SEAWORTHINESS — A COMPARATIVE SURVEY

A ship is a complex instrument with potentially hidden defects, some of which are undiscoverable by reasonable care. The maintenance, repair and inspection of the ship are delegated to experts and registered surveyors and are largely carried out while the ship is in port or drydock. Yet in the modern world the ship-owner is blamed if his ship is found to be unseaworthy, whether in fact or law. Since bills of lading, charter-parties or marine insurance policies refer to seaworthiness and do not particularise further, this perpetually creates a tug-of-war between the ship-owner and the shipper. All this leads us to the question of what constitutes seaworthiness at the present day and how both the shipper and the ship-owner can be protected in a complex commercial world?

To answer this question, the history and development of seaworthiness will have to be traced from ancient times and the duty of a ship-owner under the Common law and the Hague Rules differentiated. Recent decisions of English and American courts will also have to be sifted before we can come to a conclusion regarding the ship-owner's liability for seaworthiness of his ship.

(A) ANCIENT HISTORY :

Faint traces of seaworthiness are found as early as in Rhodian Sea Law which was the principal maritime law in the Mediterranean from circa 900 B.C.[1] Of course, no passage deals explicitly with the obligation of the ship-owner to provide the ship in a good state with its proper tackle and sufficient number of skilful mariners,[2] yet merchants were recommended by the Sea Law to make inquiries that the ship is water-tight.[3] It must be remembered that seaworthiness was not a warranty or a condition in the maritime contracts of those times, though it was a moral obligation on the ship-owners. This moral obligation is reflected in the survival of a private charter-party dated A.D. 236 in Papyrus 948 in the British Museum which among other things mentions that '. . . ship-owner is to provide sufficient sailors and complete equipment of the ship . . .'[4] Yet there was nothing in the Sea Law providing any remedy to the shipper, if the ship-owner failed to carry out his moral obligation.[5]

1. Ashburner, *The Rhodian Sea Law* (London, 1909), at p. 110.
2. *Ibid*., at p. 179.
3. *Ibid*., at p. 185.
4. *Ibid*., at p. 155.
5. *Ibid*., at p. 202.

The Rhodian Sea Law was then absorbed in Roman Law and with the fall of the Roman Empire was again incorporated in the Basilica[6] of the Eastern Roman Empire. This was used as a basis of maritime law from 600 A.D. to 1600 A.D. through the Amalfi Sea Code,[7] regulations made by Genoa, Florence, Venice and other seaport towns of Italy and finally in the Consolato Del Mare at Barcelona.[8] The earliest medieval charter-party drawn up in Pisa on August 10, 1263 A.D. specifically mentioned among other things, ship-owner's duties in reference to conditions of the ship and of the ship's company.[9] So this charter-party shows us how far the moral obligation of ship-owner to provide a seaworthy ship had developed.

(B) MEDIEVAL PERIOD:

At the same time two sets of maritime laws were developed separately from Mediterranean countries in N. W. Europe about 1200 A.D. and became known as the Rules of Oleron[10] and the Rules of Wisby.[11] These Rules which contained minor references to seaworthiness were accepted in England and formed the basis of its maritime law.[12] Thus seaworthiness in its infant stage came to England in about the 14th century and was used by the merchants who were also familiar with the maritime practices of Mediterranean countries. All through the 16th century, these continued to be the principal basis of Law Merchants in England.[13] The records of the Court of Admiralty sometimes refer specifically to the usages of merchants[14] or of mariners[15] or the Laws (or Rules) of Oleron[16] and charter-parties generally contained a similar specific reference to these laws.[17] One of the earliest of English charter-parties mentioned by Scrutton[18] dated 15th July, 1531 A.D. does contain a minor reference to seaworthiness of the ship. But it is extremely doubtful whether seaworthiness existed as a legal obligation at common law and in the first reported case in Common law on this subject, namely in *Loggan* v. *Bessett,*[19] it was decided by the court, that no such obligation

