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SEAWORTHINESS IN CHARTERPARTIES, BILLS OF LADING AND MARINE INSURANCES : A COMPARATIVE STUDY

by

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1. Introduction

Various undertakings are implied in charterparties, bills of lading and marine insurances. Such undertakings are implied because they are so vital that without them the contract would not function properly. One of such undertakings on the part of the shipowner is to provide a seaworthy vessel.

In general, seaworthiness means the fitness of a vessel to complete the contract voyage by encountering the ordinary perils of the sea and other risks to which she may be exposed to in the course of her voyage, and to receive and preserve her cargo by encountering the malfunctions and problems of the stowage system.

'Seaworthiness' is used in its ordinary meaning and not in any extended or unnatural meaning. It means that the vessel with her master and crew is herself fit to encounter the perils of the voyage and also that she is fit to carry the cargo safely on that voyage.[1]

The shipowner's undertaking merely relates to the ordinary perils and malfunctions likely to be encountered on the voyage. He does not guarantee that the ship will withstand any peril or malfunction.

'Seaworthiness' is used in two senses – strict and wide. As **Lord Justice Scrutton** observed[2] '... the word seaworthiness is used in two senses : (1) fitness of the ship to enter on the contemplated

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1. Actis Co. Ltd. v. The Sanko SS Co. Ltd., The Aquacharm (1982) 1 Lloyd's Rep 7, 11 CA (per Lord Denning MR).
2. Reed V. Page (1927) 1KB 743 (CA) 754.

adventure of navigation; and (2) fitness of the ship to receive the contemplated cargo as a carrying receptable. A ship may be unfit to carry the contemplated cargo, because, for instance, she has not sufficient means of ventilation, and yet be quite fit to make the contemplated voyage as a ship.'

Seaworthiness, in its strict sense, refers to the fitness of the ship as an 'efficient means of transport', capable of encountering the ordinary perils of the sea.

Mr Justice Field said[3] 'Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires. A vessel seaworthy for port and even for loading in port may be, without any breach of warranty, whilst in port, unseaworthy for the voyage : Annen v. Woodman, but if she put to sea in that state the warranty is broken. Now the degree of seaworthiness which the merchant requires is seaworthiness for the voyage and surely the most natural period at which the warranty is to attach is that at which the perils are to be encountered which the ship is to be worthy to meet ...

As an 'efficient means of transport', a ship is seaworthy when her hull, tuckle, engine, equipments etc. are in good order and condition, when she has an adequate stock of fuel and ballast to complete the voyage, when she has necessary papers and documents for the voyage and, of course, when she is manned by competent and adequate number of crews. Thus where the shipowner, while appointing an engineer did not enquire about his qualifications, and during the voyage the ship's engine broke down and the engineer, who was in fact, wholly incompetent, failed to repair it[4], or where the ship proceeded on her journey with insufficient fuel and she had to burn as fuel some of her cargo to enable her to get to the port of

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3. Cohn V Davidson (1877) 2 QBD 455.
4. The Roberta (1938) 60 L.I.L.R. 85 (CA).

destination[5], or where due to the reason of taking an avoidable excess of fuel, the ship had to incur expenses for lightering[6], it was held that the ship was unseaworthy.

Seaworthiness, in a wide sense, refers to the fitness of the vessel as an 'efficient floating warehouse' for her cargo. Obviously, this is a modern extension of the doctrine of seaworthiness, and is often referred to as 'cargoworthiness'.

As an 'efficient floating warehouse' a vessel is seaworthy when she is properly equipped to carry the contract cargo. Thus where the ship's pumps were incapable of extracting moisture from wet sugar[7] or where iron armour plates broke loose in rough weather and went through the side of the vessel[8], or where a cattle transport ship was not disinfected after an out break of foot-and-mouth disease and failure to disinfect the ship resulted in cattle contacting the disease[9], or where the refrigerating system, which was defective from the very beginning, broke down during the voyage and the cargo of meat suffered[10], it was held that the ship was unseaworthy.

A ship may become unseaworthy due to bad stowage which endangers the safety of the ship. Thus, in **The Standale**[11] a cargo of grain in bulk was stowed in the hold, but adequate measures against its shifting was not taken. It was held that the mode of stowage made the ship unseaworthy, since it endangered its safety.

