Causation in Marine Insurance: The Conflicts between Perils of the Sea and the Exclusions

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ABSTRACT

The law of Marine Insurance, unlike any other areas of commercial law, is yet to be prevalently known in Malaysia and to this date, Malaysia is yet to have its very own legislations in marine insurance. Due to such lacunae, the Malaysian courts have to look into the English law (i.e. the Marine Insurance Act 1906). Under a contract of marine insurance, as in any other contract of insurance, the question of proximate cause of a loss plays an important role in order to determine what causes a particular loss: an insured or excluded peril. In practice, the question of causation normally appears when the question of perils of the sea arises. A peril that qualifies to be enumerated under the expression "perils of the sea" must be one that has both the elements of fortuity and unexpectedness. Although there are established perils enumerating the expression "perils of the sea", which have relatively outlined the limits of perils of the sea, its parameter is still subject to further study. It is also pertinent to look into the area of excluded perils in order to assist the effort to determine the extent and limit of perils of the sea. The excluded perils under marine insurance come under two broad categories: the statutory exclusions expressly provided for under Section 55 (2) of the English Marine Insurance Act 1906 and the contractual exclusions referring to the marine policy contracted between the assured and the underwriter. Thus, this paper attempts to look into the dichotomies between perils of the sea and some of the excluded perils, with the purpose of determining a clearer and definitive parameter of perils of the sea.

Keywords: *causation, marine insurance, perils of the sea, exclusions, dichotomies*

Penyebab dalam Insurans Maritim: Konflik di antara Bahaya di Lautan dan Penyingkiran

ABSTRAK

Undang-undang Insurans Maritim, tidak seperti dengan lain-lain perkara yang berkaitan dengan undang-undang komersial, belum lagi dikenali secara meluas di Malaysia dan sehingga kini, Malaysia masih belum mempunyai perundangan sendiri dalam insurans maritim. Akibat dari lompang tersebut, mahkamah-mahkamah di Malaysia perlu melihat kepada undang-undang Inggeris (iaitu, Akta Insurans Maritim 1960). Di bawah kontrak insurans maritim, sepertimana dengan lain-lain kontrak insurans, persoalan mengenai penyebaban terhampir yang mengakibatkan kerugian tersebut memainkan peranan yang penting untuk menentukan apakah yang telah menyebabkan kerugian tersebut; suatu yang telah mempunyai insurans atau bahaya yang disingkirkan. Sesuatu yang bahaya yang layak untuk dicatitkan di bawah pernyataan "bahaya di lautan" perlu menjadi suatu yang mempunyai kedua-dua perkara iaitu secara kebetulan dan ketidakjangkaan. Walaupun terdapat banyak bahaya yang dibuktikan yang memberi gambaran"bahaya di lautan", yang secara relatifnya telah menggariskan sempadan bahaya di lautan, namun parameternya masih tertakluk kepada kajian lanjutan. Adalah sesuatu yang penting untuk meninjau kawasan yang tersingkir dari bahaya supaya ia dapat membantu usaha untuk menentukan sempadan dan batasan bahaya di lautan. Bahaya di lautan yang tersingkir di bawah insurans maritim berada dalam dua kategori: penyingkiran berkanun yang secara terang-terangan disediakan di bawah Bahagian 55 (2) dalam Akta Insurans Maritim Inggeris 1906 dan penyingkiran berkontrak yang merujuk kepada dasar maritim yang dikontrakkan di antara pihak dijamin dan penaja jaminan. Dengan itu, artikel ini cuba melihat dikotomi di antara bahaya di lautan

dan sebahagian daripada bahaya yang disingkirkan, dengan tujuan untuk menentukan parameter bahaya di lautan yang lebih jelas dan lebih tepat.