6. Ashburner, *op. cit.*, at p. 188.
7. Holdsworth, *History of English Law,* (7th ed., 1956), Vol. I, at p. 527.
8. V. Dover, *The Handbook of Marine Insurance,* (6th ed., 1962), at p. 24.
9. Ashburner, *op. cit.,* at p. 180.
10. *Black Book of Admiralty,* (R. S.), Vol. 1. 1., at pp. 98-111.
11. *Ibid.*, Vol. IV, at pp. 263-284.
12. Holdsworth, *op. cit.*, Vol. V, at p. 128.
13. Welwod, *Abridgement of all Sea Laws,* (London, 1613), Title V.
14. *Select Pleas of Admiralty,* (S. S.), i. 98.
15. *Select Pleas of Admiralty,* (S. S.), i. 44 and 48.
16. *Select Pleas of Admiralty,* (S. S.), i. 82; ii. 122.
17. Malynes, *Lex Mercatoria,* (3rd ed., London, 1683), at p. 98.
18. Scrutton, *Charter-parties and Bills of Lading,* (6th ed., London, 1955), at p. 101.
19. (1573) Libel File 44, No. 74 (Record Office, London).

can be read into the contract and the damage that arose was due to want of care and negligence of the master and mariners.

(C) DEVELOPMENT IN ENGLAND OF "SEAWORTHINESS":

(1) *From contractual obligation to legal obligation:*

Long before the courts had developed the carrier's liability relying upon the Custom of the Realm, the general rule that the ship must be seaworthy was inserted in the charter-party contracts as a contractual obligation. But when the Common law courts were attempting to attract cases away from the Admiralty, they gave a more advantageous position to the cargo-owner. They did this by reducing the ship-owners to common carriers and also inferred that by usages and Custom of the Realm, the obligation of seaworthiness underlay the contract of affreightment.[20] Thus, they were on the path of developing the limited obligation of seaworthiness into an absolute one. So the development of seaworthiness was in existence before the 18th century as is evidenced by *Southcotte* v. *Bennett*[21] and *Coggs* v. *Burnard,*[22] but the first actual discussion of absolute obligation of seaworthiness by the English Court was in *Lyon* v. *Mells,*[23] by Lord Ellenborough.

As the liability of seaworthiness became absolute at common law[24] by being equated with common carriers, the ship-owners started limiting their liability by the incorporation of partial or absolute exception clauses,[25] thus negativing the absolute liability developed by the common law for common carriers. By 1815 cases came before the courts in which carriers (and others) sought not merely to limit their liability in certain circumstances but unconditionally to exclude it altogether. This practice was negatived by the courts in several decisions[26] on the basis that notice of exclusion had not been properly given but the validity of the right to add exceptions in bills of lading seems never to have been questioned on the ground of public policy.[27] In the U.S.A. (except the New York Courts) the courts said that this exclusion of liabilities by exceptions from every conceivable causes of damage were against public policy and struck down the terms but as late as 1868 the English courts held that

20. Holdsworth, *op. cit.*, Vol. III, at pp. 387-389, Vol. IV, at pp. 362-363 and Vol. V, at pp. 140-143.

21. (1601) 4 Co. Rep. 83b.

22. (1703) 2 Ld. Raym. 909.

23. (1804) 5 East 428.

24. See: *Morse* v. *Slue,* (1673) 2 Keb. 135; *Dale* v. *Hall,* (1750) 1 Wils. 281; *Forward* v. *Pittard,* (1785) 1 T.R. 27; *Lyon* v. *Mells,* (*supra*); *Liver Alkali* v. *Johnson,* (1874) L.R. 9 Ex. 338; *Hamilton* v. *Pendorf,* (1887) 12 App. Cas. 518 (H.L.).

25. Abbott, *Merchant Shipping,* (London, 1802), at p. 176, (14th ed., at p. 423).

26. *Maving* v. *Todd.* (1815) 1 Stark 92; *Leeson* v. *Holt,* (1816) 1 Stark 186; *Wyld* v. *Pickford,* (1841) 8 M. & W. 443; *Spence* v. *Chadwick,* (1847) 10 Q.B. 547.

