

UNDERSTANDING THE FIVE FUNDAMENTAL MARINE INSURANCE EXCLUSIONS

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INTRODUCTION

The long and well-litigated history of marine insurance has led to a highly developed and codified law relating to marine insurance contracts. Of particular interest to those who underwrite risks and investigate losses in Canada are the marine insurance exclusions set out in the *Marine Insurance Act*, SC 1993, c 22 (the “MIA”). The MIA’s provisions have been the subject of substantial commentary and interpretation by Canadian courts.

This paper will discuss several of these statutory exclusions as well as an additional exclusion which arose in response to the widespread use of Inchmaree cover. While there are many more exclusions which are common to most marine insurance policies, a good understanding of the five fundamental exclusions reviewed below (referred to collectively herein as the “core exclusions”) is key to analyzing basic coverage provisions and in particular, the requirement that perils be fortuitous.

MARINE INSURANCE ACT

Unless a marine insurance contract provides otherwise, the *MIA* imposes several exclusions. These are set out in section 53 of the Act, which begins by stating that an insurer is only liable for a loss that is proximately caused by a peril insured against, e.g. a peril of the sea. The Act defines perils of the seas as “...fortuitous accidents or casualties of the seas, but does not include ordinary action of the wind and waves”¹.

The MIA describes the following major exclusions which are incorporated into Canadian policies:

53. (1) Subject to this Act and unless a marine policy otherwise provides, an insurer is liable only for a loss that is proximately caused by a peril insured against, including a loss that would not have occurred but for the misconduct or negligence of the master or crew.

(2) Without limiting the generality of subsection (1), an insurer is not liable for any loss attributable to the wilful misconduct of the insured nor, unless the marine policy otherwise provides, for

(a) in the case of insurance on a ship or goods, any loss proximately caused by delay, including a delay caused by a peril insured against;

(b) ordinary wear and tear, ordinary leakage or breakage or inherent vice or nature of the subject-matter insured;

(c) any loss proximately caused by vermin; or

(d) any loss or damage to machinery not proximately caused by maritime perils.

(emphasis added)

¹ Schedule MIA, s. 2(d)

In addition to (and in part because of) the statutory exclusions, a “lack of due diligence by owners or managers” exclusion arose in conjunction with additional coverage for damage to machinery that was not caused by a traditionally recognized peril of the sea. This core exclusion can be described as “the exception to the exception to the statutory exception.” Near the end of the 19th century, in response to a gap in coverage arising out of what is now the statutory exception/exclusions for “damage to machinery not proximately caused by a peril of the sea” or arising out of an inherent vice/latent defect, insurers began to offer optional coverage for such losses (the exception to the statutory exception). Purchase of the additional coverage – known as an Inchmaree clause (discussed further below) - became so wide spread that it is now a standard inclusion in most hull and machinery policies. Accordingly, it is included in the core exclusions examined in this paper and is indeed relevant to acquiring a greater understanding of the degree of “fortuity” required to generate a covered risk.

CORE EXCLUSIONS

Five core exclusions can be distilled from section 53 by omitting the now rarely invoked “vermin” exclusion, focussing on the frequently litigated “wear and tear”(rather than breakage/leakage) and recognizing that s. 53(2)(d) has been largely displaced by Inchmaree clauses:

1. Wilful misconduct on the part of master or crew;
2. Loss caused by delay, including delay caused by an insured peril;
3. Ordinary wear and tear;
4. Inherent vice; and
5. Lack of due diligence of assured or managers.

The statutory exclusions are often explicitly part of hull and cargo policies and implied in P & I policies (with the exception of wilful misconduct, which is invariably explicit). The due diligence requirement is explicit in inchmaree clauses and all risks policies. [See Appendices A and B for examples of commonly used clauses.]

A NOTE ON PROXIMATE CAUSE

The first thing to note about section 53 of the MIA is its requirement for “proximate cause”. This is a condition precedent to all coverage under a marine insurance policy. The leading Canadian case on “proximate cause” in this context is *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814. There the Supreme Court was asked to decide whether the sinking of a vessel was a loss proximately caused by a peril of the sea. The sinking was caused by the failure of cap screws due to corrosion and a failure to close a valve which would have stopped the ingress of the sea water. Writing for a unanimous court, Justice McLachlin, as she then was, indicated her disdain for a doctrinal approach:

28. The question of whether insurance applies to a loss should not depend on metaphysical debates as to which of various causes contributing to the accident was proximate. Apart from the apparent injustice of making indemnity dependent on such fine and contestable reasoning, such a test is calculated to produce disputed claims and litigation. It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, the loss is shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things.

