PERILS OF THE SEA: A CONCLUSIVE DEFINITION?

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Introduction

In Insurance Law, the peril insured against may be any peril, which the assured seeks and the insurers are willing to give protection[1]. In *Seaton v Burnand*[2], Lord Halsbury made the following remarks:

> 'Of course, the transaction itself of guaranteeing the solvency of somebody who is to a security for somebody else's debt is, I admit, a somewhat extraordinary transaction ... I was not aware, until this case, that such a transaction as this, any more than the determination of judicial tribunals, is now made the subject of policies at Lloyd's.[3]'

The above remarks signify the possibility of coverage of any peril agreed upon by the parties to an insurance contract. So long as the peril is covered by the policy, the occurrence of such peril will give rise to a right of indemnity by the assured provided the loss must be attributed to such peril only and not any other perils.

Risk or peril is relatively the most important part of marine insurance[4]. The concept of insured perils signifies a very central issue under marine insurance where the assured's property or profit are put at risk by maritime perils and the insurer agrees to indemnify the assured against any loss caused by those perils. In practice, the extent of the covered risks is determined by the

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[1] E R Hardy Ivamy, *The General Principle of Insurance Law*, 5th Edition, 1986.

[2] [1900] AC 135.

[3] Ibid, at p 140.

[4] *Colinvaux's Law of Insurance*, ed, Robert Merkin, 1997, p 89.

agreement of the parties by selecting the appropriate set of Institute Clauses[5]. In marine insurance, there may be two broad categories of the insured perils on hull and cargo policies viz. marine risks and war and strikes risks. The former type of risk includes any risk other than the second type and it can be further divided into three sub-categories, ie:

a) the traditional risks, such as perils of the sea, fire, jettison, theft and piracy which were formerly insured under the old SG form and are now insured under the Institute Clauses;
b) additional or special risks insured under clause 6.2 of the Institute Time Clauses (Hull) (95) and Institute Voyage Clauses (Hull) (83) known as the Inchmaree clause, and
c) the 3/4ths Collision Liability of Clause 8 of the above Institute Clauses[6].

The very purpose of marine insurance is to secure the assured's interest and to indemnify any loss or damage, which might occur on the subject matter insured during the course of 'marine adventure'[7]. The expression 'marine adventure' is defined in s 3 of the English Marine Insurance Act 1906 (MIA 1906) as when any ship, goods, any other moveable goods, profit or earning of freight, security for loan or advances or disbursement are exposed to and endangered by maritime perils, inclusive of 'perils of the sea'. Perils of the sea was specifically insured under the old SG form (applied to both ship and goods) and presently, the Hull Clauses (95) cover for loss or damage sustained by the subject-matter insured which is caused by perils of the sea, rivers, lakes or other navigable waters. As for cargo policies, the Institute Cargo Clauses (A) that provides coverage for all risks, for a higher premium of course, perils of the sea, rivers, lakes or other navigable waters are also covered.

The problems in defining 'Perils of the Sea'

The numerous courts decisions, which previously dealt with the questions of

[5] Davies & Dickey, *Shipping Law*, 2nd edition, 1995, p 493. Under this concept, there are two important points to be pondered, ie a) Which maritime perils are insured against and which are not insured against; and b) The duration of when the insurer accepts the risk of loss from those perils.
[6] Susan Hodges, *The Law of Marine Insurance*, 1996, p 173.
[7] Ibid.

the meaning of the expression 'perils of the sea' and its scope, have clearly shown that it is not as simple and straightforward term as it sounds. The courts have attempted to draw a line between 'perils of the sea' and other perils like unseaworthiness, negligence, ordinary wear and tear, barratry, wilful misconduct, etc that sometimes turned out to be fruitless. There are questions that need to be drawn and distinctions need to be made under different situations. For instance, sea water could be led into a ship intentionally with or without the connivance of the ship owner, it may also be by the negligence of the crew who left a valve or port hole open while it should have been closed and sometimes owing to the unfit condition of the ship itself due to ordinary wear and tear, latent defect and even unseaworthiness[8].

