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Causation in Hull Insurance
A Comparison of English and Nordic Marine
Insurance

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Contents

SUMMARY	5
SAMMANFATTNING	6
ACKNOWLEDGEMENTS	7
ABBREVIATIONS	8
1 INTRODUCTION	9
1.1 Background	9
1.2 Scope and Purpose	10
1.3 Method and material	11
1.4 Scheme of thesis	12
2 ENGLISH SYSTEM	14
2.1 Proximate cause	14
2.1.1 <i>The common sense approach</i>	16
2.1.2 <i>Contractual freedom</i>	17
2.2 Concurrent Proximate causes	17
2.2.1 <i>One included loss and one not expressly excluded</i>	18
2.2.2 <i>One included loss and one expressly excluded loss</i>	19
2.2.3 <i>More than two proximate causes</i>	20
2.3 Succession of proximate causes	20
2.4 Paramount clauses	21
2.5 Exceptions provided by the Act	21
2.5.1 <i>Wilful misconduct and negligence</i>	22
2.6 Burden of proof	23
3 NORDIC SYSTEM	25
3.1 Nordic Marine Insurance Plan	25
3.2 General rule for the causal expression	26
3.2.1 <i>Development of the apportionment principle</i>	26
3.2.2 <i>Combination of causes</i>	28
3.3 Distribution of liability	30
3.3.1 <i>What perils should be included in the apportionment</i>	30
3.3.2 <i>How should the loss be allocated?</i>	31
3.3.3 <i>RACE II perils</i>	32
3.4 Causal expression for war perils	33

3.4.1	<i>When a cause considered as dominant</i>	34
3.4.2	<i>Losses entirely attributable to war perils</i>	35
3.4.3	<i>Loss attributable either to marine or war perils</i>	36
3.5	Intent and gross negligence	36
3.6	Burden of proof	37
4	COMPARATIVE ANALYSES	39
4.1	Proximate cause rule and apportionment rule	40
4.2	Modified dominant cause rule and proximate cause rule	42
4.3	War perils	43
4.4	Radioactive contamination	44
4.5	Negligence and intent	45
4.6	Burden of proof	46
5	PROXIMATE CAUSE OUTSIDE ENGLAND AND ITS EFFECTS FOR THE INDUSTRY	47
5.1	Proximate cause in other jurisdictions	47
5.1.1	<i>Canada and the proximate cause rule</i>	47
5.1.2	<i>Australia and the proximate cause rule</i>	50
5.2	Industry aspects	51
5.3	Would the proximate cause principle benefit from some changes?	53
6	CONCLUSION	55
	BIBLIOGRAPHY	59
	Books	59
	Articles	59
	Other Publications	60
	Web pages	60
	Mail correspondence	61
	Lecture notes	61
	TABLE OF LEGISLATION AND OTHER INSTRUMENTS	62
	Australia	62
	Denmark	62
	Finland	62
	Norway	62
	Sweden	62
	United Kingdom	63

TABLE OF CASES	64
Australia	64
Canada	64
United Kingdom	64
Norway	65

Summary

In marine insurance causation is a fundamental principle. Causation defines if a loss falls under the insurance policy or if the loss is too remote to be considered under the insurance policy. In order to define the necessary causal connection different principles are used in different countries, or in relation to different perils. In England the proximate cause principle is used while the Nordic Plan mainly uses a principle of apportionment.

According to the doctrine of proximate cause the entire loss shall be attributed to the peril proximately caused the loss. It is also possible for the court to find several proximate causes for the loss and in such a case the insurance policy will respond if one cause is covered while one is not covered. However, the Wayne Tank principle prescribes that if one cause is expressly excluded the assured cannot recover under the insurance policy. There are some exceptions to the proximate cause rule e.g. if the loss is intentionally caused by the assured or if the parties have agreed that a different causal expression shall be used.

In the Nordic Plan, which entered into force the 1st of January 2013, a rule of apportionment is used. This means that the loss can be apportioned between several causes of legal relevance depending on how much they have contributed to the loss. The most important exception to the apportionment rule is that the modified dominant cause principle is used for the combination of marine and war perils. Under the Nordic Plan the parties have, similar as in England, the possibility to change causal expression by contract.

The primary difference between the two systems is that loss can be apportioned between several different perils under the Nordic Plan while the English approach not allows the loss to be distributed over several perils. Even if there are substantial differences between the two systems there are also some similarities e.g. both systems contain some special rules in regard of war perils and radioactive contamination.

In other common law jurisdictions the proximate cause rule has been used traditionally but some criticism against the principle has been brought forward. In Canada the rule has developed, especially in regard of the Wayne Tank principle, as a response to the criticism. In Australia on the other hand the proximate cause rule is still used but some criticism has been brought forward.

Sammanfattning

I sjöförsäkring är kausalitet en fundamental princip. Kausalitet avgör om en förlust ska anses falla under försäkringen eller om förlusten är för avlägsen för att bli beaktad. För att definiera vilket kausalt samband som är nödvändigt har olika principer används i olika länder, eller i relation till olika sjörisker. I England har "the proximate cause" principen används medan den nordiska sjöförsäkringsplanen i huvudsak använder fördelningsprincipen.

Enligt doktrinen om "proximate causes" ska hela förlusten hänföras till den sjörisk som i huvudsak orsakade förlusten. Det är även möjligt för domstolen att finna att flera sjörisker tillsammans är huvudorsaker och i så fall täcker försäkringen om en sjöförsäkring är täckt även om en annan inte är täckt. Däremot föreskriver Wayne Tank principen att om en av huvudorsakerna är uttryckligen undantagen så kan inte den försäkrade bli kompenserad under försäkringen. Det finns några undantag till principen om "proximate causes" exempelvis om förlusten är uppsåtliga orsakad av den försäkrade eller om parterna har kommit överrens om att en annan kausal princip ska gälla.

I den nordiska sjöförsäkringsplanen, som trädde i kraft den första januari 2013, används en fördelningsregel. Detta innebär att förlusten kan fördelas mellan flera juridiskt relevanta anledningar till förlusten beroende på hur mycket de har bidragit till förlusten. Det viktigaste undantaget till fördelningsprincipen är att ett annat kausalt uttryck används för kombinationen sjö- och krigsrisker där en modifierad dominerande orsaksprincip används. Under den nordiska sjöförsäkringsplanen har parterna, liknande som i England, möjligheten att i kontraktet ändra vilket kausalt begrepp som ska användas.

Den främsta skillnaden mellan de två systemen är att förlusten kan bli fördelad mellan flera olika sjörisker under den nordiska sjöförsäkringsplanen medan det engelska systemet inte tillåter att förlusten fördelas. Även om det finns substantiella skillnader mellan de två systemen finns det också några likheter, exempelvis så finns det i båda systemen specialregler för krigsrisker och radioaktiv kontaminering.

I andra common law länder har "proximate cause" principen används traditionellt men det har framkommit kritik mot principen. I Kanada har principen utvecklats, speciellt i relation till Wayne Tank principen, som ett svar till kritiken. I Australien å andra sidan används fortfarande "proximate cause" principen men viss kritik har framkommit.

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Abbreviations

Danish Convention	Danish Marine Insurance Convention of 1934
IHC	International Hull Conditions (01/11/03)
ITCH	Institute Time Clauses Hull (95)
IWSC(H)	Institute War and Strike Clauses
Marine Insurance Act	English Marine Insurance Act 1906 c. 41 (Regnal. 6 Edw 7)
Nordic Plan	Nordic Marine Insurance Plan of 2013
Norwegian Plan	Norwegian Marine Insurance Plan of 1996, version 2010
Swedish Plan	Swedish Marine Insurance Plan of 2006

1 Introduction

1.1 Background

Marine insurance is essential for the marine trade and any prudent shipowner insures his ship against various risks. The ship and its equipment are insured through hull insurance which also contain some elements of liability insurance in connection with collisions. A prudent ship owner would also have a cover against e.g. war risks, strike risks and possible liabilities but it is possible to insure against other risks as well.¹

The actual cover of a marine insurance policy varies. For the scope of cover it is firstly important to view what perils are insured against e.g. if the policy offers an “all-risk” cover or nominated perils only. The insurance policy also provides what losses are covered, for example if only total losses are included or also partial losses.² Another important question in deciding the cover of the insurance policy is the question of causation.³ Causation concerns what connection is needed between a casualty and the marine insurance policy i.e. what loss the insurer is liable to compensate for.

The primary issue regarding causation in marine insurance is when several perils causing the loss. The problem arises when not all the perils are insured under the same policy, or when a peril is uncovered alternatively excluded. In this situation the question arises as to where the loss should fall or which underwriter will be liable to compensate for the loss.

The legislative framework in England is the Marine Insurance Act⁴ but many principles are also contained in case law. English marine insurance is by tradition of importance and the English hull conditions⁵ are widely used. Many states also look at the English system when making their own legislation. In regard of causation the concept of “proximate cause” is used in England, which means that the loss shall fall under the policy insuring the proximate or dominant cause of loss.⁶

In the Nordic countries⁷ there are some legislation in regard of insurance. Insurance contracts are governed by an Insurance Contract Act⁸ specific to

¹ Professor Rhidian Thomas, Unpublished lecture notes from Lund University, 2012, p. 15

² *Ibid.*

³ Wilhelmsen Trine-Lise and Bull Hans Jacob, *Handbook in Hull Insurance*, Gyldendal Akademisk, 2007, p. 79

⁴ 1906 c. 41 (Regnal. 6 Edw 7)

⁵ Standard contract used in marine insurance e.g. International Hull Clauses and Institutional Time Clauses

⁶ Bennet, Howard, *The law of marine insurance*, 2d ed, Oxford university press, 2006, p. 302

⁷ Here “the Nordic countries” refers to Norway, Sweden, Denmark and Finland.

every country. Due to corporation and the influence the Nordic countries have on each other these acts are similar in content and scope. However, the Insurance Contract Acts are in most parts not mandatory for marine insurance wherefore various standard contracts have developed. Latest in time is the Nordic Plan which is developed by the industry and based on the Norwegian Plan of 1996, version 2010. The Nordic Plan entered into force 1st of January 2013.⁹

The Nordic Plan handles causation through the apportionment principle. According to the apportionment principle it is possible to allocate the loss over different marine policies, i.e. an underwriter can be liable to compensate for a part of the loss only.¹⁰

1.2 Scope and Purpose

This thesis aims at comparing the principle of causation in marine hull insurance in England and in the Nordic countries. The comparison is interesting since the English and Nordic markets are among the biggest markets for marine insurance but the approach in relation to causation is different. The comparison will also provide a good foundation for the discussion of benefits and disadvantages with the different causal expressions.

When examine the situation in England focus will be on the Marine Insurance Act and case law dealing with the act. Well-known standard contracts will also be brought forward to some extent. In regard of the Nordic countries focus will be on the Nordic Plan and where relevant for the Nordic Plan examples from the Norwegian Plan. However, principles and developments in relation to other Nordic countries have been left outside the scope of this thesis.

The general question of this thesis is how England and the Nordic countries treat causation. By that meant that the thesis will consider similarities and differences between the two systems and compare them. The question has been divided into sub-question on which the thesis will focus.

The first sub-question concerns the situation of several perils causing the loss. Namely, if there are several perils for the loss who will be held liable to compensate? This question is one of the more challenging questions in regard of causation. The question also includes what happens if not both perils are insured under the same insurance policy. Will any of them take precedence?

⁸ Swedish Insurance Contract Act (2005:104); Finish Insurance Contract Act 28.6.1994/543, Norwegian Insurance Contract Act 16 June 1989 No. 69.; Danish Insurance Contract Act LBK nr 999 af 05/10/2006

⁹Falkanger, Thor, Hans, Jacob Bull et alia, *Scandinavian maritime law - The Norwegian perspective*, 2 edn, Universitetsforlaget, 2008, p. 476 – 477;

The Nordic Marine Insurance Plan of 2013, the Preface

¹⁰ The Commentary to the Nordic Plan, cl. 2-13

The second sub-question is if there are any perils that are treated differently. In such a case, how?

Thirdly, how do the different causal expressions affect the market and what are the developments of the proximate cause principle in other common law jurisdictions? Are there any lessons to be learned i.e. would the proximate cause principle benefit from some changes?

For the benefit of the reader two fictional situations will be described to keep in mind when reading the thesis. These examples will be used later in the thesis to demonstrate the different results depending on causal principle.

- In the first example a ship runs aground causing damage to the hull. On the way to a port for reparations she meets bad weather causing the ship to sink. The grounding and the bad weather are insured under different policies.
- In the second example a ship runs into a mine. The mine causes a hole in the hull of the ship. Later the ship is running into bad weather causing the ship to sink. The mine is considered as a war peril, insured under a war policy while the weather, a marine peril, is insured under a marine policy.

This thesis will not deal with questions of doctrine of good faith e.g. when the assured has given the underwriter incorrect information relevant to the peril causing the loss. Neither will the thesis concern the situation where part of the loss occurs because of the ship being unseaworthy at the time of the loss or loss due to delay. These delimitations have been necessary to keep the thesis focused.

Developments for Nordic countries, other than Norway, have been left outside the scope of the thesis. However, the Nordic countries have different legal systems wherefore there are differences in the development of marine insurance in general. The reason for excluding other Nordic countries is that the Norwegian development is interesting for the Nordic Plan while the other national legislation has affected the Nordic Plan less. It is also important to emphasise that the Nordic Plan is based on the Norwegian Plan which also lessens the influence of the other Nordic countries.

1.3 Method and material

In chapters two and three a legal dogmatic method will be used, meaning that relevant legal sources will be investigated to clarify the legal position.¹¹ In these chapters the English and Nordic marine insurance in relation to causation will be described and interpreted to provide the basis for the

¹¹ Wahlgren Peter, 'Syfte och nytta med rättsvetenskapliga arbeten', *SvJT*, 2002 s.293, p. 299-300

chapters following. The findings in the two descriptive chapters will be compared to find similarities and differences between the two systems. In the comparative analysis some benefits and disadvantages with the two systems will be lifted forward.

