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# Fortuity in the law of marine insurance

*Howard Bennett\**

*This article addresses the meaning and significance of the concept of fortuity within the law of marine insurance. Voluntary conduct, naturally occurring losses and inherent vice, and inevitable losses are analysed, highlighting both the variable role and varied meanings of fortuity and considering the extent to which fortuity represents a presumption as to the interpretation of insurance contracts or an absolute restriction on the scope of insurance.*

In insurance contract law, fortuity is a variable concept that addresses questions of both the likelihood of loss and the cause of loss. A loss may be said to lack fortuity for a variety of reasons: because it was bound to happen; because it happened naturally by reason of the condition of the insured property without external intervention; because causative external intervention, although present, achieved a certain standard of likelihood; or because the loss was the natural result of human intervention, usually by the assured. In most instances, however, the restriction on cover flowing from an idea of fortuity is not absolute, but a presumption born of the express wording of the policy or implicit in the natural understanding of the bargain embodied in an insurance contract. This article is concerned to evaluate the variable role of fortuity in contracts of marine insurance, although much of the discussion applies equally to non-marine policies.

## A. FORTUITY IN THE COVER PROVIDED UNDER MARINE POLICIES

The role played by fortuity with respect to defining the scope of perils covered under policies of marine insurance differs between “all risks” and named perils cover, reflecting the differing nature of the cover provided. In the former, it functions as a gloss upon quasi-universal cover, while in the latter its significance varies according to the peril in issue.

### 1. All risks cover

The scope of an “all risks” policy was first examined judicially in *Schloss Bros v. Stevens*.<sup>1</sup> Bales of merchandise were insured for inland transit in Colombia under a policy that contained a number of perils clauses including one covering, *inter alia*, “all

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1. [1906] 2 KB 665.

risks by land and by water by any conveyance until safely delivered". At the time, the combination of a revolution, the weather, and a landslide rendered transport in Colombia unusually disorganized. Moreover, the combination of a damp climate and imperfect storage conditions meant that any unusual delay was likely to result in exposure to damage by damp and rain. This was the fate of 12 of the bales. A further bale was damaged by accidental wetting and one more by both such wetting and worms. The insurers argued that an all risks policy did not cover ordinary wear and tear or ordinary leakage and that damage by ordinary dampness because of the climate fell into the same category. Walton J held that the policy had to be read as "it would be reasonably understood by any merchant or insurance broker".<sup>2</sup> As a matter of construction, the all risks perils clause covered "all losses by any accidental cause of any kind occurring during the transit".<sup>3</sup> On the facts, the abnormal delay caused by unusual circumstances that led to 12 bales being damaged qualified as an accidental cause. *A fortiori*, the insurers were liable for the other two damaged bales. The decision stands as authority for the proposition that the all risks clause in issue in the context of a policy on goods in transit does not guarantee arrival of the insured property in an undamaged condition. "All risks" is not a synonym for "all losses"; the term "risk" in such a commercial insurance policy, read in the requisite sensible commercial fashion, denotes an accidental cause.

The decision in *Schloss v. Stevens*, although only at first instance, has not been questioned since. In *British & Foreign Marine Insurance Co Ltd v. Gaunt*,<sup>4</sup> a cargo policy on bales of wool covered "all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and all risks from sheep's back and/or station while awaiting shipment and/or forwarding and until safely delivered into warehouses in Europe with liberties as per bill of lading". It was common ground between the parties that, following *Schloss v. Stevens*, the policy required an accidental loss. While the true construction of the policy was not, therefore, in issue, the assumed correctness of *Schloss v. Stevens* elicited no judicial query and, indeed, was expressly approved in the House of Lords.<sup>5</sup>

In *Gaunt*, some of the shipped wool sustained water damage in the course of transit. The damage was exceptional in that it had not previously occurred under normal conditions of transit. There was, however, no evidence of the precise cause of damage and the insurers denied that the assured had proved the requisite fortuitous cause of loss. The House of Lords held that all risks cover was quasi-universal. While the assured had to prove that the loss was fortuitous, evidence was not required of the precise cause of the loss. An insurer that agrees to cover loss caused by all fortuitous perils cannot escape liability on the basis that, although the cause is proved to be a fortuitous peril, it cannot be established precisely which fortuitous peril was the operative cause.<sup>6</sup>

2. *Ibid*, 673.

3. *Ibid*.

4. [1920] 1 KB 903 (CA); [1921] 2 AC 41 (HL).

5. *Ibid*, 47 *per* Lord Birkenhead LC, 52 *per* Viscount Finlay, Viscount Cave and Lord Atkinson concurring.

6. See esp. *ibid*, 57–58 *per* Lord Sumner, 47 *per* Lord Birkenhead LC. In practice, of course, an assured will often adduce evidence that either points towards the cause of the loss, even if it does not establish the precise cause to the degree of probability required under a named perils policy, or points away from the causes excluded by the fortuity requirement, even if it does not permit a court to hold on a balance of probability that they did not cause the loss.

With respect to fortuity on the facts, the insurers argued that, if bales of wool are not properly covered, becoming wet if it rains is not fortuitous. It was held, however, that the failure to cover properly at a time of rain would supply the requisite fortuity. Responding to the insurer's argument and elaborating more broadly on fortuity in an all risks context, Lord Sumner stated as follows:<sup>7</sup>

"All risks" . . . includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; . . . it is not a thing intended but is accidental; it is something which injures the wool from without; it does not develop from within. It would not happen at all if the men employed attended to their duty.

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

Similarly, according to Viscount Finlay, "no one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play".<sup>8</sup>

Since the restriction of "all risks" cover to accidental losses arises largely as a matter of construction, it follows that the precise scope of any given "all risks" policy will depend on the policy wording. In the absence of contrary intention, however, the general guidance<sup>9</sup> offered in *Gaunt* remains authoritative. Four parameters on cover are identified. Three relate to fortuity: the loss should not be caused by the assured's own, voluntary act; it should not be a certainty; and it should be external to the insured property. The final parameter consists of the restraints imposed by public policy. As such, it is not particular to "all risks" policies and flows from neither the concept of the term "risk" nor the construction of the policy as a whole. The example given by Lord Sumner is of British capture. This refers classically to capture of the property of enemy aliens in time of war. Payment by a British insurer to an enemy assured would be detrimental to British interests and contravene public policy.<sup>10</sup> Such loss is not recoverable under any insurance policy no matter how worded.<sup>11</sup> This restriction on cover will not be discussed further.

## 2. Named perils cover

A named perils policy provides cover against a series of specified perils. To claim successfully on such a policy, the assured has to prove that the loss was caused by one or more nominated perils from the list of covered perils. It cannot be argued that named perils

7. *Ibid*, 57.

8. *Ibid*, 52.

9. As with any judgment, Lord Sumner's observations on all risks cover should not be treated as a statutory definition, providing a necessarily exhaustive list of excluded losses: *London & Provincial Leather Processes Ltd v. Hudson* [1939] 2 KB 724, 731.

10. Payment to a non-enemy would not contravene British public policy, so that British war action can give rise to a recoverable loss: *British & Foreign Marine Insurance Co v. Sanday* [1916] 1 AC 650.

11. *Janson v. Driefontein Consolidated Mines Ltd* [1902] AC 484.

policies provide a seamless continuum of cover tantamount to the quasi-universal cover of “all risks” insurance so that principles of proof applicable to “all risks” policies can be translated across to such named perils policies.<sup>12</sup> The concept of fortuity falls to be considered, therefore, in relation to the individual peril(s) in issue.

A named peril could be defined expressly so as to require proof of fortuity but few are. The phrase “perils of the seas” is confined by definition to “fortuitous accidents or casualties of the seas”,<sup>13</sup> impacting upon both the burden of proof and, it has been held, upon the scope of the peril. Otherwise, the only peril covered under the Institute or International named perils clauses with a definition that includes fortuity is “accidents in loading, discharging or shifting cargo, fuel [stores or parts]”.<sup>14</sup> However, even where the peril invoked by the assured does not by its definition require an investigation of fortuity, the circumstances identified by Lord Sumner may surface as express exclusions in the policy or as implicit restrictions on the scope of cover.

This article will now consider each of the three fortuity parameters identified by Lord Sumner in *Gaunt*.

## B. VOLUNTARY CONDUCT

The first inherent restriction on the scope of cover provided by an all risks policy identified by Lord Sumner in *British & Foreign Marine Insurance Co Ltd v. Gaunt*<sup>15</sup> relates to the role of the assured in bringing about the casualty. An assured cannot recover for “a loss which the assured has brought about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself”.<sup>16</sup> In addition, the voluntary conduct of third parties is occasionally relevant.

### 1. Voluntary conduct of the assured

The Marine Insurance Act 1906, s 55(2)(a) recognizes that the intervention of the assured will bar a claim if it amounts to wilful misconduct, wilfulness embracing both intentional causing of loss and reckless running of risk.<sup>17</sup> The suggestion of Lord Sumner in *Gaunt* is, however, somewhat broader, namely that conduct that is perfectly lawful may, nevertheless, bar a claim because it negates fortuity.

#### (a) Wilful misconduct

Insurance law denies recovery for loss caused by the wilful misconduct of the assured.<sup>18</sup> This, it might be said, is a simple example of the restriction of insurance cover to

12. *Brownsville Holdings Ltd v. Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458, 464–465. It must, however, suffice if the assured can prove on a balance of probability that the loss was caused by one of a number of identified perils, all of which are covered, even if the evidence does not allow the court to conclude precisely which of those identified perils was the operative cause.

13. Marine Insurance Act 1906, Sch 1, r 7.

14. International Hull Clauses (01/11/03), cl 2.1.8. The words in brackets do not appear in the equivalent provision of the Institute Time Clauses Hulls (1/10/83 and 1/11/95).

15. [1921] 2 AC 41.

16. *Ibid*, 57.

17. *National Oilwell (UK) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 622; *Morley v. United Friendly Insurance Plc* [1993] 1 WLR 996; *CP v. Royal London Mutual Insurance Soc Ltd* [2006] EWCA Civ 421; [2006] 2 All ER (Comm) 344.

18. Marine Insurance Act 1906, s 55(2)(a).

fortuitous losses. However, the prohibition on the insuring of wilful misconduct is absolute and not subject to contrary intention.<sup>19</sup> Moreover, the wilful nature of the assured's intervention may speak to the absence of fortuity, but that does not suffice. The intervention must also amount to misconduct, and the dividing line between conduct, such as negligence, that can give rise to a valid insurance claim and misconduct that denies any such claim cannot be drawn by the pen of fortuity.

Why is the deliberate or reckless exposure of insured property to danger wilful misconduct? Why is it not simply an exercise of a prerogative of ownership? Wilful incurring of the risk of an insured loss of itself cannot be a bar to recovery. A golfer who is insured against the cost of honouring the custom of buying drinks for everyone in the clubhouse in the event of succeeding in hitting a hole in one wilfully attempts to bring about the insured event, yet in the event of success the insurer will surely have to pay.<sup>20</sup> Likewise, it is hard to see why a Formula One motor racing team should not be able to conclude a legally binding insurance contract covering its cars against damage in the course of a race, notwithstanding that the circumstances of such a race must amount to a reckless running of the risk of damage.<sup>21</sup> Conduct only becomes misconduct when it transgresses a line drawn in insurance contract law about the running of risk. That line is drawn by public policy. The law is concerned to protect the physical well-being, the property, and the interests of third parties.<sup>22</sup> Law that permits an insured shipowner at an insurer's expense to expose its vessel to the perils of navigation knowing that the vessel is unfit to encounter them fails to discourage the wilful endangering of the lives of the crew, the interests of cargo owners and the environment.<sup>23</sup> The line is, however, drawn flexibly, taking account of the context of the policy in question and all the surrounding circumstances.<sup>24</sup> What is misconduct in general navigation may be permissible conduct in the context of a race. In that sense, what is misconduct is a question of interpretation of the contract,<sup>25</sup> although the line between conduct and misconduct is drawn by, and for reasons of, policy.

19. *State of the Netherlands v. Youell* [1997] 2 Lloyd's Rep 440, 452.

20. The example is taken from M A Clarke, "Insurance of Wilful Misconduct; the Court as Keeper of the Public Conscience" (1996) 7 Ins LJ 173, 175. Successful Japanese golfers are expected to be significantly more generous and may insure against the penalty of success: Clarke, *The Law of Insurance Contracts*, 5th edn (2006), para 24–5B2.

21. The relative likelihood of an insured loss may render the cover prohibitively expensive. That is not, however, the same as saying that the risk is uninsurable as a matter of legal principle.

22. *Gray v. Barr* [1971] 2 QB 554.

23. The law's tolerance of negligence with respect to the seaworthy condition of vessels insured under time policies has failed to discourage negligence with respect to maintenance. In *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 AC 469, the assured shipowner's negligent response to two fires in its fleet did not bar recovery because the insurers could establish only negligence rather than privity to the unseaworthiness, as required by the Marine Insurance Act 1906, s 39(5).

24. *Hardy v. Motor Insurers' Bureau* [1964] 2 QB 745, 767–768; *Shooter v. Incorporated General Insurances Ltd (The Morning Star)* 1984 (4) SA 269, 282–284.

25. *Beresford v. Royal Insurance Co Ltd* [1938] AC 586, 604; *Charlton v. Fisher* [2001] EWCA Civ 112; [2002] QB 578, [51]. Any suggestion that the exclusion of wilful misconduct is based on construction to the exclusion of public policy (a possible reading of an oft-quoted extract from the speech of Lord Atkin in *Beresford* at 595) countenances the possibility of English law enforcing a claim for loss caused by wilful misconduct. With respect, that cannot be correct.

**(b) Wilful lawful conduct**

Conduct of the assured may be lawful yet range from the accidental to the deliberate. The mere fact that the assured's intervention in causing the loss is wilful in nature does not of itself constitute an absolute disqualification from recovery. It may, nevertheless, bar recovery as a matter of interpretation of the policy.

In *The Wondrous*,<sup>26</sup> shipowners insured loss of hire against "the risks enumerated in the Institute War and Strikes Clauses Hulls – Time 1.10.83". The vessel was chartered to Iranian exporters to carry a cargo of molasses from the port of Bandar Abbas, Iran. After loading such cargo as could be obtained, the vessel was unable to leave Bandar Abbas without obtaining Customs clearance. In order to obtain Customs clearance, port dues and a local tax on freight had to be paid and a foreign currency guarantee had to be provided. Under Iranian law, the exporter was responsible for the guarantee, while the owners were responsible for the dues and tax. As between the owners and the charterers, the charter placed liability for the dues and tax on the charterers. They failed to pay the required sums and provide the guarantee and the owners lost the opportunity to use the vessel to earn hire. However, Hobhouse J held that the loss attributable to an initial period up until 30 September 1987 was not recoverable under the policy. During this period, the owners had not been prepared to pay the dues and tax without ensuring that the charterers made a contribution and also discharged their obligations with respect to the guarantee. The end of September 1987 saw an agreement between all interested parties to resolve the financial problems and allow the vessel to sail. The agreement was not, however, honoured and in the end it took a further year and a second agreement before the vessel finally undertook her voyage.

Hobhouse J concluded that there had been a loss of hire from August 1987 to October 1988, but that until 30 September 1987 the cause of that loss was not an insured peril. He accepted that the claimants could show a detention of the vessel (a peril named in the policy), but that was not enough. He said:<sup>27</sup>

[I]t was still necessary for the [claimants] to show that the detention was fortuitous. How to characterize the element of fortuity in this context is not easy. If the owners had asked themselves at the time of placing the cover or at the time of making the charter-party whether detention for any substantial period after loading a cargo at Bandar Abbas was to be anticipated or likely to occur in the ordinary course, they would have correctly answered that it was not. But, on the other hand, where a situation comes about as a result of the voluntary conduct of the assured, it would not normally be described as fortuitous. It did not happen by chance but by the choice of the assured. Put another way, it would be in the ordinary course that, if the owners of the vessel do not pay the port dues for which they are liable to the port authority in respect of the stay of the vessel in that port (or provide acceptable security), the vessel will not be cleared. For the purposes of the law of insurance, in the absence of an express agreement to the contrary, a policy should not be construed as covering the ordinary consequences of voluntary conduct of the assured arising out of the ordinary incidents of trading; it is not a risk.

By this criterion, I consider that, on any view, it is not correct to characterize the period of detention to Sept. 30, 1987 as fortuitous. The dominant and, in my judgment, only proximate cause

26. *Ikerigi Compania Naviera SA v. Palmer (The Wondrous)* [1991] 1 Lloyd's Rep 400; *aff'd* [1992] 2 Lloyd's Rep 566, although the issue discussed in this section was not appealed.

27. [1991] 1 Lloyd's Rep 400, 415–416.

was the fact that to that date the owners had neither discharged nor acceptably secured their liabilities.

In *Royal Boskalis Westminster NV v. Mountain*,<sup>28</sup> Rix J, referring to *The Wondrous*, distinguished “the ordinary application of the laws of a country, albeit by political or executive act, and intervention which is out of the ordinary course of events and contains some element of fortuity in it”. On the facts, the imposition of international sanctions following the Iraqi invasion of Kuwait led the Iraqi government to introduce legislation potentially preventing the demobilization of vessels carrying out a dredging contract at the port of Umm Qasr. This legislation was “something extra, something outside the terms of the dredging contract itself, and something fortuitous”.<sup>29</sup>

In *The Wondrous*, the policy defined cover by reference to the “risks” insured under the stipulated Institute War and Strikes Clauses Hulls – Time. The decision may, therefore, be regarded simply as amplification of the true interpretation, subject to contrary intention, of the term “risk” in an insurance contract. Most insurance contracts, however, do not employ the term “risk”. Most sets of standard marine hull and cargo clauses, for example, simply insure the subject-matter insured against loss or damage caused by a series of named perils. Hobhouse J, however, clearly considered an element of fortuity to be implicit in some way in any insurance contract.

