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RECENT DEVELOPMENTS IN MARINE INSURANCE LAW.

by

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Recent Policy Form Changes

> "Touching the adventures and perils which we, the assurers, are contended to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, and merchandises, and ship, etc. or any part thereof."

The above language, taken from the Lloyd's S.G. policy, First Schedule, Marine Insurance Act, 1906,(1) has for centuries titillated scholars, baffled assureds, and provoked the ire of judges.(2)

Alas, for those of us who have spent many years agonizing over the traditional wording, this is a sad and nostalgic moment. The days of those sonorous phrases are clearly numbered. The United Nations Committee on Trade and Development (UNCTAD) has unlimbered its mighty guns (unquestionably at the behest of the so-called "developing" nations) at the traditional policy forms and concluded:

> "The immortalisation of an antiquated and obscurely worded document as being immune from any improvement is excessive and unnecessary . . . the unyielding resistance to any change of the S.G. form is unfounded."(3)

Not content with this slashing attack on the policy form itself, UNCTAD has concluded[4] that the use of the national regime [and here UNCTAD is referring to the English market] as a de facto international legal regime presents problems with its continued use on an indefinite basis, noting that it is not the result of an internationally representative forum but rather is a legal regime created in a national context and designed to meet national needs. Thus, UNCTAD concludes, developing countries, as well as all other countries, both socialist and developed market-economy countries, have not had a say in its original structure or its continued development, and the "national character" of this marine insurance legal regime inhibits it from successfully serving as a truly international legal base for marine insurance contracts adaptable to all members of the international community.[5]

One may well ponder the effect these rather startling pronouncements had upon Lloyd's and the Institute of London Underwriters. Aside from what one may confidently predict must have been a reaction of instant hostility, underwriters in England moved rapidly predictably and certainly to "head off at the pass" UNCTAD's move toward international uniformity without proper weight being given to the preeminence of the English underwriters in marine insurance coverage world-wide.

Thus, as respects cargo insurance, the time-honored Lloyd's S.G. policy form has been completely discarded, to be replaced by a sheet of paper containing

sub-headings and blank spaces to be filled in with such vital information as the policy number, name of assured, vessel, voyage or period of insurance, subject-matter insured, agreed value (if any), amount insured, premium, clauses and endorsements to be attached, and a "catch-all," special conditions and warranties.

There are now three new sets of cargo clauses to replace the existing "All Risks," "W.A." and "F.P.A." clauses. These are known, presumably for lack of better titles, simply as the "A," "B" and "C" clauses. Make no mistake, however; these are not mirror images of the old "All Risks," "With Average" and "Free of Particular Average" clauses under new labels, but reflect a decidedly new approach.

At the risk of over-simplification, it is fairly accurate to state that the "A" clauses cover, essentially, "all risks" with the caveat that, as everyone knows, an "all risks" policy does not cover all risks....only those which are fortuitous. Thus, Clause 1 of the "A" form covers all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5 and 6 which are clearly denominated as "Exclusions." Moreover, the intention is to cover physical loss or damage and not economic loss or consequential loss, however those terms may be defined.

To the contrary, the "B" and "C" forms cover <u>named risks</u>, subject to Exclusion clauses. The "C" form provides the most restrictive coverage and may be summarized as follows:

loss of or damage to the subject matter reasonably attributable to:(6)

(1) fire or explosion

(2) vessel or craft being stranded grounded sunk or capsized

(3) overturning or derailment of land conveyance

(4) collision or contact of vessel craft or conveyance with any external object other than water

(5) discharge of cargo at a port of distress

loss of or damage to the subject-matter caused by

(a) general average sacrifice

(b) jettison

In addition, coverage is provided for general average and salvage charges....incurred to avoid, or in connection with the avoidance of, loss from any cause except those excluded in Clauses 4, 5 and 6, as well as provides an indemnity to the assured against such proportion of liability under Both-to-Blame clauses so long as such liability is in respect of a loss recoverable under the clauses.

The "B" form provides slightly broader coverage. In addition to the risks mentioned in the "C" form, loss of or damage to the subject-matter is covered if reasonably attributable to earthquake, volcanic eruption or lightning. Moreover, under the second class of risks covered will be found an expansion to cover jettison or washing overboard, and the "entry of sea lake or river water into the vessel craft hold conveyance container liftvan or place of storage."

Again, under the second class of risks such loss or damage must be caused by the peril so enumerated.

The "A" form, as previously noted, covers "all risks" as well as general average and salvage charges, together with an indemnity against such proportion of liability under Both-to-Blame clauses.

Exclusions

The enumerated exclusions in the three forms are identical with one major exception which will be noted hereafter. The exclusions in the "A" form are war risks (Clause 5)[7] and strikes (Clause 6),[8] together with "General" exclusions which are:

(1) loss damage or expense attributable to wilful misconduct of the assured

(2) ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

(3) loss damage or expense arising from insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this sub-clause, "packing" is deemed to include stowage in a container or liftvan but only when such storage is carried out prior to attachment of the policy or by the Assured or their servants)

(4) loss damage or expense caused by inherent vice or nature of the subject-matter insured

(5) loss damage or expense arising from

unseaworthiness of vessel or craft,

unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured,

where the Assured or their servants or agents are privy to such unseaworthiness or unfitness, at the time the subject matter insured is loaded therein

(6) loss damage or expense proximately caused by delay, even though the delay is caused by a risk insured against (except expenses payable under Clause 2 [general average and salvage charges])

(7) loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel or their respective agents.

The exclusions in the "B" and "C" forms are identical except an additional exclusion is added to those forms, reading:

> "deliberate damage to or deliberate destruction of the subject matter insured or any part thereof by the wrongful act of any person or persons."(9)

Remaining Clauses in the "A," "B" and "C" Forms

In the remaining clauses of the new forms, each group of clauses has a definitive title and each clause has a margin title. These can be summarized seriatim under their broad group headings:

DURATION

Clauses 7, 8 and 9 in all three of the new forms are collectively referred to under the heading of "Duration." Under this heading appear:

Transit Clause

Clause 7, denominated the "Transit Clause" is essentially identical to Clause 1 of the old Institute F.P.A., W.A. and All Risks clauses, except minor changes in language to reflect a necessary renumbering.

Termination of Contract of Carriage Clause

The Termination of Contract of Carriage Clause supplants the Termination of Adventure Clause (Clause 2) in the current Institute forms. Whereas, in the current forms

the insurance continues subject to prompt notice being given to underwriters and an additional premium being paid, if required, the new Termination Clause provides that the insurance shall terminate unless prompt notice is given to the underwriters and continuation of cover is requested when the insurance shall remain in force, but subject to an additional premium if required by the underwriters.

Change of Voyage Clause

The comparable clause in the current I.C.C. form provides that the subject-matter is held covered (at a premium to be arranged) in case of a change of voyage, or of any omission or error in the description of the interest, vessel or voyage. The new clause is more restrictive and simply provides that where, after attachment of the coverage, the destination is changed by the Assured, it is held covered at a premium and on conditions to be arranged subject to prompt notice being given to the underwriters. Compare, the definition in Section 45(1) of the Act.

SEAWORTHINESS WARRANTY

Clause 10 of the new forms must be read in para materia with Clause 4.5 of the Exclusions portion of the new forms. Clause 4.5 excludes coverage with respect to loss, damage or expense arising from unseaworthiness of the vessel or craft or unfitness of the vessel, craft, conveyance, container, etc. for the carriage of the goods where the assured or their servants or agents are privy to such unseaworthiness or fitness at the time the subject-matter insured is loaded therein. Clause 10 of the new forms simply provides that the underwriters waive any

breach of the implied warranty of seaworthiness of the ship and fitness of the ship to carry the subject-matter, unless the Assured or their servants or agents are privy to such unseaworthiness or fitness. By contrast, Clause 8 of the current I.C.C. forms provide that the seaworthiness of the vessel as between the Assured and Underwriters is admitted.

Thus, it will be seen that under Clause 10 there is an express waiver of the implied warranty of seaworthiness and fitness of the ship to carry the cargo to destination which would otherwise arise by virtue of Section 39 of the Act. Absent such a waiver, underwriters could defend on the basis of a breach of the implied warranty even if unseaworthiness were not the cause of the loss. However, the waiver is only effective if the Assured or their servants or agents are not privy to such unseaworthiness.

CLAIMS

Under this sub-heading, a new clause appears in all three forms, denominated the "Insurable Interest Clause." It appears in two parts. The first (Clause 11.1) provides that in order to recover the assured must have an insurable interest in the subject-matter at the time of the loss. The second (Clause 11.2) provides that subject to having such an insurable interest, the assured shall be entitled to recover for an insured loss occurring during the period covered by the insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the assured were aware of the loss and the underwriters were not.

It will be seen that this new Insurable Interest Clause substitutes for the "lost or not lost" phrase which appeared in the old Lloyd S.G. form and, in essence, states the law as set forth in Rule 1, Rules for Construction of Policy, First Schedule to the Act, subject, of course, to the assured having an insurable interest at the time of the loss.

It should be noted that this new clause does not affect the assignability of the policy. Whether or not the policy is assignable depends upon English law in the absence of any restriction in the policy. If there is a proper assignment, and if the assignor had an insurable interest at the date of loss and was not aware of a loss prior to the inception of the contract of insurance, then the assignee stands in the shoes of the assignor.

Forwarding Charges Clause

This is a wholly new clause which, in essence, provides that where, as a result of the operation of a risk covered by the insurance, the insured transit is terminated at a port or place other than that to which the subject-matter is covered under the insurance, the underwriters will reimburse the assured for any extra charges properly and reasonably incurred in unloading, storing and forwarding the subject-matter to the destination to which it is insured.

At the risk of stating the obvious, not only must there be the operation of a risk covered by the insurance; i.e., an "insured peril," but any exclusions contained in the policy must not apply. Consequently,

for example, expenses incurred in unloading, storing and forwarding the goods to destination would not be recoverable even under the form "A" (All Risks) form where the insured transit was terminated at an intermediate point by reason of the insolvency or financial default of the carrier.(10)

Moreover, the new policy forms make it very clear that the new clause does not apply to general average and salvage charges, is subject to all exclusions, and does not include charges arising from the fault, negligence, insolvency or financial default of the assured, or their servants or agents.

Constructive Total Loss Clause

Clause 13 of the new forms is a verbatim repetition of the same clause (Clause 6) appearing in the current I.C.C. forms.

Increased Value Clause

There is a new clause (Clause 14) which follows along similar lines to the "Increased Value Clause" in certain "Trade Clauses." The intent seems to be that when the new forms are used, cargo insurance on increased value should no longer be accepted on a P.P.I./W.B.S. basis.

BENEFIT OF INSURANCE

Under this heading appears only one clause (Clause 15) which is entitled "Not to Inure Clause" and is identical to the old clause of the same name in the current I.C.C. forms; i.e., "This insurance shall not inure to the benefit of the carrier or other bailee."

MINIMISING LOSSES

Duty of Assured Clause

This clause (Clause 16) is an extended version of the Bailee Clause which appears in the current I.C.C. forms. Moreover, it incorporates Sue and Labor provisions from the old S.G. policy form, and undertakes to reimburse the assured when charges have been properly and reasonably incurred in addition to any loss recoverable under the insurance.