Where cargoes are damaged due to bad stowage but the safe navigation of the vessel has not been impaired thereby, then it does

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5. The Voltigern (1899) P. 140.
6. Darling v. Raeburn (1907) 1 KB 846.
7. Stanton v. Richardson (1874) L.R. 9 C.P. 390 (EX.Ch.).
8. Kopitoff v. Wilson (1876) 1 QBD 377.
9. Tattersall v. National Steamship Co. (1884) 12 QBD 297.
10. Cargo per Maori King v. Hughes (1895) 2 QBD 550 (C.A.).
11. (1938) 61 L.I. L.R. 223.

not amount to unseaworthiness. Thus in **The Thorsa**[12] chocolate was stowed in the same hold with cheese. One arrival at destination, the chocolate was found tainted with cheese. It was held that the ship was seaworthy, since the stowage of chocolate and cheese in the same hold was simply a bad stowage and it did not endanger the safety of the ship.

Viscount Findlay laid down[13] '... seaworthiness ... relates to the condition of the vessel as regards its capacity to perform the voyage with safety to itself and the goods and persons on board.' He posed the question : 'Is the vessel fit to cope with the perils of the sea?' This is the vital test of a seaworthy ship at the commencement of her voyage, since at that time she must be fit for and capable of navigating on the contract voyage and of safely transporting the cargoes to their port of destination.'

To be seaworthy a vessel 'must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it.'[14]

The test of seaworthiness is 'Would a prudent owner have required the defect to be remedied before sending his ship to sea if he had known of it? If he would, the ship was unseaworthy.'[15]

Whether a vessel is seaworthy or not is a question of fact, depending on the type of vessel, features of voyage, nature of cargo, standards prevailing, knowledge possessed by the parties to the contract at the time it is entered into etc. Thus crossing the Atlantic requires stronger vessel than sailing across the English Channel.

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12. (1961) 257.
13. Elder, Dempster & Co. v. Paterson, Zochonis (1924) AC 522 (HL), 539.
14. McFadden v. Blue Star Line (1905) 1 KB 706.
15. Ibid.

II. Comparison among Charterparties, Bills of Lading and Marine insurances in respect of seaworthiness

In this article an attempt will be made to examine the implied undertaking of seaworthiness of the shipowner. The differences among the three documents of charterparties, bills of lading and marine insurances concerning seaworthiness, would be analysed with regard to nature of undertaking, time of seaworthiness, seaworthiness by stages, seaworthiness, whether a condition or warranty, burden of proving unseaworthiness, carrier's immunities, and effect of unseaworthiness.

III. Nature of Undertaking

(i) Charterparties

The shipowner is under an 'absolute obligation' to provide a seaworthy ship to the charterer, unless otherwise agreed. In otherwords, the shipowner is liable for unseaworthiness whether he has been negligent or not.

The shipowner can, however, exempt himself from the liability of unseaworthiness by using clear and unambiguous language in the contract. Hence, general words do not afford any protection. Thus in the **Nelson Line (Liverpool) Ltd. v James Nelson & Sons Ltd.** [16] cargoes were shipped under an agreement which stated that the shipowner would not be liable for any damage 'which is capable of being covered by insurance.' The cargoes were damaged due to unseaworthiness of the ship. It was held that the clause was not sufficiently clear to exempt the shipowner from the obligation to provide a seaworthy ship.

Again, a mere right given to the charterer to inspect the vessel before loading and to satisfy himself that she is fit for the contract cargo does not exempt the shipowner from his obligation to supply a

16. (1908) AC 16, (1904-7) All ER Rep 244, HL.

cargoworthy vessel. Thus, in **Petrofina S. A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa**[17] the charterparty of a tanker which was to carry a cargo of benzine provided in clause (1) that the ship was to be 'in every way fitted for the voyage and to be maintained in such condition during the voyage.' By clause (16) the master was bound to keep tanks, pipes and pumps clean. Finally, under clause (27) the steamer should be clean for the cargo in question to the satisfaction of the charterer's inspector. The benzine was discoloured, due to the fault of the steamer. The shipowner, however, pleaded clause (27), and contended that he was only bound to keep the tanks clean to the satisfaction of the charterer's inspector, and the latter had in fact expressed his satisfaction. It was held that the clauses (1) and (16) contained an express warranty of sea, i. e. cargoworthiness, and that clause (27) far from derogating from that warranty, only gave an additional right of inspection to the charterers. Without express words to this effect, the satisfaction of the inspector could not be relied on as a discharge of the shipowner's obligation to provide a seaworthy ship.

(ii) Bill of Lading

Before the enactment of the Carriage of Goods by Sea Act[18] (unless otherwise excluded) the carrier was under an 'absolute obligation' to provide a seaworthy vessel. The Act abolished the 'absolute undertaking.' Section 3 of the Act expressly provides 'There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of goods to provide a seaworthy ship.'

