What Courts Get Wrong about "War"

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Abstract

For half a century, *Pan American World Airways v Aetna Casualty & Surety Co* has been recognized as among the leading American cases interpreting the term "war" in the context of an insurance contract dispute. The case relays an "ancient international law definition" of the term purportedly based on English and American caselaw representing the idea that "war" only encapsulates hostilities performed by de jure or de facto governments. As modern conflicts regularly involve violence performed by non-state actors, this definition has continued to cause interpretive problems in insurance cases, which raises the question of whether the approach is indeed historically entrenched. Retracing the analytical steps contained in the *Pan American* decision, this brief article argues that the rule might not be so ancient after all.

1. Introduction

On the narrow issue of defining the scope of war exclusions in insurance coverage disputes, the English and American approaches appear to diverge.[1] But American courts do not seem to notice. Among the most important rules articulated by US caselaw on the subject is the following passage from the 1974 case *Pan American World Airways, Inc v Aetna Casualty & Surety Co*, which reads:

> English and American cases dealing with the insurance meaning of 'war' have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character.[2]

Even a cursory review of the leading cases reveals there is no such rule in English law.[3] Indeed, the leading English treatise on war risk insurance describes a very different framework relying on an ordinary business meaning of the contract term instead of any technical definition of war.[4] US caselaw predating the *Pan*

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[1] The author discussed this divergence in a BILA lecture on 12 March 2024, entitled 'Delineating War and Terrorism in Insurance Coverage.'

[2] 505 F2d 989, 1012 (2nd Cir 1974).

[3] See, eg, *Spinney's v Royal Insurance* [1980] 1 LL Rep 406. English caselaw defining 'war' as a contract term under its ordinary business meaning long predates *Pan American,* including *Kawasaki Kisen Kabushiki Kaisha v Bantham Steamship Company Ltd* [1939] 1 LL Rep 155, which the *Pan American* court cited in footnote 12 of its own judgment.

[4] See Michael Davey et al, *Miller's Marine War Risks*, 4th ed (Informa 2020) Ch 6. However, a view more closely aligned with the *Pan American* definition of war is mentioned in another important English treatise. See N. Geoffrey Hudson and Tim Madge, *Marine Insurance Clauses*, 4th ed (Informa 2005) Ch VI.

American decision also does not appear to support the rule as a contemporaneous reflection of domestic law. So where did this 'ancient' definition come from? This short piece aims to unearth the source of the confusion and highlight its contemporary practical significance.

2. Lost in History

The *Pan American* case involved the destruction of an aircraft by several men claiming to act on behalf of a political group called the Popular Front for the Liberation of Palestine. The men hijacked the aircraft during a commercial flight scheduled to fly from Brussels to New York, diverted the plane to Lebanon and then Egypt, disembarked all of the passengers, and destroyed the aircraft with explosives on an Egyptian runway. The airline sought to recover from its all-risk insurers, which denied the claim on the basis of war exclusion language in the applicable policies. In the litigation that ensued, the central question before the US District Court for the Southern District of New York was whether the events fell within the policy exclusions referencing 'war' and 'warlike operations.' The trial court held that the facts did not warrant the application of the war exclusions since the damage was caused by a terrorist group instead of a sovereign government. The US Second Circuit Court of Appeals affirmed.

Although the quoted passage under scrutiny in this article is excerpted from the opinion of a three-judge panel of the Second Circuit, it appears to have been influenced by the language of the trial court judgment.[5] The trial court judge reasoned that '"[w]ar" has been defined almost always as the employment of force between governments or entities essentially like governments, at least *de facto*.'[6] But beyond this position, the trial court judgment contains additional statements that appear to have shaped the perspective of the Second Circuit panel. Remarkably, the trial court judgment used the term 'ancient' ten times. Employing rather flamboyant phraseology, the trial court described the 'ancient exclusions' and 'ancient, boiler-plate clauses' influenced by 'ancient formulae' and 'ancient canons' arising out of 'the fountainhead of the ancient concepts and ancient language of marine insurers.'[7] Through this colourful language, the trial court highlighted that the war exclusions used in the aviation market are based on old wordings that had been adopted through practice in the marine insurance context.[8] Perhaps induced by the trial court's historical bent, the ancient-ness of insurance doctrines clearly resonated with the Second Circuit panel.

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[5] The Second Circuit panel in *Pan American* included Judges Hays, Oakes, and Christensen. The trial court judgment, written by Judge Frankel is found at *Pan American World Airways Inc v Aetna Casualty & Surety Co,* 368 F Supp 1098 (US SDNY 1973).