In light of *CCR*, any consideration of whether or not a cause is the “proximate cause” of the loss should be governed by common-sense principles. If the loss would not have occurred “but for” a peril insured against, it can be said to be proximately caused by that peril. The analysis then shifts to any applicable exclusions.

BURDEN OF PROOF

In a named perils policy (such as a marine insurance policy intended to provide coverage against perils of the sea), as opposed to an all-risks policy, the insured bears the burden of proving that the loss was proximately caused by the named peril. If the insured discharges this burden, the burden shifts then to the insurer to prove that the loss falls within an exclusion.

The shifting burden was considered in *H.B. Nickerson & Sons Ltd. v. Insurance Co. North America*, [1984] 1 FC 575 (CA). That case involved a fishing boat that sank while tied up at a dock. The cause was never determined. The boat was insured against perils of the sea. The trial judge found that the plaintiff had failed to discharge its duty of making out a prima facie case of loss due to an insured peril. The Court of Appeal agreed. Justice Marceau made the following comments at paragraph 30:

The onus is of establishing that a peril of the sea was at the origin of the loss, not of identifying the exact cause, and the standard of proof applicable is only that of a balance of probabilities. If the owner, although unable to put his finger on the precise cause of the loss, can nevertheless demonstrate on a balance of probabilities that, because of the circumstances of the case and the clear seaworthiness of his vessel, most of the events that could not be included into the concept of peril of the sea have to be disregarded as possible causes, he may very well satisfy the onus that rested upon him. This is so, obviously, because proof by inference or presumption is a perfectly valid means of evidence and the inference relied upon here may be quite

reasonable in view of the great extension given by the case law to the concept of peril of the sea.

The Plaintiff in *H.B. Nickerson* failed to adduce evidence establishing that the vessel was seaworthy before it sank and therefore did not meet the basic threshold of coverage. Accordingly, the burden did not shift to the insurer so the inconclusive cause was resolved in its favour. Once an insured meets what is typically a low threshold of establishing seaworthiness, or on a cargo claim that the goods were in good condition and packed properly when shipped, the burden shifts. [There are many cases on this point, but for example see: *Williams v. Canada*, (1984), 7 CCLI 198 (FCTD) – struck mystery object at sea; and *Feuiltaut Solution Systems Inc. v. Insurance Co. North America*, [1984] 1 FC 575 (CA) – cargo claim on all risks policy involving goods packed improperly by insured].

A loss proximately caused by a peril of the sea still must fall outside of the statutory and express exclusions. The five core exclusions are further explored below.

CORE EXCLUSIONS EXAMINED

WILFUL MISCONDUCT

As one would expect, damage or loss caused by wilful misconduct is excluded from coverage. This includes both intentional wrongdoing and conduct exhibiting reckless indifference to the outcome of one's actions. A recent Supreme Court of Canada case *Société Telus Communications v Peracomo Inc.*, 2014 SCC 29 (hereinafter "*Telus*") offers a useful illustration of how this exclusion can apply.

In *Telus*, the insured crab fisherman snagged a subsea fibre optic cable while fishing in the St. Lawrence in 2005. The following year, he snagged the same cable twice over a two day period and cut the cable with an electric saw each time. He claimed – and the trial judge accepted – that after the 2005 incident, while touring a nearby museum, he saw an old chart or map that showed a line running through the general area of the cable and had the word “abandoned” written next to it. He therefore believed the cable was no longer in service.

The cable was, in fact, active and the owners sued the insured. When the case got to the Supreme Court of Canada, the main issues were whether the insured's actions amounted to wilful misconduct such that he would lose the benefit of the limit on liability found in the *Marine Liability Act*, S.C. 2001, c. 6 and whether his marine liability insurer was protected by the wilful misconduct exclusion.

