract clauses
2. To treat warranties as suspensive conditions
3. To introduce special rules for terms designed to reduce the risk of a particular type of loss, or the risk of loss at a particular time or in a particular location

Instead of justifying the traditional harsh effect of a requirement of causal link, the new recommendation fundamentally changes the effect of breach of warranty itself. To rationalize this formulation, the Law Commission reviewed several jurisdictions' experiences, including New Zealand, Australia, New York, Canada and civil jurisdictions in Europe. This time the Law Commission expressed substantial concerns over the limitations and “problems” of the approaches of New Zealand and Australia. The main conclusion drawn from their lessons by the Law Commission is “the test is not appropriate for all terms” and “it would generate too much uncertainty.”

Specifically, s 54 of Australian Insurance Contracts Act is regarded as a complex provision in the Consultation Paper 2012. It was observed by Dr Baris Soyer that s 54 has “generated a good deal of litigation over the years” and the rule is still “in flux” to some extent after two decades.⁴²⁹ *FAI Insurance Limited v Australian Hospital Care Pty Ltd*⁴³⁰ is often cited as the leading case of s 54, on the issue of whether an event amounts to an act or omission in the provision. In this case, a professional indemnity policy was issued and contained a clause saying that “The Insured should as a condition precedent to his or their right to be indemnified under this Policy to [sic] give to the [insurer] immediate notice in writing of any claim made against him or them.” A claim by a third party was made after expiry of the coverage period but the insured became aware of the event which gave rise to claim during period of cover but failed to notify the insurer. The court finally held that “No distinction can be made, for the purposes of s 54, between provisions of a contract which define the scope

⁴²⁹ Dr Baris Soyer, ‘Reforming Insurance Warranties- Are We Finally Moving Forward?’ in Baris Soyer (Ed) *Reforming Marine and Commercial Insurance Law*, (Informa 2008) p137

⁴³⁰ [2001] HCA 38

of cover, and those provisions which conditions are affecting an entitlement to claim. The substantive effect of the contract can be determined only by examination of the contract as a whole." and thus s 54 was applicable in this case of failing to deliver such a notice. The decision has been applied in several subsequent cases.⁴³¹ However, in pure causation terms, Australian court did not find much difficulty in defining whether the breach was capable of "causing or contributing to" the loss by the nature of the act.⁴³²

On the other hand, The New Zealand Law Commission did express reservations about its provision and proposed to modify it by adding the following circumstances under which a requirement of a causal connection would not apply:⁴³³

- (a) defines the age, identity, qualifications or experience of a driver of a vehicle, a pilot of an aircraft, or an operator of a chattel; or
- (b) defines the geographical area in which a loss must occur if the insurer is to be liable to indemnify the insured; or
- (c) excludes loss that occurs while a vehicle, aircraft, or other chattel is being used for commercial purposes other than those permitted by the contract of insurance.

Moreover, Prof Malcolm Clarke has also expressed reservations on the approach of a causal link. The learned professor expressed three concerns which have been taken into account by the Law Commission when producing the 2012 Paper.⁴³⁴ For one reason, the burden of proof on the assured to prove a lack of a causal connection between the breach and the loss is a departure from the pattern that who alleges must prove. Also, Sir Aikens doubted whether the onus of the two parties can be integrated.⁴³⁵ It has to be admitted that it is indeed unusual in the sense that the causative requirement is a defence upon another defence. It is also more difficult to prove a negative condition. The breach of warranty is a powerful policy defence of the insurer and the importance of a warranty implicates a presumptive relation to and effect on the loss, if breached. Therefore, the lack of a causal link is deemed as an exception to the presumption which ought to be alleged by the assured in order to revive the insurer's liability. It breaks the conventional pattern of rebuttal in revert; instead, the argument is diverted to another question of law, namely, the causal connection. Nevertheless, the well-known principle of "who alleges must prove" remains properly complied with.

⁴³¹ For instance, *Highway Hauliers Pty Ltd v Maxwell* [2012] WASC 53; *Stapleton & Anor v NTI Limited* [2002] QDC 204 and *Aussie Tax Pty Ltd & Anor v Markel Capital Limited* [2008] VSC 592 have reaffirmed the decision, however, the final results were different due to the different type of policy and the contrary indication of the express terms respectively.

⁴³² *Hensel v Aon Warranty Group (Civil Claims)* [2007] VCAT 1993

⁴³³ *Supra* 427, para 48

⁴³⁴ Malcolm Clarke, "Insurance warranties: the absolute end?" [2007] L.M.C.L.Q 474, 486-487

⁴³⁵ Sir Richard Aikens, 'The Law Commissions' Proposed Reforms of the Law of Warranties in Marine and Commercial Insurance: Will the Cure be better than the Disease?' in Baris Soyer (Ed) *Reforming Marine and Commercial Insurance Law* (Informa 2008) p113-125

Secondly, Prof Clarke in his article was concerned that the drift of the reform to assimilate the effect of breach of a warranty and the law of exceptions, such as the excluded perils, might put the law into a difficult position. It seems true that the trend to redress the “absolute” or harsh effects of warranty by resorting to a legal requirement is an approach commonly employed in the case of exceptions. However, compared with the Paper 2007, it is interesting that suspensive conditions in the Consultation Paper 2012 are much more likely to assimilate the two kinds of terms. The test of causation in 2007 Paper as mentioned above differs from those of exception clauses, as well as the party to undertake the burden of proof. Moreover, the significance and effect of warranty remain independent from the exceptions of the policy in law. The mere requirement of a connection in a causative form would not lead to a substantial assimilation of the two regimes without more. However, to treat warranties as suspensive conditions is something seriously different; without the special harsh effect of breach, a warranty is in no way unique from an excluded occasion, despite these terms would not take account of whether the breach has caused or contributed to the loss.⁴³⁶ Moreover, as to “the special rules to *all kinds of* terms to reduce *particular* risks”, this suggestion essentially aims to ascertain the cause of loss and the risk warranted free from are related or the same type. Although a causal connection is not favoured at present, it shows *a* connection is still called for.

The last reason of Prof Clarke’s hesitation happens to address the root of this thesis, since Prof Clarke questioned the necessity of a sophisticated analysis of the law of causation. Instead, resorting to common-sense was suggested to be more widely accepted, but it remains problematic in terms of certainty. This thesis precisely purports to conclude a set of concrete causation rules which is far from theoretical to tackle the uncertainty arising from facts and common-sense. The warranty agreed in the contract may be more fruitful and more related to the factual background; however, the legal theory of causation ought to be universally applicable in the context of the insurance law. Therefore, respectfully disagreeing with Prof Clarke’s concerns, I suggest that a “but for” causal link undertaken by the assured can be one of the efficient ways to resolve the harshness in current law.

Essentially, the two reform plans both aim to redress the unfairness and impracticalities of the old warranty law, but from different focus with different degrees of reform. It is pretty clear that if the effect of warranty retains as before, a causal link is the most appropriate manner; if the effect itself is totally altered in law, it simply implies that warranties are removed from insurance law and have become obsolete. One cannot generally come to a conclusion as to which one is better. This is all about how far the reform is intended to reach. However, in terms of certainty, which is recognised as the most important feature of English common law and for commercial reasons, it would be more sensible to abandon

⁴³⁶ *Supra* 429, p 137

warranty in law completely and leave the issues to freedom of contract and matters of construction.

With respect of marine insurance, it is the prevailing customary legislative operation in common law jurisdictions to separate marine insurance from the general insurance contracts, in which case the marine insurance law remains unprejudiced.⁴³⁷ In light of the new trend in reforming the warranty in all types of insurance contracts, the marine sector seems to face a more complex and challenging task. The Consultation Paper 2007 suggested that express warranties in a marine policy, though very rare, ought to be connected to the loss. The implied marine warranties should also contribute to the loss if the defence seeks to succeed. However, the standard is lessened compared with the proximate cause of loss. That is to say, in the case of seaworthiness, the implied warranty in a voyage policy need not be the dominant cause, which is distinguished from the exception in the case of a time policy.⁴³⁸

This plan is strikingly different from the reform plan of Australia which is considerably influenced by the Norwegian Marine Insurance Plan.⁴³⁹ The Norwegian Plan does not differentiate between time and voyage policies in terms of seaworthiness in the 1999 version, which stated that "The assured has the burden of proving that he neither knew nor ought to have known of the defects, and that there is no causal connection between the unseaworthiness and the casualty."⁴⁴⁰ However, this section, concerning exclusively unseaworthiness, has been removed since 2003 version. Instead, unseaworthiness will be governed by the general rule s 3-9 "alteration of the risk caused or agreed to by the assured": "If it must be assumed that the insurer would have accepted the insurance, but on other conditions, he is only liable to the extent that the loss is proved not to be attributable to the alteration of the risk."

Also having treated time policies and voyage policies identically in this regard, the Australian Law Commission intended to abolish the concept of "implied warranty" in the marine insurance law entirely but to introduce a regime similar to an express warranty in the policy and apply the rules of an express warranty. The causation standard should be whether loss was "attributable to" the breach, adopting the language of the 1906 Act s 45(5) (words identical to s 39(5) of the English 1906 Act). Particularly, the phrase "attributable to" should be interpreted as "proximately caused by".⁴⁴¹ Therefore, it recommended that

⁴³⁷ Such as the Australian Insurance Contracts Act 1984 and the New Zealand Insurance Contracts Act 1977.

⁴³⁸ *Supra* 398, p 211

⁴³⁹ All versions from 1997 to 2010 are available at <http://www.norwegianplan.no/eng/index.htm>. As The Australian review of the Marine Insurance Act 1909 was taken place in 2001, it should refer to the 1999 version of the Plan.

⁴⁴⁰ The Norwegian Marine Insurance Plan 1996, 1999 version, s 3-22

⁴⁴¹ ALRC, *Review of Marine Insurance Act 1909* (2001), No. 91, ch 9, para 9.172, 9.173

unseaworthiness ought to be the proximate cause of loss against which the insurer defends either on the ground of breach of the warranty or as an excluded risk. Moreover, the burden of proving the lack of causal link undoubtedly should be placed on the side of the assured.

Prof Howard Bennett has warned that seaworthiness should be considered within the whole picture of international shipping law, in particular with reference to shipping safety.⁴⁴² It has more legal significance than a contractual term in a marine policy. Therefore, an implied warranty of seaworthiness in voyage policies ought to remain. However, The Australian Law Commission explained the removal of implied warranty of seaworthiness would not jeopardize marine safety, as the deterrent effect of unseaworthiness not only remains working, but also it grapples with the unfairness to the assureds in terms of recovery. After all, it is open for the parties to agree to the effect by a contractual express warranty.

