Approximate Causes and Perils of Perils of the Seas*

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The background

The inspiration for this article is not in any recent pearls of wisdom falling from their Lordships in the Supreme Court, or other "unexpected and unintended" event; rather it arises from an awareness of the sheer number and frequency of cases coming across the desks (or screens) of practitioners, all with a story line that goes something like this.

> *"It was a dark but not stormy night (the weather being arguably lighter than adverse). The Captain said to the Mate 'Tell us a Story Mate' so the Mate began: "Cap'n – there a foot of water in the engine room and rising fast. Mayday Mayday ...." Hours later a shipowner sits in his office and learns of the sinking of one of his vessels, perhaps an old bulker or maybe his new superyacht, a few hours out of a Mediterranean port. His concern is tempered by the news that the crew are safe and the knowledge that the vessel was covered for normal risks with reputable insurers. Full disclosure of all material facts had been given by his trusty brokers, and all warranties complied with. Thus, he thinks, this will be a straightforward claim on a valued policy, with reassuring margin of agreed value over current market value. At this, he allows himself a small smile of self-satisfaction.*
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> *A few days later his solicitor disturbs his calm with his letter of advice. Whether he can recover or not may depend on a consideration of any or all of the following:*
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> *(1) Precisely why the vessel sank. This could involve an extensive and expensive scientific investigation by marine engineers, metallurgists, Uncle Tom Cobley etc etc lasting months if not years, which may or may not produce an answer at the end of it, with the vessel at the bottom of the sea;*
> *(2) A detailed assessment of the actual weather conditions, and whether they were flat calm, "adverse" or somewhere in between;*
> *(3) Whether the vessel was seaworthy when she sank, and if not why not, how not and who knew this;*
> *(4) Whether the loss was due to negligence by someone;*

* Or possibly, for those who enjoy contemporary music, Alt-J-J.

Ψ Brick Court Chambers. Whilst any errors and heresies are solely my responsibility, I acknowledge with gratitude the assistance I have received by way of comments on a draft of this article from Aikens LJ, Tom Adam QC and John Dunt.

(5) *Whether she sank through a "fortuity", which might include loss by perils of the seas, an ancient concept for which centuries of cases had produced no very helpful definition, and whether contributory causes might include unseaworthiness or perhaps even debility or maybe inherent vice, or fair wear and tear, or crew negligence, or negligence of the Owner's superintendent ashore;*

(6) *Whether the necessary facts could be proved to a satisfy the court, bearing in mind that although everyone knows that improbable things happen, the court might feel unable to make a finding to that effect. The court might be willing to rely on a presumption of loss by perils of the seas, which might be dependent on whether the possibility of the vessel having hit a floating container or a submarine or unseasonal whale or uncharted island or unlit smuggler's boat was merely improbable or wholly fanciful;*

(7) *Which out of the contributory causes was or were the proximate cause or causes - this might be one dominant cause or two or more effective causes - and whether each was an insured peril, or excluded event, or the special intermediate category in s. 55(2)(a) of the MIA;*

(8) *The relationship as a matter of law between insured perils and section 39(5) of the MIA;*

(9) *The answers to a lot of worrying questions the loss adjuster had started asking about the owners' finances and the circumstances of the crew's rescue and the fact that this was not the first vessel on which the second engineer had served which had sunk."*

The aim of this article

This article seeks to examine the answers to the Owner's two immediate questions to his solicitor – (i) why, when he has paid his premium for standard cover, is it so complicated? and (ii) does it really need to be?

The basic answer to the first question is twofold.

The legal answer is that English law has steamed onwards in a steady and somewhat self satisfied manner over the last hundred years or so, oblivious to the deleterious "marine growths" in the form of encrustations of case law, and failing to change course where appropriate to adapt ancient wordings and concepts to modern conditions.

The commercial answer is that underwriters and Judges are often faced with a dilemma. If on the one hand, the assured is honest and has suffered a genuine loss, it is most unfair that he should not recover. If however the vessel has been scuttled, it is most unfair that he should. How though, to tell the difference?

