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THE CONCEPT OF INHERENT VICE

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THE CONCEPT OF INHERENT VICE

During the 1950's there appeared in the Law Reports a succession of cases,[1] which were argued by counsel on the basis of inherent vice; however, the proposition that an underwriter or carrier is not liable for the loss occasioned by any inherent defect in the subject matter of the contract, is by no means a product of twentieth century litigation. As early as 1821,[2] English courts were deciding that where goods were destroyed by an inherent defect, the underwriter was not liable. The rationale of the principle may have changed somewhat,[3] and certainly it has become a far more complex defence, but the basic proposition evidenced above, was restated as recently as 1971 in England,[4] and will without doubt continue to be regarded as an important factor in the Law of Marine Insurance.

This paper will attempt a critical survey of a field which, due perhaps to the more rewarding study of 'deviation', fundamental breach and containerization, has not received a great deal of consideration over recent years.[5] This scarcity of academic comment should not however, be regarded as an indication of slow development - over the last seventy years, courts throughout the world have frequently had occasion to refer to the words of Willes J. in Blower v. Great Western Railway Company:[6]

> "By the expression vice, I do not, of course, mean moral vice in the thing itself or its owner, but only that sort of vice which by its internal development tends to the destruction or the injury of the animal

Folder Ha	HANSEN, B.G. The concept of inherent vice.

> or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of a journey, the liability of the carrier (or underwriter) is necessarily excluded from the contract between the parties." 7

The approach taken to inherent vice by the courts is the subject of the remainder of this paper. The influence of scientific developments on the doctrine will be discussed at the outset in order to show how the concept of inherent vice has changed. The paper will then proceed to a comparison of the place of inherent vice in the law of marine insurance, contracts of affreightment and sale of goods, and its relationship with the insurance principle of general average. A problem of evidence, viz. the onus of proof, which is a vital factor in this, a field which is based in the final analysis on an interpretation of the facts in any one particular case, will then be looked at, and the substantive paper will conclude with a discussion of the relationship between the provisions of the Marine Insurance Act 1908 and insurance policies, focussing on attempts to hold the insurer liable for loss caused by inherent defects.

The Courts and Scientific Advances

Over the last 150 years, the subject matter of marine insurance policies in reported decisions has changed radically from livestock[8] and slaves,[9] to groundnuts,[10] oils,[11] and tinned goods;[12] in fact all the raw materials and secondary products of a commercial and industrialized world. At the same time, laboratory techniques and skills have progressed just as radically, making precise

assessment of the cause of decay and destruction of goods a mere formality in many cases.

It is not surprising therefore, to find the judgments of the courts, over the last fifty years especially, becoming increasingly technical and dependent upon scientific evidence. In 1930, Mr Justice Wright in Bowring v. Amsterdam London Insurance Company,[13] illustrated the respect many judges were beginning to show for the new methods of investigation:

> "... He comes to this conclusion entirely by fact, sometimes by the sound ... and by the feel of the hand. That method of testing, he says, has served him in the past. That may be where you have fairly reasonable crops ... but it does appear however, that, however experienced Mr Eckford may be, his conclusions can only be very rough; and having regard to the general conditions of things at this place, I do not see any reason at all to accept the accuracy of his statement." 14

Of the scientific evidence presented at the trial, the learned judge stated:

> "No doubt, they are only laboratory experiments and to my mind not always helpful, when you have to consider what happens on a practical and commercial scale; but the evidence is that mere heat without sufficient moisture in the nuts, could not create fermentation to any serious or appreciable extent." 15

It is apparent from the judgment that for years, Mr Eckford's system had been the prevailing custom, and it is suggested that it would not be rash to claim that had this case been decided twenty years earlier, the evidence of that gentleman would have been readily accepted.

Again in 1972, the words of Mr Justice Donaldson in F.M.C. Meat Ltd. v. Fairfield Cold Stores,[16] show the regard in which the courts now hold the 'expert' witness:

> "I thought Mr Reading was a pleasant, hardworking and honest witness, but he is not an expert refrigeration engineer." (Nor, one might well substitute, an expert physicist.) 17

However, the courts took some time to trust completely the word of scientists and technicians. The doubts of Mr Justice Wright in 1930 are to some extent typical of the court's attitude in early years to the growth in technical evidence. In 1926, Mr Justice Roche, chose not to adopt evidence tendered by a 'battery' of eminent scientists as to the optimum percentage of moisture in cigarettes, and accepted that of another cigarette exporter, whose sole qualification was practical experience;[18] six years later, the United States Supreme Court decided that, having regard to 'the formidable array' of witnesses experienced in stowage, who approved the stowage in question, in such circumstances, the customs of the trade, and not the opinions of chemists, however sound, should be the test.[19]

Nevertheless, the courts in recent years have been more willing to accept scientific and laboratory tests as decisive evidence, and appear prepared to rule in favour of that evidence at the expense of well established 'commercial methods' and customs.[20] It is difficult to rationalize any change in the approach taken by the courts, but in this case, it could only be due to the gradual acceptance by society as a whole of the reliability of scientific techniques. Courts up till recently have been somewhat distrustful of tests conducted in 'controlled' conditions, but it appears that now they have accepted the inevitable; one can be sure that in the future, cases involving inherent vice will consist largely of expert testimony.

It must be emphasized, however, that these early cases were generally of a borderline nature - common to them all is a conflict of evidence, and one can sympathize with the courts' reluctance to overthrow established customs in the commercial world. But on the other hand, one could not deny that even today, the basic evidence before the courts is technical in nature, and this raises the very pertinent question as to whether in fact the qualities which made our judges such invaluable arbiters in the past, automatically make them the most suitable persons to weigh up the wealth of conflicting scientific evidence invariably presented today.