The materials will mainly consist of legislation, articles, books and case law. In regard of the English system case law and books from well-known scholars constitutes a predominant part.

Material relating to the Nordic Plan is not as rich as the material relating to English law, partly because the Nordic Plan entered into force recently. However, the Nordic Plan is based on the Norwegian Plan and the principles of causation has not been changed to any great extent wherefore books, articles and case law on the Norwegian Plan is still relevant and will be used to a great extent.

Relevant for the Nordic Plan is also the extensive commentaries accompanying the Nordic Plan. As in interpretation of legislation in the Nordic legal tradition, the Commentary is used as an important source of law even if the text of the legislation would supersede in the case of a disparity.

Cases law is considered as an important source of law in both the Nordic tradition and in the English tradition. However, it is only under the English system that the precedencies are formally binding which gives case law another weight. However, in the Nordic countries case law is relevant and even if case law is not formally binding it is unlikely that a principle stated in case law would not be followed in subsequent cases.¹²

1.4 Scheme of thesis

Following this introduction chapter is firstly a chapter describing the causal expression used under English law. This chapter mainly concerns the proximate cause principle and its development.

Secondly, a chapter describing the approach in the Nordic Plan will follow. In this chapter the application of the apportionment rule will be investigated together with its development. In addition, the chapter will bring forward other causal expressions used in the Nordic Plan e.g. the modified dominant cause principle.

Thirdly, a chapter comparing the two systems is undertaken. The chapter provide a discussion of benefits and disadvantages for the different ways of handling causation, mainly in relation to the main principles of proximate cause principle and apportionment principle.

¹² Bogdan Michael, *Komparativ rättskunskap*, Norstedts Juridik, 1993, p. 118

Fourthly, a chapter analysing how the proximate cause doctrine has developed under two other common law jurisdictions, Canada and Australia. The chapter also bring forward how the causal expressions are affecting the market together with the question if there is a need to change the proximate cause principle.

Finally, a conclusion of the findings of this thesis will be presented.

2 English System

2.1 Proximate cause

The English legal system applies the proximate cause principle and for the assured to be indemnified under the marine insurance policy two issues need to be established. Firstly, the loss needs to be proximately caused by an insured peril. Secondly, the peril should not be excluded or excepted under the insurance policy.

The Marine Insurance Act states that the proximate cause shall be decisive and section 55(1) reads as follows:

Subject to the provision of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

The Marine Insurance Act does not provide an answer to how the proximate cause should be defined.

Case law has historically distinguished between proximate and remote cause of loss by their order in time by referring to Bacon's maxim:

it were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause and judgeth of acts by that, without looking to any further degree.¹³

Hence, proximate cause was considered as the cause last in time before the occurrence.¹⁴ The events leading up to the loss was therein viewed as a chain of causes where the last cause was to be considered as the proximate cause.¹⁵ In *Pink v Fleming (1890) 25 QBD 396* the court held that it was only the last cause which was relevant since if not for the last cause the event as a whole would not have occurred.

In *Pink v Fleming*¹⁶ the goods were insured against damage caused by collision. During the voyage the ship collided with another ship and was forced to undertake repairs. In order to undertake the repairs it was necessary to discharge the goods and the goods were later shipped to its final destination. When the goods arrived it was found that the goods had been damaged by the handling during the discharge necessary for the repairs and by delay which occurred later in time. The assured sought compensation under the insurance policy. The Court of Appeal held that the collision was

¹³ Bennet, *supra* note 6, p. 303

¹⁴ *Ibid.*

¹⁵ Hodges Susan, *Law of marine insurance*, Cavendish Publishing Limited, 1996, p. 146

¹⁶ (1890) 25 QBD 396

not the proximate cause since it was not last in time wherefore the assured could not recover.

Today the courts have another approach to the identification of the proximate cause i.e. the traditional view on the proximate cause as the one latest in time has been abandoned.¹⁷ In *Reishcher v Borwick* (1894) 2 QB 548, CA the Court of Appeal did not use time to determine the proximate cause but did instead consider the predominant cause of loss.¹⁸ In the leading case of *Leyland Shipping v Norwich Union* [1918] AC 350 the House of Lords rejected the view that the proximate cause was the cause latest in time and instead confirmed the principle established in *Reishcher v Borwick*¹⁹.

In *Leyland Shipping*²⁰ a vessel was insured under a policy covering loss by perils of the sea but with a clause excluding “all consequences of hostilities or warlike operations”. The ship, *Ikaria*, was heading to Le Havre when a German submarine torpedoed her. The torpedo caused severe damage but with the assistance of tugs she could reach Le Havre and mooring at a quay. When *Ikaria* was still at the quay a gale made her bump against the quay making the harbour authority worried that she might sink and therein block the quay. The harbour authority ordered *Ikaria* to either be beached outside the harbour or moor inside the breakwater since the quay was needed for military purposes. This was a reasonable measure by the harbour authority considering the circumstances and *Ikaria* had to obey even if it might have been possible for her to be saved if she stayed at the quay. *Ikaria* moored inside the breakwater where she remained for two days. Because of the damage made by the torpedo she went aground with every ebb tide and refloat with the flood which weakened her. Hence she broke her back and the shipowners claimed compensation for loss by perils of the sea. The underwriters contested the claim and claimed that the loss was due to a war risk which fell under the exception.

The House of Lords held that the proximate cause was the torpedo and not the repeated groundings as claimed by the assured. Consequently, the underwriters were not held liable to pay compensation since they were protected by the exclusion. Lord Shaw explained that causation is to be viewed as a net rather than a chain and that it is for the judges too, based on the facts, to decide which cause is the proximate cause.²¹ The proximate cause could, however, still coincide with the latest in time but not necessarily.²² The ruling in the *Leyland Shipping*²³ has been confirmed by later cases.²⁴

¹⁷ Gilman Jonathan, *Arnould's law of marine insurance and average*, 17th ed., Sweet & Maxwell, 2008, p. 900

¹⁸ Hodges, *supra* note 15, p. 146;

Also, *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] 2 Lloyd's Rep 604

¹⁹ (1894) 2 QB 548, CA

²⁰ [1918] AC 350

²¹ *Ibid.*

²² Bennet, *supra* note 6, p. 304

²³ [1918] AC 350

In the later case *Samuel (P) & Co Ltd v Dumas*[1924] AC 431 House of Lords held that when the crew is scuttling the ship causing an inrush of water, the proximate cause is the scuttling and not the last cause i.e. peril of the sea. The later cause was the inevitable or likely consequence of the earlier cause and in such a situation it is likely that the court will find the first cause to be the proximate cause.²⁵

2.1.1 The common sense approach

Several different words or synonyms has been used in an attempt to identifying the proximate cause e.g. “direct”, “direct caused”²⁶, “dominant”²⁷, “effective”²⁸, “predominant” or “real”. However, even if they can be used as guidance, most judges now agree that common sense should be used when determining the proximate cause.²⁹

In *Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold)* 73 Lloyd’s List L. Rep. At 11 a ship stranded while sailing in convoy, the convoy was considered as a war operation. The stranding was because of a number of causes but there was no negligence in the navigation from the crew. It was held by their Lordships that the warlike operation was the proximate cause for the stranding. In regard of the common sense rule Lord Wright held that:

To choose the real and efficient cause from out of the whole complex facts must be applying common sense standard ... the test to be used is that it must be looked into as a man in the street would understand.³⁰

The common sense rule has been confirmed in subsequent cases.³¹

However, the common sense rule can be hard to apply since common sense is a matter of opinion and opinions may diverge.³² This was also pointed out by Lord Brightman “My Lords, questions of causation are mixed questions of fact and law and opinions may and often do differ upon them.”³³ Nevertheless the common sense rule might still constitute the best

²⁴ E.g. *Board of Trade v Hain SS Co* [1929] AC 534, HL; *Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold)* 73 Lloyd’s List L. Rep.

²⁵ Peter MacDonald Eggers, Unpublished lecture notes from University Collage London, 2006, p. 1

²⁶ *Becker, Gray and Co v London Assurance Corpn* [1918] AC 101

²⁷ (1863) 14 CB (NS) 259

²⁸ *Ibid.*

²⁹ Hodges, *supra* note 15, p. 150

³⁰ (1942) 73 Ll. L. Rep. 1

³¹ E.g. *Heskell v Continental Express Ltd* (1949-50) 83 Ll. L. Rep. 438; *Gray v Barr* [1971] 2 Lloyd’s Rep. 1; *Llyods TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2002] Lloyd’s Rep. I.R. 113

³² Gilman, *supra* note 17, p. 902

³³ *Shell International Petroleum Co Ltd v Gibbs* [1983] 2 A.C. 375

alternative and it could also be the most reliable measure in determine the proximate cause.³⁴

2.1.2 Contractual freedom

From section 55(1) of the Marine Insurance Act it can be understood that the parties enjoy freedom of contract i.e. the test of proximate cause has to be based upon the intention of the parties as expressed in the insurance policy.³⁵ The court interprets the wording of the contract as the meaning they would have conveyed to a reasonable shipowner or insurer who is contracting in the commercial marine market.³⁶

Lindley LJ held in *Reisher v Borwick*³⁷ that the proximate cause test:

is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not defeat those intentions.

Various standard contracts have used different causative expressions to describe what perils qualify under the insurance policy. These expressions will in most cases be considered as requiring the loss to be proximate caused by the peril. The court has interpreted e.g. “caused by”³⁸, “results from”³⁹, “consequences thereof”⁴⁰ and “arising from”⁴¹ as to prescribe the application of the proximate cause principle.⁴²

In other cases it has been held that the cause does not need to be the proximate cause for the assured to recover under the policy. “Directly or indirectly caused by”⁴³ and “caused or contributed to by” should be interpreted as to not demand the insured peril to be the proximate cause of loss.⁴⁴

2.2 Concurrent Proximate causes

In many cases there are more than one cause for the loss which might make it difficult for the court to decide which one is the proximate cause and even more so if several causes seems equally blameable.⁴⁵ In *Wayne Tank &*

³⁴ Hodges, *supra* note 15, p. 150

³⁵ Hardy Ivany, E.R., *General Principles of Insurance Law*, 6th ed, Butterworths, 1993, p. 406

³⁶ Bennet, *supra* note 6, p. 302

³⁷ (1894) 2 QB 548, CA

³⁸ *Seashore Marine S.A. v Phoenix Assurance plc (The Vergina) (No. 2)* [2001] 1 Lloyd’s Rep 298

³⁹ *Llyods TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2002] Lloyd’s Rep. I.R. 113

⁴⁰ *Ionides v Universal Marine Insurance Co* (1863) 14 CB (NS) 259

⁴¹ *Coxe v Employers Liability Assurance Corp Ltd* [1916] 2 KB 629

⁴² MacDonald Eggers, *supra* note 25, p. 2

⁴³ *Coxe v Employers Liability Association Corp Ltd* [1916] 2 K.B. 629

⁴⁴ MacDonald Eggers, *supra* note 25, p. 2

⁴⁵ Bennet, *supra* note 6, p. 309

Pump Co Ltd v Employers Liability Assurance Corp Ltd [1973] 2 Lloyd's Rep. 237 Lord Denning opened for the situation where several causes can be considered as proximate in the same case i.e. concurrent proximate causes. The possibility for the court to find several proximate causes was later confirmed in the *JJ Lloyd Instruments v Northern Star Insurance Co (The Miss Jay Jay)*[1987] 1 Lloyd's Rep. 32

The tendency in English courts is to try to find one proximate cause rather than concurrent causes. Nevertheless, Bennet argues that the proximate cause test should be applied in a neutral fashion where the courts should not favour either finding one proximate cause or several proximate causes.⁴⁶ Potter L.J held in *Handelsbanken ASA v Dandridge (The Aliza Glacial)* [2002] C.L.C. 1227;

Nonetheless, whenever an argument as to causation arises in respect of rival causes contended for under a policy of insurance, the first task of the court is to look to see whether one of the causes is plainly the proximate cause of the loss ... It is only if the court is driven to the conclusion that there was 'not one dominant cause, but two causes which were equal or nearly equal in their efficiency in bringing about the damage', one being a peril and the other an exception, that the exception prevails.

However, other case law has expressed opposite view, Cairns L.J. held in the *Wayne Tank*⁴⁷ that:

I do not consider that the court should strain to find a dominant cause if, as here, there are two causes of which can properly be described as effective causes of the loss.⁴⁸

Although English courts traditionally try to find one proximate cause, it is now accepted that there can be more than one proximate cause however is not clear how the courts should reach such a conclusion.⁴⁹

2.2.1 One included loss and one not expressly excluded

When the law recognises the possibility for several proximate causes the question arises what happens if one loss is covered by the policy while one is not. The situation of at least one included loss and where none of the causes is expressly excluded will first be examined.