[6] The trial court relied on three sources to support this holding: a US Supreme Court case addressing the rights of nations to seize fishing vessels as prizes of war, a public international law treatise, and the English House of Lords decision discussed below. *The Brig Amy Warwick (The Prize Cases)* 67 US 635 (1862); Lauterpacht, Oppenheim's International Law (7th ed 1952); *Britain Steamship Co Ltd v The King (The Petersham)* [1920] Lloyd's LL Rep 245, [1921] 1 AC 99.

[7] The trial court continued with this theme: '[t]he ancient words considered at this point have led counsel to deal learnedly with legal pronouncements of centuries long gone.' Ibid. at 1129.

[8] The trial court was correct on this point. Although the judgment does not explain this history of the clauses explicitly, the war exclusion terms used in aviation insurance derive from the FC&S clause adopted in the London market to delineate between marine risks and war risks. See Michael Davey et al, (n 4) section 1.15; See also Rob Merkin, *Marine Insurance: A Legal History* (Edward Elgar Publishing 2021) section 7-040.

Ultimately, the Second Circuit went further than the trial court by holding that there is an 'ancient international law definition' entrenched in both English and American insurance cases requiring war to include *only* hostilities performed by de jure or de facto governments.[9] But the Second Circuit cited only two cases to support this narrow proposition.[10] The first is the English House of Lords decision *Britain Steamship Company, Ltd v The Crown* (*The Petersham*).[11] Paraphrasing Lord Atkinson's speech in that case, the Second Circuit wrote, "'hostilities,' a term certainly of no narrower scope than "war," "connotes the idea of belligerents, properly so called, enemy nations at war with one another."'[12] In that characterization of Lord Atkinson's speech, the Second Circuit sidestepped significant context.

The *Petersham* was not a conventional insurance coverage case, but rather a charterparty dispute hinging on whether the loss of the vessel due to a collision should be absorbed by the shipowner or whether it should fall to the British government under a charterparty contract—the T.99 form—that was used for requisitioned vessels during the period leading up to the First World War.[13] While subject to the terms of the charterparty, on orders from the British Government, the *Petersham* had been moving iron ore between Bilbao and Glasgow. It collided with another ship and sank. Both vessels were traveling without lights as required by regulations issued by the British Admiralty to avoid enemy attack. Citing the language of the charterparty, the shipowners claimed that the loss was 'a consequence of hostilities and warlike operations,' which would cause it to fall within the responsibility of the British Government. The trial court rejected this argument and held in favour of the British Government on grounds that the loss was not caused by war risks, but rather a marine peril that fell within the contractual obligations of the shipowner. The Court of Appeal affirmed, as did the House of Lords.

The judgment of the House of Lords addressed the question on consolidated appeal because multiple cases hinged on similar questions of whether a loss was the result of marine perils or hostilities and warlike operations.[14] As for the *Petersham*, the central question was whether the loss was 'in consequence of dangers of

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[9] 505 F2d 1012 (2nd Cir 1974).
[10] The Second Circuit engaged in more thorough cross-jurisdictional analysis on the separate question of whether a 'guerilla war' can fall within the policy language referencing war. On this point, the Second Circuit softened its definition of war by acknowledging "[w]ar can exist between quasi-sovereign entities." 505 F2d 1013.
[11] *Britain Steamship Co Ltd v The King (The Petersham)* [1920] Lloyd's LL Rep 245, [1921] 1 AC 99. The Second Circuit described this case as 'an action on dovetailing marine and war risk policies.' This is technically incorrect, as the dispute did not directly involve dovetailing insurance policies, but rather a charterparty designed for government requisitioned vessels that described whether a loss was covered by the shipowner as a marine peril or the British Government as a war peril.
[12] 505 F2d 1012.
[13] The T.99 charterparty is discussed in FD Rose, *Marine Insurance Law and Practice*, 2nd ed (Informa 2012) section 17.7.
[14] The other case considered on consolidated appeal *was* an insurance case. It involved the *Matiana*, which was stranded on a reef while participating in a convoy escort led by British warships. Since the convoy involved the vessel operator taking orders regarding the route, course, and precautions taken during the voyage, Viscount Cave and Lord Shaw found that the loss was proximately caused by a warlike operation within the meaning of the war risk policy, while Lord Atkinson, Lord Sumner, and Lord Wrenbury agreed with the Court of Appeal that the grounding was caused by a marine peril. [1920] Lloyd's LL Rep 245. Shortly after the House of Lords ruled on these cases, the US Supreme Court discussed the *Petersham* and *Matiana* in a decision in which Justice Holmes famously described the 'special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.' Despite the split decision in the *Matiana* case, Justice Holmes described the contract terms at issue as 'an ancient form of words which always have been taken in a narrow sense.' *Queen Insurance Company of America v. Globe & Rutgers Fire Insurance Company*, 263 US 487 (1924). Reflecting on further caselaw arising during the Second World War, one commentator argued the