When it comes to the Consultation Paper 2012, the causal link issue in marine insurance is not recommended. The Law Commission continues to suggest that, subject to contrary agreement, the express warranties in marine insurance should comply with the general view of insurance law. As to implied warranties, since there is no great support for the removal and since they have been employed over hundreds years in English marine insurance law, the Law Commission intends to retain implied warranties in current form; however, the effect of breach should be the same as proposed in the case of express warranties. For instance, if the ship left the port in an unseaworthy condition but was repaired in an intermediary call, the insurer should continue to cover the loss caused by an insured peril after the remedy. On the other hand, during the unseaworthy period, the insurer ought not to be liable for the loss, as the concept of seaworthiness is necessary to reduce marine perils, the breach of which will lead to the discharge of the insurer's liability. Regardless, it seems ascertained that warranties in marine insurance law will be subjected to the reform of general insurance contract law. Compared with the Australian proposal, English Law Commissions take a milder step in terms of the implied warranty of marine insurance. "No harm to retain it" seems to be the best reason and answer. Moreover, it is more plausible and logical to maintain most consistency between marine and non-marine law in this respect, since the proposal "suspensive" effect of warranty would remove the grounds of Australian Law Commission's confidence in maintaining the marine safety in the absence of the implied warranty of "seaworthiness".

5.3 Seaworthiness as a cause of loss

⁴⁴² Howard Bennett, 'Reflections on Values' in Baris Soyer (Ed), *Reforming Marine and Commercial Insurance Law* (Informa 2008) p 176.

Per Tindal C.J in *Sadler v Dixon*,⁴⁴³ it was held that there was no distinction as to the implied warranty of seaworthiness under a voyage policy and a time policy. Before long, in *Gibson v Small*,⁴⁴⁴ the House of Lords established that by the law of England, there is no implied warranty that the ship should be seaworthy on the day when the policy is intended to attach. The majority (seven out of nine) found that no analogy could be drawn between time policies and voyage policies in terms of an implied warranty of seaworthiness. Besides all cases that had ever been decided were related to voyage policies, most Lords found it would be implausible and impractical to imply such a warranty in law, as the shipowner might even not be able to control the vessel in every voyage designated in the duration of the policy. In particular, Talford J pointed out that the definition of seaworthiness was exclusively related to one particular voyage, rather than to an overly flexible and uncertain manner as in a time policy; Baron Martin and Baron Alderson further iterated how it was inappropriate to determine the commencement of the implied warranty of seaworthiness in a time policy, unlike a voyage policy. In contrast, Williams J and Erle J, in their dissenting judgment, insisted that time policies should be subject to the implied warranty. Williams J considered that seaworthiness was a common foundation of both time policies and voyage policies, though the degrees differed. Erle J reasoned that such warranty was the insurer's basis of calculating premium and presented fruitful expositions of the Jurists in order support his judgment, though most of which had been re-cited and opposed by Baron Parke in the following judgment. Erle J suggested the terms and the constructions in both types of policies should be identical except that "in voyage-policies, they are measured by the motion of the ship; in time-policies, by the motion of the earth." Regardless, the rule has been set up and has been codified into the 1906 Act. Pursuant to s 39(5), in a time policy, although unseaworthiness is not an implied warranty, the insurer is still entitled to refuse the liability caused by unseaworthiness with the privity of the assured. Sir Mackenzie, who codified the Act, cited and relied upon McArthur, *The Contract of Marine Insurance*, 2nd ed. (1890):

... if the assured knowingly send the vessel to sea in an unseaworthy state, and she be lost in consequence thereof, the loss will not be recoverable, though the direct cause of loss be a peril insured against, because it was originally caused by the wrongful act of the assured.⁴⁴⁵

Over a century, various arguments and even alterations of this provision have arisen, surrounding two important issues: first the test of causation, the second, how to define the

⁴⁴³ (1841) 8 M. & W. 895

⁴⁴⁴ *Anthony Gibson v Robert Small and Others* (1853) 4 H.L. Cas. 353. Followed and supplemented by *Thompson v. Hopper* 1856, 6 E. and B. 172; and *Fawcett v. Sarefield* 1856, 6 E. and B. 192; and adopted in *Dudgeon v. Pembroke*, 1877, 2 A. C. 284

⁴⁴⁵ *Supra* 411, p 48. The content of citation is from *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)* [1977] Q.B. 49, p 66.

privy of the assured.⁴⁴⁶ Besides, as above mentioned, seaworthiness and perils of the sea have an unavoidable link arising from the definitions. Therefore, this connection, and in particular, whether unseaworthiness and perils of the sea can jointly result in a loss as concurrent causes will be analysed and answered.

5.3.1 Test of Causation

Per Lord Mance in *The Cendor Mopu*:

When the Act was passed, the language “loss attributable to unseaworthiness” catered for the Victorian reluctance to look behind the last cause in time to any previous cause. How far the word “attributable” now allows regard to be had to causes which would, under modern conceptions, not be regarded as proximate appears undecided, and may in turn depend upon how far modern conceptions of proximity can, in cases of unseaworthiness, lead the eye back beyond the immediate cause to initial unseaworthiness as the real, dominant or effective cause.

The important “how far” question, regrettably, still remains open in this case, as the focus of the decision was diverted to “inherent vice” and its proximity test in s 55(2).

The legal connection between unseaworthiness and losses has been analysed in a carriage case, *Smith, Hogg v Black Sea & Baltic*.⁴⁴⁷ The shipowner claimed a general average contribution from the charterer under a charterparty concluded for carrying an amount of timber. The charterparty stated that the shipowner should not be liable for loss or damage *resulting from* unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy; and also that the shipowner should not be responsible for loss or damage *arising from* (amongst other things) act, neglect or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. The vessel had been overloaded and commenced the voyage. She put into a port on the way to replenish her bunkers and she fell on her beam end subsequently.

Before the appeal to the House of Lords, both courts below decided the vessel was not seaworthy and the shipowner had not exercised due diligence. However, the first instance decision found that unseaworthiness did not cause the loss, having considered that the unseaworthy condition had been remedied after the bunkering (which actually was not the

⁴⁴⁶ *Thomas v Tyne and Wear Steamship Freight Insurance Association* [1917] 1 K.B. 938. Per Atkin J: “Where a ship is sent to sea in a state of unseaworthiness in two respects, the assured being privy to the one and not privy to the other, the insurer is only protected if the loss was attributable to the particular unseaworthiness to which the assured was privy.”

⁴⁴⁷ [1940] A.C. 997

case); whereas the Court of Appeal held the cause of loss was unseaworthiness due to a failure to exercise due diligence.

Lord Wright in the House of Lords looked into the pure causation on the divergent conclusions of the two courts below. Lord Wright supported that “A shipowner is responsible for loss or damage to goods, however caused, if his ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen *but for* that unseaworthiness.”⁴⁴⁸ Therefore, unseaworthiness in the law of carriage by sea applies a “but for” test in terms of causation. Moreover, as to the possibility of an intervening cause, Lord Wright doubted “whether there could be any event which could supersede or override the effectiveness of the unseaworthiness if it was *a cause*.”

Most importantly, Lord Wright attempted to distinguish the test in carriage cases from those in marine insurance law, as “the selection of the relevant cause or causes will generally vary with the nature of the contract.” In particular with seaworthiness, he continued:

In the former [marine insurance], unseaworthiness is a condition precedent (at least in voyage policies) and if not complied with the insurance never attaches. In carriage of goods by sea, unseaworthiness does not affect the carrier's liability unless it causes the loss, as was held in *The Europa* [[1908] P. 84] and in *Kish v. Taylor* [[1912] A. C. 604]. (Brackets added)

However, Lord Wright’s analysis on the distinction between the carriage by sea and marine insurance law seems ineffective in the case of a time policy. In time policies, it is explicit that seaworthiness is not a “condition precedent” according to s 39(5). Literally speaking, unseaworthiness is simply to be uninsured peril.⁴⁴⁹ Thus, there seems no distinction from the nature of the contracts between the carriage contract and a time policy in this regard. Moreover, “attributable to”⁴⁵⁰ employed in the subsection is literally different from the wording of s 55(1), but the same as the phrase in respect of “wilful misconduct”. Based upon these observations, is the test of proximity redundant in determining the liability when one cause of loss is unseaworthiness based upon the nature of the marine insurance contract? The answers provided in the case law are hardly consistent.

⁴⁴⁸ Carver in Carriage of Goods by Sea, 4th ed, quoted at p 1005

⁴⁴⁹ Susan Hodges, ‘the Quest for Seaworthiness: a Study of US and English Law of Marine Insurance’ in Thomas, D, (Ed) The Modern Law of Marine Insurance, Vol 2, (Informa 2002) 199, 217

⁴⁵⁰ As concluded in Chapter One, “attributable to” in the clauses illustrating or limiting scope of perils is predominantly regarded the same as the proximate cause provided in s 55. The distinction should be remarked here that “attributable to” contained in s 39(5) does not necessarily follow the approach to interpret and may come to a different conclusion.

In an old case, *Thompson v Hopper*,⁴⁵¹ an action on a time policy on a ship for a total loss, the majority of the judges in the Exchequer Chamber held that the act of the insured knowingly sending the ship to sea could only discharge the liability of the underwriter if the unseaworthiness was the immediate cause of loss. In that era, the causation test was known as the immediate cause in time order. Therefore, it seems the courts had held a high standard of causation between unseaworthiness and the loss. However, Crowder J dissented in the sense that the unseaworthiness should be sufficient to affect the liability if it was acting as a mere “but for” cause. Furthermore, in *West India and Panama Telegraph Co Ltd v Home and Colonial Marine Insurance Co Ltd*,⁴⁵² it was affirmed that though unseaworthiness in a time policy was a *causa sine qua non*, the explosion, an insured peril, was a proximate cause. Accordingly, the underwriter was held liable, as only the effective cause mattered.

However, after the enactment of the 1906 Act and the recognition of the test of efficiency, a few cases supported the “but for” test. *George Cohen Sons & Co v Standard Marine Insurance Co Ltd*⁴⁵³ has followed the principle set up in *Thomas v London and Provincial Marine and General Insurance Co Ltd*,⁴⁵⁴ which is “it is enough if the unseaworthiness to which the assured is privy forms part of the cause of the loss.” Both cases were concerned with the loss of vessel under a time policy.