27. E. G. M. Fletcher, *The Carrier's Liability,* (London, 1932), at p. 221.

these practices have become too strongly established to be struck down, with the result that the English courts lost the opportunity to modify the situation and it was left to Parliament to modify this.[28] In U.S.A. the Congress had passed the Harter Act, 1893 to relieve shippers by forbidding ship-owners from limiting their fundamental liability of seaworthiness.[29] Still the British Parliament did not step in but merely passed the Merchant Shipping Act, 1894,[30] (for the benefit of crew and passengers) which helped the ship-owners instead of alleviating the difficulties of shippers. Though the nineteenth century statutes[31] modified the land carriers' tendencies of contracting out of their liabilities, it was not until the first quarter of the 20th century, that Parliament stepped in[32] and stopped these practices amongst the ship-owners.

(2) *From Legal (absolute) Obligation to Statutory (limited) Obligation:*

The condition of affairs thus brought about contained within itself the causes of its disruption. In the years preceding 1924 there was an increase in the volume of complaints from bankers, underwriters and others, who became directly interested in the rights given by bills of lading and were left unprotected. The difficulties facing the cargo-owners were sought to be overcome by C.I.F. contracts. The result of the efforts made to secure uniformity among all maritime States resulted in the Hague Rules, 1921, adopted by the International Law Association, which framed an uniform self-contained and complete set of rules governing the rights and liabilities of cargo-owners and ship-owners respectively. The Hague Rules[33] were adopted in England and came into operation as a legislative enactment i.e. Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5 c. 22) limiting the freedom of contract, and it applies apart from coastal shipping and bulk cargo to every outward bill of lading.

In the result, a large majority of contracts for carriage by sea is now covered by the Carriage of Goods by Sea Act, 1924. But the common law liabilities relating to common carriers continue to prevail whenever the Act does not apply. The Act is not applicable to:

28. Fletcher, *op. cit.*, at p. 213.

29. S. 2 of Harter Act, 1893 — which section is also incorporated in the U. S. Carriage of Goods by Sea Act, 1936.

30. (57 & 58 Vict., c. 60) recently amended by the Merchant Shipping (Liability of Shipowners and others) Act, 1958, (6 & 7 Eliza. 2., c. 62).

31. Carriers Act, 1830, (11 Geo. 4 & 1 Will. 4., c. 68) — was the first statute of its kind — which restricted the land carriers from limiting their liabilities at Common law, by insertion of exceptions. The Railway and Canal Traffic Act, 1854, (17 & 18 Vict., c. 31) — similarly restricted the railway carriers.

32. Carriage of Goods by Sea Act, 1924, (14 & 15 Geo. 5., c. 22) which restricted for the first time (in Britain) the sea carriers from contracting out of their liabilities by exceptions.

33. Adopted by Singapore in the Carriage of Goods by Sea Act, 1927. Adopted by (N. Borneo) now Sabah also in 1927; by Sarawak in 1931 and by Malaya in 1950.

(a) homeward shipments (unless they in turn are covered by Acts similar to the British statute) ;

(b) charter-parties;

(c) coasting trade (where no bill of lading is issued);

(d) bulk cargoes;

(e) carriage of animals and

(f) cargo agreed to be carried on deck and actually carried on deck.

So whenever the Act does not govern the contract of affreightment, the carrier can by using express words release himself from the absolute obligation of seaworthiness.[34]

It must be remembered that the Harter Act, 1893, section 2, laid down an absolute liability of ship-owners for seaworthiness of the ship in any contract governed by U.S.A. laws. This section has been incorporated in the U.S. Carriage of Goods by Sea Act, 1936. On the other hand, the (English) Carriage of Goods by Sea Act, 1924 (Art. III. r. 1) laid down that ship-owners are to exercise due diligence to make the ship seaworthy. This, it is *submitted* is a limited liability. Further the ship-owner cannot now by exceptions cut down his statutory liability as such exceptions will be considered illegal under Art. III. r. 8 (Hague Rules). Thus the parties to a contract of carriage of goods by sea are no longer absolutely free to agree between themselves on the terms of the contract, whenever the Act applies and the chief boon to the cargo-owner is that he knows exactly where he stands and cannot be made to accept terms which are more unfavourable than those in the Act.[35]