Keywords: *penyebaban, insurans maritim, bahaya di lautan, penyingkiran, dikotomi*

INTRODUCTION

To this present date, Malaysia is yet to have its very own legislation in Marine Insurance apart from the existing Insurance Act and Regulations 1963 (amended 1992), which has very little provisions on marine insurance. Thence, whenever any dispute of this area of law arises, the Malaysian courts have to, by virtue of Section 3 and 5 of the Civil Law Act, 1956, resort to English Law. Section 3 provides for the general acceptance of English law in Malaysia where the States in Peninsular Malaysia only accepts the English Common Law and the rules of equity as at 7 April 1956. On the other hand, the application of the English Law in Sabah and Sarawak is further extended to the English statutes of general application, as at 1 December 1951 and 12 December 1949 respectively. Subject to the proviso however, such application of the English law in Malaysia can only be carried out if the circumstances of the States of Malaysia and their inhabitants allows so. This means that the said English Law must be one that does not contradict with the respective legal regime in Malaysia. The above provisions, nonetheless, allow the application of English Law in marine insurance, which is undoubtedly lacking in the Malaysian written laws. Due to such *lacunae,* the Malaysian courts have no alternative but to look into the English Law as our source of law and the statute applicable is the English Marine Insurance Act 1906, which was promulgated from various judicial decisions and trade conventions practiced in the marine insurance markets (Kamaruddin, 1997). Apart from the English Marine Insurance Act, 1906 and the relevant English Case Law, marine insurance contracts in Malaysia are also subject to the provisions of the Local Contracts Act, 1950 and the Specific Relief Act, 1974 (Wong, 1976, p. 208).

Causation

Since the Marine Insurance Act, 1906 is completely silent on the meaning of proximate cause, the courts have attempted, on countless occasions, to grasp the most acceptable meaning to this theory. Starting with "immediacy", there have been various terms used to imply the proximity of a cause where the interpretation was further enhanced to some other terms where finally, it has been discovered that a proximate cause must also be dominant and efficient. Both "dominance and efficiency" imply that only the cause that is dominant as well as efficiently and immediately leads to the loss can be categorized as the proximate cause. Such is the case regardless whether the cause is the last cause in time or whether there are some other competing or intervening causes. It may finally be concluded that "immediacy" as well as "dominance and efficiency" denote proximity of a cause as one that immediately leads to the loss

In practice, the question of causation normally appears when the question of perils of the sea comes into light. It may be considered as unsafe for anyone to try to completely define the parameters of the expression "perils of the sea" because in the practice of marine insurance, the question of "what is a peril of the sea" is inextricably interwoven with another question of "whether the loss was proximately caused by the sea peril" (per Willes J. in an old case of *De Mattos v Saunders* (1872) L.R. 7 C.P. 570 at p. 580). Thus, whenever one tries to figure out what constitutes a peril of the sea, he cannot avoid but to answer the question of whether the said peril is the proximate cause of a particular loss.

Perils of the Sea

Perils of the sea was specifically insured under the old S.G. form (applied to both ship and goods) and at present, the Hull Clauses (95) cover for loss or damage sustained by the subject-matter insured which is caused by perils of the sea, rivers, lakes or other navigable waters. As for cargo policies, the Institute Cargo Clauses (A) that provides coverage for all risks, for a higher premium of course, perils of the sea, rivers, lakes or other navigable waters are also covered. Rule 7 of the Rules of Construction of the English Marine Insurance Act, 1906 (MIA 1906) restricts the term to only "fortuitous accidents and casualties exclusive of the ordinary winds and waves". A more comprehensive definition, however, may be found in the judgment of Lord Bramwell in *Thames and Mersey Insurance Co. v Hamilton, Fraser & Co.* ("The Inchmaree") (1887) 12 App. Cas. 484 that reads,

> "*Every accidental circumstances not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of the insurance*."

A peril that qualifies to be enumerated under the expression "perils of the sea" must be one that has both the elements of fortuity and unexpectedness. According to Ivamy (1994), the term "peril" means that it must be accidental and fortuitous and the expression is "peril of the sea" and not "peril on the sea". He adopted the definition attempted by the Supreme Court of Canada in *CCR Fishing Ltd. v Tomenson Inc.* ("The La Pointe") [1991] 1 Lloyd's Rep. 89, which provides for two necessary elements to form a peril of the sea:

(i) The term "peril" means that it must be accidental and fortuitous.
(ii) The peril must be "of" the sea and not "on" the sea.