The 'absolute obligation' was substituted by a 'qualified obligation.' Article III, Rule 1 of the Schedule to the Act provides 'The carrier shall

17. (1937) 53 TLR 650 (CA).

18. 1925 : Act XXVI, which applies only to bills of lading.

be bound, before and at the beginning of the voyage, to exercise due diligence to–

(a) make the ship seaworthy :

(b) properly man, equip, and supply the ship :

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage an preservation.'

Again, Article VI, Rule 1, paragraph 1 of the Act provides 'Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating ad cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.'

Whether due diligence has been exercised is a question of fact in each case. Thus a failure to discover that the steelworks of a vessel was corroded[19], or a failure to instruct engineers in the operation of an oil fuel system[20], or failure to see that a vessel's sanitary water system was in order[21] is sufficient to prove absence of exercise of due diligence.

Besides the carrier, due diligence is to be exercised by the employees, servants, agents and also by independent contractors or ship repairers. In **Riverstone Meat Co. Pty Ltd. v. Lancashire**

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19. Aktieselskabet de Danske Sukkerfabriker v. Bajamar Compania Naviera SA, The Torenia (1983) 2 Lloyd's Rep 210, QBD (Com. Court).

20. The Makedonia (1962) 2 All ER 614.

21. International Produce Inc. and Greenwich Mills Co. v. SS Frances Salaman, Swedish Gulf Line AB and Compania de Navegacao Maritima Netumar, The Frances Salman (1975) 2 Lloyd's Rep. 355.

Shipping Co. Ltd.[22] a shipyard fitter employed by the ship repairers refixed some inspection covers on some storm valves, but, due to negligence, failed to secure the nuts properly. The omission was impossible to detect by visual inspection. The working of the ship in rough weather loosened the nuts and sea water entered through the valve and damaged the cargo. The House of Lords held that the negligence of the fitter was a lack of due diligence for which the carrier was responsible.

(iii) Marine Insurances[23]

In a contract of marine insurance the law implies an 'absolute warranty' that the ship is seaworthy at the commencement of the voyage, or at the commencement of any stage. Thus the insurer is discharged though unseaworthiness arises from hidden causes which no reasonable examination could reveal.

The rules of law and private contracts, however, have contributed much to mitigate this rigour :

(a) In time policies, the absolute warranty of seaworthiness does not apply, and

(b) In voyage policies of goods, when the clause 'seaworthiness admitted' is inserted, the insurer promises to pay the assured, in spite of the unseaworthiness of the ship, in which goods are being carried.

IV. Time of Seaworthiness

(i) Charterparties

In a voyage charterparty, the shipowner must provide a seaworthy ship to the charterer at the beginning of the voyage.

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22. (1961) AC 807, (1961) 1 All ER 495, H. L.
23. For details see Giles, O.C., Shipping Law, 7th Edn., (1982), 375.

According to **Mr. Justice Field**[24], '... the warranty of seaworthiness ... is a warranty that the ship is or shall be seaworthy for the voyage at the time of sailing on it. That is the point at which the risk commences, at which the warranty attaches ...

It is important to note that in the case of time charters, the implied undertaking of seaworthiness attaches at the commencement of the period during which the vessel is on hire.[25]

(ii) Bills of Lading

Article III, Rule 1 of the Schedule to the Carriage of Goods by Sea Act[26] provides that a ship must be seaworthy 'before and at the beginning' of her voyage.

In **Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine**[27] it was laid down that the words 'before and at the beginning of the voyage' cover the period from at least the beginning of loading until the vessel starts on the voyage. The liability under Article III begins at least when loading begins. In that case a ship caught fire while it was being loaded. The fire was caused by the negligent use of an acetylene torch when thawing out frozen scrupper pipes. Ultimately the ship had to be scuttled. It was held that diligence to make the ship seaworthy at the beginning of loading was an overriding obligation. The shipowners were, therefore, liable to the cargo owners whose cargoes were destroyed on board.

