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PERILS OF THE SEAS

by

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THE PERILS OF THE SEAS

1. Introduction

The expression "the perils of the seas" or equivalent expressions fall to be considered in relation to two quite distinct forms of maritime instrument, bills of lading and charter parties on the one hand, and policies of marine insurance on the other. In bills of lading and charter parties, and in the Hague Rules, the expression is used to describe an exemption clause or an immunity from liability which the carrier or owner may assert against the shipper or charterer. Such a clause is not to be construed liberally, because it enables a party to escape the consequences of a breach of contract. On the other hand, in policies of marine insurance, the expression is used to describe an accident on the occurrence of which the indemnity provided by the policy will attach.

As might be expected, the same facts considered from the point of view of marine insurance can amount to a peril of the sea for which the underwriter will have a liability to indemnify and yet the insured shipowner as carrier may be held to be disentitled from relying on a perils of the sea immunity under a bill of lading.

In part this difference arises from the fact that the immunity of the carrier for loss caused by the perils of the sea is not absolute: In pleading terms, certain replications are available to be pleaded by a plaintiff who is met by a defence that the loss occurred as a result of a peril of the seas.

In insurance law, when the shipowner puts his case on the perils of the seas head of indemnity, the only issue as to causality in the case is, was the loss caused by an insured peril, or was it not. In a bill of lading case, the choice of cause is often more diverse, because the defendant may contend that the cause of the loss was an excepted peril, namely a peril of the sea, but the plaintiff may assert that, even if a peril of the sea was a cause or a contributing cause of the loss, nevertheless a cause amounting to a breach of contract, such as unseaworthiness was also a cause of the loss. If the plaintiff makes out his assertion, the fact that the defendant may also make out his assertion becomes unimportant, for the defendant will still be liable.

The courts have traditionally insisted that even though the finding whether the loss was caused by a peril of the sea might, on the same set of facts, be different in the two classes of case, nevertheless the expression "perils of the sea" means the same in both classes of maritime instrument. See, for example, the three leading "perils of the seas" cases reported successively in (1887) 12 App. Cas.: Thames and Mersey Marine v. Hamilton Fraser (at 484), The "Xantho" (at 503) and Hamilton Fraser v. Pandorf (at 518). That is a somewhat unreal assertion to make, and it means that a judge deciding a perils of the sea case in the context of a bill of lading must keep one eye on the law of maritime insurance, and vice versa. It is also rather a hard assertion to justify, especially because in an indemnity provision, the expression "peril of the seas" is associated with the concept of an "accident", or insured peril, and in a contract of carriage the expression has reference neither to the unintentional nor to the intentional, but rather refers to the kind of danger to which the cargo is exposed.

Upon the question of what is, and what is not, a peril of the sea, it seems that any attempt at formulating a definition has only led in the past to criticism of that definition by judges and textwriters, or both, and as no single criterion or group of criteria has been identified as necessary and sufficient to give rise to a peril of the sea, it will be more useful to examine particular principles and cases in order to determine the scope of the expression.

First, some textual matters should be noticed. Article IV rule 2 (c) of the Hague Rules refers to "perils, dangers and accidents of the sea or other navigable waters". Inland waters are thus within the rule, as must be harbours and docks. The same result will be achieved under the standard form of maritime policy, because that form of policy ends the enumeration of insured perils with the words "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". It has been held that those words are to be read ejusdem generis with the earlier mentioned perils (and today, the Marine Insurance Act, 1909 (Commonwealth), Second Schedule Rule 12 expressly so provides). In Thames and Mersey Marine v. Hamilton Fraser (supra) approval was given by the House of Lords to the decision in Phillips v. Barber (1821) 106 ER 1151 5 B. and Ald. 161 to the effect that loss occasioned by the violence of the wind and weather in port was produced by a peril ejusdem generis with a peril of the sea, and was thus within the "all other risks" indemnity.