Again, the prevailing test has returned to the proximate cause of efficiency in the last few decades. In the celebrated case, *The Miss Jay Jay*,⁴⁵⁵ the Court of Appeal has held ill-designed and ill-constructed hull and adverse conditions of sea had concurrently and equally contributed to the loss. The unseaworthiness of the vessel had been examined as exclusion of the coverage in accordance with the express indication in the time policy. Subsequently, even though the forms of unseaworthiness are not enumerated under the exclusion clause, cases have still been determined by a test of proximity. In *Marina offshore v China Insurance co (Singapore)*,⁴⁵⁶ the court found that “no finding as to how the crew’s incompetence had on its own operated as a *proximate* cause of the loss. Accordingly, the insurers had some difficulty in meeting this requirement.” [Emphasis added] More recently, in view of the analysis of Lord Mance in *The Cendor Mopu* on the distinguished causation wording, “attributable to”, it is suggested that such wording is equivalent to the “proximately caused by” in the modern context, as the test of efficiency has tackled the problem caused by the test of the last cause in time order.⁴⁵⁷ Moreover, the Law Commission’s Consultation Paper recognised that the causal connection in time policies

⁴⁵¹ (1858) El. Bl. & El. 1038

⁴⁵² (1880-81) L.R. 6 Q.B.D. 51

⁴⁵³ (1925) 21 Ll. L. Rep. 30

⁴⁵⁴ (1914) 30 TLR 595

⁴⁵⁵ [1987] 1 Lloyd's Rep. 32

⁴⁵⁶ *Supra* 222

⁴⁵⁷ *Supra* 82, p 20150/1

required the insurer to “prove that the breach was a real or dominant cause of the loss,”⁴⁵⁸ which differs from the proposed “but for” test in terms of breach of the warranty of seaworthiness in voyage policies.

However, some scholars, such as Prof Howard Bennett and Dr Susan Hodges prefer to support the formulation in carriage cases that unseaworthiness ought to affect the insurer’s liability as long as it had been one of the contributing causes and with the privity of the assured.⁴⁵⁹ One commonly recognised reason by the two scholars is that if unseaworthiness itself is the proximate cause, it means it is superfluous whether the condition is under the assured’s knowledge or not, as the coverage is simply negated in light of the loss caused by an uninsured peril. Moreover, Prof Bennett suggests that the significance of subsection (5) lies in the “privity” requirement in modern marine insurance law. Therefore, reading s 39(5) as a whole, the test of causation should be “a” cause instead of “the proximate” cause.

Given that the “but for” test is the genuine test of causation in s 39(5), where a loss was proximately caused by an insured peril, such as perils of the sea, and that unseaworthiness contributed a lesser causal effect to the loss (or even an equal efficiency), (1) the insurer is liable if the assured was not aware of such unseaworthiness; (2) the insurer is not liable if the privity of the assured had been proved. Therefore, unseaworthiness can affect liability of the insurer without being the proximate cause under the condition of the assured’s privity, even though the proximity has been established between an insured peril and the loss in compliance with s 55.

However, an attention should be paid to contractual variation, which is allowed by s 33(3), whether express or implied warranties. In a time hull policy, seaworthiness may be either agreed as an express warranty or as a form of exclusion. In the former instance, no causal link is required according to the current law but subject to the reform in future which is prone to apply the “a cause” test. Under the latter circumstance, on the contrary, the test ought to be the proximate cause under s 55, or the otherwise-agreed test in the clause.⁴⁶⁰ So far as s 39(5) is concerned, the “attributable to” should be interpreted in the manner suggested by the learned scholars as above, *viz.*, the “but for” test. However, it is noteworthy in the case that unseaworthiness is an insured peril that Lord Denning emphasised that there still remains room for the operation of s 39(5) so as to disentitle the assured from recovering if such unseaworthiness was in his privity and merely attributable

⁴⁵⁸ *Supra* 398, p 211

⁴⁵⁹ *Supra* 134, p 583 and *Supra* 448, p 217

⁴⁶⁰ In the *Miss Jay Jay*, the policy excluded the loss *solely* caused by the faulty design. Such unseaworthiness of the vessel failed to meet with the test.

to the loss.⁴⁶¹ Furthermore, per Roskill LJ, an express provision is required in order to exclude the effect of s 39(5) under such circumstances.⁴⁶²

5.3.2 “The Privity of the Assured”

In *Fawcus v Sarefield*,⁴⁶³ it was considered that although “the defects were not known to him and he has acted without fraud” and although “there be no warranty of seaworthiness”, the insurer should not recover the expenses incurred as a consequence of the unseaworthy state of the vessel in a time policy. However, two decades later, the House of Lords in *Dudgeon v Pembroke*⁴⁶⁴ declared that if a shipowner knowingly and wilfully sent his ship to sea in an unseaworthy condition in a time policy, the knowledge and wilfulness are essential elements in the consideration of his claim to recover. Consequently, s 39(5) stipulates that such unseaworthiness attributable to the loss should be under “the privity of the assured”; otherwise, the insurer should remain liable. If the assured has established that he lacks the privity or the courts have found no privity of the assured exists, it is necessary for the courts to enquire into the causation issue and the subsequent effect of s 39(5).⁴⁶⁵ Therefore, this phrase has received judicial attention and two important cases have given clear illustrations and established the principle of privity in *The Eurysthenes* and *The Star Sea*.⁴⁶⁶ Two crucial questions have been clarified, namely, who is the assured and what is privity.

The issue of identifying the assured has been basically resolved by the two landmark cases. In *The Eurysthenes*, the assured shipowner found a cover against the damage to or loss of cargo arising from unseaworthiness or unfitness of the vessel from a P&I club. Much of cargo was lost, but the insurer rejected the claim on the ground of s 39(5), contending that the vessel was sent to sea in an unseaworthy condition with the shipowner’s privity. The fact showed that the vessel was not equipped with certified deck officers and proper charts, etc. Lord Denning held that “The knowledge must also be the knowledge of the shipowner personally, or of his alter ego, or, in the case of a company, of its head men or whoever may be considered their alter ego,” but excluding those who merely acted as the servants of the assured.⁴⁶⁷ This issue has been illustrated in the extreme scenario of *The Star Sea*, where four individuals (the beneficial shipowner, the registered shipowner, the manager and the registered manager) had been all involved and regarded as the “assured” on the basis of

⁴⁶¹ *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)* [1977] Q.B. 49, p 65. This case will be discussed in more details in the following subsection.

⁴⁶² *Ibid*, p 74

⁴⁶³ (1856) 6 El. & Bl. 192

⁴⁶⁴ (1876-77) L.R. 2 App. Cas. 284

⁴⁶⁵ *Frangos v Sun Insurance Office* (1934) 49 Ll.L.Rep. 354

⁴⁶⁶ *Supra* 260

⁴⁶⁷ *Supra* 398, p 66, 68

Lord Denning's formulation. The material question of ascertaining the assured ought to be who participated in making the decision to send *The Star Sea* to sea.⁴⁶⁸

In terms of the meaning of privity, in the first place, it has been questioned and argued whether the neutral wording of "privity" altered the real law which appears to demand an element of fault.⁴⁶⁹ Per Atkin J in *Thomas v Tyne and Wear Steamship Freight Insurance Association*:⁴⁷⁰

In the case of insurance under a time policy the intention was that the assured should be unable to recover in respect of a loss occasioned by his own fault. That was the rule under the law as it existed before the Act. It was always necessary to show that the loss was the result of some misconduct. Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured.

However, Prof Bennett suggests that "privity is not synonymous with any species of fault, but connotes instead knowledge of the vessel's unseaworthiness, and an assured that, correctly, suspects unseaworthiness and refrains from enquiry in order to avoid having suspicion transformed into certainty is taken as having the requisite knowledge." The same proposition can also be found in *The Arnould's*. Furthermore, a reconciling approach to the interpretation of this term was employed by the Singapore Court of Appeal, who understood the privity as the situation in which the assured *knowingly or recklessly closed its eyes* to an unseaworthy condition based upon the English authority, *The Eurysthenes*.⁴⁷¹ It seems true that privity is not equivalent to any particular type of fault; it may connote various states of mind, such as wilful misconduct, reckless and even sometimes negligence.⁴⁷² S 39(5) seems to stress that the assured has to undertake the consequences of his own decision without reference to the mentality or purpose of such a decision to send an unseaworthy vessel to sea. This is also echoed in the approach of identifying the assured, i.e. the decision-maker. Therefore, the law would be narrowed down if it had been codified from the aspect of the assured's fault.

Regardless, the predominant construction of "privity" refers not only to the actual knowledge of the assured, but also to the fact that he had turned a blind eye in ascertaining such unseaworthiness. Lord Denning gave the celebrated test in *The Eurysthenes*, with which Roskill LJ and Geoffrey Lane LJ concurred:

⁴⁶⁸ *Supra* 260, p 414

⁴⁶⁹ *Supra* 13, p 858

⁴⁷⁰ *Supra* 446

⁴⁷¹ *Supra* 222, p 81-82

⁴⁷² *Supra* 13, p 858

To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge, but also the sort of knowledge expressed in the phrase "turning a blind eye." If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry - so that he should not know it for certain - then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.⁴⁷³

Again, the House of Lords in *The Star Sea* have reviewed and analysed the cited decision, concentrating especially on the "blind eye test". A fire started in the engine room and resulted in the constructive total loss of the ship with cargo on board. The underwriter sought to deny the liability on the ground of s 39(5) and the breach of utmost good faith. In terms of the blind eye test, in Lord Clyde's judgment, the test requires a "conscious reason for blinding the eye", or "at least a suspicion of a truth which you do not want to know and which you refuse to investigate." Lord Hobhouse approved of Lord Clyde's statement and further posed the illuminating question: "why did he not inquire?" The purpose should be in the hope avoid certain knowledge of the truth, in this case, unseaworthiness, as provided by Roskill LJ and Geoffrey Lane LJ in *The Eurysthenes*. Lord Scott upheld the same view and limited the suspicion in the way that "the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe." Ultimately, the blind-eye test with all these statements has been applied and highlighted by Lord Hobhouse's conclusion on the factual privity:

The inadequate response to the previous casualties was evidence consistent with a number of states of mind of those concerned with the management of the fleet and does not *without more* establish that there was privity in relation to any individual vessel. [Emphasis added]

5.3.3 Concurrent Causes: Unseaworthiness and Perils of the Sea?

Unseaworthiness in a time policy may simply act as an uninsured peril and s 39(5) does not apply, for instance, where no privity of the assured has been established, and both perils of the sea and such unseaworthiness were causative of the loss; alternatively, where the policy explicitly indicates that some forms of unseaworthiness is insured against or excluded. Under such circumstances, the principle of proximity under s 55 subject to otherwise agreed

⁴⁷³ *Supra* 222, p 171

is revived and becomes determinant of the insurer's liability. Returning to the question posed in the overview of the definition of seaworthiness, the meaning of seaworthiness unavoidably leads to a tangled relationship with perils of the sea, especially when both of them are acting as causes of a loss.