Waiver Clause

This clause (Clause 17) incorporates the wording from the old S.G. policy form, making it clear that measures taken by the assured or the underwriters for the purposes of sue and labor shall not be considered a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

This clause (Clause 18), denominated "Reasonable Dispatch Clause," is a verbatim repetition of Clause 14 of the current I.C.C. forms, and simply requires the assured to act with reasonable dispatch in all circumstances within their control.

LAW AND PRACTICE

This clause (Clause 19) simply provides that the insurance is subject to English law and practice.

The new basic form replacing the old Lloyd's S.G. form (sometimes referred to as the "MAR" form) contains a clause which will not be found in the current S.G. form. That is, the English Jurisdiction Clause. The intent of

this clause is to make it clear that the contract is subject to English jurisdiction unless, by agreement of the parties, the provision is deleted and there is inserted a statement of other jurisdiction.

It should be emphasized that the MAR policy form should not be used with the current Institute Clauses (Cargo, War, S.R. & C.C. and Trade Clauses) but, instead, the old S.G. form must be used.

The New Institute War Clauses, Strike Clause (Cargo) and Malicious Damage Clause

The format of the new War Clauses and Strikes Clauses (Cargo) follows the new format of the Forms "A," "B" and "C." That is, named perils followed by specific exclusions. It is noteworthy that "malicious damage" as such will not be covered under Forms "B" and "C" and where coverage is effected on those forms, protection against loss of or damage to the subject-matter caused by malicious acts, vandalism or sabotage will have to be purchased through the new Malicious Damage Clause. Moreover, "piracy" as such will no longer be covered as a war peril.

SUMMARY AND TENTATIVE CONCLUSIONS ON THE NEW CARGO CLAUSES

It is with extreme trepidation that an American lawyer presumes to summarize and predict how the English and Commonwealth courts will interpret and apply the new cargo clauses....not to mention what the American underwriters will do when the new clauses have been in force for some time and the impact of them is felt in the American market.

Perhaps the best way of approaching this difficult and thankless task would be to ask some pertinent questions. For example:

1. Now that the old "perils clause" is a thing of the past, and the "B" and "C" forms are on a "named peril" basis, will the doctrine of esjudem generis be applied when a loss occurs which does not fit neatly into the description of the "named perils" in those forms?

Search as one may in the "C" form (providing the least extensive coverage), there is no mention of the incursion of sea water into the vessel, craft, hold, conveyance, container, etc.....although this particular peril will be found amongst the "named perils" in the "B" form.

What, for example, would the court in Davidson v. Burnand[11] hold with respect to a total loss of cargo under the new form "C"? It will be recalled that in that case, while the vessel was loading, her draft was increased to the point where a discharge pipe was brought below the surface of the water. The water flowed down the pipe and some valves having been negligently left open, flowed thence into the hold and damaged the goods. Under the old Lloyd S.G. form, the court held that the loss was "similar" in kind to one happening from "perils of the seas."

What would be the result in circumstances similar to those in Jones v. Nicholson[12] where the master, who was a part owner of the ship, fraudulently sold the cargo? There, the underwriters were held liable both under the heading of "barratry" as well as under the words "all other perils."

What would be the result in circumstances similar to those presented in Canada Rice Mills, Ltd. v. Union Marine & Gen. Ins. Co., Ltd.(13) where the damage was to a cargo of rice caused not by incursion of sea water but by closing of ventilators to prevent such incursion? There, the underwriters were held liable for a loss by "perils of the sea" as well as under the general words.

2. More to the point, what would Mustill, J. have done under forms "B" and "C" with the peculiar facts involved in The Salem?(14) "Takings at sea" has now disappeared from the standard policy. Even if it were considered as falling within the new perils named, Clause 4.8 of the "Exclusions" in the "B" and "C" forms would eliminate coverage for ".....deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons." It will be noted, of course, that Clause 4.8 in the "B" and "C" forms now removes all liability for arson, scuttling, any form of sabotage, or other malicious acts aimed at the subject-matter insured. Moreover, since the "B" and "C" forms do not include perils of the seas as such, rain water damage and theft are not included as covered risks, although rain water damage may be included in certain causes of loss mentioned in Risk Clause 1.

3. Moreover, let us suppose that the carrying vessel encounters a vicious storm and the vessel is badly battered and the cargo rendered completely worthless by sea water entering the cargo holds. No fire or explosion ensues, nor is the vessel stranded, grounded, sunk or capsized. Neither is the vessel in collision with anything.

No general average sacrifice is made or attempted and no cargo is jettisoned. In short, the cargo is rendered worthless (the cost of reconditioning and sale would exceed its value) by the operation of the sea water. Under form "C" there is no coverage even though the destruction of the cargo was clearly occasioned by a peril of the sea and there was a constructive total loss of the cargo.

4. What would be the result in circumstances similar to those presented on Montoya v. London Assurance Co.(15) where during the course of a voyage a vessel loaded with hides and tobacco shipped large quantities of sea water? On the termination of the voyage it was discovered that the sea water had rendered the hides putrid and that the putrefication had imparted an ill flavor to the tobacco rendering it worthless. In that case, the court ruled that the loss was due to a peril of the sea. Under form "C" this result would not follow, notwithstanding that the tobacco was a total loss.

5. Let us suppose that it is desired to insure a cargo of antique furniture from Belgium to the United Kingdom. The furniture is stored in a warehouse in Antwerp and was purchased F.O.B. the warehouse by the potential assured, who places insurance on the furniture under form "A" (all risks). The assured then employs an independent contracting company (who specializes in packing antique furniture) to pack the furniture in containers for shipment to the United Kingdom. The independent contracting firm performs its function in a grossly negligent fashion and,

as a consequence, the furniture is badly damaged enroute by heavy weather.

Clause 4.3 of the "Exclusions," it will be recalled, eliminates coverage for loss, damage or expense arising from insufficiency or unsuitability of packing or preparation of the subject-matter insured and, for the purpose of that clause, "packing" is deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of the insurance or by the Assured or their servants.

Query: Is the loss or damage to furniture covered by form "A"? It will be observed that the packing of the container occurred after the attachment of the insurance and was carried out by an independent contractor....not by the assured or its servants.(16)

6. Let us suppose that a cargo is insured under new form "A." The vessel arrives in Vancouver, Washington, U.S.A. just after the first major eruption of Mt. St. Helens. The master, professing the safety of his vessel to be emperiled by further eruptions, discharges all the cargo emperiled by further eruptions, discharges all the cargo clause of the bills of lading, and the vessel hurriedly departs. The consignees, at considerable expense, tranship the cargo from Vancouver, Washington via truck to Vancouver, British Columbia, the ultimate destination of the discharged cargo. Enroute from Vancouver, Washington to Vancouver, British Columbia, one of the trucks is overturned and the cargo damaged.

Under Form "A," the Transit Clause would extend coverage to the cargo while enroute during the overland portion of the transit and under Clause 12, the Forwarding Charges Clause, underwriters would reimburse the assured for any extra charges properly and reasonably incurred in storing and forwarding the cargo to the destination to which it was insured; i.e., Vancouver, B.C.(17)

The same result would obtain with respect to coverage on Form "B" as one of the specifically named perils includes "volcanic eruption."

Form "C" does not include volcanic eruption as one of the risks. Assuming for the purposes of discussion, that the fear of the master that further volcanic eruptions constituted a danger to his ship and the cargo was real and not fanciful and that his reliance upon the "Caspiana" clause was not misplaced, Form "C" would not provide coverage as the operation of the Forwarding Charges Clause is dependent upon the "operation of a risk covered by this insurance."

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In the last few years, a variety of cases have arisen which are intriguing to the marine insurance industry, and which deserve commentary and analysis. These cases are, of course, divisible into specific categories and will be treated accordingly.

"All Risk" Policies

The latest expression in the United States with respect to "all risk" policies is Goodman v. Fireman's Fund.(18) In that case, the plaintiff, the owner of a

yacht, sued to enforce a marine insurance policy issued by the defendant with respect to damages to the yacht when it sank. The district court granted judgment for the defendant insurer on the grounds that the policy did not cover the particular loss which the plaintiff sustained. On appeal, the appeals court disagreed with the reasons advanced by the district court but, nonetheless, held that the judgment for the defendant was proper because the plaintiff-owner breached a warranty contained in the policy and was therefore precluded from recovery.

In that case, the policy issued covered "all risks." The policy also contained a special typed clause which warranted that the vessel would be laid up and out of commission from October 1 until May 1. In 1975, the assured had employed professional help to lay up his yacht for the winter but in 1976 he undertook to do this work himself. Unfortunately, he omitted to drain the sea water cooling system and, more importantly, he did not close the port and starboard sea valves which permitted sea water to enter the cooling system. The cooling system included two filters which were encased in plastic cylindrical jackets and, because the sea valves remained open and the sea water lines were not drained, the water remained in the filters.

The plastic filter jackets broke during the course of the winter due to freezing of water in the filters, and the breaking of the filter jackets permitted water in the cooling system to flow into the hull through the broken jackets. Indeed, water continued to enter the system through the open valves and to flow through the broken jackets in such volume that the yacht sank at its moorings.

The district court held that the sinking of the yacht was not covered by the policy because (1) insofar as the loss was caused by the freezing of the water in the cooling system, the loss was excluded from coverage; (2) the loss was not covered by the "all risks" clause of the policy; and (3) the provision insuring against negligence of the master - the Inchmaree Clause - did not apply.

The court of appeals did not wholly agree. Noting that if the loss did not result from inherent defect, ordinary wear and tear, or intentional misconduct, its cause was necessarily external, the court also held that the Inchmaree Clause did apply. Moreover, while the policy excluded loss or damage by ice or freezing, the appeals court did not agree that liability was excluded under this exclusion because it was the owner's negligence in failing to close the intake valves which caused the sinking. As the court stated, when two or more causes combine to cause a loss, one of which is insured against while the other is not, the loss is not insured unless the covered cause is the predominant efficient cause of the loss; i.e., while freezing was an intervening cause in the series of events, it was not unforseeable.

However, the insured did not prevail. The court of appeals held that the assured breached his express warranty that the yacht would be laid up during the time specified as it was not laid up in accordance with the custom in Chesapeake Bay which was, at the very least, to close the sea valves as a part of the winterizing program.

HOLM v T.W. RICE & CO (BC Sup Ct)
124 DLR 3rd 463

In Heindl-Evans v. Reliance Ins.,[19] the insured yacht was purchased by the principal stockholders in Heindl-Evans, Inc. to be used primarily in entertaining clients of the corporation. However, the yacht sank at its moorings when the shore power was turned off, thus inactivating the automatic bilge pumps. The water entered the yacht through an opening in the starboard rudder post occupied by a grease fitting normally covered by a cap. The cap was missing, thus permitting water to enter the hull. Underwriters denied the claim on the grounds that the plaintiff corporation had no insurable interest in the vessel and, further, that the sinking resulted from wear and tear.

The court rejected the argument that the plaintiff corporation had no insurable interest, holding that under Virginia law an insurable interest "means any lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage." Therefore, the absence of legal title or ownership by the corporation of the yacht was immaterial inasmuch as it had contracted to bear all costs of fuel, maintenance, repairs and insurance.