Seaworthiness needs only to exist 'before and at the beginning' of the voyage, and there is no implied undertaking that the ship will continue to be seaworthy throughout the voyage. Where the ship is seaworthy at the commencement of her voyage but subsequently becomes unseaworthy at sea, and incurs loss, the liability will be

24. Cohn v. Davidson (1877) 2 QBD 455.
25. Reed v. Page (1927) 1 KB 743.
26. 1925 : Act XXVI.
27. (1959) AC 589.

determined not by reference to the implied undertaking as to seaworthiness[28], but by reference to the cause of the loss. The shipowner will be protected if loss was due to an excepted peril, otherwise he will not. The fact that the ship is fit for sailing at the commencement of her voyage will not relieve the shipowner from liability for a breach of the implied undertaking, if subsequently, she suffers loss of damage due to an unseen defect or weakness which had existed when she first set out.

(iii) Marine Insurances

In a voyage policy a ship must be seaworthy at the commencement of the voyage. On the other hand, in a time policy a ship must be seaworthy at the beginning of the period for which the policy is taken.

V. Seaworthiness by Stages

(i) Charterparties

In a voyage charter where the voyage is divided into several stages, the ship must be seaworthy at the beginning of each new stage, so as to be able to complete that part of the voyage, so that when she commences the first stage, she need not be fit for the second or third stage. On the completion of each stage she must have that degree of fitness which is required for the next stage. The object of this doctrine is to mitigate the harshness of seaworthiness upon the shipowner.

The stages of a voyage are usually determined by different physical conditions, e.g. river and sea, fueling ports or ports of loading, which must be usual and reasonable. Thus in **The Voltigern**[29] a vessel sailed from the Philippines to Liverpool. The charterparty excluded liability for the negligence of the master and engineers. The voyage was divided into several stages. She called at Colombo, but did not

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28. since the ship had been seaworthy at the time when she sails, and as such the implied undertaking had been complied with.

29. (1899) P.140.

take on sufficient coal for the next stage to Suez. When she was near a coaling station, the master did not take on any more fuel as he was not warned by the engineer that supplies were running short. Some of the cargoes had to be burned as fuel to enable her to get to Suez. It was held that the shipowners could not plead the exception clause, since he had not made the vessel seaworthy at the commencement of each stage of the voyage.

The doctrine of stages does not apply to time charters. Hence the undertaking of seaworthiness in such charters does not arise afresh at the commencement of each of the voyages. The undertaking is satisfied for the whole period of hiring if at the commencement of that period the vessel is in a seaworthy condition.[30]

(ii) Bills of Lading

The principles of seaworthiness by stages relating to voyage charterparty, applies to bill of lading.

(iii) Marine Insurances

The doctrine of stages applies only to voyage policies, and not to time policies.

VI. Seaworthiness, whether a Condition or Warranty

(i) Charterparties and Bills of Lading

The undertaking to provide a seaworthy vessel is one of a complex character which cannot be categorized as being a 'condition' or a 'warranty'. It embraces obligation with respect to every part of the hull and machinery, stores, equipment and the crew. It can be broken by the presence of trivial defects easily and rapidly remediable, as well as, by defects which must inevitably result in a total loss of the vessel. Consequently, the problem is not soluble by considering whether the undertaking is a 'condition' or a 'warranty'.[31] The undertaking is

30. *Giertsen v. Tunbull & Co.* (1908) SC 1101.

31. Ivamy, E. R. Hardy, Carriage of Goods by Sea, 12th Edn. (1985), 15.

an undertaking one breach of which may give rise to an event which relieves the charterer or shipper of further performance of his part of the contract if he so elects, and another breach of which entitles him to monetary compensation in the form of damages.[32]

(ii) Marine Insurances

In marine insurance, seaworthiness is always treated as an implied 'warranty,' and never as a 'condition.'

VII. Burden of proving unseaworthiness

(i) Charterparties

The burden of proving unseaworthiness is upon the charterer. There is no presumption of law that a ship is unseaworthy because she breaks down or even sinks from any unexplained reason. However, in exceptional cases the facts may raise an inference of unseaworthiness. Thus in **Fiumana Societa di Navigazione v. Bunge & Co. Ltd.**[33] an unexplained fire broke out in the coal bunker. It was held that it could be presumed that this was due to unfitness of the coal banker, and as such the ship was unseaworthy.

(ii) Bills of Lading

Article IV, Rule 1, Paragraph 2 of the Schedule to the Carriage of Goods by Sea Act[34] provides 'Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article'.

The shipper must establish a prima facie case of unseaworthiness and that he has sustained loss or damage thereby. Then the burden

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32. Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kaisha Ltd. (1962) 1 All ER 474, P. 487, CA.
33. (1930) 2 KB 47.
34. 1925 : Act XXVI.

of proving the exercise of due diligence to make the ship seaworthy shall be on the carrier.[35]

The carrier does not discharge the burden of proving that due diligence has been exercised by proof that he engaged competent experts to perform and supervise the task of making the ship seaworthy. The state imposes an inescapable personal obligation.[36] Hence a clause stating that a survey certificate shall be conclusive evidence of due diligence to make the ship seaworthy is void. [37]

(iii) Marine Insurances

The burden of proving unseaworthiness is upon the person who allege it.