The author can see no answer to the commercial issue, except by way of the increasing amount of information which may gathered and kept by "black box" and other technology,

especially if underwriters are minded to insist on its use, but considers below the implications of the legal issue, and whether the law is satisfactory in this respect.

Ultimately insurance is about pricing of risk. The beneficiaries of the current position are the lawyers – and legal costs of claims are of course ultimately borne by the assured. One could have a much simpler law which said that the assured always recovers unless the dominant cause of loss was wilful misconduct or breach of express warranty. Premiums might go up initially but then be offset by the lowered legal costs. At the other end of the scale might be a bargain marine version of the Monty Python "never pay" policy, excellent value provided that you never claim.

Looking at the problem analytically is not easy as so many of the concepts are interrelated. Some are considered below.

(1) Fortuity

Do we need this concept? It sounds simple enough but even a recent learned 45 page discourse on "fortuity"[1] doesn't tell us all the answers. The omniscient (but not omniprescient) underwriter on the quayside can assess the risk of a range events happening over the next x days or y miles, between 0% and 100%. The cases give us some general guidance on what it means. So we know it means things that might happen, not that must happen[2] and it has to be an "accident"[3] – but is such an otherwise fluid concept helpful? As pointed out by Mustill J. in the *Miss Jay Jay*,[4] the vessel's condition may mean that damage is bound to occur but the timing is be uncertain. In this case of a time policy, this raises the question of the temporal yardstick under which likelihood of risk is judged; is it by reference to the policy period?[5] And is the "might/must" prospect judged on the basis of the reasonable owner on the quayside[6], or a hypothetical surveyor who has ultrasounded and X-rayed the vessel to the nth degree? And how is likely maintenance factored in? But one of the few things that is certain is that we cannot ignore fortuity – it is a part of the statutory ingredients of "perils of the seas".

Furthermore although ingress of seawater will usually but not always be a peril of the seas (see below), the courts have generally required the assured to prove how and why there was ingress,[7] in order to establish the required[8] ingredient of fortuity.[9] Whilst *The Popi M* and

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[1] *Fortuity in the Law of Marine Insurance, Howard Bennett* [2007] LMCLQ 315

[2] *Blackburn v Liverpool, Brazil and River Plate* [1902] 1 KB 290, *Hamilton v Pandorf* (1887) 12 App Cas 518, *Samuel v Dumas* [1924] AC 431

[3] *The Xantho* (1887) 12 App Cas 503. And as suggested in *British & Foreign Marine v Gaunt* [1924] 2 AC 41 deliberate lawful conduct may not be covered, not because there is wilful misconduct but because of absence of fortuity: see *Bennett* op. cit. p. 318-327

[4] [1985] 1 Lloyd's Law Reports 264, affd [1987] 1 Lloyd's Law Reports 32

[5] Yes generally , according to Popplewell J. in *Versloot Dredging BV v HDI Gerling* [2013] EWHC 1666 (Comm) ("*Versloot*"), § 62

[6] The "prudent owner" test applies to seaworthiness, not fortuity

[7] Although the "presumption" cases and *Ajum Goolam Hossen & Co v Union Marine Insurance* [1901] AC 362, 371 make it clear that loss by unspecified perils of the seas is covered; without being able to specify the peril however the assured may not be able to prove the operation of a peril. If as *Gaunt* tells us, unspecified fortuitous loss is covered, why is unexplained unintended water ingress not, without more covered by perils of the seas? Some would say it is, but see *The Marel* (infra)

The Marel[10] are cited most often for purposes of burden of proof, they illustrate the fact that the assured could prove ingress in a particular place at a particular time but had to go further. It is not clear why the assured has to do this; it might be thought that it was because if wilful misconduct or unseaworthiness were possible candidates for proximate cause there could be no fortuity. But in *The Marel* it was proved that there was water ingress. As the judge specifically rejected scuttling or unseaworthiness as causes, it is hard to see how the ingress was not "fortuitous", whether or not the assured could prove the ultimate cause. The result in *The Marel* should perhaps be borne in mind on the journey through the principles below, whether or not the reader has, like this author, difficulty in divining the ratio of the case.[11]

(2) Perils of the seas

This poetic but harmless sounding phrase is encrusted with centuries of authority. Despite (or perhaps because of) this, its ambit is still not clearly comprehensible to the layman, even if it is to the lawyer.