The ultimate decision of the court really depended upon who had the burden of proof. For the assured, it was contended that under an all risks policy, the assured meets his burden simply by showing that the policy was in effect and that a loss occurred. To the contrary, the underwriter contended that the rule to be applied was that which holds that when a vessel sinks in calm water, a presumption arises that the vessel was unseaworthy and, therefore, the plaintiff must prove either that the vessel was seaworthy before

the sinking occurred or that the unseaworthiness was caused by actions or defects falling within the purview of the Inchmaree Clause.

The insuring clause in the policy provided protection against "all risks" of direct physical loss of or damage from any external cause.

The court noted that the "external cause" phrase in the policy could be interpreted in two ways. First, it could be seen as an exception or exclusion to the otherwise blanket coverage against "all risks." Or, it could be seen as a basic limitation to the all risks coverage; that is, the broad coverage provided by the "all risks" clause of the policy means only all risks from external causes.

The court held, in effect, that the assured had proved that the vessel was in a seaworthy condition prior to the sinking. Thus, the court said, a presumption arose that the loss was caused by some fortuitous external event. The court also observed that if the vessel were in fact unseaworthy, the unseaworthiness could only have been due to a latent defect in which case it would have been covered under the Inchmaree Clause.

In short, the court held that the underwriter could not rely on the general presumption that where a vessel sinks in calm waters for no apparent reason it is presumed unseaworthy. That presumption operates only where the cause of the sinking is unknown. Here, the cause of entry of water into the hull was the missing grease cap. Underwriters contended that this could only have been due to wear and tear or due to the owner's

failure to maintain the vessel properly. However, under either theory, the burden of proving wear and tear or want of due diligence was upon the defendant underwriters and this burden has not been borne.

It is also interesting to note that the court, in dicta, made this observation: "Where a (yacht) owner has exercised due diligence in maintaining a vessel and providing for its preservation following some casualty, it does not seem that the innocent negligence of the owner acting as both master and crew should be excluded from coverage in an all risks policy with an Inchmaree Clause."

This brings us to Lewis v. Aetna Ins. Co.[20] In that case, the yacht was found sunk in its boathouse and it was raised and repairs effected. In a suit on the policy for the cost of repairs, there was evidence that the yacht sank because of leaks in its hull but the cause of the leaks was unknown. The court held that the jury could reasonably infer that the vessel sank because of a latent defect. Two justices in a specially concurring opinion urged a reexamination of the traditional rules of interpretation applied to the Inchmaree Clause when included in pleasure craft policies. Citing Professor Keeton, the concurring justices urged application of the "reasonable expectations" doctrine, stating, in part:

> "The difficulty is with the term 'latent defect.' In this case, the term is stretched to embrace an unknown, unexplained something that caused the Manatee to sink at its moorings. This interpretation does violence to the language but justice to the case. The phrase may have served

> a proper function in 1889 but today it only confuses courts and policyholders and frustrates the reasonable expectation of the insured, a result which courts have historically disfavored. We would reach an unreasonable result if we denied the plaintiff policyholders the coverage which they reasonably assumed they had purchased because they cannot explain an inexplainable sinking."

There are, of course, necessary limits to "all risks" policies. As Lord Sumner pointed out:(21)

> "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 behavior of the subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings 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, and the onus of proof remains where it would have been on a policy against ordinary sea perils."

Thus, if packing is inadequate or defective at the inception of the policy, no loss, damage or expense proximately caused by such inadequacy or defectiveness in packing would be recoverable as such damage is inevitable and not a "risk."(22) Nor is inherent vice in the subject-matter of the insurance.(23) However, loss from theft, pilferage or unlawful detention or conversion is covered as these are "fortuitous" insofar as the assured is concerned.(24)

There is nothing, however, which prevents underwriters from agreeing to cover risks which would otherwise be excluded by reason of "inherent vice." This was demonstrated in Soya G.M.B.H. Kommanditgesellschaft v. White (The Corfu Island).(25) In that case, the policy insured,

inter alia, heat, sweat and spontaneous combustion known collectively as the "HSSC Clauses" for damage to a cargo of soya beans. The cargo arrived in a damaged condition. The underwriters defended on the grounds that the cargo had been shipped in such a condition that it was unable to withstand the ordinary incidents of the voyage from Indonesia to Europe; i.e., the cargo was inherently vicious and therefore not covered because of Section 55(2)(c) of the Marine Insurance Act, 1906, reading:

> "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."

The defense failed on the facts, the judge considering that underwriters had not established inherent vice and the damage was, therefore, not inevitable. However, interestingly, the judge was obviously prepared to hold that as long as it was established that the damage was not inevitable, the HSSC Clauses would cover the loss even if the damage to the cargo had been proximately caused by inherent vice in the cargo. That is, the express coverage provided for heat, sweat and spontaneous combustion was a sufficient expression of intent to overrule the contrary provisions of the inherent vice exclusion of Section 55 of the Marine Insurance Act.

Insurable Interest

An interesting case recently arose in England involving insurable interest. In that case,[26] a c. and f. purchaser had insured on all risks terms drums of "essential"

oils which he had purchased in Indonesia. When he took delivery of the drums they were found to contain water with only a thin layer of oil floating on the top. The assured's difficulty, of course, was to prove that the fraud had occurred during the currency of the policy during the course of transit. The underwriters, predictably, took the position that the fraud necessarily occurred prior to the shipment and, therefore, prior to the assured taking title and assuming the risk under the C. and F. terms of his purchase. Consequently, he had no insurable interest in the oils. The assured argued violently that Section 5(2) of the Marine Insurance Act (Section 11(2) of the Australian Act) had changed the law. That subsection, you will recall, reads:-

> "In particular a person is interested in a marine adventure where he stands in any legal or equitable relationship to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or the detention thereof, or may incur liability in respect thereof."

The assured also contended that Section 5(2) must be read, in para materia, with Section 6(1) (Section 12(1) of the Australian Act) reading:-

> "The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the assurance is effected."

Unfortunately for the assured, the court found that he had failed to establish that the fraud had occurred after the drums of oil had commenced their transit and, therefore, his suit failed. It is, of course, rather difficult to imagine how the oil - if it ever was in the drums - could have been siphoned off and replaced with water during the transit.

Attention is also directed to two recent American cases involving insurable interest. In Boston Old Colony v. Charles Orland Co.,(27) involving a suit by a cargo underwriter against its assured for premiums allegedly due on shipments, the court held that an insurable interest in the goods must be proved and there was no such interest where the defendant acted only as a broker who had not been instructed by his principals to insure their goods and whose brokerage commission was not dependent upon their safe delivery. In N.Y. & L.B.R.R. Co. v. U.S.,(28) the court held that a tugowner had a sufficient insurable interest in a barge which was being towed to warrant being included as a named assured in the barge owner's P & I policy because the tugowner might be found negligent in operating the towed barge.

It should also be observed that Heindl-Evans v. Reliance Ins., discussed earlier, also involved the question of insurable interest in which the court held that a corporation which had agreed with its principal stockholders that it would insure, maintain and repair a vessel owned by the stockholders but used for the purpose of entertaining business clients of the corporation, had an insurable interest.

Agents and Brokers

Surprisingly, neither legal commentators nor the courts have developed and expounded to any major degree upon the fundamental distinctions between agents and brokers as those terms are used in marine insurance. A few American cases have touched upon the distinction, noting that brokers

are ordinarily employed by the person seeking insurance, as distinguished from insurance agents who are employed by insurance companies to solicit and write insurance by and in the name of the insurance company.(29)

The term "broker" in English marine insurance law has a well-settled meaning. He is clearly an agent of the assured, and in effecting insurance with an underwriter upon instructions from his principal, the assured, owes no duty to the underwriters.(30) The same rule obtains in the United States insofar as true "brokers" are concerned.(31)

The very recent decision in Edinburgh Assur. Co. v. R. L. Burns(32) contains a fascinating and factually accurate exposition of the methods used in placing marine insurance coverage in the London market by or through American brokers. In that case, American Pacific International (API), a corporation engaged in oil and gas exploration and the R. L. Burns Corporation (Burns) formed a joint venture to purchase the Gatto, a self-contained three-legged, mobile and self-evacuating off-shore drilling platform which had sustained a casualty in the Mozambique Channel off Madagascar as a consequence of which its owners were paid as for a constructive total loss. API and Burns believed the drilling rig could be salvaged but desired insurance to cover the risks attendant on the proposed salvage project. They approached Emett & Chandler, a firm of insurance brokers in Los Angeles to place the insurance. It soon became apparent that Total Loss Only insurance was the only insurance which could be

placed. This Emett & Chandler placed through its corresponding brokers, Hogg, Robinson in London, on the basis of "actual total loss only" (meaning irretrievably lost).

The insurance cover was finally placed and confirmed on or about October 29, 1975. On January 14, 1976, a typhoon developed in the vicinity of Mozambique Channel and by January 30, 1976, the rig had completely toppled over and appeared to be so damaged as to be completely unsalvageable. The assured thereupon filed claims on their policy for an actual total loss.

One of the principal issues in the case was whether the Los Angeles brokers and Hogg, Robinson in London were agents of the insurers or the assureds. In the course of ruling, the court developed at considerable length the trade practices involved in the placement of coverage in the London market and the discussion there is particularly commended to you for the details of placement in a practical sense.

As the court noted, the placement of insurance by the assured in the London market followed the customary pattern of such transactions. Based thereon, the court found specifically that Emett & Chandler and Hogg, Robinson were agents of the assured in the placement of the coverage, citing Anglo-African Merchants Ltd. v. Bayley (1971) 1 Q.B. 311 and Rozanes v. Bowen (1928) 32 Ll.L.Rep. 98, C.A. As between the assured and the Los Angeles brokers and between the latter and the underwriters, the court concluded that California law applied under which the broker is also the

agent for the assured and not the underwriters, citing section 33 of the California Insurance Code.

Parenthetically, I should mention that the assureds did recover in the Edinburgh case on the grounds that the drilling rig was irretrievably lost and that the parties intended that English law should apply. The case contains a very interesting discussion of what is or is not an "actual total loss," which leads inexorably into the next subdivision.

What is an "Actual Total Loss"?

In Edinburgh, the court was confronted with a question of what is an actual total loss. The facts were relatively clear: On January 14, 1976, the drilling rig stood where it had been since the time of the initial casualty in June, 1974. The platform was generally erect though tilted. The hull, although tilted, remained completely above the surface of the water. After the typhoon, the story changed. Because of the damaged condition of the platform, the hull could not be raised above wave height. The physical impact of the wave fronts moving through the platform area started to rock the hull back and forth in position, aggravating the severe crack damage around the port leg well area which had been sustained in the initial 1974 casualty. On January 24, 1976, the hull still stood out of the water, although one leg was sinking. The crack damage was propagated by the hull movement, so that eventually the cracks had extended to such a degree that the structure could no longer hold the leaning weight of the port leg against the hull. The leg broke away and fell onto the sea bed, while the buoyant hull, still attached

Continuing, the court observed that under English law commercial reality must be considered in determining whether the thing insured is an actual total loss, citing Berger and Light Diffusers Pty, Ltd. v. Pollock, (1973) 2 Lloyd's Rep. 442. However, the court also noted that a distinction must be retained between actual total loss and constructive total loss, and complete dependence upon commercial reality or practicability creates the danger of obliterating the difference between the two concepts.