From the historical discussion above, it can be seen that legislatures, courts and international conferences have tried to strike and maintain a balance between the paramount duty to protect the public (crews, passengers and cargo-owners) and the desire to render justice to ship-owners. It is submitted that the pendulum has swung in favour of cargo-owners by the decisions of the House of Lords in *Riverstone Meat Co. Pty., Ltd.* v. *Lancashire Shipping Co., Ltd.*[36] and *Union of India* v. *N. V. Reederji Amsterdam.*[37]

(D) Analysis of the Doctrine of Seaworthiness:

Having seen how the doctrine of seaworthiness developed, it must be reviewed in the following order:

34. See: *Petrofina S. A. of Brussells* v. *Compagnia Italiana Transporto Geneva,* (1937) 50 T.L.R. 650 (C.A.) and *Shavington, Ltd.* v. *V. Vokins & Co.,* [1961] 3 All E.R. 696.

35. Chorley and Giles, *Shipping Law,* (4th ed., 1963), at p. 96.

36. [1961] A.C. 807 (H.L.).

37. [1963] 2 Lloyds Rep. 223 (H.L.).

(1) What is seaworthiness? i.e. its definition and difference if any, in a bill of lading, a charter-party or a marine insurance policy.

(2) Is it a condition or a warranty?

(3) Differentiation of the Common law duty and duty under the Hague Rules.

(4) Division of performance of the duty into stages.

(5) Time of Seaworthiness.

(6) Charter-party contracts and Seaworthiness.

(7) Proof of unseaworthiness.

(8) The exclusion of liability of seaworthiness.

(9) The legal effects of unseaworthiness.

(1) *Definition of Seaworthiness*:

The old definition of seaworthiness was '. . . reasonably fit for perils of voyages at sea, properly manned and . . . cargo safely and properly stowed.'[38] The modern definition of seaworthiness[39] means that the ship should be in a condition to encounter whatever perils a ship of that kind and laden in that way might be fairly expected to encounter in making such a voyage at such a time.[40] Therefore, 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 the voyage, having regard to all the probable circumstances of it.[41] Further, once the necessary degree of seaworthiness has been ascertained, this obligation is an absolute one and it is no excuse that the ship-owner took every possible precautions to make her so, if in fact he failed to make her seaworthy.[42] But it must be noted that the undertaking of seaworthiness does not require absolute perfection or an absolute guarantee of safe carriage. Thus, a ship may be seaworthy even though the ship-owner knows that in the ordinary way, cargoes of a particular kind carried in the vessel will inevitably suffer ruin or damage.[43]

To satisfy the definition of seaworthiness, the vessel:

(a) must be efficient as an instrument of transport and that can only

38. Chorley and Giles, *op. cit.*, at p. 108.

39. Scrutton, *op. cit.*, (16th ed., 1955), at p. 102; (17th ed., 1964), at p. 84.

40. *Steel* v. *State Line S.S. Co.,* (1877) 3 App. Cas. 72 (H.L.).

41. *Per* Channel J. in *Mcfadden v. Blue Star Line,* [1905] 1 K.B. 697 at p. 706.

42. Chorley and Giles, *op. cit.*, at p. 109.

43. *M. D. C.* v. *N.V. Zeevart Maarts Beaustraat,* [1962] 1 Lloyds Rep. 180 at p. 186.

be achieved if her hull, tackle and machinery[44] are in a state of good repair, if she is sufficiently provided with fuel[45] and ballast and is manned by efficient crew.[46]

