

MARINE INSURANCE COVERAGE FOR NEGLIGENCE

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INTRODUCTION

In today's litigious society, people are conditioned to not make any unnecessary admissions of fault. For example, in the insurance folders provided by many automobile insurance brokers to their customers, drivers are cautioned that at the scene of an accident they should avoid any discussion of who is to blame. Similarly under the *Canadian Charter of Rights and Freedoms*, persons accused of a crime are given the right to remain silent and are invariably advised by their lawyers to exercise that right. Given this general conditioning to avoid making admissions of fault, it is not surprising that when making marine insurance claims many vessel owners are reluctant to admit to their insurance underwriters that the loss they are claiming may have been caused by their own negligence or that of their crew. This article will provide an overview of the nature of marine insurance hull and machinery coverage provided for acts of negligence and why, it is often important for vessel owners and their claims advisors to seek out and advise underwriters of any such negligence.

NEGLIGENCE OF MASTER AND CREW

The scope of marine insurance coverage for acts of negligence is governed by both the *Marine Insurance Act of Canada* ("**M.I.A.**") and by the contract of marine insurance. With respect to the *M.I.A.*, section 53(1) specifically provides coverage for losses proximately caused by a peril insured against, including those losses that would not have occurred but for the misconduct or **negligence** of the master or crew.¹

¹ Unless coverage for negligence is excluded by the policy. The writer is not aware of any policy containing such an exclusion. Section 53(1) provides: "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."

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Perils of the Sea Clause Coverage for Negligence of Master and Crew

With respect to the contract of marine insurance, the primary coverage in most cases is provided by the perils of the sea clause.² Guidance on the interpretation of this clause is included in the “Rules for Construction of the Policy” that are included as a schedule to the M.I.A. These rules provide that in a marine policy, “perils of the sea” means “fortuitous accidents or casualties of the seas, but does not include ordinary action of the wind and waves.” Generally, the courts have interpreted the term “fortuitous” to mean not intentional and not inevitable.³ Since acts of negligence by definition are not intentional and not inevitable, it follows that negligence is one type of fortuity that can give rise to a loss under the perils of the sea clause.

Typical cases where there would be coverage under the perils of the sea clause for losses arising from crew negligence (including negligence of the master) would involve collisions, groundings and sinkings.⁴ One of the leading Canadian cases on the subject is *Century Insurance Co. of Canada v. Case Existological Laboratories Ltd. (The Bamcell II)* [1983] 2 S.C.R. 47. This case involved a converted barge that was being used for research purposes that sunk when a crewmember negligently left a valve open. In finding that there was insurance coverage for this loss, the Supreme Court of Canada adopted the following explanation of how negligence can be one, of several, possible causes of a fortuitous loss by a peril of the sea:

*Where there is an accidental incursion of seawater into a vessel . . . there is prima facie a loss by perils of the sea. The accident may consist in some **negligent** act, such as improper opening of a valve, or a hole made*

² Touching the Adventures and Perils which we, the Underwriters, are contented to bear and take upon us, there are of the Seas, Men-of-War, Fire . . .”.

³ *CCR Fishing Ltd. v. British Reserve Insurance Co.* [1990] 1 S.C.R. 814 as quoted in George R. Strathy, *The Law and Practice of Marine Insurance in Canada*, p. 103.

⁴ See: Strathy, *supra*, at p. 104; *Arnould’s Law of Marine Insurance and Average* (16th), p. 652.; E.R. Hardy Ivamy, *Marine Insurance*(4th), pp. 141-3.

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in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea . . . These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater.
[emphasis added]⁵

Although crew negligence is generally covered by the perils of the sea clause, as discussed below under the heading “Negligence of Owners”, under some circumstances if a vessel owner sends its vessel to sea with an inadequately trained crew there may be a denial of perils of the sea coverage under s. 37 of the M.I.A.