In relation to the limit on liability found in the MIA, the Supreme Court noted that the parties to the 1976 Convention intended to limit liability in all but the rarest situations. Accordingly, the Court held that wilful misconduct in that context had to include an intention to cause the very harm which occurred including the ultimate consequences. The Court applies different reasoning when reviewing the exclusion set out in s. 53 of the MIA for “any loss attributable to the wilful misconduct of the insured.” Given the insured's conduct was intentional and his

recklessness as to the consequences (ie. failing to ascertain whether the cable was truly abandoned) occurred in circumstances where he had had a duty to know better, the exclusion applied. The Court, perhaps prompted by skepticism about the old map/chart showing an abandoned line, points to the fact that the insured's charts were out of date, he ignored Notices to Mariners and failed to contact marine traffic when he snagged the line. Therefore, by failing to maintain appropriate charts as he was required by law to do, the insured converted his intentional act (cutting the line) into wilful misconduct. In other words, he exhibited reckless indifference to consequences in the face of a duty to know (that the cable was active).

The Court noted that the exclusion relates to a fundamental principle of insurance law: fortuity. If a loss is caused by an insured's wilful misconduct rather than a fortuitous event or an accident, it is not within the scope of an insurable risk.

The same conclusion does not necessarily follow in cases where, unlike cutting the cable in *Telus*, the physical contact was not intended. In *Conohan v. Cooperators*, [2001] 2 FCR 238 T.D., the insured fishing boat, "Lady Brittany," collided with another vessel at night which was anchored and lighted. The captain of the Lady Brittany was intoxicated at the time and did not post a lookout, despite approaching a fairly busy fishing ground. Although it is hard to imagine a more reckless approach, the court held that the misconduct was not "wilful". Contact with and damage to the other vessel was not intended. The failure to post a look out and the captain's impairment did not make the result so inevitable as to rise to the level of wilful misconduct. The Court may have been swayed by a "it's a big ocean" argument, providing the degree of fortuity required to avoid the exclusion. If this accident had occurred in a busy harbour or narrow passage, the result might not have been the same.

Another consideration of wilful misconduct is found in *Williams v. Canada*, (1984), 7 CCLI 198 (FCTD), where a fishing boat sank after colliding with a submerged and unseen object. The force of the collision allegedly caused an intake pipe to crack, filling the hold with water. The insurer denied coverage in part based on alleged wilful misconduct by the assured who allowed an uncertified captain to sail the boat. The Court found that although the captain lacked a certificate, he was competent nonetheless. Furthermore, the lack of certification did not lead to the loss. This case provides some support for the theory that wilful misconduct must involve either intended results, or consequences which flow so directly from the alleged recklessness that the outcome was a certainty (not fortuitous). In *Williams*, the uncertified captain could have very well made an uneventful voyage. Hitting the object was unforeseen bad luck.

The elements of wilful misconduct can be summarized as follows:

1. intentional wrongdoing; or
2. conduct exhibiting reckless indifference to a known or foreseeable risk

Wilful misconduct requires more than mere negligence. To satisfy the test laid out by the Court, such acts must be intentional or be so extreme or reckless as to be properly characterized as misconduct in the face of foreseeable risk. In other words, if the knowledge that ordinary and required diligence would reveal is imputed to the insured at the time of the incident, the consequences would be clear, certain and in all respects not fortuitous.

LOSS CAUSED BY DELAY

Even a short delay in a shipment of cargo can cause a loss. Perishable cargo can deteriorate and lose some or all of its value. The market value of cargo may change over the course of days or weeks, and a merchant may consequentially suffer losses as a result of delay. Claims for delay are excluded unless a policy states otherwise.

Continental Insurance Co. v Almassa International Inc., [2003] OJ No 1125 offers a vivid illustration of an insurer's difficulty in relying on the delay exclusion when delay is only one factor in the loss. That case involved a shipment of lumber insured under a marine cargo policy. The voyage was intended to take 25 to 30 days. The policy contained the typical exclusion for loss or damage "proximately caused by delay" even where the delay is caused by a risk insured against. The ship's engine failed en route to the destination and the ship had to be towed to port. In all, the voyage was delayed more than four months. After learning of the engine failure, the insured warned that the cargo of lumber would be damaged if it was kept on board for an extended period of time without ventilation. For various reasons, the ship's holds were not ventilated and as expected the lumber was damaged.

