MARINE INSURANCE FRAUD

by F.G. Turner

Fraudulent claims under policies of marine insurance have received considerable publicity in recent years, in legal and insurance circles and within the shipping industry, due in part at least to the reporting of a series of cases on the topic in Queensland in particular, and in the United Kingdom. The cases have been much-commented upon and you will be familiar with some of them at least - see for example Stuart Hetherington's article, Table Tennis for Maritime Lawyers, (1986) Lloyd's Maritime and Commercial Law Quarterly 286.

For the purposes of this discussion, I limited the ambit of fraud to acts involving the intentional deceit of insurers, specifically scuttling, barratry and arson. It is no doubt arguable that other examples could be included, such as the grosser type of intentional non-disclosure of a proposer to an insurer.

The cases to which I shall refer have concerned hull policies. Cases concerning fraudulent cargo claims have been almost non-existent in Australia and it has been suggested that such claims are not a serious problem in this part of the world.

Because the Marine Insurance Act 1909 (Cth) is modelled on and contains the same substantive provisions as the English Act of 1906 and the English Act was in turn a codification of the Common Law, it is convenient to start with the English decisions.

In P. Samuel & Company Limited v. Dumas (1924) A.C. 431, the facts as found were that the insured vessel was scuttled by the master and crew, or some of them, with the connivance of the owner, but without any connivance or complicity on the part of the mortgagee. In an action on the policy by the plaintiffs on behalf of the mortgagee, the House of Lords held that loss of the ship by scuttling was not a loss by a peril of the sea and was not included in the general words of the policy; it was accordingly not covered by the policy.

Since then, there have been many cases exemplifying the obligation of an insured to prove that the loss has been caused by an insured peril. This was decisively reaffirmed by the House of Lords in "The Yellow Submarine Case", Rhesa Shipping Co. v. Edmunds & Anor. ("The Popi M"), (1985) 2 All ER 712, (1985) 1 WLR 948. This was the case, you will recall, where a cargo vessel of some antiquity sank for no apparent reason. It was postulated on behalf of the insured that the vessel may have collided with an unidentified moving, submerged submarine. Despite regarding such an explanation as being inherently improbable the Trial Judge (Bingham, J.) accepted this hypothesis as, on the balance of probabilities, the explanation for the casualty. The (English) Court of Appeal rejected the submarine hypothesis but nevertheless held that the owners were entitled to succeed. The House of Lords allowed an appeal by the underwriters. Lord Brandon of Oakbrook, with whom the other Law Lords agreed, said (at p.714 of the All England Report):

"... the burden of proving, on a balance of probabilities, that the ship was lost by perils of the seas is and

remains throughout on the shipowners. Although it is open to the underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

... it is always open to a court even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the ship owners have failed to discharge the burden of proof which lay on them."

Scuttling was not pleaded against the plaintiff in The Popi M but an observer might conclude that the underwriters were encouraged to deny liability by the unexplained nature of the loss. The onus of proof issue can be critical whether scuttling is pleaded or some other allegation in the nature of fraud is made against the insured.

Where an underwriter intends running a scuttling defence, it appears now to be settled that he is obliged to plead the scuttling with particularity. This was not always the case. In his dissenting judgment in the Court of Appeal in Astrovlanis Compania Naviera S.A. -v- Linard ("The Gold Sky") (1972) 2 Q.B. 611 at 615-618, Lord Denning M.R. set out a history of the practice in England of not requiring a defendant underwriter to give particulars of an allegation of scuttling, the rationale

being that the very nature of a scuttling was such that underwriters could not as a matter of practice supply particulars. He saw no reason to alter the practice. However, the majority of the Court of Appeal (Edmund Davies & Stephenson L.JJ.) held that while in the particular case, the application for further and better particulars of the alleged scuttling had been made too late and would be refused for that reason, particulars should normally be given. Edmund Davies L.J. said, at p. 622, "... notwithstanding the established practice, (delivery of particulars) should, had they been timeously sought, have been ordered."