Inchmaree Clause Coverage for Negligence of Master and Crew

In addition to coverage for crew negligence under the perils of the sea clause, most contracts of marine insurance extend coverage for such acts of negligence by way of a clause that is often referred to as the “Inchmaree” clause. For example, the form of the clause commonly used on the West coast of Canada (CHP, 1991) specifically provides coverage for additional damage including accidents in loading, explosions, breakage of shafts, or shifting of cargo.⁶ However, since the coverage in this clause involves matters over which the owner has control, it includes a due diligence requirement by the “Assured, Owners or Managers.” Accordingly, failure of the owners or managers to adequately train crew can be grounds for denial of coverage for crew negligence.

Since it can be quite difficult in the case of a vessel owned by a corporation for the vessel’s underwriter to prove lack of due diligence on the part of the managers

⁵ See also Arnould, *supra*, p. 605 where it says: “to inquire whether negligence was merely a remote cause, or the dominant cause, of the casualty may not always be the most appropriate way of approaching the problems of causation in cases involving negligence . . . it would seem more appropriate to regard negligence as part of the chain of events together amounting to the fortuitous operation of the insured peril – we have already noted, that fortuity is an essential element in perils of the seas as a class of insured perils, and that negligence may be the factor which enables the casualty to be seen as fortuitous.”

⁶ Clause 3; the newer CHP, 2005 also contains this clause.

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of the corporation, underwriters in England have narrowed the coverage under the Inchmaree clause by extending the due diligence requirement to apply also to superintendents and on shore management of the insured.⁷ However, this change has not been adopted in the clause commonly used in British Columbia.

Since the Inchmaree clause has a due diligence requirement, a claim that falls under the peril of the seas clause is easier for a vessel owner to establish than a claim under the Inchmaree clause. For example, in the *Bamcell II* case referred to above, the owner was able to avoid the court investigating whether or not it was duly diligent in the training and monitoring of its crew by relying only on the perils of the sea clause.⁸

NEGLIGENCE OF OWNERS

Whether or not marine insurance coverage is available for negligence of owners, as contrasted with negligence of crew (including the master), will depend upon the circumstances of each case and which insurance clause the claim is being made under.

Inchmaree Clause Coverage for Negligence of Owners

With respect to coverage for on board negligence of owners under the Inchmaree clause, the wording commonly used in the British Columbia clause (CHP, 1991), specifically provides that crew will not be considered owners even if they own all or part of the vessel. Accordingly, it follows that a loss caused by the negligent conduct of an owner/operator while working as a master or crew member will not be excluded under the due diligence provision of the Inchmaree clause.⁹

⁷ Chartered Insurance Institute, *Marine Insurance Underwriting and Claims* (Version 775TB Nov. 2003), p. 2/13.

⁸ See Strathy, *supra*, bottom page 121 to top of p. 122.

⁹ Arnould, *supra*, p. 833.

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With respect to exclusions from coverage for negligence of owners, as briefly discussed above, negligence of an owner with respect to supplying a competent crew can cause a denial of coverage under the Inchmaree clause. For example, in the case of *Coast Ferries Ltd. v. Century Insurance Co. of Canada* [1975] 2 S.C.R. 477¹⁰ a vessel capsized as a result of negligent loading by the master. A denial of coverage under the Inchmaree clause was upheld by the court because of a want of diligence on the part of the owner of a vessel in failing to supply the master with available stability information. Similarly, lack of due diligence by owners with respect to other items covered by the Inchmaree clause such as inspection for latent defects can also result in a denial of coverage.¹¹ Another specific exclusion is negligent repairs by the assured, unless the assured is operating a commercial repair facility.

Perils of the Sea Clause Coverage for Negligence of Owners

With respect to losses claimed under the perils of the sea clause, although the *M.I.A.* does not specifically include coverage for negligence of owners as it does for crew, the legal cases interpreting the *Act* have, for the most part, held that “negligence on the part of the assured . . . does not exempt the insurer from liability though the loss is caused thereby, for one of the main objects of insurance is to protect the assured against the consequences of negligence”.¹² The main exception or limit to this rule is contained in s. 53(1) of the *M.I.A.*, which excludes liability for any loss attributable to the “wilful misconduct of the insured.” However, the courts have applied a restrictive interpretation to this provision, for the most part restricting its application to situations above and beyond negligence, or even gross negligence, to situations where the insured

¹⁰ As discussed by Strathy, *supra*, p. 119-20.