What falls under the criteria 'perils of the sea' is still not fully answered even though rule 7 of the Rules of Construction restricts the term to only 'fortuitous accidents and casualties exclusive of the ordinary winds and waves'[9]. A more comprehensive definition, however, may be found in the judgement of Lord Bramwell in *Thames and Mersey Insurance Co v Hamilton, Fraser & Co* (*'The Inchmaree'*)[10] that reads:

> 'Every accidental circumstances not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of the insurance.'[11]

He also approved the definition by Lopes LJ in *Hamilton, Fraser & Co v*

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[8] Susan Hodges, *The Law of Marine Insurance*, 1996, p 174.
[9] Various terms were held to be equivalent to perils of the sea, for instance, in *E D Sassoon v Western Assurance* (1923) 16 Ll.L Rep. 129., the term 'marine risks' and in the *'Miss Jay Jay'* [1987] 1 Lloyd's Rep 32, CA, 'external accidental means' were held to bring the same meaning as perils of the sea. Likewise, 'hazards of the sea' is also an acceptable term in place of it. The term 'perils of the sea' was held to be the same in both marine insurance and carriage of goods by sea in the case of Trinder, *Anderson & Co v Thames & Mersey War Insurance Co* [1898] 2 QB 114. See also the discussion by Susan Hodges, *The Law of Marine Insurance*, 1996 at p 174.
[10] (1887) 12 App Cas 484.
[11] Ibid, at p 492.

Pandorf & Co[12] that '[i]n a seaworthy ship, damage to goods caused by the action of the sea during transit not attributable to the fault of anybody, is a damage from a peril of the sea.' As Rule 7 of the Rules of Construction defines perils of the sea as excluding ordinary winds and waves, the direct interpretation would mean that only the weather with extraordinary winds and waves constitutes perils of the sea. This opinion, however, was rejected in an Australian case of *Skandia Insurance Co v Skoljarev*[13] where Mason J ruled that '[t]he old view that some extraordinary action of winds and waves is required to constitute a fortuitous accidents or casualties is now quite discredited.' This view was subsequently adopted by Mustill J in *The 'Miss Jay Jay'* who explained that the adjective 'ordinary' qualifies the word 'action' and not 'winds and waves'. Therefore, even the 'ordinary winds and waves' can be perils of the sea.

In a recent case, *CCR Fishing Ltd, v Tomenson Inc* ('*The La Pointe*')[14], the Supreme Court of Canada attempted to define of the term by laying down two elements, which are necessary to form a peril of the sea, ie 'fortuity' and 'of the seas'. From this decision, we can say that only events that are fully unexpected and take place at sea are eligible as perils of the sea. This judgement was later on crystallised into Rule for Construction 7 mentioned earlier[15]. Nonetheless, the said rule still does not provide the clear and complete definition of the expression 'perils of the sea'. This inconclusive meaning of term has resulted a multitude of problems faced by the courts to actually interpret and ascertain the parameters of perils of the sea.

Even prior to the codification of the Marine Insurance Act 1906, Lord Macnaghten in *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co*[16] had already proclaimed that it was impossible to actually frame the definition of the words 'perils of the sea'. The inexhaustive extent of the perils makes the term as even more difficult to define. There had in fact been many

[12] (1887) 12 App Cas 518.
[13] [1979] 142 CLR 375.
[14] [1991] 1 Lloyd's Rep 89.
[15] R J Lambeth, *Templeman on Marine Insurance*, 6th ed, 1986, p 134.
[16] (1887) 12 App Cas 484, at p 502.

terms used to describe perils of the sea[17].

By looking at the different directions taken by the courts in the above two cases, the big question remains unsolved, 'what is considered accidental, fortuitous and expected in order to hold a particular loss as one occasioned by perils of the sea?'[18] A standard line has yet to be drawn to conclusively answer this question and at present it is wholly up to the courts, in each and every individual case, to decide and attempt to answer the question based on the facts of the case. It was suggested that the understanding of the term would be more fruitful if the attempt is made to enumerate the perils it does not embrace rather than those it does[19].

After reviewing the meaning of the term 'perils of the sea', there is a fact that the meaning of the term has yet to be fully established. The definition of the term as provided under the Rules for Construction of Policy 7, which refers only to fortuitous accidents or casualties of the seas and does not include the ordinary winds and waves, is deemed to be inconclusive. From the reinterpretation of the Marine Insurance Act 1906 and the study of the various judicial decisions affecting this area of marine insurance, there is found to be an urgent need to have a reviewed definition and interpretation of the term.