In *Miss Jay Jay*⁵⁰ a yacht sank because it was unseaworthy (not covered peril) and because of the sea conditions (an insured peril). The underwriters were held liable and L.J Lawton stated:

⁴⁶ Bennet, *supra* note 6, p. 309

⁴⁷ [1973] 2 Lloyd's Rep. 237

⁴⁸ [1974] Q.B. 57, at 68-69

⁴⁹ Bennet, *supra* note 6, p. 309

⁵⁰ [1987] 1 Lloyd's Rep. 32

It now seems to be settled law, at least as far as this court is concerned, that, if there are two concurrent and effective causes of a marine loss, and one comes within the terms of the policy and the other does not, the insurers must pay.⁵¹

Bennet explains the reasoning by saying that the loss is covered by the insurance even if there are several causes to the loss. At the same time there is nothing in the policy that denies cover.⁵² Consequently, as long as no cause is expressly excluded it is not important to settle if there is one or several proximate causes.⁵³

2.2.2 One included loss and one expressly excluded loss

Another situation that could arise when there are several proximate causes is that one of the losses is covered by the policy while another is expressly excluded. For a long time it was not possible to find any authoritative case on this situation even if there were several cases discussing it dicta.⁵⁴

In the *Wayne Tank*⁵⁵, a non-marine case, the question was if the proximate cause to a fire was the negligently installed equipment or if the proximate cause was that the system was switched of and left unattended when it was not properly tested. It was said by Lord Denning that when there are two proximate causes and one is excluded by an exception the underwriters can rely on the exception. He continued by arguing that the particular exception takes priority over the general words since “general works always have to give way to particular provisions.”⁵⁶

In the same case Lord Roskill quoted a passage by Lord Sumner in *P. Samuel & Co Ltd v Dumas*⁵⁷:

Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates.⁵⁸

Cairns L.J. held in the *Wayne Tank*⁵⁹ that when there are two proximate causes of which one is excluded the assured can not recover. Lord Denning M.R. and Roskill L.J. on the other hand held that there was only one proximate cause but both supporting the view that if there would have been two proximate causes where one were excluded the assured would not be

⁵¹ *Ibid.*

⁵² Bennet, *supra* note 6, p. 310

⁵³ Gilman, *supra* note 17, p. 904

⁵⁴ *Ibid.*, p. 935

⁵⁵ [1973] 2 Lloyd's Rep. 237

⁵⁶ *Ibid.*

⁵⁷ [1924] A.C. 431

⁵⁸ *Ibid.*;

[1973] 2 Lloyd's Rep. 237

⁵⁹ [1973] 2 Lloyd's Rep. 237

able to recover. The reasoning in *Wayne Tank*⁶⁰ has been followed in subsequent cases e.g. *Miss Jay Jay*⁶¹ and *Kuwait Airways Corp v Kuwait Ins Co S.A.K [1999] 1 Lloyd's Rep. 803*.

The principle from the *Wayne Tank*⁶² is applicable when the court has found more than one proximate cause to the loss and one cause is expressly excluded by the policy. Additionally, the principle is applicable when there is only one proximate cause but when that cause can be interpreted in different ways of which one is excluded under the policy.⁶³ A third situation in which the principle from *Wayne Tank* is applicable is when an exclusion is provided by law, however this situation was settled before the *Wayne Tank*^{64 65}.

2.2.3 More than two proximate causes

The courts have yet not had the reason to consider if more than two causes can be the proximate cause. However, there is no reason to believe that it would be impossible to find such a situation and courts would most likely apply the *Wayne Tank* principle.⁶⁶

2.3 Succession of proximate causes

In the situation of successive causes of loss the court can find either one proximate cause or several proximate causes. However, there are no exact rules to determine if a loss is covered under the policy other than the common sense rule i.e. there are no special rules for how to determine successive causes of loss.⁶⁷

However, there are a few points that can be made. When the first cause, covered by the policy, leads to an excluded peril which then leads to a loss the loss is likely to be covered. On the other hand, when the first cause is an excepted peril which leads to a loss that loss is not likely to be covered. Consequently, it is important to determine what is the first cause and if that cause inevitably leads to the second loss or if it was a separate new cause.⁶⁸

⁶⁰ *Ibid.*

⁶¹ [1987] 1 Lloyd's Rep. 32

⁶² [1973] 2 Lloyd's Rep. 237

⁶³ [1999] 1 Lloyd's Rep. 803

⁶⁴ [1973] 2 Lloyd's Rep. 237

⁶⁵ Gilman, *supra* note 17, p. 936;

e.g. *Thomas & Son Shipping Co Ltd v London & Provincial Ins Co Ltd* (1913) 29 T.L.R. 736

⁶⁶ Hodges, *supra* note 15, p. 154

⁶⁷ Gilman, *supra* note 17, p. 927

⁶⁸ MacDonald Eggers, *supra* note 25, p. 4

2.4 Paramount clauses

Some clause in English marine insurance are referred to as paramount clauses which means that they override other provisions. These clauses exist to clarify that if there is a conflict between a paramount clause and any other provisions of the insurance policy the paramount clauses shall prevail. Examples of paramount clauses are the War Exclusion, the Strike Exclusion and the Radioactive Contamination Exclusion of the IHC(01/11/03).⁶⁹

In regard of war and strike perils IWSC(H) states that loss is covered if the loss is “caused by” e.g. war, torpedoes or strikes. “Caused by” has been interpreted by the courts to be mean “proximately caused by”.⁷⁰

If there only is one proximate cause the paramount clause will not affect the application of the proximate cause principle. However, if there are two proximate causes where one peril is insured under the policy while the other is excluded in a paramount clause the assured will not be able to recover under this policy, similar to expressed exclusions according to the Wayne Tank principle.⁷¹

The difference between an expressed exclusion and a paramount clause is that a paramount clause exclude the peril under every clause of the contract i.e. the loss will not be recoverable under one clause while not under another, which can be the case for other exclusions.⁷²

In regard of radioactivity IHC(01/11/03) states that loss “directly or indirectly caused by or contributed to by or arising from”⁷³ some specified perils shall not be covered by the insurance.⁷⁴ From the wording of this clause, especially “indirectly caused by” it can be held that the proximate cause shall not be used in this situation. The paramount clause regarding radioactivity can therefore prevail even if it is not considered as a proximate cause of loss.⁷⁵

2.5 Exceptions provided by the Act

Other considerations have to be made in relation to section 55 of the Marine Insurance Act as well. Firstly, if the loss is attributable to the wilful misconduct of the assured the underwriter is not liable to compensate the damage.⁷⁶ Secondly, the underwriter is not liable for loss proximately caused by delay.⁷⁷ Delay is here only mentioned for the reader to be aware

⁶⁹ Hodges, *supra* note 15, p. 154

⁷⁰ See chapter 2.1.2

⁷¹ Hodges, *supra* note 15, p. 333

⁷² *Ibid.*, pp. 333-334

⁷³ International Hull Clauses (01/11/03), cl. 31

⁷⁴ *Ibid.*

⁷⁵ Bennet, *supra* note 6, p. 482

⁷⁶ Marine Insurance Act, Sec. 55(2)(a)

⁷⁷ Marine Insurance Act, Sec. 55(2)(b)

of but will not be examined further. Thirdly, according to section 55(2)(c) the underwriter is not liable for loss of:

ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.⁷⁸

From the wording of the clause it can be understood that the proximate cause still is the relevant causal expression. However, the question arises if the clause should be read as an exclusion or as clarifying the scope of cover provided by the policy.⁷⁹

In *HIH Casualty & General Insurance LTD v Waterwall Shipping Inc (1998) 146 FLR 76*, an Australian case, it was argued dicta that the clause should not be interpreted as an exclusion but rather as limiting the scope of cover.⁸⁰ If the clause would be considered as an exception the Wayne Tank principle means that compensation will be denied if any of the provisions of section 55(2)(c) is one of several proximate cause, provided that the policy did not cover such a peril.

2.5.1 Wilful misconduct and negligence

Wilful misconduct includes both intentional and reckless acts. However, negligence and gross negligence are outside the scope of wilful misconduct. This means that if nothing else is agreed the underwriter has to stand the risk of the assured's negligence. An example of wilful misconduct is if the shipowner deliberately do not avoid a vessel which the shipowner knows is hostile, in an attempt to get the vessel captured.⁸¹

Wilful misconduct can be held as the proximate cause. In *P. Samuel & Co Ltd v Dumas*⁸² it was held that the loss was proximately caused by wilful misconduct of the shipowner wherefore the underwriter was not held liable to compensate. Since their Lordships held wilful misconduct as the proximate cause there was no reason to examine the causal expression "attributable to".⁸³

When wilful misconduct is considered as the proximate cause the underwriter will not be held liable to compensate. Firstly, due to the fact that wilful misconduct can never be a covered peril. Secondly, there is a general principle of law that a man cannot take advantage of his own wrong. For these reasons it is reasonable to believe that "attributable to" should mean

⁷⁸ Marine Insurance Act, Sec. 55(2)(c)

⁷⁹ Bennet, *supra* note 6, p. 314

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, pp. 255-256

⁸² [1924] A.C. 431

⁸³ Hodges, *supra* note 15, p. 155

something else than “proximately caused”, since the provision otherwise would be superfluous.⁸⁴

In the Australian case *Wood v Associated National Insurance Co Ltd [1985] 1 QdR 297* the shipowner left the ship in severe weather to a crew that was not competent, this was considered as wilful misconduct and the assured could not recover. In many cases however the assured is not directly involved as in *Wood v Associated National Insurance Co Ltd*⁸⁵ but rather induce the master or crew to e.g. scuttle the ship. The planning of the scuttling cannot however be considered as the sole proximate cause to carry out the plan.⁸⁶

The assured’s actions can be even more remote and still fall under “attributable to” e.g. if the assured tell the master that it would be beneficial if the ship sank and it is then for the master to plan and execute the plan. The doctrine of proximate cause might even have considered such an action of the assured to be too remote, however the term “attributable to” makes it possible to bind the assured to the loss with the consequence that the underwriter will not be held liable to compensate for the loss.⁸⁷

In, for example, ITCH and IHC there are also provisions regulating that the insurance only cover provided that the loss has not arisen from want of due diligence by the assured, owner or master. This provision is only applicable in respect of certain perils e.g. loading, discharging, latent defects and negligence of repairers.⁸⁸ The proximate cause rule shall be read into the expression “caused by”.⁸⁹

2.6 Burden of proof

Burden of proof contains two parts. Firstly, the production of evidence that refers to the burden to find evidence enough to support the case. During the trial this burden can shift e.g. when one party has produced a prima facie case. Secondly, the burden of persuasion that consists of the burdened party tries to find arguments for his case. The burden of persuasion stays with the burden party.⁹⁰

Firstly, the assured need to, on a balance of probabilities, prove that the loss was caused by a peril insured under the policy. Secondly, the assured needs to prove that the event was the proximate cause of loss or the other causative expression provided in the situation.⁹¹ When the policy covers “all risks” the

⁸⁴ *Ibid*, p. 156

⁸⁵ [1985] 1 QdR 297

⁸⁶ Bennet, *supra* note 6, p. 457

⁸⁷ *Ibid*, pp. 457-458

⁸⁸ ITCH cl. 6.2, IHC cl. 2.2;

Wilhelmsen and Bull, p. 188

⁸⁹ Hodges, *supra* note 15, p. 284

⁹⁰ *Ibid*, p. 245

⁹¹ Bennet, *supra* note 6, p. 255

burden of proof for the assured eases and the assured needs only to, on a balance of probabilities, prove that the cause of the loss was accidental.⁹² However, “all-risk” cover is not available for hull insurance.⁹³

The underwriters are not liable to prove a positive case but in reality this often happens e.g. to establish an excluded peril as the proximate cause of loss instead of a covered peril.⁹⁴ In *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 Lloyd's Rep. 1 Lord Brandon explained:

Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.⁹⁵

However, the underwriters normally need to prove that a loss was covered by an excepted peril.⁹⁶

⁹² *Ibid*, p. 258

⁹³ Thomas, *supra* note 1, p. 15

⁹⁴ Gilman, *supra* note 17, p. 952

⁹⁵ [1985] 2 Lloyd's Rep. 1

⁹⁶ *Seashore Marine S.A. v Phoenix Assurance plc (The Vergina)* (No. 2) [2001] 1 Lloyd's Rep 698

3 Nordic System

3.1 Nordic Marine Insurance Plan

The Nordic countries have a common legal tradition and there are substantial similarities between the legal systems in the area of marine insurance. Still, each country has its own courts and legal rules. Traditionally, the primary source of marine insurance has in Norwegian been the Norwegian Plan, in Sweden the Swedish Plan and in Denmark the Danish Convention. The situation has been a bit different in Finland since there is no Plan or Convention as in the other Nordic countries.⁹⁷

The 1st of January 2013 a common marine insurance plan for the Nordic countries entered into force. The Nordic Plan is based on the Norwegian Plan of 1996, version 2010 and therefore much of the Nordic Plan can be recognised from the Norwegian Plan. A novelty in the Nordic Plan is that the English text shall prevail although the Nordic Plan will be available in all the Nordic languages.⁹⁸

Extensive commentaries are complementing the text of the Nordic Plan. The Commentary is an integral part of the Nordic Plan and is considered to a great extent in the interpretation of the text of the Nordic Plan. However, if there is any disparity between the Commentary and the text the text shall prevail.⁹⁹

In the Commentary there are also references made to the Norwegian Plan and its Commentary, this is due to the fact that the Nordic Plan is based on the Norwegian Plan. Many principles have remained the same even if differences in both the text and the Commentary occur. For the question of causation many principles from the Norwegian Plan are still relevant wherefore the development and precedencies concerning the Norwegian Plan will be considered.

