

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

(MR. JUSTICE MUSTILL)

Royal Courts of Justice

Wednesday 15 October 1986

Before:

LORD JUSTICE LAWTON

LORD JUSTICE SLADE

LORD JUSTICE CROOM-JOHNSON

—————
J. J. LLOYD INSTRUMENTS LTD.

Respondents

v.

NORTHERN STAR INSURANCE CO. LTD.

Appellants

"THE MISS JAY JAY"
—————

(Transcript of The Association of Official Shorthandwriters Ltd.,
Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's
Inn, London, WC2A 3RU).

—————
MR. GEOFFREY BRICE Q.C. and MISS BELINDA BUCKNALL (instructed by
Messrs. Ingledeu Brown Bennison & Garrett) appeared for the
Appellants (Defendants).

MR. ADRIAN HAMILTON Q.C. and MR. JEFFREY GRUDER (instructed by
Messrs. Ince & Co.) appeared for the Respondents
(Plaintiffs).

—————
J U D G M E N T

LORD JUSTICE LAWTON: At about 1.30 p.m. on 15 July 1980 the plaintiffs' motor cruiser, Miss Jay Jay, with two experienced yachtsmen on the flying bridge, started from Deauville a return passage across the English Channel to Hamble. A course was set for the Le Havre buoy at the mouth of the Seine Estuary. There was a head wind. As the cruiser approached the buoy at a speed of about 15 knots, it ran into a choppy, confused sea with waves about three metres high, maybe a little more. Once in this sea the helmsman, a Lieutenant in the Royal Navy, slowed down. He found it advisable to go through this sea at a speed which would ensure planing as far as possible from wave to wave. About every two minutes the cruiser fell into a trough because the waves were not evenly spaced. Whenever it did so, it hit the water with a bang, producing a slamming effect on the hull. No criticism has been, or could be, made of the helmsman's seamanship when passing through this sea. The cruiser duly arrived at Hamble. It was then discovered that, as a result of the passage through the choppy, confused sea, the floor of the cruiser had cracked and part of the skin of the hull on the port side was missing from chine to topside. The cost of repairing the hull was about £30,000.

The plaintiffs claimed that their insurers, the defendants, should indemnify them against this loss under a time marine policy for the period from 1 August 1979 to 31 July 1980. The policy, subject to specified exclusions and conditions, indemnified the plaintiffs "against all loss of or damage to the insured craft ... which is directly caused by external accident means". The defendants said that it had not been so caused. There had been nothing exceptional about the sea at the material time. The damage had been done by the ordinary and

to be anticipated action of the sea on the hull. There was nothing accidental about the loss. Anyway, what had caused the loss was the admitted faulty design of the cruiser. It was never suitable for use in the kind of sea which was running in the mouth of the Seine Estuary on 15 July 1980. It was unseaworthy for a cross-Channel passage during which seas of this kind could be anticipated. Such loss as the plaintiffs had sustained could have been recovered under a products liability policy, if they had had one, not under a marine policy. The defendants, as marine insurers, were concerned at the prospect of claims of this kind being made against them under their standard form of policy for pleasure craft. It was commercially impractical for them to carry out surveys of such craft, many of which (but not this cruiser) belong to classes many thousands strong.

Litigation resulted. The action was tried by Mustill J. (as he then was). He delivered judgment on 29 November 1984 (see (1985 1 Lloyd's List Reports 264) in favour of the plaintiffs. The detailed history of the litigation is set out in that judgment and need not be repeated.

The defendants have appealed on three grounds: first, that the loss was not caused by "accidental external means"; secondly, that the trial judge misdirected himself by excluding from consideration the fact, not challenged by the plaintiffs, that the loss would not have occurred but for the cruiser's unseaworthiness due to design defects; and, thirdly, that the design defects, not the adverse sea, were the dominant and effective cause of the loss. The plaintiffs joined issue on all three submissions. As to the second one they submitted that the judge did take into account the unseaworthiness of the cruiser due to the design defects; but, even if he did not, it was irrelevant if the

adverse sea was an effective, and therefore proximate, cause of the loss. Anyway, on the evidence, there were two concurrent and effective causes of the loss. One was the unseaworthiness due to the design defects, the other the action of the adverse sea.