The trial judge held that the damage was caused by lack of ventilation and was therefore not excluded under the policy. At paragraph 91, Justice MacFarland noted:

In my view, the proximate cause of this damage is the failure to adequately ventilate the cargo. Obviously, the longer the cargo remained aboard in the unventilated holds, the worse the damage became, but that does not, in my view render the cause of the damage delay. Had the cargo been properly ventilated there would have been no damage no matter how long it remained on the ship.

The trial judge held that the exclusion clause would only have been effective if delay was the sole cause of the loss. At paragraphs 101-109, Justice MacFarland provided the following comments:

105 No authorities were cited in the meaning of "proximately caused by delay", not even dictionary definitions. Mr. Tirel said when he used the term "proximate cause" in his opinion, he meant "main cause".

106 The cases seem to contrast proximate with remote in the sense that "proximate" seems to imply "direct" while remote implies "distant".

107 I am reminded in considering this aspect of the words of McLachlin J. (as she then was) in *C.C.R. Fishing Ltd. v. Tomenson Inc.*, *supra*, where she said:

The question of whether insurance applies to a loss should not depend on metaphysical debates as to which of various causes contributing to the accident was proximate.

108 It was, in my view, open to insurers to use language that would make it clear that any loss caused either by delay alone or delay in conjunction with any other risk or risks including other risks insured against elsewhere in the policy would not be covered. In my view, the language the insurer employed in this policy does not make this clear. It is not clear that the damage is not covered when caused by delay coupled with any other risk insured against elsewhere in the policy.

109 Consequently, if I am in error, in my conclusion that the loss was caused by the failure to ventilate and it is determined that delay was a contributing factor, I remain of the view that the exclusion clause does not oust coverage. The language here used is inadequate for that purpose.

Insurers should not assume that the delay exclusion can necessarily be applied anytime a loss is somehow connected to delay. Where a delay by itself is enough to cause the loss, there is no element of fortuity that is not expressly excluded. Where delay combines with another cause which is not excluded, fortuity returns (ie. the poor ventilation was not expected).

ORDINARY WEAR AND TEAR

The purpose of insurance is to protect against fortuitous events and contingencies. It is not intended to cover losses or injuries which occur in the normal course of things. In *C.C.R. Fishing Ltd.*, Justice McLachlin considered both the meaning of "ordinary wear and tear" and "inherent vice". In that case, one cause of the loss was the failure of cap screws made of the wrong material. The Court found that these materials were negligently installed. Justice McLachlin wrote as follows:

I turn first to the question of whether the failure of the bolts can be viewed as "ordinary wear and tear". In my view it cannot. There was nothing ordinary about the failure of the cap screws. Their failure was extraordinary, resulting, as the trial judge found, from

the negligent act of the repairers who installed them. As stated in *Arnould's Law of Marine Insurance and Average*, vol. II, (16th ed. 1981), ordinary wear and tear is "merely the result of ordinary service conditions operating upon the hull or machinery, as for example when the relevant part wears out . . .". ordinary corrosion might well fall within this definition. But corrosion caused extraordinarily by the negligent use of the wrong materials does not.

A number of recent cases illustrate how Canadian Courts interpret this exclusion. In 566935 *B.C. Ltd. v Allianz Insurance Co. of Canada*, 2006 BCCA 469, a wooden barge, which had been built eighty years earlier and had been recently used as a floating sport fishing lodge sank while it was being moored in calm waters. Maintenance of the barge's hull had been minimal over the years and ordinary wear and tear of the hull had opened her seams leading to the progressive ingress of water which, in turn, led to the infestation of worms into some of its planking. Several devices and pumps were fitted onboard to minimize these negative effects on the already worn-out hull. Eventually, after the pumps had temporarily ceased to operate, the barge sank. After the barge was raised, it was discovered that the pump which had worked to keep the barge afloat was working properly. The assured alleged that the power to the pump must have been interrupted and that the loss was, therefore, fortuitous and due to a peril of the sea. The Defendant underwriters argued that the cause of the sinking was ordinary wear and tear and a failure in the barge's planking due to the worm infestation which allowed water to enter rapidly and overwhelm the pump.