The court then concluded certain standards must be applied to determine whether the rig was an actual total loss. The first was the standard of "reasonable salvage and/or engineering effort" where the reasonable salvor must consider the salvaging effort required to recover the thing insured. The reasonable engineer must consider the engineering effort required to bring the thing insured back to a functional status. If the effort required to either recover or refurbish the thing insured is too disproportionate an effort for the resulting operational entity, then the thing insured is an actual total loss.

The second standard was whether the refurbishing effort was so extensive as not reasonably to be characterized as repair. If so, and if tantamount to rebuilding, then the thing insured is an actual total loss.

The third standard was whether the cost of recovering and refurbishing the thing insured is so out of proportion to the value of the resulting operational entity, that the thing insured must be considered an actual total loss.

Under all three standards, the court found the rig to be an actual total loss.

Insured Risks

In what promises to be a landmark decision, the court in Prudent Tankers Ltd, S.A. v. The Dominion Ins. Co., Ltd. (The Caribbean Sea)[33] held that the mere fact that the historical reasons for a defect in hull or machinery was defective design would not of itself preclude recovery under the Inchmaree Clause, thereby overruling (at least inferentially) Jackson v. Mumford, 9 Com.Cas. 114, C.A.

In Prudent Tankers, the vessel lightly took the ground during a passage through a dredged channel from Lake Maracaibo. Subsequently, while off the coast of Nicaragua in the Pacific Ocean, in mild weather and seas, the vessel sank due to the entry of sea water into her engine room. The owners claimed under their insurance policy, which incorporated the AIH clauses, and specifically the Inchmaree Clause, asserting that the loss was caused by the grounding which damaged the sea suction valve, or alternatively, that the failure of the valve was due to a latent defect therein, and that the loss was due to the negligence of the master and crew in the navigation of the vessel; i.e., the grounding. The underwriters defended on the grounds that they were relieved of liability because the vessel was sent to sea in an unseaworthy state; or that the assured breached the provisions of the AIH clauses relating to keeping the vessel in class, and that if the failure occurred in the sea valve, it was caused by ordinary wear and tear

or by defect in design and therefore was not a peril insured against.

The court found that the vessel did take the ground on her passage up the dredged channel but that the grounding had no causative effect on the casualty; that the casualty was not attributable to ordinary wear and tear in that the defect upon which owners relied consisted of fatigue cracks in a wedge-shaped nozzle which were attributable to (1) the manner in which the vessel was designed and (2) the effect upon the nozzle of the ordinary working of the vessel, the result of this combination being that the fracture opened up a significant period of time before the end of the expectable life of the vessel. Therefore, recovery for the loss of the vessel consequent upon such a fracture was not excluded by Section 55(2)(c) of the Marine Insurance Act (ordinary wear and tear exclusion) but was due to a latent defect.

The court said, in part:

> " . . . At all events, however this case is to be interpreted (here Justice Goff was referring to Jackson v. Mumford) neither the decision nor the dictum on which Mr. Kentridge relied, has in my judgment the effect of excluding a defect in hull or machinery from the cover provided by the Inchmaree Clause merely because the historical reason for such defect was defect in design.
>
> "The present case is one where defective (though not negligent) design has had the effect that defects would inevitably develop in the ship as she traded; if such defects develop and have the result that a fracture occurs and the ship sinks, such a loss is not in my judgment caused by ordinary wear and tear and so is not excluded by s. 55(2)(c) of the Act.
>
> "I am also satisfied that the defect in the present case, consisting as it did of the fatigue cracks in the wedge-shaped nozzle, constituted a latent defect."

Justice Goff then cited with approval Brown v. Nitrate Producers S.S. Co., (1937) 58 Ll.L.Rep. 188, defining a latent defect as one which could not be discovered on such an examination as a reasonably careful skilled man would make, and stated:

> " . . . I therefore conclude on that test, that the loss of the ship in the present case was directly caused by a latent defect in the hull, within the cover provided by the Inchmaree Clause; and that it follows that the owners are entitled to recover . . . "

On the submission of underwriters that the vessel's class was changed, cancelled or withdrawn, in violation of the terms of the AIH clauses, by reason of having grounded, thus automatically losing her classification or, alternatively, that the classification was lost because the master failed to notify the vessel's Society of the incident, the court ruled negatively. As the court construed the Society's rules, there had been no breach. More significantly, the court was obviously prepared to accept the Society's own assurances that the vessel was still in class at the date of the casualty.

* * * * * * * *

The High Court of Australia recently handed down a most interesting decision involving perils of the sea and burden of proof. In Skandia Ins. Co. Ltd. v. Skoljarev and Another(34) the insured vessel sank shortly after leaving port in seas which, though subject to a considerable swell, were calm. Bright, J., in the Supreme Court of South Australia, in giving judgment for the vessel owners, found that the ship was seaworthy and that there was no negligence

on the part of the master and crew, applying the presumption that if a ship which is seaworthy sinks in smooth water and there is no other evidence as to the cause of the loss, the casualty is attributable to a peril of the seas. The full court dismissed the underwriters' appeal, whereupon an appeal was filed to the High Court on the ground that the full court had failed to recognize that the onus of proving seaworthiness lay upon the vessel owners.

The High Court dismissed the appeal, stating that it is no longer the law that some extraordinary action of the wind and waves is required to constitute a fortuitous accident or casualty; that such an accident or casualty can occur even in calm seas and fair weather, and the cause of the loss need not be external to the vessel.

The High Court further held that the onus of proof that the loss was caused by perils of the seas is on the assured. Though the onus of proving a breach of the insured's implied warranty of seaworthiness in a voyage policy is on the insurer, and though the onus of proving that a ship insured under a time policy was sent to sea in an unseaworthy condition with the privity of the insured is on the insurer, the insurer does not bear an onus of proving unseaworthiness when it arises in relation to the issue of whether loss was caused by perils of the seas or not; i.e., there is no presumption of seaworthiness or unseaworthiness unless, in the absence of other evidence as to the condition of the ship or the cause of the loss, a ship sinks in smooth water soon after the policy attaches or the ship leaves port.

The High Court continued by observing that the insured discharges his burden of proving loss by perils of the seas if he tenders evidence of sinking as a result of a fortuitous event; if there is also evidence of seaworthiness, the question of what caused the loss must be decided as a question of fact. The insured will only find it necessary to establish seaworthiness in order to prove his case if he has no direct evidence of loss due to a fortuitous event and seeks to establish by inference a case of loss due to an unascertained peril of the sea; it will be necessary for him to prove seaworthiness in order to support the necessary inference.

Thus, since the trial judge had rejected the appellant's claim that the ship was unseaworthy, it was correct to infer that the loss was due to a peril of the sea even though that peril was unidentifiable.

* * * * * * * *

The most fascinating cases involving perils seem to be arising in other jurisdictions. For example, in Case Existological Laboratories Ltd. v. Foremost Ins. Co.,(35) Justice McKenzie of the Supreme Court of British Columbia was confronted with a question of coverage with respect to the unexpected sinking of a specially-contrived barge or platform which was actually designed to be sunk deliberately.

The vessel involved was rather unique, being designed for the purpose of lifting onto its deck from the surface of the sea, or depositing from its deck upon the surface of the sea, floating modules, each weighing seven tons, used to keep in place a container which hung

down to a considerable depth vertically from the surface. The container was part of the equipment devised for a university experiment being conducted to study the effects of pollution upon plankton.

The vessel was converted to its special form by the plaintiff assured from the remains of a steel ship scow. As converted, it became a floating platform about 88' long and 49' in width, weighing about 188 tons. It could be partially submerged at the stern end enough to allow a module to be drifted off its deck or received upon its deck. The bow section was fully enclosed and watertight and was divided into two compartments by a longitudinal bulkhead. Seventy tons of cement had been poured into the ottom of the bow section. A longitudinal bulkhead divided the midships and after sections into two compartments each. The most striking feature of the design was the absence of any bottom under the midships and after compartment leaving them wholly open to the sea. The idea was that air would be pumped into the open compartments from the top so as to provide a cushion of compressed air lying between the underside of the deck and the level of sea water inside the compartments.

By controlling the volume and pressure of the trapped air, the volume of sea water could be varied. Generally speaking, as the volume of sea water increased, the vessel would incline by submerging at the stern and, in reverse, as the air pressure was increased and the sea water displaced, the vessel would rise progressively by the stern to a level position. Most significantly, as

a matter of fact, without the compressed air the vessel would inevitably sink like a rock....and that is precisely what she did when a new employee negligently left open a valve so that the air in the compartments was displaced by water.

At the time of the sinking, there was no perceptible wind or waves and the sinking occurred in broad daylight. As the court put it, the sea was a wholly passive agent in that its only contribution to the sinking was in being there to receive the vessel when the employee negligently made that receipt inevitable by removing the vessel's only means of flotation.

The court correctly noted that the difficulty in applying the criteria for determining what is a peril of the sea arose from the fact that the criteria were developed in cases dealing with conventional ships - conventional at least in that they had whole bottoms designed to keep the sea out.

Citing the classic English decisions on the definitions of "perils of the seas,"(36) Justice McKenzie concluded that the assured's action failed because the loss was not caused by a peril of the sea, inasmuch as the sea water in the instant case did not enter the vessel in a manner not expected in the ordinary course of things. To the contrary, the distinguishing factor as the learned justice saw it was that the employee intentionally admitted the sea water although he did not intend to admit as much as he did so that the vessel would sink.

The poor assured was understandably vexed and argued that the risk of sinking for lack of air was the greatest risk to which the vessel was exposed and the very risk against which insurance was needed.

Although agreeing to this proposition, the court discussed how it happened that the extraordinary craft was insured under an ordinary marine policy of hull insurance. It seems that, following normal custom, the broker retained by the owner to find insurance for the craft engaged a marine surveyor who carried out a condition and detail survey which was reflected in his report submitted to the underwriter. The report contained detailed descriptions of the vessel's structural components, machinery and fittings but, incredibly, nowhere did it contain any direct description of its mode of operation; i.e., that its buoyancy was totally dependent upon air pressure.

Being puzzled by the bizarre description, the underwriter called the surveyor by telephone. The surveyor then briefly explained to him the employment and operation of the vessel which conveyed to the underwriter that as the water was let in or out the effect would be of slightly submerging or tilting the aft end so that the stern would be just awash which would allow the module to be pulled off the deck into the water or pulled onto the deck. The underwriter swore that the surveyor had told him that even after the water completely filled the compartments there would still be fifteen inches of freeboard; the surveyor denied this.

The judge commented that he did not believe the surveyor intentionally misled the underwriter but that he believed the surveyor failed to communicate the true characteristics of the unique vessel with clarity and precision, his report having given no inkling of the startling fact that buoyancy was totally dependent on air pressure - a rather remarkable omission - and his further explanations did not succeed in putting that idea across to the underwriter.