It is submitted that the 'efficiency' of the crew should be limited to the excercise of their skill and knowledge in proper performance of their duty and is not related to their perfect state of health[47] provided that the carrier adoptes an ordinary standard of care in choosing a fit crew. The ship-owner generally in practice, satisfies himself by inspection of the seaman's documents, interviews and enquiries from their previous employers that he is reasonably fit to occupy the post to which he is appointed. In a recent case of *Walden* v. *Court Line Ltd.*,[48] Glyn-Jones J. rightly brushed aside an argument by plaintiff's counsel, that as the shop-owner had employed a bullying seaman who injured the plaintiff, the ship-owner had committed a breach of the 'warranty' of seaworthiness. As this suit was between a member of the crew and the ship-owner, the warranty of seaworthiness cannot be used to cover this type of cases for the carrier owes the duty of seaworthiness only to a shipper and his consignees, if any. It is probable that a shipper can bring an action on this basis if on the facts, it can be proved that employing a bullying seaman constitutes an inefficiency of the crew which in turn constitutes unseaworthiness.

(b) As a storehouse for cargo (cargoworthiness) —

(i) that the vessel must be sufficiently strong and equipped to carry the particular kinds of cargo which she has contracted to carry[49] and her cargo must be so loaded[50] that it is safe for her to proceed on her voyage.

44. *The Makadonia,* [1962] P. 190 — The ship was declared unseaworthy because of a defect in its steering gear. *Union of India* v. *N.V. Reederji Amsterdam.* [1962] 2 Lloyds Rep. 336, where the Court of Appeal held that the ship was unseaworthy because of a defect in its reduction gear. (But in the House of Lords, [1963] 2 Lloyds Rep. 223, the ship-owner was held not liable, because he had excercised 'due diligence' to make the ship seaworthy).

45. *McIver* v. *Tate,* (1903) 1 K.B. 362. It was held that, 'It is the duty of master to make sufficient amount of fuel, otherwise the ship-owner is liable for unseaworthiness of the ship.' *Northumberian Shipping Co.* v. *Timm,* (1939) A.C. 397. The House of Lords decided that, as 'due diligence' was not excercised at the beginning of the second stage of the voyage, the ship had insufficient amount of bunker and therefore the ship was unseaworthy.

46. *Moore* v. *Lunn,* (1923) 39 T.L.R. 526. As the master was drunk at the commencement of the voyage, he was incapable of performing his duties properly, with the result the ship was unseaworthy.

47. *Rio Tinto Co.* v. *Seed Shipping Co.,* (1926) 42 T.L.R. 381.

48. (1965) 1 Lloyds Rep. 214 (Q.B.).

49. In *Stanton* v. *Richardson,* (1872) L.R. 7 C.P. 421, it was decided, that the ship was not fit to carry wet sugar as her pumps could not be made ready in a reasonable time. *Tattersall* v. *National S.S. Co.,* (1884) 12 Q.B.D. 297. The ship was declared not fit to carry cattle as her holds were improperly cleaned, after her previous voyage. *Queensland National Bank* v. *P. & O. S. N. Co.,* [1898] 1 Q.B. 567, it was held that the ship was not fit to carry gold as her bullion room was not strong.

50. *Kopitoff* v. *Wilson,* (1876) 1 .Q.B. 377. It was held, that the vessel was un-

But it must be noted that bad stowage by itself does not create unseaworthiness,[51] it is only when such bad stowage endangers the safety of the ship, then it may amount to unseaworthiness.

(ii) Further the ship must be equipped not only to carry the contracted cargo but also to prevent its deterioration during the voyage.[52]

It is *submitted* that if the machinery and equipment of the ship are in proper running order and if the shipper does not inform the carrier at what exact temperature his goods must be carried throughout the voyage, then the carrier ought not to be made liable if the goods deteriorate due to their being carried in the way in which goods of similar kind are always carried.[53]

The term "seaworthiness" occurs in charter-parties, bills of lading and marine insurance policies. In principle it has the same meaning in all three contracts but there is a certain danger in treating affreightment and marine insurance cases relating to seaworthiness on same footing,[54] for the state of seaworthiness is a relative and not an absolute one. It must be determined with reference to the particular voyage and adventure in contemplation.[55] Moreover the effects of unseaworthiness differ in affreightment and marine insurance contracts.[56] The reason for this difference is that in ordinary parlance, seaworthiness as such is an absolute expression, while in law, ships are seaworthy in relation to certain contracts.[57]

(2) *"Seaworthiness": Is it a condition or warranty?*

At law the contratual undertakings are divided into conditions and warranties. The breach of a condition entitles the injured party to repudiated all further liability and also recover damages, while a breach of

seaworthy because of bad stowage of armour plates, which went through the side of the ship in rough weather and were lost.