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[17] Amongst them are 'marine risks' and 'external accidental means' which were used in *E D.Sassoon v Western Assurance* (1923) 16 Ll.L Rep. 129 and *Lloyd (JJ) Instruments Ltd v Northern Star Insurance Co Ltd* ('*The Miss Jay Jay*') [1987] 1 Lloyd's Rep 32, CA respectively. These terms were equally held as equivalent to the meaning perils of the sea. In an old case *Harrison v Universal Marine Insurance Co* [17], the court suggested that, in order to determine what occasion falls under the term, a dividing line must be drawn between what is accidental, fortuitous and unexpected and what is natural, ordinary and usual by having regard to the circumstances of each case. This formula, even though it may seem simple, is found to be difficult in practice. For instance, in an earlier case of *Magnus v Buttermer* (1852) 11 CB 876, the court decided that a vessel that took ground at low water, in its ordinary course of navigation, causing it to be strained was not a loss by perils of the sea. Long before that, the court in *Fletcher v Inglis* (1819) 2 B & Ald. 315 held that a ship, which took ground at low water in the ordinary way, was a loss by peril of the sea.

[18] To defend solely on the formula, as laid down in *CCR Fishing Ltd v Tomenson Inc* ('*The La Pointe*') [18], may not provide a conclusive meaning of 'perils of the sea' since it does not seem to provide a clear-cut approach to the question of 'what is a peril of the sear?'

[19] *Arnould's Law of Marine Insurance and Average*, eds. Sir M J Mustill and J C B Gilman, 16th Edition, 1981, para 791, p 652.

The revision on the term 'Perils of the Sea'

Mustill J (as he then was) in the court of first instance in the Australian case of *'The Miss Jay Jay'*[20] listed down an interesting meteorological account of the range of weather conditions encountered by a ship during a voyage as follows:

(a) abnormally bad weather;
(b) adverse weather;
(c) favourable weather;
(d) perfect weather[21].

In trying to determine what is 'perils of the sea', Kent describes the expression in the following manners:

> 'Those words apply to those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. *Quod fato contigit, et cuivis patrifamilias, quamvis diligentisimo possit contigere.* The imprudence, or want of skill in the master, may have been unforeseen, but it is not a fortuitous event. The underwriter undertakes to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed.'[22]

The elements of 'Perils of the Sea'

For a clearer perspective of the meaning of 'perils of the sea', it is best to look

[20] [1987] 1 Lloyd's Rep 32.
[21] The favourable and perfect weather was found to be impossible to constitute perils of the sea. If the loss was sustained during these two types of weather, the court has to look into some other causes like unseaworthiness, wear and tear, etc. which would be more possible to be the cause of such loss. As for the first two ranges of weather conditions, both are acceptable to constitute perils of the sea. The difference is only to the degree of foreseeability of such weather where abnormally bad weather is said to fall outside the conditions if it can be reasonably foreseen during a voyage.
[22] *Kent's Commentaries*, 3 Kent's Comm 300.

into the words that have been frequently used when perils of the sea are mentioned, ie fortuitous and accidental.

Fortuitous

According to Cambridge[23], 'fortuitous' means something that is (to your advantage) not planned or a happening by chance. A fortuity is something that is unintentional and inevitable. A fortuitous loss must not be one not caused intentionally and also not a result of inevitable deterioration generated by the ordinary action of the winds and waves. Lord Sumner, in expressing his dissenting judgement in *Samuel v Dumas*[24], explored the word 'fortuitous' in the following manner:

> 'The interpretation of the term 'perils of the seas' is now statutory and is subject to the provisions of the Act, including s 55. Perils of the sea refer to accidents or casualties of the seas, so evidently, accident or casualty is the point of the definition. Fortuitous probably, adds nothing to either substantive. A fortuitous casualty is a matter of chance, a mischance; but in causation there is no chance. The effect is caused, it does not happen. Along this line, the interpretation seems to carry us no further. If the chance refers to something not to be expected and not to be precisely foreseen, something must be made of the term.'[25]

His Lordship was adamant that since fortuity is an incident happens by chance, it does not carry any significance to the term 'perils of the sea' as far as the question of causation is concerned. To him, an effect or a loss is caused and does not simply happen. The term 'fortuity' will only be of significance if such incident is completely unexpected and unforeseen.

Fortuity is not, however, completely unforeseen. It is reasonable for any

[23] *Cambridge International Dictionary of English*, 1995, p 555.
[24] [1924] AC 431, HL.
[25] Ibid, at p 465.

seafaring man to foresee that during a long voyage at sea, an accident or casualty may happen to the ship where an unfavourable or adverse weather is bound to have occurred. When certain commodities are sent on a sea-voyage, the assured is considered to know that certain amount of damage or loss is bound to happen to the commodities[26]. Lord Wright, by referring to the storms at sea that is indeed outside the ordinary winds and waves, opined in *Canada Rice Mills v Union Marine and General Insurance* in the following words:

> 'They may happen on the voyage, but it cannot be said that it must happen. In their Lordship's judgement, it cannot be predicated that where damage is caused by a storm, even though it's incidence or force is not exceptional, a finding of loss by perils of the sea may not be justified.'[27]

These are incidents that are indeed foreseeable even though the exact time of such occurrences cannot be foretold and if any of the incidents take place during the voyage, the loss accruing from it cannot be strictly said as foreseen thus releasing the insurer from liability[28].