the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk' which would cause it to fall to the shipowner, or whether it was caused by 'risks of war…which would be excluded from an ordinary English policy of Marine Insurance.'[15] This division, at the time, was evidenced by the FC&S clause included in marine insurance policies to separate marine risks from war risks. Interpreting the terms of the FC&S clause referenced by the T.99 charterparty, Viscount Cave, writing the main judgment, read 'hostilities' and 'warlike operations' to require some act of 'warlike character.'[16] He found that 'there was no such thing' in the scenario involving the *Petersham* in part because 'the mere fact that a submarine war was being waged by Germany cannot possibility be regarded as a proximate cause of the collision of these two vessels.'[17] In a separate speech drawing largely from the judgment of the Court of Appeal below, Lord Atkinson wrote, 'I concur with Lord Justice Atkin in thinking that the word "hostilities" connotes the idea of belligerents, properly so-called enemy nations at war with one another, and is used to describe the operations, offensive, defensive or possibly protective of the one against the other, in the conduct of their war.'[18] He continued, 'warlike operations' have a 'much wider reach' than only hostilities, and include situations 'even where a state of war does not exist, operations of such a general kind or character as belligerents have recourse to in war.' As an example, Lord Atkinson explained that hostilities might encompass situations, 'where combative operations are undertaken to suppress a rebellion against an allied or friendly power, or where the territory of a nation has…required, in anticipation of attack, to be protected by such defensive measures as laying down mines.'[19]

Despite the US Second Circuit's reference to Lord Atkinson's speech as support for an ancient definition of war, a careful reading reveals no demonstrable view that the contract terms war, warlike operations, or hostilities must always involve actions attributable to nation states. Instead, Lord Atkinson's speech relays the perspective that a casualty proximately caused by war perils must involve some kind of 'combative or aggressive' operations—whether offensive, defensive, or protective—in contrast to the more benign governmental order to sail without lights that contributed to the collision at issue in the *Petersham* case.[20] Lord Atkinson's reference to 'enemy nations at war with one another' was not used in the context of distinguishing between actions carried on by state and non-state actors, but rather to illustrate the combative character of an activity that could cause a loss to fall within the war exclusions referenced by the T.99 charterparty.[21]

The sole American case cited by the Second Circuit in *Pan American* directly to support its 'ancient' definition of war is *Vanderbilt v Travelers' Insurance Co*.[22] That case, decided on the merits by a trial-level state court in

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Supreme Court's position is 'opposed to the British cases.' See S. Hasket Derby, What are Warlike Operations Under FC&S Clause in Marine Policies, 33 California Law Review 130 (1945).

[15] [1920] Lloyd's LL Rep 246.

[16] Ibid. Viscount Cave wrote, 'The word "hostilities" connotes operations of war, which may be either offensive or defensive and may be undertaken either by the vessel immediately concerned or by an enemy or friendly force. The expression 'warlike operations" is said to have been added in order to cover cases where similar acts were done, but no actual outbreak of war had occurred.'

[17] Ibid.

[18] Ibid, 249.

[19] Ibid.

[20] Ibid, 249-250.

[21] Ibid, 249. The Second Circuit also referenced Lord Atkinson's speech in a another section of its judgment addressing proximate causation, although it discussed this separate issue through the lens of the *Matiana* grounding, not the *Petersham* collision. See 505 F2d 1007-1008.

[22] 184 NYS 54 (1920).

New York, involved a life insurance policy that excluded death caused by war.[23] A civilian passenger died by drowning when a German submarine infamously sunk a passenger vessel, the *Lusitania*, off the coast of Ireland during a voyage between Liverpool and New York. The decedent had been insured under a life insurance policy, but the insurer denied liability on the basis that his death was caused by war. The plaintiffs seeking to collect under the life insurance policy had argued that the sinking of the *Lusitania* should not fall within the scope of the war exclusion because the attack, 'violated the common usages and acceptances of principles of enlightened nations, termed the laws of war.'[24]

Analyzing war as a contractual term '[i]n the broad sense,' the court reasoned that the death of the insured 'must be conceded to be a result of war, because it came about in a contest conducted by armed public forces and during a state of affairs during the continuance of which the parties to the war were exercising force against the other.'[25] And in this broad sense, war might include attacks on civilians given that 'limitations designed to protect non-combatants, neutrals and others wholly disassociated from the armed conflict itself have been repeatedly offended against and flouted even in civilized times by Christian sovereignties.'[26] But '[i]n the narrow sense,' the court wrote,

> 'war may be regarded as controlled within absolute law which can be ascertained, applied and enforced by a body of rules properly applicable as occasion arises, and that civilized nations have consented that this body of law should form the rules of their conduct in their relations with each other.'[27]

In other words, viewed narrowly, an attack on civilians might not fall within the war exclusion because the act itself violates fundamental principles of war.