Both at the trial and in this court many authorities were relied upon by both sides. This was due, in part, to counsel equating the risk insured against in the policy in suit with that insured in the well-known and long-used Lloyd's S.G. policy, namely "the adventures and perils ... of the seas". That which under Lloyd's S.G. policy was a loss caused by a peril of the seas would almost certainly be a loss caused by "accidental external means"; but it is clear from other provisions in the policy in suit that the defendants intended to indemnify the plaintiffs against losses which were more than "perils of the seas", for example, losses caused by "contact with aircraft or other aerial devices".

It follows that consideration of the issues in this appeal must start with the construction of the relevant part of the policy. The three words which identify the risk insured against are words of ordinary usage in English. Impacts of the adverse sea upon the cruiser's hull were clearly external. So far as the plaintiffs were concerned, they did not intend them to happen and they were unexpected because nothing of the kind had happened on the passage from Hamble to Deauville or at the start of the return passage or during the last part of it. Further, as the judge found, a cruiser of this size and configuration ought not, if properly designed and built, to have suffered the kind of damage it did in the conditions it encountered. In my judgment, this was enough to make what happened "accidental". The fact, as

the judge found, that the sea was not exceptional and could have been anticipated, does not stop the loss from being adjudged to have been caused by "external accidental means". It was not caused by "the ordinary action of the wind and waves" (see Rule 7 of the Construction Rules in the First Schedule to the Marine Insurance Act 1906) but by the frequent and violent impacts of a badly designed hull upon an adverse sea. This fact, however, did not make the defendants liable under the policy unless the loss was "proximately caused by a peril insured against": see section 55(1) of the 1906 Act. Most of the argument was directed to this issue.

Mustill J. also found that the cruiser "was in such a condition, by reason of defects in design and construction, as to be unseaworthy for a passage from Deauville to Hamble". If the defects in design and construction had been the sole cause of the loss, then the plaintiffs would not have been entitled to claim either at common law (see Ballantyne v. Mackinnon (1896) 2 Q.B. 455) or because of an express exclusion in the policy. On the facts, as the judge found, the unseaworthiness due to design defects was not the sole cause of the loss. It now seems to be settled law, at least as far as this court is concerned, that, if there are two concurrent and effective causes of a marine loss, and one comes within the terms of the policy and the other does not, the insurers must pay. In the last three editions of Halsbury's Laws, the law has been stated in these terms:

"If one of these causes is insured against under the policy, and none of the others is expressly excluded from the policy, the assured will be entitled to recover".

In the fourth edition see Volume 25 paragraph 181. All the relevant authorities were considered by this court in Wayne Tank and Pump Co. Ltd. v. Employers Liability Assurance Corporation Ltd.

(1974) Q.B. 57. In that case there were two causes of a fire, one was within the terms of an insurance policy, one within an exception. This court adjudged that the dominant cause came within the exception. All three members of the court, however, considered what should happen when there were two causes which were equal or nearly equal in their efficiency in bringing about the damage, one being under the general words so as to make the insurers liable and the other within the exception so as to exempt them from liability. They all agreed that the exception applied. Roskill L.J. (as he then was) stated at page 74 that in marine insurance law the position was clear. In this case the evidence proved that there were two causes. I will consider later whether both were proximate or only one was. The exclusions in the policy only applied if "any loss or expenditure (was) incurred solely in remedying a fault in design or in the event of damage resulting from faulty design". On the facts as found this exclusion did not apply.

The plaintiffs were not privy to the defects in design (see section 39(5) of the 1906 Act) nor to the fact that at the material time the cruiser was not seaworthy. They had not impliedly warranted that it was (see the same sub-section of the 1906 Act) nor had they failed to take reasonable steps to maintain and keep the cruiser in a proper state of seaworthiness as they were required to do under the policy. The loss was not caused by wear or tear so as to cause "debility". Since the defendants did not exclude unseaworthiness or design defects which contributed to a loss without being the sole cause (as they could have done) the plaintiffs' claim falls within the policy provided that what happened in the sea conditions was a proximate cause of the loss.