The courts, at the beginning of the 20th Century, in the case of *Popham and Willet v St Petersburg Insurance Co*[29], had tried to define the word 'fortuitous' by making a distinction between what is regular and normal and what is unusual and unexpected. Lord Sumner in *Mountain v Whittle*, tried to apply the distinction by ruling that:

> 'Sinking by such a wave seems to me a fortuitous casualty; whether formed by passing steamers or between tug or tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of

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[26] *Arnould's Law of Marine Insurance and Average*, eds. Sir M J Mustill and J C B Gilman, 16th Edition, 1981, para 781, p 638.
[27] [1941] AC 55, at p 70.
[28] In *N E Neter & Co v Licenses and General Insurance Co Ltd* [1944] 1 All ER 341, for example, even an expected weather, which was obviously not accidental, could be held as fortuitous which amounted to a loss by peril of the sea. Therefore, foreseeability of certain events cannot be taken as a test to determine a certain event as a casualty.
[29] (1904) 10 Com Cas 31.

such towage.'[30]

A simple incursion of seawater would not immediately point to perils of the sea unless it can be shown that the event was fortuitous and in order to do so, some evidence pointing to the adverse and unusual condition occurrence[31]. A fortuitous event taking place from within the vessel during the voyage that makes her unseaworthy and allows water into her, the loss resulted from it is a peril of the sea even though the action of the sea is rendered inevitable by the occurrence and weather, at and near the time of the loss, was perfectly fine[32].

Accidental

'Accident', or 'casualty' as it is sometimes called, is defined as something that happens unexpectedly and unintentionally, which especially caused damage or injury[33]. Again, for the purpose of really understanding this element of a sea peril, the judgment of Lord Sumner in *Samuel v Dumas* can be looked into where he said:

> 'Accidents are not what is ordinary: what will happen more or less in any case is not fortuitous. To say that, if you make a hole under water, water will ordinarily come in, is only a gibe. That is an extraordinary manner for water to enter a hold at sea. To say that scuttling is not a peril of the sea because it has nothing to do with the seas except there are the scenes on which the drama of

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[30] [1921] 1 AC 615, at p 630. In this case, seawater had entered a houseboat through defective seams above the waterline, by the high bow wave caused by a powerful tug employed to tow the boat.

[31] *Arnould's Law of Marine Insurance and Average*, eds. Sir M J Mustill and J C B Gilman, 16th Edition, 1981, para 793, p 654.

[32] Ibid, para 793, p 655. See the decision reached by the Australian court in *Skandia Insurance Co v Skoljarev* (1979) 26 ALR 1. A similar phenomenon can be witnessed in *Canada Rice Mills v Union Marine and General Insurance* [1941] AC 55 where the Privy Council held that the entry of seawater, which would have happened if the ventilators to the hold where the rice was kept had not been closed, constitutes the operation of a peril of the sea.

[33] *Cambridge International Dictionary of English*, 1995, p 8.

crime is played out, appears to me also to be playing with words.'[34]

His Lordship was persistently of the view that accidents only take place in an extraordinary manner and there is no way for them to operate ordinarily. Something that is an ordinary and natural consequence of certain acts does not accidentally happen. As Slade LJ in a more recent case of *Lloyd (JJ) Instruments Ltd v Northern Star Insurance Co Ltd* ('*The Miss Jay Jay*') pointed out:

> 'The word 'accidental' in s 1 (a) of the policy in the present case must, in my opinion, similarly exclude events which must happen in the ordinary course of navigation.'[35]

At the first instance court, Mustill J had earlier categorised that the sea conditions encountered by the yacht in question were 'accidental means' as set out in the policy, observed that the sea conditions faced by the yacht were such that a person navigating at sea could have anticipated but would hope to avoid. The word 'accidental' means that even though an unwanted event is foreseeable, it will still be considered as a casualty if it really takes place.

An illustration of an 'accident' can be found in the case of *Popham v St Petersburg Ins Co*[36] where Walton J held that the obstruction of ice to the navigation of the vessel was indeed an accidental and unexpected event and therefore, the loss caused was one by perils of the sea.