Both in marine insurance and in the bill of lading cases, it is clear that damage caused by wear and tear or the ordinary action of wind and waves is outside the expression "perils of the seas": See The "Xantho" (supra, at page 510), and see Rule 7 in the Second Schedule to the Marine Insurance Act, 1909 (Commonwealth).

Marine perils for this purpose comprehend not only bad weather but the striking of a sunken rock, a collision with another vessel, penetration of the hull of the vessel as a result of colliding with an iceberg: See The "Xantho" (supra, at page 509).

In Canada Rice Mills v. Union Marine and General Insurance Co. (1941) AC 55 it was held in the Privy Council that where there is an accidental incursion of seawater into a vessel at a part of the vessel and in a manner where seawater is not expected to enter in the ordinary course of things and there is consequent damage to the thing insured, there is prima facie a loss by the perils of the sea: per Lord Wright at page 68.

If the accident which occurred was of such a character that it could have occurred on land, and owes nothing to the vessel being at sea, then the accident will be outside the expression. Thus if rats eat a cargo of cheese, that will not be a loss caused by a peril of the sea. But if rats gnaw a pipe through which seawater is carried, or if they gnaw a hole in the hull of a wooden vessel during the voyage and seawater enters the vessel, the resultant loss is due to a peril of the sea: see Hamilton Fraser v. Pandorf (supra). Similarly, if a pump is negligently operated, forcing water into the hold, or if during loading a machine is dropped into the hold by the negligence of a machine operator, there will be no relevant peril of the sea: See Thames and Mersey Marine v. Hamilton Fraser (supra) and Stott v. Marten (1916) 1 AC 304. Into the same category will fall damage caused by an accidental fire in the hold (Hamilton Fraser v. Pandorf (supra at 527 per Lord Branwall)) and damage caused by the heating or sweating of the cargo (The Freedom (1869) LR 3 P.C. 594).

Loss which occurs as a result of the vessel not being staunch, and which therefore occurs merely as a result of the vessel being in the water, will not be covered: Sassoon v. Western Assurance (1912) AC 561, a case to which it will be necessary to return in discussing the relationship between "perils of the seas" and unseaworthiness. See also Grant Smith & Co. and McDonnell Ltd v. Seattle Construction (1920) AC 162 at 171.

In the judgment of Mason J. in Skandia Insurance Co. Ltd v. Skoljarev (1979) 142 CLR 375 at 383 there is a valuable discussion of the meaning of the expression "perils of the seas" in a policy of marine insurance and a useful collection of relevant authorities.

While the ordinary action of wind and waves is something that is foreseen and expected, and therefore a necessary and ordinary incident of the voyage, English law does not ordinarily so treat heavy weather, even if by reason of the season and locality, it was to be expected. Rough seas are traditionally treated in English law as a peril of the sea, whereas in American jurisprudence, it will only be if losses suffered as a result of heavy weather are extraordinary in nature that the finding will be made: See Carver, Carriage By Sea 12th Ed., Volume 1, S. 162, and the discussion of The Guilia (1914) 218 F. 744 in Shipping Corporation of India v. Gamlen Chemical (1980) 147 CLR 142 at 166. On the force of a gale necessary to give rise to a perils of the sea immunity, and on the desirability of framing demurrage exclusions in charter parties by reference to the Beaufort scale, the reader is referred to an article by James M. Textor in Lloyd's Maritime and Commercial Law Quarterly, 1985, page 343.

The question of the relevance of negligence of the shipowner, his master and crew, in marine insurance cases on perils of the sea is resolved by s. 61 of the Marine Insurance Act. It is there provided that the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even if the loss would not have happened but for the misconduct or negligence of the master or crew. Negligence of those navigating the vessel being irrelevant, it would follow that a vessel which sinks as a result of a collision with another vessel, such collision being caused by the negligence of her own master, is lost by a peril of the sea, for the purposes of the law of marine insurance: See the speech of Lord Herschell in The "Xantho" (supra, at page 510).

The relevance of negligence in relation to the perils of the sea under bills of lading and in particular under the Hague Rules is a topic which I shall discuss in the next section of this paper.