VIII. Carrier's Immunities

(i) Charterparties

The shipowner is responsible for any loss or damage to the goods which he is carrying, unless it is covered by the exception clauses contained in the charterparty. If the charterparty is silent on this matter, then the court will presume the following exceptions :

(a) act of God;
(b) act of foreign enemies;
(c) act of war,
(d) saving or attempting to save life at sea;
(e) inherent vice in the goods themselves;
(f) the negligence of the owner of goods; or
(g) a general average sacrifice.

(ii) Bills of Lading

The Carriage of Goods by Sea Act[38] sets out a list of 'excepted perils.' But the shipowner cannot rely on them if he has not carried

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35. Minister of Foods v. Reardon Smith Line (1951) 2 Lloyd's Rep 265
36. Per Lord Keith of Avonholme (1961) AC 807.
37. The Australia Star (1940) 67 Ll. 2 Rep. 110, 116.
38. 1925 : Act XXVI.

out his obligation under Article III, Rule 1 of the Schedule to the Act, to exercise due diligence to make the ship seaworthy and its non-fulfillment causes the damage.[39]

Article IV, Rule 2 of the Schedule to the Act[40] provides 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship:
(b) fire, unless caused by the actual fault or privity of the carrier :
(c) perils, dangers and accidents of the sea or other navigable waters :
(d) act of God :
(e) act of war :
(f) act of public enemies :
(g) arrest or restraint of princes, rulers or people, or seizure under legal process :
(h) quarantine restriction :
(I) act or omission of the shipper or owner of the goods, his agent or representative :
(i) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general :
(k) riots and civil commotions :
(l) saving or attempting to save life or property at sea :
(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods:
(n) insufficiency of packing :
(o) insufficiency or inadequacy of marks :
(p) latent defects not discoverable by due diligence :

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39. Maxine Footwear Co. Ltd. v. Canadian Govt. Merchant Marine Ltd. (1959) AC 589.

40. 1925 : Act XXVI.

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. '

(iii) Marine Insurance

Various losses for which the insurer is not liable to indemnify the assured are as follows : [41]

(a) losses not proximately caused by the perils insured against,
(b) losses caused by the willful misconduct of the assured ;
(c) losses caused by delay,
(d) losses caused by ordinary wear and tear,
(e) losses caused by inherent vice;
(f) other losses e.g. those caused by vermin.

IX. Effect of Unseaworthiness

(i) As regards Contract of Carriage

Before the commencement of the voyage if the charterer or shipper discovers that the ship is unseaworthy and the shipowner fails to make it seaworthy by the date named in the contract for the commencement of loading, or where no date is fixed within a reasonable time, then the charterer or shipper's obligation to load is conditional upon the ship being seaworthy at the port of loading. Thus in **Stanton v. Richardson**[42] a ship was chartered to take cargo including wet sugar. When the bulk of the sugar had been loaded, it was found that the pumps were not of sufficient capacity to

41. Ivamy, E. R. Hardy, General Principles of Insurance Law, 6th Edn. (1993), 285.

42. (1874) LR 9 CP 390 (Ex. Ch).

remove the drainage from the sugar and the cargo had to be discharged. Adequate pumping machinery could not be obtained within a reasonable time, and the charterer refused to load. It was held that the ship was unseaworthy for the cargo agreed on, and as she could not be made fit within a reasonable time, the charterer was justified in refusing to load.

In **Hong Kong Fir Shipping Co. v. Kawasaki**[43] Solmon J. and all the members of the Court of Appeal were clearly of the view that unseaworthiness by itself was not a breach of a condition entitling the charterer at once to rescind the charter : to justify that, the delay must be so great as to frustrate the commercial purpose of the charter.

After the commencement of the voyage, if the charterer discovers that the ship is unseaworthy, then he cannot rescind the contract, however, he can claim damages, but for such damage as is actually caused by unseaworthiness.

(ii) As regards Freight

Where the charterer or shipper rescinds the contract of carriage, the shipowner is not entitled to any freight. On the other hand, the charterer or shipper must pay full freight, where inspite of unseaworthiness the contract subsists, or where the unseaworthiness is waived.