At trial, the court discussed the meaning of "ordinary wear and tear" and ultimately agreed with the underwriters that the cause of the sinking was the ingress of sea water into the hull from leakage and the failure of the barge's stern rake directly attributable to the presence of shipworms, as well as the assured's own failure to use anti-fouling paint to halt the infestation. Accordingly, this was an ordinary case of wear and tear or loss caused by the infestation of shipworms and the loss was excluded. The insured subsequently appealed. The appeal was dismissed.

The question before the Court of Appeal was whether the loss resulting from the sinking of a barge while it was being moored in calm waters was caused by a "peril of the sea". To constitute a peril of the sea, the loss had to be fortuitous in the sense that it would not have occurred but for an unusual event not normally expected. The actual cause of the loss was the deterioration of the hull, which did not qualify as a peril of the sea. The use of anti-fouling paint would have prevented the deterioration. In addition, while the Court conceded that the interruption of power to the pump which evacuated the water probably contributed to the loss, the policy was not all-risks and therefore did not cover damage caused by power loss. While the pump may have slowed the inevitable result, the vessel "was always in the grip of the casualty". In other words, the result was inevitable and therefore, not fortuitous.

INHERENT VICE OR NATURE OF THE SUBJECT-MATTER INSURED

Similar to “ordinary wear and tear”, inherent vice excludes coverage for damages which arise from the natural qualities of the thing which is lost. In a maritime context, this exclusion may arise in respect of the way cargo is packed or shipped. There is no fortuity to the melting of ice cream in a hot locker.

In *Nelson Marketing International Inc. v. Royal & SunAlliance Insurance Co. of Canada*, 2006 BCCA 327 a dispute arose out of three claims on an “all risks” policy of marine cargo insurance for damage to shipments of laminated wood flooring manufactured in Malaysia and shipped first to Singapore and then to California in 1999. The damage to the flooring was done by moisture. The issue in the case was whether the damage was due to a fortuity, and therefore covered by the all risks cargo policy, or whether it was caused by inherent vice, which was an excluded peril.

At trial the plaintiff led evidence that the moisture occurred as a result of exposure to rainfall during shipment and storage. The defendant underwriters led evidence that the moisture had been absorbed by the flooring while it was waiting to be shipped and that the absorbed moisture was released in the holds of the vessels and subsequently condensed on the surface of the flooring which was wrapped in plastic. The trial judge agreed with the underwriters’ expert and found as a fact that the moisture came from the cargo in the holds of the vessels. However, he further found that “the environments the cargoes interacted with were abnormally and unnaturally amplified in the hold by conditions, the causes of which, although not addressed by evidence, manifestly had nothing to do with the inherent characteristics of the cargoes” (para. 172). The trial judge therefore held that “the damage leading to the loss claim was not due to the inherent vice or nature of the cargoes, as pleaded by the defendants, but rather was caused by the fortuity of being put in holds which substantially altered the normal environment” (para. 173). The underwriters appealed.

The appeal was allowed. Royal argued in part that the insured had not proven that the loss was fortuitous because there was no evidence that the climate conditions in the holds of the vessels was other than what might reasonably have been expected and that the plaintiff had not been able to prove that the conditions in the holds were different from what would have been typical between the departure point and Singapore. The BC Court of Appeal agreed, finding that the loss was therefore “attributable to the nature of the subject matter of the insurance”. The message here is that carriers are not required to correct an inherent vice by doing more than what is typically expected under ordinary conditions. Since the insured could not expect better than ordinary conditions, the loss was inevitable because the lumber had absorbed moisture prior to shipping. [see also *T.M. Noten B.V. v. Harding*, [1990] 2 Lloyd’s Rep. 283 (Eng.C.A.); and *Global Process Systems Inc. & Anr v. Syarikat Takaful Malaysia Berhad*, [2011] UKSC 5]

LACK OF DUE DILIGENCE BY ASSURED OR MANAGERS

Pursuant to MIA section 53(2)(d), unless a policy provides otherwise, damage to machinery not proximately caused by maritime perils is excluded from coverage. Specific machine and hull policies, as well as all risks policies, do “provide otherwise”. This coverage is often referred to as an “*Inchmaree clause*”, named for the response to the decision in *Inchmaree: Thames & Mersey Marine Insurance CO. v. Hamilton, Fraser & Co.*, (1887), 12 App. Cas. 484 (CA), where the court held that crew negligence and latent defects were not perils of the sea. Typically, Inchmaree clauses cover damage to machinery caused by negligent operation by the captain or crew and latent defects, amongst other things. Invariably, this type of cover excludes losses which result from a “want of due diligence by the assured, the owners or managers (referring to senior managers who would have a hand in planning the voyage – as opposed to ship’s officers).