51. *The Thorsa,* [1916] P. 257. It was held, that it was bad stowage to stow chocolate and Gorgonzola cheese together but the vessel was seaworthy, as it could safely proceed, inspite of the bad stowage. Similarly, in *Elder, Dampster* v. *Paterson Zochonis,* [1924] A.C. 522, the House of Lords said that stowing of heavy karnal bags on top of paim oil casks was bad stowage, but as it did not endanger the ship, the vessel was seaworthy. (In both these cases, the shipowner escaped the liability of damages to the cargo-owner, as the 'bad stowage' was excepted in the contract of affreightment).

52. *Maori King (The Cargo-owners)* v. *Hughes,* [1895] 2 Q.B. 550, it was held, that there is an implied warranty that the ship and refrigerating machinery were fit to receive and carry the frozen meat safely on the agreed voyage and therefore the ship was unseaworthy, when the cargo of meat deteriorated because of the fault in refrigerating machinery.

53. *Albacorra v. Westcott,* (1965) 2 Lloyds Rep. 37.

54. Chorley, *op. cit.,* at p. 108.

55. Chalmers, *Marine Insurance Act, 1906,* (5th ed., 1956), at p. 57.

56. *The Europa,* [1908] P. 84, at p. 120.

57. Chorley, *op. cit.,* at p. 109.

a warranty entitles him only to the recovery of damages. Unfortunately, in practice, the merchants and later on lawyers and even Parliament had hopelessly intermixed the use of the words 'condition' and 'warranty'. This trend is still reflected by the Marine Insurance Act, 1906, which refers throughout to the "warranty of seaworthiness" whereas if the distinction between a warranty and a condition were accepted, it would clearly amount to a condition of contracts of marine insurance.

For a long time it was though that "seaworthiness" was a condition in contracts of affreightment and it was accepted in early cases that the charterer can throw up the contract if he finds the ship unseaworthy before the beginning of the voyage. But in *MacAndrew* v. *Chapple,*[58] the Court clearly decided that, such breaches of warranty of seaworthiness as do not defeat the object of the charterer in chartering the ship, give rise only to actions for damages, and this was also laid down in later cases.[59] Generally in practice, the ship is found to be unseaworthy, by the aggrieved party only after she has sailed; this coupled with indiscriminate use of the words 'condition' and 'warranty' have led the courts to give cumbersome decisions. In this situation of doubtfulness, the Court of Appeal's judgment in *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha*[60] is illuminating. The Court affirmed the judgement of Salmon J.[61] that a breach of the undertaking of seaworthiness entitles in most cases the charterer or bill of lading holder to recover damages against the ship-owner; the breach can only lead to a repudiation of the contract if it gives rise to circumstances that frustrate the contract. Diplock L.J. went further and said:[62]

> "It is not a condition at all .... Unseaworthiness is a breach of an obligation but it does not entitle the injured party to avoid the contract. . ."

The Court gave the judgment for the ship-owner on the basis that the circumstances in that case did not frustrate the contract and disallowed the charterer from repudiating the contract even though the ship was unseaworthy. It is probable, that if the charterer had not accepted the unseaworthy ship at the beginning of the voyage, knowing it to be unseaworthy, then the decision would have been otherwise.

It is *submitted* that this obligation of seaworthiness is a hybrid between a warranty and a condition and is peculiar to the law of carriage by sea. It operates as a condition before the ship sails and as a warranty,

58. (1866) L.R. 1 C.P. 643.