The Miss Jay Jay is the most relevant and direct authority on debility of the ship and perils of the sea jointly and proximately causing the loss of an insured yacht. Against the wording as to "solely caused by" contained in the time policy in *The Miss Jay Jay*, Lord Wright in *Smith, Hogg v Black Sea & Baltic*⁴⁷⁴ stated that unseaworthiness could never be the sole cause. It must always be only one of several co-operating causes. Moreover, Lord Wright in a later case, *A/B Karlshamns Oljefabriker v Monarch Steamship Co Ltd*,⁴⁷⁵ reiterated that:

Seaworthiness as a cause cannot from its very nature operate by itself; it needs the "peril" in order to evince that the vessel, or some part or quality of it, is less fit than it should have been and would have been if it had been seaworthy, and hence the casualty ensues.

However, Lord Mance in *The Cendor Mopu*⁴⁷⁶ implied contributory causes of internal nature, such as inherent defects of ships and cargo, ought not to be regarded as a concurrent proximate cause with perils of the sea. This proposition may affect the possibility of seaworthiness to apply the rules of "concurrent causes" thereafter. After all, as demonstrated in Chapter Four Inherent Vice, *The Cendor Mopu* may be deemed as an authority to reject the concurrency between internal risks and external ones. Thus, it seems doubtful whether unseaworthiness and perils of the sea can be concurrent proximate causes.

At the outset, a few observations and conditions need to be clarified and admitted. Firstly, "perils of the sea" is the peril defined under r 7 of the Schedule in the 1906 Act, as distinguished from perils at sea. Secondly, seaworthiness is not a warranty in the dispute and the doctrine of proximity applies in determining the recovery. Thirdly, (un)seaworthiness has to be testified by perils of the sea along with the factual evidence of defects, and thus in most cases these two causes coexist. The key question is remaining to be how to judge the efficiency in law. It seems that the definition of seaworthiness has already provided an answer, which is whether the "perils of the sea" in question is ordinary/reasonable or not.

(1) If there were no perils of the sea but merely an ordinary movement of the sea, the loss of an unseaworthy vessel should be regarded as solely caused by unseaworthiness. Therefore,

⁴⁷⁴ *Supra* 448

⁴⁷⁵ (1948-49) 82 Ll. L. Rep. 137, at p 156

⁴⁷⁶ *Supra* 7, p 577

unseaworthiness was the proximate cause. For instance, in *E. D. Sassoon & Co. v Western Assurance Company*⁴⁷⁷, the insured opium stored on a wooden hulk moored in a river was damaged by water percolating through a leak caused by the rotten condition of the hulk unknown to the assured, the Privy Council recognised the loss was proximately caused by unseaworthiness of the vessel instead of perils of the sea.

(2) If perils of the sea were ordinary and the vessel was still lost due to its defect, it amounted to unseaworthiness and both perils were attributable to the loss. In this occasion, the two factors are likely to be concurrent proximate causes and *The Miss Jay Jay* rule should apply.

“Ordinary” in this context coincides with the “ordinary” in the statutory definition but describing “actions of wind and waves”. However, “ordinary” in the face of perils of the sea is the test of seaworthiness and also an insured peril in most policies, while the statutory definition is the test of existence of perils of the sea and uninsured. These two “ordinary” are somewhat confusing, which may be relative to and have affected the decisions of *Mountain v Whittle*⁴⁷⁸ and the *Mayban* case, in the way that the court held perils of the sea should be exceptional in order to outweigh the causal effect of unseaworthiness and inherent vice of the goods insured for the voyage.

An effective manner in which to define whether perils of the sea is ordinary or not is whether the condition of the sea is foreseen or foreseeable based upon customary and seafaring common-sense and experience. A more specific and clear way is illustrated in the *Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp*,⁴⁷⁹ although the argument concerning unseaworthiness primarily focused on the factual basis, both an Assessment of Strength, Stability and Unsinkability in Towage Plan and Instructions given to the Captain stated that the floating dock insured was only allowed for ocean towing on the basis of the permissible wave scale 5 at a maximum wave height of approximately 3.5 metres. The Court of Appeal held that, “We think that the correct analysis is that the adventure insured was one where it was contemplated by the parties that there would be a maximum wave height of 3.5 m, so that the Dock had to be fit in all respects to encounter the ordinary perils of the seas for that adventure, rather than some other voyage. In short, the contemplated voyage for insurance purposes was one where the maximum wave height would be 3.5 m.”

On applying *The Miss Jay Jay* rule, where an insured peril and an uninsured peril concurrently cause a loss, the insurer should be liable for that loss. This result is compatible with the House of Lord’s intention to broaden scope of perils of the sea and the insurer’s

⁴⁷⁷ *Supra* 233

⁴⁷⁸ [1921] AC 615

⁴⁷⁹ [2011] EWCA Civ 773

coverage. Also, it is consistent with the law that perils of the sea do not have to contain exceptional elements.

(3) On the contrary, where the perils of the sea were extraordinary and unseaworthiness is also proved, even if both factors had contributed to the loss, perils of the sea should outweigh unseaworthiness in efficiency, as the vessel was not expected to survive such perils and such perils of the sea are exactly what had been agreed to cover against under the policy. This is where the aim and commercial sense of the policy lie. Therefore, the proximate cause of loss should be perils of the sea and the loss should be recoverable.

In conclusion, in conformity with the view expressed in Chapter Two Concurrent Causes, unlike internal risks of goods, it is legally possible that unseaworthiness and perils of the sea can be regarded as concurrent proximate causes when ascertaining the insurer's liability.

Chapter 6: Burden of Proof

Lord Hoffman commented on the regime of burden of proof as follows:⁴⁸⁰

If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

Proof is an intermediary and crucial session between the facts, supporting evidence and the application of the substantive law. This chapter will discuss the burden of proof regarding causation under the law of marine insurance. Assureds and insurers undertake different matters and standards of proof, which reflects balanced of allocation of the obligation and the protection of the interests. If a party fails to discharge this onus he will bear the risk of the adverse consequences in proceedings. The general principles, presumptions and exceptions will be demonstrated and analysed by virtue of a detailed studying of English case law.

6.1 General Principles

6.1.1 Burden of Proof on the Assureds

It has been universally recognised that the assured bears the onus to show the loss was proximately caused by an insured peril on balance of probabilities in English marine insurance law. The assured would be disentitled to the recovery, if he failed to meet the burden of proof.⁴⁸¹ For instance, Lord Dunedin stated in *Becker Gray & Co v London Assurance Corp*⁴⁸² that the assured had failed to discharge his burden of proving that there was a present and actual peril which proximately resulted in the loss. The House of Lords held the frustration of the adventure was caused, not by a peril insured against, but by the voluntary act of the captain in putting the ship into a port of refuge to avoid risk of capture.

⁴⁸⁰ *Re B (A Child)* [2008] UKHL 35

⁴⁸¹ Arnould’s 17th edition, para 22-31; Prof Rob Merkin, *Marine Insurance Legislation*, 4th edn, p 74; “The third possible solution” proposed by Lord Brandon in *The Popi M Rhesa Shipping Co. S.A. v Edmunds, Rhesa Shipping Co. S.A. v Fenton Insurance Co. Ltd* [1985] 1 W.L.R. 948, 954

⁴⁸² *Supra* 3

Likewise, in *The Tropaioforos*,⁴⁸³ the shipowner sought for the recovery of a vessel sunk by perils of the sea, while the insurer refused and contended the loss was caused by scuttling. Pearson J reaffirmed that it has been well established that the assured bears the burden of proof of demonstrating that the accidental loss was proximately caused by an insured peril, notwithstanding the mere standard of balance of probabilities. Nevertheless, the Judge still held the assured failed to discharge his burden of proof; instead he found in favour of the insurer's theory which provided the sole explanation of the loss, namely, the scuttling.

Besides English law, the Australian Law Reform Commission recognises the same principle relating to burden of proof and intended to codify it as follows:⁴⁸⁴

To make a claim under a marine insurance contract, an insured has the burden to prove, on the balance of probabilities, that

- the loss was caused by a peril which was insured against in the contract, and
- the alleged cause of loss was the proximate cause.

Theoretically speaking, the onus may be varied by explicit otherwise words in the contract.⁴⁸⁵ Where a policy issued by the insurer stated that "the Insured should prove that such loss or damage happened independently of the existence of such abnormal conditions" which refers to the excluded perils, the court held that the clause effectively reversed the onus of proof.⁴⁸⁶ It has been further clarified by Mustill J in *The Spinney's*⁴⁸⁷ that in order to benefit from this type of clause, the underwriters must produce *prima facie* evidence demonstrating that the loss was caused by an excepted peril, and only when the cause of loss becomes arguable the assured should disapprove the exclusions. Thus, this type of clause seems to impose on the assured of contractual secondary onus of proof; whereas, the conventional burdens of proof on both parties remain unchanged. Otherwise, in the absence of such an agreement, the assured does not have an initial or secondary burden to disprove the loss was caused by an excepted peril.⁴⁸⁸

It is noteworthy that the wordings in the agreement must be explicitly referring to the issue of burden of proof, rather than a mere warranty or precedent condition to the claim. In *Bond*

⁴⁸³ *Compania Naviera Santi S.A. v. Indemnity Marine Assurance Co. Ltd.* [1960] 2 Lloyd's Rep. 469

⁴⁸⁴ ALRC Report 91, para 9.220, available at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch9.html#Heading59> (Last time access: 02/07/12)

⁴⁸⁵ *Supra* 12

⁴⁸⁶ *Levy v Assicurazioni Generali* [1940] AC 791

⁴⁸⁷ *The Spinney's* at p 426 per Mustill J

⁴⁸⁸ *La Compania Martiatus v Royal Exchange Assurance Corporation* [1923] 1 K.B. 650, C.A

Air Services v Hill,⁴⁸⁹ the policy provided that the observance and performance of the conditions by the claimants and their servants were conditions precedent to their right to recover. The insurer alleged that the assured should prove the fulfilment of the conditions; yet the court held that it was the insurer's burden to prove the breach of such condition or warranty, and the clause merely showed the nature of the condition rather than a switch of onus of proof. Therefore, the assured may undertake a higher burden of proof, subject to clear agreement in the policy.