For starters, it is usual to distinguish between a peril (cause of damage, such as fire or flood) and the resulting damage – goods burned or soaked. But with "perils of the seas" it is not so easy. Its name suggests it is a peril (cause of damage) but the statutory definition in the MIA includes "fortuitous accidents and casualties of the seas..". Sea (salty water) may be perilous in itself, or may not be; indeed it is a necessary medium for transport. And is it any more perilous if by unintentional act it is caused to flow, by basic laws of physics, through a hole in a vessel and/or cause the vessel to sink?

We know that it is not certain things (ordinary action of the wind and waves) and that it has to be "of" rather than "on the seas".[12] *Arnould's* First Edition lists "foundering by the fury of storms and tempests", "shipwreck, in the form of being driven ashore or on shoals by the violence of the wind and waves" , "strandings" and "collisions". Passing over the sophist's aside that most wrecks, strandings and founderings are caused not by the seas but by land in the wrong place at the wrong time, it can be seen that the category which gives rise to most

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[8] *Samuel & Co v Dumas*

[9] *Popi M* [1985] 2 Lloyd's Law Reports 1 p. 4-5. Although, as neatly put in *Versloot* § 45, "the peril is not the fortuity which gives rise to the ingress, it is the fortuitous ingress itself"

[10] [1992] 1 Lloyd's Law Reports 402, per Judge Diamond Q.C., affd [1994] 1 Lloyd's Law Reports 624

[11] On one level it is an illustration of the inapplicability of the so called presumption of loss by perils of the sea; but the fact that the classic ingredients of the presumption (such as disappearing without trace in wholly unknown circumstances) were not present does not mean that inferences cannot be drawn from the facts, and it is not clear what non-fortuitous causes were possibilities. Furthermore although unseaworthiness was eliminated as a cause of initial ingress, "questions remain[ed]" as to whether unseaworthiness caused the spread of water to Hold No. 4, without which the vessel would not have sunk (see p. 416). But on the currently broad test for proximate causes (see below) does that matter?

[12] Bringing in a further complication that if the negligent act or accident was one that could have happened on land (including a ship's boiler in the ship bursting (*Inchmaree*), or being dropped into a ship's hold (*Stott*)) it is not a peril "of" the sea, although cargo falling out of a porthole into the sea would be (*Stranna*). And it is of course perils of the "sea" not of water generally (although often extended contractually to inland waterways). Confused? Join the club. As Thomas politely puts it (see footnote 14 below, p. 583) the distinction is one of "*pragmatic arbitrariness*", hardly a fine advertisement for clarity. In *Versloot*, Popplewell J. had no difficulty in distinguishing *The Inchmaree* (§53).

difficulty in modern times, ingress of water in conditions which are not violent and fall well short of a furious tempest, do not get a mention.

And it is to be noted that what is relevant is the cause of the loss, not of the water ingress. Thus there may be water ingress caused by perils of the seas, but loss proximately caused by instability or lack of buoyancy.[13]

In such circumstances water ingress may or may not be perils of the seas, and may or may or may not be the proximate cause of the loss, and in order to know when it is, the reader is referred to the extensive literature on the subject[14] of which space does not permit even an abridged version. Some of the factors in this knotty problem are examined below.

Ships should not sink in conditions within the normal range of weather conditions, at least in the absence of being run down by another ship, but lots do, usually as a result of the condition of the ship or human error or both, and this is where, just when clarity is most needed, it is lacking. Loss by inherent vice is not covered. If inherent vice is defined to mean the ability of the subject matter insured to withstand the foreseeable rigours of the voyage there is a neatly logical approach, which is that if the vessel is lost in foreseeable conditions, then in the absence of some other explanation the inference is that it must have been inherently vicious and is not covered. That approach was, for cargo/ voyage policies, reflected in *The Mayban*[15], but has been roundly squashed in *The Cendor Mopu*, a decision which significantly limits the ambit of inherent vice. It has never been the approach for time policies, but why not? And more practically, if that is the case, what is the right approach?