(iii) As regards General Average

The shipowner cannot claim general average contribution from the charterer of shipper where unseaworthiness was the cause of loss or damage.

(iv) As regards Limitation of Liability

The shipowner cannot rely on any clause in the charterparty or bill of lading entitling him to limit his liability, or claim demurrage, where his ship has been unseaworthy, and causes loss or damage.

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43 (1962) 2 QBD 26.

(v) As regards Carrier's immunities

If a ship is unseaworthy, and there is a connection between unseaworthiness and subsequent loss or damage, then the shipowner cannot rely upon any exception clause, since it only applies to perils of the voyage and not to initial defects. Thus in **Tattersal v. National Steamship Co**[44] . a ship, which on a previous voyage had carried cattle suffering from foot-and-mouth disease, was not properly disinfected, with the result that a subsequent cargo of cattle contacted the disease. The bill of lading stated that the shipowners were not to be responsible for disease or mortality and limited their liability in any event to five £ Sterling per head. The shipowners sought to rely upon this clause, but it was held that they could not do so since they had failed to provide a cargoworthy ship.

But the shipowner can rely upon exception clause where the connection between unseaworthiness and subsequent loss cannot be proved. This rule also applies to a case where in spite of the ship being unseaworthy, the damage was caused by another peril. Thus in **The Europa**[45] there was a clause in the charterparty excepting collision. At the start of her voyage the vessel was unseaworthy by reason of the fact that two upper holes had been imperfectly plugged. While entering the port of destination the ship collided with a dock wall, and a water-closet pipe was broken. Water passing through the broken pipe entered the tween decks and damaged some sugar which was stowed there. Water also flowed through the upper holes on to sugar in the lower hold. It was not disputed that this imperfect plugging existed before the cargo was loaded and thereby the ship was unseaworthy. The owners of the Europa did not, therefore, dispute their liability for the damage to the sugar in the

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44. (1884) 12 QBD 207: 5 Asp MLC 206.

45. (1908) P. 84, 93.

lower hold, admitting that it was caused by the unseaworthiness. But they did dispute their liability for the damage to the sugar in the tween decks. It was held that they were not liable for this damage. The damage to the sugar in the tween decks was caused not by unseaworthiness, but collision, and so the owners were entitled to rely on the exception clause.

The Europa was approved and followed by the House of Lords in **Kish v. Taylor, Sons & Co.**[46]

X. Findings

The findings of the above comparative analysis are as follows :

(i) As regards nature of undertaking

In a charterparty the shipowner is under an absolute obligation to provide a seaworthy ship, while in a bill of lading, he is under a qualified obligation, whereas in a marine insurance he is under an absolute warranty.

(ii) As regards time of seaworthiness

In a voyage charterparty, the ship must be seaworthy at the beginning of the voyage, whereas in a time charterparty, she must be seaworthy at the beginning of the period during which she is on hire.

In a bill of lading, the ship must be seaworthy 'before and at the beginning' of her voyage.

In a voyage policy, the ship must be seaworthy at the commencement of the voyage, whereas in a time policy she must be seaworthy at the beginning of the period for which policy is taken.

(iii) As regards seaworthiness by stages

Doctrine of seaworthiness by stages applies to voyage charterparties, bills of lading and to voyage policies, and not to time charterparties or time policies.

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46. (1912)AC 604.

(iv) As regards burden of proof

In a charterparty, the burden lies on the charterer. While in a bill of lading, 'the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption'. Whereas in marine insurance, burden of proving unseaworthiness is upon the person who allege it.

(v) As regards carrier's immunities

The carrier's immunities applicable to bills of lading are laid down in express terms in the Carriage of Goods by Sea Act[47], while immunities applicable to charterparties and marine insurances are regulated by contracts and judicial decisions.

(XI) Conclusion

The Standard of seaworthiness raises with the change of time. The invention and development of modern equipments e.g. life saving appliances, equipments for detecting, controlling and extinguishing fire, weather forecast equipments, tele-communication installations etc. and their efficiency and accuracy when considered reveal that they are indispensable for ships built today. Hence a modern ship without these equipments would be unseaworthy in today's context, though a wooden ship with sails built a hundred years ago without these equipments was perfectly seaworthy in those days. Although the standard of seaworthiness raises with the change of time, yet the basic principles of seaworthiness remain the same, i.e. the capability of the ship to complete the voyage by encountering the ordinary perils of the sea and to receive and preserve the cargo by encountering ordinary malfunctions of the stowage system.

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47. 1925 : XXVI.