The established perils of the sea are as follows:

a) **Foundering, Sinking and Capsizing:** "Foundering" means sinking of a ship due to an entry of seawater; "Sinking" means going down below the surface of water; "Capsizing" means a boat or it's kind is caused to overturn in the water.
b) **Grounding:** When she touches the ground accidentally.
c) **Stranding:** Where the ship touches the ground and is forced ashore or driven on a bank and remains there for any time upon the ground.
d) **Collision:** If resulted from negligence of the master or crew of either the ship or any other ship, still classified as a peril of the sea because the act is not willful and intentional. Thus, the element of fortuity still exists in such a case.
e) **Entry of Seawater into Vessel:** Must contain the element of fortuity that can be realized by either establishing some adverse or unusual conditions of the weather or the sea or by showing some fortuitous occurrence or happening on board the ship, which allows water into it.
f) **Missing Ships:** Under normal circumstances where there is no impending war going on, if a ship fails to arrive at it's destination, a presumption will be made that the ship has foundered by reason of perils of the sea (despite absence of evidence to show the occurrence of any incident of perils of the sea).
g) **Adverse Weather:** Covers every type of unfavorable weather condition faced by the insured ships on the course of their voyage and it may range from violent storm to heavy gale, forceful winds and waves, heavy rainstorm etc. It is the most common happening of perils of the sea and it may also lead to other perils enumerating the expression "perils of the sea" such as foundering, capsizing, straining, stranding, jettison and washing aboard.

h) **Loss by Negligence:** In the absence of any statutory provision on the negligence of the assured, losses accruing from such negligent act are recoverable as perils of the sea. However, this conclusion is subject to the duty of the assured to avert or minimize loss as provided by Section 78(4) of the Marine Insurance Act, 1906. Under such circumstances, if the insurer can prove the failure of the assured to carry out this statutory duty, the position might differ.

i) **Jettison**: There must be a threat on the ship's safety by the occurrence of a sea peril. For instance, during heavy gale, the ship will be sunk unless its weight is lightened. If some cargoes on board the ship are jettisoned in order to avoid the impending sinking, then the loss due to the act of jettison is recoverable as a loss *ejusdem generis* to perils of the sea by sinking.

j) **Washing Overboard:** Unlike jettison, washing overboard is an incident that happens involuntarily. It is a peril, which is likely to happen to the insured cargo stowed on the deck, when there is an incident of perils of the sea. Under the new Institute Cargo Clauses (B), "washing overboard" is now specifically covered by virtue of Clause 1.2.2.

k) **Straining:** Literally means the stretching due to the force exerted. Straining can be classified as a peril of the sea if such condition caused to an insured ship happens fortuitously and unexpectedly.

The Exclusions

The purpose of looking into the area of excluded perils is to assist the effort to determine the extent and limit of perils of the sea. A loss falling within the exclusion clause is not covered by the policy. According to Poh Chu Chai (1993), the excluded perils under marine insurance can be classified into two broad categories:

(i) The Statutory Exclusions, which is expressly provided for under Section 55 (2) that reads:

> (2) *In particular, -*
> (a) *The insurer is not liable for any loss attributable to the willful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;*
> (b) *Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;*
> (c) *Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.*

(ii) The Contractual Exclusions, which refer to the marine policy contracted between the assured and the underwriter. The provisions of Section 55(2), which speaks of the statutory exclusions, specifically mentions that all the exclusions set out therein are subject to the agreement between the parties. Therefore it is utmost important, for each individual case, to look into the content of the policy before we can determine which perils are included and which are excluded.

A clear illustration of the General Exclusion Clause is set out in the modern Institute Cargo Clauses (B) & (C), which are basically those contained in the MIA, 1906. There are also certain added exclusions that are not specified in the Act. The General Clause reads:

4. In no case shall this insurance cover
4.1 loss damage or expense attributable to willful misconduct of the assured
4.2 ordinary leakages, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured
4.3 loss damage or expense caused by insufficiency or unsuitably of packing or preparation of the subject-matter insured
4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured
4.5 loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against
4.6 loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel
4.7 deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons
4.8 loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter

The Institute Cargo Clauses (A), better known as an "All risks" policy, contains exclusions as set out in Clauses 4, 5, 6 & 8 respectively. Clause 4 is in fact equivalent to the General Clause cited above with the exception of the deliberate damage exclusion (Clause 4.7 of the General Exclusion Clause) while Clause 5 excludes unseaworthiness and unfitness of vessel etc. where there is privity of such on part of the assured. Clause 6 and 7 provides for the War & Strike Exclusions.