⁹⁷ Trine-Lise Wilhelmsen, 'Duty of Disclosure, Duty of good faith, Alteration of risk and warranties', *CMI Yearbook 2000* (2000), <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook+2000.pdf>, accessed 2013-03-15, pp. 339-340

⁹⁸ Nordic Plan Agreement, <http://www.cefor.no/Documents/Clauses/Nordic%20Plan%202013/2010%20sign%20Nordic%20Plan%20Agreement.pdf>, 2010 accessed 2013-03-13

⁹⁹ Bjørn Slaatten, *The Nordic Marine Insurance Plan of 2013 - A brief overview*, 9th International Marine Claims Conference, 27th September 2012, <http://www.marineclaimsconference.com/docs/Bjorn%20Slaatten.pdf> accessed 2013-03-12, p. 7

3.2 General rule for the causal expression

It is stated in the Nordic Plan that there needs to be a causal connexion between the insured peril and the loss i.e. the loss has to be caused by an insured peril.¹⁰⁰ The Nordic Plan does not specify what kind of causal connection is required but merely states that a causal connection is necessary.¹⁰¹ Under Norwegian insurance law the normal practise is to use the dominant cause principle, which is well established through case law. Under this principle the entire loss shall be allocated to the policy under which the dominant cause is insured i.e. the underwriter will have to compensate for “everything or nothing”.¹⁰²

However, under Norwegian marine insurance another principle has developed. Since the 1930s the principle of apportionment has been used i.e. the loss shall be apportioned between the relevant causes contrasting to “everything or nothing” under the dominant cause principle.¹⁰³ Another principle has developed in regard of the combination of war and marine perils, the modified dominant cause principle.¹⁰⁴

3.2.1 Development of the apportionment principle

The apportionment principle in marine insurance has been established contrary to the causal expression used in general Norwegian insurance law and international law. In order to understand the reasons for this the development of the apportionment principle will be described.

The starting point in Norwegian insurance law is the dominant cause principle and this principle was practised in the Norwegian Plan until the beginning of the 20th century. During World War I many cases occurred where the court had to decide if loss was attributable to war perils or marine perils e.g. combination of navigational errors and deviations to avoid mines, or when ships sailing in convoys meet bad weather. The shipowner was in most cases insured against both war and marine perils but often under different policies, this made it necessary for the court to decide the dominant cause.¹⁰⁵ In the leading case *ND 1916.209 Skotfors* it was held that the entire loss was attributable to the dominant cause.¹⁰⁶

¹⁰⁰ The Nordic Plan, cl. 2-11

¹⁰¹ Commentary to the Nordic Plan, cl. 2-11

¹⁰² Falkanger, *supra* note 9, p. 485

¹⁰³ *Ibid.*

¹⁰⁴ See chapter 3.4

¹⁰⁵ Braekhus, Sjur and Rein, Alex, *Håndbok i kaskoforsikring*, Bergens Skibsassuransforening, Christianssands Skibsassuransforening, Unitas Gjensidig Assuransforening, Den norske Krigsforsikring for Skib, 1993, p. 258

¹⁰⁶ Commentary to the Nordic Plan, cl. 2-13

In *Skotfors*¹⁰⁷ a ship went aground outside Orkney islands. The reason was partly that the navigator had misjudged the steam and partly because of a lighthouse that had been closed down because of the war. The entire loss was attributed to the marine peril. The court held:

En ulykkes aarsaksforhold er ikke sjelden sammensat av skadelige indvirkninger av forskjellig art. Men det vil regelmæssig være en enkelt av disse faktorer, som for den almidelige opfatning bestemmer ulykkens væsen, nemlig den faktor, som anses for at være hovedårsaken til ulykken.^{108 109}

Case law regarding the combination of war and marine perils from this time was often weighted in benefit for the war underwriter. There needed to be a strong element or dominance of the war peril for the court to consider this peril as dominant. If there were any fault such as navigational errors or other mistakes from the crew of significance the entire loss would be allocated to the marine underwriter with the consequence that he was held liable for the loss in its entirety.¹¹⁰ Subsequently, the marine underwriters had to bear a greater part of the increasing risks attributed to the war situation.¹¹¹

During the 1930 revision of the Norwegian Plan the marine underwriters had a strong wish to appropriate the risk. The underwriters wanted a system where it was possible to find an alternative solution to dominant cause principle where all loss was attributed to one policy.¹¹² The result was the apportionment rule.

When there was a combination of causes contributing to the loss the apportionment rule made it possible to apportion liability between several perils. The apportionment was made against each perils legal significance. Consequently, the solution answered the wish of the underwriters and made it possible to take the specific circumstances of each case into consideration.¹¹³ The scope of the principle of apportionment in the revision of the Norwegian Plan 1930 was made general i.e. the principle was to be applied when nothing else was stated.¹¹⁴

The number of litigations in relation to causation rose during World War II since it proved hard to predict the outcome of the apportionment principle. Many of these litigations were combinations of war and marine perils e.g. situations where Norwegian ships disappeared in German controlled waters. The increasing amount of litigations has been attributed to the difficulties to apply the apportionment rule, the problem was that the outcome of the cases

¹⁰⁷ ND 1916.209

¹⁰⁸ Translation by the author: "a casualty is not rarely consisting of several perils of different nature. But it will regularly be one of these factors, that for the common perception deciding the nature of the accident, namely the factor, which has been perceived as the dominant cause to the accident"

¹⁰⁹ Braekhus and Rein, citing the court in ND 1916.209 *Skotfors*, *supra* note 105, p. 258

¹¹⁰ Wilhelmsen and Bull, *supra* note 3, p. 109

¹¹¹ Braekhus and Rein, *supra* note 105, p. 259

¹¹² *Ibid.*

¹¹³ Wilhelmsen and Bull, *supra* note 3, p. 110

¹¹⁴ Braekhus and Rein, *supra* note 105, p. 260

was strongly based on the specific circumstances of every case. Under the dominant cause principle it had been possible to find some typical situations leading to one result or another, which was harder under the apportionment rule.¹¹⁵

By the 1964 reversion of the Norwegian Plan the dominant cause principle in a modified version was taken back into the Norwegian Plan in regard of loss caused by a combination of war and marine perils. For other combinations of perils, i.e. other than the combination of war and marine perils, the apportionment principle was kept. The apportionment principle was kept since it had become a part of the Norwegian legal system and even if it was rarely used in court it was used in practical settlements.¹¹⁶

With the aim at reaching national, and international, unification in regard of causation it was proposed during the revision of the Norwegian Plan in 1996 to change from the apportionment principle to the dominant cause principle. However, the proposal did not become a part of the Norwegian Plan and the principle of apportionment has followed into the Nordic Plan i.e. the Nordic Plan is based on the apportionment principle.¹¹⁷

3.2.2 Combination of causes

The Nordic Plan contains a clause regulating the situation of combination of causes. The clause reads as follows:

If the loss has been caused by a combination of different perils, and one or more of these perils are not covered by the insurance, the loss shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss, and the insurer shall only be liable for that part of the loss which is attributable to the perils covered by the insurance.

If a peril that is excluded from cover in Cl. 2-8 (d) and Cl. 2-9, sub-clause 2 (b), has directly or indirectly caused or contributed to the loss, the entire loss shall be attributed to that peril.¹¹⁸

In this clause the apportionment rule is established as the causal principle in the situation of a combination of causes. The clause is general in scope and should be applied where there is a combination of different perils and one or more of the perils are not covered by the policy. However, the clause is not applicable when there are other contradicting clauses.¹¹⁹

As can be read in the second paragraph the clause itself provide an exception, the so-called RACE II clause.¹²⁰ Another exception stipulated by the Nordic Plan is the situation of a combination of war and marine perils

¹¹⁵ *Ibid.*

¹¹⁶ Commentary to the Nordic Plan, cl. 2-13

¹¹⁷ Wilhelmsen and Bull, *supra* note 3, p. 110

¹¹⁸ The Nordic Plan, Cl. 2-13

¹¹⁹ Commentary to the Nordic Plan, cl. 2-13

¹²⁰ See chapter 3.3.3

where another causal expression is used.¹²¹ The parties also have the discretion to include other provisions contradicting the clause into the specific policy.¹²²

According to the wording of the clause the apportionment rule is applicable when a combination of causes leads to the loss. There are various ways in which perils can work together and not all are covered by the clause. The clause is applicable when two causes operating together and therein causing the loss i.e. when both are necessary for the loss to occur while one of the causes would not be sufficient to cause the loss.

For illustration, a ship is loaded unevenly causing the ship to tilt slightly but this alone would not constitute a problem. However, the ship is also constructed incorrectly which, together with the unevenly loading, causing the ship to sink. The construction error would not alone created the ship to sink i.e. the ship would not have sunk unless both causes was at hand. In this case, the underwriters would have been held liable for the loss caused by the incorrect loading but would not be liable for the construction error.¹²³

Another example is if the ship sinks because of both bad weather and defecting navigation. The loss would be allocated partly to the policy covering marine perils and partly to the assured since loss caused by breach of safety regulations are excluded in cl. 3-25 of the Nordic Plan.¹²⁴

The clause is also applicable when the causes working together as a chain of causes where the first cause is the reason, or is necessary, for the last cause to occur.¹²⁵ In *Vestfold I ND 1977.38* a gear was breaking down because of mistakes made during a reparation of a previous grounding damage. The loss from the first incident was covered by the insurance, however the damage to the subsequent machinery was not. The question was if the was casualty between the grounding damage and further damage caused by the repair yard.

The Supreme Court held that there was such causation and that the failure of the repair yard could not breach the chain of causation. Some of the loss was allocated to the mistake made by the repair yard and the Supreme Court distributed the loss with two thirds on the underwriters and one third on the assured, which he had to stand for.

In addition, the chain of causation works when the first cause is triggering a second cause which causing loss.¹²⁶ However, when two causes irrespectively of each other lead to different losses or different parts of the

¹²¹ See chapter 3.4

¹²² Braekhus and Rein, *supra* note 105, p. 262

¹²³ *Ibid.*, p. 261

¹²⁴ Bull, Hans Jacob, *Norsk Sjøforsikringsplan av 1996* in Jan Ramberg (ed), *Festskrift till Jan Samdström, Nerenius & Santerus Förlag*, 1997 p. 112

¹²⁵ Braekhus and Rein, *supra* note 105, pp. 261-262

¹²⁶ Wilhelmsen and Bull, *supra* note 3, p. 112

loss the clause is not applicable. The different losses should here be allocated to the causes respectively.¹²⁷

3.3 Distribution of liability

3.3.1 What perils should be included in the apportionment

After settled that the loss is caused by a combination of causes the next step in applying the apportionment principle is to distinguish relevant from non-relevant causes. It is only the causes of legal relevance that shall be taken into account since there otherwise could be an endless number of causes to which it is possible to trace the loss.¹²⁸

The loss has to been caused by a combination of perils for the apportionment principle to be applicable but even if a peril has been necessary in causing the loss it is possible that the underwriter can avoid liability. The court has the possibility to apportion a cause to zero per cent as well as to a 100 per cent. In other words, if a peril is considered as rather insignificant the court can apportion zero per cent of the loss to the peril meaning that the underwriter will not be held liable to compensate anything.¹²⁹ The possibility to apportion zero or 100 per cent applies both in situations of combination of two causes¹³⁰ and in a chain of causes^{131 132}.

Examples of situations where one peril has been attributed with zero per cent and another with 100 per cent can be found in arbitration practise e.g. where a deviation has been made because of the war peril in combination with a marine peril. Here 100 per cent of the loss was allocated to the marine insurer, the deviation would only be considered relevant if the deviation would be unnatural also in peace time.¹³³ Note that a modified dominant cause principle was inserted into the Norwegian Plan in 1969 wherefore the result might have differed today.¹³⁴

The clause is applicable both in situations where two perils working together to cause a casualty as well as when the causes working together as a chain of causation. However, for a peril to be considered as having an effect on the loss the peril should have a bearing in the apportionment for about ten to fifteen per cent.¹³⁵

¹²⁷ Braekhus and Rein, *supra* note 105, p. 261

¹²⁸ Wilhelmsen and Bull, *supra* note 3, p. 112

¹²⁹ Commentary to the Nordic Plan, cl. 2-13

¹³⁰ E.g. ND 1942.360 *VKS KARMØY II*

¹³¹ E.g. ND 1977.38 *NH Vestfold I*

¹³² Commentary to the Nordic Plan, cl. 2-13

¹³³ Wilhelmsen and Bull, *supra* note 3, p. 113

¹³⁴ See chapter 3.4

¹³⁵ Commentary to the Nordic Plan, cl. 2-13

3.3.2 How should the loss be allocated?

When the court has established that a combination of causes has caused the loss, and which causes are of legal relevance, the question following is to what extent the specific causes has contributed to the loss. Case law on how the contribution should be done is not conclusive which makes it difficult to find any general principles. In principle, the contribution should be the same even if it regards two covered perils or one covered and one not covered peril. It is however possible that, in the situation of one uncovered peril, the courts would decide in favour of the assured.¹³⁶

In an attempt to analysing existing case law Braekhus and Rein identified three different situations. These situations are also referred to in the Commentary to the Nordic Plan as being of relevance.