The second quoted paragraph reduces the issue to one of causation. The voluntary conduct of the assured is said to take effect as the only proximate cause rather than any covered peril. With respect, however, this is inconsistent with authority. In *Cory & Sons v. Burr*,<sup>30</sup> the House of Lords held that, where barratrous smuggling leads to the insured vessel’s being seized, the seizure is a proximate cause of the resulting loss. Similarly, a detention will not cease to be a proximate cause of ensuing loss simply because the detention is the result of the assured’s voluntary conduct. Consequently, if *The Wondrous* does not turn on the presence of an express term such as “risk”, insurance contracts must be construed as inherently subject to a fortuity limitation, flowing from the very nature of insurance, that excludes losses where the assured’s voluntary conduct forms part of the proximate cause of the loss. This was the view of Rix LJ in *Charlton v. Fisher*:<sup>31</sup> the inability of the assured to recover for loss wilfully caused by itself was “a basic rule of insurance law” and not dependent on the presence in the policy of the term “accident” or any similar term, for such inability “is inherent in the concepts of risk, peril and fortuity, which are basic to the law of insurance”. The presence of a term such as “accident” or “risk” in a policy serves merely to emphasize the exclusion of deliberately caused losses.

Such a “basic rule” would reflect the natural underwriting concern that rating a risk that includes the voluntary incurring of loss by the assured is impossible to do in any sensible manner. Instead of assessing the risk of accident, the insurer is being asked to assess the risk of the assured’s inclinations. The purely commercial nature of this concern suggests, however, that ultimately such a fortuity implication is a matter of interpretation and subject to contrary intention, in contrast to the public policy basis of the wilful misconduct

28. [1997] LRLR 523, 535.

29. *Ibid.*, 547.

30. (1883) 8 App Cas 393.

31. [2001] EWCA Civ 112; [2002] QB 578, [51–52].



exclusion that generates an absolute legal prohibition. Again, this was the view of Rix LJ in *Charlton v. Fisher*:<sup>32</sup> it was a basic rule that insurance did not cover loss wilfully caused by the assured “at any rate in the absence of express stipulation”.

### (c) *Unseaworthiness*

A specific instance of a voluntary conduct defence may be seen in the law on unseaworthiness of vessels under time policies. Eschewing the implied condition precedent approach adopted earlier in the context of voyage policies, the 19th century courts recognized a more limited defence requiring proof of three elements.<sup>33</sup> First, the vessel must be unseaworthy, meaning not reasonably fit to encounter the ordinary perils of the insured adventure,<sup>34</sup> when sent to sea. Secondly, the assured must be privy to that unseaworthiness, meaning that the assured must subjectively know of the circumstances rendering the vessel unseaworthy and consciously realize that such circumstances do indeed render the vessel unseaworthy.<sup>35</sup> Thirdly, subsequent loss in respect of which the assured claims must be attributable to that unseaworthiness. Insurers are then relieved from liability in respect of any loss so caused but remain liable in respect of all other losses.<sup>36</sup> While it is clear that privity does not connote fault for, in the sense of having intentionally or negligently caused, the condition of the vessel and the resultant casualty,<sup>37</sup> sending a vessel to sea in the knowledge that it is not reasonably fit to encounter the risks ordinarily associated with the maritime adventure to be undertaken clearly amounts to a voluntary running of risk.<sup>38</sup> Indeed, the circumstances giving rise to the unseaworthiness exclusion under time policies may, although will not necessarily, support a defence of wilful misconduct, and to that extent at least the unseaworthiness exclusion is not susceptible to contrary intention.

## 2. Voluntary conduct of third parties

Neither the policy concerns identified nor underwriting common sense that lead to absolute or presumptive restrictions on cover in the context of the voluntary conduct of the assured dictate similar restrictions when the voluntary conduct is that of a third party. A number of common named perils, such as piracy, barratry, and violent theft by persons from outside the vessel, are clearly designed to provide cover against deliberate acts. Other perils, such as fire and explosion, could be construed as confined merely to accidental occurrences and not covering deliberate acts. This, however, has not been the approach of the courts. Instead, for example, the approach to fire has been that the peril of fire requires the assured to prove merely that loss was caused by a fire. The only

32. *Ibid.*, [51], quoting and echoing Lord Atkin in *Beresford v. Royal Insurance Co Ltd* [1938] AC 586, 595.

33. Marine Insurance Act 1906, s 39(5).

34. *Ibid.*, s 39(4).

35. *Compania Maritima San Basilio SA v. Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)* [1977] QB 49.

36. *Thomas v. Tyne & Wear Steamship Freight Insurance Association* [1917] 1 KB 938.

37. *Compania Maritima San Basilio SA v. Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)* [1977] QB 49.

38. *Thompson v. Hopper* (1856) 6 El & Bl 172, 191–192.

defence then available to an insurer is that the fire was started by or with the connivance of the claimant assured, and the insurer carries the burden of so proving. An insurer is thus liable under the peril of fire for loss caused by fire whether the fire is accidental, negligent,<sup>39</sup> started deliberately by a member of the crew (in which case the fire is barratrous and the assured can claim under the heading of either fire or barratry),<sup>40</sup> started deliberately by a stranger to the vessel,<sup>41</sup> or, in the context of a mortgagee's interest policy, started deliberately by or with the connivance of the owner.<sup>42</sup> Under composite policies, the voluntary causing of loss by one co-assured, even if amounting to wilful misconduct, does not prejudice the right of another co-assured to recover on the basis of a lack of fortuity.<sup>43</sup> Indeed, the contrary proposition would undermine the commercial rationale behind many such policies.<sup>44</sup>

The position is, however, slightly different in the context of perils of the sea, where the question has arisen whether a deliberate sinking of the insured vessel qualifies as fortuitous as required by the definition of that peril. It might be expected that the crucial issue would be whether the assured was complicit in the sinking. If the assured was not so complicit, then the loss would be fortuitous to the assured and, so, regarded as a peril of the sea for the purposes of that assured's cover. The case law has not, however, entirely adopted this position, distinguishing according to whether the deliberate act was that of a person in charge of the vessel or a stranger.

The issue first arose in the context of persons in charge of the insured vessel in *Small v. United Kingdom Marine Mutual Insurance Association*.<sup>45</sup> The vessel was insured for the benefit of three co-owners, including one Wilkes, and the mortgagee of Wilkes' interest, named Small. The vessel was wilfully scuttled by Wilkes, who was also the master of the vessel. This act clearly constituted the peril of barratry as against the other co-owners, and Small sought to recover under that peril. The insurers argued that the mortgagee was to be treated as at one with the mortgagor, but it was held at first instance and affirmed on appeal that their interests were distinct and that Small was accordingly entitled to recover. The case is clearly authority for the separate treatment of interests co-insured under composite policies. However, the insurers also argued that the loss could not be regarded as barratry as against the mortgagee because misconduct by the master could amount to barratry only as against the person for whom he was acting as master. This argument, although correct in principle,<sup>46</sup> failed on the facts since there was evidence that Small had been involved in the appointment of Wilkes as master so that Small was

39. *Busk v. Royal Exchange Assurance Co* (1818) 2 B & Ald 73.

40. *Continental Illinois National Bank & Trust Co of Chicago v. Alliance Assurance Co Ltd (The Captain Panagos D.P.) (No. 2)* [1986] 2 Lloyd's Rep 470, 511; *aff'd* [1989] 1 Lloyd's Rep 33, 41.

41. *Slattery v. Mance* [1962] 1 QB 676.

42. *Schiffshypothekenbank zu Luebeck AG v. Compton (The Alexion Hope)* [1987] 1 Lloyd's Rep 60, 65–67; *aff'd* [1988] 1 Lloyd's Rep 311.

43. *State of the Netherlands v. Youell* [1997] 2 Lloyd's Rep 440, 454.

44. In *Arab Bank Plc v. Zurich Investment Co* [1999] 1 Lloyd's Rep 262 it was held that imputing to a co-insured company the fraud of its co-insured managing director would frustrate the commercial purpose of the policy. Similar frustration would result from any fortuity restriction on the insurable conduct of a co-assured. For the assessment of fortuity relative to the assured in other areas of insurance, see *Hawley v. Luminair Leisure Ltd* [2007] Lloyd's Rep IR 307, esp. at [103–106], and authorities there cited.

45. [1897] 2 QB 42; *aff'd* [1897] 2 QB 311.

46. Barratry is defined as a wrongful and wilful act by the master or crew "to the prejudice of the owner, or, as the case may be, the charterer": Marine Insurance Act 1906, Sch 1, r 11. See also *Soares v. Thornton* (1817) 7 Taunt 627, 639–640; *Samuel (P) & Co Ltd v. Dumas* [1924] AC 431, 451, 463–464.

eligible to be a victim of barratry by Wilkes. Alternatively, however, if Small had not been so involved, the Court of Appeal held that the casualty could be regarded as caused by a peril of the sea and that Small could recover under that heading since the acts of Wilkes would be those of a stranger.

This latter reasoning was revisited in the now leading case of *Samuel (P) & Co Ltd v. Dumas*.<sup>47</sup> In this case, the insured vessel was in single ownership and was scuttled by the master and some of the crew with the connivance of the owner.<sup>48</sup> The claimant was again a mortgagee that was not complicit in the sinking and whose interest was held to be co-insured under a policy that included barratry and perils of the sea among the named perils. However, the connivance of the sole owner, coupled with the fact that the master was not in the service of the mortgagee, meant that no claim for barratry could be sustained. At first instance, Bailhache J held, following *Small*, that the absence of complicity of the mortgagee entitled the mortgagee to sustain a claim for a loss by perils of the sea.<sup>49</sup> A majority of the Court of Appeal likewise held that *Small* constituted a binding precedent on the matter, although Bankes LJ intimated some doubt as to whether the decision would withstand an appeal to the House of Lords.<sup>50</sup> Scrutton LJ, however, considered the relevant statements in *Small* to be *obiter* and, consequently, felt free to consider the mortgagee's position in terms of principle. In the opinion of Scrutton LJ, the deliberate damaging of property by its owner could not be regarded as a peril of the sea, although precisely why is unclear. On the one hand, he appeared to consider that the deliberate act denied the entry of water the requisite fortuity. Thus, he quoted Collins LJ in *Trinder, Anderson & Co v. Thames & Mersey Marine Insurance Co*<sup>51</sup> that "[t]he wilful act [of the owner inducing the loss] takes from the catastrophe the accidental character which is essential to constitute a peril of the sea". However, he also stated that, even if the misconduct could be regarded as fortuitous as against innocent interested parties, it lacked the necessary maritime nature to constitute a peril of the sea.<sup>52</sup> If, however, the misfeasant owner also held the immediate control of the navigation of the vessel, then the misconduct could constitute the peril of barratry as against innocent co-owners.

*Samuel v. Dumas* was appealed to the House of Lords. The appeal was dismissed and the decision of the Court of Appeal upheld, but to some extent on different grounds. Aside from the issue of whether the mortgagee could rely on any covered peril, the Court of Appeal found unanimously in favour of the insurers on the ground of breach of a promissory warranty in the policy. Two members of the House of Lords held that the breach had been waived,<sup>53</sup> but, by a majority, the House held that the mortgagee could not claim for a loss by perils of the sea. Of the four members of the House who gave reasons for dismissing the appeal, Viscounts Cave and Finlay delivered reasoned speeches in favour of the insurers on this point, Lord Parmoor concurred with Viscount Cave and Lord Sumner dissented. According to Viscounts Cave and Finlay, the proximate cause of the

47. [1923] 1 KB 592; *aff'd* on different grounds [1924] AC 431.

48. The connivance of the owner was found as a fact by Bailhache J at first instance, a finding that was not appealed.

49. See [1923] 1 KB 592, 600.

50. *Ibid.*, 616.

51. [1898] 2 QB 114, 127.

52. [1923] 1 KB 592, 620.

53. Two members of the House dissented on this point and the fifth member, Viscount Haldane LC, merely concurred in the result without giving any reasons.

loss had to be the act of scuttling and not the ensuing ingress of water and an act of scuttling could not be a peril of the sea for want of fortuity, a term that “involves an element of chance or ill luck, which is absent where those in charge of a vessel deliberately throw her away”.<sup>54</sup> Fortuity was not to be assessed relative to the assured’s claiming under the policy, but in absolute terms.

The majority reasoning appears to disregard as causally relevant the ingress of water, which was to be viewed as merely a consequence of the act of scuttling. With respect, this is difficult to sustain. The maritime context was essential to the loss of the vessel. The deliberate making of holes in the side of the vessel would have occasioned no additional loss if, for example, the vessel had been in dry dock. It was only because it was at sea that it sank. The ingress of water played an essential part in the sinking. The only realistic analysis is that the cause of the loss was an ingress of water caused by an act of scuttling. The cause of the loss was “of the sea” and the only question was whether, as a matter of law, it was fortuitous. That required a consideration of why the water entered the vessel. *Small* was authority for the proposition that fortuity was to be assessed relative to the claimant, but the majority overruled *Small* on this point. Lord Sumner dissented. “Fraud is not something absolute, existing *in vacuo*; it is a fraud upon someone. A man who tries to cheat underwriters fails if they find him out, but how does his wrong against them invest them with new rights against innocent strangers to it?” There is, it is suggested, force in this dissenting opinion, supported, as noted by Lord Sumner, by earlier *dicta*.<sup>55</sup> The House of Lords in *Samuel v. Dumas* accepted that innocent co-assureds were not automatically denied recovery by the fraud of a fellow co-assured and, as discussed later,<sup>56</sup> the reference to fortuity in the context of perils of the sea has an established meaning as excluding ordinary wear and tear. There was no reason why the majority should have adopted such a simplistic linguistic approach to the issue of deliberate losses.

*Samuel v. Dumas* is concerned on its facts with the deliberate sinking of a vessel by those in charge of it. On the facts, the deliberate acts were those of the master and some crew with the connivance of the owner. On the approach of the majority, however, it seems clear that, even if the owner had not been complicit in the sinking, the scuttling would have lacked the fortuity required for a loss by perils of the sea. The only available peril would be barratry.

A question that arises from *Samuel v. Dumas* is whether deliberate acts by persons other than those in charge of the vessel can give rise to a peril of the sea. The issue is unlikely to arise in practice because such deliberate acts are likely to be expressly contemplated by other named perils or by exclusions. Thus, attacks by pirates or enemies that lead to a vessel’s being holed and water entering so as to give the incident a maritime nature will, under the modern Institute and International hulls clauses, in the former case be covered as a marine peril and in the latter case be excluded from marine cover and covered instead under the war and strikes clauses. So, in *Leyland Shipping Co Ltd v. Norwich Union Insurance Society Ltd*,<sup>57</sup> a vessel was torpedoed and subsequently sank when exposed to

54. [1924] AC 431, 448 *per* Viscount Cave. See also Viscount Finlay at 453, 457.

55. *Heyman v. Parish* (1809) 2 Camp. 149; *Thompson v. Hopper* (1856) 6 E & B 172, 191–192 *per* Lord Campbell: “if the ship had been scuttled or sunk by being wilfully run upon a rock” there would have been a loss by perils of the sea.

56. *Infra*, text to fnn 70–74.

57. [1918] AC 350.

tidal action in a port of distress. Given that the policy covered perils of the sea but excluded war risks, the issue was whether the tidal harbour conditions constituted the proximate cause of the sinking to the exclusion of the explosion caused by the impact of the torpedo. It was held that the exclusion operated. Whether an ingress of water through a hole in the side of a vessel caused by the impact of a torpedo fired deliberately in order to sink a vessel could be classified as a peril of the sea was not, therefore, in issue. Nevertheless, passages in judgments in the Court of Appeal and the House of Lords clearly contemplate that an ingress of water so caused would still amount to a peril of the sea. *Swinfen Eady LJ* was in no doubt:<sup>58</sup>

Where, in the case of a vessel at sea, sea water flows into her through an opening in such quantities that the vessel sinks and is lost, that is a loss through a peril of the sea. If the opening were made by a hostile shell or torpedo, and in consequence the vessel fills and sinks, the loss would still be by a peril of the sea, but being the direct and immediate consequence of hostilities, such a loss would not be recoverable under a policy in the form of the present one.

Similarly, in the House of Lords, Lord Dunedin, when considering how to approach an event that qualifies as both a covered marine peril and an excluded war peril, stated as follows:<sup>59</sup>

But there are certain perils which, so to speak, pray in aid the perils of the sea. A man-of-war fires a shot and hits the ship. If it only hits the top of the bulwark or a bit of the rigging there will be at the worst only a partial average. But if the shot strikes between wind and water and makes a hole, the vessel will be sunk, and the reason of its sinking will not be the mere existence of the hole, but the fact that the sea comes in through the hole, and the vessel founders. Overwhelming by the sea is a peril of the sea in a general sense, and accordingly in such a case, if either the body of the policy or the exception were looked at alone, the peril incurred could be held to fall under either.

To the extent that the passages appear to focus on the ingress of water as a peril of the sea to the exclusion of the reason for the ingress, they must now be read in the light of the case law already discussed that makes it clear that the assured must prove the reason for the ingress and that the reason qualifies as fortuitous in the eyes of the law. Where the definition of a peril includes a requirement of fortuity, that which supplies the fortuity is part of the peril and, therefore, in a case where that peril is operative, it is part of the proximate cause. In a case such as *Leyland Shipping*, the better analysis is that the proximate cause of the loss was ingress of water by reason of impact of torpedo, the torpedo supplying the fortuity for the ingress and contributing causally as part of the proximate cause. Aside from this reservation with the tenor of the quoted passages, which must be read bearing in mind that the possibility of the torpedo contributing to a peril of the sea was not in issue given the terms of the policy, they clearly consider that an ingress of water by reason of a deliberate hostile act can constitute a peril of the sea.