The decision of the majority of the Court of Appeal in "The Gold Sky" was, strictly speaking, obiter dicta. The requirement to deliver particulars of an allegation of scuttling was canvassed again that same year by a differently constituted Court of Appeal in Palamisto S.A. -v- Ocean Insurance Ltd. (The "Dias"), (1972) 2 Q.B. 625. The majority (Buckley and Cairns L.JJ.) followed the majority in "The Gold Sky" by ordering the delivery of particulars.

Buckley L.JJ. said, at p. 644:

> "... Where a party asserts his opponents' complicity in fraudulent conduct amounting, as in the case of scuttling, to criminal misconduct, the case is pre-eminently one in which not only the Rules of the Supreme Court ... but also fair treatment require that, so far as practicable, the matter shall be pleaded with particularity, so that the party accused may know what case he has to meet. This does not mean that he is entitled to know what evidence will be

adduced against him. Nor, I think, should he, at any rate normally, be entitled to particulars of circumstantial matters from which inferences will be sought to be drawn. He ought, in my judgment, to have the best particulars available of those circumstances which his opponents will, whether by direct evidence or by inference, attempt to establish as constituting the scuttling of the ship. To put it concisely, he should be told, not why his opponent will say that the ship should be found to have been scuttled, but how his opponent will say that the ship was scuttled, if the circumstances are such that it is realistic to suppose that his opponents can furnish such particulars."

The other member of the majority, Cairns L.J. said (at p. 649):-

"The modern tendency is for more particulars to be required, in various fields, than were formerly thought necessary.

...

I do not accept that underwriters would have to plead expert evidence while owners would not. I think owners must give reasonably full particulars of the way in which they say the casualty occurred."

The practice of pleading scuttling with particularity has been followed in Queensland. Rarely will it be possible for underwriters to say precisely how a vessel was sunk, but they can

and, it would seem, should, plead the circumstances which they say give rise to the conclusion the vessel was scuttled. Such circumstances are likely to include the financial position of the owner of the vessel, the fact that the insured value of the vessel was greater than its market value and so on. As Lord Sterndale M.R. said in Issaias -v- Marine Insurance Co. Ltd., 15 Ll.L.Rep. 186 at 187:

> "... it must be remembered ... that direct evidence cannot be expected in such matters, and that a conclusion has to be drawn from all the circumstances and facts of the case, in some cases important, in some cases of themselves trivial, which may lead to a necessary inference of the owners' complicity ..."

The effect of a plea of scuttling is to cast the onus of disproving the scuttling on to the insured owner. Scuttling by definition involves the connivance of the owner. Where it is proved that the vessel was cast away, the owner must disprove that he connived at the casting away. There appear to be at least three theoretical bases for disallowing a claim where the owner was privy to or acquiesced in the casting away; the first is the obvious one that the insured should not be allowed to profit by his own fraud against the underwriters, the second and more esoteric is that the cause of the loss lacks the element of fortuity necessary to bring it within the definition of perils of the seas mentioned in Rule 7 of the Rules for Construction of Policy contained in the Second Schedule of the Marine Insurance Act. The third is wilful misconduct, which I shall revert to later in this paper.

Where the owner has not acquiesced or connived in the casting away of the vessel, the action of the crew constitutes barratry, which is an insured peril.

