SOME OBSERVATIONS ON

THE STANDARD OF PROOF

IN MARINE INSURANCE CASES WITH

SPECIAL REFERENCE TO THE "POPI M"

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MEMORIAL ADDRESS

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by

The Honourable Mr. Justice K.J. Carruthers

of the

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It is with a deep sense of honour that I present the Frank Stewart Dethridge Memorial Address to you today in this delightful City of Hobart, conscious as I am of the distinguished persons who have preceded me.

Each year we remember the late Frank Stewart Dethridge because it was he who conceived the idea of the Association. But for his untimely death he would have laboured mightily on behalf of the Association.

As Australia is approaching its Bicentennary Year it is particularly appropriate that we pause to praise great Australians. Frank Dethridge is numbered as one of them.

The sinking of ships in unexplained circumstances in deep waters has always held an awesome fascination for those interested in the ways of the sea, but in a more practical sense such sinkings raise interesting and difficult questions of proof when the inevitable marine insurance claim is made.

The onus which rests upon the insured shipowner is to prove on the balance of probabilities that the sinking was caused by a peril insured against. That sounds simple enough. But the considerable problem lurking beneath the surface is whether, in order to discharge that onus, the insured need only demonstrate objectively that the facts for which he contends are more probable than not or whether the Judge must have an actual subjective belief in the truth of the assertions by the insured.

When the "Popi M" plunged stern first into the deep waters off the Algerian coast, she highlighted this controversy in a stark form.

Thus I intend this morning to examine this phrase "the balance of probabilities" using the case of the "Popi M" as a focal point.

In Skandia Insurance Company Limited v. Skoljarev & Anor. (The "Zadar"), (1979) 142 C.L.R. 375 the High Court authoritatively set out the principles of law which apply to a claim by a shipowner insured against his insurer in the case of an unexplained sinking. They are lucid and simple and can conveniently be summarised as follows:

1. The insured carries the burden of proving that the loss of the vessel was occasioned by a peril of the seas. The burden is discharged by evidence which satisfies the court on the balance of probabilities that the proximate cause of the loss of the vessel was a specific fortuitous accident or casualty of the seas rather than some other cause such as the ordinary action of the wind and waves and wear and tear. (See r.7 of the Rules for Construction in the Second Schedule to the Marine Insurance Act, 1909).

2. The insured is not required to establish that the vessel was seaworthy at the commencement of the voyage as an essential element in his cause of action. If there is, however, evidence of unseaworthiness, the question of what is the proximate cause of the loss must be decided as a question of fact on the balance of probabilities.

3. If there is no direct evidence of loss by a fortuitous event the insured may inferentially seek to

establish loss by an unascertained peril of the seas, i.e. the court may find that the vessel was lost by a peril of the seas although it is unable to ascertain what the peril was. In such a case the insured must exclude the possibility of loss due to unseaworthiness by evidence as to the condition of the vessel; the line of reasoning being that where there is evidence of seaworthiness the inference of loss by fortuitous accident arises from the fact that the immediate cause of the loss is the foundering of the vessel and if that is not due to unseaworthiness at the commencement of the voyage it is difficult to see how the foundering could have been caused otherwise than by a fortuitous and unascertained peril of the seas, or perhaps a latent defect. In other words the fact of seaworthiness raises an inference of loss by fortuitous accident.

4. However, where a vessel sinks in smooth waters soon after leaving port then in the absence of evidence as to the cause of the loss, i.e. a specific fortuitous event or evidence of seaworthiness, the court will infer that her loss was due to unseaworthiness.

5. The insured will fail if he does no more than adduce evidence of facts which are equally consistent with the hypothesis that the loss occurred from the defective, deteriorated or decayed condition of the vessel or the inevitable action of the sea, as with the supposition that the loss resulted from the peril of the seas.

The difficulty, however, of applying these principles could not be better illustrated than by the case of Rhesa Shipping Co. S.A. v. Edmunds (The "Popi M"), (1983) 2 Lloyd's Rep. 235, (1984) 2 Lloyd's Rep. 555 and (1985) 2 Lloyd's Rep. 1.