As the court put it, the vessel faced only one exceptional hazard; i.e., loss of air through some human or mechanical failure, and this was the very hazard which caused it to sink. The special hazard was known to the surveyor but he did not manage to communicate it to the underwriter with sufficient clarity to allow him to properly assess the risk and had he chosen to do so, to write specialized coverage appropriate to the true circumstances. Thus, the underwriter could not be faulted for failing to provide appropriate coverage when he was not made aware of the special risk inherent in the operation of the vessel.

"Held Covered" Clause

Two recent decisions have dealt with the ever-troublesome interpretation of the "held covered" clause, one American[37] and one English.[38]

In Tinkerbell, the owner of a fishing vessel had procured a hull policy in usual form. The policy also included a warranty that the vessel would be "laid up and out of commission from October 1, 1971 to April 13, 1972."

The owner entrusted the vessel to one Gentry with instructions to sail it from Brookings, Oregon north to Charleston, Oregon and there to lay it up for the winter. Gentry proceeded toward Charleston but, enroute, stopped at an intermediate port, Port Orford, one day later. Various mechanical problems arose. Gentry kept the vessel at Port Orford for about a month and a half, making repairs from time to time and taking the vessel on an occasional fishing trip. The vessel was not laid up. (Although the court's decision does not reflect it, Gentry's home - and his wife - was at Port Orford, so his dallying about there for over a month was somewhat explicable.)

On October 20, 1971, a storm washed the vessel ashore, resulting in its constructive total loss.

It was agreed that the owner first learned of the breach of the lay-up warranty when he was advised of the loss of the vessel, and that he notified the underwriter immediately thereafter. It was further stipulated that the question of coverage was governed by English law which, of course, requires a strict and literal compliance with express policy warranties.

The assured, of course, admitted failure to comply with the lay-up warranty but contended that he could recover despite the breach because of the held-covered clause in the policy, reading:

> "Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided:
>
> "(A) Such event occurs without the actual privity or prior knowledge of the assured, and

"(B) Immediately upon becoming aware of such event the assured shall give notice thereof to the Underwriters and agree to pay additional premium as required."

As the court noted, the held-covered clause is intended to protect the owner of the vessel from the harsh results of inadvertent failure to comply with specified warranties of the policy. By including the clause, the underwriter accepts the greater risk occasioned by a possible failure to comply with those warranties, on condition that the breach is not wilful, the assured gives prompt notice in the event a breach occurs, and agrees to pay an additional premium. The sole issue presented was whether the clause is applicable to a breach of the lay-up warranty.

The underwriter contended that the notice given by the assured was not effective because not given until after the loss had occurred. The court demolished this contention in short order.

The real issue was whether the lay-up warranty pertained to <u>locality</u> so that it would be within the third category of warranties to which the held-covered clause applied.

The court held that the lay-up warranty was concerned not with the location of the vessel at a particular time but rather with the condition of the vessel during the winter months - namely, whether she had been secured, according to local custom, in a manner which would protect her from the perils of inclement weather. The court said in part:

> "Lay-up in any location appropriate for that purpose would have constituted compliance with the warranty we are here considering. Such a warranty is not one as to location but only as to condition. . . . In such cases, the inquiry consistently turns not on where the vessel is located, but on how it has been safeguarded and secured."

Continuing, the court demolished the last contention of the assured; i.e., that he was entitled to recover under the Inchmaree Clause of the policy on grounds that the master's negligent failure to lay-up the vessel was the proximate cause of the loss. Observing that the trial court had found that the master, Gentry, had not been negligent but that the difficulties had been occasioned by various malfunctions which the vessel had experienced, the court of appeals concluded that it was not "clearly erroneous" for the district court to find that failure to continue the voyage to Charleston for layup was not negligent.

In Liberian Insurance Agency, Inc. v. Mosse, discussed earlier on another point, enamelware was insured in a policy decribing it as "cups and plates in wooden cases." Actually, the enamelware was packed in cartons; a considerable amount of it was painted over and, finally, as it turned out, the enamelware was a job lot bought at a cheap price. Findings having been made to this effect by the court, and upon his conclusion that there was non-disclosure, the assured's fall-back position was the clause of the policy reading:

> "Held covered at a premium to be arranged in case of change of voyage or of any omission or error in the description of the interest, vessel or voyage."

The policy (on Institute Cargo Clauses, All Risks) also contained a note stating:

> "It is necessary for the assured when they become aware of an event which is 'held covered' under this insurance to give prompt notice to Underwriters and the right to such cover is dependent upon compliance with this obligation."

The assured, therefore, contended that there having been a discrepancy in the description of the cargo as insured and that found as a fact by the court, he could avail himself of the held covered clause to extend the coverage and thereby correct the discrepancies.

Justice Donaldson did not buy this argument but in the course of ruling, laid down some guidelines for the application of the held covered clause as follows:

(1) An assured seeking the benefit of the clause must give prompt notice to the Underwriters of his claim to be held covered as soon as he learns of the facts which render it necessary for him to rely upon the clause.

(2) It is no obstacle to the operation of the clause that it will defeat the Underwriters' right to avoid the contract for non-disclosure or mis-description.

(3) The assured cannot take advantage of the clause if he has not acted in the utmost good faith.

(4) The clause does not contemplate any alterations in the terms of the insurance other than in respect of premiums.

(5) The clause only applies if the premium to be arranged would be such as could properly be described as a "reasonable commercial rate."

The second proposition, I am told, caused some little surprise in the London market. However, so long as the second proposition is read in conjunction with the third; i.e., the assured must be acting in good faith - which presupposes that the non-disclosure or mis-description was inadvertent and not intentional - then the reasoning would appear to be proper.

In the event, the assured failed because no prompt notice was given. The court also held that even if prompt notice had been given, the underwriters would not have quoted a reasonable commercial rate on the same terms.

"P & I Policies and Privity"

I would be remiss if I did not call attention to Compania Maritima San Basilio S.A. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. (The Eurysthenes).(39)

That case involved P & I cover in which the vessel/owner/member was confronted with third party cargo claims following the vessel's stranding. The club resisted on grounds that the vessel was under-manned, her charts were out of date, her echo sounder was out of order and she did not have an operative boiler. Thus, underwriters contended, the vessel was unseaworthy, and the plaintiff member was privy to that unseaworthiness, under Section 39(5) of the Marine Insurance Act, reading:

> "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the Assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

At first instance, it was held that in principle the provisions of the Marine Insurance Act do apply to P & I insurance as respects shipowners' liability. Consequently, Sec. 39(5) was applicable if the underwriters' contention as to unseaworthiness and privity was sustained.

The owners of the vessel argued that they were only to be deprived of their indemnity if they had been guilty of wilful misconduct in deliberately or recklessly sending the ship to sea knowing she was unfit. The club, on the other hand, argued that their member had no right of indemnity if their "alter ego" ought to have known the ship was not reasonably fit to be sent to sea yet nonetheless sent her to sea.

The Court of Appeal held unanimously that to lose his coverage by reason of the breach of the warranty contained in Sec. 39(5) the assured must have not only knowledge of the facts which constituted the unseaworthiness but also knowledge that those facts rendered the vessel unseaworthy. Although acknowledging that an assured could not turn "a blind eye" to the recognition that certain facts constituted unseaworthiness, the court clarified its meaning in the language of Lord Denning, which warrants repeating:

> "If the owner of a ship says to himself: 'I think a reasonably prudent owner would send her to sea with a crew of 12. So I will send her with 12,' he is not privy to unseaworthiness, even though a Judge may afterwards say that she ought to have 14. He may have been negligent in thinking so, but he would not be privy to unseaworthiness. But, if he says to himself 'I think that a reasonably prudent owner would send her to sea with a crew of 12, but I have only 10 available, so I will send her with 10,' then he is privy to the unseaworthiness, if a Judge afterward says he ought

to have had 12. The reason being that he knew she ought to have had 12 and consciously sent her to sea with 10."

It will be remembered that the American rule as to seaworthiness in a time policy is expressed in the negative; i.e., that the owner, from bad faith or neglect, will not knowingly permit his vessel to break ground in an unseaworthy condition, the consequence of which is a denial of liability if the loss or damage was caused proximately by such unseaworthiness.(40)

Unexplained Sinkings

There appears to be general agreement among English, Commonwealth, and American courts that when a vessel sinks in calm water and calm weather while in port or within a short time afer sailing, there is a presumption that the vessel was unseaworthy and that the unseaworthiness was the proximate cause of the loss.(41)

Where, however, the assured goes forward and proves that the vessel was seaworthy at the commencement of the voyage or period of time covered by the policy, the majority of the courts hold that a counter-presumption arises that the loss was either (1) due to perils of the sea, or (2) due to a cause embraced within the Inchmaree Clause - assuming such a clause appears in the policy.(42)

But, this appears to be the case only where the cause of the loss is simply unknown. Where the cause can be deduced, or where the assured fails to adduce evidence which was available to him from which it would be reasonable to assume that the cause could be ascertained, the duty still falls upon the assured of proving that the loss occurred due to an insured peril.(43)

Raising the Counter-Presumption

At the outset it must be recognized that the assured has the continuing burden of proving peril and causation. In a classic "unexplained sinking" case, to this burden is added the presumption of the vessel's unseaworthiness.

At this point, if the insured fails to offer rebuttal evidence showing vessel seaworthiness, the initial presumption of unseaworthiness prevails.

What happens once the assured produces substantial evidence of seaworthiness? The general rule appears to be that the assured has made out a prima facie case. After that, even assuming the underwriter does nothing more, it becomes a fact question. The trier of fact is then to weigh the circumstances of the unexplained sinking along with the assured's evidence of seaworthiness.(44)

This does not prevent, however, the underwriter from proffering a reasonable explanation for the sinking which, of course, must tend to show that the proximate cause of the loss was either not a peril of the sea, or, that it was an excepted peril. Clearly, however, the underwriter's explanation must be supported by some evidence; merely arousing a suspicion will not do. This is demonstrated in Wenhold v. Royal Ins. Co.(45) In that case, the defense was misconduct of the assured. The best the underwriter could do was to arouse a strong suspicion that the vessel had been scuttled. It was proved that the

owner (and master) was heavily indebted. While acknowledging that such evidence might well raise a suspicion, the court nonetheless held:

> "But suspicion, even strong suspicion, is not an acceptable substitute for proof by a preponderance of evidence."

If the insured offers no countering explanation, or if, taken on balance, the evidence is in equipoise, then the assured has failed in his ultimate burden of persuasion and there is no recovery.(46)

Logically, an unexplained sinking inevitably triggers thought on the part of the underwriters of raising available defenses; i.e., that the loss occurred through no peril of the sea, breach of the warranty of seaworthiness, or misconduct on the part of the assured. To counter the first two of these defenses, the assured will normally seek to prove seaworthiness at a time and place as closely as possible to the event of sinking. On the breach of warranty issue (in a voyage policy), the misconduct of the assured (in a time policy), the proximity in time is relatively unimportant since the material inquiry is seaworthiness (or lack of fault or privity) as of the inception of the voyage. Clearly, in proving seaworthiness, the assured will concentrate on proof in time as closely as possible to the sinking; i.e., the more immediate in time the more probative the proof for the assured.