Examples of the barratry argument are found in the two English cases featuring Mr. Komiseris, a mariner of eastern Mediterranean origin who has, perhaps uniquely, risen to fame if not fortune through the medium of the law reports. The first case was The Gold Sky, to which reference has already been made and the second was Piermay Shipping Co. S.A. and Brandt's Ltd. -v- Chester (the "Michael"), (1979) 1 Lloyd's Rep. 55 (trial judge), (1979) 2 Lloyd's Rep. 1 (Court of Appeal). In "The Michael", the trial judge, Kerr, J. (as he then was) held that to establish a loss by the insured peril of barratry involved establishing both a deliberate sinking and the absence of the owners' consent but if the Court was left in doubt whether the owners consented or not then the claim failed; and common sense required that the owners had to satisfy the Court on a clear balance of probability that Komiseris had sunk the vessel without their knowledge or consent. Having found that Komiseris did deliberately sink the vessel, he went on to find that the sinking was without the consent or foreknowledge of the owners and the claim for loss by barratry therefore succeeded. Some skeptical soles might find the last part of this conclusion unconvincing, but the Court of Appeal held that since the evidence had been approached by the trial judge upon the basis that it was for the owners to prove the absence of complicity upon "a clear balance of probabilities", there was no ground for disturbing his conclusion that the owner had successfully and satisfactorily discharged that burden.

The history of the pleadings in "The Michael" is also instructive in that the circumstance of the owners having initially put forward their claim for a loss by perils of the sea and subsequently acknowledged that there was a strong suspicion the vessel had in fact been deliberately sunk by Komiseris, did not prevent them from recovering from the underwriters.

The difficulty in predicting the decision a Court will reach in attempting to apply these principles is illustrated by the contrasting outcomes of two other English cases, namely The "Zinovia" and The "Captain Panagos D.P.". Each involved the grounding of a vessel off the coast of Egypt. In the former, N. Michalos & Sons Maritime S.A. & Anor. -v- Prudential Assurance Co. Ltd. (the "Zinovia"), (1984) 2 Lloyd's Rep. 264, the insured value of the vessel was in excess of its market value, the owners were short of cash and the Chief Officer, who joined the vessel at Port Said, held false Certificates of Competency. Bingham, J. held that on the facts and evidence the defendants had not satisfied the Court, according to the high standard of proof required, that the vessel was deliberately cast away; the owners had succeeded in showing that the loss of the vessel was proximately caused by a peril of the sea, namely the grounding of the vessel due to negligent navigation and to subsequent pounding on the bottom. Further, he held that if the vessel had been deliberately run aground by the Chief Officer or any other member of the crew, the insurers had not proved that the owners in any way consented or were privy to that action; if the burden of disproving privity lay on the owners, then they had discharged it.

In the later decision of Continental Illinois National Bank and Trust Co. of Chicago & Anor. -v- Alliance Assurance Co. Ltd. (The "Captain Panagos D.P."), (1986) 2 Lloyd's Rep. 470, the facts were that the vessel ran aground about 17 miles off course and, while aground and with salvors standing by, caught fire. Evans, J. wrote an exhaustive analysis of the evidence and issues and held that on the facts and the evidence there was no doubt that the vessel was deliberately run aground and set afire and that the Master carried out these operations in accordance with a pre-conceived plan. The evidence did not establish that the Master received detailed instructions from the owners and it was possible that the Master made the original suggestion to the owners and thereafter took matters largely into his own hands. The Master received a sufficient indication of assent and authority from the owners to cause him to proceed as he did and there was no basis for concluding on the evidence that the owners had authorised one casualty but not the other. At p.501 he said "The barest signifying of assent by the owner could suffice, even if the operation is conceived, planned and executed by the others, who may or may not be known to the owner himself."

Evans, J. went on to hold that the plaintiffs had failed to prove that the grounding was fortuitous. "Fire" unlike "perils of the seas" did not itself connote a fortuity; unlike "barratry" there was no statutory definition which gave grounds for arguing that the possibility of connivance had to be disproved and the plaintiffs would have proved a loss by fire if their claim had not been defeated by the defence of owners' connivance. The two claims were closely connected notwithstanding their technical separation for the purpose of alternative partial loss claims, and one claim was defeated by connivance by the assured. In the

circumstances, the plaintiff's fraud in relation to one entitled the defendants to refuse liability in respect of both.