In another case, even the smooth condition of the seawater at the time of the accident and the proper manner in which the towage of the vessel was carried out failed to rule out the loss by peril of the sea. In *Whittle v Moun-*

[34] [1924] AC 431, at p 466.
[35] [1987] 1 Lloyd's Rep 32, at p 38.
[36] (1904) 10 Com Cas 31.

tain[37], the court held that the influx of water through leaky seams was one caused by perils of the sea even though the condition during which the incident took place was very much ordinary. This decision shows that even the slightest degree of the 'accidental' or 'unexpectedness' will justify the court's finding of a peril of the sea.

Ivamy considers perils of the sea as commonly known as occurrences that involve something fortuitous and unexpected[38]. From the above discussion, it is found that these two elements work together in the operation of a sea peril. When an accident or a casualty takes place, it happens unexpectedly and it happens unintentionally and unplanned.

Weather condition

In discussing perils of the sea, three important points have often appeared. When the term 'perils of the sea' are mentioned, what often crosses our minds is the picture of a ship tumbling in exceptionally forceful winds and extraordinarily violent waves[39]. Nevertheless, by interpreting and reinterpret-

[37] [1921] AC 615. As Lord Wright in *Canada Rice Mills v Union Marine and General Insurance* [1941] AC 55 enchantingly put it at p 68… 'Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous entry of the sea water which is the peril of the sea in such cases.' He further declared that to determine a particular peril as one falling under the genesis 'perils of the sea' is a question of fact for each individual case

[38] E R Hardy Ivamy, *Marine Insurance*, 4th Edition, 1985, p 143. See also Susan Hodges, *The Law of Marine Insurance*, 1996, p 176 in which she views both the words 'peril' and 'accident' contain the elements of fortuity and unexpectedness where one cannot forego any of the elements[38]. The operation of fortuity and accident does certainly not require the ill condition of weather nor does the foreseeability of a certain incident stands as the standard test to determine a marine peril. See the judgment of Lord Halsbury in *Hamilton v Pandorf* who dictated … 'I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'...' (1887) 12 App Cas 518, at p 524.

[39] The exclusion of 'ordinary winds and waves' from the definition of 'perils of the sea' as provided by Rule for Construction 7 of the Marine Insurance Act 1906 tends to show that the criterion of perils of the sea only points to weather which is extraordinary or abnormal.

ing the wordings of the Marine Insurance Act 1906 and by considering several judgments, it is found that losses by perils of the sea are not strictly confined to those caused by extraordinary violence of the winds or waves but may also include all losses proximately occasioned by the fortuitous action of the winds and waves[40]. As Lord Herschell put it in the famous case of *'The Xantho'*[41],

'...It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds and waves. I think that is too narrow a construction of the words and it is certainly not supported by the authorities, or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel even when the collision results from the negligence of that other vessel, falls within the same category.'

At the end of this discussion, we will thence discover that even incidents that take place during the most ordinary weather may be held as caused by sea perils and the condition of weather can no longer be considered as a prime test in determining a loss by perils of the sea. As Lord Wright, in delivering the judgements of the Privy Council, in *Canada Rice Mills v Union Marine and General Insurance* said, 'There are many contingencies which might let the water into the ship besides a storm …'[42]

From the decisions of a number of cases illustrated above, it seems that, the condition of weather at the time of the loss no longer plays an important

[40] *Halsbury's Laws of England*, Vol 25, 4th Ed, 1994, p 94.
[41] (1887) 12 App Cas 503, at p 509.
[42] [1941] AC 55, at p 68. Lord Halsbury, in *Hamilton v Pandorf* (1887) 12 App Cas 518, at p 524, previously opined that any accident that should do damage by letting in seawater into the vessel should be one of the risks contemplated under heading perils of the sea. Lord Bramwell enchantingly illustrated at p 527 that… 'An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behaviour or ill-condition. But that is met by the argument, that if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or it's consequences.'

part in the operation of a sea peril. There are cases where losses that took place during the most favourable weather were held to be occasioned by perils of the sea[43]. It certainly does not take forceful thunderstorms and violent waves to fall under the term. Lord Wright, in his judgement in *Canada Rice Mills Ltd v Union Marine and General Insurance Co*[44], affirmed the fact by saying:

> 'It cannot be predicted that where damage is caused by a storm, even though it's incidence or force is not exceptional, a finding of loss by perils of the seas may not be justified.'