Types of Proof of Seaworthiness

Proof of seaworthiness may be direct or circumstantial evidence.(47) Generally speaking, the kinds of

evidence include facts such as a large amount of repairs recently done, careful survey recently made, excellent conduct of the vessel up to a time immediately preceding the loss, newness of the vessel, and findings as to the vessel immediately following her raising.(48)

Effect of Negligence

Although an owner/assured's lack of due diligence may defeat a claim under the Inchmaree Clause, such a lack (even if equated with negligence) is no defense to coverage under the perils clause. Only if water entered the hull as a result of the assured's own wilful misconduct can human negligence defeat a perils claim.(49)(50)

"Mystery" Sinking

As discussed, there are "unexplained" sinkings. The term seems to refer to instances in which vessels sink in calm or sheltered waters or fair weather with neither insured nor underwriter establishing, or being able to establish, the cause of the loss. But where vessels sink in port and are raised, some logical explanation usually surfaces after inspection such as a broken pipe, a hole in the hull, an open valve or the like. I know of only one case in which a sinking in port occurred and the vessel was raised and inspected and still the cause of the sinking could not be determined. Nor were any really viable theories advanced by either assured or underwriters as to the cause of the sinking. I choose to call this a "mystery" sinking, and it is unlike any sinking of which I have ever heard.

The case is a recent one, Riverport Seafoods Limited v. Insurance Company of North America, et al, Federal Court of Canada, Trial Division, No. T-68-76, decided October 1, 1981 (not yet reported).

There, a large fishing trawler, the J. E. Kenney was moored port-side to the dock unloading her catch. She normally had a slight list to port when operating. She also had two large ballast tanks, one port and one starboard, alongside the stern trawl ramp. Just prior to coming to port, both ballast tanks, unaccountably, filled. They were pumped empty. They refilled in a period of between 8 and 12 hours. This was not regarded as dangerous as there was no sign of water escaping from the tanks into the hull and the full tanks merely rendered the vessel a bit sluggish when underway.

After arriving at the dock and commencing her unloading, the starboard tank was again inspected, no leak was found, and the tank was left full to see if leakage from it occurred overnight. The port tank had been drained and left empty but was not inspected. By late afternoon on the first day in port, the vessel's list had increased from several degrees to about five degrees but no one seemed to be alarmed.

Sometime after midnight, the vessel sank by the stern. Upon being raised, she was inspected but not one expert or knowledgeable seaman who examined her was able to testify to any lack of integrity in her hull which would account for the entry of water up to the point where obvious deck openings would permit the incursion of water.

Even the trial judge examined her and he was unable to come up with any logical explanation for her sinking.

The parties were agreed that the insurance policy was to be construed in accordance with English law; i.e., the onus was on the plaintiff to establish a prima facie case that the vessel sank because of a peril insured against and only after that must the underwriter show that she sank from a cause not covered.

Citing Marion Logging v. Utah Home Fire Insurance Co., [1956] 5 D.L.R.(2d) 700, the court held that where the evidence is in equipoise and the court is left in doubt as to whether the loss was due to a peril insured against or to a cause not covered by the policy, then the plaintiff has failed in his burden of proving his case and there was judgment for the underwriter. The court said, in part:

> " . . . While it might be different in the case of a vessel at sea, there is no basis for inferring, without the weight of the evidence pointing in that direction, that the proximate cause of the sinking of a vessel in the Kenney's situation was more probably a peril insured against than one not covered by the policy."

Interestingly, there was no discussion in the court's reasons for judgment as to presumptions of seaworthiness or unseaworthiness. While the court seemed to accept, implicitly, that the vessel was seaworthy immediately prior to sinking, and the underwriter certainly advanced no reasonable theories for a sinking due to an unexpected cause, nonetheless recovery was denied. Personally, from the tenor of the court's decision, I have my own theory which is that the owners

and operators of the vessel displayed such an incredibly casual attitude toward the undeniable listing of the vessel that the court felt it would be unjust to award recovery. Another instance of perhaps bad law but good justice.

In conclusion on unexplained sinkings, may I commend to you the outstanding paper delivered on this subject at the Second International Maritime Law Seminar in Vancouver, B.C. in June, 1981.(50) The analysis of the law on the subject is exhaustive, penetrating and cogent and all the principal cases are discussed.

Maritime Fraud

The classic case of attempted maritime fraud in the United States is Padre Island (Stranding).(51) That case, involving the constructive total loss of a tankship by stranding in the Bahamas, also proves the old adage that if at first you don't succeed, try, try again.

There, the vessel departed from a brief layover in Freeport, Bahamas, bound for Pascagoula, Mississippi. From the time the vessel departed until approximately three and a half hours later when she first stranded, only the master was on the bridge. Notwithstanding the proposed course would have taken the vessel safely past any hazardous points, she inexplicably ran aground on the west side of Hen and Chicken Rocks.

Unfortunately (for the master and owners) a nearby lighthouse keeper was an eye-witness to the stranding. After daybreak, about two hours after the stranding,

he and five other people went in a small vessel out to the Padre Island to see if they could be of any assistance. A ladder was thrown down to them and one of the parties started to climb aboard. Suddenly a man, appearing to be the master of the vessel, ran over and shouted down for them to get away, get off, we don't need any help and if you come aboard we'll cut your throats. Quite sensibly, the six men left the vicinity of the ship but continued to observe her. Shortly thereafter, the vessel moved away from the rocks and was afloat with her bow headed in a general northwesterly direction toward deep water.

Instead, according to the testimony of the eye-witnesses, after some rather difficult and intricate maneuvering, the vessel turned around and once again grounded, this time on the east side of the rocks.

At the time of the stranding, the vessel was insured for $750,000. She was encumbered by a mortgage for $375,000. The evidence showed that her owners had inquired about a sale but the best offer they could get was about $350,000. The corporate owner was in dire financial straits and the evidence showed that to continue operations would require about $200,000....which the owners did not have and which they could not obtain through further loans. The evidence further showed that the actual purchase price of the vessel only 14 months prior was $405,000. However, when the $375,000 was borrowed from the mortgagee, it was represented that the sales price was $505,000 with $100,000 having been paid

down by a cashier's check. In fact, only $50,000 had been paid down.

But the plot thickens. The evidence also showed that shortly before the vessel left Freeport, the port captain for the corporate owners, one Captain Stratakis, showed up and went aboard the vessel where he delivered over to the master $20,000 in cash. The port captain left the vessel shortly before it departed on its ill-fated voyage.

It further appears that the principal stockholders in the owning corporation remained on friendly terms with the port captain and the master after the stranding. When one of these stockholders, a Mr. Swantner, went to the Bahamas to see the stricken vessel, he was, in the court's words, "laughing, drinking, and obviously joyous over the event."

The court felt that the failure of the principal stockholders to be concerned about the mysterious $20,000 which was delivered to the master by Captain Stratakis was contrary to human nature. As the court noted, the almighty dollar is too beloved by the heart of man to be parted with so lightly. The failure to call as a witness any crewmember on the vessel, other than the master, as well as the inability of the owner to produce vital records concerning the vessel, also impressed the court.

As one might expect, the court found that the plaintiff owner had failed to prove a loss by an insured peril. The plaintiff mortgagee, whose right to recover stood or fell on the right of the plaintiff owner, was also denied recovery.(52)

"The Case of the Frustrated Girlfriend"

Thieves and crooks often come a cropper because they fail to honor their obligations in a timely fashion. In this tale of a tardy boyfriend (permanently I might say), I must leave out names of the parties and the places of occurrence as both civil and criminal cases are now pending and have not yet been resolved.

In April, 1980, residents of a small port on the coast of Oregon were surprised to see a large and expensive combination yacht and charter fishing vessel not only stranded on the rocks near the entrance of the bay but some 10 to 12 feet up on the rocks. Needless to say, the vessel was a total loss.

The body of a man was found floating in the sea not far from the scene of the accident. The owner, who was conveniently in California, was notified of the loss of his vessel and within a short time appeared on the scene. In due course a Proof of Loss was filed with the insurance company underwriting the risk. In the Proof of Loss, the owner claimed that his vessel had been stolen by parties unknown and driven upon the shore.

In the investigation which followed, the facts began slowly to unfold. The owner was in serious financial difficulties and, in fact, had been seeking a purchaser for the vessel. A "balloon" payment was due shortly on the mortgage of the vessel. The body found floating in the sea turned out to be a friend of the owner who had occasionally served as a crewman on the vessel. When he was identified, his girlfriend appeared. She told a

fascinating story. It seems that her boyfriend had, on the evening the vessel was "stolen," failed to show up for a date. He did, however, leave her a note stating, in substance, that the owner of the vessel had hired him to sink her for which he was being paid $2,000 and that as soon as he had completed the job, he would return. She also reported that when the owner first appeared on the scene, she had accosted him. She mentioned the note she had received. The owner offered her $10,000 to "keep quiet." Her statement was taped by the underwriters' investigator.

Ultimately, the local prosecuting attorney brought the matter before the grand jury and she was subpoenaed. While waiting to testify, the law enforcement officials persuaded her to call the vessel owner on the telephone....which was taped of course. When she did so, the owner said he could not talk but would call her back. He did so in fifteen minutes. She inquired about the $10,000 whereupon the owner replied that the insurance company had not paid off yet but that he would pay her when the insurance funds were received.

Incredibly, when the insurance company's counsel took the deposition of the vessel owner, he was shown a typed transcript of the taped conversation and admitted that the transcription was correct.

Two mysteries initially plagued the authorities. How did the vessel get so far up on the rocks and, having done so, why did not the person involved simply clamber up the rocks and walk home rather than succeeding in

drowning himself? The autopsy threw some light on the questions. It showed that the deceased had a sufficiently high blood alcohol level that if drowning had not done him in, his inebriation might well have done so. Moreover, reconstructing the event showed that the vessel probably went ashore at high tide and examination of the vessel's engines indicated that they had been shaken to pieces by being operated at maximum speed even after the vessel went up on the rocks. The speculation is that the deceased wandered off the rocks in his drunken condition, fell in the ocean and was too drunk to swim.

I leave it to your imagination as to how the insurance claim will be finally resolved. I also leave you with these admonitions if you wish to sink your vessel for the insurance proceeds:

(1) Be sure it is sunk....not driven ashore where it can be inspected;

(2) Employ a teetotaller....preferably one without romantic inclinations, without a current girlfriend, and who is unable to read and write;

(3) If you have to pay "hush" money, pay it promptly ....delay, as in an insurance policy, can be devastating; and

(4) Disconnect your telephone.

(1) The classic form of the perils clause seems to have first surfaced in Whyte v. Besswicke, File 37, No. 74 (1563), Select Pleas in the Court of Admiralty, Vol. II, A.D. 1547-1602, Selden Society, where the goods were insured against

> " . . . the danger of the sea from fire and water, men of war, enemies, corsairs, pirates, thieves, letters of mart, barratry of masters and mariners, jettisons, retainment by king or prince or by any by their authority or by any other person or persons whomsoever and from all other perils and dangers whatsoever."

See, also, the text of the 1613 policy on the Tiger, Tanner MS No. 74, folio 32, Bodleian Library, Oxford.