*Leyland Shipping* was cited to the House of Lords in *Samuel v. Dumas*, but in connection with the general approach to determining the proximate cause of a loss rather than the scope of perils of the sea. Moreover, Viscount Cave, with whose speech Lord Parmoor agreed, twice expressly confined his remarks to the deliberate scuttling of a vessel by those in charge of it.<sup>60</sup> It is, therefore, suggested that the majority view should

58. [1917] 1 KB 873, 883. See also *Scrutton LJ* at 894.

59. [1918] AC 350, 363.

60. [1924] AC 431, 448.

not be regarded as disapproving the quoted passages from *Leyland Shipping*. More fundamentally, however, it might be asked whether the distinction drawn according to whether the person who commits the deliberate act is a stranger to the vessel is sustainable. There is perhaps an additional element of chance involved where the act is that of a stranger in that the vessel might not encounter that person. The distinction is, moreover, welcome to the extent that the decision in *Samuel v. Dumas* might be regarded as regrettable.

### C. NATURALLY OCCURRING LOSSES AND INHERENT VICE

Insurance contracts commonly do not cover losses that may be expected to occur in the ordinary course of events, without the intervention of any external accidental factor. Such losses may not be inevitable, but the only sensible assumption that an underwriter can make is that they will occur. Unless the underwriter is prepared to accept such losses for a specific business reason, the only sensible commercial response is not to accept the risk of such losses. That could be achieved by increasing the premium by an amount equal to the measure of indemnity for such losses, but that would be commercially and administratively unattractive. Consequently, restricting the scope of cover provided is the logical response. Insurance contract law duly reflects this commercial common sense. The Marine Insurance Act 1906, s 55(2)(c) provides that, subject to contrary intention, the insurer is not liable for ordinary wear and tear, ordinary leakage, and ordinary breakage. Also presumptively excluded is any loss caused by rats or vermin, again on the basis that such loss is a natural incident of sea carriage.<sup>61</sup> Likewise, the presumptive exclusion under s 55(2)(b) of losses caused by delay is based upon the consideration that “there are so many cargoes which are necessarily affected by the voyage being delayed”.<sup>62</sup> In addition, s 55(2)(c) also excludes loss caused by “inherent vice or nature of the subject-matter insured”. The presumptive restrictions on cover articulated by s 55(2)(c) are reflected by Lord Sumner in *Gaunt*,<sup>63</sup> stating that an “all risks” insuring clause “does not cover inherent vice or mere wear and tear”. The insured property is covered against a casualty that “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”. The extent of the inherent vice exclusion is, however, problematic.

There is no statutory definition of inherent vice. In the cargo case of *Soya v. White*,<sup>64</sup> inherent vice was described by Lord Diplock as denoting “the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty”.<sup>65</sup> It is clear from the statutory wording (“vice or nature”) and the description

61. The case law considers that defining the scope of cover in terms of “risks” excludes such losses through the natural meaning to be ascribed to the term “risk”. However, s 55(2)(c) makes it clear that the assumed exclusion of natural losses from cover does not depend on the presence in the policy of a specific term such as “risk” that can be construed as importing such exclusion, but rather reflects the logical commercial assumption, outlined in the text, as to the nature of the bargain between insurer and assured.

62. *Taylor v. Dunbar* (1869) LR 4 CP 206, 210, per Keating J.

63. *British & Foreign Marine Insurance Co Ltd v. Gaunt* [1921] 2 AC 41, 57.

64. [1983] 1 Lloyd’s Rep 122.

65. *Ibid.*, 125.

of Lord Diplock that the phrase “inherent vice” should not be understood as confined to circumstances where the insured property is defective in the normal sense of that term. Accordingly, where leather gloves were damaged in the course of transit by moisture previously absorbed by the gloves, a defence of inherent vice was upheld even though the ability of the gloves to absorb moisture was a natural function of leather and not attributable to any defect in the gloves.<sup>66</sup> The scope of the concept is not, however, free from difficulty. According to Lord Diplock, the intervention of a “fortuitous external accident” is inimical to an inherent vice defence. What is meant by “fortuitous” in this context?

Ambiguity is injected by two sets of variables. First, [A] inherent vice might be confined to loss or damage incurred solely and exclusively by reason of internal characteristics of the insured property and not by exposure to any risks of transit. Alternatively, [B] it might extend to loss or damage caused by a combination of internal characteristics and risks of the insured adventure. In other words, inherent vice may amount to reasonable fitness of the insured property for the insured adventure. A further sub-level of ambiguity arises with respect to the likelihood of the risks of the adventure impacting upon the goods given their internal characteristics. The relevant risks of the insured adventure [1] may be confined to such risks that are so natural a feature of the transit that it would be unusual not to encounter them (“habitual risks”) or [2] could extend to all reasonably foreseeable perils of the insured transit. Indeed, further levels of foresight of perils of the insured transit could be postulated.

Were inherent vice restrictively defined so as to embrace merely the innate characteristics that goods of the type insured by definition possess and the risk of damage by such characteristics in the context only of the habitual risks of the transit [A or B1], the same rationale would apply to inherent vice as to ordinary wear and tear. Indeed, the former could be regarded as a sub-species of the latter.<sup>67</sup> It may not be inevitable that particular goods will incur a certain level of breakage or deterioration, but the innate characteristics of goods of the type insured may be such that a certain level of breakage or deterioration will ordinarily be incurred in the ordinary course of the insured transit—indeed, it would be unusual for such loss or damage not to be sustained—and any prudent insurer must assume that it will be incurred. Clearly, inherent vice does at least include such deterioration, and to that extent at least it overlaps with, and its exclusion admits of the same rationale as that of, ordinary wear and tear. In a policy that does not cover either ordinary wear and tear or inherent vice,<sup>68</sup> the choice of label attaching to such loss and attendant presumptive exclusion of liability has no significance.

Conversely, inherent vice might be defined so as to extend beyond habitual risks to include the reasonably foreseeable perils of the insured transit. However, inherent vice so defined represents a risk that very possibly might not materialize. It may be subject to the same level of exclusion as ordinary wear and tear, but it cannot be justified by the same rationale.

66. *Noten BV v. Harding* [1990] 2 Lloyd's Rep 283, 287.

67. The nominate exclusion of both ordinary wear and tear and inherent vice in s 55(2)(c) would then serve to emphasize that, in so far as the former might be argued to denote loss from external sources, the presumptive exclusion covers ordinary losses arising from both internal and external sources.

68. Whether because both are expressly excluded or neither one falls within the risks *prima facie* covered.

Whatever its extent, inherent vice addresses the condition of the insured property. In hull insurance, the condition of the insured vessel is addressed through the concept of seaworthiness. This is defined by the Marine Insurance Act 1906, s 39(4) as reasonable fitness “in all respects to encounter the ordinary perils of the seas of the adventure insured”. There are, however, limitations on the circumstances in which an insurer can invoke an unseaworthiness defence that are not mirrored in the exclusion from cover of loss caused by inherent vice found in s 55(2)(c). Cargo insurance, however, contains no doctrine of seaworthiness of the insured cargo to match the hull insurance doctrine.<sup>69</sup> Questions arise, consequently, of the relationship between inherent vice and unseaworthiness and of the role of inherent vice in hull insurance. Indeed, in exploring the limits on insurance cover arising by reason of the condition of the insured property, it is convenient to consider the position in hull insurance before turning to cargo insurance.

### 1. Hull insurance

The protection enjoyed by assureds under hull policies in respect of losses where the condition of the insured vessel is at least a contributory factor is a product of the generosity of cover provided under the heading of “perils of the sea”, the restrictions on unseaworthiness defences, and the cover provided under the Inchmaree clause.

#### (a) *Perils of the sea*

By virtue of r 7 of the Rules for Construction of Policy in the Schedule to the Marine Insurance Act 1906, unless the policy otherwise provides, the phrase perils of the sea “refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves”. Fortuity, in this context, addresses two related matters. First, insurance policies are not designed to finance routine maintenance; some wear and tear to a vessel is a natural product of a vessel’s normal existence. Perils of the sea do not include “the silent, natural, gradual action of the elements upon the vessel”,<sup>70</sup> which is just another way of describing ordinary wear and tear.<sup>71</sup> In *The Xantho*,<sup>72</sup> Lord Herschell famously observed that the words “perils of the sea”:

do not protect, for example, against that natural and inevitable action of the wind and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.

In truth, the precise impact that the natural action of the elements will have upon any given vessel during the period of cover under any particular policy cannot be predicted with

69. See the Marine Insurance Act 1906, s 40(1), discussed *infra*, text to fnn 137–138. At common law a cargo insurer is entitled at common law to make assumptions about the seaworthiness of the carrying vessel and its fitness to carry the cargo, although in practice the common law protection is largely waived.

70. From the direction to the jury by Lush J in *Merchants Trading Co v. Universal Marine Insurance Co* (1870) 2 Asp MC 431, 432, cited by Blackburn J, delivering the judgment of the Court of Queen’s Bench in *Dudgeon v. Pembroke* (1874) LR 9 QB 581, 596.

71. “The principal object of the definition is to rule out losses resulting from [ordinary] wear and tear”: *The Miss Jay Jay* [1985] 1 Lloyd’s Rep 264, 271, *per* Mustill J.

72. *Wilson Sons & Co v. Owners of Cargo per the Xantho (The Xantho)* (1887) 12 App Cas 503, 509.



certainty. However, such loss as does occur cannot be regarded as fortuitous from an underwriting perspective.

Secondly, hull policies do not guarantee the sound condition of the insured ship.<sup>73</sup> A ship may degenerate to such an extent that it then sinks purely by virtue of its debilitated condition by reason of age, neglect, or a combination of the two. The precise timing and circumstances of the loss will remain a matter of uncertainty, but the cause of the loss when it occurs will not be characterized as fortuitous so as to qualify as a peril of the sea. In *The Miss Jay Jay*,<sup>74</sup> Mustill J stated as follows:

There can be few losses of which it can be said that they must happen, in the sense that *this* accident is bound to happen in *this* way at *this* time . . . When the vessel succumbs to debility, the claim fails, not because the loss is quite unattended by fortuity, but because it cannot be ascribed to the fortuitous action of the wind and waves. A decrepit ship might sink in perfect weather tomorrow, or it might not sink for six months. To this extent a loss tomorrow is not inevitable. But if the ship does sink, there is no external fortuitous event which brings it about. In respect of such losses, the ordinary marine policy does not provide a remedy.

Significantly, however, fortuity does not restrict perils of the sea to wholly unforeseeable or not reasonably foreseeable events. In *Canada Rice Mills Ltd v. Union Marine & General Insurance Co Ltd*,<sup>75</sup> cargo on a voyage from Rangoon to British Columbia and insured against perils of the sea was damaged by reason of heating occasioned when cargo hold ventilators were closed to prevent ingress of water in heavy weather. The Court of Appeal of British Columbia held that the cause of the loss was not a peril of the sea because, as summarized by Lord Wright in the Privy Council, "the weather encountered was normal, and such as to be normally expected on a voyage of that character, and there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed".<sup>76</sup> However, delivering the opinion of the Board reversing this decision, Lord Wright was clear: "these are not the true tests."<sup>77</sup> Any accidental ingress of water into the vessel was a peril of the sea. The entry of sea water through an opening by which it was not supposed to enter was accidental even if the sea conditions were entirely normal for those waters at that time of year. Thus, storms that were seasonal and frequent, and therefore to be expected, nevertheless "are outside the ordinary accidents of wind and sea [and are therefore fortuitous]. They may happen on the voyage, but it cannot be said that they must happen".<sup>78</sup>

Similarly, in *The Miss Jay Jay*,<sup>79</sup> the relevant sea conditions were "such as a person navigating in those waters could have anticipated that he might find, but would hope that he would not find. The conditions were markedly worse than average, but not so bad as to be exceptional".<sup>80</sup> These sufficed to qualify as a peril of the sea.

73. *Grant, Smith & Co v. Seattle Construction & Dry Dock Co* [1920] AC 162, 172.

74. [1985] 1 Lloyd's Rep 264, 272.

75. [1941] AC 55.

76. *Ibid.*, 67.

77. *Ibid.*

78. *Ibid.*, 70.

79. *JJ Lloyd Instruments Ltd v. Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1985] 1 Lloyd's Rep 264; *aff'd* [1987] 1 Lloyd's Rep 32. See also *Neter (N.E.) & Co. Ltd v. Licenses & General Insurance Co Ltd* (1944) 77 Ll L Rep 202.

80. [1985] 1 Lloyd's Rep 264, 271. See also [1987] 1 Lloyd's Rep 32, 36.

It is, consequently, clear that weather and sea conditions are not disqualified from giving rise to fortuitous losses in the context of perils of the sea merely because they are such as might reasonably be expected of the relevant waters at the relevant time of year. The precise threshold posed by fortuity is, however, uncertain. References to events that “must” happen suggest a test of factual inevitability. However, the intention behind the fortuity requirement of excluding ordinary wear and tear suggests a slightly lower threshold. It may be that circumstances will not qualify as fortuitous so as to give rise to a loss by perils of the sea if they are so characteristic of the relevant waters at the relevant time of year that an informed seaman would consider it highly unusual not to encounter such circumstances, even if they are occasionally not in fact encountered and cannot, therefore, be considered inevitable in an absolute sense.

The inclusion of fortuity within the definition of perils of the sea requires the assured to adduce evidence negating a loss by ordinary wear and tear or inherent vice or nature of the insured vessel. Thus, whereas with most named perils the burden lies on the insurer to invoke s 55(2)(c) and adduce supporting evidence,<sup>81</sup> the definition of perils of the sea reverses that burden.

#### **(b) Unseaworthiness and inherent vice in hull insurance**

In the context of hull insurance, the concept of seaworthiness addresses the question of reasonable fitness of the insured property for the insured adventure.<sup>82</sup> The approach varies dramatically depending on whether the vessel is insured under a voyage policy or a time policy. With respect to voyage policies, the Marine Insurance Act 1906, s 39 implies a promissory warranty of seaworthiness of the vessel, namely that the vessel is reasonably fit in all respects including physical structure, master and crew, and documentation for the perils of the insured voyage. This warranty attaches and must be complied with at the single moment of commencement of the voyage or, in the case of a voyage in stages, at the moment of commencement of each stage.<sup>83</sup> Unseaworthiness at a relevant moment triggers an automatic prospective discharge of the insurers’ liability under the policy, without prejudice to liability for earlier casualties.<sup>84</sup> Today, however, most vessels are insured under time policies, in which context there is no implied warranty of seaworthiness. Instead, s 39(5) of the 1906 Act affords insurers a defence in respect of loss attributable to unseaworthiness of the vessel at any time it is sent to sea provided the assured has knowledge of such unseaworthiness.<sup>85</sup> This may be regarded as, in effect, an implied exemption clause.

81. *Sassoon (ED) & Co Ltd v. Yorkshire Insurance Co Ltd* (1923) 14 Ll L Rep 167, 173; (1923) 16 Ll L Rep 129, 132; *Soya v. White* [1980] 1 Lloyd’s Rep 491, 503.

82. Marine Insurance Act 1906, s 39(4), (2).

83. *Ibid.*, s 39(1), (3), (4). In addition, where a voyage policy attaches while the insured vessel is in port prior to commencement of the voyage, the vessel is subject to a portworthiness warranty that applies at the moment of inception of the risk: s 39(2). This may be viewed as in effect a particular manifestation of the doctrine of stages.

84. *Ibid.*, s 33(3); *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.

85. *Ibid.*, s 39(5). The statute speaks of the “privity” of the assured. Case law establishes that this means subjective knowledge, albeit that the assured cannot deny what he knows, or at least strongly suspects, by turning a blind eye to confirmatory evidence: *Compania Maritima San Basilio SA v. Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)* [1977] QB 49; [1976] 2 Lloyd’s Rep 171; *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 AC 469.

The differing approaches to seaworthiness in voyage and time policies reflect differing underlying approaches to the fitness of the insured vessel. The implied warranty of voyage policies recognizes seaworthiness as the “substratum” of the contract, affording the underwriter a fair chance of obtaining financial gain from the contract and without which there is no fair commercial bargain.<sup>86</sup> In the context of time policies, however, the law’s refusal to imply any warranty led to a defence based upon the idea of personal misconduct, and, therefore, voluntariness.<sup>87</sup>

The implied warranty of seaworthiness in voyage policies necessarily excludes any defence based on a combination of the condition of the insured vessel and causation. Where the vessel is unseaworthy at a relevant moment, the absolute defence in respect of subsequent casualties afforded by the breach of warranty renders any other defence otiose. It might be argued that there is room to invoke a condition-plus-causation defence where the vessel is seaworthy at any relevant moment but subsequently becomes unseaworthy and that unseaworthiness is a proximate cause of the casualty. However, in none of the judicial pronouncements codified in s 39 is there any hint of a qualification to the liability of insurers provided the vessel is seaworthy at the relevant moments. There is no suggestion that the condition of the vessel can be invoked in any way other than unseaworthiness.<sup>88</sup> In time policies, the exclusive nature of the statutory unseaworthiness defence is clear. If underwriters could invoke any causally relevant sub-standard condition of the vessel whether or not amounting to unseaworthiness, that would make a mockery of the statutory requirement of the assured’s knowledge of that unseaworthiness.<sup>89</sup> Of course, in the case of either a voyage or time policy, if the unseaworthiness is the sole proximate cause of the loss, the insurer will not, subject to contrary intention, be liable simply because the loss will not have been caused by a covered peril.