The answer may be considered by reference to the somewhat nebulous interface between two principles which are in summary that:

a. Unintended ingress of seawater is prima facie "perils of the seas"[16] and only when the loss is caused by "debility" of the vessel "dissociated with any peril of wind or water" is it not,
b. But perils of the seas do not include the ordinary action of the wind and waves (see MIA) or the "normal" condition of the water, but a "special circumstance" such as heavy waves causing ingress to make it perils of the seas.[17]

Whilst the answer to marrying these lies in resort to the issue of proximate "cause(s), this perhaps glides over a prior question which is when the state of the sea becomes or leads to a "peril" of the sea in the first place.

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[13] This is, it seems, the same as looking at the cause of the initial ingress and then whether that "continued to have a hold" on the sinking (per *Milasan* p. 466). See for a consideration of the distinction between cause of ingress and of loss, *566935 BC Ltd v Allianz* [2007] Lloyd's Insurance Reports 503 and *The Bamcell* [1986] 2 Lloyd's Rep. 524

[14] Including *Arnould* 18th Edn Ch 23, Thomas *Perils of the Seas as a Maritime Peril* Liber Amicorum Marc Huybrechts, Antwerp 2011, *Mustill* [1988] LCMLQ 310, *Bennett* [2007] LMCLQ 315

[15] [2004] 2 Lloyd's Law Reports 609

[16] *Canada Rice Mills v Union Marine & General Insurance Co Ltd.* [1941] AC 55, *The Vergina No. 2* [2001] 2 Lloyd's Rep. 698, § 100

[17] *Mountain v Whittle* [1921] AC 615, and see *The Cendor Mopu* § 73 -74

(3) Unseaworthiness

Loss by unseaworthiness is not an insured peril. Why then should loss or damage caused because the vessel is unseaworthy be covered under a time policy under perils of the seas. The answer in *The Miss Jay* Jay[18] is that provided that "perils of the seas" are also the (or a) proximate cause, the assured can recover. As Mustill J, said "*a chain of causation running (i) initial unseaworthiness (ii) adverse weather (iii) loss of watertight integrity.. (iv) damage, is treated as loss by perils of the seas"*, but this begs the question as to the relative causative effect of each factor.

The Miss Jay Jay draws on a concept of "gross" unseaworthiness with the use of the term "debility". [19] This appears to be defined as a condition[20] where the ordinary action of the wind and waves in <u>any</u> type of sea is <u>bound</u> to cause loss and damage. But this is obiter and must be seen in the context of the finding of fact by Mustill J that the sea conditions were "markedly worse than average", and nothing in Mustill J.'s judgment[21] or the cases referred to by Slade L.J. seem to justify such a narrow definition.[22] It is suggested that debility might justifiably include a case where the vessel is bound to sink in adverse conditions weather or likely to sink in any conditions.[23] As Lord Clarke stated in *The Cendor Mopu*, "the loss or damage may not be inevitable, but will nevertheless be irrecoverable"[24]

The "rotting hulk" cases[25] are not instructive on the common situation where the weather is not flat but not "adverse". Furthermore, whilst often unseaworthiness is looked at as at the beginning of a voyage, it does not have to be, and a vessel may become unseaworthy during a voyage, classically by some act of crew negligence (see below).

Let us throw into the mix inherent vice (as applied to a vessel – a concept not well developed in the authorities)[26] and fair wear and tear (as referred to in the *Miss Jay Jay*[27]) , bearing in

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[18] [1985] 1 Lloyd's Law Reports 264, 271 affd [1987] 1 Lloyd's Law Reports 32. See a similar analysis in *Versloot* (fn 5 supra) § 21

[19] P. 271, taken from *Wadsworth Lighterage & Coaling Co v Sea Insurance Co* (1929) 34 Ll. L. Rep 98, 105

[20] Judgment of the court of appeal, p. 41

[21] Although the judgment does point out at p.272 to the vessel would not have sunk at her mooring or underway in a millpond sea.