The question must be, are our judges continuing to give a calculated and objective assessment of such evidence; or are they floundering as amateurs in a field which the expert microbiologist and biochemist find difficult to comprehend and come to any unanimous decision. Should they be replaced for findings of fact by a tribunal of experts? The issue is certainly worth more than the brief examination given here!

However qualified the judges may be to arbitrate on questions of scientific evidence, their willingness to do so may have reduced the number of occasions when inherent vice will apply. Particularly in cases where the burden is on the cargo owner to initially affirm loss by a risk covered, it was previously very difficult for him to prove that the loss was caused by anything but an inherent defect, if the goods were stowed or produced according to custom. Now however, it is possible, with the advance of scientific techniques, for the

former to produce reliable evidence that in a particular case, disease was caused through slightly excessive temperatures or perhaps by insufficient ventilation. He may in fact be able to prove by a process of elimination based on laboratory tests, that the goods could not have been damaged in normal circumstances, but that the loss was due to factors within the control of the ship owner; in this case of course, negligence becomes an issue and the prospect of proving loss by risk becomes a much more feasible proposition. It follows as a matter of course that the underwriter may, in the future, find it more difficult to rely on inherent vice to exclude his liability under the policy.

Contracts of Insurance and Contracts of Affreightment

As with the contract of insurance, the common carrier operating under a contract of affreightment, has his responsibility for goods destroyed in transit limited in the case of loss by inherent vice.

> "Undoubtedly," as Lord Dunedin stated in his speech in London & N.W. Company v. Richard Hudson & Sons Ltd. 21, "though a common carrier is an insurer, yet if the damage arises from inherent vice or from bad packing of the goods, the common carrier is not liable." 22

In addition, like the contract of marine insurance, the exception has been encompassed in the relevant statute. Section 3(b) of the Sea Carriage of Goods Act 1940 states as follows:

> "Neither the ship nor her owner, agent, or master shall be responsible for loss or damages, arising or resulting from....
> (iv) inherent defect, quality, or vice of the thing concerned,
> (v) insufficiency of packing. 23

However, while the principle finds expression in the law governing both contracts, the basis of liability under each is quite distinct, as is consequently in some aspects, the operation of the exception.

The basis for the carrier's liability is founded on negligence, and arises from a breach of his contract which, unless limited, imposes upon him all the duties of the common carrier,[24] and his relationship with the other parties is governed by the normal rules of contract. The sole question in determining liability is whether the carrier was responsible for the damage to the goods; was he in breach of his contractual duty? Consequently if the carrier, through his negligence, aggravates or contributes to the process of decay, which could with reasonable care have been averted, he is liable, and the exception of inherent vice does not operate.[25]

On the other hand, liability under an insurance policy arises automatically as soon as the casulty covered by the policy eventuates. Negligence of the assured or his servants giving rise to the peril insured against, does not defeat the claim of the assured. The insurer is therefore liable for any loss '<u>proximately caused</u>', by a peril insured against.

One must almost hesitate in using the word 'proximate' in this context, for its meaning cannot be regarded, in any way, as settled. Causation appears to be at the root of many problems pertaining to the doctrine under consideration and there is strong authority in favour of the view that it is within the 'realms of causation',

that the essential distinction in the application of the concept of inherent vice to contracts of insurance and affreightment lies.[26] The basis for this point of view is to be found in the Court of Appeal decision of Pink v. Fleming,[27] the facts of which were as follows:

The plaintiffs were insured under a policy of marine insurance which covered him against, inter alia, the perils of collision. As a result of a collision, the ship was delayed, the cargo of citrus fruit had to be offloaded, and upon eventual arrival, the fruit was found to have suffered considerable damage. The court however dismissed the claim against the insurance company on the ground that the proximate cause of damage was the perishable nature of the article itself, and the question as to the effect of the delay was irrelevant.

Esher M.R., justified his decision in a passage which is worth quoting at length:

> "... but in cases of marine insurance, only the causa proxima can be regarded. The question can only arise when there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked at, and the others rejected, although the results would not have been produced without them. Here, there was such a succession of causes.... According to the English law of marine insurance, only the last cause can be regarded. There is nothing in the policy to say the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy you must go back two steps, and that according to English law they are not permitted to do." 28

As stated, there are those who believe that the distinction between the limitation of the insurer's liability as compared to that

of other persons which was drawn by Lord Esher M.R., still exists today, and they compare the English position to that of America where, it is claimed, a much more realistic and practical approach to the problem of causation is taken.

It is submitted that this view is incorrect and at least fifty years out of date. In Leyland Shipping Co. v. Norwich Union Society,[29] the House of Lords commented at some length on the law as laid down in Pink v. Fleming. Lord Shaw of Dunfermline was in no doubt as to the relative position of liability under marine insurance law:

> "My Lords, there was at one time an attempt to differentiate the same contractual words as used in a policy of marine insurance from the meaning of the same expression used in other maritime contracts, but in two judgments of your Lordships House in 1887, the practice was condemned." 30

And again at page 369, he dealt with another of Lord Esher's heresies:

> "What does 'proximate' here mean? To treat proximate cause as if it were the cause which is proximate in time is, as I have already said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved, although other causes may meantime have sprung up which have not yet destroyed it ... and it may culminate in a result which it still remains the real effective cause to which the event can be ascribed."