59. *The Europa,* [1908] P. 84. It was declared by the Court that, merely because the ship was unseaworthy, it does not mean that the contract can be repudiated; it can only be repudiated, if such unseaworthiness led directly to damage suffered by the injured party. (In this case the damage to goods had arisen out of collision and not due to unseaworthiness of the ship). *Kish* v. *Taylor,* [1912] A.C. 604. Where Lord Atkinson in no uncertain words said that a contract of affreightment is not put to and end either by unseaworthiness or by deviation to save the ship and crew even though the necessity to deviate was caused by unseaworthiness.

60. [1962] 2 Q.B. 26 (C.A.).

61. [1962] 2 W.L.R. 716.

62. [1962] 2 Q.B. 26 at p. 71.

after she has sailed. Further, if the charter accepts the ship at the beginning of the charter-party, knowing it to be unseaworthy, when he could have repudiated the contract, then his only recourse will be for damages unless on the facts of the case, he proves that subsequent operation of initial unseaworthiness has frustrated the commercial purpose of the contract.

(3) *Differentiation of the common law duty and duty under Hague Rules*:

At common law the duty to provide a seaworthy ship is an absolute undertaking in the sense that the ship-owner must actually make the ship fit, not merely do his best to make the ship fit.[63] The fulfilment of the duty is judged by the result and the application of reasonable diligence as we have seen is not sufficient. Further, at common law a ship-owner is liable for damage caused by unseaworthiness due to a latent defect in the ship even if the latent defect is undiscoverable.[64] He is also responsible if metal became fatigued and no one was at fault.[65] The ship-owner is not without recourse at common law, for he can freely contract out or reduce the absolute obligation provided that clear and unambigious words are used.[66] This implied undertaking at common law arises not from the ship-owner's position as a common carrier but from his acting as a ship-owner.[67]

On the other hand, whenever the Hague Rules apply either as such, or as part of the Carriage of Goods by Sea Act, 1924, or as part of any foreign enactment, the absolute duty is reduced to what is described in the Hague Rules as a duty 'to exercise due diligence', to provide a seaworthy, cargoworthy and voyageworthy ship.[68] Further, s. 2 of Carriage of Goods by Sea Act, 1924 provides that there is no absolute undertaking to provide a seaworthy ship, unlike the U.S. Carriage of Goods by Sea Act, 1936. The reduction of the duty is compensated by the prohibition to contract out of this obligation.[69]

Art. III in Carriage of Goods by Sea Act, 1924 is the main article establishing responsibility of the carrier. In the beginning around 1924 the English courts seemed to feel that the Act was a compromise between carriers and cargo-owners as is evident from the decision of *W. Angliss & Co. (Australia) Proprietary Ltd. v. P. & O. S. N.* Co.,[70] where the court said that, whether a ship is built for, (as it was in this case) bought by, or chartered to the carrier, the ship-owner or carrier should *not* be

63. *Steel* v. *State Line S.S.*, (1877) 3 App. Cas. 72 at p. 86 *(per* Lord Blackburn).

64. *The Glenfruin,* (1885) 10 P.D. 103. (But this is not so under the Hague Rules, Art. IV. r. 2. (p).).

65. Scrutton, *op. cit.,* at p. 98.

66. *The Kaikato,* [1899] 1 Q.B. 56 (C.A.); *Elderslie* v. *Borthwicke,* [1905] A.C. 93.

67. Scrutton. *op. cit.,* at p. 96.

68. Hague Rules, Art. III. r. 1. and Art. IV. r. 1.

69. Hague Rules. Art. III. r. 8.

held liable for bad workmanship for which he had no responsibility before the ship came into his possession, so long as he had exercised due diligence in engaging builders of repute. Later on the courts and the judges changed their attitude and made the carriers responsible for all things. In *Paterson S. S.* v. *Robin Hood Mills,*[71] where the negligence of a compass-adjustor was in issue, Lord Roche emphatically said:

> "The condition of due diligence is not fulfilled merely because the ship-owner is personally diligent. The condition requires that diligence shall in fact have been exercised by the ship-owner or by those whom he employs for the purpose. The carrier's responsibility for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to make sure by careful and skilled inspection that what he is taking in his service is in fit condition for the purpose and if there is anything lacking that is fairly discoverable to put it right."