Notwithstanding the insurer's defence in particular regarding infringement of the duty of utmost good faith or warranties, the assured's burden to prove the loss was caused by an insured peril initially in order to bring a sustainable claim remains unaffected.⁴⁹⁰ Had these types of defence been proved by the insurer and approved by the court, they will have the effect of rendering the issue immaterial as to whether the loss was caused by an insured peril, as they go to the root of the policies or the insurer's liability. Nevertheless, it does infer that the assured's burden of proof as to the cause of loss is discharged or becomes unnecessary in the proceedings. Under such circumstances, not only does he need to undertake different burdens of proof to rebut the insurer's defences, but also in order to finally succeed in the claim, it is necessary for the assured to establish the required causal link between an insured peril and the loss.

6.1.2 Burden of Proof on the Insurers

It has been indicated since late eighteenth century that the assured does not need to prove the loss was not attributed to an excepted cause.⁴⁹¹ It has been further clarified by Bailhache J in *Munro Brice & Co v War Risks Association*,⁴⁹² that if the assured has proved his loss, the burden then switches to the underwriters to demonstrate that the peril proximately causing the loss was uninsured or that some other defence exists; and it is necessary for the assured to bear the burden of proof to navigate the "exception" only when the term covers the whole scope of the coverage, in this case, for example, a deductible condition. Although the conclusion of the judgment was reversed by the Court of Appeal⁴⁹³ due to an inference of fact, Bailhache J's analysis and proposition as to burden of proof was supported by the Court of Appeal. In general, if the underwriter attempts to avail himself of a non-insured or

⁴⁸⁹ [1955] 2 Q.B. 417

⁴⁹⁰ *Supra* 82, p 20149

⁴⁹¹ *Green v Brown* (1743) 2 Str. 1199

⁴⁹² [1918] 2 K.B. 78. The shipowner placed both a war risks policy and a marine risks policy. Both covers were warranted from captures and similar. The proximate cause of the loss of ship was unascertained, as the ship was not heard of after sailing. Thus, the shipowner brought a claim for indemnity against both insurers. Bailhache J found the assured failed to prove the ship was lost more probably due to war risks, therefore, war risks policy did not respond. In contrast, as the assured had proved the vessel foundered at sea, the Judge held the loss was recoverable under the marine cover.

⁴⁹³ [1920] 3 K.B. 94

an excluded cause in order to rebut the *prima facie* evidence provided by the assured, the burden of proof will be shifted to him, which is consistent with the long-established yet significant principle of that the burden of proof lies upon him who claims.

Lord Brandon in *The Popi M*⁴⁹⁴ expressed a lenient attitude to the insurer's burden to prove his defence in the sense that what remains on the part of the insurer is merely a choice or right to suggest and prove an alternative story of the causation accordingly which is not within the scope insured against under the policy on the balance of probabilities as well; there is no obligation to suggest some other cause of loss, nor even to prove it if he suggested. Apparently, the learned Judge did not mean to impose any duty in terms of proof on the part of the insurer. It is indeed so only when the assured is initially trying to establish a *prima facie* recoverable loss by an insured cause. However, once the assured has managed to present a theory on the balance of probabilities to the courts, the insurer should be liable for the recovery without more. However, if the insurer is unhappy with the result and attempts to defend on the ground of an uninsured or excluded cause of loss, the burden of proof will practically shift to him.⁴⁹⁵

Echoing to the freedom and boundary of the insurer's position, a clear "ambit" of the insurer's burden of proof has been summarised in *The Vergina (No. 1)*⁴⁹⁶ on the basis of a few celebrated precedents regarding burden of proof in insurance law: the insurer is free to suggest and to prove a positive defence as to causation or not to do so; the insurer is free to disprove the assured's ground for his claim by calling evidence or cross-examining the assured's witnesses. However, when he does not present a positive defence, he is NOT allowed to adduce any form of evidence to support such a positive defence and the court cannot work outside this ambit.⁴⁹⁷

6.1.3 Balance of Probabilities

It has to be noted here that the test of proximity and test of balance of probabilities are different issues and not in conflict. Which cause is proximate is a substantive question regarding the test of causation which has been solved in the first chapter; contrariwise, burden of proof concerns procedural issues such as whether the insured peril, alleged to be the proximate cause by the assured, had in fact ever occurred and whether it is likely to be efficiently connected to the loss. For example, it was proposed by the Law Commission's reform on the insurance contract law that a causal link between such a breach and the consequence of loss should be required upon a test of balance of probabilities. Despite the fact that the substantive test of causation proposed differs from the doctrine of proximity,

⁴⁹⁴ *Rhesa Shipping Co. S.A. v Edmunds* [1985] 1 W.L.R. 948, 951

⁴⁹⁵ *Supra* 7, para 20

⁴⁹⁶ *Seashore Marine SA v Phoenix Assurance Plc (The Vergina) (No. 1)* [2001] 2 Lloyd's Rep. 719, 723-724

⁴⁹⁷ *Regina Fur Company, Ltd. v. Bossom* [1958] 2 Lloyd's Rep. 425, 428, per Lord Evershed

however, the standard of proof is identical under the two circumstances, namely, balance of probabilities.

Balance of probabilities is the renowned civil standard of proof, as opposed to the one in criminal law, "beyond reasonable doubt". The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not,⁴⁹⁸ and it must be applied with common sense.⁴⁹⁹

However, the civil standard of proof does not invariably mean a literal meaning of "balance of probability". It is a flexible standard of different degrees of strictness according to the seriousness of what has to be proved and the implications of proving those matters.⁵⁰⁰ Insurance is well known for the consideration of fortuity. Moral hazard inherently attaches to every policy. A few perils, in particular with the uninsured/excluded ones, overlap with the occasion of crimes, such as barratry and wilful misconduct in the form of scuttling. However, it has been suggested that the standard of proof in this regard is unsettled.⁵⁰¹

Barratry of the master or crew other than the assured himself is normally an insured peril subject to the insertion of The Inchmarnie Clause in the policy. Given that the barratry of the master and crew is insured, the burden of proof in respect of such kind of barratry lies on the assured. The owners must establish a loss and the absence of the owners' consent on a clear balance of probability. If in the end the court is left in doubt whether the owners consented or not, then the claim should fail.⁵⁰² Furthermore, it has been held that "in the absence of suspicious circumstances, lack of consent might readily be inferred, and very little in the way of proof might be necessary."⁵⁰³

Occasionally, the assured may need to prove the loss was not caused by the barratry of the master and etc in order to prove an insured peril was the proximate cause. The standard of burden of proof was held to be on a balance of probability. *The Grecia Express*⁵⁰⁴ is concerned with a claim by the owners against the insurers, alleging that the sinking of a car ferry was caused by unknown persons acting maliciously, an insured peril under the war risks cover. In terms of burden of proof, the commercial court held that the assured was required to establish that the deliberate sinking of the vessel fell within the scope of war

⁴⁹⁸ *re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563

⁴⁹⁹ *Supra* 497, p 956

⁵⁰⁰ *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340

⁵⁰¹ *Supra* 86, p 98

⁵⁰² *Piermay Shipping Co S.A. And Brandt's Ltd. v. Chester (The "Michael)* [1979] 1 Lloyd's Rep 55

⁵⁰³ Per Bingham J, *N Michalos & Sons Maritime SA v Prudential Assurance Co (The Zinovia)* [1984] 2 Lloyd's Rep. 264, 272

⁵⁰⁴ *Strive Shipping Corp & Anor v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2003] 1 C.L.C. 401. The case was disapproved by *Brotherton v Aseguradora Colseguros SA (No.2)* [2003] 2 C.L.C. 629 on other grounds.

risk cover which did not include barratry, unlike the hull and machinery policy. The assured therefore had to prove on the balance of probabilities that the sinking was not caused by the master, the watchman or the crew so as to constitute barratry.

In contrast, the barratry of the assured which is excluded from the coverage of the policy should be established by the counter party, the insurer. In *Issaias (Elfie A) v Marine Insurance Co Ltd (The Elias Issaias)*,⁵⁰⁵ Bailhache J, the judge at first instance, favoured the insurer's argument that the sinking of the insured vessel was caused by the owner's wilful scuttling along with the master. Bailhache J adopted the test of "beyond reasonable doubt". This proposition was affirmed by the Court of Appeal, as the shipowner had been accused of the severest form of fraud in English law, which would constitute a crime; however, the result of the decision was overruled due to a contrary view and evaluation on the fact and evidence. Atkin LJ in the Court of Appeal held that the assured could invoke the well-recognised *resumption of innocence* in his favour in English law, when the insurer contended that he was guilty and privy to the scuttling. The judges unanimously concluded that the evidence was not solid enough to remove their doubts, so that the court the loss should be recovered either as a peril of the sea or as barratry of the master.

The higher standard established in *The Elias Issaias* was recognised and followed by a few celebrated cases, *The Zinovia*⁵⁰⁶ and *The Captain Panagos DP*⁵⁰⁷ relied upon the obiter decision, contemplating that "once the owners have proved a casting away by the deliberate act of the master or crew, it is for the insurers to establish to the high standard required for the proof of fraud in a civil case that the owners consented to, or connived at, the casting away." Furthermore, *The Ny-Easteyr* reaffirmed the standard of beyond reasonable doubt on the insurer, however, interestingly yet subtly describing it as "a balance of probability appropriate to the seriousness of the charge, a standard falling not far short of the rigorous criminal standard."⁵⁰⁸

Nevertheless, some expositions oppose the application of the criminal test, insisting that the civil standard should be applicable in cases of scuttling.⁵⁰⁹ The presumption of innocence ought not to be invoked in such civil cases⁵¹⁰ and the criminal standard of burden of proof is too harsh to the insurer to defend himself of the assured's wilful misconduct.

⁵⁰⁵ (1923) 15 Ll. L. Rep. 186

⁵⁰⁶ *Supra* 503

⁵⁰⁷ *Continental Illinois National Bank & Trust Co of Chicago v Alliance Assurance Co Ltd* [1989] 1 Lloyd's Rep. 33

⁵⁰⁸ *Houghton (RA) and Mancon Ltd v Sunderland Marine Mutual Insurance Co Ltd (The Ny-Easteyr)* [1988] 1 Lloyd's Rep. 60, 62

⁵⁰⁹ Hazelwood, "Barratry- the Scuttlers Easy Route to the Golden Prize" [1982] L.M.C.L.Q. 383, as cited from Peter Muchlinski, 'Causation and Proof of Loss in Marine Insurance', in F. D. Rose (ed.) *Current Legal Problems*, (1987), p 99

⁵¹⁰ See *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458

Particularly, Arnould's suggests that the civil cases involved with fraudulent elements or criminal act should be ultimately decided on balance of probabilities without exception. Although all the aforementioned dicta seemingly indicated a different standard, in practical terms, there was no difference in indicating that "a finding of wilful misconduct requires strong evidence, of sufficient strength to induce a high level of confidence that the allegation is true."⁵¹¹

As the perils of a severe moral hazard normally become rarer in modern context, it is natural and common-sensible to demand strong evidence to be convinced of the existence of the misconducts even in a civil case. Regardless, the balanced effect of burden of proof between the two parties in this regard has been succinctly concluded by Branson J in *The Gloria*:⁵¹²

The law is, in my opinion, clear. 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. 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. If, however, the evidence is such that the Court, giving full weight to the consideration that scuttling is a crime, is not satisfied that the ship was scuttled, but finds that the probability that she was is equal to the probability that her loss was fortuitous, the plaintiffs will fail.