The defendants submitted that, although the evidence proved

that the loss would not have been sustained but for the unseaworthiness of the cruiser due to the design defects, the judge misdirected himself by adjudging that unseaworthiness was irrelevant and he did not take it into account when deciding whether what happened in the adverse sea was a proximate cause of the loss. This submission was based on the following passage in the judgment:

"Second, as to causation. It may be that the doctrine of proximate cause has undergone some reassessment since the days when the most important cases on the present topic were decided. In those days the ultimate cause was more readily identified as the proximate cause than might be the case today. Nevertheless, it is clearly established that a chain of causation running - (i) initial unseaworthiness; (ii) adverse weather; (iii) loss of watertight integrity of the vessel; (iv) damage to the subject-matter insured - is treated as a loss by perils of the seas, not by unseaworthiness: see, for example, Dudgeon v. Pembroke (1987) 9 Q.B. 581, per Blackburn J. at p. 595, and 2 App. Cas. 284, per Lord Penzance at p. 296, and Frangos v. Sun Insurance Office (1934) 49 Ll.L.R. 354, at p. 359."

I do not read Mustill J.'s judgment as doing anything of the kind. As I would expect from such an experienced judge in this branch of the law, he directed himself as to whether what happened was a proximate cause of the loss. As there were no relevant exclusions or warranties in the policy the fact that there may have been another proximate cause did not call for specific mention since proof of a peril which was within the policy was enough to entitle the plaintiffs to judgment. All through his judgment it is clear that he kept in mind the evidence about the design defects and the effect which they had had upon what happened. The criticised passage should be read in the light of the facts found and what was in issue in the case. I do not accept that he adjudged that the unseaworthiness of the cruiser was irrelevant. If he had done so this court would have had to decide on the evidence whether the adverse sea was a proximate cause of the loss.

Mr. Hamilton Q.C. on behalf of the plaintiffs submitted that, even if the judge did regard the unseaworthiness of the cruiser as irrelevant, he was, as a matter of law, entitled to do so. He replied upon a dissenting judgment of Brett J. when the case of Dudgeon v. Pembroke was before the Exchequer Chamber - see (1875) 1 Q.B.D. 96 at page 119 - and a short obiter comment made by Lord Wright in Smith, Hogg and Co. Ltd. v. Black Sea and Baltic General Insurance Co. Ltd. (1940) A.C. 997 at page 1006. The House of Lords reversed the Exchequer Chamber in Dudgeon v. Pembroke and, by implication, approved the judgment of Brett J. I am not satisfied that they approved everything he said. There was much force in Mr. Brice Q.C.'s comment on behalf of the defendants that neither Brett J. nor Lord Wright were considering a case in which, on the evidence, on the balance of probabilities the unseaworthiness of the vessel rather than an adverse sea was the proximate cause of the loss. That, submitted Mr. Brice, was this case. It was not the case in Dudgeon v. Pembroke where the grounding and breaking up of the vessel was a proximate cause. I am not persuaded that unseaworthiness, followed by a loss due to a peril of the seas, can never be relevant.

The cause of a loss has to be determined on the evidence. There may be a number of causes, some making a bigger contribution to the loss than others. Under marine insurance law the insurer is only liable for losses proximately caused by a peril insured against. In the past, judges have used synonyms for the statutory word "proximately" - "dominant", "effective" and "direct". Lord Wright favoured "dominant" - see the Smith, Hogg and Co. Ltd. case at page 1006. It has been adjudged, however, that "proximately" means proximate in efficiency rather than proximate in time (see Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance

Society Ltd. (1918) A.C. 350 at pages 363 and 369.

What has to be decided in this case is whether on the evidence the unseaworthiness of the cruiser due to the design defects was such a dominant cause that a loss caused by the adverse sea could not fairly and on commonsense principles be considered a proximate cause at all. In my judgment, the evidence did not establish anything of the kind. What it did establish was that, but for a combination of unseaworthiness due to design defects and an adverse sea, the loss would not have been sustained. One without the other would not have caused the loss. In my judgment, both were proximate causes.

I would dismiss the appeal.

LORD JUSTICE SLADE: The facts of this case, which I will not recapitulate, are to be found set out in the judgments of Lawton L.J. and of Mustill J., whose findings have not been challenged on this appeal. In agreement with Lawton L.J. I find myself unable to accept the careful submissions made by Mr. Brice on behalf of the defendants. In view of the interest and apparent novelty of at least some of the points involved, I will attempt to summarise my reasons in my own words.

The learned judge decided in effect (1985) 1 LL.L.Rep. 264 at pp. 272-273) that

- (1) the immediate cause of the damage to the yacht, Miss Jay Jay, was "the action of adverse weather conditions" during the course of the vessel's return voyage from Deauville to Hamble in July 1980 "on an ill-designed and ill-made hull";
- (2) the cases show that this is sufficient to bring the loss within the words of a time policy in the standard form;

- (3) for present purposes there is no material distinction between "perils of the seas" and "external accidental means";
- (4) the plaintiffs therefore established a prima facie loss under section 1(a) of the policy;
- (5) exclusion (i) in the policy (which made certain references to faults in design) did not exclude the prima facie liability under section 1(a).