A further theoretical basis for rejection of a scuttling claim is that the scuttling is an example of the wilful misconduct of the insured, (s.61(2)(a) of the Marine Insurance Act (Cth), (s.55(2)(a) of the English Act of 1906)). Not all wilful misconduct is fraudulent in the sense of the insured deliberately setting out to caste away the vessel. For an example of a finding of wilful misconduct where scuttling or the deliberate casting away of the vessel was not pleaded, see Wood -v- Associated National Insurance Co. Ltd. (The "Isothel"), (1985) 1 Qd. R. 297 and the comment thereon by Ronald Salter in (1985) Lloyd's Maritime and Commercial Law Quarterly 415.

The deliberate setting on fire of a vessel by the insured in order to claim under the policy is another example of wilful misconduct which provides a defence under s.61(1)(a). - Craig -v- Associated National Insurance Co. Ltd. (The "Tiki Too"), (1984) 1 Qd.R. 209, a decision of Carter J. sitting in the Supreme Court of Queensland. Craig's Case is another demonstration of the difference in onus of proof between a scuttling case and a fire case. His Honour held that fire being an insured peril and the plaintiff having proved the loss of the vessel by fire, the onus then lies on the defendant underwriter to prove on the balance of probabilities that the insured fraudulently set fire to the vessel. In determining whether that degree of persuasion has been induced in the mind of the Court, the clarity and cogency of the proof offered must be closely examined in the knowledge that such an allegation is one which is serious and grave.

Having so ruled, Carter, J. went on to find in Craig's Case that the fire which destroyed the vessel was deliberately set by the plaintiff, that this was wilful misconduct within the meaning of s.61(1)(a) of the Marine Insurance Act 1909 and gave judgment for the defendant against the plaintiff.

Having broached the Queensland cases, it is convenient to examine the leading Australian decision, that of the High Court in Skandia Insurance Company Limited -v- Skoljarev & Anor., (1979) 142 C.L.R. 375. The facts were that the "Zadar", a fishing vessel, sank a few hours after leaving Port Lincoln in a calm sea after the rapid entry of sea water in the engine room. The point and cause of entry were unknown. According to the headnote of the report, it was held that:

"(1) In a time policy of Marine Insurance, the insured carries the burden of proving that the loss of a vessel was occasioned by a peril of the seas. The burden is discharged by evidence that the loss was attributable to a fortuitous event. If there is also evidence of unseaworthiness, the question of what is the proximate cause of the loss must be decided as a question of fact.

(2) The insured does not carry the burden of proving seaworthiness except where, there being no evidence of loss by a fortuitous event, he seeks inferentially to establish a case of loss by an unascertained peril of the sea. In such a case, the insured must exclude the possibility of loss due to unseaworthiness by evidence as to the

condition of the ship.

(3) Where a ship sinks in smooth water soon after leaving port, in the absence of evidence as to her condition or as to the cause of loss it is inferred that the loss was due to unseaworthiness. But there is no such inference if it is established that the ship was seaworthy at the commencement of the voyage. The fact of seaworthiness raises an inference of loss by fortuitous accident."

Stephen J. said, at p.379:

"The unexplained sinking of a thoroughly seaworthy ship in calm waters cannot support an inference that her fate was the simple result of her inability to withstand the ordinary action of the winds and the waves. On the contrary, her seaworthiness distinctly negates such an inference and, in the absence of any other evidence, must instead lead to the inference that, whatever was the unknown cause of the sudden entry of sea water, it should be regarded as some "fortuitous accident or casualty of the seas", that is to say, some peril of the seas".

Mason J., who delivered the leading judgment of the Court, said at pp. 390-391:-

"The effect of these decisions is that it is for the insured to prove a loss by perils of the sea. He will discharge this burden of proof if he gives evidence of a

sinking as a result of a fortuitous event. If, in addition to this, there is also evidence of unseaworthiness, the question of what caused the loss must be decided as a question of fact. In speaking of the cause of the loss, I refer to the proximate cause of loss (see s.61). It is for this reason that the loss of an unseaworthy ship may be attributed to the perils of the sea.