2. The onus of proof in a case upon a contract of carriage involving a perils of the sea immunity

(a) At common law

The case of The Glendarroch (1894) p. 226 in which the leading judgment is given by Lord Esher M.R. contains an extremely lucid account of the matters which plaintiff and defendant must aver in their pleadings and prove, in a perils of the sea case between shipper and carrier on a bill of lading not subject to the Hague Rules. The plaintiff must prove the contract and non-delivery or delivery in a damaged condition. The plaintiff's declaration or statement of claim should not properly state anything about negligence, because as Lord Esher, M.R. points out, negligence is immaterial. The defendant's plea is that the case is brought within an exception in the bill of lading, namely that of loss caused by perils of the seas. The plea will follow the terms of the exception. Lord Esher pointed out that no plea can be found in books of precedent which goes on to say that the loss by perils of the sea was not caused by negligence. Then it is for the plaintiff to put on a replication, and to assume the burden of proving, that the damage was brought about by the negligence of the defendant's servants or, it could be added for completeness, that the damage was brought about by unseaworthiness of the vessel. As the law stood when The Glendarroch was decided, unless negligence or unseaworthiness were expressly declared to be an excepted cause of loss, the law would presume that exemption clauses were subject to a proviso making the carrier liable for those acts or omissions or the consequences of that condition of the vessel: See Paterson Steamships Ltd. v. Canadian Co-operative Wheat Producers Ltd. (1934) AC 538 at 545 per Lord Wright delivering the opinion of the Judicial Committee in a Canadian appeal and Smith, Hogg & Co. v. Black Sea and Baltic General Insurance Co. (1940) AC 997 at 1004 per Lord Wright speaking as a member of the House of Lords. See also the speech of Lord Macnaughten in The "Xantho" (1887) 12 App. Cas. 503 at 515, where his Lordship said:

"Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast on the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss."

(b) Under the Hague Rules

For the sake of facilitating discussion of this paper, there is set out as an appendix thereto a copy of Article III rules 1 and 2, and Article IV rules 1, 2, 4, 5 and 6 of the Hague Rules.

When one seeks to compare those rules with the former position at common law, in order to ascertain the correct order of pleading, the task is no easy one.

Article III rule 2 provides that:

"Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Rule 2 is to be compared with Rule 1, which is not expressed to be subject to the provisions of Article IV, and which therefore wholly prevails over the provisions of Article IV.

One of the provisions of Article IV is itself concerned with negligence: Article IV rule 2 (a) gives the carrier an immunity if damage results from "act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship". It has been held in the High Court of Australia that part of the work done by the opening words of Article III rule 2 is to preserve the operation of Article IV rule 2 (a): See Shipping Corporation of India Ltd. v Gamlen Chemical Co. (Australasia) Pty. Ltd. 147 CLR 142 at 154, 165. That decision was inevitable, as otherwise no operation could be given to Article IV rule 2 (a).

The words "management of the ship" have been held to be different from management of the cargo, so that, inter alia, negligent stowage by the master will be outside Article IV rule 2 (a), and within Article III rule 2: See Scrutton on Charterparties, Eighteenth Edition, pages 245-6 and cases there cited.

Another provision of Article IV which is concerned with negligence is Article IV rule 2 (b), which gives the carrier an immunity for "Fire, unless caused by the actual fault or privity of the carrier". It follows from the language of the rule that if a fire is caused by the negligence of the master or crew for which the carrier would be liable only by reason of his vicarious liability for their acts and omissions, the immunity would be available. Of course, if the master and/or crew were known to be incompetent when employed or the fire arose from a breach of the duty to exercise due diligence to make the ship seaworthy, the matter is covered by Article III rule 1, and the immunity in Article IV rule 2 (b) is unavailable. Article III rule 2 was held to operate subject to Article IV rule 2 (b) in

Shipping Corporation of India Ltd. v. Gamlen Chemical Co. (supra at pp 154, 165).