6.2 Generic Perils: All Risks and Perils of the Sea

It is suggested that the scope of coverage largely determines how specific the assured's factual evidence ought to be in order to convince the court on balance of probabilities.⁵¹³ Specifically, if insured perils are enumerated in the policy one by one, it indicates that the assured cannot discharge his burden of proof unless a causal link with a specified insured peril has been established on balance of probabilities. On the contrary, if the insured perils are described in a generic manner in the policy, the assured does not have to prove which specific form of the type has caused the loss, but just need to prove the cause of loss occurred accidentally and "prima facie" falls in the generic scope.⁵¹⁴

All Risks

⁵¹¹ *Supra* 13, Para 22-36

⁵¹² *Compania Naviera Vascongada v British & Foreign Maritime Insurance Co Ltd* (1936) 54 Ll L Rep 35 at 50-51

⁵¹³ *Supra* 81, para 7.23

⁵¹⁴ Hazelwood, S "Marine Perils and the Burden of Proof" in Thomas D.R. (1996) *The Modern Law of Marine Insurance*, p 149

“All risks” policies cover a significantly broad scope of risks except for some exclusion by agreement or statutes. English courts consider that due to the nature of all risks cover, the assured is only required to prove an actual and fortuitous loss, irrespective of the exact form of the cause of loss.

*Wilson v Jones*⁵¹⁵ came to the conclusion without reference to a specific peril insured against. The judges approved that the assured, who was the shareholder of the company, acquired insurable interest in the adventure on the profits deriving from the success of laying a cable in a marine policy. It covered “every risk and contingency attending the conveyance and successful laying of the cable”. The operation failed and a portion of the cable was lost. Per Willes J., in answering whether the loss was caused by perils insured against, in the absence of mala fide or evidence of inherent defect of the cable, it was impossible to come to the conclusion that there was no evidence that the loss was caused by perils insured against.

Moreover, in *British & Foreign Marine Insurance Co Ltd v Gaunt*,⁵¹⁶ Lord Birenhead provided the most frequently-cited basis for the assured’s burden of proof in an all risks cover:

We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss.

Croom-Johnson J cited the former dictum in *Theodorou v Chester*⁵¹⁷ as the authority regarding the issue as to whether the assured should enjoy the recovery in an “all-risks” policy. Although the learned judge spent most of his judgment in analysing the evidence and witnesses, the law he considered was quite clear that “all risks of loss however arising” is not all-embracing. It requires the assured to show that the loss was due to “abnormal perils”. The wording used by the judge may be misleading to some extent; but based upon his detailed analysis. “Abnormal perils” should be interpreted as some accidental cause instead of inevitable events or “ordinary actions of the winds and waves”. However, the learned judge did go too far by declaring that “the assured was also required to disprove any counter-theory put forward by the insurer which was designed to show that the loss was due to normal transit risks.” The judge’s opinion is therefore incompatible with the general principle that the assured is not obliged to disprove the insurer’s explanation of causality. Even if the insurer directly denies the assured’s theory by a mere cross-examining the

⁵¹⁵ (1866-67) L.R. 2 Ex. 139

⁵¹⁶ *Supra* 218, p 47

⁵¹⁷ [1951] 1 Lloyd’s Rep. 204

assured's evidence without doing anything more, the assured is still not obliged to remove every doubt and question of the insurer, let alone disprove the insurer's alternative account of events. The analysis of the case strangely reflects a strict attitude to the assured's onus of proof in an "all-risks" cover, although in the end the judge granted the partial recovery.

Recently, *AXL Resources Ltd v Antares Underwriting Services Ltd*⁵¹⁸ cited and addressed the obiter dictum of the former paragraph. The assured took a cargo policy on the terms of the Institute Cargo Clauses (A) with an additional exception of "Mysterious Disappearance and Stocktaking Losses". The assured claimed for the lost cobalt insured in the policy and provided the evidence saying that the cargo was likely to be stolen by a group of local gang. However, the insurer rejected the claim relying upon the Mysterious disappearance exception. So far as an "all-risks" cover is concerned, the Judge held that the only onus on the assured under such circumstance is to establish that the loss occurred accidentally. This means the assured's burden of proof will be discharged as long as he can prove the fortuity of the loss. The Judge also relied upon the renowned treatise, MacGillivray⁵¹⁹ which indicates the same proposition. Thus, it is settled that the law discharges the assured's primary burden of proof in an "all-risks" cover by merely requesting a proof of fortuity in general situations.

Perils of the Sea

As discussed in Chapter Three, the statutory definition of perils of the sea⁵²⁰ embraces quite a wide spectrum of fortuitous incidents of sea apart from the ordinary action of winds and waves. Thus, it has been recognised that when the assured claimed indemnity by the perils of the sea, he should establish that there was an accidental event amounting to a peril of the sea.⁵²¹ Normally, it is not difficult to find some event amounting to perils of the sea (on a balance of probability) in a marine insurance case, notably the ingress of sea water, adverse weather conditions, etc. That is why it appears simple for the assured to establish a loss caused by perils of the sea.

However, it was held in *The Cendor Mopu* that the most frequent event, the ingress of water, does not automatically discharge the assured's burden; the assured also has to prove the event is fortuitous.⁵²² The burden of proving fortuity in terms of perils of the sea enumerated in the policy differs from the burden to prove a fortuitous loss in the case of an "all risks" policy. In an "all-risks" cover, the requirement of fortuity does not derive from causation, but

⁵¹⁸ [2010] EWHC 3244 (Comm)

⁵¹⁹ Para 19-006-19-007

⁵²⁰ Marine Insurance Act 1906, Sch.1 r. 7

⁵²¹ *Supra* 81, para 7.23

⁵²² *Supra* 7, Para 71-72. *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* (1940) 67 Ll Rep 549; *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 Lloyd's Rep 1 applied; and *Skandia Insurance Co Ltd v Skoljarev* [1979] HCA 45 considered.

from the fundamental doctrine of fortuity in insurance law; whereas, in terms of perils of the sea, the nature and concept of the peril requests a proof of fortuity. Proving the existence of a peril of the sea is the prerequisite to establishing the causal link between the peril and the loss.

Thus, although peril of the sea is the most common form of the marine risks, the assured need to identify an event of perils of the sea and proves it has occurred accidentally. Once the two conditions have been satisfied, there is a *prima facie* case of perils of the sea.

6.3 Unexplainable Losses

Unexplainable losses are interchangeably known as mysterious losses/disappearance.⁵²³ It has been decided that a sweeping definition is not necessary as the concept depends on context. "Normally it will involve a situation where the cause of the loss cannot be identified or the circumstances in which the property has been lost arouse speculation or are hard to explain."⁵²⁴ Unexplained losses may be rare in the light of modern developments of the ship engineering and technology. However, cases concerning unexplained losses have appeared since the earliest stages of English insurance history. The concept is extremely unwelcoming, as it brings the assureds considerable difficulty in proving they deserve indemnity; while insurers are reluctant to recover some losses which they do not even know what had happened. As above indicated, the assured undertakes the primary burden of proof, if failed, the loss would not be recovered. However, this rule is not always applicable, as English courts have developed a few presumptions and solutions in order to tackle the difficulty of providing evidence and the question as how to balance burden of proof between the two parties.

In the old case *Green v Brown*,⁵²⁵ the ship sailed out of port on her intended voyage, and was never been heard from again. The ship was assumed to have sunk based upon several witnesses' opinions. In the absence of a clear explanation of the loss, the Chief Justice considered that it would be unreasonable to expect certain evidence of such a loss from the assured to establish the loss was caused by a certain insured peril; and all that can be required is the best proof the nature of the case admits.

Based upon the former case, the Court in *La Compania Martiatiu v Royal Exchange Assurance Corporation (The Arnus)*⁵²⁶ pronounced a further presumption that when a seaworthy vessel was lost by unascertained peril, the peril must be presumed to be an

⁵²³ *Supra* 39, para 19-058

⁵²⁴ *Supra* 335

⁵²⁵ (1743) 2 Str. 1199

⁵²⁶ [1923] 1 K.B. 650, C.A, 655 per Banks LJ

insured peril. Two evident yet strict conditions must be satisfied in order to apply the presumption, *viz.*, seaworthiness and “unexplainability”.⁵²⁷

Seaworthiness

As addressed in the previous chapter, seaworthiness is either an implied warranty in a voyage policy or, generally, an uninsured peril in a time policy. Although there is a presumption in English law that the vessel was seaworthy and therefore the burden of proof as to unseaworthiness is on the insurer,⁵²⁸ the assured will find it necessary to establish seaworthiness in order to prove his case when he has no direct evidence of loss due to a fortuitous event, an unascertained peril of the sea.⁵²⁹ There is a presumption that without apparent evidence a missing ship was due to unseaworthiness, however it is a mere *prima facie* presumption.⁵³⁰ Therefore, where no direct evidence is left since the ship vanished without a trace, proving seaworthiness is not only the only thing that the assured may be only able to do, but also an act that rebuts such a presumption in fact.⁵³¹ On the other hand, in *Davidson v Burnand*,⁵³² when there is no proof that the vessel is not seaworthy, it had to be accepted that the cause should be marine perils and alike. The rationale is that as seaworthiness warrants the vessel is fit for the voyage against ordinary perils of the sea, it turns more probable that the loss was due to an unordinary action of the sea.

Moreover, it is noteworthy that when the loss is not totally unexplainable, a presumption in fact that the ship is *prima facie* lost by unseaworthiness and that therefore the assured bears the burden of proof has also been drawn by English courts.⁵³³ The classic scenario of these cases is that the vessel is known having been lost in calm sea shortly after departure.