The cardinal importance of the rules relating to unseaworthiness was emphasized in *Dudgeon v. Pembroke*,<sup>90</sup> the pre-Act House of Lords case that finally settled the law on unseaworthiness in time policies. The case arose out of the loss of a vessel insured under a time policy in circumstances that clearly constituted an insured peril of the sea. It was found as a fact that, if the vessel was unseaworthy, the assured was ignorant of that fact. This, held Lord Penzance,<sup>91</sup> was fatal to any unseaworthiness defence on a time policy, the requirement of knowledge being settled law. The insurers, however, argued that it sufficed to defeat the claim that the vessel was sent to sea in an unseaworthy condition and that the unseaworthiness caused the loss.<sup>92</sup> In other words, in such circumstances the vessel could not properly be regarded as lost by a peril of the sea. This argument was rejected by Lord

86. *Christie v. Secretan* (1799) 8 TR 192, 198, per Lawrence J.

87. *Thompson v. Hopper* (1856) 6 El & Bl 172, 191–192.

88. See, eg, *Bermon v. Woodbridge* (1781) 2 Dougl 781; *Watson v. Clark* (1813) 1 Dow 336; *Dixon v. Sadler* (1839) 5 M & W 405.

89. The concepts of inherent vice and unseaworthiness are not, of course, co-terminal. The test for seaworthiness is that the vessel be “reasonably fit”, not absolutely free from all deficiencies that may impede her due progress on the insured voyage. A vessel may, therefore, have a deficiency that qualifies as inherent vice without being unseaworthy. However, on the basis of the reasoning in the text, the statutory provisions on unseaworthiness must, it is suggested, oust totally the inherent vice defence of s 55(2)(c). It would be perverse if a major defect in the vessel rendering it unseaworthy did not afford an inherent vice defence in circumstances where the warranty is not broken, but a more minor deficiency that did not render it unseaworthy could sustain the defence. This would merely encourage conduct conducive to minor deficiencies becoming major defects.

90. (1877) 2 App Cas 284.

91. With whose speech the other members of the House agreed.

92. *Ibid.*, 289–290.

Penzance in emphatic terms. Having observed that the argument applied equally to voyage policies and would, if correct, permit underwriters to circumvent the temporal limitation of the warranty in favour of causally relevant unseaworthiness, he stated as follows:<sup>93</sup>

If such be the law, my Lords, the underwriters have been signally supine in availing themselves of it . . . The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine.

The issue was the bargain struck between assured and insurer on the balance of risk. The insurer had undertaken to bear losses proximately caused by perils of the sea. Consequently, if the loss was so caused, the underwriters were liable regardless of any other contributing causes that were not the subject of express contractual exclusion. The contrary view, "if sanctioned by judicial decision, would result in relieving underwriters from many other losses to which they have hitherto been held liable".<sup>94</sup> Thus, by the time of *Dudgeon v. Pembroke*, in the context of crew negligence the courts had expressly refused to extend the law on unseaworthiness into the performance of the voyage, observing that so confining the insurer's possible defences "prevents many nice and difficult enquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance".<sup>95</sup> It was established law, subsequently codified in the Marine Insurance Act 1906,<sup>96</sup> that such causally relevant negligence of the master or crew gave insurers no defence, yet on the insurers' argument in *Dudgeon v. Pembroke* there would be no recovery.

The passing of the Marine Insurance Act changed nothing. In the post-Act case of *Frangos v. Sun Insurance Office Ltd*,<sup>97</sup> Roche J held that, following *Dudgeon v. Pembroke*, where a vessel insured under a time policy was lost by perils of the sea, the possibly unseaworthy condition of the vessel at the beginning of the voyage was in law irrelevant unless the assured had knowledge of that condition or the policy otherwise provided. Subsequently, in *The Miss Jay Jay*,<sup>98</sup> an unseaworthy yacht insured under a time policy sank in sea conditions held to constitute a peril of the sea.<sup>99</sup> Had the yacht been seaworthy or had the sea been calm, it would have survived the voyage, but the combination of the unseaworthiness and the sea conditions was fatal. The assured had no idea that the yacht was unseaworthy and the insurers were held liable for a loss caused by perils of the sea.

The reasoning in the case, however, causes a slight difficulty. In a passage directed at causation, Mustill J stated as follows:<sup>100</sup>

[I]t is clearly established that a chain of causation running—(i) initial unseaworthiness; (ii) adverse weather; (iii) loss of watertight integrity of the vessel; (iv) damage to the subject-matter insured—is treated as a loss by perils of the seas, not by unseaworthiness . . .

93. *Ibid.*, 296.

94. *Ibid.*, 297.

95. *Dixon v. Sadler* (1839) 5 M & W 405, 415, *per* Parke B.

96. s 55(2)(a).

97. (1934) 49 Ll L Rep 354, 359.

98. *J J Lloyd Instruments Ltd v. Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1985] 1 Lloyd's Rep 264; *aff'd* [1987] 1 Lloyd's Rep 32.

99. The policy in fact referred to "external accidental means", but for the purposes of the litigation this could be equated with perils of the sea.

100. [1985] 1 Lloyd's Rep 264, 271.

At first sight, it seems as though Mustill J is saying that the application of the proximate cause doctrine results in the unseaworthiness being disregarded as causally irrelevant. This would be problematic.<sup>101</sup> However, the passage may be read as saying that, in such circumstances, the unseaworthiness has no legal significance and the loss is treated as if the only cause were a peril of the sea.

On appeal, the insurers criticized the first instance judgment for ignoring the causal relevance of the unseaworthiness, which alone, they argued, qualified as the proximate cause of the loss. The Court of Appeal rejected this criticism. The passage above, although “economically expressed”,<sup>102</sup> was accurate in the context of a policy that contained no relevant exclusions or warranties and of an acceptance that insurers could not invoke the statutory unseaworthiness defence. The only issue was whether a covered peril was at least a proximate cause of the loss.<sup>103</sup>

As stated above, however, where the unseaworthiness is the sole proximate cause of the loss, the insurer will not be liable, simply because there will be no loss caused by a covered peril. For this reason, Lawton LJ in *The Miss Jay Jay*<sup>104</sup> was not prepared to accede to the assured's argument that the condition of the vessel was always irrelevant outside of the statutory unseaworthiness defence. It will, however, be rare for unseaworthiness to be the sole proximate cause. An example is provided by *Ballantyne v. Mackinnon*,<sup>105</sup> in which the assured shipowner sought to recover a salvage award for services rendered to the insured ship when it ran short of coal having sailed with an inadequate quantity for the contemplated voyage. Clearly, the ship was unseaworthy on sailing, but it was insured under a time policy and there was no suggestion that the assured was privy to the unseaworthiness. However, the insurers' liability for salvage depended on the need for salvage being caused by an insured peril and the Court of Appeal rejected the assured's argument that the loss was caused by a peril of the sea. According to AL Smith LJ,<sup>106</sup> the sole cause was:

the insufficiency of coal with which the ship started upon her voyage, the consequence of which was that what in fact did happen must have happened, namely, that the ship ran short of coal, no sea peril bringing this about in any shape or way, or placing the ship in a position of danger thereby.

101. See *infra*, fn 103.

102. [1987] 1 Lloyd's Rep 32, 41, *per* Slade LJ.

103. *Ibid.*, 37. While such reasoning is clearly correct, it may have been charitable of the Court of Appeal to attribute it to Mustill J. The problem with the passage is that it seems to slip into arranging contributory causes in a linear fashion and then identifying the last in time before the loss as the proximate cause. This is contrary to the dominant and effective approach to proximity of causation adopted by the House of Lords in *Leyland Shipping Co Ltd v. Norwich Union Insurance Soc Ltd* [1918] AC 350 and the warnings against inappropriate linear reasoning given in that case. Moreover, it has also been held that, where unseaworthiness impacts upon a loss, it should be regarded as a proximate cause in the *Leyland Shipping* sense: *Monarch Steamship Co Ltd v. Karlshamns Oliefabriker* [1949] AC 196, 226–227. There are two keys to the true reasoning behind the quoted passage. First, in *The Miss Jay Jay* in support of the quoted passage, Mustill J cited Blackburn J in *Dudgeon v. Pembroke* (1874) LR 9 QB 581, 595, where the linear and last in time approaches to causation and unseaworthiness are again apparent, although he also cited *Frangos v. Sun Insurance Office Ltd* (1934) 49 Ll L Rep 354, 359, discussed above, which admits of unseaworthiness being a concurrent cause. Secondly, writing extra-judicially of his own judgment, he has graciously observed: “A severe critic might wonder whether the trial judge had in mind just what had happened to the doctrine of causation since *Dudgeon v. Pembroke*”: Mustill, “Fault and Marine Losses” [1988] LMCLQ 310, 350 n 101.

104. [1987] 1 Lloyd's Rep 32, 41.

105. [1896] 2 QB 457.

106. *Ibid.*, 461, delivering the judgment of the court.

If a peril of the sea had been at least a proximate cause, then *Dudgeon v. Pembroke* was conclusive authority that the unseaworthiness of the vessel would not have prevented the assured from recovery. However, the absence of any covered peril as a proximate cause denied recovery.

With respect to unseaworthiness in the form of the general debilitated condition of the vessel being the sole proximate cause, at first instance in *The Miss Jay Jay*,<sup>107</sup> Mustill J stated as follows:

Where a ship sinks through its own inherent weakness, there is no loss recoverable under the ordinary form of policy. It is not enough for this purpose that the vessel is unseaworthy. The loss must be disassociated from any peril of wind or water, even if these form the immediate context of the loss, and constitute the immediate agency (for example, the percolation of water through an existing flaw in the hull) by which the loss takes place . . . [T]he policy is not a guarantee that a ship will float.

On the facts of *The Miss Jay Jay*, however, there was clearly an operative peril of the sea. Insurers could not, therefore, rely on unseaworthiness as a simple causation defence.<sup>108</sup>

Another way of analysing the situation is via the causation rule that, where a loss is caused by two proximate causes one of which is a covered peril and the other of which receives no mention in the policy, the covered peril prevails. Effect must be given to the operative nature of the covered peril and the policy pays no heed to the other operative cause. As a matter of construction, therefore, the assured recovers. This, indeed, is a major part of the reasoning of the Court of Appeal in *The Miss Jay Jay*, the adverse sea conditions and the unseaworthiness of the yacht combining to cause her loss and neither one being sufficient of itself.

Such causation reasoning cannot be criticized. And it reflects well the status of s 55(2)(c) as a presumptive illustration of a basic causation rule. But reliance on the language and rules of causation as an approach to the fundamental issue of the circumstances in which insurers can invoke the sub-standard condition of an insured vessel risks losing sight of English marine insurance law's true point of departure and essential principle. As emphasized by Lord Penzance in *Dudgeon v. Pembroke*<sup>109</sup> and also by Mustill J in *The Miss Jay Jay*,<sup>110</sup> this lies in the law on unseaworthiness and the restrictions with which English law—for better or for worse—has chosen to circumscribe the insurer's defence based on unseaworthiness. If English law had adopted a different presumptive causation rule leading to no recovery on the facts of *The Miss Jay Jay*, the restrictions on the statutory unseaworthiness defences would then have rebutted the presumption. Ultimately, provided only that the assured can prove the operation of a covered peril, the condition of the vessel can be invoked only through the law of unseaworthiness. Assuming the circumstances do not support the relevant statutory unseaworthiness defence, the condition of the vessel has no role to play unless the sole proximate cause is the debility of the vessel. If, however, debility is the sole proximate

107. [1985] 1 Lloyd's Rep 264, 272.

108. For an example of debility being the sole proximate cause of a loss, see *Wadsworth Lighterage & Coaling Co v. Sea Insurance Co* (1929) 34 Ll L Rep 285.

109. *Supra*, text to fn 90.

110. [1985] 1 Lloyd's Rep 264, 270.

cause, the assured cannot discharge the basic burden of proving an operative peril, and references to the condition of the vessel add nothing.

The above discussion establishes that defences based on fitness of a vessel to encounter the foreseeable perils of the insured adventure are confined to the doctrine of unseaworthiness and that the limitations on the unseaworthiness defences preclude any supplementary unfitness defence based on the combination of the condition of the insured vessel and causation. It follows that the doctrine of inherent vice, as stated in s 55(2)(c), cannot trespass on the territory of the law of unseaworthiness.<sup>111</sup> The question is how this result is produced. This depends on the precise scope of inherent vice, a question that is not addressed by hull insurance authorities and is considered below in the context of cargo insurance. Is the doctrine of unseaworthiness required in hull insurance because there is no other means of raising the vessel's unfitness for the insured adventure, or would the doctrine of inherent vice in principle provide a condition-plus-causation defence in hull insurance were it not overridden by the unseaworthiness rules? If inherent vice is synonymous with debility and constitutes a form of ordinary wear and tear, which is the view that will be favoured in this article, then, as already seen, inherent vice and unseaworthiness are aligned, and overlap is avoided, by principles of causation. If, however, inherent vice extends to fitness to encounter the foreseeable perils of the insured adventure, overlap is produced and a priority dispute arises that needs resolution in favour of the unseaworthiness rules. This can be achieved as follows.

As already seen, s 55(2)(c) contains merely a presumptive rule of construction. Inherent vice is excluded "unless the policy otherwise provides". It is suggested that, by virtue of s 39, voyage policies, whether hull or cargo, do impliedly otherwise provide. The presence in such policies of the implied promissory warranty that addresses the limitations on the insurer's liability based on the condition of the vessel is an implicit statement that, subject to express stipulation,<sup>112</sup> such is the full extent of any defence so based.

With respect to time policies, the reconciliation is slightly more difficult. Section 55(2)(c) is subject to contrary provision in the policy and s 39(5) does not proceed by overt implication of any term into time policies. Moreover, where one provision in the Marine Insurance Act is subject to other provisions in the statute, the subordinate provision expressly so provides.<sup>113</sup> There are two possible responses. First, as noted above, s 39(5) operates in effect as if an exemption clause were written into the policy. It would not do undue violence to the wording of the subsection to read it as implicitly implying such an exemption clause into the policy, thus generating a contrary implied contractual provision sufficient for s 55(2)(c). Secondly, s 55(2)(c) could be regarded as subordinate to s 39(5), notwithstanding the absence of any express subordination clause within s 55(2)(c). Although the default nature, as subject to contrary provision in the policy, of various provisions in the 1906 Act is also expressly stated, it has been held that provisions lacking any such express statement may similarly be subject to contrary

111. See also *supra*, fn 89. In cargo insurance, of course, the extent of any defence based on unseaworthiness of the carrying vessel is irrelevant to the issue of inherent vice of the insured cargo.

112. Such as, for example, express provisions relating to classification.

113. Marine Insurance Act 1906, ss 3(1), 27(3), 55(1), 62(1). Sections 46 and 48 do not provide that they are subordinate to s 49, but the latter may be regarded as an amplification of the concepts of deviation and delay or as containing an express overriding provision.

intention.<sup>114</sup> It is equally possible that the subordinate nature of a provision may be implied.

*(c) Insuring losses attributable to the condition of the insured vessel*

The above discussion considers the extent to which the internal condition of an insured vessel may impact on cover with respect to losses caused by external fortuities. However, the Institute hull clauses, as part of the Inchmaree clause, provide cover against “loss of or damage to the subject-matter insured caused by bursting of boilers breakage of shafts or any latent defect in the machinery or hull”.<sup>115</sup> Equivalent wording is found in the International hull clauses.<sup>116</sup> This clause was introduced in response to the decision of the House of Lords in *The Inchmaree*<sup>117</sup> that a breakage of machinery on board a vessel unconnected with the vessel being at sea did not give rise to a loss recoverable under the heading of perils of the sea, and s 55(2)(c) duly provides that, subject to contrary intention, insurers are not liable for “any injury to machinery not proximately caused by maritime perils”. While the Inchmaree clause clearly constitutes contrary intention with respect to that part of s 55(2)(c), the question arises of the relationship between the Inchmaree clause and, on the one hand, the doctrine of seaworthiness and also, on the other hand, the restrictions on cover in respect of ordinary wear and tear and inherent vice also articulated by s 55(2)(c). It is convenient to consider latent defects first before turning to bursting of boilers and breakage of shafts.

*(i) Cover for loss caused by latent defects*

It is suggested that unseaworthiness cannot be invoked by an insurer to detract from latent defect cover under the Inchmaree clause.<sup>118</sup> The reason for this, however, differs depending on whether the insurance is written on a voyage or time basis.

With respect to time policies, it is difficult to see that there will ever be any conflict between the unseaworthiness defence under s 39(5) and the latent defect cover. The key issue will be the knowledge (or privity) of the assured. Cover under the Inchmaree clause is subject to the proviso that “such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers”.<sup>119</sup> Where the assured knows at the time the vessel puts to sea of unseaworthiness that proves to be causally relevant to the subsequent casualty, so that s 39(5) applies, any defect will not be latent and in any event the due diligence proviso is highly likely to operate to deny cover.

114. *HIH Casualty & General Insurance Ltd v. Chase Manhattan Bank* [2001] 1 Lloyd’s Rep 30, [26].

115. Institute Time Clauses Hulls (1/10/83), cl 6.2.2.

116. International Hull Clauses (01/11/03), cl 2.2.

117. *Thames & Mersey Marine Insurance Co Ltd v. Hamilton, Fraser & Co (The Inchmaree)* (1887) 12 App Cas 484.

118. The cover provided under the Inchmaree clause is not against the presence of latent defects but against consequential loss damage or expense caused by latent defects. Nothing, however, turns on this for the purposes of this article and reference will be made simply to latent defect cover.

119. This wording of the due diligence proviso is taken from the 1/10/83 hulls clauses. Under the 1/11/95 hulls clauses the proviso is extended to cover the lack of due diligence of superintendents and onshore management. This extension, however, proved highly controversial and failed to gain acceptance in the market. The International Hull Clauses (01/11/02 and 01/11/03) revert to the 1/10/83 wording.