In the Gamlen Case, the High Court held that Article IV rule 2 (c) does not prevail over that part of Article III rule 2 concerned with the obligation properly and carefully to load, handle, stow (and it would follow, discharge) the goods. Thus in a case where goods are lost or damaged due to heavy weather, but in which the loss would not have occurred if the goods had been properly stowed, the perils of the sea exemption will not prevent the carrier being made liable. In that sort of case, the same result is achieved as under the old law, prior to the Hague Rules.

In a case of the incursion of seawater due to a collision caused by the negligence of the master, it will be of merely academic significance whether Article IV rule 2 (c) is available since Article IV rule 2 (a) is clearly available to the carrier.

Article IV rule 1 appears to affect the onus of proof in a case under Article III rule 1 since it puts upon the carrier the obligation to prove that he exercised due diligence. It has been held, however, that the onus of proving unseaworthiness and that the unseaworthiness caused the loss is upon the shipper: See Minister of Food v. Reardon Smith Line (1951) 2 Lloyd's Reports 265.

Another matter which the Rules themselves do not make clear is whether the plaintiff (shipper) must prove in chief a breach of Article III rule 1 or rule 2 in order to recover, or whether it is sufficient for him simply to prove the contract and non-delivery or delivery in a damaged condition, as in other bailment cases. The authors of the Twelfth Edition of Bullen & Leake Precedents of Pleadings are no clearer about this matter, since they propose a form of pleading which alleges, first a count in bailment and making a general charge of "breach of duty under the said bill of lading" and in the alternative counts alleging breaches of Article III rule 2 and negligence, and alternatively a breach of Article III rule 1.

In Madras Electrical Supply Co. v. P. & O. Steam Navigation Co. (1924) 18 Ll.L.R. 93, Scrutton L.J. had this to say about the matter:

"I am well aware of the difficulty which has always perplexed practitioners in the Commercial Court and will perplex them to the end of all time, whether, when you are suing on a bill of lading and know that exceptions are going to be pleaded and know that you are going to reply unseaworthiness, you should do it in the statement of claim or whether you should wait until the exceptions are pleaded and do it in the reply. I do not propose to decide that interesting question: but I am clear that you should do it somewhere, and that when you get before the judge or the Court of Appeal he or they should be able to look at the pleadings and see whether one party alleges unseaworthiness and in what respect he alleges it."

That advice is of course, more helpful to the judges than it is to the practitioners and it does not help with the vital question of whether a plaintiff ought to do more in chief than prove the contract and non-delivery or delivery in a damaged condition, nor does it avoid any problems that might arise out of split cases.

The New South Wales Court of Appeal has considered the matter in Gamlen Chemical Co. (Australasia) Pty. Ltd. v. Shipping Corporation of India (1978) 2 NSWLR 12 at pages 23, 24. There the solution is proposed that, since the enactment of the Sea Carriage of Goods Act, nothing has changed at all as to the sequence of pleading or the matters which must be proved. The general proposition is asserted that the plaintiff may still in his reply, plead negligence by the defendant causing the loss in answer to an exception arising under Article IV of the Rules.

With respect to the members of the Court of Appeal who participated in that decision, the general proposition stated is too wide. For one thing, if one regards Article III rule 2 as stating a requirement not to be negligent, it cannot prevail over or be a good answer to a plea of an immunity under Article IV rule 2 (a), or rule 2 (b) unless those rules have no operation at all. A plea of negligence would simply be irrelevant to many of the other paragraphs of Article IV rule 2.

In relation to Article IV rule 2 (q) it will be for the carrier to plead the absence of negligence. See Scrutton on Charterparties 12th Ed., page 437 and cases there cited.

What may be pleaded in answer to an immunity claimed under Article IV rule 2 (a) and Article IV rule 2 (b) is a breach of Article III rule 1, causing the relevant loss, or, no doubt, contributing to the relevant loss, but not a breach of Article III, rule 2.