The due diligence exclusion is carefully examined in *Secunda Marine Services Ltd. v. Liberty Mutual Insurance Co.*, 2006 NSCA 82. There, the insured inspected and then purchased a used tug in 1994. A few years later, there was evidence the tug had run aground while out on charter, including damage to four propeller blades. The tail shaft was inspected in place by shining a strong light through the rope guard. Transport Canada representatives did not ask that the shaft be removed for inspection. The tug underwent several more inspections over the years in compliance with Transport Canada regulations. These inspections did not require removal of the shaft from its protective liner. The tug was subsequently insured under a hulls policy. For additional premium, an Inchmaree clause was deleted, and a Liner Negligence Clause was inserted to provide additional coverage. The exclusion to coverage under the Liner Negligence Clause was only for want of due diligence by the insured and/or manager of ship. One day after the policy came into effect, the ship lost its propeller and tail shaft as it entered harbour while it was towing a barge. The shaft had snapped off at the flange resulting in a loss of the propeller. The insurer refused to indemnify on the basis that lack of due diligence caused the tail shaft to break. The trial judge found in favour of the insured, concluding that compliance with all statutory maintenance and inspection requirements showed due diligence was exercised. The insurer appealed.

The issues on appeal were who had the burden of proving want of due diligence and whether the loss was caused by want of due diligence. The Court of Appeal reviewed a number of authorities and held that want of due diligence was an affirmative defence. The burden to prove it rested with the underwriters. The Court then considered whether want of due diligence had been proven. The Court adopted the following definition of due diligence:

"Due diligence" seems to be equivalent to reasonable diligence, having regard to the circumstances known, or fairly to be expected, and to the nature of the voyage, and the cargo being carried. It will suffice to satisfy the condition if such diligence has been exercised

down to the sailing from the loading port. But the fitness of the ship at that time must be considered with reference to the cargo, and to the intended course of the voyage; and the burden is upon the shipowner to establish that there has been diligence to make her fit.

The Court agreed with the trial judge who found that even if there were more reliable forms of inspection available, all statutory requirements had been met and the ship owner had taken reasonable care with respect to maintenance of the vessel.

A good, if unfortunate, example of when an owner's mismanagement rises to the level of "want of due diligence" is found in *Coast Ferries Ltd. v. Century Insurance Co. of Canada*, [1975] 2 SCR 477. In that case, an automobile ferry was converted to a freighter. The owner was aware that the master routinely overloaded the freighter. The owner also obtained a verbal and written report from a naval architect which set clear parameters on maximum loading capabilities, but never provided this information to the master. On one occasion, the master negligently over loaded the freighter which capsized, dumping its load before righting itself. The Court held that the owner failed to exercise due diligence. At paragraph 11, DeGrandpree, J., explains "The duty of due diligence imposed upon the owner is not satisfied if for years he closes his eyes and does nothing."

Coast Ferries is a standard example of situations involving owners or managers in possession of key information that they fail to pass onto the master. *Secunda* deals with the owner's duty to ascertain whether a vessel is seaworthy. In each case the courts applied a "reasonableness" standard when assessing the required amount of diligence. In each case the question was whether the owner was in possession of information that ought to have led to additional diligence. In other words, whether the voyage was doomed from the beginning as a result of something the owner reasonably ought to have done. If so, the loss was inevitable.

CONCLUSION

The concepts behind the core exclusions are not especially complex. Everyone can understand the idea of wilful misconduct or ordinary wear and tear. But once lawyers become involved in disputes, even the most apparently simple factual situations reveal shades of grey. This is so when considering both the exclusions and whether a loss was proximately caused by an insured peril. Ultimately, the cases seem to arrive at a common thread: fortuity. If a loss is inevitable, it will not be covered. Some element of chance must exist before the policy is engaged. Inevitability, and the amount of chance required are issues which will continue to be litigated as new fact scenarios arise. With the consistent refrain of "fortuity", the core exclusions act as examples contained within a larger definition of "perils of the sea". They are as important to understanding what is covered as they are to what is not. As such, a good knowledge of them is useful in analysing coverage on a broad range of losses.