- (1) *The loss is a result of two objective concurrent perils causing the casualty.*

There are no later case law dealing with this situation but some cases from the first half of the 20th century are still relevant. When reviewing these cases there seems to be a tendency that a greater part of the loss will be attributed to the cause later in time. For the cause earlier in time to be considered as more blameable that cause has to increase the likelihood of the loss i.e. the ship was forced to take a risk it would normally not do. There might also be a tendency to put greater weight to navigational errors than external causes.¹³⁷

- (2) *Several causes working together as a chain causing the loss.*

For example when after one casualty a new peril occurs causing further damage. The cause leading up to the loss will most likely be weighted heavier. This is also supported by Wilhelmsen and Bull who is referring to the *Vestfold I*¹³⁸ to support their view¹³⁹. However, existing case law does not give much guidance on how the damages actually should be divided.¹⁴⁰

Braekhus and Rein argues that the loss probably should be allocated depending on how likely it is that the first casualty will trigger the second peril causing the loss. The likelier the greater weight should be attributed to the first cause.¹⁴¹

- (3) *The loss is a combination of risks covered by the insurance and subjective negligence.*

¹³⁶ Braekhus and Rein, *supra* note 105, pp. 264-265

¹³⁷ Commentary to the Nordic Plan, cl. 2-13;

Ibid., p. 264

¹³⁸ ND 1977.38

¹³⁹ Wilhelmsen and Bull, *supra* note 3, p. 114

¹⁴⁰ Braekhus and Rein, *supra* note 105, p. 265

¹⁴¹ *Ibid.*, p. 266

An element of negligence can occur in both situations described under (1) and (2). In such a situation the apportionment rule is flexible since it does not need to invoke the assureds breach of duty in full, the apportionment rule work as a reduction system. It will serve both the underwriter and the assured when the assured do not loss his entire cover since there is a risk that the judge otherwise would favour the assured. The deduction will be based on an evaluation of probability i.e. depending on how likely it is that the fault will result in loss the higher the negligence will be weight in the apportionment.¹⁴²

In *ND 1981.347 NA Vall Sun* the situation concerned a combination of dereliction of duty and other causal factors. The *Vall Sun* wa s anchored in Pusan to be delivered for scrapping. Because of heavy wind anchor slipped and the *Vall Sun* collided with another ship, after which it stroke a harbour and a quay. The question was why the damage after the anchored had slipped was not prevented. A part of the loss, 25 per cent, was allocated to the assured because of the negligence. The underwriter was held liable to compensate for the remaining 75 per cent.¹⁴³

3.3.3 RACE II perils

The Nordic Plan does not cover so-called RACE II perils, neither in regard of marine insurance nor war insurance.¹⁴⁴ The RACE II perils consist of:

- 1.ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel,
- 2.the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof,
- 3.any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter,
- 4.the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this sub-clause does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes.
- 5.any chemical, biological, bio-chemical, or electromagnetic weapon.¹⁴⁵

If a RACE II peril has indirectly, directly or contributed to the loss the entire loss shall be allocated to the RACE II peril.¹⁴⁶ The reason for the exception is both to conform to the international market but also to adapt to the reinsurance market. The reinsurance market is not willing to cover any loss

¹⁴² Commentary to the Nordic Plan, cl. 2-13

¹⁴³ Wilhelmsen and Bull, *supra* note 3, p. 116

¹⁴⁴ The Nordic Plan, cl. 2-8, cl. 2-9

¹⁴⁵ The Nordic Plan, cl. 2-8

¹⁴⁶ The Nordic Plan, cl. 2-13

deriving from these perils, neither on its own nor in combination with other perils.¹⁴⁷

3.4 Causal expression for war perils

When a casualty is attributed partly to a war peril and partly to a marine peril the Nordic Plan contains special rules and the apportionment rule is not applicable, instead the main rule is the modified dominant cause rule is applied. The modified dominant cause rule appeared for the first time in the 1964 reversion of the Norwegian Plan as a reaction of the high number of litigations in regard of the combination of war and marine perils during World War II.¹⁴⁸

When the apportionment rule was used the actual result of the loss was almost equally divided between the marine peril underwriters and the war perils underwriters. The modified dominant cause rule was therefore believed to give a similar effect but be more cost effective. It was also inserted to provide a higher degree of certainty since the cases would not, to the same extent, be depended on the specific circumstances of each case i.e. it would be easier to develop a precedency.¹⁴⁹

The modified dominant cause rule means that when a loss occurs as a consequence of a combination of marine and war perils the whole loss shall be deemed to have been caused by the dominant cause. However:

if neither of the classes of perils is considered dominant, both shall be deemed to have had equal influence on the occurrence and extent of the loss.¹⁵⁰

Consequently, the courts should find the dominant cause of the loss and the entire loss will be allocated to the dominant peril. If there is doubt as to what cause is the dominant cause the loss should be divided equally.¹⁵¹

As in combinations of causes other than war and marine perils the loss can be caused by both concurrent causes or a chain of causes leading up to the loss. The most common situation for war and marine perils are concurrent causes. The courts have to apply a strict objective evaluation to decide which peril had the greatest impact on the loss to determine the dominant cause.¹⁵²

¹⁴⁷ Wilhelmsen and Bull, *supra* note 3, p. 116

¹⁴⁸ Commentary to the Nordic Plan, cl. 2-14

¹⁴⁹ *Ibid.*

¹⁵⁰ The Nordic Plan, cl. 2-14

¹⁵¹ Commentary to the Nordic Plan, cl. 2-14

¹⁵² *Ibid.*

The courts should not regard whether the assured actually have insurance against war perils since the shipowner will have, or at least have had, the possibility to get such insurance.¹⁵³

3.4.1 When a cause considered as dominant

There is some case law from the World War II that is relevant as guidance for when a peril is considered as dominant; it is from this possible to distinguish some atypical situations. The first situation concerns when there is an unlit lighthouse (war peril) and a navigational mistake (marine peril). The navigational mistake has in most situation been considered as the dominant cause but in one case the loss has been attributed equally between the two perils. If it is possible to attribute two thirds of loss to one cause this cause should be considered as dominant.

Secondly, when a casualty occurs (a) while traveling in convoy and/or (b) traveling with blinded lanterns or (c) cover up of lights other than lighthouses the holdings of the courts varies to a great extent which makes it hard to find a specific pattern. In the *ND 1989.263 NV Scan Partner* the court held that because of the radar equipment available today the extinguish of the lights means less than before. Hence it is possible that this situation would have been considered differently today.

Thirdly, when a deviation is made because of a war risk the loss will most likely be divided between the two perils. In *ND 1942.406 VKS* a ship went aground because it had followed a route different than the normal route due to the war risk, in times of peace it would not had went so close to land. Additionally, the chart was incorrect in the depth of the sea which contributed to the loss. The incorrect chart was a marine peril and the deviation was found to be a war peril. The court held that the loss would be divided equally between the two perils.¹⁵⁴

From the wording of the clause on the modified dominant cause rule it is clear that one cause needs to be dominant for this peril to bear all the loss, i.e. it is not enough that one cause is slightly more dominant. In the Commentary it is said that when the blame is split 60/40 between two causes this is probably the upper limit as for when loss should be divided equally.¹⁵⁵ In a situation where one peril is blameable to 66 per cent the other peril would be blameable to 33 per cent. As a general statement, this means that second peril is only blameable to half of the first peril wherefore it would not be reasonable to not consider the first peril as dominant.¹⁵⁶

Some case law can be used as guidance for when a cause is considered as dominant. These cases are mainly from the time of the Iran-Iraq war in the

¹⁵³ *Ibid.*

¹⁵⁴ Braekhus and Rein, *supra* note 105, pp. 271-274

¹⁵⁵ Commentary to the Nordic Plan, cl. 2-14

¹⁵⁶ Braekhus and Rein, *supra* note 105, p. 270

1980s. In *NV Scan Partner*¹⁵⁷ a tanker, Barcelona, used as a storage vessel by Iran in the Persian Gulf, was attacked by Iraq. Another ship, Scan Partner, was participating in the work to save Barcelona. Several hours later there was an explosion on board Barcelona with the consequence that Scan Partner was covered in oil, which came to burn causing Scan Partner to become a total loss. The reason of the explosion was uncertain but it could have been a gas explosion, a bomb or a combination of the two.

Scan Partner was insured under the Norwegian Plan. The arbitral court held that it was not likely that the explosion was a consequence of a bomb and it was not enough that the ship was in a war zone for the war peril underwriter to be held liable. However, a part of the blame was of the war, i.e. the bombing of Barcelona, but when there is a chain of causation time and geographical proximity is highly relevant.

In *Scan Partner*¹⁵⁸ it was three days between the bombing and the total loss of Scan Partner. During this time many other things happened wherefore the dominant cause of the total loss of Scan Partner could not be the war peril. Another important part in the arbitral court's reasoning was that Scan Partner was obliged to participate in the extinguishing of the fire because of their charter.¹⁵⁹

As evidenced by the *Scan Partner*¹⁶⁰ it can prove difficult for the courts to know whether to apply the modified dominant cause rule in the first paragraph or the second paragraph and therein divide the damage equally. However, both the Commentary and Braekhus and Rein still advocate this rule as a better alternative than the apportionment rule for combinations of war and marine perils.¹⁶¹

3.4.2 Losses entirely attributable to war perils

When there is a combination of war and marine perils the modified dominant cause rule shall apply but there are an exception to this clause. In some situations war perils should always be considered as the dominant cause. Namely when;

- a. loss arising when the ship is damaged through the use of arms or other implements of war for war purposes, or in the course of military manoeuvres in peacetime or in guarding against infringements of neutrality,
- b. loss attributable to the ship, in consequence of war or war-like conditions, having a foreign crew placed on board which, wholly or partly, deprives the master of free command of the ship,
- c. loss of or damage to a life-boat caused by it having been swung out due to war perils, and damage to the ship caused by such a boat.¹⁶²

¹⁵⁷ ND 1989.263

¹⁵⁸ *Ibid.*

¹⁵⁹ Braekhus and Rein, *supra* note 105, pp. 270-271

¹⁶⁰ ND 1989.263

¹⁶¹ Braekhus and Rein, *supra* note 105, p. 271

¹⁶² The Nordic Plan, cl. 2-15

Perils mentioned under sub-paragraph a. would in most cases constitute the dominant cause either way but this provisions makes sure that all such perils is deemed to be the dominant cause. However, the paragraph should only be used when the implement of war is the direct cause of loss, otherwise the modified dominant cause rule should be applied.¹⁶³

3.4.3 Loss attributable either to marine or war perils

When it is not certain whether a loss is caused by a marine or a war peril and it is impossible to settle what peril was the reason the liability should be allocated equally between the underwriters. However, if there is more than 60 per cent probability that one of the perils caused the loss that peril should be deemed to be the more probably cause. The underwriter of the blamed peril will have to compensate for the entire loss.¹⁶⁴

3.5 Intent and gross negligence

In the Nordic Plan there is a general rule stating that if the assured intentionally causes the casualty the underwriter will not be held liable to compensate for the loss.¹⁶⁵ Intent under the Nordic Plan shall be considered in the same manner as in criminal law and consists of situations when the assured deliberately brings about the casualty to receive compensation under the policy. This could be the situation of fraudulent intent when the assured understands that the casualty will occur as a consequent of his action.¹⁶⁶ If the casualty is caused intentionally the underwriter can cancel the insurance contract without notice.¹⁶⁷

In *ND 1985.126 NSC Birgo* a ship had been sunk by purpose. In the first process the underwriter could not prove intent but the truth was later revealed when a member of the crew told about the sinking at a drinking party. The underwriters successfully claimed reimbursement for what they had earlier compensated.

In the case of gross negligence of the assured the underwriter's liability shall be decided based on the specific circumstances and degree of fault.¹⁶⁸ Gross negligence is more than negligence but less than intent and in the case of gross negligence liability shall be determined based on the circumstances of each case. If the cause of damage is gross negligence the reduction will be

¹⁶³ Commentary to the Nordic Plan, cl. 2-15

¹⁶⁴ Commentary to the Nordic Plan, cl. 2-16

¹⁶⁵ The Nordic Plan, cl. 3-32

¹⁶⁶ Commentary to the Nordic Plan, cl. 3-32

¹⁶⁷ The Nordic Plan, cl. 3-34

¹⁶⁸ The Nordic Plan cl. 3-33

progressive.¹⁶⁹ If gross negligence is proved, the underwriter may cancel the insurance contract with a fourteen days' notice.¹⁷⁰

In *ND 1971.350 NSC Kari-Bjørn* a fishing vessel went aground and sunk. This was because the owner took commando over the ship after a disagreement between the captain and the charterer. Severe navigational errors were made and the court held that the owner must have sailed blindly and lacked all feeling of responsibility. The insurer had to pay 2/3 of the insured sum even if the assured's actions were considered as grossly negligent.

Even if the assured has acted with intent or gross negligence he will not lose his cover if the assured on account of a mental disorder or otherwise was unable to judge his own actions. An exception is made for self-induced intoxication i.e. self-induced intoxication is never an excuse for intent or gross negligence.¹⁷¹

The assured will neither lose his cover in the event he tries to save human life or salvaging goods of material value. The value of the material normally has to be substantial but if the assured was mistaken of the value he might be able to remain covered.¹⁷²

3.6 Burden of proof

As in other areas of private law the general rule of burden of proof is that facts need to be established on a balance of probabilities, this is the starting point also in the Nordic Plan. "A balance of probabilities" means that it must be more likely than not that the issue at hand is true. The first paragraph of cl. 2-12 in the Nordic Plan states that, as expressed by the Commentary, that to make a claim under the Nordic Plan the assured has to establish that:

- the assured has an insurable interest in the sense that he has suffered actual economic loss of the kind that is covered by the insurance in question,
- the assured's economic loss has arisen from events (perils) of the kind specified in the relevant insurance,
- that the loss occurred during the insurance period, and
- the extent or quantum of the loss.¹⁷³

If the assured succeed in establishing these parts, the underwriter will have to prove, if relevant, the applicability of an exclusion clause. The assured on the other hand has to prove that the loss was not caused by a so-called

¹⁶⁹ Commentary to the Nordic Plan, cl. 3-33

¹⁷⁰ The Nordic Plan, cl. 3-34

¹⁷¹ The Nordic Plan, cl. 3-35

Commentary to the Nordic Plan, cl. 3-35

¹⁷² *Ibid.*

¹⁷³ Commentary to the Nordic Plan, cl. 2-16

RACE II perils. If the Nordic Plan contains any provisions contradicting this main rule that provision should be applied instead.¹⁷⁴

For the assured the burden of proof eases when the cover is an “all risk cover” since the assured only need to prove that loss covered by the policy and the underwriter then has to prove that the peril causing the loss is excluded. This makes the assured’s burden of proof easier compared to non-marine insurance where the assured has to prove that the loss is caused by one of the specifically named perils in the policy.¹⁷⁵

The burden of proof relating to the situation when the assured has committed a breach of contract rests with the underwriter, but after the underwriter has established a prima facie case, the burden of proof might revert to the assured.¹⁷⁶

However, it must be differentiate between situation where it is clear that the assured has a valid claim, and established loss, but the question on hand is whether a underwriter is liable under insurance policy A or B. This could be the situation when it is not certain if a loss has been caused by a war or a marine peril.¹⁷⁷

In this situation “the more probable cause” should be attributed the loss which should be interpreted in the same way as “dominant cause” i.e. if more than 60 per cent is attributable to one cause this cause shall be deemed to be “the more probable cause”, otherwise the loss shall be attributed equally.¹⁷⁸

¹⁷⁴ Commentary to the Nordic Plan, cl. 2-12

¹⁷⁵ Wilhelmssen and Bull, *supra* note 3, p. 135

¹⁷⁶ Commentary to the Nordic Plan, cl. 2-12

¹⁷⁷ *Ibid.*

¹⁷⁸ Commentary to the Nordic Plan, cl. 2-16

4 Comparative analyses

When a comparison is made between two legal systems one have to take the characteristics of each legal system into consideration. England is considered as a common law jurisdiction which means that much emphasis is given to case law. The Nordic system on the other hand is traditionally considered as a civil law jurisdiction which means that case law is given less weight.¹⁷⁹ However, case law is used in the Nordic countries and lawyers are regularly using case law in their work but not to the same extent as is done under English law.