His Lordship further quoted and approved the findings of Lord Herschell in *The 'Xantho'*[45] who was strong of the view that no exceptional violence of weather is necessary to constitute a peril of the seas. A persuasive decision by Mason J in an Australian case of *Skandia Insurance Co v Skoljarev* can also be taken into consideration where he decided that the old view which required the presence of extraordinary action of winds and waves has now been quite discredited[46]. In a more recent case of *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd* (The 'Miss Jay Jay')[47], Mustill J explained that the adjective 'ordinary' qualifies the word 'action' and not 'winds and waves'. Therefore, even the 'ordinary winds and waves' can qualify as perils of the sea.

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[43] For eg *Mountain v Whittle* [1921] AC 615. An explicit example of where a peril of the sea would have occurred even though the weather, during which the incident took place, was perfectly fine. In this case, the influx of water through leaky seams above the water line occasioned by a breast wave caused by the towing of the vessel was held to be a peril of the sea even though the water was smooth and the towage was properly performed. The best illustration can be seen in the case of *Hamilton v Pandorf* where the loss to the cargo of rice had nothing at all to do with the condition of the weather during the voyage. The cause of the loss was held to be due to the act of the rats that had gnawed a hole on a pipe from the sea leading to the bathroom, which had let the sea water to escape and eventually spoil the cargo of rice. See also the discussion by Susan Hodges, *The Law of Marine Insurance*, 1996, p 176.

[44] [1941] AC 55, at p 76.

[45] (1887) 12 App Cas 503.

[46] [1979] 142 ALR 375.

[47] [1987] 1 Lloyd's Rep 32.

Action of the sea

Another important point denoting the term 'perils of the sea' is that it refers to a danger caused by the action of the sea where no human force can make any imprint on it. From the various decisions, it has been found that no human action will actually affect the operation of a sea peril. The decision of the Privy Council in the *Canada Rice Mill v Union Marine and General Insurance*[48] is an excellent example where it was held that the action taken by the crews to cover the ventilators of the hold where the rice were kept, for the purpose of preventing the incursion of sea water leading to the heated condition of the rice, was indeed a peril of the sea. The intervention of human action during the happening of a sea peril, in this case, did not affect the action of the sea, ie the heavy storm, from becoming the proximate cause.

In a much earlier case, *'The Thrunscoe'*[49], where a cargo of oats and maize had been damaged by the closing of the ventilators owing to heavy weather, perils of the sea and not the action of closing the ventilators was held as the cause. In both these cases, the court upheld the severity and exceptional condition of the weather at sea as the proximate cause of the losses, which had led to the closing of the ventilators by the crews of both vessels. Peril of the sea is one range of perils where no human force can affect nor guard against it.

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[48] [1941] AC 55. In a bill of lading case of *Hamilton v Pandorf* (1887) 12 App Cas 518, the claim made was against the owner of a ship by the owner of the cargo of rice on board the ship, which was spoiled by sea water escaped from a hole gnawed by rats in a pipe connecting the bathroom with the sea. Lord Halsbury LC pronounced his judgment at p 524.in the following words… 'One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is. And I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. See also Lord Watson's judgment at p 525, who was adamant that the meaning of 'perils of the sea' is the same whether the term appears in a policy of marine insurance or in a charterparty or in a bill of lading, said in his concurring judgement as follows '…But in the case where rats make a hole, or where one of the crews leaves a port-hole open, through the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful eyes been employed, the sea would not have been admitted and there would have been no consequent damage.' In the same case, Lord Bramwell firmly held at p 527 that 'The damage was caused by the sea in the course of navigation with no default in anyone.'

[49] [1897] P. 301.

In an American case of *Garrigues v Coxe*[50], it was held that a leak caused by the gnawing of rats, without the negligence of the ship owner, was a risk falling under the term 'perils of the sea'. In both these cases, even though with the absence of any unordinary weather or forceful winds, the losses were held to be occasioned by perils of the sea because it was the sea that caused the damage, ie the sea water. As Lord Herschell, in the earlier case of *Hamilton v Pandorf*, pointed out:

> '…Taking the facts of this case as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy, as due to a peril of the sea. It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be anticipated. And in as much as it was not the result of any act or default on part of the ship owner or his crew, I think, for the reasons I have given in my opinion in the case already alluded to, that it is within the exception in the bill of lading.'[51]