(2) Sir Frederick Pollock characterized the ancient form of policy as being "clumsy, imperfect and obscure." It has been variously described as "a very strange instrument" (Le Cheminant v. Pearson, 4 Taunt. 367, 128 E.R. 372), "an absurd and incoherent instrument" (Brough v. Whitmore, 100 E.R. 976) and "like woman, 'fearfully wondrously wrought'" (Ferrante et al v. Detroit F. & M. Ins. Co., 1954 A.M.C. 2026, 125 F.Supp. 621). Justice Frankfurter, in Calmar S.S. Corp. v. Scott, 345 U.S. 427 (1952) said:

> "Construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of obscure palimpsest texts . . . nor have we any Elder Brethren of Trinity House to help us. . . . "

Chief Justice Charles Doe of the New Hampshire Supreme Court in Delaney v. Insurance Company, 52

N.H. 581 (1873) described an insurance policy as follows:

> " . . . it was printed in such small type and in lines so long and so crowded, that the perusal of it was made physically difficult, painful and injurious. Seldom has the art of typography been so successfully divested from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot . . . "

The court in City Stores v. Sun Insurance, 1973 A.M.C. 44, 357 F.Supp. 1113 (S.D. N.Y.), characterized an open cargo policy as being "so prolix, diffuse and confused that it is a mystery how business can be conducted with such a verbal mishmash." In Joseph H. (Stranding), 1976 A.M.C. 1565, 411 F.Supp. 951 (M.D., Fla.), the court noted that " . . . the less than lucid language of the traditional hull policy remains somewhat inexplicable in today's world."

Justice Mocatta in Panamanian Oriental Steamship Corp. v. Wright (The Anita), Q.B. [1970] 2 Lloyd's Rep. 365, on appeal [1971] 1 Lloyd's Rep. 487, after wrestling with the "tortuous complexities" of the F.C. & S. Clause, asked plaintively " . . . whether it was really beyond the wit of Underwriters and those who advise them, in this age of law reform to devise more straightforward and easily comprehended" war risk cover.

(3) Report by the UNCTAD Secretariat, "Legal and Documentary Aspects of the Marine Insurance Contract," TD/B/C.4/ISL/27, 20 November 1978 (Para. 113). See,

also, Report of the Working Group on International Shipping Legislation on its Seventh Session, Trade and Development Board, Committee on Shipping, Tenth Session, UNCTAD, TD/B/C.4/219, TD/B/C.4/ISL/32, 26 January 1981.

(4) Ibid., Para. 245.

(5) This startling conclusion was reached despite the fact that shippers from the "developing" nations seem to be quite happy to pay the London market handsome premiums and endure slightly harsher terms merely because that market provides efficient service and prompt claims handling - something which experience tells us does not always characterize the state-owned/controlled marine insurance concerns operating in the "developing" countries; despite the fact that insurance companies in most "developing" countries were using, word for word, the London Institute Clauses; and despite the fact that redrafting clauses does not always improve comprehensibility.

(6) Note the distinction between the first class of named risks (reasonably attributable to) versus the second class of risks (caused by).

(7) Clause 5, "War Exclusion Clause," is identical to the F.C. & S. Clause [Clause 12] in the Institute Cargo Clauses (F.P.A.), Institute Cargo Clauses (W.A.), and the Institute Cargo Clauses (All Risks), except slight changes in the last paragraph to reflect that if the insurance is extended to cover risks excluded by Clause 5, the relevant current Institute War Clauses shall form part of the insurance.

(8) Clause 6, "Strikes Exclusion Clause," is identical to the S.R. & C.C. Clause [Clause 13] of the Institute Cargo Clauses (F.P.A.), Institute Cargo Clauses (W.A.), and the Institute Cargo Clauses (All Risks), except slight changes in the last paragraph to reflect that if the insurance is extended to cover risks excluded by Clause 6, the relevant current Institute Strikes, Riots and Civil Commotion Clauses shall form part of the insurance.

(9) This distinctive difference between the "A" form on the one hand, and the "B" and "C" forms on the other, is commented on hereafter.

(10) Nor, would it seem that such unloading, storing and forwarding charges would be recoverable in the case of perishable goods requiring, for instance, discharge, storage in a reefer and forwarding on to destination in a refrigerated compartment where such steps were necessary because of a delay consequent upon an

insured peril operating upon the venture and causing a particular average loss. See, Clause 4.4 excluding claims caused by inherent vice or nature of the subject-matter insured, and Clause 4.6 excluding claims arising from loss, damage or expense proximately caused by delay (except general average and salvage charges mentioned in Clause 2).

(11) (1868) L.R. 4 C.P. 117.

(12) (1854) 156 E.R. 342.

(13) (1940) 4 All E.R. 169, (1941) A.C. 55, 67 Ll.L.Rep. 549, P.C.

(14) Shell International Petroleum Co. Ltd. v. Gibbs (The Salem), [1981] 2 Lloyd's Rep. 316. Parenthetically, it should be mentioned that the Court of Appeal reversed, in substantial part, Mustill's decision in The Salem on November 18, 1981. Since form "A" is on an "all risks" basis and no exclusion appears in that form with respect to "wrongful acts of any person or persons," one must presume that coverage would have been provided for the cargo owner's loss under form "A."

(15) (1851) 6 Exch. 451, 155 E.R. 620.

(16) Elsewhere in the policy, there are references to the "Assured or their servants or agents." The language in Clause 4.3 refers only to the "Assured or their servants." The answer devolves on a on a narrow distinction between the Assured's "servant" and the term "agent." Is an independent contractor in these circumstances an "agent" or a "servant"?

(17) Subject, of course, to Clause 9, "Termination of Contract of Carriage Clause," requiring prompt notice to underwriters.

(18) 1979 A.M.C. 2534, 600 F.2d 1040 (CA 4).

(19) 1980 A.M.C. 2823 (E.D. Va.).

(20) 264 Or. 314, 505 P.2d 914 (St. Or. 1973).

(21) British and Foreign Marine Ins. Co. v. Gaunt [1921] 26 Com. Cas. 247, [1921] 2 A.C. 41, H.L.

(22) F. W. Berk & Co., Ltd. v. Style [1955] 2 Lloyd's Rep. 382; Liberian Insurance Agency, Inc. v. Mosse [1977] 1 Lloyd's Rep. 560.

(23) Greene et al v. Cheetham, 1961 A.M.C. 2549, 293 F.2d 933 (C.A. 2) (inherent vice in the cargo of fish, i.e., unfit prior to the inception of the policy).

(24) London & Provincial Leather Processes Ltd. v. Hudson, (1939) 2 K.B. 724, 64 Ll.L.Rep. 352, 55 T.L.R. 1047; Australia & New Zealand Bank Ltd. v. Colonial & Eagle Wharves, Ltd. & Boag (Third Party) [1960] 2 Lloyd's Rep. 241; Nishina Trading Company Ltd. v. Chiyoda Fire and Marine Insurance Co., Ltd. [1969] 1 Lloyd's Rep. 293.

(25) [1980] 1 Lloyd's Rep. 491.

(26) Fuerst Day v. Orion Insurance Co., Ltd. [1980] 1 Lloyd's Rep. 656.

(27) 1975 A.M.C. 2066 (N.Y. M.).

(28) 1976 A.M.C. 2253 (S.D. N.Y.).

(29) American Casualty Co. v. Ricas, 179 Md. 627, 22 A.2d 494 (1941); Mooney v. Underwriters at Lloyd's London, 54 Ill.App.2d 237 (1964), 204 N.E.2d 51, rev'd on other grounds, 33 Ill.2d 566, 214 N.E.2d 283 (1965); Universal Ins. Co. v. Manhattan Motor Line, 82 Cal.App.2d 425, 186 P.2d 437 (1947); Osborn v. Ozlin, 310 U.S. 53 (1940); Morris McGraw Wooden Ware Co. v. German F. Ins. Co., 126 La. 32, 52 So. 183 (1910); Karam v. St. Paul F. & M. Ins. Co. (La. App.), 265 So.2d 821 (1972), aff'd 281 So.2d 728 (1973), 72 ALR3d 697 (La. 1973); Chicago v. Barnett, 404 Ill. 136,

88 N.E.2d 477 (1949); Assiniboia Corp. v. Chester (Del. Sup.), 355 A.2d 873 (1974), aff'd 355 A.2d 880 (Del. 1976); Ross v. Thomas, 45 Ill.App.3d 705, 360 N.E.2d 126 (1977); McFarlang v. Demco, Inc., 546 P.2d 625 (Okla. 1976); Lynn v. West City, 36 Ill.App.3d 561, 345 N.E.2d 172 (1976); Dudley v. Inland Mut. Ins. Co., 330 F.2d 112 (C.A. 4, 1963); Seamans v. Knapp-Stout & Co., 89 Wis. 171, 61 N.W. 757 (1895); United Firemen's Ins. Co. v. Thomas, 82 F. 406 (1897), aff'd 92 F. 127 (C.A. 7, 1899).

(30) Empress Assur. Corp., Ltd. v. C. T. Bowring & Co., Ltd. (1905) 11 Com. Cas. 107; Glasgow Assur. Corp., Ltd. v. William Symondson & Co. (1911) 104 L.T. But if the broker makes an actively misleading statement, then the underwriter may have an action against him under Hedley Byrne v. Heller (1964) A.C. 465.

(31) Ruby (Hurona), 1927 A.M.C. 714, 18 F.2d 948 (C.A. 2); Yellowtail, 1938 A.M.C. 499, 22 F.Supp. 545 (S.D. Cal.); Arkwright-Boston v. Bauer, 1978 A.M.C. 1570 (S.D. Tex.); Edinburgh Assur. v. R. L. Burns, 1980 A.M.C. 1261, 479 F.Supp. 138 (C.D. Cal.).

(32) Id., n. 31.

(33) [1980] 1 Lloyd's Rep. 338.

(34) [1979] 26 A.L.R. 1 (H.C., Aus.).

(35) 1981 A.M.C. 881 (Sup. Ct., B.C.).

(36) Wilson, Sons & Co. v. Xantho (Cargo Owners) (1887) 12 App.Casl. 503 (H.L.); Canada Rice Mills, Limited v. Union Marine and General Insurance Company Ltd. (1941) A.C. 55; Cohen, Sons & Co. v. National Benefit Assurance Company Ltd. (1924) Ll.L.Rep. 199.

(37) Campbell v. Hartford Fire Insurance Co. (The Tinkerbell), 1976 A.M.C. 799, 533 F.2d 496 (C.A. 9).

(38) Liberian Insurance Agency, Inc. v. Mosse [1977] 2 Lloyd's Rep. 560.

(39) [1976] 2 Lloyd's Rep. 1171, C.A.

(40) Compare, in this respect, The T. W. Lake (Hanover Fire Ins. Co. v. Merchants Transp. Co.), 1927 A.M.C. 1, 15 F.2d 947 (C.A. 9), and Sorenson & Nielsen v. Boston Ins. Co., 1927 A.M.C. 1288, 20 F.2d 640 (C.A. 4), with Edgar F. Coney and Tow, 1941 A.M.C. 262, 117 F.2d 694 (C.A. 5) and The Morro Castle (P. & I. Insurance), 1941 A.M.C. 243, 117 F.2d 404 (C.A. 2). The strict construction by the court in Morro Castle of the term "privity" led to a deletion of the "fault or privity" clause from American P & I policies. In fact, in 1941, the U. S. Maritime Commission required, by order, the deletion of all "privity" clauses in respect of vessels

in which it had an interest. See 1941 A.M.C. 429 for the text of the order. See, also, Martin & Robinson v. Orion Insurance Co., 1971 A.M.C. 515 (St., Cal.).