In argument on this appeal the defendants have not relied on exclusion (i); if it had been drafted in rather wider terms, the result might have been different. Their case, as presented by Mr. Brice, has relied heavily on sections 55(1) and 55(2)(c) of the Marine Insurance Act 1906 ("the Act") which, so far as material, provide:

"55. (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.

(2) ...

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ... inherent vice or nature of the subject-matter insured ..."

Mr. Brice has rightly reminded us that we should constantly bear the provisions of section 55 in mind. His argument has essentially been founded on two submissions which reflect these statutory provisions and have been to the following effect, namely

- (A) that, whether or not they proximately caused the relevant loss, the relevant weather conditions were not a peril insured against by this particular policy ("submission (A)");
- (B) further or alternatively, that the loss in question

was not "proximately caused" by these weather conditions within the meaning of section 55(1)(a) of the Act ("submission (B)").

I find it helpful to consider these two submissions separately, even though they are closely inter-related.

SUBMISSION (A)

If the policy in the present case had included the phrase "perils of the seas", Rule 7 set out in the First Schedule to the Act and the authorities relating to the construction of the phrase, which have been cited so extensively in this court and below, would have been directly material for present purposes. However, the draftsman of this policy, by what was clearly a deliberate choice, decided not to use that time-honoured phrase. Instead, in subparagraphs (a) to (g) of section 1 of the policy, he set out a list of the perils insured against, beginning in section 1(a) within the item "external accidental means".

I do not think that Rule 7 or the authorities relating to the construction of the phrase "perils of the seas" are wholly irrelevant, since they may give some guidance as to what action of the weather or the sea may fairly be regarded as "accidental" in the context of a policy of marine insurance. Nevertheless, it seems to me that, for the purpose of considering submission (A), the court must throughout direct its attention to the particular phrase which the draftsman of this policy saw fit to use, in preference to the phrase "perils of the seas". On any possible footing the phrase "external accidental means" gives cover wider in some respects than the phrase "perils of the seas", since, for example, it is capable of covering damage caused to the vessel while in transit on land or damage caused to it by aircraft or other objects falling from the sky.

No authority has been cited to us in which the meaning of the phrase "external accidental means" has been considered in the context of a policy of marine insurance. We therefore have to form our own view as to its meaning.

In P. Samuel & Co.Ltd. v. Dumas (1924) A.C. 431 at p. 458

Lord Sumner observed:

"As has been often said, perils of the sea refer to things that may happen, not to things which must happen in the ordinary course of navigation."

The word "accidental" in section 1(a) of the policy in the present case must, in my opinion, similarly exclude events which must happen in the ordinary course of navigation. As the learned judge commented, ((1985) 1 LL. L. Rep. at p. 271) the word "accidental" makes explicit what is implicit in the older form of words, that there is no recoverable loss in the absence of a fortuitous event. It would not, for example, include the ordinary action of the wind and the waves in a dead calm sea. Nor would it include an intentional act on the part of the insured: (see In re Kate Scarr & The General Accident Assurance Corporation Ltd. (1905) 1 K.B. 387 at p. 393).

In my judgment, however, the sea conditions encountered by the vessel in the present case did not fall outside the phrase "accidental means" merely because, in the learned judge's words ((1985) 1 LL.L.Rep. at p. 270), they

"were such as a person navigating in those waters could have anticipated that he might find, but would hope that he would not find".

Even if the occurrence of a particular unwanted event, which may or may not occur, is a readily foreseeable risk, the event may still be properly regarded as accidental when it does in fact occur. In the present case the weather conditions at the relevant time were found by the learned judge (ibid at p. 270) to have been

"markedly worse than average". They were by no means bound to occur. They fell within the description of an "accidental" cause.

The expression "external" in section 1(a) of the policy, in my judgment, simply falls to be read as the antithesis of "internal": (compare Hamlyn v. The Crown Accidental Insurance Co. Ltd. (1893) 1 Q.B. 750 at p. 753 per Lord Esher M.R. and at p. 755 per A. L. Smith L.J.). The impact of the sea on the yacht's hull clearly amounted to "external" rather than "internal" means.