The "Popi M" was an elderly vessel having been built in Japan in 1950. At about 1050 hours on 5th August, 1978 whilst on a voyage from Rouen to The Yemen, the shell-plating in way of the engine room suddenly opened up, allowing a jet of sea water to enter. The opening was some 2 metres long and 2.5 centimetres wide and admitted sea water at the rate of something to the order of 3000 tonnes an hour. The vessel's pumps could not cope with such an inflow and there was no practical way of closing or covering the opening.

For reasons which need not concern us, sea water managed to make its way from the engine room and flooded Nos. 4 and 5 holds. At 1815 hours she sank.

The action came before Bingham, J. (as he then was) at first instance sitting in the Commercial Court.

The insured relied in its pleadings and sought to rely at the trial on the proposition that if a seaworthy vessel sinks in unexplained circumstances in good weather and in a calm sea, there is a rebuttable presumption that she was lost by peril of the seas. The insured was, however, unable to rely on this proposition for two reasons. The first was that Bingham, J. felt unable to make a finding

one way or the other on the question whether the ship was seaworthy. The second reason was that the loss did not occur in unexplained circumstances; albeit the cause for the aperture was not made clear.

The insured conceded that two causes of the aperture which were at one time canvassed could be eliminated as impossible. The first of these causes was collision with a submerged rock, the second was collision with a floating object. The elimination of these two possibilities resulted in the insured contending that the aperture was consistent with the vessel having collided with a submerged object of some kind, ultimately designated to be a submerged submarine.

For their part the insurers suggested that the cause of the aperture was prolonged wear and tear on the vessel's hull over many years, resulting in her shell-plating opening up under the ordinary action of the wind and waves.

Bingham, J. closely considered the proposition suggested by the insured and ultimately propounded seven cogent considerations which militated against the submarine theory. He concluded (at 246) as follows:

> "I think it would be going too far to describe a collision between the vessel and a submarine, rupturing the shell-plating of the vessel,as impossible. But it seems to me so improbable that, if I am to accept the plaintiffs' invitation to treat it as the likely cause of the casualty, I (like the plaintiffs' experts) must be satisfied that any other explanation of the casualty can be effectively ruled out."

Bingham, J. then went on to examine the alternative wear-and-tear theory. Having gone through the essential features of the complex expert evidence which had been led before him, his Lordship concluded (at p.248):

> "(Insurers) are not, of course, obliged to prove that explanation, even on a balance of probabilities, but unless I am satisfied that some degree of probability attaches to it, I am left with no explanation but the owners'."

Then he came to the ultimate finding:

> "In the result, I find ~~myself driven~~ to conclude that the defendants' wear and tear explanation must on the evidence be effectively ruled out. That leaves me with a choice between the owners' submarine hypothesis and the possibility that the casualty occurred as a result of wear and tear but by a mechanism which remains in doubt. Cases must be decided on evidence. My conclusion is that despite its inherent improbability and despite the disbelief with which I have throughout been inclined to regard it, the owner's submarine hypothesis must be accepted as, on the balance of probabilities, the explanation of this casualty."

With what was almost a perceptible sigh of relief his Lordship said:

> "Interestingly enough it is the cause which the crew apparently favoured, when they talked about the matter in the boats, before being picked up by the British tanker."

As there could be no doubt that loss caused by collision with a submerged submarine fell within the policy cover against peril of the seas, his Lordship found for the insured.

The matter went on appeal to the Court of Appeal

constituted by Sir John Donaldson, M.R., Lord Justice O'Connor and Lord Justice May. The appeal was unanimously dismissed, although none of their Lordships found it necessary to rely upon the submerged submarine hypothesis.

Sir John Donaldson, M.R. took the view that it was open to the insured to recover under the policy by proof of loss by unspecified perils of the sea by inference from the elimination of all other possible causes.

Thus, once scuttling was eliminated there were only two other possible causes for the casualty. One was wear and tear, decrepitude or the ordinary action of the wind and waves. The other was a non-specified peril of the seas such as, but not limited to, collision with a submarine. Bingham, J. found that the insured's wear and tear explanation must effectively be ruled out. This left him with a choice between (a) being satisfied that there had been a loss by peril of the seas taking the form, as a possibility, of collision with a submarine and (b) a wear and tear loss occasioned by some unknown mechanism ultimately not supported by any of the witnesses.