CBMU Great Lakes Hull Clauses

PERILS

Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon.

ADDITIONAL PERILS (INCHMAREE)

Subject to the conditions of this Policy, this insurance also covers loss of or damage to the Vessel directly caused by the following:

Accidents in loading, discharging or handling cargo, or in bunkering;

Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;

Explosions on shipboard or elsewhere;

Breakdown of motor generators or other electrical machinery and electrical connections thereto, **bursting of boilers, breakage of shafts, or any latent defect** in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);

Breakdown of or accidents to nuclear installations or reactors not on board the insured Vessel;

Contact with aircraft, rockets or similar missiles, or with any land conveyance;

Negligence of Charterers and/or Repairers, provided such Charterers and/or Repairers are not an Assured hereunder;

Negligence of Master, Officers, Crew or Pilots;

provided such loss or damage has not resulted from **want of due diligence by the Assured**, the Owners or Managers of the Vessel, or any of them. Masters, Officers, Crew or Pilots are not to be considered Owners within the meaning of this clause should they hold shares in the Vessel. (emphasis added)

[Form appended to Strathy and Moore, Law and Practice of Marine Insurance in Canada, 2003]

Appendix A: Perils Insured

Canadian Hulls (Pacific) Clauses (2005)

1. Touching the Adventures and Perils which we, the Underwriters,
2. are contented to bear and take upon us, they are of the Seas, Men-of-
3. War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart
4. and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and
5. Detainments of all Kings, Princes and Peoples, of what nation,
6. condition or quality soever, Barratry of the Master and Mariners and of
7. all other like Perils, Losses and Misfortunes that have or shall come to
8. the Hurt, Detriment or Damage of the subject matter insured
9. (hereafter the "Vessel") or any part thereof; excepting, however, such of
10. the foregoing Perils as may be excluded by provisions elsewhere in
11. these clauses or by endorsement.

[Marine Insurance Association of British Columbia, 2005]

Appendix A: Perils Insured

Institute Time Clauses Hulls (1995)

6.1 This insurance covers loss of or damage to the subject-matter insured caused by

6.1.1 **perils of the seas** rivers lakes or other navigable waters

6.1.2 fire, explosion

6.1.3 violent theft by persons from outside the vessel

6.1.4 jettison

6.1.5 piracy

6.1.6 contact with land conveyance, dock or harbour equipment or installation

6.1.7 earthquake volcanic eruption or lightning

6.1.8 accidents in loading discharging or shifting cargo or fuel.

6.2 This insurance covers loss of or damage to the subject-matter insured caused by

6.2.1 **bursting of boilers breakage of shafts or any latent defect** in the machinery or hull

6.2.2 **negligence** of Master Officers Crew or Pilots

6.2.3 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder

6.2.4 barratry of Master Officers or Crew

6.2.5 contact with aircraft, helicopters or similar objects, or objects falling therefrom

provided that such loss or damage has not resulted from **want of due diligence by the Assured**, Owners, Managers or Superintendents or any of their onshore management.
(emphasis added)

[See <http://www.iaa.co.uk/> for Institute clauses]

Appendix A: Perils Insured

International Hull Clauses (2003)

2.1 This insurance covers loss of or damage to the subject-matter insured caused by

2.1.1 perils of the seas, rivers, lakes or other navigable waters

2.1.2 fire, explosion

2.1.3 violent theft by persons from outside the vessel

2.1.4 jettison

2.1.5 piracy

2.1.6 contact with land conveyance, dock or harbour equipment or installation

2.1.7 earthquake, volcanic eruption or lightning

2.1.8 accidents in loading, discharging or shifting cargo, fuel, stores or parts

2.1.9 contact with satellites, aircraft, helicopters or similar objects, or objects falling therefrom.

2.2 This insurance covers loss of or damage to the subject-matter insured caused by

2.2.1 bursting of boilers or breakage of shafts but does not cover any of the costs of repairing or replacing the boiler which bursts or the shaft which breaks

2.2.2 any latent defect in the machinery or hull but does not cover any of the costs of correcting the latent defect

2.2.3 negligence of Master, Officers, Crew or Pilots

2.2.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured under this insurance

2.2.5 barratry of Master, Officers or Crew

provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

2.3 Where there is a claim recoverable under Clause 2.2.1, this insurance shall also cover one half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby.