The court adopted the broader of these two options and held that the casualty fell within the war exclusion.[28] The court found that any modern usage and custom of the term 'war' interpreted through the lens of the laws of war is only a guide that has no bearing on the meaning of the term in an insurance policy. Accordingly, the court found that since the *Lusitania* had been attacked while 'war was being waged by and between Great Britain, the sovereign controlling the *Lusitania,* and Germany, the sovereign controlling the submarine vessel,' this meant that the casualty was caused by war and excluded from the life insurance policy.[29] In this sense, the

[23] The trial court that decided this case was in the state court system of New York, which should not be confused with the federal US District Court for the Southern District of New York that decided *Pan American* in the first instance. Although—rather confusingly— the New York state trial court is called the Supreme Court of New York, Trial Term, New York County, it is a trail-level court whose decisions do not carry precedential value outside of its narrow geographically-defined jurisdiction. The decision was affirmed without opinion in the Supreme Court, Appellate Division, First Department, New York 194 NYS 963 (1922) and then by the Court of Appeals of New York, 235 NY 514 (1923) with a one sentence opinion reading, "Judgment affirmed, with costs."
[24] Ibid, 55.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] The court cited three cases, none of which address the insurance meaning of war: *The Rapid*, 12 US 155 (1814) (addressing the recovery of prizes of war in the context of restrictions on trading with the enemy); *Bas v Tingy*, 4 US 37 (1800) (addressing the recovery of salvage in the context of restrictions on trading with the enemy); and *Montoya v United States* 180 US 261 (1901) (addressing whether federal legislation allowed recovery for property loss attributed to a group of Native Americans acting in concert).
[29] 184 NYS at 56.

interpretation of the term in the insurance policy did not depend on whether the German attack on civilians violated any laws of war.

Once again, there are no statements in the *Vanderbilt* decision limiting the insurance definition of war to be only between de facto sovereigns. It just so happened that the facts of the case involved an attack that led to the death of an insured civilian during hostilities occurring between two sovereign governments.[30] In fact, as precedential authority, the *Vanderbilt* court cited the US Supreme Court case *Montoya v. United States*, which addressed the question of recovery for property loss under federal legislation for livestock stolen from US citizens by a group of Native Americans acting in concert.[31] In that case, the US Supreme Court explained that 'North American Indians do not and never have constituted "nations" as that word is used by writers upon international law, although in a great number of treaties they are designated as "nations."'[32] Nonetheless, it held that a 'collection of marauders' may commit 'acts of war' in situations where 'their hostile acts are directed against the government or against settlers with whom they come in contact.'[33] Rather than restricting the definition of war to only involve sovereign actors, the *Montoya* case cited by the *Vanderbilt* court seems to support a more expansive view that war may be committed by non-state actors—at least in the context of the federal legislation at issue in that case.[34]

A fresh analysis of these cases casts doubt on the *Pan American* holding that an 'ancient international law definition' of war governed English or American insurance cases at the time the Second Circuit issued its judgment. The *Petersham* stands for the narrow proposition that a collision of a vessel that sails without lights for maritime security purposes at the direction of the British Government may not be proximately caused by war perils named in the FC&S clause referenced by the T.99 charterparty. But Lord Atkinson's speech in that case fails to support the Second Circuit's conception that English courts always define war in insurance cases under an ancient international law definition requiring hostilities to be performed by sovereign governments. Similarly, the *Vanderbilt* case cited by the Second Circuit offers weak authority to justify a narrow interpretation of war in insurance cases. The most important principle reflected in that case is that war exclusions in insurance policies should be viewed broadly enough to encapsulate attacks on civilians even if such attacks arguably violate international humanitarian law principles of war. Consequently, it appears the *Pan American* historical rationale for defining war is rooted in inapposite precedential authority, which suggests the case may have been the first English or American decision to announce this particular definition of war in an insurance case.