As regards voyage policies, the implied warranty of seaworthiness is ultimately merely one implied term in a commercial contract. Where the parties have expressly agreed to cover the assured against the consequences of certain forms of unseaworthiness, the sensible commercial interpretation is that the insurer agrees to waive the warranty to that extent. This is supported by *The Lydia Flag*,<sup>120</sup> in which a hull policy incorporated the Institute Time Clauses Hulls and a number of additional express terms, including a suspensive condition<sup>121</sup> of seaworthiness at the inception of the policy and of due diligence to maintain seaworthiness thereafter throughout the duration of the policy. Moore-Bick J held that, as a matter of interpretation, the perils covered under the policy, including the Inchmaree clause, had to be read as constituting exceptions to the suspensive condition. Were the suspensive condition to be read as overriding the perils clause, the effect would be a considerable reduction, albeit not complete elimination, of the cover granted in respect of, for example, latent defects. Thus, there would be no cover in respect of latent defects rendering the vessel unseaworthy at the inception of the policy. This, he held, would not be a sensible interpretation.<sup>122</sup> The case is all the stronger with respect to the implied warranty, since that would completely eliminate cover in respect of loss or damage caused by any latent defect that rendered the vessel unseaworthy at a moment when the warranty applied. Cover would be reduced to such latent defects that arose later than any such moment,<sup>123</sup> or defects then present but which were insufficiently serious to render the vessel unseaworthy. While such an interpretation would not be untenable, it would not, it is suggested, be a sensible commercial interpretation.

What, however, is the relationship between latent defect cover and the presumptive non-cover of loss caused by ordinary wear and tear or inherent vice pursuant to s 55(2)(c)? The answer to this question lies, again, in causation. Where the sole proximate cause of the loss is ordinary wear and tear, insurers will not be liable for the simple reason that there will be no covered loss. However, where a latent defect results in loss or damage that is not consistent with the attrition of the normal working of the insured vessel, the insurers will be liable. Either the defect will be the sole proximate cause of the loss, in which case insurers are liable because ordinary wear and tear is not in play.<sup>124</sup> Alternatively, the true analysis is that the combination of the defect and ordinary wear and

120. *Martin Maritime Ltd v. Provident Capital Indemnity Fund Ltd (The Lydia Flag)* [1998] 2 Lloyd's Rep 652.

121. The provision was termed a "warranty" in the policy, but its true nature was that of a suspensive condition.

122. *Ibid.*, 655–656.

123. The opinion has been expressed that a latent defect "must involve a quality inherent in the design or manufacture at the time of construction of the vessel or installation of the part": *RA Houghton & Mancon Ltd v. Sunderland Marine Mutual Insurance Co Ltd (The Ny-Eeasteyr)* [1988] 1 Lloyd's Rep 60, 63, per Hamilton QC. This does not, however, deny the possibility of a latent defect arising later than construction or installation and indeed later than the time of application of the unseaworthiness warranty. Reliance was placed on the statement in M J Mustill and J C B Gilman (eds), *Arnould's Law of Marine Insurance and Average*, 16th edn (1981) (hereafter "*Arnould*"), para 831 that, in the context of the Inchmaree clause, a defect "is a condition causing premature failure which is present in the relevant part of the hull or machinery when it is constructed or installed in the vessel, or which comes into existence as a result of the way in which the relevant part was designed, constructed or installed" (emphasis added). An example is provided by design defects that develop over time into latent defects that cause loss or damage, as in *Prudent Tankers Ltd SA v. Dominion Insurance Co Ltd (The Caribbean Sea)* [1980] 1 Lloyd's Rep 338.

124. *Wills (CJ) & Sons v. World Marine Insurance Co Ltd* [1980] 1 Lloyd's Rep 350n.

tear caused the loss so that both the defect and ordinary wear and tear satisfy the proximate cause test.<sup>125</sup> In such a case, the insurers are again liable because s 55(2)(c) is not read as importing an exclusion into the policy but merely as clarifying the scope of cover.<sup>126</sup> The distinction is critical because the natural interpretation of a policy dictates that a narrower exclusion must prevail over a covered peril otherwise the exclusion is effectively removed from the policy.<sup>127</sup> That reading of the policy does not apply where the relevant provision functions not as an exclusion but merely as clarification that loss with a certain, sole cause is not covered in the first place.

With respect to inherent vice, in *The Caribbean Sea*,<sup>128</sup> Robert Goff J stated *obiter*<sup>129</sup> that s 55(2)(c) “is clearly inconsistent with the cover under the Inchmaree clause, and so inapplicable to a policy containing the clause”. One may quibble about the question of applicability, but it is clear that in policies including the Inchmaree clause s 55(2)(c) does not provide insurers with a defence in cases of loss or damage proximately caused by a latent defect.

Latent defect is a sub-species of inherent vice. The two concepts are not, however, co-terminal. As already seen, the phrase inherent vice is shorthand for “inherent vice or nature of the subject-matter insured”. Section 55(2)(c) will, therefore, embrace properties of an insured vessel even if they cannot be regarded as defects. Thus, the case law draws a distinction between defects in construction or subsequently developing defects in the material of the vessel, which result in the vessel being a defective version of what it is supposed to be, and design defects, which result in the vessel being constructed exactly as intended but the design flaw results in the vessel being unsuitable for the purpose for which it was designed. The former are regarded as defects for the purpose of the Inchmaree clause, while the latter are regarded as mere shortcomings and outside the scope of defects as understood by that clause.<sup>130</sup> While it is clearly correct that s 55(2)(c) cannot be invoked to detract from the express provision of latent defect cover, insurers are obviously not liable for loss caused by inherent vice that does not constitute a covered peril. To the extent that it is helpful to say that in such circumstances insurers may invoke s 55(2)(c), the provision may be said to be applicable. Ultimately, however, as with ordinary wear and tear, the issue resolves itself as one of causation. If the proximately causative inherent vice qualifies as a latent defect, the insurer will be liable. If it does not, the insurer will not be liable, since there is no operative covered peril.

125. It is not entirely clear whether in *Prudent Tankers Ltd SA v. Dominion Insurance Co Ltd (The Caribbean Sea)* [1980] 1 Lloyd's Rep 338, 347, Robert Goff J favoured analysis of the loss in question as proximately caused solely by the defect in question or jointly by the defect and ordinary wear and tear.

126. *HIH Casualty & General Insurance Ltd v. Waterwall Shipping Inc* (1998) 146 FLR 76. The liability of the insurers on such analysis is supported also by *The Caribbean Sea* [1980] 1 Lloyd's Rep 338 if that case is properly understood as involving concurrent proximate causes.

127. *Wayne Tank & Pump Co Ltd v. Employers Liability Assurance Corp Ltd* [1974] QB 57.

128. *Prudent Tankers Ltd SA v. Dominion Insurance Co Ltd (The Caribbean Sea)* [1980] 1 Lloyd's Rep 338, 347.

129. Because the issue was the relationship between the Inchmaree clause and ordinary wear and tear, discussed in the previous paragraph.

130. *Jackson v. Mumford* (1902) 8 Com Cas 61, appealed unsuccessfully on another ground (1904) 9 Com Cas 114; *Prudent Tankers Ltd SA v. Dominion Insurance Co Ltd (The Caribbean Sea)* [1980] 1 Lloyd's Rep 338.

The net result of the above discussion, it is submitted, is that, within the purview of the latent defect cover of the Inchmaree clause, there is no defence available to underwriters based on unseaworthiness, ordinary wear and tear, or inherent vice.

(ii) *Cover for loss caused by bursting of boilers or breakage of shafts*

The same issues arise in respect of the cover provided by the Inchmaree clause against loss or damage to the insured vessel caused by bursting of boilers or breakage of shafts, namely the availability of the defences of unseaworthiness, ordinary wear and tear, and inherent vice. The difference, however, is that, while latent defect cover is clearly designed to provide insurance against an aspect of the insured vessel's condition, cover for bursting of boilers and breakage of shafts is, as a matter of language, ambiguous in terms of whether inherently unfit boilers and shafts are covered or whether this part of the Inchmaree clause is restricted to bursts and breakages caused by external fortuities. In *Scindia Steamships (London) Ltd v. London Assurance*,<sup>131</sup> Branson J considered *obiter* that the breakage of shafts cover was subject to the inherent vice defence in s 55(2)(c). If that is correct, this cover will also be subject to an unseaworthiness defence and the defence of ordinary wear and tear. For the following reasons, however, it is respectfully suggested that this *dictum* is misplaced.

First, to the extent that a boiler bursts or a shaft breaks because of some inherent flaw, that flaw may qualify as a latent defect so that the assured would be covered in any event. Secondly, in the event that the defect should have been detected, and so cannot be regarded as latent, the failure to detect may amount to negligence on the part of the master, officers, crew, repairers, or charterers, and the assured ought to be able to recover under that heading.<sup>132</sup> If, for example, inherent vice were a defence to repairers' negligence, then the scope and utility of that cover would be much reduced. Thirdly, in the event that the relevant boiler or shaft was inherently unsuitable and represented a design defect, there is nothing in the policy wording to preclude cover. As already noted, design defects in and of themselves are precluded from latent defect cover by reason of the interpretation of the term "defect".<sup>133</sup> There is, however, nothing in the language of cover in respect of boilers and shafts to support such a restriction.<sup>134</sup> Fourthly, cover under the Inchmaree clause is subject to the due diligence proviso, denying cover only in cases of causally relevant lack of due diligence of the assured, owners or managers. As a matter of interpretation, it would not, it is suggested, be sensible to read an express conferral of cover for burst boilers or broken shafts as subject to any more stringent requirement relating to the condition of the vessel. It is, therefore, suggested that the cover against bursting of boilers and breakage of shafts is not restricted by s 55(2)(c) and that, subject only to the due diligence proviso, loss or damage to the insured property is recoverable even if caused by a boiler that bursts or shaft that breaks without the intervention of any external fortuity.

131. [1937] 1 KB 639, 648.

132. Institute Time Clauses Hulls (1983), cl 6.2.3–6.2.4; (1995), cl 6.2.2–6.2.3; International Hull Clauses (2003), cl 2.2.3–2.2.4.

133. *Jackson v. Mumford* (1902) 8 Com Cas 61; *The Caribbean Sea* [1980] 1 Lloyd's Rep 338 (see *supra*, fn 123).

134. This is emphasized in the International hull clauses, where latent defects are covered under a separate sub-sub-clause.

## 2. Cargo insurance

### (a) *Seaworthiness and inherent vice*

Cargoes are insured on a voyage basis and, unless the policy states to the contrary, the promissory warranty of the seaworthiness of the vessel at the commencement of the voyage and any stage of the voyage is implied into cargo policies.<sup>135</sup> This means that a problem with the condition of the carrying vessel of which the assured was unaware and over which the assured had no control could deny cover. Consequently, the Institute cargo clauses routinely waive any breach of the implied warranty of seaworthiness in the absence of knowledge of such breach on the part of the assured or the assured's servants. In addition, liability is excluded for any loss damage or expense caused by unseaworthiness of which the assured or the assured's servants have knowledge at the time of loading of the cargo on board the vessel.<sup>136</sup>

There is, however, no specific equivalent to a doctrine of seaworthiness in relation to the insured cargo. In *Koebel v. Saunders*,<sup>137</sup> insurers argued that a cargo policy contained an implied warranty of seaworthiness akin to that recognized in hull policies, so that insurers would not be liable if the goods at the time of commencement of the voyage were not in a state of reasonable fitness, judged by reference to mercantile usage, to encounter the normal perils of the insured adventure. If correct, this meant that insurers would not be liable in respect of any subsequent loss even if the condition of the insured goods was not causally responsible for the casualty. The Court of Common Pleas rejected this argument. According to Willes J, the novelty of the argument betrayed its improbability. There had to have been numerous occasions when insurers might previously have raised such an argument, but none had. Moreover, the court was simply not prepared to recognize a new implied promissory warranty. Cargo insurance and hull insurance were different.<sup>138</sup>

As a general rule, the insurer is not liable for damage resulting from a peculiar vice or infirmity in the thing which is the subject of insurance. It is upon this footing that the seaworthiness of the ship is held . . . to be an implied warranty. It is a sufficient answer to the assured to shew that the vessel was unseaworthy when she sailed on her voyage, without going on to shew that the damage sustained was the consequence of that unseaworthiness. But, 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.

This reasoning clearly denies the existence of any implied warranty of seaworthiness of insured cargo, a denial subsequently codified in the Marine Insurance Act 1906, s 40(1). On the other hand, it equally clearly recognizes that cargo insurers benefit from a defence based upon a combination of the condition of the goods, although without specifying precisely what condition, and causation.

135. Or of breach of the separate warranty or fitness of the vessel to carry the cargo on the insured voyage: Marine Insurance Act 1906, s 40(2).

136. See, eg, Institute Cargo Clauses (A), (B), (C), cl 5. This clause also deals identically with the warranty of fitness to carry cargo.

137. (1864) 17 CB(NS) 71; 144 ER 29.

138. (1864) 17 CB(NS) 71, 77–78.

It appears, therefore, that by the mid-19th century courts were extremely reluctant to recognize implied warranties that had not already gained judicial or commercial acknowledgement. What is less clear is why, given rejection of a warranty, cargo insurance should evolve differently from the voluntary conduct approach of time policies in hull insurance and throw on to the assured the risk that the insured cargo might succumb to an inherent vice unknown to the assured. It may be that, historically, cargo owners were deemed to know the properties of the cargoes they ship, as in a better position than underwriters to examine the goods in question and more likely to be able to exercise some control over the conditions in which they are shipped. This, of course, translates inherent vice into an aspect of voluntary conduct. Thus, in *Boyd v. Dubois*,<sup>139</sup> Lord Ellenborough stated of fire damage to cargo by inherent vice that “the assured cannot recover for a loss which he himself has occasioned”. However, whatever the relative position as between assured and insurer, such an attribution of knowledge fails to reflect the commercial reality of cargo assureds often as purchasers of goods shipped by other persons. Moreover, it fails to address the disparate approaches of hull and cargo insurance. An alternative answer may lie in a recognition of the danger of fraud by insuring cargoes of doomed goods with insurers compelled to pay in the absence of proof of knowledge by the assured. The weakness of the unseaworthiness defence in hull time policies precisely by reason of the difficulty of proving the assured’s privity certainly attests to the genuineness of any such concern and indicates that the question ought perhaps to be not why cargo insurance law is more exacting on assureds than hull insurance, but why the latter is so much more lax than the former.

**(b) *The meaning of inherent vice***

Inherent vice is not a concept unique to the law of marine insurance. It is recognized also in the law of carriage of goods by sea, both at common law and under the Hague-Visby Rules. However, while terms common to marine insurance and carriage of goods may share a common meaning, as is the case with perils of the sea,<sup>140</sup> they do not where different commercial contexts so dictate. The concept of seaworthiness is more narrowly understood in marine insurance, excluding cargoworthiness,<sup>141</sup> because of the limited concerns of a hull insurer. With respect to inherent vice, the differences in commercial context are again significant. A carrier should not be required to guarantee the fitness of the goods for the contractual voyage,<sup>142</sup> meaning all reasonably foreseeable incidents of that voyage. In addition, a carrier should be able to frame its obligations in respect of the handling of and care for the cargo on the assumption that the cargo is fit for the reasonably foreseeable perils of the voyage. It is, therefore, unsurprising that in the law of carriage of goods by sea no analogy can be drawn between inherent vice and ordinary wear and tear. Instead, inherent vice carries an extended meaning of inability to withstand the

139. (1811) 3 Camp. 133, 134.

140. *The Xantho* (1887) 12 App Cas 503, 510, 517; *Hamilton, Fraser & Co v. Pandorf & Co* (1887) 12 App Cas 518, 527.

141. Marine Insurance Act 1906, ss 39(4), 40(2).

142. *Bradley (FC) & Sons Ltd v. Federal Steam Navigation* (1927) 27 Ll L Rep 395, 399.

rigours of the contractual voyage.<sup>143</sup> Moreover, where the operative peril falls outside the range of perils the cargo should be able to withstand, the carrier is highly likely to be able to invoke some further defence, such as perils of the sea. Consequently, the precise limits of inherent vice are unlikely to prove crucial.

In the insurance context, however, the boundaries of inherent vice may be critical as marking the limits of cover, and, importantly, the underlying issues are different. The problem with the goods, or their packaging,<sup>144</sup> will be unknown to the assured when the risk is placed, or disclosure would be required under the doctrine of utmost good faith. It will also be unknown at such later time, if any, as the assured's ability to decide not to ship the goods ceases, since knowingly choosing to expose cargo to an adventure for which it is unfit will amount to voluntary (mis)conduct. The issue, therefore, is whether insurance law's default rule in respect of the risk of unknown unfitness for the insured adventure should favour the insurer or the assured. So analysed, it is by no means self-evident that marine insurance should adopt the same extended meaning of inherent vice as carriage of goods and favour the insurer. Even if marine insurance does require an element of fitness for the insured transit, a logical dividing line may be drawn according to whether the peril was such that it would be unusual for it not to be encountered or whether it was reasonably foreseeable that it might be encountered but equally possible that it might not (in other words, between categories [1] and [2], described above).

*Arnould* favours a narrow concept of inherent vice. In the original author's words, retained in all subsequent editions, "the underwriter is not liable for loss arising solely from a source of decay or corruption inherent in the subject insured, 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".<sup>145</sup> The operative principle is causation: the insurer is not liable simply because the loss is not caused by a covered peril. Where, however, the correct causation analysis is that the loss is proximately caused by the interaction of the condition of the cargo and perils encountered in the course of the insured adventure, the insurer remains liable for a loss caused by the peril. The leading example cited, introduced into the text of *Arnould* by its first editor, David Maclachlan, is *Taylor v. Dunbar*,<sup>146</sup> which concerned claims in respect of two

143. *Albacora SRL v. Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep 53, 59. See also *Lister v. Lancashire & Yorkshire Railway Co* [1903] 1 KB 878; *Bradley (FC) & Sons Ltd v. Federal Steam Navigation* (1927) 27 Ll L Rep 395, 400; *Westcoast Food Brokers Ltd v. Hoyanger (The Hoyanger)* [1979] 2 Lloyd's Rep 79, 85–88. For the same reason, inherent vice in carriage law includes packaging: *Gould v. South Eastern & Chatham Railway* [1920] 2 KB 186. It is true that the distinction drawn earlier in this article between perils that it would be unusual not to encounter and those that are reasonably foreseeable yet might well not occur has not received specific attention. However, it is difficult to see why a carrier's inherent vice defence should be confined to an inability to encounter the former.

