



EVERYTHING MATTERS

**The Maritime Law Association of Australia and New Zealand in conjunction with the Maritime Law Associations of the United States and Canada
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Marine Insurance – inherent vice, perils of the sea, and proximate cause

Marine Insurance Act 1909

Section 46 (1)

In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy.

Marine Insurance Act 1909

Section 61 (1)

Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

Marine Insurance Act 1909

Section 61 (2) (c):

In particular, unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured.....

Institute Cargo Clauses (A)

- 4.4 *In no case shall this insurance cover loss damage or expense caused by inherent vice or nature of the subject-matter insured.*

Leyland Shipping Co v. Norwich Union Fire Ins. Society (1918)

Lord Shaw:

The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have not yet destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

Shipping Corporation of India Ltd v. Gamlen Chemical Company (1980)

Justice Stephen:

To regard both the causes in the present case as of equal effectiveness is therefore mistaken. The inadequate stowage was here the decisive or dominant cause, only waiting upon heavy weather before it might take effect. The damage to the drums was not such damage “arising or resulting from” a peril of the sea as Art. IV, r. 2 speaks of ; the effective cause of that damage was the inadequate stowage.

Soya Gmbh v White (1983)

Lord Diplock:

Inherent vice means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.

Mayban General Assurance v Alstom Power Plants (2004)

- Transformer damaged during carriage by sea.
- Transformer regarded by the expert witnesses as sound, without any flaw in design.
- Vessel encountered force 8 conditions causing her to pitch and roll heavily.
- While the judge found that there had been violent movements of the vessel due to the wind and sea which led to the damage, he concluded that as the conditions were not extreme or unusual, the damage must have been due to the inherent inability of the transformer to withstand the ordinary incidents of the voyage.

Global Process Systems Inc v Syarikat Takaful Malaysia (2011)

- An elderly oil rig carried as cargo on a towed barge on a voyage from the US Gulf coast to Malaysia.
- Prior to the voyage, the towage arrangements were approved by surveyors appointed by the insured and accepted by the insurers.
- The concern was always in relation to fatigue cracks – the three legs of the rig were extended some 100 metres into the air during transit.
- As part of the certification process, the surveyors required that there be a reinspection of the legs in South Africa.

Global Process Systems Inc v Syarikat Takaful Malaysia (2011)

- On reinspection, a considerable degree of fatigue cracking was observed, so that repairs were required before the voyage continued.
- During transit, the legs cracked and fell off one by one in something of a domino effect.
- Sea conditions were at the rougher end of what might have been expected, but not extreme.
- Judge at first instance concluded that while the damage was inevitable, it was highly probable given the fatigued condition of the legs, and that the loss was therefore proximately caused by inherent vice, so that insurer not liable.

Global Process Systems Inc v Syarikat Takaful Malaysia (2011)

- On appeal by the insured, the Court of Appeal overturned the first instance decision.
- Court of Appeal test for inherent vice was whether the cause of the damage was an inability to withstand the wind and sea conditions which would be bound to occur as part of any normal voyage.
- In this case, the court found that there must have been a leg-breaking wave which caused the first leg to fail.
- Thus, loss caused by fortuitous event, not by inherent vice.

Global Process Systems Inc v Syarikat Takaful Malaysia (2011)

- On appeal to Supreme Court by insurers, Court of Appeal decision upheld.
- The Court accepted the insured's argument that the insurer's case was the equivalent to the introduction of a warranty of seaworthiness on cargo, which was specifically excluded by the Act.
- Supreme Court held that the loss was NOT the result of the natural behaviour of the rig in the ordinary course of the voyage, but that the proximate cause was perils of the sea.
- In particular, anything that would otherwise count as a fortuitous external accident or casualty will suffice to prevent the loss being attributed to inherent vice.

Global Process Systems Inc v Syarikat Takaful Malaysia (2011)

Lord Mance:

While not myself attempting any exact definition, ordinary wear and tear and ordinary leakage and breakage would thus cover loss or damage resulting from the normal vicissitudes of use in the case of a vessel, or of handling and carriage in the case of cargo, while inherent vice would cover characteristics of or defects in a hull or cargo leading to it causing damage itself – *in each case without any fortuitous accident or casualty.*

Some Conclusions

Peter Gee (junior counsel for the insurers) has said – correctly in my view – that the practical effect of the judgment is that the exclusions of loss caused by inherent vice and nature of the thing insured have become of much less use to insurers, but that on a more positive side, the judgment brings certainty to the issue and significantly reduces the scope for extensive and expensive litigation.

Some Conclusions

Justice James Allsop, President of the New South Wales Court of Appeal, has stated that the judgment has brought simplicity and clarity to the operation of inherent vice and removed the confusion between inherent vice and cargoworthiness. However, he has also pointed out that what must be consistently resisted is the formulation of false legal principle out of factual disagreement over the basic rule properly formulated and that while the Global Process judgment helps with the recognition of the basic rule, contestable decisions of fact and disagreement about them will remain.

Some Conclusions

My own view – supported by some authority, but otherwise discredited – is that the concept of proximate cause makes it necessary to distinguish between multiple possible causes of loss in order to identify a single proximate cause, being the cause which is proximate in efficiency, and that were this the position – in contrast to the situation which now exists and permits more than one proximate cause – the difficulties which have been encountered might be more readily resolved.



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