[22] In *Dudgeon v Pembroke* the wind was "very strong" with "a heavy rolling sea" and generally "very bad". In *Fawcus v Sarsfield* (1856) 6 E & B 192, a case concerned with whether there was a warranty of seaworthiness, it is difficult to ascertain what the weather was but it appears to have included storms and tempest.

[23] In *Versloot*, Popplewell J. considered (§ 57) that two of the touchstones of debility were (i) association with wear and tear and (ii) absence of more than the ordinary action of the wind and waves. But these tests may, even though helpful, be seen as question begging.

[24] § 103. "*The critical question is whether or not the conditions of the sea were such as to give rise to a peril of the seas which caused some fortuitous accident or casualty*". Leaving aside the possibly tautology, this is probably as good and succinct statement of the law that we get, emphasising that fortuity attached to the accident not the sea conditions although the two are related. In that case the famous "leg breaking wave" qualified. But this has none of the uniqueness associated with Shane Warne. It appeared to be nothing more than a wave which broke a leg See also §§ 67-81

[25] *Wadsworth* (supra), *Sassoon v Western Assurance* [1912] A.C 561

[26] *Bennett* (op cit. P. 336) suggests that the doctrine is impliedly excluded in hull policies in so far as it would conflict with the rules on unseaworthiness and proximate cause and s.39 of the MIA, but even allowing for the attenuated post *Cendor Mopu* ambit of the concept it is difficult to see how such a position can be analytically justified

[27] CA, p. 41

mind that in the present context at least the former is a condition and the latter a cause of a condition. Let us also bear in mind that as discussed under "negligence" below, it may not be enough to defeat a claim to prove that a vessel suffered debility, without showing why.

(4) Weather

Central to all this however is the weather and the need, when invoking perils of the seas to get round the difficulty posed by Schedule 1 to the MIA, rule 7. Reverting to the "commercial issue" above, most scuttlers (except the "subtle scuttler" see below) want to scuttle the vessel in good weather so as to avoid imperilling the crew. Mustill J. refers[28] to four classes of weather – exceptional, adverse,[29] not adverse but not flat, and flat. It is not clear where these fit into the Beaufort scale or measure of sea state, but in any event their practical utility status post *The Cendor Mopu*[30] is likewise unclear. In that case Lord Clarke stated that "the critical question" was whether the conditions of the sea were such as to give rise to a peril,[31] yet in the very next paragraph he echoes Lord Mance's sentiments[32] in saying that discussions of how adverse the sea has to be to constitute a peril of the sea are "rarely fruitful". So not only do we not know when the sea is transformed from the context to the peril, but we should not enquire.

And assuming we know what "adverse" means, can less than adverse weather causing ingress of water amount to perils of the seas ? It should be borne in mind that forces generated in or on the vessel by her own way, or change of course in millpond conditions, may be greater than those exerted on her at anchor by a moderate sea.

It should be noted that in *The Popi M* the facts as found, that the vessel experienced "winds up to force 7 with correspondingly high seas", were not enough to enable the assured to succeed in defeating underwriters non-admission of perils of the seas and positive case of weakening of the hull through lack of maintenance and loss through "fair wear and tear". The same issue confronted the assured in *The Marel* where again there was unexplained water ingress less than 24 hours after the vessel experienced "adverse" weather including force 7 wind and heavy swell.

(5) Proximate cause

As has often been observed, when courts say that concept has to be applied on a "broad commonsense view"[33] basis this may be shorthand for saying that it cannot be elaborated.[34] Power to the Judge's elbow, but significant uncertainty for the parties about the result.

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[28] P. 271

[29] In *The Miss Jay Jay*, the "adverse" weather was wind force 4, and a 3 metre confused sea

[30] [2011] 1 Lloyd's Law Reports 560, § 75-77. Lord Mance embarked on a review of the "weather ingredient" in hull policy cases at §§ 67-77 but, whilst throwing out some nuggets, did not need to expound any general principle for the purposes of the decision in that case. Lord Clarke thought at § 104 that a discussion of how adverse is adverse was "rarely fruitful".

[31] § 103

[32] At § 79 "I am not attracted to a solution which depends on identifying gradations of adverse weather."