In the circumstances, I can see no grounds for differing from the learned judge's conclusion that the relevant weather conditions at the relevant time amounted to "external accidental means" within the meaning of the policy and would reject the defendants' submission (A).

SUBMISSION (B)

I now turn to the rather more difficult question whether the loss in question was proximately caused by the weather conditions. It would have been unnecessary for the defendants to invoke this argument if the policy had contained a warranty that the ship should be seaworthy at the relevant time. In this event, the warranty being broken, the plaintiffs' claim would inevitably have failed, without the need for any analysis of the meaning of the phrase "external accidental means" or of questions of causation. The policy, however, contains no relevant express warranty as to seaworthiness. Section 5 contains a warranty "that the Insured shall take all reasonable steps to maintain and keep the insured craft in a proper state of repair and seaworthiness", but it is not suggested that the plaintiffs failed to take such reasonable steps. Nor does the policy contain any implied warranty as to seaworthiness. Section 39(5) of the Act provides that in a time policy (as distinct from a voyage policy)

"there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but 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".

It is not suggested that the Miss Jay Jay was sent to sea in an unseaworthy state with the privity of the plaintiffs. Thus, the defendants have to fall back on the submissions relating to causation.

Though the words "unless the policy otherwise provides" in section 55(1) leave it open to the draftsman of a policy to restrict or exclude the application of the subsection, the policy does not "otherwise provide" in the present case. It affords an indemnity only against damage to the yacht "directly caused" by the perils insured against. In my judgment, the same meaning must be attributed to this phrase as to the phrase "proximately caused" in section 55(1). The authorities relating to proximate cause in marine insurance policies are therefore of some importance. These authorities show that the question of proximate cause has to be determined according to "a broad commonsense view of the whole position": (see Canada Rice Mills Ltd. v. Union Marine & General Insurance Co. Ltd. (1941) A.C. 55 at p. 69 per Lord Wright). The modern cases also show that the cause of damage which is the latest in point of time is by no means necessarily the proximate cause. As Lord Shaw of Dunfermline said in Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd. (1918) A.C. 350 at p. 369:

"The cause which is truly proximate is that which is proximate in efficiency".

The learned judge found as facts ((1985) 1 LL.L. Rep. at p. 270) that (a) the sea conditions encountered by the vessel were "markedly worse than average but not so bad as to be exceptional";

(b) the vessel was in such a condition by reason of defects in design and construction as to be unseaworthy for a passage from Deauville to Hamble; (c) a boat of its size and configuration, complying with the description set out in the manufacturer's brochure would, if properly designed and built, have made the relevant voyage in the conditions actually encountered without suffering damage; (d) nevertheless, the vessel would have been able to survive the voyage if the sea conditions had been no worse than average.

In the light of findings (a) and (d) I think it clear on any commonsense view that the sea conditions at the relevant time must be regarded as at least a cause, whether or not the proximate cause, of the damage to the yacht, and I did not understand Mr. Brice to dispute this proposition. However, in the light of the findings (b) and (c), I think it no less clear that the faulty design and construction of the boat must also be regarded as at least a cause, whether or not the proximate cause of the damage. On a commonsense view of the facts both these two causes were, in my opinion, equal, or at least nearly equal, in their efficiency in bringing about the damage.

In these circumstances, if the policy had contained a relevant express exception which related to loss caused by the unseaworthiness of the vessel, the plaintiffs' claim might well have been unsustainable. The problems which may arise in cases where a loss occurs by a combination of causes, the operation of one of which is excluded by a term of the policy, are helpfully discussed in Arnould's Law of Marine Insurance and Average (16th Edition) at para. 776. As Lord Sumner said in P. Samuel & Co. Ltd. v. Dumas (1924) A.C. at p. 467:

"Where a loss is caused by two perils operating simultaneously

at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates".

Roskill L.J. summarised the legal position thus in Wayne Tank and Pump Co. Ltd. v. Employers Liability Assurance Corporation Ltd.

(1974) 1 Q.B. 57 at p. 75:

"I think the law in this respect is the same both for marine and non-marine, namely, that if the loss is caused by two causes effectively operating at the same time and one is wholly expressly excluded from the policy, the policy does not pay".

However, since the instant policy contains no relevant exception relating to loss caused by unseaworthiness of the vessel, different principles apply. The legal position in such a case is stated thus in Halsbury's Laws of England (4th Edition) Volume 25 para. 181 which relates to marine insurance policies:

"It seems that there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy, the assured will be entitled to recover".