Moreover, one wonders whether it is really necessary to adopt the American approach, when the case commonly cited as an example of American practice,[31] applied a meaning to 'proximate' quite consistent with that given by the House of Lords. Indeed an earlier American Supreme Court decision had this to say about Lord Esher M.R's decision:

> "It seems neither of these cases[32] went to the House of Lords and we find it impossible to reconcile Lord Esher's ruling - ... - with the elaborate exposition of the doctrine of proximate cause which has been given by the House of Lords in Leyland Shipping Co. v. Norwich Union Fire Insurance Society, from which we have quoted. And it is recognized in England that passages in Lord Esher's judgment ... to the effect that not only the cause last in time can be looked to, cannot now be supported." 33

Thus, having regard to the above decisions, there must be at the very least considerable doubt as to whether the approach taken in Pink v. Fleming is still good law,[34] and it is my opinion that to hold so, is to unnecessarily complicate the role of causation in maritime insurance law; it is in short, a view not at all in accordance with the most recent English authority. There is, it is submitted, no basis for such a distinction to be drawn, and the approach taken by Lord Shaw in the House of Lords is surely, having regard to developments of the law in the field of causation and remoteness of damage, the common sense one.

The concept of causation aside, the courts do not appear to have discriminated against the insurer generally, as compared to the carrier, presumably because they are well aware that the carrier himself will invariably be covered. But in at least one case, the English courts have taken a somewhat liberal stand in stating the burden of proof on a carrier who attempts to prove inherent vice. In Bradley v. F.S.N.C,[35] apples exported from Australia were found to have rotted upon arrival in England. The plaintiffs proved that the apples were of good quality upon departure, but failed to prove conclusively that the damage was caused through the negligence of the ship owner. The carrier, however,

in turn, could not identify the inherent vice which specifically caused the rot. Two passages by Lord Sumner are worth repeating at this stage, although the specific topic of 'burden of proof' will be dealt with later.

At page 267 Lord Sumner stated:

> "Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment, and of their damaged condition on arrival, the burden of proof passed from the consignees to the ship owners to prove some excepted peril which relieved them from liability."

As we will see later, the courts have often placed a very heavy onus on the insurer to prove he comes within the exception, and this approach has generally been adopted by courts dealing with contracts of affreightment. However, in Bradley's case, Lord Sumner laid down a general rule of law which can only be regarded as sympathetic to the cause of the carrier:

> "... Such being the scheme to which the Commonwealth Act gives expression, can it be said either that the ship-owner must fail, if they cannot specify what the particular quality of inherent vice in the cargo might have been...." 36

His Lordship went on at page 271 of the Report, to state that so long as the shipowner can prove that there was no maltreatment of the goods, that would be sufficient to negate the shipper's claim; consequently the carrier wins virtually by default. Clearly, while the decision on the facts in Bradley's case may perhaps have been justified, the general proposition of law stated by Lord Sumner is plainly inconsistent with his original summary of the law relating to the burden of proof on the carrier, and it is submitted that this

approach can only be explained by reference to a possible distinction in the court's attitude to the liability of the carrier and underwriter respectively.

Inherent Vice and Contracts for the Sale of Goods

Since neither the underwriter nor the carrier is liable for loss caused by inherent defects in the subject matter of the contract, one would expect that the seller would automatically bear such loss in a contract for the sale of goods.

But the problem appears to be more complex than a contract of insurance or affreightment, there being a distinction drawn between two classes of loss, both of which would be construed as loss by inherent vice, if the contract was one of insurance. The courts have found it necessary to distinguish the following two situations: firstly, where all goods of the contract specifications would necessarily suffer a certain amount of deterioration in transit, and have deteriorated no more than would be expected under the circumstances in question, and secondly, where some goods of the contract kind would bear transportation with no loss, while others, because of an inherent defect peculiar to them - not their genre - would not.[37] The following observation of Diplock J. in Mash & Murrell Ltd. v. Joseph I. Emmanuel Ltd.,[38] makes this distinction clear:

> "It is only the extraordinary deterioration of the goods due to abnormal conditions experienced during transit for which the buyer takes the risk. A necessary and inevitable deterioration during transit which will render them unmerchantable on arrival, is normally one for which the seller is liable." 39

One commentator, has however gone further than recognising that the initial distinction exists and has put forward the view, that while the seller should be held liable for any inevitable deterioration arising from inadequate packing of the goods, or resulting from his employing insufficient means of conveyance, he should not be liable otherwise for losses during transit, generated by the nature of the goods themselves.[40] Any implied warranty as to fitness for transit extends only to the condition of the goods when they leave the seller's possession and he is not liable for any deterioration resulting during the transit.[41]

There is judicial support for this proposition. In Bowden Bros. & Co. Ltd. v. Little,[42] a cargo of onions, merchantable in regard to condition and quality at departure, were found to have rotted during the voyage and to be unfit for sale. The High Court of Australia (Griffiths C.J., Barton and Issacs JJ.), held that it was a question of fact depending on all the circumstances whether, and to what extent, the purchaser relied upon the skill or judgment of the vendors to supply goods fit for the purpose of shipment to Sydney, and that this was definitely not a warranty to be implied into every contract for sale of goods. Ultimately the question must be decided upon the extent to which the purchaser did in fact rely upon the skill and judgment of the defendant. Nevertheless, it is submitted that this case is by no means irreconcilable with those that take what appears to be a contrary approach. Surely, where both parties know the goods are of a perishable nature, there must be implied a warranty or condition that the goods were

fit to survive the normal transit. Later cases have certainly adopted this approach and it is without doubt consistent with common sense. What buyer would accept goods without a warranty when he knew there was a possibility of them perishing?