[33] *Miss Jay Jay*, court of appeal p.39, *Milasan* p. 466. Substituting the yardstick of the opinion of a "business or seafaring man" (*Versloot* §§ 30, 44 citing previous authority using this test) may take the debate little further.

In the old days when one looked for a single dominant cause, usually the last in time[35] it was not too difficult. Now one is looking potentially for a number of causes which pass the test as long as each is an "effective"[36] (whatever that means, other than, by circular reasoning, sufficiently important to have legal effect) cause, it is much more difficult. If one takes an effective cause which "continues to be an operating factor" [37] this is potentially very broad[38] and is likely to lead to frequent findings of multiple proximate causes. Indeed in the court of appeal in *The Miss Jay Jay*, Lawton LJ appears to relegate "proximate" to nothing more than any "but for" cause. We know that the assured recovers if there are two proximate causes, and one is an insured peril and the other is not or is a s.55(2)(a) cause, but does not recover if one is an excluded cause,[39] but this does not greatly assist us in knowing how much of a cause unseaworthiness has to be before it prevents the action of the wind and waves being perils of the sea.

To say that the issue of proximate cause must be determine by commonsense is less than illuminating, and where expressions such as inherent vice, unseaworthiness and debility are themselves defined in part by their potentially causative effect, two related dangers loom; first the danger of circular reasoning and secondly that of the Judge having to go on "impression". The difficulties in this regard are illustrated the recent court of appeal decision in *The Toisa Pisces.*[40] This was an insurance case although not on this point. The court was understandably less than enamoured with the Judge's approach to causation in terms of "one thing led to another", but the court endorsed the idea of multiple legal effective causes and the idea of the test for break in the chain of causation being "fact sensitive" (for which read "impossible to define") ;

(6) Negligence

Negligent or incompetent seamanship, whether failing to close or tighten a valve or weakening plating by accidental hitting is with a hammer during repairs, may render the vessel unseaworthy under the prudent owner test and/or debilitated and susceptible to

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Indeed the author ventures to suggest that the typical "man in the English Channel" would be much less willing to find perils of the seas as a proximate cause than, for example, Mustill J, in *The Miss Jay Jay* or their Lordships in *The Cendor Mopu*.

[34] Lord Hoffmann's address to the Chancery Bar Association in 1999: *"Commonsense and Cause of Loss"*

[35] *Cendor Mopu* § 22. Note *Leyland Shipping* [1917] 1 KB 873 at p.892 per Scrutton L.J.: "*It [the proximate cause rule] is in my view a judge-made rule of construction, which came into existence because it was found that among the infinite variety of causes which contribute to produce any given result not even 'good sense' could select with any certainty the real cause of the loss..", a prescient warning against the complications of multiple proximate causes*

[36] *Miss Jay Jay,* court of appeal, per Lawton LJ at p. 37 and Slade LJ at p. 39-40. Query the extent to which *The Cendor Mopu,* with its finding of one single cause of loss, is more consistent with the old orthodoxy.

[37] As in *The Milasan* [2000] 2 Lloyd's Law Reports 458, § 153

[38] As it must refer to "continuing" in a causal rather than temporal sense; i.e it continues, regardless of whether there are further (and effective) causes as long as the chain of causation is not broken

[39] *The Cendor Mopu* § 22 per Lord Saville, but see more equivocal comments by Lord Mance at §88, suggesting that inherent vice is not a truly an exclusion as such, as has for some time been the accepted approach with two "causes", one of which is a covered peril and the other is a s. 55(2) "exception": see *Arnould* 17th (and 18th) Edn 22-21

[40] [2012] 2 Lloyd's Law Reports 108.

inevitable or almost inevitable ingress of water even in flat calm conditions. One might refer generically to this line of authority as the "cock cock up" cases, due to the numerous instances of misadventures with seacocks opened at the wrong time or not closed.