Having made those observations, I should draw attention to a sentence in the joint judgment of Mason and Wilson J J. in Shipping Corporation of India Ltd. v. Gamlen Chemical Co. (Australasia) Pty Ltd. 147 CLR 142 at page 168 where their Honours appear to approve, in passing, the relevant part of the decision of the Court of Appeal. In the course of the same judgment, their Honours also observe that the justification for the opening words of Article III rule 2 is to be found in the presence in Article IV of rule 2 (a) and (b), and rules 4, 5 and 6, each of which provisions add a significant qualification to either the scope of the obligation (in Article III rule 2) or to the consequences of a breach. In those circumstances, it does not seem that the endorsement of the relevant part of the Court of Appeal decision should be taken at face value.

In Australian courts, until the matter arises squarely for decision, it seems to me that the better view is to regard the remarks of the Court of Appeal about the onus of proof and the approval of those remarks by the High Court in Gamlen as being limited to cases about perils of the seas, that is cases arising under Article IV rule 2 (c). That would mean that in a case where a ship sinks by collision caused by her own master's negligence, the appropriate immunity is Article IV rule 2 (a) and not Article IV rule 2 (c), and that the "perils, dangers and accidents" referred to in Article IV rule 2 (c) are those which do not arise as a result of the negligence of the master or crew.

However, insofar as the Gamlen case deals with the matters to be pleaded by the plaintiff, and proved by him in chief, the case is useful in putting to rest the question left open by Scrutton L.J. in Madras Electrical Supply Co. v. P. & O. Steam Navigation Co. (supra). Unseaworthiness (or more accurately, any breach of Article III rule 1) need be pleaded only in the reply, and not in the Statement of Claim. Prudence will probably require, however, that both the Statement of Claim and the Reply should charge a breach of Article III rule 2 in appropriate cases, since the language of the rule accords broadly with the statement of the duty of a bailee.

3. <u>The onus of proof in a marine insurance policy of proving a claim for indemnity for an insured peril of the seas</u>

As was recently reaffirmed in the House of Lords in <u>Fenton Insurance Company Ltd. v. Rhesa Shipping Company S.A.</u> (16 May 1985) and by the High Court in <u>Skandia Insurance v. Skoljarev</u> (supra) the onus of proof that the vessel was lost or damaged by reason of a peril of the sea rests throughout on the shipowner. The circumstance that a possible cause of loss might be suggested by the underwriter, and that the Court might be unsatisfied that such possible cause was the cause, will not assist the plaintiff to satisfy his onus of proof. "If an examination of all the evidence leaves the Court doubtful what is the real cause of the loss, the assured has failed to prove his case": per Scrutton L.J. in <u>La Compania Martiartu v. The Corporation of the Royal Exchange Assurance</u> (1923) 1KB 650, approved in both of the abovementioned cases.

If the underwriter alleges scuttling, the English Court of Appeal has held that the onus is on him to prove the scuttling: <u>Issaias v. Marine Insurance Co. Ltd</u>. (1923) 15 L.1.L.R. The Court actually held that since scuttling is a crime, the matter must be proved by the underwriters beyond reasonable doubt. According to modern jurisprudence, proof to a high degree would be required of such an allegation: See in the High Court of Australia, Briginshaw v. Briginshaw 60 CLR 336. The plaintiff in Issaias' Case had put the matter on the perils of the sea head of indemnity but proved a case of barratry. The Court of Appeal held that even if the case had been put in barratry, the underwriter had an onus or showing that the barratry was not "to the prejudice" of the owners, on account of their connivance.

This decision of the Court of Appeal has been criticised by a subsequent Court of Appeal in Piermay Shipping Co. S.A. v. Chester (1979) 2 Lloyd's Rep. 1 and in the same case at first instance by Kerr J. (as he then was) at (1979) 1 Lloyd's Rep. 55. The point was reserved in the House of Lords in Angelatos v. Northern Assurance Co. (1924) 19 L.1.L.R. 255 at p. 262 per Lord Sumner and in Skandia Insurance Co. Ltd. v. Skoljarev (supra, at p. 392) Mason J. said that the onus of proof in scuttling cases "has its own difficulties and they have not yet been completely resolved".