A characteristic of the Nordic legal system is that the preparatory works are considered as an important source of law and the Commentary is used to a great extent in interpretation of the Nordic Plan. The preparatory works does not have the same legal position under English law.¹⁸⁰

Another important difference in marine insurance is that the Nordic Plan is based on an “all-risk cover” meaning that a risk is included as long as it is not excluded.¹⁸¹ In the English system “all-risk cover” is not available for hull insurance and therefore the English system builds on a system where a peril is only covered if it is specifically opted into the insurance policy i.e. a nominated perils system.¹⁸² This has an effect as to what perils are covered, in general the Nordic Plan offer a broader scope of cover compared to the English system.¹⁸³ It also affects the burden of proof.

The rules that will be compared in this chapter can often be change by the parties in the specific contract. When the parties have the discretion to negotiate different terms it makes the system more flexible and allow for the parties to adjust the policy to their preferences. However, in this comparison it is not possible to take such changes into account to any great extent, some standard contracts are however referred to as deviating from the provisions in the Marine Insurance Act. Instead, the rules compared will be the general or typical terms.

In both the English and Nordic systems it is possible to consider several perils as causing the loss. Both systems also recognise that these causes can work together causing the loss either as concurrent causes or in a sequence of causes. The same principles are used in both situations and the court considers the specific situation to decide which perils are of legal significance.

¹⁷⁹ Bogdan, *supra* note 12, p. 118

¹⁸⁰ *Ibid.*, p. 132

¹⁸¹ Wilhelmssen and Bull, *supra* note 3, p. 80

¹⁸² Thomas, *supra* note 1, p. 15

¹⁸³ Extracted from mail correspondence with expert from a leading P&I Club

Firstly the principles of the proximate cause rule and the apportionment rule will be compared, including various exceptions to these principles. Secondly, the modified dominant cause rule will be compared to the proximate cause rule. Thirdly, the system of war perils will be investigated. Finally, the burden of proof will be compared.

4.1 Proximate cause rule and apportionment rule

The principle of dominant cause used in general Norwegian insurance law is similar to the English proximate cause principle but the Norwegian development in marine insurance took another direction.¹⁸⁴ The Norwegian rule came to change into an apportionment rule and the reason for this development was the complaints from the industry when it was noticed that the result of the dominant cause rule often seemed unfair.¹⁸⁵

However, what happened in return when the apportionment principle was used was that a high number of litigations appeared before the Norwegian courts. Another causal principle, the modified dominant cause principle, was therefore inserted in relation to the combination of marine and war perils.¹⁸⁶ The Nordic Plan has kept the principle from the previous Norwegian Plan and therefore sets out an apportionment principle. Under English law the proximate cause principle is prescribed by the Marine Insurance Act but are also well established through case law.

The proximate cause principle and the apportionment principle often lead to different results wherefore an example will serve well before discussing the principles further. Recall the first fictional situation given under the introduction where a ship first runs aground, insured by underwriter A, and later runs into bad weather, insured by underwriter B. This situation will first be considered in the light of the apportionment principle and later under the proximate cause principle.

The apportionment rule applies when there are several causes for the loss but the court first has to settle which causes are of legal relevance. It is here assumed that both the grounding and the weather will have such relevance. Continue to assume that the grounding would be blameable for 60 per cent of the loss while the weather would be blameable for 40 per cent of the loss. The loss would in this case be apportioned by 60 per cent for the underwriter A and 40 per cent to underwriter B.¹⁸⁷

If the same case would be considered under the proximate cause principle the courts would first try to determine which was the proximate cause or

¹⁸⁴ Bull, Hans Jacob, *Forsikringsrett*, Universitetsforlaget, 2008, p. 249; Wilhelmsen and Bull, *supra* note 3, p. 110

¹⁸⁵ See chapter 3.2.1

¹⁸⁶ Commentary to the Nordic Plan, cl. 2-13

¹⁸⁷ See chapter 3.2

causes. In this example it is assumed that both the grounding and the weather would be considered as proximate causes and therefore the principle from *Wayne Tank*¹⁸⁸ would be applicable. This means that if one of the perils is expressly excluded under the policy the assured would not be able to recover. If no such exception were in the policy the underwriter in question would be held liable to compensate for the loss in its entirety.¹⁸⁹

There are benefits and disadvantages with both results. One benefit with the apportionment rule is that it better reflects the actual reasons for the loss since the underwriter is only liable to compensate for the proportion of the loss attribute to the insured peril. Under the proximate cause rule the underwriter will be held liable for everything or nothing, which can include compensating for loss not sole attributable to the insured peril. That the compensation reflects the actual reasons for the loss also appeals for reasons of fairness.

Another reason why the English system can seem unfair is the Wayne Tank principle.¹⁹⁰ When the parties are negotiating a specific peril to be opted into the insurance policy the assured are assuming that the peril is covered. However, according to the Wayne Tank principle, the peril will not be covered if it appears in combination with an excluded peril. What the Wayne Tank principle does is that it is moving the focus from what actually is covered to what is excluded. Compared to the Nordic system where the assured will not be left entirely without cover in the case of an covered peril and one excluded peril the English system can come across as a bit unreasonable.

There is another argument of fairness in favour of the apportionment rule. When the underwriters set the premiums they are calculated for a certain risk to be covered. There is no reasonable reason for the policy to cover perils other than the once the policy is intended to cover i.e. when there are several proximate causes it is not reasonable for an underwriter to cover the entire loss when the underwriter only agreed to cover a certain loss.¹⁹¹

Since apportionment is not possible under the proximate cause rule the result in the decision of what constitute the proximate cause or proximate causes can be severe for the assured. Firstly, it is possible that only one cause is considered as proximate even if several causes is important in leading up to the loss, this could mean that the assured will be left uncovered. Secondly, even if several causes are considered as proximate but one is excluded the assured will be left without cover. Hence, slight differences can mean full cover or no cover at all for the assured.

A similar problem can arise in the situation of the apportionment principle. If the court apportions a part of the loss to a non-covered peril the assured

¹⁸⁸ [1973] 2 Lloyd's Rep. 237

¹⁸⁹ See chapter 2.1 – 2.2

¹⁹⁰ See chapter 2.2.2

¹⁹¹ Commentary to the Nordic Plan, cl. 2-13

will end up without cover for that part. However, the assured will not be in a situation of “everything or nothing”. It might be that it is a greater risk for the assured to be left partly without cover when the apportionment rule is used compared to the proximate cause rule. However, the risk for the assured to be left entirely without protection decreases with the apportionment rule.

Whatever the result of the application of the proximate cause might be one of the foremost benefits with the proximate cause does not relate to the result in the specific situation. The benefit with the proximate cause rule is that it might be easier to create a precedence compared to the apportionment rule and foreseeability is important.¹⁹² The proximate cause rule makes it easier to find typical situations for the application of the rule and when a precedence can be built up it increases the predictability. Such a precedence would in return make it easier for the parties to negotiate a policy that meet the intentions of the parties.

One of the major criticisms against the apportionment rule is that it is hard to create a precedence. This depends on the fact that the application of the rule is strongly based on the specific circumstances of every case and it is therefore hard to find these typical situations. Hence the apportionment rule was changed in regard of combination of marine and war perils.¹⁹³

In conclusion, foreseeability is wishful in any legal rule. This foreseeability should however not give an unreasonable result. The same can be said in the opposite direction, legal rules should give room for the courts to adjust to a specific situation but legal rules have to be foreseeable. For the parties it is important that they can adjust their insurance contract to their intentions and a requirement for such a possibility is that the legal position is clear.

4.2 Modified dominant cause rule and proximate cause rule

In some situations the Nordic Plan prescribes a causal expression other than the apportionment rule e.g. the modified dominant cause rule used in situations of combination of marine and war perils. As the name suggest the rule contains some elements similar to the proximate cause rule but the modified dominant cause rule is only applicable in situations of combination of war and marine perils.¹⁹⁴

As with the proximate cause rule the loss shall be attributed in its entirety to the peril considered as the dominant cause. What different the rule from the proximate cause rule is that it also prescribes that in the situation where

¹⁹² Commentary to the Nordic Plan, cl. 2-13

¹⁹³ *Ibid*;

Further see the discussion under chapter 4.3

¹⁹⁴ See chapter 3.4

none of the causes is considered as dominant the loss should be attributed equally between the two policies.¹⁹⁵

To illustrate the difference between the proximate cause rule and the modified dominant cause rule the second example as described in the introduction will be used. In this example a ship runs into a mine and later meet bad weather. Under the modified dominant cause rule this would have meant that if one of the perils was considered as dominant the entire loss would be allocated to this peril. However if neither of the perils was considered as dominant the loss would be apportioned equally i.e. 50/50 between the perils, which would have meant that the underwriters would have had to pay half each.¹⁹⁶

If the same example were considered under the proximate cause rule the result would be the same in the situation where only one cause was proximate or dominant i.e. the entire loss would be attributed to this peril. In the situation with two proximate causes the Wayne Tank rule would be applied e.g. if an exception clause was included in policy, concerning one of the proximate causes, the loss would not be recoverable under the policy.¹⁹⁷

One problem with the proximate cause rule is that even if a loss only barely is considered as the proximate cause the entire loss will be allocated to this cause. The modified dominant cause rule is a compromise between the apportionment rule and the proximate cause rule. It gives the possibility to allocate the loss equally between two losses when it is difficult to decide which of the perils actually is the proximate cause or when several causes is considered as proximate.

The benefit with the modified dominant cause rule is that it could be perceived as fairer at the same time as it is not as unpredictable as the apportionment rule. It would also respond to the criticism that even a small differences that makes the court weight one cause as proximate means that the assured could lose his entire cover. The modified dominant cause rule is only applicable in situations of combination of marine and war perils but might have answered to some criticism if it was used also in relation to the combination of different marine perils. In regard of the Nordic Plan to the uncertainty of the apportionment rule and in regard of the proximate cause to create a result better reflecting the actual reason for the loss.

4.3 War perils

War perils have gotten a specific status in both the English and the Nordic systems. In the Nordic system there are specific clauses relevant to the war perils with another causal expression as basis. Under the Marine Insurance

¹⁹⁵ *Ibid.*

¹⁹⁶ Here, cl. 2-15 of the Nordic Plan is disregarded.

¹⁹⁷ See also chapter 4.3.

Act war perils are included in the notion of “maritime perils”¹⁹⁸ however they are often excluded in paramount clauses in specific policies.

There are differences in how the two systems are handling war perils. In the English system war perils are excluded in paramount clauses but the normal causal expression, the proximate cause, is used. Because of the Wayne Tank principle, in the situation of several proximate causes, the entire loss would render none recoverable under the marine policy if a paramount clause excepting war perils would be in the policy.¹⁹⁹

The Nordic Plan on the other hand provide for some special rules relating to war perils or the combination of war and marine perils. The Nordic system uses another causal expression for the combination of war and marine perils, namely the modified dominant cause.²⁰⁰ The Nordic Plan also point out some war perils specifically and these perils are always deemed to be the cause of the loss. The second example in the introduction where a mine was partly to blame for the loss would be such a peril i.e. the entire loss would be allocated to this peril.²⁰¹

Another difference is that the paramount clauses in the English system are not solely dealing with war perils but other perils can also be contained in these kind clauses e.g. radioactive contamination and strike.²⁰² Therefore, the system of paramount clauses is not specific for war perils.

For the underwriter insuring either war or marine perils it is of importance where the loss falls. If there is only one dominant or proximate cause the result will be the same under both systems, the underwriter insured the dominant peril will be held liable. In the situation of two dominant or proximate causes the war underwriter would be held liable under the English system, while under the Nordic system the loss would most likely be apportioned since none of the causes is considered as dominant. Some perils will under the Nordic system be deemed to be the dominant cause.²⁰³

4.4 Radioactive contamination

The Nordic Plan and the IHC(01/11/03) contains a provision which has the same wording. If a RACE II peril, or a peril according to cl. 31 of the IHC(01/11/03), is directly, indirectly or contribute to a loss the entire loss shall be attributed from such a peril.²⁰⁴

Both systems deviate from their normal causal expressions since neither the proximate cause nor the apportionment rule is used. After ninth of

¹⁹⁸ Marine Insurance Act, sec. 3(2)

¹⁹⁹ See chapter 2.4

²⁰⁰ See chapter 3.4

²⁰¹ Commentary to the Nordic Plan, cl. 2-15

²⁰² See chapter 2.4

²⁰³ See chapter 2.4

²⁰⁴ See chapters 2.4 and 3.3.3

September 2011 no reinsurer was willing to reinsure against terrorism attacks. Hence, the clause concerning radioactive contamination was inserted into every reinsurance contract. The insurance market then included the same provision into the specific insurance policy.²⁰⁵

Under the Nordic Plan it is usually possible to apportion the loss but in the case of radioactive contamination such apportionment it is not possible.²⁰⁶ Because of the demands of the reinsurance market this clause seems to operate similar under the English and Nordic systems.