The Master of the Rolls could see no reason why Bingham, J. should not have rejected the unknown form of wear and tear hypothesis and been satisfied in the absence of any other explanation that, on the balance of probabilities, the loss was by peril of the seas. The Master of the Rolls pointed out that it is the fortuitous entry of the sea water which is the peril of the seas in such cases. His Lordship concluded (at p.559):

> "Once wear and tear was eliminated, there was strong evidence that the entry of the sea water was fortuitous. The puzzle was what external force caused it to enter. But this does not matter until the trial Judge's puzzlement was such as to cause him to doubt the fortuitous nature of the water' entry. This does not appear to have occurred, the learned Judge's decision was plainly right. "

Lord Justice O'Connor (at p.560) took the view that this was not a case where the insured's failure to prove that the vessel was seaworthy must be fatal to the claim - it was not a case of unexplained sinking in calm seas as there was evidence as to how and why the sea rushed in - a very substantial gap had suddenly opened in the shell-plating. This was a fortuitous event about which there was a great deal of evidence.

Lord Justice May thought that Bingham, J. had come to the correct conclusion but by the wrong route. His Lordship said (at p.561) that there could be no doubt that the cause for the ingress of water could only have been "either general wear and tear in an elderly ship, or some fortuitous event providing a sufficient source of energy capable of causing the fatal tear in the ship's plates."

> "[Bingham, J] ruled out the wear and tear explanation about which he had heard from the experts. There was no evidence that wear and tear could nevertheless still have been the explanation, but by some other mechanism which none of the experts had thought of, or could even postulate as a possibility. On the other hand there was strong evidence that the entry of sea water into the Popi M was fortuitous. There were witnesses who saw and described it suddenly occurring whose evidence was not disputed. In such

> circumstances, the learned Judge's conclusion that the loss of the vessel was due to a peril of the sea, namely that fortuitous entry of sea water was clearly correct."

One cannot leave the judgment of May, L.J. without observing that his Lordship said (at p.561) during the course of the judgment "... ... the inherently unlikely submarine was in truth an irrelevancy: the yellow submarine was no more than a red herring."

That remark was bravely described by the editor of the 1985 Annual Review of the All England Reports as "a rather bad joke".

Leave to appeal to the House of Lords was refused by the Court of Appeal but granted by the House, because (as I apprehend it) it raised an important question as to the meaning of the phrase proof of a case "on the balance of probabilities". It is certainly that aspect of the case which should excite our interest.

The leading speech of the House of Lords was delivered by Lord Brandon of Oakbrook; Lord Fraser of Tallybelton, Lord Diplock, Lord Roskill and Lord Templeton agreeing.

Lord Brandon said (at p.2-3) that in approaching a matter of this kind two matters should be borne constantly in mind:

> "The first matter is that the burden of proving on the balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to 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 choose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

The second matter is that 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 shipowners have failed to discharge the burden of proof which lay upon them."

As to the facts, His Lordship said (at p.4):

"It is important to observe that this was not a case of a ship being lost with all her crew in circumstances when the immediate cause of the entry into her of sufficient water to make her sink is unexplained. On the contrary Mr. Justice Bingham was able to make clear and positive findings with regard firstly to the way in which water entered the ship, namely, through a large aperture in the shell plating on her port side in way of the engine room; and secondly, with regard to the manner in which the water having once entered the engine room, later flooded the two after holds as well, making it inevitable that the ship should sink."

His Lordship said (at p.4) that the shipowners were unable to rely on the principle that if a seaworthy ship sinks in unexplained circumstances in good weather and calm seas, there is a rebuttable presumption that she was lost by peril of the seas for two reasons:

"The first reason was that Mr. Justice Bingham felt unable to make a finding one way or the other on the question whether the ship was seaworthy. The result of that was that all possible explanations of the ship's loss have to be approached on the basis that it is as likely that she was unseaworthy as that she was seaworthy. The second reason was that, as I have already explained the

> loss did not occur in unexplained circumstances: on the contrary, the reasons why she sank, apart from the cause of the fatal aperture itself, were as clear as they could possibly have been."