This presumption can be traced back from early nineteenth century in *Watson v Clark*.⁵³⁴ The insured vessel became leaky without apparent reason a few days after the sail; the master ordered to return during which the ship struck on the reef and was lost. The insurer denied liability on the ground of unseaworthiness. The House of Lords held that if there is any other sufficient cause of this inability to perform the voyage in such a short time after sailing, then the ship might have been seaworthy; otherwise, the presumption is that she had not been seaworthy and the onus to prove its seaworthiness is on the assured. Additionally, as

⁵²⁷ *Lamb Head Shipping Co Ltd v Jennings ("The Marel")* [1994] 1 Lloyd's Rep. 624 Dillon LJ; *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458 per Aikens J

⁵²⁸ *Parker v Potts* (1815) III Dow 23

⁵²⁹ *Skandia Insurance Co Ltd v Skoljarev* [1979] HCA 45, para 36

⁵³⁰ *Waddle v Wallsend Shipping Co* [1952] 2 Lloyd's Rep. 105

⁵³¹ Gepffrey Brice Q.C., “Unexplained Losses in Marine Insurance”, 16 Tul. Mar. L.J. 105 1991-1992

⁵³² (1868-69) L.R. 4 C.P. 117

⁵³³ *Supra* 13, para 22-31

⁵³⁴ (1813) I Dow 336

unseaworthiness would render the policy void in this case, the judges found hitting the reef did not break the chain of causation if unseaworthiness had been recognised.

Subsequently, in the first instance trial of *Anderson v Morice*,⁵³⁵ a case mainly concerning the issue of evidence, when the insured cargo was being loaded, the ship suddenly began to leak, and sank at her anchors in port in fine weather. The judges found reaffirmed the presumption that when there is no other evidence about the condition of the ship, unseaworthiness can be presumed by the fact that the ship sunk without apparent cause in calm water and weather. However, it had been stressed that as long as other explanations exist, the presumption cannot be invoked, and the fact in dispute should be judged by the jury.

The presumption has been highlighted in the leading case *Pickup v The Thames and Mersey Marine Insurance Company*.⁵³⁶ This case is concerned with an insurance policy on freight. The insurer rejected recovering the loss on the ground of unseaworthiness as the vessel was compelled to return in a leaky state merely in eleven days after the sail, while the assured claimed the loss was caused by perils of the sea as she encountered heavy seas before deciding to return. An application was made to the Queen's Bench Division for a new trial on the ground that the jury had been misdirected by the judges in terms of burden of proof and then concluded a fact of unseaworthiness in favour of the insurer. The Queen's Bench Division with the approval of the Court of Appeal ordered a new trial.

Cockburn CJ stated that the presumption is merely an inference of fact, namely a presumption of fact, rather than a presumption in law:

If a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as in the absence of every other possible cause the only conclusion, which can be arrived at, is that inherent unseaworthiness must have occasioned the result....

In terms of shifting the burden of proof to the assured, Thesiger, LJ explained in the following judgment:

⁵³⁵ (1874-75) L.R. 10 C.P. 58, the decision was been reversed in the Court of Appeal and the House of Lords on other grounds, but affirming that there was evidence for perils of the sea.

⁵³⁶ (1877-78) L.R. 3 Q.B.D. 594

...the burden of proof which originally lay upon the underwriters had shifted, and the burden was thrown upon the plaintiff of shewing that the loss of the vessel was due to the causes which had arisen subsequently to her sailing. The meaning of that was obviously this, that the jury must, from the short time that elapsed after her voyage commenced, presume *prima facie* that instead of the vessel being seaworthy, as they would have presumed without any evidence, they presume that she was unseaworthy at the commencement, unless such evidence was given on the part of the plaintiff as to satisfy them that the loss was not due to unseaworthiness, but due to perils insured against. Therefore it appears to me that, although the words "as a matter of law" may have been used, what the learned judge really intended to say was, that the burden in point of fact had been shifted. But even in this point of view it seems to me that the learned judge misdirected the jury, and that there was nothing to shew or to justify him in saying that the burden of proof, as a matter of fact, had shifted, because at the very same time that it was proved that a short time had elapsed since the vessel had started, it was also proved that there was weather which might possibly account for the loss which took place. Therefore, upon the question of seaworthiness, it seems to me that there was a clear misdirection.

The case has at least contributed to clarifying the presumption of unseaworthiness, which requires the assured to prove the contrary, is simply an inference of fact based upon the circumstantial evidence showing that the loss could not be wholly explained. It has twofold meanings. On the one hand, generally speaking, seaworthiness in favour of the assured has been recognised as the presumption in law and the insurer undertakes the burden of proof if he opts to challenge it. On the other hand, "not wholly explained" refers to a situation between the mysterious situation where the ship had never been heard from again and an arguable situation where both parties contend different explanations of the cause of loss. In the latter case, the presumption in fact does not occur and the onus of proof does not shift. This is also echoed with the proposition that another explanation defeats the presumption as held in the two precedents mentioned above. These dicta have been considerably analysed and affirmed by the later cases, such as the frequently-cited case *Ajum Goolam Hossen & Cov Union Marine Insurance Company*.⁵³⁷

Unexplainable

The basis of the presumption and the reason why it could be established and applied in *Green v Brown*, is the remarkable fact in the way that the ship had never been heard from after the sailing and no positive evidence was available. The case should be completely impossible to ascertain what happened to the insured subject-matter. However, when the

⁵³⁷ [1901] A.C. 362

crew on board are alive or heard from and some evidence remains available, despite the fact could not be wholly ascertained, the presumption is not applicable.⁵³⁸ For examples, in both *The Arnus* and *The Elias Issaias*, where the ships were known to have sunk but the cause was unascertainable, as some evidence from the board was still available. The judges distinguished that the cases were not unexplainable losses and the presumption did not apply. It should leave to the court to inquire and determine the dispute on such evidence.

Moreover, when both parties provided two equally reasonable yet incompatible explanations of the cause of loss, the presumption should not be applied and the issue will be left to the court to decide which cause of loss is more persuasive. The landmark case *The Popi M* has perfectly demonstrated how the regime of burden of proof works under such circumstances. In this case, assured's ship *The Popi M* sank in calm weather in deep water with a cargo of sugar on board. The assured sought to claim for the recovery of a total loss due to an alleged collision with a submerged object. The decision of the trial judge and the Court of Appeal respectively approved the assured's claim, despite the fact that whether the loss caused proximately by the alleged perils of the sea remained in doubt, while the theory contended by the underwriters as to wear and tear was ruled out because of its lower probability compared with the perils of the sea. Nevertheless, the House of Lords ultimately reversed the decision of the Court of Appeal and held the underwriters were not liable for the indemnity since the assured failed to discharge his burden of proof. Lord Brandon explained that the loss did not occur in unexplained circumstances and the presumption in *The Arnus* was not applicable, despite the courts face a dilemma where the both parties' theories remain in doubt. Nevertheless, Lord Brandon in this case stated a "third possible solution" theory: not in every case the proximate cause of the loss has been clearly ascertained by the proof of either the assured or the insurer; the judges do not have to select one between the two options. Rather, the "third possible solution" should be adopted that the assured has to bear the adverse consequence of failing to prove that the proximate cause was within the perils insured. That is to say, the assured bears a primary burden of proof on the proximate cause of the loss when he reports a loss for indemnity. Nevertheless, the "primary" duty does not imply a high threshold of discharging such burden.

The approach set up by the House of Lords in *The Popi M* was cited and reaffirmed in *The Marel*.⁵³⁹ Likewise, water entered in to the engine room and hold of *The Marel* without apparent reason. The ship sank but the crew were rescued. The assured claimed for the loss by perils of the sea, probably hit by an object. The insurer rejected the claim merely alleging the loss was not caused by perils of the sea, without presenting another explanation. The Court of Appeal, approving the first instance decision, found the assured's claim failed as he did not discharge his initial burden of proof on a balance of probability of establishing the

⁵³⁸ *Supra* 517, p 156

⁵³⁹ *Lamb Head Shipping Co Ltd v Jennings (The Marel)* [1994] 1 Lloyd's Rep. 624

loss was proximately caused by the perils of the sea, even though the real cause of loss remained unascertained.

Colman J further explained for the application of the “third possible solution” in *Glowrange Ltd v CGU Insurance Plc*:⁵⁴⁰

In many cases there may be primary evidence which, although suggesting from where water entered a vessel, does not indicate why the entry occurred. In such cases, if the assured is to establish a case of loss by perils of the seas strong enough to displace all other uneliminated but uninsured perils as possible causes of the loss, he will need to advance a cogent explanation for the seawater entry on which he relies. Omission to do so may lead to the court being left in such doubt that it is unable to infer that the loss was more probably caused by perils of the seas than by an uninsured peril. That was the case in both *The POPI M* and *The MAREL*.

It is clear indicated that both precedents have been confined by their limited primary evidence that to no good explanation could be established nor eliminated. This is what has been recognised by Thomas LJ in *Ide v ATB Sales Ltd*,⁵⁴¹ that *The Popi M* was unusual regarding the burden of proof, as courts frequently grapple with the situation that two or more competing theories to a particular event. In such cases, as Thomas LJ concluded, courts are allowed to make decisions by ruling out all of the explanations but one AND examining the likelihood of the remaining one on balance of probabilities. If both conditions are satisfied, the remaining explanation should be declared the cause of loss. This approach is somewhat similar to the “Sherlock Holmes” dictum which was commented by Lord Brandon in *The Popi M*, saying that “*When you have eliminated the impossible, whatever remains, however improbable, is the truth.*” Lord Brandon explained that when all the relevant facts of the case were known, though not the case of *The Popi M*, this dictum could be applicable.

A crucial point has to be stressed in terms of applying the “Sherlock Holmes” dictum to prove the cause of loss. This approach has been accepted and followed in English courts, but only when a few competing and possible causes have been and could be suggested before courts in the light of the factual basis. In a fire insurance case, *Milton Keynes v Nulty*,⁵⁴² a large fire broke out and was followed by a second one which destroyed a recycling centre insured under the policy. Only three competing causes of the first fire were focused on by virtue of quantities of investigations and evidence, which are a cigarette end carelessly discarded by an unknown person, arcing from a live electric cable or arson by an intruder.

⁵⁴⁰ Case No. 2001 folio 41

⁵⁴¹ [2008] EWCA Civ 424

⁵⁴² [2011] EWHC 2847

Edwards-Stuart J held that Thomas LJ's decision was not incompatible with *The Popi M*. Instead, what Thomas LJ suggested was that if all of the explanations but one are remote or extremely improbable, it is logical to come to the conclusion that the remaining "possibility" is in fact the desired answer. On this basis, Edwards-Stuart J was convinced that only three possible causes were presented before him and he had no difficulty to have eliminated two of them on evidence. Finally, the Judge held that the only possible one, the cigarette end should be the cause of the first fire. Thus, adequate factual information but limited possible theories are the essential preconditions to resort to the "Sherlock Holmes" approach rather than the "third possible solution".