4.5 Negligence and intent

The assured will lose his cover under both the English and Nordic systems if he intentionally causes the loss he. The definition of intent seems however to differ a bit; in the English system recklessness is included in the concept of wilful misconduct which would not be the case of intent under the Nordic system.

When the assured is acting with negligence the cover under the two systems can differ. The Marine Insurance Act does not regulate situations of negligence or gross negligence meaning that the underwriter has to stand the risk. However, in the ITCH and IHC there is a provision on due diligence which seems to be similar to ordinary negligence which states that the assured lose his cover if he is acting negligently in regard of certain perils. This exclusion covers only specific parts but the consequence for the assured is that he loses his entire cover. In practise the provision of wilful misconduct is therefore only relevant in situations not covered by the provisions in ITCH or IHC.²⁰⁷

In the Nordic Plan there is a special rule for gross negligence where it is stated that compensation can be deducted depending on the circumstances of the case. In the case of ordinary negligence the underwriter will stand the risk. The Nordic Plan provide a more flexible approach since it is possible to take the serveries of gross negligence into account.²⁰⁸

The result in the first fictional situation given in the introduction would be that the assured loss his entire cover if the assured caused one of the perils intentionally or negligently, provided that the vessel was insured under ITCH or IHC. It is not possible to take the how severe the negligence is into account since loss cannot be apportioned under the English system.

Under the Nordic Plan however the assured would lose his cover if the loss was caused intentionally. However, contrasting to the English system, the assured would not loss his cover in the event of ordinary negligence. In

²⁰⁵ Commentary to the Nordic Plan, cl. 2-8

²⁰⁶ Commentary to the Nordic Plan, cl. 2-13

²⁰⁷ Wilhelmssen and Bull, *supra* note 3, pp. 188-189

²⁰⁸ See chapter 3.5

regard of gross negligence the cover would be deducted depending on the circumstances of the case.

4.6 Burden of proof

Under both the English and Nordic system proof need to be established on a balance of probabilities i.e. it must be more likely than not that the facts are true. This is the main rule in not only marine insurance but also in general insurance law.

In both systems the assured first need to establish that loss is suffered and that the loss was suffered by a peril covered by the policy. Under English law the assured also has to prove that the peril was the proximate cause, or other relevant causal expression, for the loss. The Nordic system differs, for natural reasons, and the assured only need to prove that the loss was suffered during the insurance period.

The burden of proof for the assured ease significantly when the policy provide an “all risk cover” since the assured in this situation need only to prove that the risk was covered by the policy. Therefore, in general, the assured under the Nordic system will have an easier burden of proof since the Nordic system for marine perils, although not war perils, is based on a “all-risk cover”.

The systems also have the same approach towards exceptions, it is for the underwriter to prove that the loss suffered was within an exception provided in the policy. However, under Norwegian law the assured need to prove that loss was not caused by a RACE II peril.²⁰⁹

Considering the eased burden of proof for the “all-risk cover” the assured will under the Nordic Plan, in general have an easier burden of proof. Otherwise the basic principles of burden of proof seems to be fairly similar as between the two systems.

²⁰⁹ See chapters 2.6 and 3.6

5 Proximate cause outside England and its effects for the industry

5.1 Proximate cause in other jurisdictions

The proximate cause principle is used under English law but outside England the proximate cause principle has been subject of some criticism. There has been criticism claiming that the principle of proximate cause can seem random in its application. Criticism has also claimed it can seem unfair as to which underwriter will be held liable to compensate for the loss.²¹⁰

The English Marine Insurance Act has been used as a model around the commonwealth in developing national marine insurance acts.²¹¹ Legislators in Canada and Australia have looked at the English Marine Insurance Act when passing their legislation and in both states some criticism against the proximate cause has been brought forward. However, Australia seems to have kept the proximate cause principle while there in Canada has been some developments leading away from the traditional proximate cause principle.

Firstly the developments in Canada will be presented and secondly some criticism brought forward in Australia will be discussed.

5.1.1 Canada and the proximate cause rule

5.1.1.1 C.C.R Fishing and Derksen

In the *C.C.R. Fishing Ltd v British Reserve Insurance Co. Ltd* [1990] 1 S.C.R. 814 and the *Derksen v 539938 Ontario Ltd. et al* [2001] 3 S.C.R. 398 the Supreme Court of Canada restricted the application of the proximate cause and might have gone even further as to extinguish the proximate cause all together.²¹² The two cases will be discussed together with some reasons

²¹⁰ E.g. [1990] 1 S.C.R. 814, Hillel David and Gary Caplan, 'Serial and independent concurrent causes in insurance law', *The Advocates' Quarterly*, Vol. 36, Issue 1, 57-85, <http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/aqerty36&page=57&collection=journals>, accessed 2013-04-17

²¹¹ James Allsop, *Causation, Perils of the Seas and Inherent Vice in Marine Insurance* (2011) [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/allsop200711.pdf/\\$file/allsop200711.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/allsop200711.pdf/$file/allsop200711.pdf), accessed 2013-04-17 p. 5

²¹² Saunders, Anthony J., 'Proximate Cause in Insurance Law – Before and After Derksen', *Advocates' Quarterly*, 2006, Vol. 32, Issues 1 and 2, 140-166, <http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/aqerty32&page=140&collection=journals>, accessed 2013-01-29, p. 2

for the change from the proximate cause. Some attention will also be given to if it is likely with any further developments in the area of causation in Canada.

In *C.C.R. Fishing*, a maritime case, the court found that there were two concurrent causes for the loss. The underwriter claimed that an exclusion clause was applicable and denied cover. The Supreme Court held that the loss did not fall within the exclusion clause wherefore the underwriter was held liable to compensate. McLachlin J remarked in regard of the proximate cause:

I am of the view that it is wrong to place too much emphasis on the distinction between proximate and remote cause in construing policies such as this. Generally speaking, the authorities do not follow such a course. I do not read s. 56 of the Insurance (Marine) Act as limiting the cause of the loss to a single peril. Realistically speaking, it must be recognized that several factors may combine to result in a loss at sea. It is unrealistic to exclude from consideration any one of them, provided it has contributed to the loss.²¹³

In *Derksen*²¹⁴ the court once again had to take two proximate causes into account. One of the causes of loss was an excluded risk under the insurance policy and in this situation the view has been that the entire loss will be excluded from the policy i.e. the Wayne Tank principle. In *Derksen*²¹⁵ however it was held that loss attributed solely to the excluded peril would be excluded, if the policy did not say otherwise.²¹⁶

The parties can change the causal expression used by the court by contract since causal expressions ultimately is a matter of interpretation of the contract. In the *Pavlovic v Economical Mutual Insurance Co. (1994)*, 28 C.C.L.I. (2d) 314 the parties had used an exclusion clause as follows:

We do not insure for such loss regardless of the cause of the excluded event, other causes of the loss, or whether other causes acted concurrently or in any sequence with the excluded event to produce the loss...

The court held in the *Derksen* that an exclusion clause similar to the one used in the *Pavlovic*²¹⁷ would have excluded liability under the insurance policy in the event of concurrent causes.²¹⁸

5.1.1.2 Criticism against the proximate cause

McLachlin J criticised the proximate cause principle in the *C.C.R. Fishing* by stating:

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

²¹³ [1990] 1 S.C.R. 814

²¹⁴ [2001] 3 S.C.R. 398

²¹⁵ *Ibid.*

²¹⁶ David and Caplan, *supra* note 210, p. 69

²¹⁷ 28 C.C.L.I. (2d) 314

²¹⁸ Saunders, *supra* note 212, p. 16

indemnity dependent on such fine and contestable reasoning, such a test is calculated to produce disputed claims and litigation.²¹⁹

This passage was quoted and given support in the *Derksen*²²⁰, additionally the analysis was in *Derksen*²²¹ held to be applicable to all insurance policies equally. The Supreme Court continued in *Derksen*²²² by stating that it was not desirable to attempt to decide which of two concurrent causes was the proximate cause.²²³

McLachlin J claims in her judgement in *C.C.R. Fishing*²²⁴ that the proximate cause rule creates claim disputes and litigations. However there are no investigations attached to the statement and as such the statement is questionable. Against the Norwegian background, where the number of litigations rose when changing from the proximate cause rule to the apportionment rule, the statement seems uncertain. It could be claimed that in the Norwegian case it was rather the difficulties in applying the apportionment rule than the benefits of the proximate cause rule that lead to the increasing litigations.²²⁵ Saunders also has a point in saying that the problem when applying a rule of causation rather lies in the problems with causation than the rule itself²²⁶.

Another criticism against the proximate cause rule by McLachlin J is that it deals with fine distinctions that make it unfair to decide on such grounds. Saunders response to this by saying that courts always makes decisions based on fine distinctions; this is a part of the legal function.²²⁷ There might be some truth to Saunders observation but even if law are based on distinctions these distinctions should not be “fine distinctions” to the extent that they seem random and unfair. A related criticism by McLachlin J. is that the debate concerning the proximate cause turns into a metaphysical debate.

The fore and most benefit with the Canadian approach as it seem to develop is that this approach moves its focus to what is included in the policy rather than what is excluded. The Wayne Tank principle gives the effect for the underwriters that it is not only important to focus on what is insured under the policy but also what is excluded. This would most likely also fit the intentions of the parties better.

²¹⁹ [1990] 1 S.C.R. 814

²²⁰ [2001] 3 S.C.R. 398

²²¹ *Ibid.*

²²² [2001] 3 S.C.R. 398

²²³ Saunders, *supra* note 212, p. 16

²²⁴ [1990] 1 S.C.R. 814

²²⁵ See chapter 3.2.1

²²⁶ Saunders, *supra* note 212, p. 18

²²⁷ *Ibid.*, p. 19

5.1.1.3 Further developments

The *Derksen*²²⁸ has not lead to an apportionment but some articles suggest that apportionment should be possible. Once the court has concluded that the loss resulting from an excluding peril should not be compensated under the policy the step to an apportionment of the loss as a whole is not big. When the loss is divided and not fall in its entirety under one policy it opens a way for apportionment. David and Caplan argue in favour of apportionment by pointing out that cover only should be available for loss attributed to the insured peril.²²⁹ Also Saunders seems to suggest that apportionment could be an alternative to the traditional view of “all or nothing”.²³⁰

David and Caplan point out that it in many cases of independent concurrent causes would be hard to allocate a specific part of the loss to an excluded risk but that one way to solve the problem would be to apportion the loss on a percentage basis.²³¹

5.1.2 Australia and the proximate cause rule

Australia seems in general continuing to support the doctrine of proximate cause similar as used in England. As in England there is a possibility for the parties to use another causal expression by stipulate so in the contract.²³² Even if the proximate cause principle is still used it seems, at least to some extent, exist some criticism to the proximate cause principle.

Recently, with the floods occurred in Australia 2010-2011, the proximate cause principle was in question in regard of the Wayne Tank principle. Many assureds were left without cover as a result of the Wayne Tank principle when the floods was only one of several proximate causes for the loss.²³³ Some legislative changes were passed in 2012 to answer to the criticism, the changes concerned consumers and small business owners.²³⁴ It is worth noting that these changes was made fore and foremost for the benefit of consumers and only small business owners and would therefore in most cases not directly concern marine insurance. However, it is interesting as a part of the criticism against the Wayne Tank principle.

Some more general criticism in regard of the proximate cause has also been brought forward. Professor Martin David gave some critic to the proximate

²²⁸ [2001] 3 S.C.R. 398

²²⁹ David and Caplan, *supra* note 210, p. 69

²³⁰ Saunders, *supra* note 212, p. 28

²³¹ David and Caplan, *supra* note 210, p. 70

²³² Mark Sheller, *Causation in Australian Insurance Law*, (2011)

<http://www.tresscox.com.au/resources/resource.asp?id=702>, accessed 2013-04-19

²³³ Insurance Contracts Amendment Bill 2011, Digest no. 87 2011–12,

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1112a/12bd087#_ftn46, accessed 2013-04-19

²³⁴ Insurance Contracts Amendment Bill 2012,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/bill/home/r4717%22>, accessed 2013-04-19

cause principle on a seminar for the Australian Insurance Law Association in 1998. As in England the proximate cause in Australia should be determined by the common sense rule. Davies argues that the common sense rule is a too simple way of determine the complex question of proximate cause. In using the common sense rule it is rather the “feeling” of the court that determine whether the policy will cover the peril or not. He continues by saying that the parties to the contract at least should be able to demand a more intellectual approach to the problem.²³⁵

Davies is also criticising the principle that if there are two proximate causes and one is excluded the loss will not be recoverable under the policy i.e. the Wayne Tank principle. In *Petersen v Union des Assurances de Paris IARD*²³⁶ Rolfe J argued that it there is no rational reason to exclude cover in the case of one excluded peril and one covered peril while the policy will cover if the peril is covered in one instance and the other peril is neither included nor excluded. Rolfe J stated:

One reason suggested is that in the first case the agreement of the parties allows recovery because the insured peril is, at least, a proximate cause of loss, and there is no exclusion of the other cause, whereas in the second case there is a positive exclusion of another proximate cause by the agreement of the parties. So, it is put, the insurer has positively declined, by the exception, to accord indemnity in such a situation.²³⁷

The Court of Appeal had no reason to apply the Wayne Tank principle wherefore they did not consider the thought brought forward by Rolfe J to any great extent, however they did say that there was some force to the thinking.²³⁸ The Wayne Tank principle has however been applied in later cases for example in the non-marine case *Central Australian Aboriginal Congress Inc v CGU Insurance Limited*.²³⁹

5.2 Industry aspects

Whether the loss falls within the policy or not is of importance for the marine insurance market. When premiums are calculated several different factors are taken into account e.g. the choice of law under the charterparty and trading patterns. In addition, when earlier years of claim statistics is available these are considered when the premiums are calculated. The causal expression is a part of this calculation which makes it hard to predict its specific influence.