Before the House counsel for the shipowners contended that the owners' case had never been tied irrecovably to loss by any specified peril of the seas. In particular, loss by collision with a submarine. His Lordship said (at p.4):

> "It seems to me, however, that once it was shown that water which sank the ship had entered through an aperture in her shell plating, the burden of proof was on the shipowners to show what peril of the sea, if any, could be shown on a balance of probabilities to have created that aperture. The shipowners could not, in my view, rely on a ritual incantation of the generic expression 'perils of the sea', but were bound, if they were to discharge successfully the burden of proof to which I have referred, to condescend to particularity in the matter."

His Lordship thought that Bingham, J. had adopted an erroneous approach to the case by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable (the submarine theory) and the other which he regarded as virtually impossible (the wear and tear theory). He should have borne in mind and considered carefully in his judgment the third alternative which was open to him, namely, that the evidence left him in doubt as to the cause of the aperture in the ship's hull and in those circumstances the insured had failed to discharge the burden of proof which was on it.

His Lordship concluded that neither Bingham, J. nor the Court of Appeal was justified in drawing the inference

that there had been a loss by peril of the seas, whether in the form of collision with a submerged submarine or any other form.

Against this background let us look closely at this phrase "a balance of probabilites" or "the balance of probabilities".

The meaning of the word probability is redolent with difficulty. Lord Reid said of the word "probable" in Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. Ltd. & Anor. ("The Waggon Mound") (1967) 1 A.C. 617 at p.634-5:

> "Sometimes it appears to mean more probable than not, sometimes it appears to include events likely but not very likely to occur, sometimes it has a still wider meaning and refers to events the chance of which is anything more than a bare possibility, and sometimes, when used in conjunction with other adjectives, it appears to serve no purpose beyond rounding off a phrase."

If a mathematician says that one event is more probable than another, he means it is more likely to happen than not. If a person tosses up a coin, there are only two ways it can fall - heads or tails. It is as likely to fall one way as the other, so one can say that the probability of it falling heads is ½ (0.5). But in tossing three coins there are eight possibilities. Only three of these combinations have two heads, so the probability of throwing exactly two heads is 3/8.

There is a mathematical formula for all situations of this kind. Let M stand for any number of events

that are equally likely to happen. Let N stand for the number of these events that would be favourable. Then the probability that a favourable event will happen is $\frac{N}{M}$.

It can be seen that a mathematician may assign a probability of less than 0.5 to an event.

In ordinary language such an event would be unlikely or improbable. This difference in usage should be borne in mind.

In his absorbing book Evidence Proof and Probability (second edition) Sir Richard Eggleston (at p.8) defines probability in the context with which we are concerned as "somebody's evaluation of the likelihood of a future event happening or of a past event having happened, given the facts and assumptions accepted and adopted by that person for the purposes of the evaluation."

In the context of marine insurance the "somebody" is the judge trying the action.

Now the broad division among lawyers as to the civil standard is between those who are content that the facts should merely be shown to be more probable than not (the "objective probability" school) and those who require an actual belief in the truth of the assertions made by the party who bears the burden of proof (the "belief in the truth" school).

Put shortly it is a conflict over whether

probability is objective or subjective. In the United States the civil standard of proof is described as "the preponderance of evidence". In that country the conflict is between the school which treats this term as meaning any preponderance, whilst the other school requires the preponderance to be a "fair" one, or that the judge believe in the truth of the fact, or be satisfied or convinced: (See V.C. Ball, "Moment of Truth" (1961) Vanderbilt Law Review, 807). Thus the battle lines are similarly drawn to those under our system.

There is much authority to indicate that in England the preference is for the first school of thought.

Thus, by way of illustration, in Miller v. Minister for Pensions (1974) 63 T.L.R. 474, Denning,LJ. (as he then was) described the civil standard in this way:

> "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."

Note, in the light of what I have said the phrase "if the probabilities are equal".

Later, in Davies v. Taylor, (1974) A.C. 207, Lord Reid said (at 213):

> "... ... the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen."