It is also noteworthy that despite all the improbable explanations being eliminated, the probability of the remaining one is still required to be examined on a balance of probability. This is the legal application of the "Sherlock Holmes" dictum and it is what has been read from the *Idem* case by Popplewell J in *European Group v Chartis*.⁵⁴³ An "all risks" marine policy and an "EAR" policy were placed to insure a business project. A loss was caused by fatigue stress cracking of the tubes used for the project. The insurers under the two policies agree to undertake an equal liability if it was impossible to ascertain under which policy's duration that the loss occurred. A claim concerning the contribution of the liability under this term was brought up by the "EAR" policy underwriter against the marine insurance insurer. The former insurer alleged that either the loss should be completely covered by the opponent insurer, as the loss was happened during transport, or the time of loss was unascertained and thus they should equally share the amount of indemnity in accordance the clause. However, the marine insurer notably contended that the fatigue was more likely caused during restoration by wind; alternatively one of the proximate causes was inherent vice, excluded in the marine policy. Accordingly, on either ground, the marine insurer should not be liable at all.

Notwithstanding the scientific limitation in determining with certainty whether the loss was occurred by wind during restoration or by transport in certainty, however, sufficient evidence was available before the court. Having ruled out the theory which the marine insurer attempted to prove, instead of jumping to the conclusion in favour of the claimant "EAR" policy underwriter, the Judge considered he must examine whether the other explanation was more likely than not to have occurred. If the test failed, though the Judge himself had already ruled out the other explanation, the court would still not recognise the remaining one as the cause of loss. This appears to differ from the "*whatever remains, however improbable*" part of the dictum; however, what the Judge did is logical in the legal sense in terms of applying the approach, instead of simply following the literal meaning. Being probable with satisfactory evidence was also a fundamental element to be one of the candidates referred in the dictum, before complying with the logic underlying in the dictum.

⁵⁴³ [2012] EWHC 1245 (Comm)

In summary, notwithstanding the recognition of and adherence to *The Popi M*, the “third possible solution” is no more than one of the approaches, which applies in exceptional cases. The “Sherlock Holmes” approach in the legal sense, which essentially eliminates the impossible and remains the more possible, is applicable to the majority cases when it is argued which one of the only few possible explanations drawn from the fruitful evidence should be the one. These methods are reconcilable and accepted by English courts, but simply applied under different situations. Besides, in the most extreme case, a genuine unexplainable loss, the presumption which reduces the standard of proof should respond.

Mysterious Disappearance Clauses

It has been increasingly common that “all risks” covers include a “mysterious disappearance clause”, providing that the insurer will not be liable for mysterious or unexplainable disappearance of the insured subject-matter. *AXL Resources Ltd v Antares Underwriting Services Ltd*⁵⁴⁴ has been exclusively addressed this clause. The judgment shows that there are few dicta and expositions commenting on this clause for the judge to refer to, except for *Colinvaux's Law of Insurance*⁵⁴⁵, which was deemed important to this case by Gloster J. The book pointed out the clause is unlikely to have much effect. According to the learned authors, the clause adds nothing to the insurer's rights in a policy against enumerated perils, as the assured is obliged to prove the specific cause of loss. Failure to do so will entitle the insurer to discharge the indemnity. In contrast, in an “all risks” policy, this clause undermines the basic cover of the loss, as the all-risks clause only requires the assured to prove the loss is caused by a fortuitous event.

In a real case of a mysterious or unexplainable loss, which is distinguished from a cause of loss in doubt, there is no difference, respectfully disagreeing with the highly reputed *Colinvanx's*, between an “all risks” cover from the others, as the presumption favouring the perils of the sea should be invoked instead of the general principles of burden of proof. In essence, “mysterious disappearance clauses” are no more than contradicted by the presumption established in *The Arnus*, rather than the basis of cover. The underwriters may think they are smart enough to narrow down their liability when the cause of loss is *doubtful* by introducing such a clause into the policy, however, fully agreeing with the *Colinvaux's*, this clause has little effect in modern context, since the real mysterious disappearance in literal meaning is remarkably rare. Thus, unless under genuine circumstances of mysterious disappearance, the clause will not be affected and the conventional burden of proof in “all risks” covers and other covers will not be affected despite the insertion of such a clause.

6.4 Concurrent Causes

⁵⁴⁴ *Supra* 335

⁵⁴⁵ *Supra* 39, para 19-058

In ‘concurrent causes’ situation, the assured should not undertake the onus to prove that there is more than one proximate cause. The law merely requires him to provide *prima facie* evidence in establishing the causal link of proximity between an insured peril and the loss regardless of the concurrency involved with uninsured perils or excluded perils. As the law provides that when an insured peril and an excluded peril concurrently caused the loss, the insurer is not liable, the insurer is provided with an alternative to contend that an excluded peril has equally resulted in the loss, instead of a direct denial of the assured’s evidence and grounds. Nevertheless, there is practically no difference in burden of proof between the two approaches of defence, as the two alternatives derive from the test of proximity and have no relation to the standard of “on balance of probabilities”.

In conclusion, the assured bears the initial burden of proof on balance of probabilities to establish the loss was proximately caused by an insured peril. The parties can opt to impose the assured of the burden of proof concerning the excluded peril by clear agreement. In contrast, the insurer is not obliged to submit such evidence to court unless he so alleges. Likewise, had the insurer provided a different theory and evidence that the loss was proximately caused by an excluded peril; there is no secondary burden of proof on the assured against the insurer’s defence. It is the court’s duty to consider the evidence provided by both parties and give judgment accordingly. The generic terms such as “all risks” and “perils of the sea”, which indicate a wide scope of coverage, entitle the assured of a lesser burden of proof, and discharge the assured from seeking the specified form of the perils. In the rare cases of unexplained losses, the presumption in favour of the assured can be only relied upon in a strict condition; whereas most frequently, the case falls in the argument between the parties by submitting different stories in respect of the cause of loss. Under such circumstances, courts normally weigh the evidence and give judgments by following the general principles of burden of proof.

Conclusion

The theory of causation in marine insurance law context has been dramatically developed, in particular after the enactment of the 1906 Act. The test of identifying the proximate cause of loss has been changed from the last cause occurring before the loss to measuring the efficiency of contribution. Nonetheless, it does not imply that all the judgments prior to 1906 are no longer good law in ascertaining the proximate cause of the loss. On occasion, direct and immediate causes in time sequence are the efficient ones contributing to the consequential loss in the legal sense. Accordingly, whether a decision has precedential value nowadays is determined by its legal reasoning in applying a certain test, rather than in which era it was made. Moreover, the time order in which the perils and loss occurred still remains a helpful reference but need to be replaced by the chain of efficiency. Basically, the starting peril which introduces the risk of loss initially and substantively should be considered as the proximate cause, except for other intervening events which break the chain of causation. The last but not least, the test of common sense assists the judges substantially in identifying fair grounds to determine insurers' liability.

In the case of two equally competing causes, English courts used to hold a mild attitude in recognizing a loss arising from more than one proximate cause and they seem to have set up a rather harsh standard at present. Particularly after the Supreme Court's judgment, *The Cendor Mopu*, it is clear that an internal cause of the goods and external fortuitous event cannot be considered as concurrent causes. However, it is necessary and legally possible to retain the notion "concurrent causes" in weighing the causal connections in marine insurance cases.

In respect of proof, generally, the assured bear the initial burden of proof on balance of probabilities of establishing that the loss was proximately caused by an insured peril, unless otherwise agreed. The insurer is not obliged to submit such evidence to court unless he alleges so. The generic terms such as "all risks" and "perils of the sea", which indicate a wide scope of coverage, entitle the assured to a lesser burden of proof, which discharge the assured from seeking the specified form of the perils. In exceptional cases of unexplained losses, the presumption in favour of the assured is subject to extremely unusual circumstances; whereas most frequently, the case falls in the argument between the parties by submitting different stories in respect of the cause of loss. Under such circumstances, courts normally weigh the evidence and give judgments by following the general principles of burden of proof.

The main aim to clarify and conclude a theory of causation in marine insurance law is to serve practical applications involving the specified perils in every case. It is a matter of fact

that what kind of perils would be referred to in the case, however, the research shows that the perils comply with the general rules summarised above in causation terms.

Inherent vice is frequently questioned on the grounds of lack of fortuity and has been mismatched with the events of certainty for long. Thus, one of the aims of setting up inherent vice as a separate chapter is to distinguish inherent vice from inevitability and also to prove that inevitability is not the test of inherent vice. More importantly, as the ultimate conclusion of this issue, when applying the doctrine of proximity in order to ascertain whether inherent vice is the cause of loss, the current situation should be that, it must be an internal-triggered case, solely attributed to the internal cause within the ordinary standard. It should be emphasised that it is the external and internal conflict that eliminate the recognition of concurrent causal effects, rather than an inconsistency arising of the requirement of fortuity.

Seaworthiness in hull policies is in the same position as inherent vice as to cargo policies. However, it has different legal effect in voyage hull policies and time hull policies. It is an implied warranty in voyage policies; whereas, it is a cause, if under the privity of the assured, which ought to apply “but for” test when determining the insurer is not liable for the loss. In the latter case, it is also noteworthy that unseaworthiness may be a concurrent cause with perils of the sea, unlike inherent vice and the like.

It is more important that the law of seaworthiness as an implied warranty is subject to reform, as the device of warranty has been under review by the Law Commissions since 2006 as a part of insurance law reform project. Initially, the Law Commission intended to borrow the operations of Australian insurance contract law and that of New Zealand, with reservations, in a way to require a causal connection between the breach of warranty and the loss before approving the harsh effects of warranty. It is a brave advancement to propose such a causal link. However, the Law Commission heard opposing views and feels less confident in the approach of causal connection. One of the concerns is stated to be the complexity and uncertainty of causation in law. Although this dissertation does not purport to provide a thorough analysis on reforming the law of warranty, it at least shows in the context of marine insurance law, a causation theory related to perils and losses can be concluded and consistently applied. Uncertainty is a prospective hazard of law reform as a whole. Although the Law Commission appears unlikely to recommend and employ the approach of causal connection in law reform, an excessive concern and aversion to causation is not necessary. So far, the decisive questions ought to be whether to completely abandon the harsh effect of warranty or to introduce a causal connection, and how to set up appropriate rules.

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