144. For the extension of inherent vice to packaging in insurance law, see *Soya v. White* [1982] 1 Lloyd's Rep 136, 149; *Mayban General Assurance Bhd v. Alston Power Plants Ltd* [2004] EWHC 1038; [2004] 2 Lloyd's Rep 609, [19]. Earlier cases possibly supporting such an extension are ambiguous in that they may turn on the fact that the loss was simply not caused by a covered peril: *Berk (FW) & Co Ltd v. Style* [1956] 1 QB 180; *Gee & Garnham Ltd v. Whittall* [1955] 2 Lloyd's Rep 562. Modern cargo policies routinely provide for an express exclusion of "loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured" in addition to an express inherent vice exclusion: eg, Institute Cargo Clauses (A), cl 4.3. The concept of "insufficiency or unsuitability of packaging or preparation" raises the same question of scope as the concept of inherent vice discussed in the text, namely for what range of risks must the packaging or preparation be sufficient or suitable, and must logically receive the same answer.

145. *Arnould*, para 782.

146. (1869) LR 4 CP 206.

cargoes of dead pigs shipped from Hamburg to London. The ordinary duration of the voyage was 50 hours and the cargo was fit for a voyage of such duration. In each case, bad weather prolonged the voyage considerably. The carcasses turned putrid and had to be jettisoned, in the first case seven and in the second case five days after sailing. The Court of Common Pleas rejected a claim for loss by perils of the sea for want of the necessary maritime connection. The cause of the loss was purely the delay and, although the cause of the delay happened on the facts to be adverse sea conditions, the same loss would have resulted from any equivalent delay regardless of the cause.

There is, however, a difficulty. *Taylor v. Dunbar* provides guidance on the meaning of perils of the sea, illustrating a loss that occurred at sea but that lacked a peculiarly maritime nature. It is also a leading case on the presumptive exclusion from marine policies of loss caused by delay, subsequently codified in the Marine Insurance Act 1906, s 55(2)(b). What, however, does it tell us about inherent vice, which is not as such mentioned in the report? *Arnould's* thesis is that the inherent vice exclusion applies where the loss "arises solely" from an internal characteristic. In *Taylor v. Dunbar*, however, the cause of the loss was the combination of the perishable nature of the goods and the excessive delay to which they were subjected. It is unclear quite how unusual was a fatal prolongation of the voyage, but it is clear that, had the voyage been "of the ordinary duration", there would have been no loss. If, therefore, the case is regarded as an apt example of inherent vice, it does not support *Arnould's* thesis. Instead, inherent vice would be operative and legally significant even in cases where the condition of the goods interacted with conditions of transit that were out of the ordinary, albeit presumably reasonably foreseeable.

The leading modern marine insurance example of inherent vice being successfully invoked is consistent with a narrow view of the defence. *Noten BV v. Harding*<sup>147</sup> concerned four shipments of gloves from India to Europe insured under all risks policies. The gloves were manufactured in Calcutta of leather supplied by local tanneries and then shipped to Rotterdam. Leather being naturally hygroscopic and the atmosphere in Calcutta being humid, the gloves absorbed a certain amount of moisture before being stuffed into containers. On arrival at Rotterdam, the significantly colder external temperature caused the exterior of the container to cool. This led to warm air carrying moisture rising from the gloves. The moisture then condensed on the inside of the colder container roof and fell back on the gloves. Each of the four shipments sustained significant damage in this way: according to the cargo surveyors, they "stank".<sup>148</sup> Each was insured under a policy containing an express inherent vice defence.

The damage was not inevitable. Expert testimony identified a number of factors relating to the process of manufacture in Calcutta, the circumstances at Calcutta and Rotterdam, and the course of the transit that determined whether moisture damage was incurred at Rotterdam. The Court of Appeal, however, confirmed the distinction between the defences of inevitable loss and inherent vice. That the loss was fortuitous in the sense of not factually inevitable was no answer to an inherent vice defence. The fortuity required to rebut such a defence related to the events of the transit. Other cargoes of gloves undertaking the same transit at the same time had arrived undamaged. However, the

147. [1990] 2 Lloyd's Rep 283.

148. *Ibid.*, 286.

claimants had not sought to prove that these shipments had been made in such closely comparable conditions as to give rise to an inference that the damaged cargoes had been affected by a fortuitous occurrence. On the contrary, the gloves had experienced an entirely ordinary transit. According to Bingham LJ:<sup>149</sup>

[T]here is nothing in the facts of this case to suggest any untoward or unusual event of any kind. It was not unusually humid or hot in Calcutta at the time of shipment nor particularly cold in Rotterdam. There is nothing to suggest an unusual period between the manufacture and packing of the gloves, nor between packing and stuffing of the containers, nor between stuffing and shipment, nor between shipment and discharge, nor between discharge and unstuffing. There is nothing to suggest that the position of these containers in the stow was unusual. They were, on the evidence, an entirely normal series of shipments for the time of year. There was, on the evidence, no combination of fortuitous events, and the [insurers] never undertook to insure the [claimants] against the occurrence of hot and humid weather in Calcutta during the monsoon.

In short, “the goods deteriorated as a result of their natural behaviour in the ordinary course of the contemplated voyage, without the intervention of any fortuitous external accident or casualty. The damage was caused because the goods were shipped wet”.<sup>150</sup>

In *Soya v. White*,<sup>151</sup> a cargo of soya beans was insured under a policy covering “the risks of Heat, Sweat and Spontaneous Combustion only”. On shipment, the soya beans contained a level of moisture sufficient to give rise, when subjected to the circumstances of the voyage, to a risk, although not a certainty, of microbiological activity and consequent damage through heating. The risk duly materialized, although it was not possible to identify precisely which attendant circumstances during a perfectly normal voyage<sup>152</sup> combined with the moisture content to cause the heating. The insurer was held liable because, even on the assumption that the damage was caused by inherent vice, the policy, on its true interpretation, covered heat damage occasioned by inherent vice. This issue of interpretation was finally resolved by the House of Lords, before which it was assumed that the cause of damage was inherent vice.<sup>153</sup> The issue of the operative nature of inherent vice on the facts, however, saw disagreement in the lower courts. On the assumption that the policy did not cover inherent vice, the question arose whether the insurers could invoke the Marine Insurance Act 1906, s 55(2)(c). At first instance, Lloyd J considered they could not. This was because the inherent vice was not the sole proximate cause of the loss and would not be unless “the soya beans were such that they could not withstand any normal voyage of that duration”.<sup>154</sup> Such a formulation is consistent with a narrow approach to inherent vice. Inherent vice is the operative cause where the insured goods are not reasonably fit to withstand those perils which it would be unusual not to encounter. If they are fit to encounter perils that might reasonably be foreseen but that might equally not be encountered on any particular voyage, it cannot be said that they are unfit to withstand “any” normal voyage.

149. *Ibid*, 289.

150. *Ibid*, 288, *per* Bingham LJ.

151. [1980] 1 Lloyd’s Rep 491; *aff’d* [1982] 1 Lloyd’s Rep 136; *aff’d* [1983] 1 Lloyd’s Rep 122.

152. There was “no evidence of any untoward incident during the voyage befalling either ship or cargo”: [1980] 1 Lloyd’s Rep 491, 503, *per* Lloyd J.

153. See *infra*, text to fnn 175–177.

154. [1980] 1 Lloyd’s Rep 491, 505.



In the Court of Appeal, however, Donaldson LJ disagreed, not least because he placed a different interpretation on the words of Lloyd J. For Donaldson LJ, Lloyd J was confining the inherent vice defence under s 55(2)(c) to cases where loss was (at least factually) certain so that underwriters were not liable on any policy confined to risks simply because inherent vice was not, on the facts, a risk. Donaldson LJ emphasized that inevitability of loss gave rise to a conceptually different defence from inherent vice. Elaborating on this point, Donaldson LJ considered that a failure to withstand the ordinary incidents of the voyage was inherent vice, which carried the same meaning in marine insurance law as in the law of carriage of goods by sea, and loss caused by such a failure, even if in conjunction with other factors, was caused by inherent vice.

It is, however, suggested, that Donaldson LJ misinterpreted the words of Lloyd J. It is clear from his judgment that Lloyd J was under no illusions about the separate nature of the inevitability defence from that of inherent vice. Before him, counsel for the insurers advanced three submissions: first, that the facts revealed no casualty in the form of a "risk" as required by the policy wording, but rather an inevitable loss that fell outside the scope of cover; secondly, that the policy did not cover heating caused by inherent vice; and, thirdly, that the insurers could invoke s 55(2)(c). In rejecting the first two submissions, Lloyd J explicitly drew a distinction between inevitable losses and inherent vice as a risk. Thus, in rejecting the second submission, he stated that, "[i]f the moisture content had been [such] that damage was bound to occur, underwriters would have had a defence, not because the policy does not cover the risk of heating through inherent vice but because the heating would in that event have been not a risk but a certainty".<sup>155</sup> It is, with respect, highly implausible that Lloyd J then proceeded to overlook that distinction in the very next paragraph, in which are found the words highlighted by Donaldson LJ.

Waller LJ confined himself to establishing the insurability in principle of the risk of inherent vice, disagreeing with Lloyd J only to the extent that inherent vice should be considered legally operative even where it is a, as opposed to the sole, proximate cause of the loss, acting in conjunction with another cause or other causes. Again, however, it is suggested that this does some injustice to the judgment of Lloyd J. The requirement that inherent vice be the sole proximate cause was expressed specifically in the context of the insurers' defence under s 55(2)(c). In this context, the issue is the correct characterization of s 55(2)(c). On the view of Lloyd J, s 55(2)(c) operates not as an implied contractual exclusion but as a clarification on the scope of cover. This accords with the drafting of s 55(2)(c), amplifying the proximate cause rule articulated in s 55(1) and providing an example of a circumstance of a loss not proximately caused by a peril insured against. This view has also since been adopted by the New South Wales Court of Appeal.<sup>156</sup> However, in the different context of inherent vice as a covered peril (the context in which Waller LJ expressed his disagreement with Lloyd J), it is clear that, provided on the facts inherent vice is a proximate cause, it is irrelevant that it is not the sole proximate cause unless another proximate cause is the subject of an express exclusion. But again the judgment of Lloyd J is faultless. Having interpreted the policy as covering the risk of heating by inherent vice, he held the insurers liable on the basis that inherent vice combined with some other unspecified cause(s) to produce the loss.

155. *Ibid.*, 504.

156. *HH Casualty & General Insurance Ltd v. Waterwall Shipping Inc* (1998) 146 FLR 76.

The critical focus then moves to the view expressed by Donaldson LJ as to the scope of inherent vice. It has already been suggested that it is far from self-evident that marine insurance should adopt the approach of carriage of goods by sea. A more recent decision may, however, illustrate both marine insurance doing so, and, it is suggested, why it should not.

*Mayban General Assurance Bhd v. Alston Power Plants Ltd*<sup>157</sup> concerned the insurance of a large electrical transformer under a policy incorporating the Institute Cargo Clauses (A) (1/1/82) for a voyage from Ellesmere Port in the United Kingdom to Rotterdam and, after transshipment, from there to Malaysia. In the course of the voyage, the transformer sustained damage costing in excess of £1 million to repair. The cause of this damage was the strain to which the transformer was subjected by the motion of the carrying vessels in heavy seas. The assured claimed under the “all risks” insuring clause and the insurers invoked an express inherent vice defence.

In the course of the first leg of the voyage, the carrying vessel, the *Eliane Trader*, encountered winds of force 8 and waves in excess of six metres for a continuous period of about 27 hours while proceeding off the south-west coast of England between Milford Haven and Land’s End. Moore-Bick J found that unbroken periods of such conditions in excess of 24 hours at that time of year in those waters occur on average once every 2.5 years. Moreover, a vessel plying such waters on a random basis could expect to encounter such conditions once every 8.5 years. In addition, further, shorter episodes of force 8 winds and accompanying heavy seas were encountered on each of the two legs of the voyage. The damage sustained by the transformer could have been caused by either the single sustained period of heavy weather or “two or three shorter spells of similar weather at different stages in the voyage”.<sup>158</sup> On that basis, Moore-Bick J found in the insurers’ favour: “the loss in the present case was caused by the inability of the transformer to withstand the ordinary conditions of the voyage rather than by the occurrence of conditions which it could not reasonably have been expected to encounter.”<sup>159</sup>

In reaching this conclusion, the fact that the assured had previously shipped over 300 transformers without loss or damage was correctly disregarded as there was no evidence that any, still less a significant number, of these shipments had been made in parallel circumstances. Uncontradicted expert testimony was, nevertheless, adduced that “damage of the kind experienced in this case was unknown in the industry, despite the fact that transformers are routinely carried by sea”.<sup>160</sup> The question, however, remained whether the weather conditions that led to the damage were to be regarded as a risk and whether the inherent condition of the cargo could be regarded as, at least, a proximate cause of the loss so as to afford the insurers the protection of the express inherent vice exclusion.<sup>161</sup> This turned on whether the conditions encountered “were more severe than could reasonably have been expected”.<sup>162</sup> Moreover, “[c]onditions or events which are well known to occur from time to time but which are nonetheless relatively uncommon may well be properly regarded as ordinary incidents of the voyage”.<sup>163</sup> To encounter the

157. [2004] EWHC 1038; [2004] 2 Lloyd’s Rep 609.

158. *Ibid*, [29].

159. *Ibid*, [33].

160. *Ibid*, [23].

161. This is not the causation analysis espoused in the judgment, but is in line with settled authority.

162. *Ibid*, [21].

163. *Ibid*, [30].

prolonged period of heavy seas that the *Eliane Trader* did encounter was accepted as “unusual” but not outside the range of conditions that a seaman with experience of coastal voyages off the west coast of England would regard as reasonably to be expected at that time of year. Such an encounter was, therefore, “an ordinary incident of the voyage for which the vessel and cargo ought to be prepared”.<sup>164</sup>

It is, with respect, suggested that this analysis falls into error. First, the reference to vessel and cargo indicates that Moore-Bick J was drawing a parallel between the standards expected of a carrier of goods by sea and the limits of cover offered by a marine insurer. It has already been suggested that it is by no means self-evident that such a parallel can be supported. Secondly, assureds do not procure insurance against losses that they consider fanciful. Rather, it is precisely because commercial experience indicates a certain level of probability of a particular type of loss that the reasonable person considers insurance a sensible and prudent investment. 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. “All risks” cover would be confined to loss or damage occasioned only by wholly unusual perils or wholly unusual examples of known perils. “All risks” insurance would not cover cargo destined for New Orleans against loss or damage caused by a hurricane of no greater force than Hurricane Katrina that so devastated the city and surrounding area in 2005. It would not insure against loss by piracy cargo that was to be shipped through waters notorious for piratical attacks, such as the Straits of Malacca. And what sort of packaging and security would be required to insure cargo against theft on a voyage during which theft was within the reasonable commercial experience?

Insurers know they are being asked to assume risks that might well occur and have the protection of the law of non-disclosure and misrepresentation in reaching their decision on whether to accept the risk and, if so, on what terms. Insurers, of course, enjoy contractual freedom to restrict their liability by reference to the probability of loss occurring. However, the approach to inherent vice adopted in *Mayban* represents a restriction on cover that goes far beyond any logical *presumed* exclusion of ordinary losses and introduces a startling dichotomy between hull and cargo insurance that does not seem to respond to commercial common sense. Foreseeable events, it is suggested, can still constitute risks within the meaning of an all risks policy and the concept of inherent vice should be confined to losses analogous to ordinary wear and tear emanating from the internal characteristics of the insured property.

The above discussion has focused on the single, prolonged period of heavy weather encountered by the *Eliane Trader*. It may, however, be noted that, on the facts of *Mayban*, “it would not have been at all unusual for the transformer to be exposed to several similar, albeit briefer, spells of bad weather at various stages of its voyage to the Far East” and the damage could have been caused by two or three such shorter periods of adverse weather.<sup>165</sup> The decision in the case may be justified if such shorter periods of bad weather could be considered so ordinary and natural an incident of the voyage that it would be unusual to complete a voyage without encountering them. An inability to withstand such

164. *Ibid.*

165. *Ibid.*, [31].

shorter periods would then qualify as inherent vice even on the narrow view favoured in this article.

*(c) Insuring natural losses in cargo policies*

The exclusion from cover of natural losses, including losses caused by inherent vice, pursuant to the Marine Insurance Act 1906, s 55(2)(c) represents merely an assumption as to the agreed scope of cover. Ultimately, therefore, the existence and extent of any such exclusion depends upon the interpretation of the individual policy<sup>166</sup> in the same manner as one would interpret any commercial contract. However, the emphasis in the interpretative process placed upon the intentions of the parties, coupled with the fact that certain losses are presumptively excluded by s 55(2)(c) precisely because that is the most likely intention of parties to an insurance contract, means that displacing the presumptive exclusion requires a clear expression of contrary intention.