In order to calculate an accurate premium certainty is important. In general few claims are litigated in the area of marine insurance making it hard to find specific patterns. Whether the proximate cause principle or the apportionment principle gives the highest degree of certainty is hard to settle

²³⁵ Davies, *supra* note 210, p. 23

²³⁶ (1995) 8 ANZ Insurance Cases 61-244

²³⁷ *Ibid.*

²³⁸ Davies, *supra* note 210, p. 22

²³⁹ [2009] NTCA 1

but some general points can be made.²⁴⁰ More cases are available under English law of the simple fact that the English insurance market is bigger than the Nordic market. It could be that this would create a pattern with the consequence of certainty.²⁴¹

When the apportionment rule was first inserted into the Norwegian Plan the number of litigations was raised which could indicate the uncertainty of the apportionment rule. However, the proximate cause rule has also been criticised as random, especially in regard of the Wayne Tank principle.²⁴²

The benefit of the apportionment rule is that it create more certainty as to what perils are covered which makes it easier to calculate the premiums. Under the proximate cause principle it also has to be included what perils are excluded to accurately set the premium. Since many losses results from several causes is it important to know what perils are excluded since the underwriter would not be held liable when one of the proximate causes for a loss is excluded. Theoretically, if a peril commonly occurring is excluded under the policy this would decrease the risk of liability for the underwriter.

In both the English and the Nordic systems there are possibilities to change the causal expression e.g. to not use the apportionment principle or the proximate cause principle.²⁴³

It seems that many of the widely used standard contracts e.g. the Institute Clauses continue to use the proximate cause principle indicating that the industry is not dissatisfied with the current legal position. The Institute Clauses are commonly using “caused by” as a causative expression however this has been interpreted as “proximately caused by”.²⁴⁴ The same can be said about the Nordic Plan, if the parties where dissatisfied with the causal expression provided by the Norwegian Plan, on which the Nordic Plan is based, they could have changed it in the Nordic version.

It might be that the consequences are of greater importance for the assured. If the assured believes that he is covered for a specific loss he would not take out yet another insurance. However, in a situation of two concurrent losses of which one is excluded he will not be compensated under the proximate cause, on the other hand he might recover for the entire loss in a situation where a part of the loss depends on a not covered peril. Under the apportionment rule he has the possibility to get compensation for the part of the loss attributable to the loss he has insured.

Davies has claimed that the principles of causation “are too firmly established to be changed without a paradigm shift that would cause

²⁴⁰ See also the discussion under 4.2

²⁴¹ Extracted from mail correspondence with an expert from a leading P&I Club

²⁴² See discussion under chapter 5.1

²⁴³ See chapter 4

²⁴⁴ Hodges, *supra* note 15, p. 167

massive reverberations throughout the insurance industry”.²⁴⁵ It is hard to believe that so would be the case since many of the underwriters today are already insuring under various standard contracts, both using the proximate cause principle and the apportionment principle. Examples can be made of the Swedish Club²⁴⁶, Skuld²⁴⁷, Gard²⁴⁸ and Codan Marine²⁴⁹ which all insure under both Nordic and English conditions.

What could happen if the causal expression was changes is that the industry adopt to the change and as a part of their calculations when setting the premiums include the “new” causal expression. Otherwise the industry could use their freedom of contract as to change the causal expression similar to what happened in Norway where the apportionment principle was inserted instead of the dominant cause principle.

5.3 Would the proximate cause principle benefit from some changes?

One of the repeated criticism against the proximate cause principle which has been brought forward in both Canada and Australia is its treatment of the situation when one loss is covered while one is expressly excluded i.e. the Wayne Tank principle.²⁵⁰ One of the problems with this principle is that in the situation of concurrent proximate causes it focuses on what is excluded and not what is actually covered. Theoretically, an underwriter would escape liability to compensate by adding exclusion clauses.

It is wishful that the causal expression is reflecting the actual cover intended by the parties. If the assured pays for a specific peril to be covered this peril should for obvious reasons also be covered by the policy. If one of the perils causing the loss were an excluded loss the policy would offer no protection even if one peril is covered.

On the other hand it is not wishful to not give an exclusion clause any effect at all. If it was enough for one peril to be covered under the policy in the situation of concurrent proximate causes it would not matter if the other perils were excluded or not. As Lord Diplock explained the reason for the principle:

The reason is that if the underwriters were held liable for loss, they would not be free of it. Seeing that they have stipulated for freedom, the only way of

²⁴⁵ Davies, *supra* note 210, p. 22

²⁴⁶ *Hull insurance*, The Swedish Club,

<http://www.swedishclub.com/main.php?mid=102&pid=43&tid=43>, accessed 2013-04-19

²⁴⁷ *Hull & Machinery*, Skuld, <http://www.skuld.com/products/marine/hull--machinery1/hull--machinery/>, accessed 2013-04-19

²⁴⁸ *Hull and machinery cover*, Gard, http://www.gard.no/ikbViewer/page/covering-risks/cover?p_dimension_id=17256&p_document_id=68339, accessed 2013-04-19

²⁴⁹ *Insurance Conditions*, <http://www.codanmarine.com/codanmarine/Page18222.html>, accessed 2013-04-19

²⁵⁰ See chapter 5.1

giving effect to it is by exempting them altogether. The loss is not apportionable. Hence no part of it can fall on the policy.²⁵¹

Assuming there is no possibility to divide the loss it is hard to see how both the cover and the exception clause would be given effect if not for the solution in the *Wayne Tank*.²⁵²

However, here the decision in the *Derksen*²⁵³ might give a good middle ground since it would give effect to both the covered provisions and the exceptions i.e. it is only possible to recover the part of the loss actually covered. The *Derksen*²⁵⁴ require it to be possible to divide the loss, which seems to be unknown in England.

Apportionment would solve some of the criticism brought forward by McLachlin J. When there are several concurrent causes to a loss it is reasonable and fair that an underwriter compensate only for the risk he accepted, similar it is reasonable that the assured get compensated for risks he insured.

An apportionment rule would also make the “fine distinctions” less fine since it would be possible for a way between “everything or nothing”. However, it might prove hard to predict the outcome of such a principle since the apportionment principle is highly dependent upon specific circumstances of each case.²⁵⁵

Many problems with causation probably lies in the problem of causation rather than which specific principle that is used.²⁵⁶ However it would be wishful to find a principle that gives effect to both cover and exclusion clauses. It might not be necessary to use an apportionment principle but to exclude the entire loss because of an exclusion clause as in the *Wayne Tank* principle seems unreasonable wherefore a solution as in *Derksen*²⁵⁷ would be beneficial.

²⁵¹ [1973] 2 Lloyd's Rep. 237

²⁵² *Ibid.*

²⁵³ [2001] 3 S.C.R. 398

²⁵⁴ *Ibid.*

²⁵⁵ See chapter 4.1

²⁵⁶ Compare to Saunders, *supra* note 212, p. 18

²⁵⁷ [2001] 3 S.C.R. 398

6 Conclusion

Causation in marine insurance is a matter of importance and it is vital to appreciate the difficulties built into causation. When deciding if the necessary causal connection exists many different factors need to be taken into account e.g. the expression used in the insurance policy, intention of the parties but also the specific circumstances of each case. In England the entire loss is attributed to the proximate cause while under the Nordic Plan the loss can be apportioned between several causes. However, both systems provide some exceptions for specific perils or combination of perils.

Firstly, the legal position in the case of a combination of two marine perils will be discussed. In the first fictional situation described in the introduction a ship runs aground and later sinks due to bad weather. Under the English proximate cause rule the entire loss would be attributed to the dominant cause meaning that the underwriter would be liable to compensate for everything or nothing. Under the Nordic apportionment rule the loss would be apportioned depending on each cause's attribution to the loss.

The benefit of the Nordic apportionment rule is that it makes it possible to attribute the loss and therein the possibility to take the specific circumstances of every case into account. This also makes the Nordic approach flexible and it gives effect to both covered perils and excluded perils. If a specific peril was to be excluded the proportion of that loss is not recoverable under the policy, however that part of the loss could be attributed to another policy covering the peril.

In contrast the English proximate cause rule does not allow apportionment of the loss but it might be easier to predict the outcome compared to the Nordic System. For the parties in a business situation predictability is important since they know what to adopt to e.g. the underwriter knows the risk wherefore he can calculate the premiums accurately. The proximate cause rule, however, is not always fair and can seem inflexible in its application.

In the *Wayne Tank*²⁵⁸ decision Their Lordships held that, in the case of concurrent proximate causes of which one cause is included in the policy while the other cause is expressly excluded, the policy would not respond. Hence the English proximate cause gives effect to the exclusion clause but are not considering that one proximate cause is actually covered by the policy. This can seem unfair and it also make it hard to know in what situation the underwriter is covered since if an insured peril is combined with an exclusion the cover would disappear altogether.

²⁵⁸ [1973] 2 Lloyd's Rep. 237

It might be that the Canadian approach after *Derksen*²⁵⁹ is a better solution. In this case the Supreme Court of Canada held that the underwriter was not liable to compensate for the loss sole attributable to the excluded peril. In its decision the Supreme Court of Canada gave effect to both the covered peril and the excluded peril.

It is worth noting that even if there been criticism against the proximate cause in Australia the proximate cause has not changed. It might be that it would disadvantageously to change a well-established principle since the precedence that has been built up gives some certainty.

What are presented above is the main principles of the two systems but these principles are subject of some exceptions. One of the more important exceptions is that war perils are treated differently than marine perils under both systems. In the English Marine Insurance Act war perils are included in “maritime perils” but they are often excepted in specific standard contracts. In the Nordic Plan there are some special rules regarding the combination of war and marine perils.

The second example described in the beginning concerns the combination of a war and marine peril. In English marine insurance there are often so-called paramount clauses inserted into the contract meaning that in the situation of two proximate causes of which one was excepted under the paramount clause the assured would not be able to recover. The different from an “ordinary” exclusion is that a paramount clause is against every other clause in the contract while an “ordinary” exclusion can be valid in relation to one specific peril only.

Consequently, the marine underwriter would be held liable to compensate for the entire loss, even if a part of the loss was because of a war peril, if the marine peril was held to be the proximate cause. However, in the case of concurrent proximate causes the marine underwriter would not be held liable if a paramount clause including war perils was included in the policy.

In the Nordic Plan the regulation about war perils are more complicated. Another causal expression is used in the situation of one war and one marine peril, the modified dominant cause principle. This principle says that if the dominant cause was the war peril the entire loss would be allocated here, and if the marine peril was dominant the entire loss would be allocated to the marine peril. If there is doubt as to what peril is the dominant peril the loss shall be divided equally between the perils causing the loss. In some situations of war perils the loss shall be deemed to be caused entirely by war perils e.g. when the ship is damaged through the use of arms. When there are uncertainty if the marine or war peril caused the loss the loss shall be divided equally.

²⁵⁹ [2001] 3 S.C.R. 398

Therefore, four different answers are possible for the second example in the introduction. Firstly, if one of the causes is dominant wherefore the entire loss will be allocated to this cause. Secondly, if none of the causes is held as dominant the loss will be divided equally. Thirdly, in some situations the loss shall be deemed to be caused by the war peril wherefore the underwriter insuring such a loss will be liable to compensate for the entire loss. Fourthly, the loss will be equally divided if there is uncertainty as to which peril caused the loss.

The paramount clauses in the English system commonly cover also other specified perils, e.g. radioactive contamination or strike. Radioactive contamination is, among others, excepted in the Nordic Plan by the so-called RACE II perils. The paramount clause regarding radioactive contamination and the RACE II perils are identical and prescribes if radioactive contamination has indirectly, directly or contributed to the loss for the entire loss to be allocated to this peril. This is due to the reinsurance market which do not want to insure terrorist attacks after 9th of September 2011.

If, in the first example from the introduction, the loss would be caused by radioactive contamination the entire loss would be allocated to the radioactive contamination even if the radioactive contamination only had contributed to the loss. This is held equally for the two systems.

If loss would have been intentionally caused by the assured in one of the examples mentioned in the introduction the underwriter would not be held liable to compensate. In the event of negligence the situation is a bit different under the two systems. In the Nordic Plan the assured would be compensated in the event of ordinary negligence but in the situation of gross negligence the compensation could be deducted. Under the English Marine Insurance Act the underwriter has to stand the risk of negligence, however in ITCH and IHC it is stated that the underwriter is not liable to compensate in the situation of negligence in regard of certain situation e.g. loading or discharging.

For the industry it is important whether the loss falls under the insurance policy or not. It is also important for the assured to retrieve an insurance covering the intended perils, equally it is important for the underwriter to be able to calculate the premium accurately. For these reasons foreseeability is crucial. The benefit with the apportionment rule is that it is easier to know what perils are covered by the policy even if the actual proportion that will be attributed to different perils are uncertain. However when the apportionment rule was inserted into the Nordic Plan it raised the number of litigations due to this uncertainty.

The benefit with the proximate cause rule lies in the fact that it is easier to find atypical situations for when different perils will be considered as proximate. However, due to the Wayne Tank principle the entire loss will be rendered unrecoverable if one of the perils are excluded under the policy.

This would make it harder to know what is covered by the insurance since one also have to take the exclusion clauses into account. Theoretically, it would be possible to decrease the risk of the underwriter to compensate by adding an exclusion clause which commonly occur.

The effect of changing the proximate cause principle against the apportionment rule or vice versa is hard to tell. There are some criticism against the proximate cause rule but also against the apportionment rule. It is not unlikely however that these problems rather relates to the problem of causation as a whole.

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