THE CONFLICTS BETWEEN PERILS OF THE SEA AND THE EXCLUSIONS

In determining the question of causation in marine insurance and when there involves dichotomy between perils of the sea and the excluded perils, certain ambiguous issues crop up. These dichotomies are as follows:

(i) Perils of the Sea and Willful Misconduct

Willful misconduct is provided for under sub-section 55 (2) (a) and the position are clear that any loss proximately caused by the assured's willful misconduct is not recoverable. On the other hand, misconduct of the master and crews is excused and any loss arising from it is recoverable. Arnould (1981) gives a clear explanation on this area,

> "Misconduct must be that of the assured personally, or that of the altar ego in the corporate body, as opposed to misconduct of subordinate employees or agents of the assured...This is a rule of law, rather than an aspect of the doctrine of causation and cannot be ousted by the agreement of the parties: it is a general principle, founded on considerations of public policy, that an assured may not recover indemnity for a loss attributable to his own criminal conduct."

This exclusion has now been incorporated into the Institute Cargo Clauses (B) & (C) as set out in Clause 4.7 and this exclusion is even extended to the willful misconduct of the master or crew as the clause specifies the deliberate action by any person or persons. On the other hand, as far as the Institute Cargo Clause (A) is concerned, the risk of deliberate action as contained in the other Institute Cargo Clauses is not expressly excluded. Therefore, the act of scuttling is a covered risk under this Institute Cargo Clause.

It is understood that misconduct of the assured is totally excluded. However, the misconduct of the master and crews will not affect the liability of the insurer provided it's done without the owner's notice or consent. Study on case law will further illustrate this matter. Before the case of *Samuel v Dumas* [1924] 18 Ll.L Rep. 211 was decided by the House of Lords, any loss or damage caused by the entry of seawater into a ship was considered as a loss by perils of the sea even though such entry was caused intentionally (scuttling).

The position in scuttling cases has now been reversed, where in *Samuel v Dumas*, a ship was scuttled with the connivance of the owner and the claim was made by an innocent mortgagee who had an insurable interest over the ship. The House of Lords held that loss by scuttling with the owner's tacit approval was not a peril of the sea and was not recoverable even by an innocent mortgagee who had no part to play in the act of scuttling. This decision had clearly overruled the decision of the Court of Appeal in *Small v United Kingdom Marine Mutual Insurance Association* [1897] 2 Q.B. 311, which warranted indemnity to the innocent mortgagee.

This rule, as enunciated in *Samuel v Dumas*, has in fact two underlying reasons, viz., firstly, the loss or damage is clearly not a fortuitous one but a deliberate and intentional act of the assured. The "willful" nature of the acts negates "fortuity", an important element constituting perils of the sea. Secondly, one of the rules of equity is that "he who comes to equity must come with clean hands" where no wrongdoer is allowed to take advantage of his wrongful act. It is immaterial who the plaintiff is; the position is the same between ship owners, cargo owners or mortgagees (Hodges, 1996). This majority decision of the House of Lords was strongly opposed by the dissenting judgement of Lord Sumner who viewed that the loss was still fortuitous as against the assured mortgagee who was the innocent third party. In *Peters v Royal Exchange Assurance* (1933) 49 Ll.L Rep. 400, Roche J. observed that, *"nobody could recover because the willful throwing away of the ship was not a fortuitous circumstances."*

(ii) Perils of the Sea and Barratry

Barratry is defined under Rule 11 of the Rules for Construction as "every wrongful act willfully committed by the master or crew to the prejudice of the owner, or as the case may be, the charterer." The courts of the earlier time tended to interpret barratry as fraud or criminal knavery of the master as against the owner with intent to benefit himself at the owner's expense. For instance, Lee C.J. in *Knight v Cambridge* (1724) 8 East 135 said that to constitute barratry, it must be something of criminal nature.