Although there is nothing in all this to throw the burden of proof of seaworthiness on to the insured, there is one class of case in which the insured will find it necessary to establish seaworthiness in order to prove his case. This is where the insured, having no direct evidence of loss due to a fortuitous event, seeks to establish by inference a case of loss due to an unascertained peril of the sea. To justify this inference he will seek to exclude the possibility of loss caused by unseaworthiness by calling evidence as to the condition of the ship. In such a case, once evidence is given of seaworthiness, the issue of causation must be decided as a question of fact. Then the tribunal of fact, unless it is satisfied that the ship was seaworthy, cannot draw the inference upon which the insured depends in order to make out his case."

He then went on, at p.396:

"The case is therefore one in which unseaworthiness was excluded as the cause of loss and the Court, quite correctly, inferred that the loss was attributable to a peril of the sea, though it was unable to identify that

peril. It was not a case in which the evidence as to competing causes of loss was evenly balanced, leaving the Court in doubt upon the issue whether the loss was attributable to a peril of the sea or to some other cause such as the unseaworthiness of the vessel."

Although the ratio decidendi of Skandia might appear simple enough, in my experience, its practical application presents some difficulties to both underwriters and claimants.

The Popi M. was of course decided after Skandia and, on one view, despite the semantic similarities, the House of Lords took an approach less sympathetic to the plaintiff insured than did the High Court. In practice, it is the writer's experience that Australian Courts and practitioners have struggled to reconcile the two. In Doak -v- Weekes & Anor (the "Marandoo"), (1986) 4 A.N.Z. Insurances Cases 60-697, the plaintiff's vessel had sunk in about 120 fathoms of water off Townsville in a very short space of time after the finding of water in the engine room by the Plaintiff as a result of the bilge alarm sounding. The plaintiff could not say specifically how the water had entered the engine room, lead evidence as to the seaworthiness of the vessel and relied in particular on the reasoning of the High Court in Skandia to support his contention that this was sufficient to prove fortuity.

The defendant underwriters went to considerable expense to locate the wreck of the "Marandoo" on the sea bed and engaged a submersible craft and operator to examine the wreck. It is fair to say the result of that exercise was disappointing in that the

hull underneath the engine room was totally obscured by sand. However the operator was able to say that the general condition of that part of the hull below the water line which he was able to see, was excellent and that there were no coral pinnacles in the vicinity.

The defendants also called a naval architect who expressed the opinion that the cause of foundering was not a collision with a coral reef or other fixed object or a collision with a floating object and was unlikely to be the spontaneous opening of a weld seam or plate seam or accelerated electrolytic corrosion. He also undertook calculations which demonstrated that the main sea suction in the engine room was the most likely means of entry of the volume of water necessary to sink the vessel in the time taken for it to go down.

In addition, the underwriters adduced evidence that the Plaintiff had at one stage had his vessel listed for sale, that the insured value was greater than the market value at the time of the loss, that the fishing industry was depressed and that Mr. and Mrs. Doak, who were joint owners of the vessel, had separated. The evidence of scuttling was thus circumstantial.

Mr. Justice Ryan held that:

"(a) rebuttable presumption arising from the loss of a seaworthy vessel in calm waters is nothing more than that, and if evidence is adduced which puts forward as an alternative cause of the ship's loss the scuttling of the ship by the owner, the insured will fail unless he establishes affirmatively that the loss was due to a peril

of the sea."

He also observed:

"I do not think that there is any conflict between the principles laid down in the Skandia case and The Popi M., nor do I think that that case decides that once it can be said that the circumstances in which a ship sank are not entirely unknown the principle stated by Mason J., is inapplicable. In The Popi M. there was only one possibility open to the ship owners by way of explanation of the loss, namely a collision with a submerged submarine. The shipowners' action failed because they had not discharged the burden of proof which lay upon them. As Lord Brandon said, the only inference which could justifiably be drawn from the primary facts found by the trial judge was that the true reason for the ship's loss was in doubt and there was no justification for drawing the inference that there had been a loss by perils of the sea, whether in the form of collision with a submerged submarine or any other form."