¹¹ See for example *Atlantic Freighting Co. v. Provincial Insurance Co. of Canada* (1956), 5 D.L.R. (2d) 164; For a recent failed attempt to deny on this basis see *Secunda Marine Services Ltd. v. Liberty Mutual Insurance Co.* 2005 NSSC 180.

¹² *Williams v. Canada* (1984), 7 C.C.L.I. 198 at 211 as quoted in Strathy, p. 109; Arnould, *supra*, p. 603-4 & 701.

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vessel has been intentionally damaged or sunk by the owner or with the connivance of the owner.¹³ This is consistent with jurisprudence discussed above that defines fortuitous to mean not intentional. Other situations where negligence of the owner could cause a loss of coverage under the perils of the sea clause include:

- (a) The breach of a warranty implied into a voyage policy by s. 37(1) of the *M.I.A.* that at the commencement of the voyage the vessel will be seaworthy;¹⁴ and
- (b) The sending of a vessel insured under a time policy (such as CHP, 1991) to sea in an unseaworthy state, with the privity of the assured (s. 37(4) of the *M.I.A.*).¹⁵

Another situation where negligence of an owner could cause a reduction rather than loss of coverage (that is most likely to arise under a perils of the sea claim) is when the assured breaches its duty to take actions to avert or minimize a loss after it has occurred (*M.I.A.* s. 80 and sue and labour clause)¹⁶. Examples would include the failure to make any reasonable efforts to save a ship that has grounded or the failure to make reasonable efforts to put out a fire that has started. However, in practise the courts have not imposed too high a standard of conduct upon mariners acting in good faith during a marine emergency.¹⁷

¹³ Strathy, *supra*, p. 108-12; Arnould, *supra*, p. 606, 645-7; Ivamy, *supra*, p. 232.

¹⁴ Arnould, *supra*, p. 547-50, 604. This has been interpreted to mean “in a reasonably fit state of repairs, equipment, crew, and all other respect to encounter the ordinary perils of the voyage insured . . . (Arnould, 548); see also Strathy, *supra*, p. 146 and Ivamy, *supra*, p. 296-302. Since this is a true warranty, it would appear that it does not have to be causative of the loss and the insured does not have to have been aware of it (See Arnould, *Supra*, p. 549 bottom). Since the insured does not have to be aware of the unseaworthy state, negligence is just one of several possible causes of denial for breach of this implied warranty.

¹⁵ Arnould, *supra*, p. 558-9; Ivamy, *supra*, p. 302-3; This provision has been interpreted to mean that the loss must be caused by the unseaworthy state (see Arnould’s discussion of *Thomas v. Tyne and Wear SS. Freight Insurance Association.*); see also Strathy, *supra*, p. 146.

¹⁶ Arnould, *supra*, p. 617-8; Clause 2 of CHP, 1991; Strathy, *supra*, p. 180-1.

¹⁷ Strathy, *supra*, p. 181-2.

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CONCLUSION

Subject to the fairly limited exceptions described above, it can be seen that marine hull and machinery insurance provides broad coverage for on board negligent actions of crew (including masters) and owners of vessels. Accordingly, when assisting vessel owners in preparing marine insurance claims, claims advisors should caution vessels owners against minimizing or hiding negligent conduct. Vessel owners and their crew should be reminded that the purpose of marine insurance is to insure against marine losses caused by fortuities, including negligent conduct aboard the vessel. To the extent that a loss involves a non-marine peril covered only by the Inchmaree clause, it would also be useful for vessel owners to present records demonstrating regular inspection and maintenance of machinery and training of crew.

Brad Caldwell is lawyer with the firm of Caldwell & Co. in Vancouver, B.C. His practice is primarily devoted to maritime, fisheries and insurance matters. He can be contacted at 604 689 8894. Previous articles written by Mr. Caldwell, including a recent article on Machinery Claims under the Inchmaree clause, can be viewed on his web page at <http://admiraltylaw.com/fisheries/bradcw.htm> An earlier version of this article without footnotes was published in Mariner Life December 2005 and Fisherman Life December 2005.