*(i) Leakage*

In *Dodwell & Co Ltd v. British Dominions & General Insurance Co Ltd*,<sup>167</sup> two consignments of barrels of oil were shipped on board the *Glenstrae* and the *Protesilaus*. Each consignment was insured against leakage. According to expert evidence, somewhere between 3% and 6% leakage in transit was to be expected as normal. However, the *Glenstrae* shipment suffered 12% leakage while 60% of the *Protesilaus* shipment was lost by leakage. The *Glenstrae* policy covered the risk of leakage but without any particular wording. This was construed as rendering the underwriters liable only for the excess leakage above the ordinary.<sup>168</sup> That was fixed by Bailhache J at 5%, leaving the underwriters liable for 7% leakage. The *Protesilaus* policy, however, contained the following clause drafted by the underwriters: "Including risk of leakage from any cause whatever." Bailhache J held that this clause meant exactly what it said, rendering the insurer liable for all leakage sustained.<sup>169</sup> Furthermore, in *Traders & General Insurance Association v. Bankers & General Insurance Co*,<sup>170</sup> Bailhache J held that a policy on soya bean oil that covered "leakage in excess of 2 per cent each barrel over trade ullage" provided cover against leakage *simpliciter*. In other words, where leakage cover stipulates a percentage by way of excess, the insurance bargain is taken to include a conclusive agreement between the parties of the amount to be deducted by way of ordinary leakage.

166. Subject to any policy based restrictions on inevitable losses, discussed *supra*.

167. (1918) [1955] 2 Lloyd's Rep 391n.

168. The report quotes Bailhache J as concurring with counsel for the underwriters to the effect that the policy covered only the extra leakage due to sea transit, thus eliminating "the normal leakage which would have happened to these barrels if there had been no sea transit at all". With respect, however, s 55(2)(c) presumptively excludes the ordinary leakage loss during the insured maritime adventure. The subtraction should therefore be of the ordinary leakage during the ordinary transit, including the part that occurred at sea. The report of the case is, however, only very brief and may not be wholly accurate on this point, which was not in issue, the questions being a defence of non-disclosure and the scope of leakage liability under the *Protesilaus* policy.

169. Although, in a later case involving a similarly worded policy, Bailhache J saw scope for a defence of inevitable loss: *Wilson, Holgate & Co Ltd v. Lancashire & Cheshire Insurance Corp Ltd* (1922) 13 Ll L Rep 486, 487. As discussed *infra*, however, such a defence is narrow in scope.

170. (1921) 9 Ll L Rep 223.

The modern Institute clauses, including not only the standard Institute Cargo Clauses but also more specific cargo clauses such as the Institute Bulk Oil Clauses, all contain an express exclusion of “ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured”.<sup>171</sup> In principle, therefore, underwriters contract expressly to preserve the position that applied to the *Glenstrae* shipment in *Dodwell*. Underwriters may, however, agree to an extension of cover in the form of a “guaranteed outturn extension”. This consists of a promise to pay for any loss in quantity in the course of transit and may even be drafted to cover loss “howsoever caused”. Nevertheless, given the natural evaporation over time of cargoes such as oil, such a provision will include a deductible to cover the normal evaporation to be expected during the voyage in question. In the case of oil, this is likely to be 0.5% or 0.75% depending on the type of oil. The net effect is that, while a guaranteed outturn extension may resemble a *Protesilaus* clause, the inclusion of the deductible returns the underwriters’ net liability to the *Glenstrae* scale.

(ii) *Inherent vice*

In *Sassoon (ED) & Co Ltd v. Yorkshire Insurance Co Ltd*,<sup>172</sup> cigarettes were insured under a cargo policy which included, by special extension, cover against “the risk of theft and/or pilferage, and/or damage by fresh water, mould, mildew . . . irrespective of percentage”. The cigarettes arrived in a mildewed condition. As a matter of interpretation, Roche J held that this clause added mould and mildew to the list of covered perils rather than merely, for the sake of clarity, enumerating a type of damage that might flow from other covered perils. The question then arose of whether the policy covered mildew damage however caused, as contended by the assured, or only if attributable to some external accidental cause. On this point, Roche J held that the policy failed to rebut the presumption under s 55(2)(c) so that the assured was not covered for mildew proximately caused by inherent vice. However, the burden of proof lay on the insurers to establish that the cause of the loss was inherent vice. Evidence was given and accepted that significant quantities of cigarettes were shipped packed in the same way to the same or similar destinations without incurring mildew damage. The cigarettes in question had undergone a longer transit than normal because of port congestion and the more probable cause of the mildew damage was rusting of the tin lining of the cases in which the cigarettes were packed so as to admit humid air and moisture. Under these circumstances, the insurers failed to prove inherent vice and were liable for the mildew damage.

The decision of Roche J was upheld by the Court of Appeal. Bankes LJ considered that the evidence established an external, accidental cause of the damage and, accordingly, refrained from expressing any view as to inherent vice cover. The other members of the court did, however, venture comment. Scrutton LJ stated as follows:<sup>173</sup>

I agree that [the assured] must prove something extraordinary or a casualty. If the ordinary consequence of sending cigarettes by sea is always mildew or mould that I think is not a thing which the underwriters are insuring; they are insuring against some casualty which causes damage by

171. See, eg, cl 4.2 of the Institute Cargo Clauses (A), (B), (C) and Institute Bulk Oil Clauses.

172. (1923) 14 Ll L Rep 167; *aff'd* (1923) 16 Ll L Rep 129 (CA).

173. *Ibid*, 132.

mildew or mould, some casualty where mildew or mould is the result of something unusual and not the ordinary consequence of the voyage.

In the opinion of Scrutton LJ, therefore, the reference to mould or mildew in the policy included only such mould or mildew as was caused by some external fortuity. Although mould or mildew might well result from inherent vice, their inclusion as perils did not rebut the presumptive exclusion in s 55(2)(c).

Turning to the burden of proof, Scrutton LJ approved the analysis of Roche J. Distinguishing the need for the assured to demonstrate fortuity under all risks policies, he held that under a named perils policy, once the assured had demonstrated loss caused by a covered peril, it then fell to the insurer to establish inherent vice by way of a defence. The occurrence of the peril established, albeit subject to rebuttal, the requisite accidental nature of the loss. This reasoning respects s 55(2)(c) as a rule of causation yet, as a function of the interpretation of a named perils policy, has the effect of placing the burden of invoking proving inherent vice under the statute on the insurer as if it were an express exclusion in the policy.

Atkin LJ did not dissent from this approach<sup>174</sup> but, like Bankes LJ, held that the evidence supported an external cause of the damage. He did, however, express some sympathy for the assured's contention that the policy was intended to cover all mildew damage regardless of the cause.

The question of insuring against inherent vice arose directly in *Soya v. White*.<sup>175</sup> In 1973, a United States government embargo on the export of soya caused a shortage in Europe. Indonesia was an alternative source of supply but Indonesian exporters lacked experience in shipping significant quantities to Europe. A shipment of Indonesian soya beans insured against "the risks of Heat, Sweat and Spontaneous Combustion only" (HSSC cover) arrived in a heated and deteriorated condition. The insurers denied liability on the basis, *inter alia*, of s 55(2)(c). The defence failed. Lord Diplock,<sup>176</sup> having observed that s 55(2)(c) focused on inherent vice as the proximate cause of the loss, analysed the wording of the policy as follows:<sup>177</sup>

In the standard HSSC policy itself "heat, sweat and spontaneous combustion" are the words that are descriptive of the perils insured against, not of the loss occasioned by these perils nor of what caused the heat, sweat or spontaneous combustion to occur . . . "Heat", if it stood alone as descriptive of a peril, would be equally apt to describe both the heating of the insured cargo from an external source and its becoming hot as a result of some internal chemical, biological or bacterial process taking place in the cargo itself. But "heat" does not stand alone; it appears in conjunction with two other perils insured against, "sweat" and "spontaneous combustion". "Sweat" means the exudation of moisture from within the goods which comprise the cargo to their exterior, as a result of something which happens inside the goods; while "spontaneous combustion" can refer only to a chemical reaction which takes place inside the goods themselves and results in their becoming incandescent or bursting into flames. Referring as they do to something which can only take place inside the goods themselves, these two expressions in their ordinary and natural meaning appear to me to be clearly intended to be descriptive of particular kinds of inherent vice; and "heat" appearing

174. Which was followed by Lloyd J in *Soya v. White* [1980] 1 Lloyd's Rep 491, 504.

175. [1980] 1 Lloyd's Rep 491; *aff'd* [1982] 1 Lloyd's Rep 136; *aff'd* [1983] 1 Lloyd's Rep 122.

176. With whose speech the other members of the House of Lords agreed.

177. *Ibid*, 126. See also [1982] 1 Lloyd's Rep 136, 140, *per* Waller LJ.

in immediate conjunction with them is apt to include heating of the cargo as a result of some internal action taking place inside the cargo.

As a matter of interpretation, therefore, the HSSC policy as worded covered the peril of inherent vice in the form of heat, supplying the contrary intention required by s 55(2)(c).

The following propositions can be derived from *Sassoon* and *Soya v. White*. First, the presumption against inherent vice cover under s 55(2)(c) is strong and requires clear wording to rebut. Secondly, wording that provides cover for a peril that can equally be a manifestation of inherent vice or an instance of an external accident is probably<sup>178</sup> insufficient to rebut the presumption against inherent vice cover.<sup>179</sup> Thirdly, where such an ambiguous peril forms part of a group of perils and the other members of the group can only be manifestations of inherent vice, the ambiguous peril will be construed *eiusdem generis* as covering inherent vice. It has yet to be authoritatively decided whether an ambiguous peril alongside perils of inherent vice would extend to external accidents or be confined to inherent vice.<sup>180</sup>

#### D. INEVITABLE LOSS

Much discussion of fortuity consists of an exercise in the construction of all risks and named perils cover and involves an analysis of the relationships between certain aspects of the law relating to the condition of insured property. However, fortuity (often under the label of inevitability or uncertainty) is also said to operate at a more fundamental level than contractual interpretation and requires distinguishing from inherent vice. Thus, according to Donaldson LJ in the Court of Appeal in *Soya v. White*:<sup>181</sup>

Inevitability of loss is not mentioned in s. 55 of the Marine Insurance Act, because it operates at a much more fundamental level than the rule that underwriters are only liable for losses proximately caused by perils insured against. Underwriters can rely upon inevitability of loss, because the whole concept of insurance is about risks, not certainties.

Clearly, the concepts of inevitable loss and inherent vice overlap, but they are nonetheless distinct in two ways. First, inherent vice is confined to the condition of the insured property, while inevitability of loss may arise from circumstances extraneous to the insured property. Donaldson LJ gave the example of an assured who loads cargo on to a vessel that he is certain (and correctly so) will be lost on the voyage. The circumstances would give rise to a defence of inevitable loss but the condition of the cargo is unaffected.<sup>182</sup> Secondly, loss by inherent vice may itself be inevitable or uncertain depending on the vice in question and the circumstances of the insured adventure. The

178. This is clearly the view of Roche J and Scrutton LJ in *Sassoon*, but subject to a measure of doubt on the part of Atkin LJ.

179. Similarly, cover against a form of damage that can arise equally from inherent vice and from an external cause will be construed as covering only the latter.

180. In *Soya v. White* [1982] 1 Lloyd's Rep 136, 140, Waller LJ stated that the HSSC clause "is an insurance against these particular forms of inherent vice and may well also cover heat or sweat damage from extraneous causes".

181. *Ibid.*, 149. See also *ibid.*, 150.

182. *Ibid.*, 151.

alignment of inherent vice with ordinary wear and tear argued for earlier in this article would render loss by inherent vice always at least highly probable. Nevertheless, there remains a clear and crucial distinction between, on the one hand, loss that it would be unusual not to sustain in the ordinary course of the insured adventure but that, whatever the probabilities, as a factual proposition may or may not be sustained and, on the other hand, loss that will inevitably be sustained, is factually inescapable and a matter of certainty not probability.

The same type of loss may, of course, be to some extent inevitable, to some extent a natural feature of the insured adventure, and to a greater extent a possibility in the event of some extraneous peril. Donaldson LJ referred to leakage or evaporation in transit: "Some leakage or evaporation may be inevitable. That amount plus a further quantity may be attributable to inherent vice. Losses in excess of this level may be proximately caused by extraneous perils which may or may not be insured."<sup>183</sup>

The question to be considered in this section is the extent to which fortuity in this more basic sense of absence of factual inevitability does indeed operate at a more fundamental level. To what extent is it a defining characteristic of the legal concept of insurance as opposed to, again, encapsulating a presumptive rule of construction?

### 1. Defining insurance

It has rarely proved necessary to define insurance. The Marine Insurance Act 1906 indicates the characteristics of marine insurance,<sup>184</sup> but thereby indicates rather what renders a contract of insurance one of marine insurance than identifying what renders a contract one of insurance in the first place. Other legislation in the insurance field also assumes that definition of the fundamental concept is either unnecessary or undesirable.<sup>185</sup> With respect to the case law, such as it is, the most commonly cited judgment is that of Channell J in *Prudential Insurance Co v. Commissioners of the Inland Revenue*,<sup>186</sup> where the issue was whether an instrument constituted a life policy so as to attract stamp duty. Channell J identified three defining characteristics of an insurance contract. First, in return for consideration usually in the form of payment of premium the assured secures some benefit upon the happening of some event. Secondly, "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".<sup>187</sup> Thirdly, the event must be "prima facie adverse to the interest of the assured", although this formulation requires modification or contextual reading with respect to some forms of insurance. The approach of Channell J was subsequently adopted by Templeman J in *Department of Trade and Industry v. St Christopher Motorists' Association Ltd*<sup>188</sup> in the context of regulatory legislation designed to ensure the solvency of insurance companies. In consequence,

183. *Ibid*, 149, per Donaldson LJ.

184. See ss 1–3.

185. *Department of Trade and Industry v. St Christopher Motorists' Association Ltd* [1974] 1 WLR 99, 101.

186. [1904] 2 KB 658.

187. *Ibid*, 663.

188. [1974] 1 WLR 99.



commentators often define contracts of insurance by reference to the three criteria of Channell J.<sup>189</sup> The requirement of uncertainty, however, requires some consideration.

## 2. Developing the concept of uncertainty

The most detailed, albeit *obiter*, consideration of uncertainty in insurance contract law is found in the judgment of Donaldson LJ in *Soya v. White*.<sup>190</sup> While accepting that insurance is fundamentally about risk rather than certainty, Donaldson LJ introduced an important qualification, namely that certainty was to be judged by reference to the knowledge of the assured. Thus, immediately after the extract quoted above, Donaldson LJ continued as follows:<sup>191</sup>

In a sense the use of the term 'inevitability' misleads. In practical terms there is as much a risk if the inevitability of a loss is not known as if the loss itself may or may not occur. Overdue ships and cargo can be insured, notwithstanding that the whole basis of the insurance is that their loss may not only be inevitable, but already have occurred. I would therefore prefer to use the term 'known certainty' instead of 'inevitability'.

Two strands of authority support the confining of any inevitable loss restriction on cover to known certain loss. First, as noted by Donaldson LJ, marine insurance law permits insurance to be taken out on a "lost or not lost" basis. Under such a policy, the insurer is liable even though the insured property has already been lost or damaged. Yet, since the casualty has already occurred, there is no element of factual uncertainty. Secondly, a latent defect may render damage to the insured property factually inevitable during the period of cover. However, in *The Nukila*,<sup>192</sup> while observing that "[i]nsurance covers fortuities, not losses which have occurred through the ordinary operation of the vessel", Hobhouse LJ stated that:

The presence or absence of a latent defect in the hull or machinery of a vessel is, by definition, unknown to the assured and whether or not it will during a given period of time or maritime adventure have an impact or cause any damage is fortuitous from the point of view of the assured.

Indeed, there is no indication since the introduction of the Inchmaree clause that latent defect cover is limited to factually uncertain damage.<sup>193</sup> Furthermore, if the doctrine of ratification requires that the ratified act be capable of being executed at the time of ratification, the possibility of ratification of a marine policy after loss<sup>194</sup> would also be inconsistent with a factual certainty of loss restriction on insurability. However, while ratification requires legal competence on the part of the principal at the time of ratification and that the third party be not unduly prejudiced by the ratification,<sup>195</sup> the better view is that there is no restriction in terms of the bald nature of the ratified act. The contrary is

189. Eg, N Legh-Jones, J Birds and D Owen (eds), *MacGillivray on Insurance Law*, 10th edn (2003), ch 1; R Merkin (ed), *Colinvaux's Law of Insurance*, 8th edn (2006), ch 1.

190. [1982] 1 Lloyd's Rep 136, 142–151.

191. *Ibid*, 149.

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

193. This is, of course, no different in principle from cover under life or medical policies in respect of genetic diseases.

194. Marine Insurance Act 1906, s 86; *Williams v. North China Insurance Co* (1876) 1 CPD 757.

195. *Bowstead & Reynolds on Agency*, 18th edn (2006), Arts 15, 19.

suggested only by non-marine insurance case law,<sup>196</sup> which may no longer be good law.<sup>197</sup>

A possible contrary *dictum* may be found in the judgment of Atkin LJ in *Sassoon (ED) & Co Ltd v. Yorkshire Insurance Co.*<sup>198</sup> Having acknowledged that the Marine Insurance Act is clear that inherent vice is insurable, he stated as follows:

The particular kind of loss, the amount of the loss, is one which . . . is a loss that may or may not happen; if it was a loss which certainly must happen within the voyage I doubt whether it could ever be made properly the subject-matter of a policy of insurance. It seems to me conceivable if apt words are used that an assured might cover a loss occasioned by mould which he does not know enough about to know whether it will or will not happen during the voyage, and which in fact may happen during the voyage but which may not happen during the voyage.