In the present state of the law, in a doubtful case of scuttling, at least where any other cause of the loss is uncertain, it may be that underwriters will be well advised to press a denial of the plaintiff's claim to indemnity rather than an affirmative case of scuttling.

4. <u>The relationship between unseaworthiness and perils of the sea</u>

In a case on a contract of marine insurance, Sassoon v. Western Assurance Corporation (1912) AC 561 it was held that unseaworthiness may itself negate a peril of the sea. Opium was stored in a rotten wooden hulk, and unbeknown to the owners, water entered the hulk because of the rotten condition of the hull. The Judicial Committee of the Privy Council, on appeal from China, held that the damage although caused by the incursion of seawater, was not caused by a peril of the sea, but by the weakness of the hulk. Their Lordships held that: "There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitates by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea." (Ibid at p. 563).

This decision gives scope, in both a case on a policy of marine insurance and in a case on a contract of carriage, to require the person alleging a relevant peril of the sea to negative unseaworthiness.

To the same effect are cases cited by Mason J. in Skandia Insurance v. Skoljarev (supra) 142 CLR at pages 384-394.

It will not always be the case that unseaworthiness leading to the incursion of seawater will negative the presence of a peril of the sea: See Smith Hogg & Co. v. Black Sea and Baltic Insurance Co. (1940) AC 997 where the relevant unseaworthiness was constituted by instability resulting from a negative metacentric height rather than by the vessel being not staunch.

In a contract of marine insurance, there is a relevant difference between voyage policies and time policies. In the former there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. In the latter case, where, with the privity of the assured, the ship is sent to sea on any particular voyage in an uninsured state, the insurer is not liable for any loss attributable to unseaworthiness. (See in this country, s. 45 of the Marine Insurance Act 1909 (Commonwealth).) Under either form of policy, it will be for the insurer to allege and prove the unseaworthiness.

In a bill of lading case, it will be for the shipper or indorsee of the bill to allege and prove a breach of Article III rule 1 in reply to reliance by the carrier on Article IV rule 2 (c).

5. <u>The relationship between Article IV rule 2 (c) and Article IV rule 4</u>

In the case of a deviation which is outside the protection of Article IV rule 4, the perils of the sea immunity is unavailable: See <u>Stag Line Ltd. v. Foscolo Mango Co</u>. (1932) AC 328. Deviation is not relevant as such in a standard policy of marine insurance, not containing territorial limitations.

6. <u>The relationship between deliberate acts of the master or crew and perils of the sea</u>

In <u>P. Samuel & Co. v. Dumas</u> (1924) AC 431 an innocent mortgagee went to the House of Lords in a scuttling case and it was held that he was disentitled to recover on the ground that scuttling with the connivance of the owner was not a peril of the sea. The possibility was described as a peril of the wickedness of man, not of the sea: Ibid at p. 459 per Viscount Finlay.

7. <u>Causation in cases of perils of the sea</u>

In <u>The "Xantho</u>" (1887) 12 App. Cas. 503 Lord Herschell attempted to distinguish between cases of marine insurance and cases on bills of lading as to perils of the sea on the ground that in the former, the proximate cause alone is considered, whereas in the latter, it is permissible to look beyond the immediate cause to see whether negligence of the shipowner has brought about the loss. Lord Macnaughten in the same case said that the immunity claimed by the carrier in a bill of lading case will be unavailable if his negligence has caused <u>or contributed to</u> the loss.

This distinction is sometimes in the judgments expressed as the distinction between the proximate cause (which by s. 61 of the Marine Insurance Act is solely relevant in insurance law) and the causa causans (the "real cause") in the law of carriage.