Later authorities provide an interesting contrast to the Bowden Bros. case. In 1960 Diplock J. in Mash & Murrell Ltd. v. Joseph I. Emmanuel Ltd.,[43] decided that in c.i.f. and c. & f. contracts, there was an implied condition that the goods should remain of merchantable quality from the time of shipment, throughout the normal transit to the destination, and thereafter a reasonable time for disposal; the learned judge held furthermore, that having regard to later authority,[44] the Bowden Bros. case was perhaps no longer good law. Forty years previously, Mr Justice Hilbury had held in Broome v. Pardess Co-Operative Society,[45] that:-

> "... These words seem to me to be strong enough to show that what is fundamental is that the goods must be merchantable, and, where they are perishable goods and the contract contemplates they have a transit to undergo, merchantable not only at the beginning of the transit, though that would appear to be the place for delivery under the contract, but they must be merchantable in the sense that, at the place for delivery under the contract, they are in a suitable and fit condition for the transit normally to be expected." 46

It has been argued that commercial practice demands that such a warranty be not implied, but it is submitted that the existence of such a practice should be doubted. In Bowden Bros. Griffiths C.J. stated that such an implied warranty would be uncommon in a c,i.f. contract, because the buyer would always be covered by insurance. But this is quite patently a fallacious approach; the protection

any normal insurance policy gives would be worthless, since, as we have discovered, the underwriter is not liable for loss caused by inherent vice. It must be queried whether any buyer would make a binding agreement to buy perishable goods, without securing some recourse against the seller, if they are destroyed by their own vice during a normal transit.

Certainly it appears that current judicial authority is quite definite in its decision to imply a warranty of fitness for transit, and it is by no means unlikely that if such a commercial practice did exist, the courts would refuse to adopt it, having regard to the obvious unjust consequences that could be reached.

General Average

The place of inherent vice in the laws of General Average, is worth mentioning, if only because it is one occasion when the presence of an inherent defect as a causal factor, does not constitute a complete defence. It is no answer, either in English or American law, to a claim to contribution, that the necessity for sacrifice was occasioned by an inherent defect in the property sacrificed.[47]

Thus in Greensheilds v. Stephens,[48] where a fire broke out in the hold of a ship, due to spontaneous combustion of some coal, and the whole cargo was damaged in an effort to extinguish it, the House of Lords held that the fact that the inherent vice of the coal caused, in a sense, the loss, was no defence to a claim for contribution.

This general rule of law, which both the House of Lords and the United States Court of Appeal in the William J. Quilliam case,[49] laid down, is open to the criticism that it may be quite unjust in operation. Although in Greenshield's case, Kennedy L.J., sitting in the Court of Appeal,[50] limited his judgment to cover only the cargo which had not initially spontaneously erupted, Lord Alverstone C.J. in the same court and the full House of Lords, stated a rule of general application which covered all cargo damaged, regardless of the nature of the loss, i.e. by fire or water. It is possible to understand the court allowing the contribution claim in respect of that cargo not originally damaged by the inherent defect, but why should the cargo owner be able to reduce his loss in respect of such cargo destroyed by inherent vice, because, due to the emergency other cargo was damaged. Normally, of course, he would bear the full loss.

For the insurer, ironically, it is also the only time when, barring express coverage of such loss,[51] he has to pay out for damage caused by inherent vice. For under a policy of Marine Insurance, the insurer is normally liable for contributions made to general average claims.

This final point highlights the unpredictable nature of the law in this area and if consistency and rationality were ever criteria for evaluating a judicial decision, then those discussed above are long overdue for distinguishing.

The Onus of Proof

As far as contracts of affreightment are concerned, there can be no doubt that in English law, the onus is on the carrier to prove that the loss was occasioned by inherent vice.[52] Similarly accepted, is the general proposition that the assured must prove that his loss was caused by a peril insured against and not something arising from the subject matter of the goods themselves.[53] In so far as the latter proposition lays down a general rule of law, that the burden is upon the assured to show that the loss was not from inherent vice, it is submitted that while such an analysis might well be correct in strict theory, in practice, the approach of the courts has been far from uniform.

In that writers on insurance draw an initial distinction between the onus of the assured under an 'all risks' and 'specific' insurance policy respectively, they are quite correct.

> "(In) insurances against all risks," stated Mr Justice Roche in Sassoon & Co. v. Yorkshire Insurance Company, 54
> "I can understand it being said, 'once you prove some external damage, damage happening from something outside the goods, if you have insured against 'all risks', you need not prove what risk it is, because you are insured against them all, so long as it is something which happens externally and not the condition of the goods themselves.' That is not the position when you are insured against a specific peril and you have to show some damage caused by that specific peril, subject to the reservation that if the peril results from the condition of the thing itself, the underwriter is relieved." 55

The question to be looked at, is what are the practical consequences of the distinction.

Turning first to the onus of proof in an 'all risks' policy, as

stated previously, English authority all appears to place the onus of proving a casulty as opposed to a loss caused by internal activity, upon the assured. The House of Lords made this quite clear in British and Foreign Marine Insurance v. Gaunt,[56] and the House's decision in this case, particularly the judgment of Lord Sumner,[57] has been followed in two relatively recent cases. In F. W. Berk & Co. Ltd. v. Style,[58] Sellers J., decided that the onus was on the plaintiff to prove that the loss or the expense was due to an accident or casulty, and found on the facts that the latter had not managed this. Four years earlier, Mr Justice Croome-Johnson in Theordorou v. Chester,[59] laid down in the most forthright terms yet, the burden of proof the assured must bear when making a claim:

> "The onus of proof is of course upon the plaintiff to establish these things which I have indicated earlier in the judgment. There is no onus on the defendant either to account for, or try to explain or satisfy me in any way about the matters which have been made on behalf of the plaintiff."

It is clear however, that while the courts conform to the approach taken in British and Foreign Marine Insurance v. Gaunt with respect to the onus in 'all risks' policies, they assume that there is a heavier onus on the assured under a 'specific' policy as compared to an 'all risks'. Briefly stated, my proposition is that this belief may well not be the practical effect of the English authorities at all.