The word 'action of the sea', in this case, ie the incursion of the sea water itself renders the damage to the rice as caused by a peril of the sea. The choice of the word itself reflects the less stringent approach by the House of Lords in interpreting the term 'perils of the sea'. This decision was further explained and the scope of 'action of the sea' was narrowed down in *Patterson v Harris*[52] where it was held that to constitute a peril of the sea, the sea and salt water must be the destroying agent. In other words, a mere existence of a hole gnawed by rats, if not supplemented with the incursion of seawater, does not give rise to a claim by peril of the sea. The question of whether such a loss by perils of the sea may be affected by the fact that the loss would not have happened but for the negligence of the master or crew of the vessel is no longer relevant. Regardless of whether there appears to be negligence or not, the claim by perils of the sea will succeed provided the sea and salt water is the destroying

[50] 1 Binney, Penn., 592.
[51] *Hamilton v Pandorf* (1887) 12 App Cas 518 at p 530.
[52] (1861) 1 B & S 336.

agent. From the wordings of s 55(2)(a), it may now be settled that such loss is caused proximately by perils of the sea and only remotely by the negligence or unskillfulness of the master or crew[53].

Based upon the above discussion, it may be justified to say that in the operation of a sea peril, the action of the sea is important where the sea and the seawater, in certain cases, must be the destroying agent to a particular loss. However, such operation of the sea peril will not be affected by any human action.

Incidental to the course of navigation

It has also been established that not every casualty or accident that takes place on a ship at sea can simply be categorised as a peril of the sea. In order to qualify as a sea peril, the happening leading to the loss must be one that takes place in the course of navigation and incidental to the navigation. In *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co*, Lord Bramwell suggested a tentative definition of a peril of the sea as:

> 'Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of navigation of the ship, and incidental to the navigation, and causing loss to the subject matter of insurance.'[54]

In this case, a damage was done to a donkey engine used in pumping water into the main boilers, owing to a valve being closed forcing water into the air-chamber of the pump and consequently split it open. It was held that the damage was not due to the insured perils of the sea or the general words 'all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the subject matter of insurance', even though the incident took place on board a ship. His Lordship further approved the definition laid down by Lopes J in *Pandorf v Hamilton*, which reads that damage from a peril of the

[53] Ivamy, *Chalmer's Marine Insurance Act*, 1906, 10th Edition, 1993, p 79.
[54] (1887) 12 App Cas 484, at p 492.

sea is damage to goods in a seaworthy ship caused by the action of the sea during transit that is not attributable to anybody's fault. His Lordship went on to summarise the definition of perils of the sea in the following words, 'All perils, losses and misfortunes of a marine character, or a character incident to a ship as such.'[55]

This case is an instance where the House of Lords attempted to define the meaning of perils of the sea, and with the view that the bursting of the donkey engine would have happened even on land and the nature of the damage itself is not of a marine character alone, the court decided that the loss was not one of perils of the sea neither of the general words. In addition to the above definition, Buckley LJ in the case of *Stott (Baltic) Steamers v Marten*[56] laid down another definition for the term, ie 'A peril to which the assured would not be exposed if his adventure was not a marine adventure.'[57]

After looking into the strong dispositions by the courts as discussed above, we cannot thereafter dispute the fact that not all accidents or casualties occurring at sea can be generalised as perils of the sea. The requirement of 'incidental to the navigation of the ship' has been proven, in light of the above authorities, as vital in classifying a sea peril. In a Malaysian case, *Pana Vana Letchumanan Chettiar v The Jupiter Insurance Co*[58], Home J profoundly said to this effect:

> 'Washing deck is incidental to the navigation, for ships must be kept clean and the decks need to be wetted down. It is a wooden deck, and as the master has described, must periodically be

[55] Ibid.
[56] (1914) 19 Com Cas 438; affd [1916] 1 AC 304, HL.
[57] Ibid, at p 439. Lord Herschell laid down a very interesting point in *'The Xantho'* (1887) 12 App Cas 503, when he proclaimed at p 509, as follows, 'I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against the natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.'
[58] [1939] MLJ 39.

scrubbed and holystoned … I therefore find that the damage had been caused by a peril of the sea.'

The new definition of 'Perils of the Sea'?

Finally, ensuing from the above discussions, a new and revised definition may now be presented. Thus, in determining what falls under the criterion 'perils of the sea', the following conditions must be present:

a) The term 'peril' gives meaning that it must be accidental and fortuitous[59]. Lord Herschell, in his famous judgement in *'The Xantho'*, enchantingly ruled that '[t]he purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.'[60] This point, however, is open to criticism especially when it involves a claim by an innocent insured third party in scuttling cases because a wilful act of the person in charge of the ship may not be coupled with the intention and knowledge of the insured. A clear example can be seen in the case of *P Samuel & Co Ltd v Dumas*[61] where the assured was denied his right of recovery as an innocent mortgagee when the vessel was scuttled by the master with the connivance of the owner.