2.4 Where there is a claim recoverable under Clause 2.2.2, this insurance shall also cover one half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby.

2.5 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 2.2 should they hold shares in the vessel.

...

Additional Perils

41.1 If the Underwriters have expressly agreed in writing, this insurance covers

41.1.1 the costs of repairing or replacing any **boiler which bursts or shaft which breaks**, where such bursting or breakage has caused loss of or damage to the subject-matter insured covered by Clause 2.2.1, and that half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby which is not covered by Clause 2.3

41.1.2 the costs of correcting a **latent defect** where such latent defect has caused loss

Appendix A: Perils Insured

of or damage to the subject-matter insured covered by Clause 2.2.2, and that half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby which is not covered by Clause 2.4

41.1.3 loss of or damage to the vessel caused by any **accident or by negligence, incompetence or error of judgment** of any person whatsoever provided that such loss or damage has not resulted from **want of due diligence by the Assured**, Owners or Managers.

41.2 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 41.1 should they hold shares in the vessel. (emphasis added)

[See <http://www.iaa.co.uk/> for Institute and Joint clauses (amongst many others).]

AMERICAN INSTITUTE CARGO CLAUSES 2004 ALL RISKS

A. Unless otherwise specified below, this policy insures against “All Risks” of physical loss or damage from any external cause irrespective of percentage, but excluding nevertheless the risks of War, Strikes, Riots, Seizure, Detention and other risks excluded by the Nuclear/ Radioactive Contamination Exclusions Clause, the F.C & S. (Free of Capture and Seizure) Warranty and the S.R. & C.C. (Strikes, Riots and Civil Commotions) Warranty of this policy, excepting to the extent that such risks are specifically covered by endorsement.

[See www.aimu.org for American Institute clauses.]

Appendix B: Exclusions

Canadian Hulls (Pacific) Clauses 2005

49. 3. This insurance includes loss of or damage to the Vessel directly
50. caused by:-
51. (a) Accidents in loading, discharging or shifting cargo or fuel
52. Explosions on shipboard or elsewhere
53. Breakdown of or accident to nuclear installations or reactors
54. on shipboard or elsewhere
55. Bursting of boilers, breakage of shafts or any latent defect in
56. the machinery or hull
57. Negligence of Master, Charterers other than an Assured,
58. Officers, Crew or Pilots
59. Negligence of repairers provided such repairers are not
60. Assured(s) hereunder, but this exclusion shall not apply to
61. loss or damage resulting from the operation by the Assured of
62. a commercial repair division or facility
63. (b) Contact with aircraft or similar objects, or objects falling
64. therefrom
65. Contact with any land conveyance, dock or harbour
66. equipment or installation
67. Earthquake, volcanic eruption or lightning
- 68. Provided such loss or damage has not resulted from want of due**
- 69. diligence by the Assured, Owners or Managers.** (emphasis added)

[MIABC 2005]

Appendix B: Exclusions

Institute Marine Cargo Clauses, A

4. - General Exclusion Clause

4 In no case shall this insurance cover

4.1 loss damage or expense attributable to **wilful misconduct** of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or **ordinary wear and tear** of the subject-matter insured

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured ...

4.4 loss damage or expense caused by **inherent vice or nature** of the subject-matter insured

4.5 loss damage or expense proximately caused by **delay**, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

...

(emphasis added)

[See <http://www.iua.co.uk/> for Institute and Joint clauses (amongst many others).]

AMERICAN INSTITUTE CARGO CLAUSES 2004

This policy does not cover:

(1) Ordinary leakage, ordinary loss in weight or volume, or **ordinary wear and tear**.

(2) Loss, damage, or expense:

(a) Attributable to **willful misconduct** of the Assured;

(b) caused by **inherent vice or nature** of the insured property;

(c) arising from insolvency or financial default of the owners, managers, charterers, or operators of the vessel;

(d) resulting from insufficiency or unsuitability of packing or preparation of the insured property for the intended voyage...

...

Warranted free of claim for loss of market or for loss, damage, expense or deterioration arising from **delay, whether caused by a peril insured against or otherwise**. (emphasis added)

[See www.aimu.org for American Institute clauses.]