His Honour then found both that the plaintiffs had failed to prove that the loss was due to a peril of the seas and also that Mr. Doak had scuttled the vessel.

An earlier Queensland case, Itobar Pty. Ltd. -v- MacKinnon & Anor. (the "Galway Bay"), (1985) 3 A.N.Z. Insurance Cases 60-610 had taken a similar course. The directors and shareholders of the plaintiff company were the skipper and his wife. The skipper was on board when the vessel sank in unusual circumstances off

the South Queensland coast. He said there was a sudden rush of water into the engine room from a ruptured water line and that in attempting to close off the main sea suction, he had sheared off the handle of the valve.

At the trial, the defendant underwriters adduced evidence that the "Galway Bay" had been in a poor state of repair, that the plaintiff company and its director/shareholders had been in financial difficulties for some time and that the mortgagee of the vessel had served notice of intention to foreclose on real property which a friend of the director/shareholders had put up as collateral security for the mortgage over the vessel.

A naval architect called by the defendants gave evidence of the time it would take for the vessel to sink from the cause described by the skipper, and said it should have been possible to reduce the flow of water through the valve by rags and other material on board.

The underwriters had also pleaded material non-disclosure in that the skipper had not disclosed in the proposal form that he had a lengthy history of criminal convictions. While the non-disclosure point is not directly relevant to the central theme of this paper, the fact that the skipper/director/shareholder did not admit many of the convictions under cross-examination and the defence was then able to prove those convictions, cannot have assisted his credibility on the scuttling issue.

Macrossan J., said "... there is the possibility that in circumstances of suspicion and in view of the probabilities one may simply not be persuaded that the loss was due to fortuitous

dislocation of the salt water line." He then concluded that the plaintiff's case must fail as the Court was unable to conclude that the plaintiff proved its case. He commented:

> "But the burden of showing that the loss was due to a cause such as this, which might thus be regarded as falling within the policy, remains on the insured and if in response to an evidentiary onus arising in the circumstances, the insurers adduce some evidence of scuttling then, even if it is insufficient to sustain a finding of scuttling, it may still be sufficient to prevent a finding on the balance of probabilities of loss due to a peril of the seas."

Although that was sufficient to dispose of the plaintiff's claim, he went on to make a positive finding of scuttling.

Another Queensland case which may be contrasted with The "Marandoo" and The "Galway Bay" is Jeffery -v- Associated National Insurance Co. Ltd. (The "Northern Star"), (1984) 1 Qd.R. 238. The "Northern Star" was used for catching trochus shells on the Barrier Reef. It was acquired by the plaintiffs about two years prior to the sinking. It had operated at a loss and there were considerable crewing and operational problems. The vessel was anchored off Grass Tree Beach, near Mackay, after a fishing trip had been aborted due to mechanical problems. She remained at anchor for one and a half weeks before disappearing. Flotsam from the vessel was identified soon after, but the wreck was not found until some thirteen months later. The position of the wreck was about 5 miles from the beach in a direction other than that in which the current could have been expected to take it. The anchor

was secured to the bow rail, indicating it had been lifted by human agency. The vessel could not have been driven under her own power for any significant distance due to the mechanical fault which had led to her being anchored at the beach in the first place. Her electronic gear was still intact. A diver who examined the wreck gave evidence that there was a large hole about 5 inches in diameter through the hull below the water line directly below the central hatchway. The hole was of the nature which could have been made by a person standing at deck level using a device such as a crow bar. The hole appeared to have been made from inside or above the hull, rather than outside and there were no rocks in the area.