Another approach towards the definition of barratry had been established by Lord Ellenborough in *Earle v Rowcroft* (1806) 8 East 126 where any act of known criminality or gross malversation, though not intended for the owners' prejudice and even though intended for their benefit but, in fact, it operated to their prejudice by causing the loss or the seizure of the ship is the barratry of the master. In much simpler words, barratry is the misconduct of the masters or crews to the prejudice of the owner that involves a fraudulent or criminal act. Fraud refers to the relationship between the master and the owner whilst criminality refers to the relationship between the master and the society at large. Unlike fraud, a criminal act does not require a motive in order to be held a barratrous act of the master or crews.

Barratry, in English and American Law, implies intention but the courts have seemed to differ in deciding the content of the intention: what is the degree of fraud and criminality constituting an act of barratry (Pitts, 1983). Lord Mansfield in *Nutt v Bourdieu* (1786) 99 Eng. Rep. 1119, 1123 found that whatever "is by the master a cheat, a fraud, a cozening, or a trick, is barratry in him..." Examples of acts of master or crews that constitute barratry are illegal trading with the enemy (*Earle v Rowcroft*), smuggling, cutting the ship's cable so as to let her drift on the rocks etc.

The general rule is that barratry is a covered peril as it is not committed with the connivance of the owner and it is often pleaded together with perils of the sea because in the former, entry of water is caused by the master and crew intentionally whilst in the latter, the entry is caused accidentally or fortuitously. However, in cases involving scuttling, be it with or without the owner's consent or knowledge, the rule, as pointed out by *Samuel v Dumas*, is clear that it does not fall within the realm of perils of the sea (Hodges, 1996).

Again, the General Exception Clause (Clause 4.7) under the Institute Cargo Clause (B) and (C) which excludes the deliberate act of any person or persons (may include masters and crews) which damage the subject-matter insured may somehow restrict the operation of barratry as a covered peril. As far as the Institute Cargo Clause (A) is concerned, barratry is a covered peril judging from the absence of Cause 4.7 of any express exclusion on barratry.

(iii) Perils of the Sea and Ordinary Wear and Tear

Section 55 (2) (c) provides for the general exclusion where ordinary wear and tear is expressly excluded. This provision is however subject to the election of the parties whether to include or exclude this peril under the agreement so as to subsequently bind them. The Institute Cargo Clauses, for example, expressly exclude this type of risk (Hodges, 1996).

The term ordinary "wear and tear" refers to progressive deterioration of a vessel where it is common for the vessel, in the course of navigation as well as while being laid up, to be exposed to the gradual process of decay mainly due to the actions of winds and waves (Lambeth, 1986). Mustill J. in *The Miss Jay Jay* [1985] 1 Lloyd's Rep. 264. pointed out,

> *"The principal object of the definition of Rule 7 of the Rules of Construction is to rule out losses resulting from wear and tear."*

Lush J., in drawing a clear distinction between perils of the sea and wear and tear in *Merchants Trading Co. v The Universal Marine insurance Co.* (1870) 2 Asp. MC 431n. observed,

> "..."Perils of the sea" denoted all marine casualties resulting from the violent action of the elements of the winds and water, lightning, tempest, stranding, striking on a rock and so on – all casualties of that description as distinguished from the silent natural gradual action of the elements upon the vessel itself, though the latter properly belonged to wear and tear, and that what the underwriters insured were casualties that might happen, no consequences which must happen, casualties which might occur and were incident to navigation arising from the violent action of the elements upon the ship."

A clear illustration of the application of the distinction drawn can be found in the case of *Wadsworth Lighterage v Sea Insurance Co.* (1929) 45 T.L.R. 597. where the Court of Appeal held that the sinking of a ship through general debility was not occasioned by perils of the sea even though she had been sunk by the entry of seawater. A question may arise, however, if a ship was lost at sea during an unfavorable weather and at the time of such loss, there is a possibility of the ordinary wear and tear condition judging from the age of the ship itself, which of these perils will be considered as the proximate cause of the loss. Can perils of the sea be the proximate cause and wear and tear be the indirect cause which contribute to the loss?