The English courts, when adjudicating claims under insurance policies giving a specific coverage, have taken what is in practice, a remarkably liberal approach (at least from the assured's point of view). The leading authority is the judgment of Mr Justice Roche in

Sassoon v. Yorkshire Insurance Company Ltd.,[60] where the policy concerned covered loss through, inter alia, 'mould and mildew'. Roche J. said of the respective burdens of the parties to the policy:

> "Yet, in my judgment, the plaintiffs are right in their contention that, in the circumstances of this case, the onus of establishing the precise cause of the mould and mildew is upon the defendants, and having established in the affirmative, that mould and mildew have occurred to the cigarettes, and have caused the damage, then it is upon the defendants, in the circumstances of this case, to satisfy me that the occurrence of the mould and mildew was due to the inherent vice of the goods." 61

In the Court of Appeal, Bankes L.J. agreed with Mr Justice Roche on this point, as did Scrutton L.J., who claimed that if you prove its occurrence (i.e. the mould), you automatically have a casulty, unless the underwriters show it happened as a result of the qualities or defects of the subject insured.

Further support for this premise can be gathered from the judgment of Wright J. in Bowring & Co. v. Amsterdam London Insurance Co.,[62] where he held that while in the policy before him, it was for the plaintiffs to prove, 'leaking or sweating from an external cause', if the words 'external cause' had not been included in the policy and it had read only 'leaking and sweating', he would have decided that the burden of proof lay on the defendant underwriters, once damage by leaking etc. was shown.

These judicial pronouncements represent validly the approach taken by English courts to policies of specific insurance, and it is submitted that to state as a general rule, that the onus is on the

assured, is to ignore the practical realities of the situation. The approach taken by the courts is hardly uniform, and they appear to have adopted a different standard for each kind of contract, an approach which leads to a rather unusual result. For while legal personalia agree that the assured has a lighter burden of proof under an 'all risks' policy, in practice, because of the necessity to prove a casulty conclusively, he has in many cases a more difficult burden to overcome than the assured under a 'specific' policy. The latter of course, shifts the burden onto the insurer as soon as the damage occurs, be it by fire, mould, mildew or sweating, and the latter must prove the inherent defect's existence.

The reason for this lack of uniformity is not clear. There is no indication that it stems from a sympathetic outlook towards the assured who has to rely on a specific peril and there is certainly no justification for a distinction on this ground. Any rationalization of the differing approaches must, it is submitted, be based on an argument of evidence. The assured under the wider policy is insured against 'all risks', and the mere fact that his goods are damaged in some way, is not sufficient evidence for the court that the loss was caused by a 'risk' or casulty. The damage of goods by a peril, specifically insured against, is on the other hand, prima facie evidence that the loss occurred through a casulty, against which the assured was covered. This is surely a realistic approach based on a normal reaction to the factual situations before the court. If I insure my cargo of coal under an 'all risks' policy, the fact that it suddenly

bursts into flames of its own accord, is not really any evidence that it was damaged by an external cause. But if a cargo of corn is being transported through the tropics in the wet season, and it is insured specifically against 'mould or mildew', then if that mould appeared, the presumption would be that it was caused by the humid climate, the risk insured against.

Whatever the reason for the distinction, the practical consequences may be tremendous; the arguments being based mainly on an analysis of relevant facts, the onus of proof can be in many cases the determining factor,[63] and it certainly appears to be the case that if the prospective policy holder is sure of the particular damage his goods are susceptible to, it will be both cheaper, and in the event of any dispute, legally to his advantage to insure against the specific danger and leave the 'all risks' policy well alone.

Contracting out of the Protection of the Marine Insurance Act 1908

Section 55(2) of the Marine Insurance Act 1908 contemplates that parties may contract out of the statutory exemption to liability of loss by inherent vice.

The question as to what terms must be included in a contract of insurance to extend the insurer's liability, has received a considerable amount of judicial and academic comment[64] over the past few years, and it is to this topic that we must now turn to.

The consistent approach of the courts has been that for an insurer to extend his liability, his reference to the cover of inherent defects

in goods must be express, or at the very least, clearly implied. This attitude is based on the assumption (probably quite correct), that an insurance policy is designed to cover 'risks' and not 'certainties' of loss. The traditional rationale is that given by Lord Birkenhead C.J., in British and Foreign Marine Insurance v. Gaunt:[65]

> "There are of course limits to 'all risks'. They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear. ... It covers a risk, not a certainty; it is something which happens to the subject matter from without, not the natural behaviour of the subject matter, being what it is, under the circumstances in which it is carried." 66

With these comments in mind, courts have been reluctant to read into insurance policies any extension of the insurer's traditional liability, but there are several cases which give some indication of what terms will be required.

In Sassoon v. Yorkshire Insurance Company Ltd.,[67] the policy covered 'damage by fresh water, mould and/or fire, irrespective of percentage'. In the Court of Appeal, both Scrutton and Bankes LJJ., thought that this policy was not wide enough to cover mould caused by inherent vice. Atkin L.J. was not, however, of this opinion:

> "It seems to me conceivable, if apt words are used, that an assured may cover a loss occasioned by mould which he does not know enough about, to know whether it will or will not happen during the voyage, and which in fact, may happen during the voyage, but may not....
>
> In this particular case, I think there is something to be said for the view that the intention of the parties was to cover mould or mildew arising from any cause whatsoever; that is one of the matters that was in the mind of the assured. It is quite unnecessary for me to decide that point here...." 68

Lord Atkin made during these observations one very important point, which even today is confusing the issue. Lord Birkenhead C.J. in Gaunt's case, spoke of an 'inherent vice' as a 'certainty'. This assumption, it is submitted, is quite wrong, and that, as Atkin L.J. pointed out, an assured might well cover a loss, which, because he does not know enough about the goods in question, he is not quite sure will eventuate or not. For example, tinned pork has, under certain conditions, a tendency to blow - this is an inherent defect of that particular product. But no one is quite sure just what conditions will lead to such an increase of pressure so as to cause this result. Could not a person validly insured against this sort of 'risk', under an 'all risks' policy? I see no reason why not, except of course for the narrow interpretation placed by the courts on the word 'risk'.