The insured value of the vessel at the time of the loss was in excess of its market value at that time, although not significantly in excess of the insured value at the time the policy was taken out. Creditors were threatening bankruptcy proceedings against the owners at the time of the loss, but the judge found the owners were not unduly perturbed by this.

Not surprisingly, the trial judge, (Thomas J.) found that some person wrongfully sank the "Northern Star". He also held that the onus was upon the plaintiffs to show that the loss fell within the cover granted by the policy and cited Skandia, The Gold Sky, The Michael and Lord Sterndale's comments in the Issaia Case that scuttling evidence was necessarily circumstantial. Specifically, Thomas J. said (at p.247):-

> "Perusal of the cases indicates that the Courts have been quite robust in inferring scuttling against owners despite necessarily limited and circumstantial evidence available

to support such an inference."

He went on to say that the four plaintiffs had not been adversely touched by cross-examination and at p.249:

"I do not have any strong conviction in the matter. It was perfectly proper of the insurer to reject the claim and require it to be proved in a Court. I consider, with the reservations already expressed, that the insureds have done so.

I therefore hold that the vessel was scuttled by persons unknown without the privity of the insureds."

He said such a loss was "caused by persons acting maliciously" and gave judgment for the plaintiffs.

In Craig's Case, the "Tiki Too" had burned in the early hours of the morning in the Norman River at Karumba and there were numerous witnesses to that fact. The onus was therefore on the defendant insurer to prove that the plaintiff had deliberately burned his vessel. There was evidence that the vessel, which had been built by the plaintiff from fibreglass, was of unusual design (for Barramundi fishing) and had certain defects, that the plaintiff was under some financial pressure and was also facing a deadline from the licensing authorities to commence fishing operations and there was some evidence from photographs to contradict the plaintiff's description of the wind prevailing at the time of the fire.

Perhaps more importantly, Carter J. accepted the opinion

of the fire expert called by the defendants to the effect that the fire could not have progressed as described by the plaintiff if it started in the manner described by the plaintiff, over that of an expert called by the plaintiff who said he had witnessed such fires proceeding in the manner described by the plaintiff. The Judge found that the plaintiff had deliberately set fire to the vessel and dismissed the claim.

Barratry is also in the nature of fraud, although the fraud is that of the master or the crew of the vessel as distinct from the owners. However barratry is an insured peril. The difficulty from an insurer's point of view, as demonstrated by the English cases, is in establishing that the owners were privy to, or acquiesced in, the act of the Master or crew. This added complication has not arisen in many of the Queensland cases because the Master of the vessel has also been the owner in his own right or has been in effective control of the company which owned the vessel.

In most of the Queensland cases in which defendant underwriters have succeeded in establishing conduct of a fraudulent nature on the part of the owners of fishing vessels, it is fair from reading the reports to think that the outcome may have been a foregone conclusion. In fact, the outcome has rarely seemed so certain at the commencement of the trial. The evidence of fraud has been circumstantial. Prolonged investigations have been undertaken by underwriters and numerous experts consulted. This may not always be commercially justified, particularly where the insured value of the vessel which was lost may not have been very great and the prospects of being able to enforce an order for costs against the claimant are not encouraging.

Much depends on the way the evidence falls and the approach taken by the judge. Evidence of the finances of the plaintiff, the market as distinct from insured value of the vessel and the state of the industry in which the vessel is used has been critical. I am not aware of any case in this jurisdiction, which has been contested by underwriters, where the insured did not have some economic motive for losing the vessel. It is noteworthy that the spate of total losses of Queensland fishing vessels in unusual circumstances coincided with a significant economic downturn in the fishing industry. I believe that a similar parallel between a downturn in the economics of the industry and a dramatic increase in the loss rate has been mirrored in other parts of the world - for example in the north east United States when US vessels lost some of their traditional fishing grounds to Canada. I am reliably informed that the loss rate in Queensland has diminished significantly following the widespread publicity given to the successes of underwriters in contesting claims and some improvement in the economics of the industry.

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