



Crew Negligence in Marine Insurance

MLAANZ Conference
10-12 September 2014

*Rob Merkin
DLA Phillips Fox
Universities of Exeter and Auckland*

- Negligence may operate as a defence to a claim but cannot give rise to a claim
- *State of Netherlands v Youell* [1998] 1 Lloyd's Rep 236:

“I do not believe I do not believe it is normally helpful, when considering the effect of negligence or misconduct on the cover afforded by a policy of marine insurance, to ask whether or not the negligence or misconduct is the "proximate cause" of the loss. Negligence and misconduct are generic terms that apply to acts or omissions that are coupled with a particular mental element. Where such an act or omission results in loss or damage to property insured, this will be because the act or omission causes or permits a more direct physical cause of loss or damage to occur.”

The Effect of Negligence on Insurance Claims

- Marine Insurance Act 1908, section 55(2)
 - “[The insurer] is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the ... negligence of the master or crew”
 - *Busk v Royal Exchange* (1818) 2 B & Ad (fire in cabin on wooden vessel)
 - *Jaggat v Lyttelton Marina* [2006] 2 NZLR 87 (marina negligently designed)
- Marine Insurance Act 1908, section 40(1)
 - “In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured”
 - *Clifford v Hunter* (1827) 3 C & P 16 (master ill – vessel not seaworthy)
 - *Redman v Wilson* (1845) 14 M & W 476 (negligence in course of voyage)

- Liability insurance
 - *Hing v Security & General Insurance* (1988) 5 ANZ Insurance Cases 60-886
- First party insurance
 - *State Insurance Ltd v Simmonds* HC Invercargill, 2001 (windows left open)
- Is the test subjective or objective?
 - *Roberts v State Insurance* [1974] 2 NZLR 312 9 (car abandoned)

Negligence as a Peril of the Seas

- Peril of the seas requires a fortuity followed by loss
- Ingress of water alone is not a peril of the seas
- Fortuity causing ingress is anything beyond assured's control
 - *Hamilton v Pandorf* (1887) 12 App Cas 518 (rats gnawing hole)
- Can crew negligence leading to ingress be the relevant fortuity?
 - *Versloot Dredging v HDI, The DC Merwestone* [2013] EWHC 1666 (Comm): crew failing to remove water from emergency fire pump. Note that the negligence did not occur at sea.
 - *Venetico v IGI* [2013] EWHC 3644 (Comm): grounding caused by crew negligence. Note that result the same without crew negligence

- Hull Clauses 1982/1996/2003

“This insurance covers loss of or damage to the subject matter insured caused by ... negligence of Master Officers Crew or Pilots ... provided that such loss or damage has not resulted from want of due diligence by the Assured”
- Does this have any independent effect?
 - *Lind v Mitchell* (1928) 32 LI LR 70 (no need to decide as there was sea peril)
 - *Baxendale v Fane* (1940) 66 LI LR 174 (insurers liable for damage whether or not there was a marine peril)
- What does “due diligence” mean?
 - *The DC Merwestone* [2013] EWHC 1666 (Comm) - negligence
 - *Coast Ferries v Century* [1975] 2 RCS 477 (failure to monitor master’s conduct)

Unseaworthiness in Time Policies

- Situation where vessel under time policy is sent to sea by master aware of shortcomings in crew:
- Marine Insurance Act 1908, section 40(5)
 - *“where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness”*
- Relationship between s 40(5) and perils of the seas
 - *The Cendor Mopu* [2011] UKSC 5

The Strange Concept of Suing and Labouring

- The duty to sue and labour: Marine Insurance Act 1908, s 78(4)
 - “It is the duty of the assured and his agents, in all circumstances, to take such measures as may be reasonable for the purposes of averting or minimising a loss”
 - Note *Yorkshire Water v Sun Alliance* [1997] 2 Lloyd’s Rep 21 but see *Hunt v Westpak Nominees* 1993, unreported (NZHC)
- Who are the assured’s agents?
 - *The Gold Sky* [1972] 2 Lloyd’s Rep 187
- Duty?
 - *Melinda Holdings v Hellenic Mutual* [2011] EWHC 181 (Comm)
 - *Lind v Mitchell* (1928) 32 LI LR 70
 - *The Pilbara Pilot* [2006] WASC 104
 - *Masefield v Amlin* [2011] EWCA Civ 24
 - *Tanner v Bennett* (1825) Ry & Moo 182
 - *The Nore Challenger* [2005] 2 Lloyd’s Rep 534

Taking Steps to Avoid Peril

- Changing nature of peril does not break chain of causation if loss was inevitable
 - *Symington v Union Insurance of Canton* (1928) 34 Com Cas 233
- But anticipating a peril may break the chain of causation
 - *Hadkinson v Robinson* (1803) 3 B & P 388 (war risks cover for pilchards not extending to early sale to avoid perilous voyage)
 - *Becker, Gray v London Assurance* [1918] AC 101 (voyage stopping early following outbreak of war – held loss by fear of capture, not war risks)