When this occurs, this (the resulting ingress) is perils of the seas, provided it is truly "of the seas and not just on the seas"[41] regardless of the state of the wind and waves, because the peril is the fortuitous ingress consequent on the negligent act.[42]

A further complication is that such acts may also engage the common separate peril of negligence, for example by Master, officers or crew or repairers,[43] which may be subject further to the due diligence proviso ?[44] So if the crew negligently makes a hole in the plating, owners negligently instruct the master to continue with only a temporary patched repair,[45] which leaks while the vessel is at her mooring in the next port in calm conditions and sinks, does the owner recover? How does proximate cause play out when the same act constitutes peril of the seas, but also crew negligence where damage would not have arisen but for the lack of owners' due diligence? It may all depend on whether the "proviso" is an "exception" for the purpose of the *Wayne Tank* rule.

The negligence line of cases may of course impact on the debility versus heavy weather cases, as shown by the Canadian *La Pointe* case[46]. Here the vessel was laid up and sank in July 1982 in calm weather as the a result of the wrong type of flange screws being installed by a repairer two years previously and a failure to close valves properly, also over a year previously, by someone apparently employed to maintain her. One might think that the vessel passed even the narrow debility test as postulated by the court of appeal *The Miss Jay Jay*, but No. Owners eventually recovered on the basis that the negligent use of screws/failure to close valves were themselves fortuitous perils of the seas and proximate causes of loss.

Where then does this take us? Presumably into an inquiry as to why any unseaworthy or debilitated vessel is in the state she is, and in particular whether this was due to a negligent act or "positive" omission in her maintenance sufficient to constitute a peril of the see itself or a more fundamental omission or inactivity (whether "negligent" or not) leading to fair wear and tear which is neither remedied not prevented from occurring.

(7) s. 39(5)

The relevant rule in this section does not involve a warranty although it appears in a section about warranties. This section may catch the subtler scuttler, who may want to avoid the

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[41] See above

[42] *Versloot* §§36-38

[43] Or even wider; for example the Institute Yacht Clauses include as an insured peril "negligence by "any person whatsoever"

[44] In *Versloot* §§ 101-104 it was held that the proviso was confined to causes of loss and damage which were proximate causes, and does not apply to causes other than named perils which are engaged

[45] The proviso may be limited to pre voyage negligence as opposed lack of due diligence during a voyage: *Arnould* § 23-66

[46] [1986] 2 Lloyd's Law Reports 513, [1989] 2 Lloyd's Law Reports 536, [1991] 1 Lloyd's Law Reports 89

expense and risk of detection involved in employing a modern version of Mr. Komiseris[47], but rather prefers to avoid maintaining any part of his ship except the lifeboats and leave the rest to nature.

More commonly it is engaged at the bottom end of the shipping market, with owners trading old vessels on a shoestring budget. The section poses two questions.

First what is its effect on the rule that unseaworthiness is not an insured peril, when the section appears to envisage that loss attributable to unseaworthiness is only irrecoverable if privity is established. *The Cendor Mopu* suggests[48] that the clue is in the word "attributable" connoting a wider causal connection than that of "proximate cause". Thus if the proximate cause is an insured peril, the insurer is not liable, if the privity requirement is fulfilled, if the loss is attributable to (in the sense of caused, even though not proximately, by) unseaworthiness.

Second what does it mean?

a. "Sent to sea" is probably not too difficult and includes presumably the commencement of any ocean voyage from a port, but may be trickier for laid up vessels, houseboats, floating docks, FPSOs and other offshore structures and the like, or vessels operating on inland waterways.
b. The meaning of privity is well established in *The Star Sea*, but greater force may be breathed into s. 39(5) with the advent of the ISM code. It may be said that the owners most likely to have ships which are unseaworthy are also most likely to have poor management information systems and thus be ignorant of the condition of the vessel. However the courts may seek to reject this line of argument as they have in other "blind eye knowledge" contexts[49], by saying that if there is no proper system in place, as required by law or practice, which allows the owner to know that his ship IS seaworthy, then he is likely to be presumed to have wilfully disregarded the possibility that she is not.