In the same case, Lord Simon of Glaisdale said (at 219):

> "Beneath the legal concept of probability lies the mathematical theory of probability. Only occasionally does this break surface - apart from the concept of proof on a balance of probabilities, which can be restated as the burden of showing odds of at least 51 to 49 that such-and-such has taken place or will do so."

In Australia there is support for both schools of thought.

Thus in Bradshaw v. McEwans Pty. Ltd., (unreported, delivered 27th April, 1950) the High Court (Dixon, Williams, Webb, Fullagar and Kitto, JJ) said:

> "All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."

That passage was applied by the majority of the High Court (Williams, Webb & Taylor, JJ) in Holloway v. McFetters, (1956) C.L.R. 470. In that case a deceased pedestrian was found on the roadway and the question was whether the unknown motorist who knocked him down was guilty of negligence. The majority upheld a judgment for the plaintiff upon the basis that negligence was "more probable than not."

The simple more probable than not test was applied by the High Court in Goodwin v. The Nominal Defendant, (1979) 54 ALJR 84.

Support is found for the second school of thought in Australia in the following passage from the judgment of the Chief Justice, Sir Owen Dixon, in Briginshaw v. Briginshaw, (1938) 60 C.L.R. 336 (at 361):

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality."

And later, in Jones v. Dunkel, (1959) 101 C.L.R. 298 at 305 Dixon, C.J. said of the passage which I have quoted from in Bradshaw:

> "But the law which this passage attempts to explain does not authorize a Court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied."

In the same case, Kitto, J. said (at 305):

> "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed."

As recently as 1981 support for the belief theory was resurrected by the majority judgment (Stephen,

Mason, Aickin and Wilson, JJ) of the High Court in West v. Government Insurance Office, (1981) 148 C.L.R. 62. At p.66 their Honours said:

> "It is well to recall what was said by Dixon C.J. in Jones v. Dunkel [(1959) 101 C.L.R. 298, at pp.304-305] where he said:
>
> > 'In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of the judicial mind.'
>
> His Honour went on to say that the law 'does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied' and see also T.N.T. Management Pty. Ltd. v. Brooks [(1979) 53 A.L.J.R. 267 at p.269]"

In Jones v. Sutherland Shire Council, (1979) 2 NSWLR 206 at 227, Mahoney, J.A. suggested that the Dixonian approach can be expressed as follows: "Something is probable (if the judge) has the appropriate degree of confidence in its existence or correctness based on or judged according to reason."

A recent judgment of the New South Wales Court of Appeal demonstrates how effectively a plaintiff may call in aid the objective probability approach to discharge the burden of proof.

In Rose v. Abbey Orchard Property Investments

Pty. Limited, (Court of Appeal, Hope, Samuels, McHugh, JJA. 6th August, 1987, unreported) the plaintiff sued for personal injuries which she received when she slipped on an oil patch on the floor of the main thoroughfare of the defendant's car parking station.

In most "spillage" cases the plaintiff will fail to prove a causal connection between the defendant's negligence and his damages unless the plaintiff establishes how long the substance has been on the premises.

This is the problem which faced Mrs. Rose and resulted in her claim being dismissed by the trial judge. However, adverting to this problem the Court of Appeal said:

> "But in some cases it may be possible to establish on the probabilities that a proper system would have eliminated the risk of injury even though it is not possible to determine how long the substance had been present. We think that the present case is one where, on the probabilities a proper system would have eliminated the risk."

Now the plaintiff was injured some time between 3 pm and 3.15 pm. No inspection was carried out for about an hour before the accident. A proper system required an inspection of the premises at intervals of not more than twenty minutes. Accordingly, inspections were required at about 2.30 pm and 2.50 pm. If the oil was present at either of those times, a proper system of inspection would have resulted in its removal.

The oil may have fallen at any time during the hour before the accident. If it had spilt in the period between

2.50pm and the time of the accident, a proper system of inspection could not have prevented the accident. In those circumstances Mrs. Rose would have lost her case.