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[59] E R Hardy Ivamy, *Chalmer's Marine Insurance Act 1906*, 1994, p 172.

[60] (1887) 12 App Cas 509. The ancient case of *Magnus v Buttermer* (1852) 11 CB 876 can amplify this point where the insured ship was damaged in the harbour as a result of taking the ground on the natural falling and rising of the tide. The court held that as there was nothing unusual, no peril and no accident leading to the damage, it was a loss by perils of the sea but by the ordinary wear and tear of the vessel itself.

[61] [1924] AC 431, HL. Lord Sumner presented a very interesting judgment at p 469, by saying that as far as an innocent mortgagee and cargo-owner is concerned, the acting of scuttling by the master or crew of the ship is fortuitous and unexpected. The question whether the act of scuttling was connived by the owner is irrelevant because the claim is by the mortgagee, who plays no part at all in the navigation of the ship. In another interesting judgment, Mustill J in *'The Miss Jay Jay'* [1985] 1 Lloyd's Rep. 271 commented that, in the older form of words, the word 'accidental' used in the policy makes explicit what is implicit. Thus, for a loss covered under perils of the sea to be recoverable, the element of 'fortuity' must be present. The decision of Home J in *Pana Vana Letchumanan Chettiar v The Jupiter Insurance Co* [1939] MLJ 39 must be seriously taken into consideration where it was held that the damage to the insured cinematograph films was caused by perils of the sea because such damage was one that is not anticipated even with the ordinary use of a hose pipe in washing the deck.

b) The expression is 'peril of the sea' and not 'peril on the sea'[62]. Since incidents taking place on board a ship cruising at sea cannot be simply categorised as perils of the sea, the judgment of Lord Herschell in The 'Xantho' must be highlighted, in which he said:

> 'I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words.'[63]

The term 'perils of the sea' does not necessarily cover all accidents or casualties that take place at sea. For instance, the risk of capture, seizure or fire which may happen during a particular voyage will not be automatically covered as sea perils and must therefore be expressly stated in the policy in order to be covered.[64]

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[62] E R Hardy Ivamy, *Chalmer's Marine Insurance Act 1906*, 1994, p 172.

[63] (1887) 12 App Cas 503, at p 509. In another stimulating decision, Lord Bramwell in *Thames and Mersey Marine Insurance v Hamilton, Fraser & Co* (1887) 12 App Cas, 498 observed, at p 493, in the following words, 'The damage to the donkey engine was not through its being in a ship or at sea. The same thing would have happened had the boilers and engines been on land. The sea, waves and waves had nothing to do with it.'

[64] See also *Stott Steamers Ltd v Marten* [1916] AC 304 where Lord Atkinson laid down an interesting account to this point, at p 311, in the following words, 'A peril whose only connection with the sea is that it arises on board ship is not necessarily a peril of the sea nor a peril ejusdem generis as a peril of the sea. The breaking of the chain of the crane, or of a shackle of that chain, if overloaded or subjected to too severe strain, is not more maritime in character when it occurs on land.' Another important case to illustrate this point can be found in the case of Grant, *Smith & Co v Seattle Construction and Dry Dock Co* [1920] AC 162 where it was found that the sea, wind and wave has to playa part in causing a loss by perils of the sea. Lord Buckmaster, after acknowledging the fact that it was not desirable to attempt to define too exactly a 'peril of the sea' laid down his ruling, at p 171, as follows, '… it is some condition of sea or weather or accident of navigation producing a result which, but for these conditions would not have occurred.' The decisions reached in the above cases were different from *'The Stranna'* [1938] P. 69 where the court held that since the heeling of the ship could not have happened on land, the loss was caused by perils of the sea. The court, in holding so, based it decision also on the founding that such heeling of the ship was wholly unexpected and was just an accident. The same decision can also be found in a recent case of *'The La Pointe'* [1991] 1 Lloyd's Rep 89 where it was held that as the ship sank as a consequence of the ingress of sea water into the ship, which could not have occurred on land, the accident was by perils of the sea.

Conclusion

This attempt to revise and to come up with a new definition to the term 'peril of the sea' may be useful in actually outlining the parameters of perils of the sea. In order to ascertain what sort of perils fall under this most commonly covered range of risk in marine insurance, the conclusive meaning of the term is deemed pertinent. In defining 'perils of the sea' and ascertaining whether a particular peril qualify as such, it is extremely important to always bear in mind the two conditions proposed by Ivamy above; firstly, that such peril must be accidental and fortuitous and secondly, that it must be 'of the sea.'