(8) Burden of Proof

This generally arises in one of two contexts. The first context is that underwriters may suspect scuttling or similar conduct, but not have sufficient evidence to advance a positive case to this effect, and put the owners to proof of loss by an insured peril. The second is where underwriters do plead a positive case.[50] This is in itself a difficult area, and how the claim may develop depends on the judgment of the lawyers as well as the court's role in

[47] See *The Michael* [1979[1 Lloyd's Law Reports 55, *The Gold Sky* [1972] 2 Lloyd's Law Reports 187, *The Dias* [1972] 2 Lloyd's Law Reports 60. Perhaps the competent scuttling owner employs someone who is stupid enough to convince the court that he was capable of doing something ridiculous by mistake rather than deliberately (the classic cock cock up) without him being so transparently stupid that the owner is nailed under s. 39(5) for being privy to his incompetence which rendered the vessel unseaworthy
[48] Paragraph 57
[49] *Armstrong v Winnington Networks* [2012] EWHC 10 (Ch)
[50] In which the approach of the court is as set in *The Milasan* § 28 and the cases cited

overseeing pleadings, disclosure and evidence.[51] It will affect not only the evidence which underwriters are allowed to adduce but the extent and manner of challenge to the assured's evidence.[52]

The Popi M is well known and its doctrine well entrenched. It has its critics who think it commercially unattractive, and prone to being misunderstood. Even if the case represents a no score draw between Sherlock Holmes and Lord Brandon, the concept of absolute rather than relative probability is dangerous, as is invoking "commonsense" without more elucidation, given that, as Staughton LJ reminds us, improbable things often happen. Its application in *The Marel* leads to what many see as an unsatisfactory outcome[53] – is this what the assured is really paying his premium for?

The so called "presumption"[54] of loss by perils by seas is likewise not usually helpful to an assured,[55] being more suited to the old days when one could presume loss by sudden storm or collision. Now there is nearly always some knowledge of the incident, thanks to modern communications, which paradoxically prevents the presumption from applying just when one might think that it ought to, in the absence of any plausible non-fortuitous cause.

Do we need all this?

Let us turn now to the owner's second question to his solicitor. One could be forgiven for forgetting, whilst enmeshed in the tangle above, that insurers maintain complete freedom of contract in terms of ability to include warranties, exclusions and conditions (precedent or otherwise), and indeed virtually any other term they wish, in the policy. With this in mind The Marine Insurance (Amendment from Richard Lord) Act 2013, might read something like this.

> *"1. Unless otherwise stated in the policy the insurance is against all risks. The insured is entitled to recover thereunder for loss and damage unless*
>
> *(1) The primary cause thereof is proved by the insurer to be (i) breach of an express warranty[56] or (ii) wilful misconduct, or (iii) an excluded peril; or*
> *(2) The assured fails to comply with a condition precedent to recovery; or*
> *(3) The claim is fraudulent to a material extent*
>
> *2. The concept of "perils of the seas" is hereby abolished[57]*

[51] As discussed in *The Marel*, by Judge Diamond, p. 406, 417
[52] *The Marel, The Michael, The Gold Sky, The Gloria*
[53] Contrast the Australian case of *Skandia Insurance Co v Skoljarev* (1979) 142 CLR 375, a case given a less than ringing endorsement in *The Cendor Mopu*, § 73
[54] It is suggested that this presumption, as for example expounded in *Anderson v Morice* (1874) L.R.. 10 C.P. 58, is in reality nothing more than a statement of the truism that the court may draw inferences from primary facts, and that "legal" burdens of proof may be tempered by shifting evidential ones
[55] And indeed was in *The Marel* possibly unhelpful , perhaps diverting the court from a more basic "non presumptive" approach to the evidence
[56] This of course touches on a wholly different debate, which is the reform of the law on warranties

3. *That's it."*

But where's the fun in that? And if it is the answer, why don't insurers "just do it" in the policy? Maybe my underwriter friends will tell me that this would be a scuttler's charter. And as for that, the smart money is on a lot of overvalued unsaleable tonnage, yachts especially, sinking in mysterious circumstances in deeper parts of the Med in the coming months and years. So *The Popi M* may remain as required bedside reading for while yet.

[57] This is not a particularly novel idea: *O'May on Marine Insurance* (1993) records at p. 101 that a similar suggestion was made in the UNCTAD Legal Secretariat report in 1975