However, the Court of Appeal resolved the case in her favour by the following reasoning. The Court said:

> "But, other things being equal, the probabilities are twice as great that the oil was spilt in the forty minutes period between the last inspection and 2.50 p.m. rather than in the twenty minute period after 2.50 p.m. ... ... Accordingly we think that as a matter of probability the oil was spilt before 2.50 p.m. and not after that time. To so find is not to engage in speculation but to make a finding in accordance with probability theory. In a civil case the plaintiff has only to prove her case on the balance of probabilities. It follows therefore, that on the probabilities the oil was spilt at a time which would have permitted a proper system of inspection to remove it prior to the time of the accident."

A similar approach was adopted in Brady v. Girvan Bros. Pty. Limited, (N.S.W. Court of Appeal Kirby, P., Priestley and McHugh, JJA, 23rd December, 1986, unreported) and it is not necessary to examine the details of that case.

It is a remarkable fact that after centuries of fact-finding by judges and by juries under their direction, there is still much uncertainty as to the precise standard of persuasion required in civil cases. This is particularly remarkable because the objective probability school and the belief school are in reality incapable of reconciliation.

Eggleston argues that "belief" is something independent of probability - one may think that the existence

of something is more probable than not without believing it exists. "In its essential meaning belief refers to the existence of a proposition as true, not merely as a working hypothesis, but as something which the person concerned regards as part of his stock of knowledge. He thus argues strongly for the objective probability school.

In the United States some commentators upon the law of evidence have strongly denied the notion that belief in the truth of a proposition is required before a finding of fact can be made. See The Moment of Truth (supra), McCormack on Evidence (2nd ed. 1972) pp.794-5, cited by Eggleston, Focusing on the Defendant (1987) 61 ALJR 58 at 61. But this is not a unanimous view. See e.g. the argument to the contrary of Professor William Trickett cited in Wigmore on Evidence (3rd ed.) para. 2498.

Against this background it is instructive to consider some observations by Lord Brandon in the "Popi M". This was a finely balanced case. It was considered by nine judges. Four of those judges found in favour of the insured, five in favour of the insurer. The degree of proof required of the plaintiff played a crucial role in the action. In most cases the facts tend to fall more clearly on to one or other side of the fence. Not so in the "Popi M".

During the course of his speech Lord Brandon referred with explicit approval to certain observations of Scrutton L.J. in La Compania Martiartu v. Royal Exchange Assurance Corporation, (1923)1 K.B. 650, a case in which the Court of Appeal, reversing the trial judge, found that

the ship in respect of which her owners had claimed for total loss by perils of the sea, had in fact been scuttled with the connivance of those owners. Having made that finding, Scrutton, L.J. said (at p.657):

> "This view renders it unnecessary finally to discuss the burden of proof, but in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship ... ... and an examination of all the evidence and probabilities leaves the court doubtful what is the real cause of the loss the assured has failed to prove his case." (my emphasis)

And later Lord Brandon said (at p.6):

> "If ever a case asked to be treated as coming within the dictum with regard to burden of proof of Scrutton L.J. in La Compania Martiartu v. Royal Exchange Assurance Corporation (1923) 1 K.B. 650, 657), this was it. The shipowners failed to establish that the ship was seaworthy, and they only put forward an extremely improbable cause of her loss. In these circumstances the judge should have found that the true cause of the loss was in doubt, and that the shipowners had failed to discharge the burden of proof which was on them." (My emphasis)

This phrase of Scrutton, L.J. "(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" presents problems of construction.

If it means that a mere 51/49 probability would not suffice to found a decision in favour of the assured it cannot stand with the later authority of which Davies v. Taylor (supra) is perhaps the best example.

The phrase certainly appears on its face to inject a subjective element of belief into the inquiry as to the cause of the sinking.

The judgment of the House of Lords in the "Popi M" must, I think, be considered as a rebuff to the proponents of the objective probability school. On the other hand they have clearly received considerable support from Rose and Brady.

You will no doubt forgive me for not entering into this debate. I have no intention of coming down on one side or the other. There is no doubt that the controversy will continue, especially in marine insurance cases where, as the "Popi M" illustrated, the matter assumes great practical importance.

I shall merely invite you to watch with interest how the courts ultimately come to terms with the problem, for that is what they must do.

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I should like to express my thanks to the staff of the Supreme Court Library for the invaluable assistance they have rendered me in the preparation of this paper.

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