With respect, this passage is not easy to understand. Atkin LJ appears to say that appropriate language could confer cover against inherent vice but only where inherent vice was not inevitable given the state of the goods both as a factual proposition and in the mind of the assured. However, if factual inevitability of damage suffices to produce uninsurability, it is unclear why the knowledge of the assured is relevant. It may be, therefore, that Atkin LJ considered loss to be uninsurable only where there is factual inevitability known to the assured. This, of course, is the approach of Donaldson LJ in *Soya v. White*. It was in this sense that the *dictum* of Atkin LJ was read by Lloyd J at first instance in *Soya v. White*.<sup>199</sup> Having held that the policy covered inherent vice in the grey area, he stated *obiter*:

I would, if necessary, go even further. Even if it could be said, looking back, that the damage was bound to occur, yet if, as I find, that was something which was not, and could not be known at the commencement of the voyage, it was still something which in the language of Atkin LJ . . . can be made the legitimate subject matter of a policy of insurance, and was on its true construction covered by the policy in the present case.

### 3. Indemnification of known certain losses

In *Soya v. White*,<sup>200</sup> having excluded the merely factually inevitable loss from the defence of inevitable loss to leave known certain losses, Donaldson LJ continued as follows:

I regard this defence [of known certain loss] as stemming from the nature of a contract of insurance . . . However, where the certainty of loss is known to both assured and underwriter, as for example is the case with cargoes which always lose some weight or volume in transit, other than that insurance is about risks and not known certainties, it is difficult to see any basis for exemption from liability. This is not to say that known certain losses cannot be the subject matter of a contract of indemnity: merely that very clear words will be required since it is [a] highly improbable contract for someone to make in the course of his business as an insurance underwriter.

For Donaldson LJ, therefore, there is no public policy objection to a contract of indemnity in respect of known certain losses; but, first, it will be extremely difficult to

196. *Grover & Grover v. Matthews* [1910] 2 KB 401.

197. *National Oilwell (U.K.) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 608.

198. (1923) 16 Ll L Rep 129, 133.

199. [1980] 1 Lloyd's Rep 491, 504.

200. [1982] 1 Lloyd's Rep 136, 149.

convince a court that such is the true interpretation of the contract and, secondly, such a contract cannot as a matter of principle be a contract of insurance because ultimately insurance is indeed by definition about risk. The interpretation point may be considered self-evident, given the, perhaps extreme, commercial unlikelihood of a contract to indemnify in respect of known certain losses. The issues of characterization as insurance and public policy repay further reflection.

With respect to characterization as insurance, *Soya v. White*<sup>201</sup> is perhaps the closest the issue of insurability of inevitable loss has ever come to requiring authoritative consideration in marine insurance. As already noted, the case arose out of the heating in transit of a cargo of soya beans shipped from Indonesia to Europe and insured under an HSSC policy. Heating of soya beans by reason of its inherent condition is caused by microbiological activity. This requires a certain degree of moisture in the soya beans. Three levels of moisture content were identified.

Given a moisture content of 12% or less, microbiological activity could not occur, and, so, there was no risk of heating from that source. At 14% or higher, microbiological activity was certain to occur and damage from resulting heating was inevitable. In between was a grey area in which microbiological activity might or might not occur. On the facts, the moisture content was found to fall in the grey area and the House of Lords held that the HSSC policy covered loss caused by inherent vice where the loss was uncertain. There was no need to consider whether the loss would have been insurable under the policy in question or any other policy had the moisture content exceeded 14%, and the House of Lords in the person of Lord Diplock expressly refrained from comment.<sup>202</sup>

The views of Donaldson LJ in the Court of Appeal are, of course, the starting point for discussion in this section. Waller LJ, however, stated that: "If inherent vice means something that will certainly happen, it is not a risk but a certainty. It is therefore not something against which insurance can be taken."<sup>203</sup> *Prima facie*, this is a clear assertion of an inevitability limitation on the concept of insurance. The quoted sentences must, however, be read in context. They are the second and third sentences of a paragraph that commences: "I must next consider whether or not the policy covers the loss on those findings of facts",<sup>204</sup> namely the findings relating to the moisture content of the insured cargo. The context of Waller LJ's statement is, therefore, that of construction of the policy in question, which on its wording did not cover inevitable loss. Cover was for "the risks of Heat Sweat and Spontaneous Combustion" and the reference to "risks" excluded certainties. This was reinforced by the commercial context<sup>205</sup>:

The policy is a commercial document and must be read against a commercial background. As a matter of common sense a shipper would not insure when the moisture content was below 12 per cent. because there would be no risk and underwriters would not carry a risk when the moisture content is over 14 per cent. because it would not be a risk it would be a certainty. The occurrence of heating when the moisture content was over 14 per cent. would not be a casualty. The risk only exists between 12 and 14 per cent.

201. [1980] 1 Lloyd's Rep 491; *aff'd* [1982] 1 Lloyd's Rep 136; *aff'd* [1983] 1 Lloyd's Rep 122.

202. [1983] 1 Lloyd's Rep 122, 126.

203. [1982] 1 Lloyd's Rep 136, 141.

204. *Ibid.*

205. *Ibid.*, 140–141.

It is suggested, therefore, that Waller LJ was not addressing the question of the insurability in principle of inevitable losses. If that is wrong, however, the view expressed is *obiter*.

Conversely, an *obiter* statement clearly in favour of the insurability of known certain losses is found in the context of “lost or not lost” policies. The Marine Insurance Act states that risk attaches and the assured may recover under such a policy if the loss has occurred before the contract is concluded “unless at such time, the assured was aware of the loss, and the insurer was not”.<sup>206</sup> It is possible that these words are not intended to address the situation where both parties know of the loss before conclusion of the contract, but it is suggested that their meaning is rather that the insurer is bound by the contract whether the loss is unknown to both parties or known to both parties at the time of contract formation, and that the insurer is not liable only if the loss is known to the assured but not to the insurer at that time. That certainly was the view expressed, albeit *obiter*, by Cockburn CJ in *Gledstanes v. Royal Exchange Assurance Corp*,<sup>207</sup> noting that the insurer might have good business reasons for taking the risk such as abandonment rights to valuable remaining insured property. More recently, in *Shell UK Ltd v. CLM Engineering Ltd*,<sup>208</sup> David Steel J referred to the “presumption” that insurance cover is confined to fortuitous losses.

Turning to public policy, it must be the case that known certainty of loss does not in and of itself constitute an absolute barrier to an enforceable contract of indemnity. Financial imprudence is no basis for interfering with contractual obligations. *Sphere Drake Insurance Ltd v. Euro International Underwriting Ltd*<sup>209</sup> concerned successive tiers of reinsurance written on the basis that claims would exceed premiums, with a profit being generated by passing most of the losses on to the next tier of reinsurance while retaining a share of the losses that it was hoped was less than the premium. At each tier of the reinsurance, the amount of premium diminished, and was subject to brokers’ commissions and the premium needed to pay the next reinsurer in the chain, worsening the bargain in the absence of effective further reinsurance. Moreover, a spiral developed in the reinsurance, undermining the effectiveness of the protection ostensibly afforded by reinsurance. The nature of the reinsured business (workers’ compensation in the United States) generated “heavy and certain losses on an enormous scale which had to be paid year in and year out”<sup>210</sup> and extremely high loss ratios on the tiers of reinsurance.<sup>211</sup> Nevertheless, provided underwriters were fully apprised of the risk they were writing and were aware that avoiding a loss was entirely dependent on their reinsurance cover, there was no reason to deny the essential validity of the transactions. According to Thomas J, “this practice was unobjectionable provided that each participant was a knowing participant in the sense that a fair presentation of the risk was made and full disclosure was

206. Marine Insurance Act 1906, Sch 1, r 1. Likewise s 6(1).

207. (1864) 34 LJQB 30, 35. See also Shee J at 37.

208. [2000] 1 Lloyd’s Rep 612, [20]. In *The Xantho* (1887) 12 App Cas 503, 509, Lord Herschell stated that: “The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.” This statement was quoted by David Steel J in *Shell* and evidently not perceived as inconsistent with the view that the restriction of insurance cover to fortuitous losses is merely a presumption. This must be correct, since Lord Herschell was addressing insurance against perils of the sea, which by definition must be fortuitous.

209. [2003] Lloyd’s Rep IR 525.

210. *Ibid*, [7](x).

211. In one example given, the loss ratios were between 20,000% and 30,000%: *ibid*, [7](vii).

given".<sup>212</sup> It should, however, be noted that such comments assume that the transaction is indeed one of insurance, attracting a duty of disclosure and fair presentation of the risk. If a contract of indemnity against known certain loss cannot be a contract of insurance, the enforceability of such a contract will be jeopardized only by a false statement that constitutes an actionable misrepresentation, including of course a half-truth, and not by pure non-disclosure.

While, however, the known certainty of loss is no barrier of itself to a valid, enforceable indemnity contract, it is equally clear that if the known certain loss will endanger human life, the property of others, or the environment, public policy dictates that the loss should not be insurable. In many cases, of course, the insurer will have a defence of wilful misconduct, but that defence is confined by causation.<sup>213</sup> Where insuring known certain losses is contrary to public policy, the repugnancy of the contract flows from the nature of the bargain itself, irrespective of whether any subsequent loss is attributable to wilful misconduct of the assured.

Outside of cases affected by public policy, whether a contract to indemnify known certain losses can be a contract of insurance remains to be authoritatively considered. The desirability of any such contract being based upon full disclosure may provide a normative reason for supporting characterization as an insurance contract so as to attract the doctrine of utmost good faith. Conversely, the inclusion of an element of uncertainty as a defining characteristic of insurance by Channell J in *Prudential Insurance Co v. Commissioners of the Inland Revenue*,<sup>214</sup> although subjected to restrictive definition by Donaldson LJ in *Soya v. White*, has never been explicitly questioned or doubted.

#### 4. Timing and meaning of knowledge

To the extent that insurability (or the scope of a particular policy as a matter of interpretation) depends on whether factual certainty of loss is known to the assured, the question arises of the relevant time for such knowledge. Clearly, knowledge at the time of conclusion of the contract of inevitability of loss must suffice. Lloyd J, in *Soya v. White*,<sup>215</sup> went further, suggesting that inevitable losses are insurable only if the inevitability could not be known at the commencement of the voyage. It is submitted, however, that knowledge of inevitability of loss gained after the conclusion of the contract of insurance cannot be relevant unless the assured also has the means to prevent the insured property from embarking upon the voyage. If the assured has such means and refrains from using them, the ensuing loss may be regarded as lacking fortuity because it is attributable to the assured's conduct in voluntarily exposing the property to the certainty of loss.<sup>216</sup>

The approach of Lloyd J to knowledge also raises the issue of whether it suffices that the factual inevitability not be known or whether, as intimated by Lloyd J, it is required that the inevitability could not be known. The assured's pre-formation duty of disclosure may provide a key. This embraces all circumstances that ought to be known by the assured

212. *Ibid.*, [1862](i). See also at [8].

213. Marine Insurance Act 1906, s 55(2)(a) ("attributable to").

214. [1904] 2 KB 658.

215. [1980] 1 Lloyd's Rep 491, 504 (quoted *supra*, p 355).

216. For discussion of fortuity and the assured's voluntary conduct, see *supra*, Part B(1).

in the ordinary course of its business.<sup>217</sup> Analogy with the pre-formation duty of disclosure suggests, therefore, that a test of whether the assured could have known of the inevitability is too strict. It would be paradoxical to deny cover on the basis of known certainty of loss even though the inevitability of loss would not be known to the assured for the purpose of the pre-formation disclosure doctrine. The disclosure rules reflect a balance of risk between assured and insurer. If the inevitability of loss does not require disclosure, that inevitability should be a risk for the account of the insurer. Conversely, if the inevitability constitutes a circumstance requiring disclosure, failure to disclose will clearly render the contract voidable. Moreover, even if the right to avoid has been lost for some reason, recovery will still be denied if public policy so dictates or if the known certainty of loss takes the loss out of the scope of the indemnity obligation as a matter of interpretation.

### 5. Insuring inevitable losses

From the above discussion, it appears that losses that, unknown to the assured, are factually certain to occur are insurable, while known certain losses can, subject to public policy, be made the subject of a valid contract of indemnity but possibly not a contract of insurance. To the extent that a contract of indemnity, whether or not a contract of insurance, is possible, there will arise a question whether the contract covers such loss as a matter of interpretation. The commercial unlikelihood of such a bargain calls for the clearest of wording. Not surprisingly, there are few examples in the case of policies potentially covering inevitable losses.

In *Soya v. White*,<sup>218</sup> Lloyd J considered that the HSSC policy in issue was appropriately worded to cover factually inevitable loss provided that the inevitability was unknown to the assured. However, the very next paragraph of the judgment contains the contradictory statement that, had the moisture content exceeded 14% so that damage was inevitable, the insurers would not have been liable, “not because the policy does not cover the risk of heating through inherent vice but because the heating would in that event have been not a risk but a certainty”.<sup>219</sup> As already seen, this latter view was espoused also by the Court of Appeal, Waller LJ highlighting the word “risk” in the commercial context.<sup>220</sup>

In contrast, in *Dodwell & Co Ltd v. British Dominions & General Insurance Co Ltd*,<sup>221</sup> Bailhache J held that insurance covering “risk of leakage from any cause whatever” rendered an insurer liable for all leakage that occurred, including that which occurred in the ordinary course of transit. Of course, that which ordinarily occurs does not inevitably have to occur,<sup>222</sup> and no distinct inevitability argument appears to have been advanced.<sup>223</sup>

217. Marine Insurance Act 1906, s 18(1).

218. [1980] 1 Lloyd’s Rep 491, 504.

219. *Ibid.*

220. [1982] 1 Lloyd’s Rep 136, 140–141, *supra*.

221. (1918) [1955] 2 Lloyd’s Rep 391n. The case is discussed further *supra*, text to fnn 167–168.

222. See *Soya v. White* [1982] 1 Lloyd’s Rep 136, 150, *per* Donaldson LJ: “The ordinary incidents of a voyage are as variable a factor as is the degree of care lavished upon the cargo by the shipowner, even when he is not in breach of his duty under the contract of carriage. Given what, to the commercial lawyer who only learns of adventures which have turned sour, may seem an unusual degree of luck, many cargoes which, given less luck, would surely perish in whole or in part, will be carried with little or no loss . . .”

223. It was, however, mooted by the same judge in a later case on a similarly worded policy: *Wilson, Holgate & Co Ltd v. Lancashire & Cheshire Insurance Corp Ltd* (1922) 13 Ll L Rep 486, 487.

Nevertheless, it is conceivable that such phraseology, especially if drafted by insurers as was the case in *Dodwell*, would preclude insurers from subsequently seeking to advance any distinction between different levels or types of leakage.

## E. CONCLUSION

As stated by Lord Sumner in *Gaunt*,<sup>224</sup> the restraint on cover under marine policies imported by the notion of fortuity embraces a range of different concerns. On analysis, these are of three different orders. First, certain losses cannot as a matter of public policy be the subject of a valid and enforceable contract of indemnity, whether or not a contract of insurance. Secondly, it is possible that known certain losses that do not raise any questions of public policy may by reason of the combination of factual inevitability and knowledge lack a basic level of fortuity required for the subject-matter of a contract of insurance. Otherwise, thirdly, the idea of fortuity responds to the presumptive interpretation of an insurance policy, that certain losses can in principle be insured but it is improbable in varying degrees that an insurer will agree to cover them. The level of improbability will be reflected in the clarity of wording required to convince a court that the relevant losses are indeed covered under the policy in issue.

Arranged under the three fortuity parameters identified by Lord Sumner in *Gaunt*, the main arguments advanced may be summarized as follows:

1. Voluntariness embraces the public policy based uninsurability of the assured's wilful misconduct and the presumption against an insurance contract as a matter of interpretation covering the assured's wilful but lawful conduct. Voluntariness is, however, relative, so that causation by the voluntary conduct of a third party does not take otherwise recoverable loss outside the ambit of insured perils. This is so even in the context of perils of the sea, subject, according to *Samuel (P) & Co Ltd v. Dumas*,<sup>225</sup> to the sole exception of loss caused by the voluntary conduct of the master or crew, an exception that appears anomalous.

2. In hull insurance, the reasonable foreseeability of a peril is compatible with the fortuity requirement of perils of the sea. Fortuity in this context serves largely to exclude ordinary wear and tear, the most extreme example of which is the sinking of a vessel purely by reason of its debilitated condition. Beyond ordinary wear and tear, the condition of an insured vessel prevents recovery only where an unseaworthiness defence is established.

3. In standard hull policies, the Inchmaree clause serves both to restrict the availability of unseaworthiness defences and to render recoverable certain losses caused by the condition of the insured property without the intervention of any external fortuity.

4. Inherent vice, it is suggested, is confined in the law of marine insurance to the inability to withstand such routine risks of the insured transit that it would be most unusual not to encounter. It is properly regarded as a form of, or parallel to, ordinary wear and tear and does not carry the same extended meaning as in the law of carriage of goods by sea.

224. *British & Foreign Marine Insurance Co Ltd v. Gaunt* [1921] 2 AC 41, 57.

225. [1924] AC 431.

It is, accordingly, suggested that much of the reasoning in *Mayban General Assurance Bhd v. Alston Power Plants Ltd*<sup>226</sup> is erroneous.

5. Should it be the case that, contrary to the submission in para (4), inherent vice in marine insurance cases is aligned with inherent vice in the law of carriage of goods by sea, the rules on unseaworthiness preclude reliance on inherent vice in the extended sense of inability of a vessel to withstand the reasonably foreseeable perils of the maritime adventure.

6. There is no reason of principle to deny the validity and enforceability of a contract of indemnity in respect of known certain losses, unless financial protection against the particular losses in question would contravene public policy. It remains unclear, however, whether such a contract of indemnity can qualify as a contract of insurance.

7. Mere factual inevitability of loss, unknown to the assured, is consistent with insurance, but may exclude from cover as a matter of interpretation of the policy.

226. [2004] EWHC 1038; [2004] 2 Lloyd's Rep 609.