Perhaps the most comprehensive discussion of this area was undertaken by Sellers J. in F. W. Berk v. Style,[69] where the relevant clause was, "all risks of loss and/or damage from any cause whatsoever". One could hardly imagine a wider insurance clause, yet although Mr Justice Sellers seemed very sympathetic to the assured's claim that this policy was intended to cover inherent vice, he eventually ruled against this interpretation, on the grounds that certain clauses of the Institute Cargo Clauses (War Time Extension) which excluded losses by inherent vice, were included in the policy and the parties were bound by their written contract.

Generally, however, the courts have been very cautious in their reading of insurance policies. There have been to my knowledge, only

two reported decisions in England or the Commonwealth where the courts have actually awarded a claim, based on loss caused by inherent vice.[70] In a third decision, Overseas Commodities v. Style,[71] the policy in which expressly included loss from inherent vices, the court placed a very restrictive interpretation on a conditional guarantee clause which excused the insurers from liability, on the grounds that, "in view of the departure from the normal form of cover, it is not unreasonable to suppose that underwriters would seek to limit the extension within certain bounds...."[72] Quite frankly, it is difficult to appreciate this conservative approach. In this case, there was definitely no certainty that the tins of pork would 'blow' - the insurer would never have given the extended cover if this was the case. Surely, if the parties to the contract make it abundantly clear that they wish to insure against a particular contingency, the courts should accept their intention and treat the case upon its merits, without restricting it in accordance with what they consider 'the normal insurance policy' encompasses.

American courts have shown the same lack of awareness. In Chute v. N. River Insurance Company,[73] the sole issue was whether the assured could recover for the cracking of an opal as the result of an inherent defect, under a policy covering "'all risks' in transportation". Although this was not a contract of marine insurance, the judge stated that he was applying principles traditionally applicable to contracts of that kind, and said there could be no claim. He based this finding on the rule that explicit language was needed to indicate that there

was an intention to extend the effect of the policy beyond damages caused by a 'casulty' and to cover losses resulting from automatic internal deterioration.

Today the courts appear to place a great deal of emphasis on surrounding circumstances[74] and in the absence of any definite indication that the parties intended such a loss to be covered, the court will remain unconvinced. The present attitude of the courts was plainly put by Sellers J. in Berk v. Style:

> "Having regard to the established law in the matter, if the plaintiff had wished to insure against inherent vice - if indeed, they could have done so at any reasonable premium - they should have used specific words to that effect, or at least had clause 6, or the relevant part of it, struck out." 75

There appears little hope for a more realistic approach by the courts. Unless express inclusion of loss by inherent vice becomes common practice, the courts will no doubt continue to 'protect' the underwriter in many causes of action in which, on an ordinary reading of the contract concerned, his liability appears certain.

Prospects for Reform and Future Development

As should have become apparent during the course of this paper, the law relating to inherent vice can hardly be regarded as settled. Its concept has changed radically from the days when it was used, inter alia, to prevent 'slavers' who had abused their charges from claiming an indemnity when the latter died of starvation. But there

are still some serious anomalies: for example, it is well established that, although it may be an undue extension of the concept,[76] damage caused by insufficient packing constitutes damage by an inherent defect.[77] The disturbing thing is, that in the only 'recent' authority directly on point, it was held that a carrier may rely on that defence, even though he was aware that the goods might well be damaged because of this inadequacy.[78] This decision appears completely irreconcilable with the general law as to the duties of common carriers, which are of course based on negligence. Some mitigation of this extreme position may have been achieved by a subsequent Court of Appeal decision, Silver v. Ocean S.S. Company;[79] here, Slesser L.J. distinguished the earlier case, and held that unless the condition of the goods' packing was admitted in the bill of lading, the carrier would be estopped from relying on the defence if he was aware of such defects. It is unfortunate that he did not go further and overrule the previous authority, since the situation remains unremedied and the decision in Gould v. S.E.C. Railway is still the law today.

Indeed, the basic concept of inherent vice is perhaps, open to the criticism, that in some fields of insurance law in particular, its operation is quite unjust. If we refer again to the example of the cargo of corn insured against mildew in a humid climate; it is submitted that there is no real basis for a rule that a loss by mildew should be excluded on the grounds of some excess moisture in the corn itself. It may be that in 'all risk' marine policies the concept of inherent vice should provide an exception to liability, since in this

case, any such loss is not caused by a peril insured against. But if the loss is caused by the specific peril the assured has paid to have cover against, should it make any difference that internal and not external developments gave rise to that peril? Surely, if the underwriter is liable for losses by mildew occasioned through the negligence of the shipowner or his servant, he should be responsible for loss caused by inherent vice in the corn itself. The question is quite simple. 'What caused the loss? Was it a peril insured against?' - In the hypothetical situation outlined above, the answer is, it is submitted, equally straightforward - 'Yes'!

It is unfortunate perhaps, that the basic concept of inherent vice has been well established for over fifty years; it is now only within the various components of the defence that any uncertainty lies, and one would doubt whether any court today would care to challenge the validity of the basis of the exception. Any reform is clearly a case for the legislature in this field.

Moves have begun however, on an international level, to remedy some of the more apparent defects in the concept as it stands today. At its fourth session held in Geneva in April 1971, the United Nations Commission on International Trade Law (UNCITRAL), adopted a recommendation to consider the subject of bills of lading as the topic of priority in its programme of analysing international shipping legislation. Amongst the subsidiary recommendations made are some relating specifically to inherent vice.

This move has been chiefly sponsored by the developing nations who consider that the Hague Rules, which were formulated at a time when they were unable to express their problems and their interests were not thought to be important, discriminate against the shipper by imposing upon him unduly heavy risks of ocean carriage. They wish, accordingly, to return to the carrier most of the liability for losses which have been historically borne by him and thus restore a reasonably equitable relationship between carrier and shipper.