In the High Court of Australia, in the <u>Gamlen Chemical Case</u>, Stephen J. summarised and analysed (147 CLR at pages 154-155) some subsequent authorities dealing with concurrent causes in the bill of lading cases. His Honour concluded in relation to the facts before him: "The inadequate stowage was here the decisive or dominant cause, only waiting upon heavy weather before it might take effect. The damage to the drums was not such damage 'arising or resulting from' a peril of the sea as Art. IV, r. 2 speaks of; the effective cause of that damage was the inadequate stowage."

After <u>The "Xantho"</u>, it has been held in a number of cases that marine insurance is not simply concerned with the immediate cause, if that expression simply means the cause which is the last in time. The proximate cause has been redefined as what is "in substance" the cause, or the cause "to be determined by common sense principles" in Canada Rice Mills Ltd. v. Union Marine and General Insurance Co. (1944) AC 55. This language suggests that the latin tag "causa causans" may be equally appropriate to the proximate cause referred to in s. 61 of the Marine Insurance Act.

In the Canada Rice Mills Case, it was held that damage to rice carried on board a ship was proximately caused by a peril of the sea, even though it was actually caused by action necessarily and reasonably taken to prevent a peril of the sea affecting the goods. Yet in Pink v. Fleming 25 Q.B.D. 396 it was held that, when a ship was damaged by collision (classically a peril of the sea) and was required to put into port for repairs, for the purpose of which it was necessary to discharge a portion of the goods insured, damage to the goods caused by the handling necessary for their discharge was not proximately caused by a peril of the sea.

Upon the philosophical difficulties into which the search for a proximate cause has led lawyers, the reader is referred to Causation in the Law, by Professor Hart and Mr Honore (O.U.P.) especially at pages 3-6 at 90-95.

If one looks at the reasoning of the members of the High Court in the Gamlen Case, Stephen J. concludes that the damage was not caused by a peril of the sea because the effective cause of the loss was the "decisive or dominant" cause, or the effective cause. Mason and Wilson J J. also conclude that the peril of the sea was not the cause of the loss, because bad stowage and heavy weather combined to cause the loss, and neither of the causes alone caused the loss. The approach of Mason and Wilson J J. is directly contrary to that which Lord Herschell describes in The "Xantho" 1887 12 App. Cas. at page 510, where he says that in a bill of lading case you are entitled to look beyond the immediate cause of the loss, and to find that the "loss through perils of the sea is caused by the previous default of the shipowner". Nevertheless Mason and Wilson J J. reach the same conclusion as that recommended by Lord Herschell.

The real difference between the considerations which lead a court to conclude that a loss occurred through a peril of the sea in bill of lading cases on the one hand, and insurance cases on the other seems to be that in the latter class of case legal principle requires one to ignore as a causal fact the negligence of the master and crew (except as to seaworthiness) whereas in the former class of case the presence of negligence on the part of the master and crew (unless itself a ground for exclusion of liability) will be decisive against the carrier. That does not depend on the using of any different method to ascertain the cause of loss but simply on treating certain parts of the factual matrix as relevant or irrelevant as the case may be, because of legal principle. If in order to answer the question "was there a peril of the sea" one is directed to a different enquiry in the two classes of case, it is merely to misuse language to assert, as do the old cases, that one is answering the same question in each case.

Article III - Responsibilities and Liabilities

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to -

   (a) Make the ship seaworthy:

   (b) Properly man, equip, and supply the ship:

   (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Article IV - Rights and Immunities

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

   Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship:

(b) Fire, unless caused by the actual fault or privity of the carrier:

(c) Perils, dangers and accidents of the sea or other navigable waters:

(d) Act of God:

(e) Act of War:

(f) Act of public enemies:

(g) Arrest or restraint of princes, rulers or people, or seizure under legal process:

(h) Quarantine restrictions:

(i) Act or omission of the shipper or owner of the goods, his agent or representative:

(j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general:

(k) Riots and civil commotions:

(l) Saving or attempting to save life or property at sea:

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods:

(n) Insufficiency of packing:

(o) Insufficiency or inadequacy of marks:

(p) Latent defects not discoverable by due diligence:

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.