(iv) Perils of the Sea and Ordinary Leakage and Breakage

Leakage and breakage usually applies for cargo policies where ordinary leakage may occur on barrels of wine, molasses, oil etc. while ordinary breakage here can be ordinary chafing or damage through handling or the use of hooks on glass, earthenware etc. It has been firmly established that the insurers will not be liable under such circumstances (Lambeth, 1986). It has been accepted that extraordinary leakage or breakage can become a peril of the sea (Arnould, 1981). However, if the leakage and breakage to the goods occurred owing to the happening of an event under perils of the sea, will the exclusion stands no matter how the injury was sustained?

Under the modern Institute Cargo policies, the word "ordinary breakage" is replaced by "ordinary loss in weight and volume" (Koh, 1989). These policies seem to provide the answer to that question where leakage and breakage are not recoverable unless such condition was caused accidentally or due to a fortuitous event.

(v) Perils of the Sea and Inherent Vice

Inherent vice has been defined, traditionally, as a condition of, for example, a cargo at the beginning of a journey, a condition that is such a deterioration will inevitably occur during the journey (Clarke, 1988). The meaning was further extended by the judgment in *Blackshaws (Pty.) Ltd. v Construction Insurance Co. Ltd* [1938] 1 SALR 120.., a South African case, to defective packing of an insured machine. The *Soya v White* [1983] 1 Lloyd's Rep. 122 provided for a clearer definition of inherent vice as "deterioration of the goods shipped as a result of their natural behavior in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty" (Koh, 1989).

The underwriter is not liable for the loss or deterioration that arises solely from the principle of decay or proper vice of the subject-matter insured (Arnould, 1981). The word "solely" here invites further interpretation that inherent vice is recoverable if it is assisted by the happening of an insured peril, a peril of the sea, in this case.

(vi) Perils of the Sea and Rats and Vermin

Damage by rats and vermin are not, basically, perils of the seas. Instances where a ship holed by rats, weevils consuming a cargo of cereals, cockroaches making holes on foods packages are enough to justify the above fact.

However, in the case of *Hamilton, Fraser & Co v Pandorf* (1887) 12 App. Cas. 518 where rats had gnawed through a pipe causing seawater to enter through the hole made which subsequently damaged the insured cargo. It was held that the damage was caused by perils of the sea since seawater was the one that damaged the cargo. A question may arise here, as far as the real and efficient cause is concerned, shouldn't the rats be the one to blame? And if the peril of the sea and the act of the rats are in fact "fortuitous" and unexpected, shouldn't the act of the rats falls under perils of the sea?

(vii) Perils of the Sea and Unseaworthiness

"Unseaworthiness" is not mentioned in Section 55(2) as an excluded peril. However, the unseaworthiness of a ship is frequently raised as a defence, as compared to the other excluded perils like wear and tear and inherent vice, by the insurers in actions claiming perils of the sea as the proximate cause of the loss of the subject-matter insured (Arnould, 1981).

A seaworthy ship is defined by Section 39(1) as "one that is reasonably fit in all respect to encounter the ordinary perils of the sea of the adventure insured." According to Koh (1989), the other requisites for a seaworthy ship are as follows:

i) Soundness of both hull and tackle
ii) Competency of the master
iii) Sufficiency of the crews
iv) Adequacy of stores
v) Enough supply of fuel and
vi) Soundness of the ship's machinery.

Basically, the rule relating to seaworthiness is different between the voyage and time policies where in the former, there is an implied warranty that the ship shall be seaworthy at the commencement of the voyage whilst no provision to the effect is found in cases of time policies. A profound judgment was made by Mustill J. in *The Miss Jay Jay* in which he said,

> "Under a voyage policy, the assured warrants that the vessel will be seaworthy at the commencement of the voyage. If the warranty is broken, any claim in respect of a casualty occurring during the voyage will inevitably fail, without the need for any complex analysis of the perils of the sea, or the doctrine of causation."