The basis for their discontent is basically economic: the developing nations claim that they are bearing a disproportionate amount of the loss occasioned during transport by sea. The first complaint of the developing nations is that there is a great deal of uncompensated loss; in many cases the cargo owners have to accept the carrier's decision of distribution of loss rather than accept the alternative of expensive and unpredictable litigation. Secondly, because of the many exceptions granted to the carrier by the Hague Rules, it is impossible to determine the certainty of compensation; subsequently there is a great deal of 'overlapping' or 'double' insurance effected by cargo owners. Finally, there is a general disturbance of the overall distribution of loss. Since the incidence of costs is mainly on the cargo owners, there is a real income transfer from countries which are mainly cargo owners to those which are predominantly carriers (developing and developed nations respectively), making the former, to some extent, the economic scapegoats for the developed world.

All these complaints are directly applicable to the problem of inherent vice, particularly so, having regard to the increasing complexities of evidence and problems of burden of proof and consequent expense, which must discourage some from disputing the compensation offered by the carrier.

To this end the comments as to inherent vice relate to two specific problem areas, both of which have been dealt with at varying lengths in this paper. The first concerns the Rules' basic exception of inherent vice (Article 4(2)(m)); viz. the burden and method of proving inherent vice, and the general intention is that these should be clarified by amendment. The second problem area is that of 'insufficiency of packaging' under Article 4(2)(n) of the Hague Rules. It is not clear in what circumstances the carrier can claim this exemption; nor is it settled what must be included in a bill of lading to prevent him being estopped from relying on it. This should also be rectified by amendment. The final point is that there is a claim that 'customary tolerances' should be specifically included as an 'inherent vice', by reason of which the carrier is exempted from liability.

Thus it appears as though in the near future, while the basis of the concept will not be attacked, certainly some of the problem areas may be remedied on an international scale.

CONCLUSION

The law relating to inherent vice must be unique in that it is surely the only field in which the courts have constantly protected the insurer, be he a professional underwriter or a common carrier, against liability to the assured. As has been seen, it may be that the courts have been rather kinder to the common carrier than to the underwriter, but while it appears that in some particular cases, the onus of proof has been put upon the underwriter to bring himself within the exception, the courts have been reluctant to interfere with or make any deliberate attempt to decrease the limitations on his liability. The rationale behind this approach is probably that they refuse to make the insurer accept liability for an act of the owner of the goods which would probably amount to a breach of the Sale of Goods Act - but as was stated earlier in this paper, if this is the intention of the parties concerned, is it right for the courts to limit that intent? The situation has now, however, become very interesting since, with the UNCITRAL developments, it appears very much as though the concept of inherent vice will in the future be subject to political, as well as legal influences in its future development.

One thing is certain; any such move to remove the limitations of carriers and underwriters' liability will be strongly opposed by the latter - for these people the exception in the past has been often a saviour; for the owner of the goods, it may have meant ruin!

FOOTNOTES

1. Inter alia; F. W. Berk & Co. v. Style [1956] 1 Q.B.D. 180; Overseas Commodities v. Style [1958] 1 Lloyd's Rep. 546; Theordorou v. Chester [1951] 1 Lloyd's Rep. 204.

2. Lawrence v. Aberdain (1821) 106 E.R. 1133. See also Gregson v. Gilbert (1783) 99 E.R. 629; Tatham v. Hodgson (1796) 101 E.R. 759; and Boyd v. Dubois (1811) 3 Camp. 133.

3. Cf.: the words of Grose J. in Tatham v. Hodgson, supra: "This is not a loss by the perils of the sea, but a mortality of natural death: if we were to determine otherwise, we should open a door to the very mischiefs the legislature intended to guard against, because it would encourage the captains of slave ships to take on an insufficient quantity of food for the sustenance of their slaves." with the rationale of inherent vice by Lord Birkenhead C.J. in British and Foreign Marine Insurance v. Gaunt [1921] 2 A.C. 41 post n. 69.

4. F.M.C. Meat Ltd. v. Fairfield Cold Stores [1971] 2 Lloyd's Rep. 221.

5. The only recent articles appear to be:
Sassoon, 'Damage Resulting from Natural Decay under Insurance, Carriage and Sale of Goods Contracts' (1965) 28 M.L.R. 180.
Sassoon, 'Deterioration of Goods in Transit' [1962] J.B.L. 352.
'Inherent Vice in Marine Insurance Policies' (1958) 102 Sol. J. 768.

6. (1872) L.R. 7 C.P. 655.

7. Supra at page 662.

8. Blower v. Great Western Railway Co. supra.

9. Tatham v. Hodgson supra.

10. Bowring v. Amsterdam London Insurance Co. (1930) 36 Ll.L.R. 309.

11. Wilson, Holgate & Co. Ltd. v. Lancashire and Cheshire Insurance Corporation Ltd. (1922) 13 Ll.L.R. 486 K.B.D.

12. Overseas Commodities v. Style [1958] 1 Lloyd's Rep. 546.

13. Supra.

14. Ibid. at page 318.

15. Ibid. at page 324.

16. [1971] 2 Lloyd's Rep. 221. An interesting attitude as to how the courts will treat expert witnesses is given in Electro Motion v. Maritime In. Ltd. & Bonner [1956] 1 Lloyd's Rep. 420, 425, 426.

17. Ibid. at page 226.

18. Sassoon & Co. v. Yorkshire Insurance Company Ltd. (1923) 14 Ll.L.R. 167.

19. The Rangoon Maru. Nippon Yusen Kaisha v. Grace Bros. (1928) 27 F. 2d 722.

20. See for example F.M.C. Meat Ltd. v. Fairfield Cold Stores, supra.

21. [1920] A.C. 324.