No authority has been cited to us which leads me to suppose that this passage incorrectly states the relevant law relating to marine insurance policies and, in my judgment, it incorporates the principle applicable to the present case. The crucial point is that in the contingencies envisaged in the passage, for the purpose of applying the provisions of the policy and section 55 of the Act, the loss is treated as proximately caused by the cause insured against, notwithstanding the presence of a concurrent cause not covered by the policy.

The Act was a codifying statute and we may, I think, consider both post-1906 and pre-1906 authorities for the purpose of obtaining guidance as to the meaning of the phrase "proximately caused" in section 55. A particularly illuminating authority is

the decision in Dudgeon v. Pembroke (1877) 2 A.C. 284, referred to by the learned judge. In that case, the House of Lords was prepared to assume in favour of the underwriters that the vessel in question "was not seaworthy and that its want of seaworthiness caused it to be unable to encounter successfully the perils of the sea, and so to perish": (see at p. 295 per Lord Penzance, with whose speech the rest of their Lordships concurred). Nevertheless, Lord Penzance pointed out (ibid) that the immediate cause of the loss of the vessel was undoubtedly "the action of the wind and waves" and (at p. 297) that a long course of decisions has established that "any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it". In reliance on this principle, the House of Lords, while assuming that the ship was in fact unseaworthy, still decisively rejected the underwriters' plea (referred to by Lord Penzance at p. 295) that the loss was not covered by the policy because it was caused by the ship's unseaworthiness. The House of Lords thus felt able to reach this conclusion without the benefit of any findings of fact as to the nature and extent of the ship's unseaworthiness. It may well be that such findings, if made, would have revealed that the state of the vessel was of equal efficiency in causing the loss. Nevertheless, for the purpose of applying the provisions of the policy, the House of Lords was prepared to treat the loss as proximately caused by the action of the wind and waves. This decision, which was followed by Roche J. in a post-1906 case, Frangos v. Sun Insurance Office (1934) 49 LL.L. Rep. 354 (see at p. 359) therefore lends strong implicit support to the passage from Halsbury cited above.

On the basis of the learned judge's finding of fact, I therefore conclude that the loss in the present case is properly to be treated as having been "proximately caused" by a peril insured against (the impact of adverse weather conditions) even though the faulty design and construction of the yacht may have been of equal efficiency in bringing about the damage. In my judgment, therefore, submission (B) is not well founded.

Mr. Brice strongly criticised the last paragraph at p. 271 of the report of the learned judge's judgment on the grounds that he appears to have regarded himself as bound by a general rule of law that

"a chain of causation running - (i) initial unseaworthiness; (ii) adverse weather; (iii) loss of watertight integrity of the vessel; (iv) damage to the subject-matter insured - is treated as a loss by perils of the seas, not by unseaworthiness".

This passage, in Mr. Brice's submission, indicated that the learned judge regarded the condition of the vessel as irrelevant in considering the question of proximate cause and erred in so doing. The passage is economically expressed but, as Lawton L.J. has observed, it must be read in the light of the facts found and the issues in the case. For the reasons which he gives, I would reject these criticisms.

Finally, I wish to stress that the condition of the yacht in the present case was not one of debility. If at the start of a voyage a vessel is in such a state of general debility that the ordinary action of the wind and waves in any type of sea is bound to cause her damage and such action duly causes her damage, common-sense may dictate that the condition of the vessel rather than the action of the wind and waves shall be treated as the sole proximate cause of the damage. That I understand to be the effect of the authorities: (see, for example, Fawcus v. Sarsfield (1856) 119

E.R. 836 and also Wadsworth Lighterage & Coaling Co. v. Sea Insurance Co. (1929) 34 LL.L. Rep. 285). In the latter case this court upheld the decision of Finlay J. (see *ibid* at p. 98) that the sinking of a barge happened as a result of the general debility of the barge and pointed out that by virtue of section 55(2)(c) of the Act, the insurer is not liable for ordinary wear and tear unless the policy otherwise provides. However, in the light of the learned judge's findings (a) and (d) referred to above, the present case is plainly distinguishable from the "debility" line of cases.

For the reasons stated, I can see no sufficient grounds upon which the defendants can resist this claim under this form of policy and would dismiss this appeal.

LORD JUSTICE CROOM-JOHNSON: I have read both judgments and I agree.

Order: Appeal dismissed with costs.