Another stimulating judgment was delivered by Lord Coleridge C.J. in *Dudgeon v Pembroke* (1877) 2 App. Cas. 284, HL to the effect,

> "In a voyage policy, it is true that the assured warrants power to encounter ordinary perils. Such perils, therefore, are not perils which, if they cause loss, gives a right of recovery under such a policy, not merely because they are not within the words of the policy, but because a condition has not been complied with, viz., that the ship shall be fit to meet them."

On the other hand, if the unseaworthiness only takes place after the commencement of the voyage, the insurer is not entitled to invoke Section 39(1) and his only defense is "the unfit or infirm condition " of that ship that had caused the loss. Under these circumstances, the court will have to choose between perils of the sea and unseaworthiness as the proximate cause of the loss (Hodges, 1996).

As for a time policy, no warranty has been implied by the Act even though Section 39(5) bars an assured if the insured ship was sent to sea in an unseaworthy condition which the assured is privy to it (has the notice of such condition). Similarly, under the modern Institute Cargo policies, the implied warranties of seaworthiness have also been waived under Clause 5.5. However, this waiver is subject to the privity of the assured or his servants of the state of the ship at the time of loading the subject-matter insured. Under this time policy, if the insurer wishes to raise a defence of unseaworthiness, the question of causation must be probe into. As per Mustill J. at page 36 in *The Miss Jay Jay*,

> *"Certainly, the absence of an implied warranty of seaworthiness, combined with the principle that a "peril of the sea" involves an element of fortuity, does create difficult problems in the field of causation...When the vessel succumb to debility, the claim fails, not because the loss is quite unaltered to fortuity, but because it cannot be ascribed to fortuitous actions of the winds and waves."*

Finally, the court has to find the proximate cause of the loss... whether it is caused by perils of the sea or unseaworthiness or any other cause. It has become a question of fact for the court to construe. In *The Miss Jay Jay*, even though the vessel was found to be unseaworthy because of the defects in design and construction, the proximate cause was held not accredited to her physical condition because the assured was not privy to such condition as the defect in design was latent. In *Willmott v General Accident Fire and Life Assurance Corporation* (1935) 53 Ll.L Rep. 156., where the insured vessel sank in harbor during strong gale, the loss was held as caused by perils of the sea despite her defective condition based on the reason that she would not have been able to stand the gale even if she was fit.

In another case, *Frangos v Sun Insurance Office Ltd.* (1934) 49 Ll.L Rep. 354, the fact of the unseaworthiness of the vessel was held to be inconsequential because perils of the sea was held to have proximately caused the loss. This decision is in fact contrary to the later decision reached upon by the House of Lords in *Monarch Steamship v Karlshams Oljefabriker* [1949] A.C. 196 where a ship, which was delayed by reason of her unseaworthy condition was subsequently caught by a British Government restraint, was a loss caused by unseaworthiness (Bennet, 1996).

These contradicting decisions have in fact contribute the unsolved questions between perils of the sea and unseaworthiness; which of these two risks would be the proximate cause if they happen concurrently and they both contribute to the loss? What would be the proximate cause if an unseaworthy ship were lost in an unfavorable weather? To what degree the unseaworthiness must be in order to withstand an unfavorable.

CONCLUSION

The question of causation, where the issue is "what peril has proximately caused the loss in marine insurance" has always remains open. From some of the decided cases dealing on the dichotomies between perils of the sea and certain excluded perils, it has been found that there are quite a number of instances where the courts, in spite of the evidence of such exclusions, were inclined to uphold perils of the sea as the cause proximately led to the losses. Although it can be said that the above established perils enumerating the expression "perils of the sea" have relatively outlined the limits of perils of the sea, the parameters of perils of the sea is still faint. From the above discussion on the dichotomy between perils of the sea and certain excluded perils, it has been found that there are quite a number of instances where the courts, in spite of the evidence of such exclusions, were inclined to uphold perils of the sea as the cause proximately led to the losses. Therefore, it can safely be concluded that the range of perils that are eligible to be classified as perils of the sea is still not exhaustive.

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