22. Ibid. at page 335.

23. Cf. Marine Insurance Act 1908.
s.55(2)(c). "Unless the policy provides otherwise, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured...."

24. "To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation pro hae vice...." Watkins v. Cottel [1916] 1 K.B. 10, per Avory J. at pp. 14, 15. His duties are generally to take care in dealing with goods in his possession throughout transit, so long as their safe keeping is his responsibility. This includes loading, stowage and discharge.

25. Internationale Guano En Superphosphaatwerken v. MacAndrew & Co. [1909] 2 K.B. 360; Blower v. Great Western Railway Co. (1872) L.R. 7 C.P. 655. 664.

26. Sassoon, 'Damage Resulting from Natural Decay...' supra.

27. (1890) 25 Q.B.D. 396.

28. Ibid. at page 397.

29. [1918] A.C. 350.

30. Ibid. at page 368.

31. Standard Oil Co. of New Jersey v. U.S. (1950) 340 U.S. 54; 71 S.Ct. 135.

32. Referring to Pink v. Fleming supra and Taylor v. Dunbar (1869) L.R. 4 C.P. 206.

33. Lasana Fruit Steamship & Importing Co. v. Universal Insurance Co. 302 U.S. 556.

34. But note that the actual legal consequence in this case, i.e., that the insurer could not be held responsible for the effects of delay has been executed in statutory form. See s.55(2)(b) Marine Insurance Act 1908.

35. (1927) 137 L.T. 266 (H.L.).

36. Ibid. at page 270.

37. Sassoon, Damages Resulting from Natural Decay, supra at page 190.

38. [1961] 1 W.L.R. 862.

39. Ibid. at page 871.

40. Sassoon, particularly in Deterioration of Goods in Transit [1962] J.B.L. 352.

41. This is the position of American law according to American Jurisprudence, Vol. 46, page 535.

42. (1907) 4 C.L.R. 1364.

43. Supra.

44. Amongst others: Beer v. Walker (1877) 46 L.J.Q.B. 672; Manchester Liners Ltd. v. Rea Ltd. [1922] 2 A.C. 74.

45. [1939] 3 All E.R. 978.

46. Ibid. at page 985.

47. See post n. 48, 49.

48. [1908] A.C. 431.

49. (1910) 180 Fed. R. 681.

50. Cf. New York - Antwerp Rules, Rule 3; these were incorporated into the Bill of Lading.

51. See post, n. 66.

52. White & Son (Hull) Ltd. v. 'Hobsons Bay' (Owners) (1933) 47 Ll.L.R. F. O. Bradley & Sons Ltd. v. F.S.N. Co. Ltd. (1927) 137 L.T. 226. The American position appears to be much the same. See 'Sabine Howaldt' [1972] 1 Lloyd's Rep. 83. Decision of the American Supreme Court.

53. Theodorou v. Chester [1951] 1 Lloyd's Rep. 204; Gee & Garnham v. Whittal [1955] 2 Lloyd's Rep. 562; but cf. Electro Motion v. Maritime Insurance Ltd. & Bonner [1956] 1 Lloyd's Rep. 420, where the judge appears to state that under an all risks policy it is sufficient for the plaintiff to establish that the goods left him undamaged and arrived damaged at the conclusion of the transit. But he was not called upon to discuss the problem of inherent vice at all.

54. (1923) 14 Ll.L.R. 167.

55. Ibid at page 173.

56. [1921] 2 A.C. 41.

57. Ibid at page 57.

58. [1956] 1 Q.B.D. 180.

59. [1951] 1 Lloyd's Rep. 204.

60. Supra.

61. Ibid at page 173.

62. (1930) 36 Ll.L.R. 309.

63. For an example of a case where the onus of proof was admittedly the vital factor see the judgment of Roche J. in Sassoon & Co. v. Yorkshire Insurance Company supra at page 173.

64. Sassoon, Damage Resulting from Natural Decay, supra; Hardy-Ivamy, Marine Insurance Law, 271. Also cases in n. 65-76.

65. Supra.

66. Ibid at page 57.

67. Supra.

68. Ibid at page 133.

69. [1956] 1 Q.B.D. 180.

70. Dodwell & Co. Ltd. v. British Dominions General Insurance Co. Ltd. Ll.L. Newsp. April 9th., 1918; Traders and General Insurance Ass. Ltd. v. Bankers & General Insurance Co. Ltd. (1922) 38 T.L.R. 257.

71. [1958] 1 Lloyd's Rep. 546.

72. Ibid at page 551.

73. (1927) 214 N.W. 473; 55 A.L.R. 938.

74. Especially, it appears, as to whether or not the premiums reflect the extra coverage of inherent vice. See F. W. Berk & Co. Ltd. v. Style supra at page 187 per Sellers J. and Maignem v. National Benefit Assurance Co. Ltd. (1922) 38 T.L.R. 275 (counsel's argument).

75. Supra at page 187.

76. Arnould, Marine Insurance, 14th ed., para. 762. See also the 'Hague Rules' and Sea Carriage of Goods Act, s.3(b)(v); the exception of insufficiency of packing is quite distinct from that of inherent vice.

77. Gee & Garnham v. Whittal [1955] 2 Lloyd's Rep. 562.

78. Gould v. S.E.C. Railway [1920] 2 K.B. 186. Atkin L.J. at p. 192 said that it was the shipper's duty to pack the goods properly and that he could not sue for his own neglect, but it is submitted that unless the goods are at 'owner's risk', the responsibility should be shared.

79. [1930] 1 K.B. 416.

80. See generally on the UNCITRAL Report - 1971: 5 Journal of World Trade Law, 577; See also the First Volume of the 'UNCITRAL' Yearbook.

LX Ha Hansen, B.G. The concept of inherent vice.