[30] The *Vanderbilt* court did use the term "sovereign" eight times, but it does not appear that the court intended to narrow the scope of war to only those acts performed by nations. Indeed, despite the Second Circuit's reliance on the case in *Pan American*, the case most clearly stands for the idea that attacks on civilians *can* amount to war within the meaning of an insurance policy.

[31] *Montoya v United States* 180 US 261 (1901).

[32] Ibid, 264. It is important to highlight that the reasoning supporting this holding in *Montoya* is reprehensible as the US Supreme Court used highly denigrating language to explain the view as to why Native American tribes were not considered capable of forming "nations" at that time.

[33] Ibid, 266.

[34] This Second Circuit addressed the *Montoya* case on the separate "guerilla war" analysis. 505 F2d at 1014.

3. Getting "War" Right

The purpose of this analysis is not only to hunt down decades-old errors in American caselaw, but rather to highlight the contemporary significance of the confusion this has caused. The rule expressed by *Pan American* has been treated as an entrenched part of American law, and it is now 'ancient' in the sense that it has withstood half a century as a leading case on the subject of interpreting war in commercial documents without any judicial acknowledgment of the shaky ground supporting one of its fundamental holdings.[35] Although based on questionable authority, the *Pan American* rule has taken on its own life and continues to influence decisions in the modern era.

For instance, the US Court of Appeals for the Ninth Circuit has recently held that the definition of war expressed in *Pan American* demonstrates a 'specialized' usage of the term in the insurance industry that should be applied instead of any ordinary and popular standard of interpretation.[36] In fact, relying on the principle that war only involves hostile actions performed by de jure or de facto governments, in *Universal Cable Products v Atlantic Specialty Insurance Company*, the Ninth Circuit overturned a trial court judgment holding that a major outbreak of violence between Hamas and Israel in 2014 satisfied the standard of a war in the ordinary and popular sense of the term.[37] Adopting *Pan American* and its progeny, the Ninth Circuit's basis for reversing the decision was that the insurance industry views the meaning of war through a specialized and technical definition that requires hostilities to be performed by either de jure or de facto governments, which, it held, does not include attacks by militant political groups like Hamas.[38]

Subsequently, in a seminal appellate decision out of the Superior Court of New Jersey, the court relied on both *Pan American* and *Universal Cable Products* to support the conclusion that the NotPetya cyber-attack performed by non-state actors—with possible support of the Russian state—did not fall within a war exclusion contained in a property insurance policy.[39] The court reasoned that the cases demonstrate 'a long and common understanding' of how the war exclusions are intended to be read through 'context and history.'[40] Although the outcome of the case hinged primarily on the lack of warlike action rather than the cyber-attack's possible connection to a sovereign state, given that it is among the world's first published cases in which an insurer has invoked a war exclusion in the context of a cyber-attack, it is significant that the court relied on caselaw containing problematic reasoning. This could perhaps diminish its influence when similar cases come up in other jurisdictions that utilize a different approach to interpreting war in commercial documents, including England.[41]

This is not to say that the *Pan American* rule that requires war to be performed by a de jure or de facto sovereign is unworkable. Admittedly, the rule serves as a guide for defining war that can lead to relatively predictable

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[35] However, in *Spinney's v. Royal Insurance*, Mustill J. did distinguish the *Pan American* court's interpretation of "usurped power" with the approach under English law. [1980] 1 LL Rep 406, 435.
[36] *Universal Cable Products v Atlantic Specialty Insurance Company*, 929 F3d 1143 (9th Cir 2019).
[37] See *Universal Cable Products v Atlantic Specialty Insurance Co*, 278 FSupp3d 1165 (CD Cal 2017).
[38] 929 F3d 1158.
[39] *Merck & Co v Ace American Insurance Co*, 293 A 3d 535 (2023).
[40] Ibid, 551.
[41] The Supreme Court of New Jersey agreed to review this decision on appeal, but the parties settled before the case was decided. See Insurance Journal, Merck Settles Coverage Dispute with Insurers Over War Exclusion in NotPetya Attack, 5 January 2024.

results. But, as the foregoing demonstrates, irrespective of the Second Circuit's claims of long-standing Anglo-American harmony on the subject, its notion of an 'ancient international law definition' represents a clear divergence from the ordinary business person standard applied in English law. In future cases, especially as the nature of armed conflict seemingly evolves to more commonly implicate non-state actors engaged in proxy fighting, courts and litigants may find it useful to recognize that there are no mysterious centuries-old principles of insurance practice demanding war to be defined as only hostilities performed by sovereign states. It seems that rule is a more recent American invention.