Footnotes - unexplained sinkings

(41) Anderson v. Morice (1876) 1 A.C. 713; Watson v. Clark (1813) 3 E.R. 720, H.L.; Pickup v. Thames & Mersey Marine Ins. Co., Ltd. (1878) 3 Q.B.D. 594, C.A.; Ajun Goolam Hossen & Co. v. Union Marine Ins. Co. (1901) A.C. 362, P.C.; Coons v. Aetna Ins. Co. (1868) 18 U.C.C.P. 305 (Can.); Myles v. Montreal Ins. Co. (1870) 20 U.C.C.P. 283 (Can., C.A.); Ewart v. Merchants' Marine Ins. Co. (1789), 13 N.S.R. 168 (Can., C.A.); Rogerson v. Union Marine Ins. Co. (1870) 6 Nfld. L.R. 359 (Can.); W. Langley & Sons Ltd. v. Australian Provincial Assur. Ass'n, Ltd. (1924) 24 S.R. (N.S.W.) 280, 41 W.N. 46, N.S.W. Sup. Ct., F.C. (Aus.); Reynolds v. North Queensland Ins. Co. (1896) 17 L.R. (N.S.W.) 121, 13 W.N. 1 (N.S.W. Sup. Ct., F.C., Aus.); Skandia Ins. Co. v. Skoljarev (1979) 26 A.L.R. 1 (H.C., Aus.); Massey S.S. Co. v. Importers' & Exporters' Ins. Co., 153 Minn. 88, 189 N.W. 415, 31 A.L.R. 1372 (1922); Sea Pak, 1957 A.M.C. 1946, 247 F.2d 116 (C.A. 5); Cary v. Home Ins. Co., 1923 A.M.C. 438, 199 App.Div. 122, aff'd 235 N.Y. 296, 139 N.E. 274; Boston Ins. Co. v. Dehydrating Process Co., 1953 A.M.C. 1364, 204 F.2d 441 (C.A. 1); Mattson v. Connecticut Fire Ins. Co., 80 F.Supp. 101 (D. Minn.); Watson v. Providence

Washington Ins. Co. (The Bertie Kay), 1952 A.M.C. 1812, 106 F.Supp. 244 (E.D. N.C.); Glens Falls Ins. Co. v. Long, 1953 A.M.C. 1841, 195 Va. 117, 77 S.E.2d 457; Pacific Dredging Co. v. Hurley, 1965 A.M.C. 836, 397 P.2d 819 (St., Wash.); Lewis v. Aetna Ins. Co., 264 Or. 314, 505 P.2d 914 (St., Or. 1973); Heindl-Evans v. Reliance Ins. Co., 1980 A.M.C. 2823 (E.D. Va.).

(42) Anderson v. Morice, id., n. 41; Ajum Goolam Hossen & Co. v. Union Marine Ins. Co., id., n. 41; Ewart v. Merchants' Marine Ins. Co., id., n. 41; Morrison v. N.S. Marine Ins. Co. (1896) 28 N.S.R. 346 (Can., C.A.); W. Langley & Sons Ltd. v. Australian Provincial Assur. Ass'n, Ltd., id., n. 41; Reynolds v. North Queensland Ins. Co., id., n. 41; Massey S.S. Co. v. Importers' & Exporters' Ins. Co., id., n. 41; Sea Pak, id., n. 41; Glens Falls Ins. Co. v. Long, id., n. 41; Glens Falls Ins. Co. v. Long, id., n. 41; Boston Ins. Co. v. Dehydrating Process Co., id., n. 41; Lewis v. Aetna Ins. Co., id., n. 41; Capital Coastal v. Hartford Fire, 1974 A.M.C. 2039, 378 F.Supp. 163 (E.D. Va.), (1975) 2 Lloyd's Rep. 100; Heindl-Evans v. Reliance Ins. Co., id., n. 41; Skandia Ins. Co. v. Skoljarev, id., n. 41.

(43) Long Dock Mills, etc. v. Mannheim Ins. Co., 116 F. 886 (S.D. N.Y. 1902); Watson v. Providence Washington Ins. Co. (The Bertie Kay), id., n. 41; Fine v. American

Eagle Fire Ins. Co., 1942 A.M.C. 96, 178 Misc. 27, 32 N.Y.S.2d 21 (1941), aff'd 180 Misc. 789, 46 N.Y.S.2d 512 (1943); Heindl-Evans v. Reliance Ins. Co., id., n. 41; D. J. McDuffie, Inc. et al v. Old Reliable Fire Ins. Co., 1979 A.M.C. 595 (E.D. La.), aff'd 1980 A.M.C. 1886, 608 F.2d 145 (C.A. 5); Pacific Dredging Co. v. Hurley, id., n. 41.

See, in connection with instances in which the cause of the sinking can be deduced and such causes are not a "covered" peril, Reliance Ins. Co. v. Brickenkamp, 1963 A.M.C. 792 (St., Fla.) (improperly tensioned water pump drive not a latent defect); Larsen v. Ins. Co. of America, 1965 A.M.C. 2576, 252 F.Supp. 458 (W.D. Wash.) (breaking off of a suction pipe which allowed a hold to flood not a latent defect); Presti v. Firemen's Ins. Co., 1972 A.M.C. 1220 (St., Cal.) (defect resulted from normal wear and tear); Texas No. 1, 1940 A.M.C. 1106, 112 F.2d 541 (C.A. 5) (defects in barge were patent - not latent); Irwin v. Eagle Star Ins., 1973 A.M.C. 1184, 455 F.2d 827, (1973) 2 Lloyd's Rep. 489 (C.A. 5) (defect resulting from joining brass and iron in a fitting not a latent defect, but mere error causing an elecrolysis); Wood v. Great American, 1968 A.M.C. 1815A, 289 F.Supp. 1014 (E.D. Wis.) (defect in rubber hose held due to ordinary wear and tear); Parente v. Bayville Marine, 1974 A.M.C. 1399 (N.Y. A.D.), (1975) 1 Lloyd's Rep. 333 (result of normal wear and tear

and corrosive effect of sea water not a latent defect); By's Chartering v. Interstate Ins., 1976 A.M.C. 113, 524 F.2d 1045 (C.A. 1) (defective hose result of wear and tear); Sipowicz v. Wimble (The Green Lion), 1975 A.M.C. 524, 370 F.Supp. 442, (1974) 1 Lloyd's Rep. 593 (D. N.Y.).

(44) Moores v. Louisville Underwriters, 14 F. 226 (W.D. Tenn. 1882); Anderson v. Morice, id., n. 41; W. Langley and Sons, Ltd. v. Australian Provincial Assur. Ass'n, Ltd., id., n. 41.

(45) 197 F.Supp. 75 (D. Mass. 1961).

(46) Compania Martiartu v. Royal Exchange Ass'n (1923) 1 K.B. 650, 92 L.J.K.B. 546, 16 Asp. M.L.C. 189; Northwestern Mutual Life Ins. Co. v. Linard (The Vainqueuer), 1974 A.M.C. 877, 498 F.2d 556 (C.A. 2), (1974) 2 Lloyd's Rep. 398; Astrovianis Compania S.A. v. Linard (The Gold Sky), (1972) 2 Lloyd's Rep. 187, 2 Q.B.D. 611.

(47) Morrison v. Nova Scotia Marine Ins. Co., 28 N.S.R. 346 (Can., C.A. 1896).

(48) Anderson v. Morice, id., n. 41; Fireman's Fund Ins. Co. v. Globe Nav. Co. (The Nottingham), 236 F. 618, 623 (C.A. 9, 1916) (survey); Glens Falls Ins. Co. v. Long, id., n. 41; Zillah Transportation Co. v. Aetna

Ins. Co., 1929 A.M.C. 166, 177 Minn. 398, 221 N.W. 529 (St., Minn.) (surveys and pre-sinking staunch construction); Land v. Franklin National Ins. Co. of N.Y., 80 S.E.2d 420 (St., S.C. 1954) (evidence of recent repairs and successful trial runs); Mattson v. Connecticut Fire Ins. Co. of Hartford, 80 F.Supp. 101 (D. Minn. 1948) (condition survey prior to attachment and during a period of repairs; also, evidence that the vessel had weathered similar weather conditions on earlier voyages in the same waters); Boston Ins. Co. v. Dehydrating Process Co., id., n. 41; Parkhill-Goodloe v. Home Ins. Co. (Dredge Ideal), 1976 A.M.C. 951 (M.D. Fla. 1975) (vessel raised, inspected, and found to be seaworthy).

(49) Pennsylvania R.R. Co. v. Mannheim Ins. Co., 56 F. 301 (S.D. N.Y. 1893); Frederick Starr Construction Co. v. Aetna Ins. Co., 1961 A.M.C. 342, 285 F.2d 106 (C.A. 2); Dixon v. Sadler (1839), 151 E.R. 172, aff'd (1841), 11 L.J. Ex. 435, Ex. Ch.; Blackburn v. Liverpool, Brazil and River Plate Steam Navigation Co. (1902) 1 K.B. 290; Redman v. Wilson (1845), 153 E.R. 562; Olympia Canning Co. v. Union Marine Ins. Co., 10 F.2d 72 (C.A. 9, 1926); New York, N.H. R.R. Co. v. Gray, 1957 A.M.C. 616, 240 F.2d 460 (C.A. 2). See, also, Robertson v. National Ins. Co. of New Zealand, Ltd. (1958) S.A.S.R. 143 (Aus.), holding that the proviso in the Inchmaree Clause

requiring due diligence relates only to coverages provided in that clause and not to other coverages.

(50) "Cruel Sea or Troubled Hull," by Paul N. Wonacott of Nehalem, Oregon.

(51) 1970 A.M.C. 600 (S.D., Tex.), [1971] 2 Lloyd's Rep. 431.

(52) After holding squarely that the principal stockholders in the corporate owner of the vessel had unquestionably been the moving force which ultimately resulted in the stranding, the court continued by observing that even assuming that they had no knowledge of, or complicity with, the stranding, they still could not recover because the knowledge of the port captain, Captain Stratakis, would be imputed to the corporate owner, citing The Spot Pack, 1957 A.M.C. 655, 242 F.2d 385 (CA-5). This followed, the court said, because the port captain had shoreside, managerial responsibility in that he ran the entire operations of the vessel except for the necessity of obtaining approval of the plaintiff corporation for major expenditures. The editors of the new (16th) edition of Arnould, in commenting upon the judgment in The Michael [1979] 1 Lloyd's Rep. 55 that complicity of a marine engineer superintendent in scuttling the vessel would not be imputed to the assured, observed that the view adopted by the court in The Padre Island as to imputation of the port captain's knowledge, would not be followed in England. With all due respect to the learned editors, I disagree.