This ambit of due diligence was extended by the House of Lords in the recent case of *Riverstone Meat Co. Pty., Ltd.* v. *Lancashire Shipping Co., Ltd.,*[72] to include the negligence of a fitter employed by an independent and reputable ship-repairers appointed by the ship-owner to inspect and repair the ship.

It was felt for a long time that the decision of *Angliss's* case protected the ship-owner not only in respect of a new vessel but also when he sent his ship to a yard for repair or overhaul. That this is not so and that the ship-owner as carrier is liable to the cargo-owners for the negligence of a carefully selected reputable ship-repairers was affirmatively decided in the *Riverstone Meat* case where Lord Radcliffe[73] said:

> The obligation is not to exercise due diligence in making the ship or to provide a seaworthy ship or to see that it is made seaworthy but to exercise *due diligence to make it seaworthy.* . .

The House of Lords refused to go further in this case and disturb the proposition that a ship-owner cannot be held liable for latent defects caused by the ship-builder's bad workmanship in the construction of the ship, before the ship came into his hands.[74] That proposition it is *submitted* has been qualified in the later case of *Union of India* v. *N.V. Reederji Amsterdam,*[75] where the ratio of the *Riverstone Meat* case was extended to cover ships taken over by a new owner, and it was decided that a ship-owner can be held liable for latent defects caused by the ship-builder's bad workmanship in the construction of the ship, if he does not exercise due diligence to discover such defects, when the ship becomes his. The ship-owner was held not liable (in this case), for he had in fact exercised due diligence to discover such defects. Lord Reid[76] went further

70. [1927] 2 K.B. 456.

71. (1937) 58 LI. L.R. 33, 40. (P.C.).

72. [1961] A.C. 807 (H.L.).

73. *Ibid.*, at p. 863.

74. *Ibid.*, at pp. 841, 854, 867 and 870.

75. [1963] 2 Lloyds Rep. 223 (H.L.).

76. *Ibid.*, at p. 230.

on the point of requisite standard of exercise of due diligence and said:

> There must be some compromise or balance in deciding what steps to take in any particular case keeping in mind both the serious consequences which may flow from failure to detect a defect and the remoteness of the chance that such a defect may exist; for it would plainly be impractical to make elaborate scientific test for every defect which could possible be present in any part of the machinery surveyed. . .

Their Lordships[77] said, that the standard of exercise of due diligence required is that of the standard generally applied to ships of the same kind on a continuing survey and to be carried out in accordance with the standard both as regards its extent and nature required by Lloyd's Register.

It is *submitted* that the difference between duty at the common law and under the Hague Rules has been considerably narrowed down in practice: First, by the courts imposing the duty to exercise due diligence on ship-owners, his agents and servants which include ship-repairers and experts used for the purpose of inspecting and repairing the ship. Secondly, by recognising the requirement of comparative standards of exercise and due diligence. This practice has made the ship-owner's liability more onerous than ever. Further, the effect of the decision of the *Riverstone Meat* case has made the ship-owner's liability into nearly an absolute liability as under common law and this decision falls into line with the United States' decisions.

(4) *Division of Performance of Duty into Stages*:

The so-called doctrine of stages grew up in marine insurance contracts to mitigate the harshness of the absolute undertaking of seaworthiness at common law, and is based on the relativity of requisite standard of seaworthiness which is determined by changing circumstances during the performance of the contract. The first authoritative decision by Court of Appeal was in the insurance case of *Bouillion* v. *Lupton*[78] where Wiles J. observed that:[79]

> Seaworthiness means different things in different parts of the voyage. It is sufficient if the warranty is complied at each stage of navigation. The voyage may be divided into portions for the purpose of considering what is the necessary state of vessel with respect to the preparation.

The doctrine further applies to the determination of material time or times during the performance of the contract at which the ship must be seaworthy.[80]

77. [1963] 2 Lloyd's Rep. 223, 232, 233 and 235.

78. (1863) L.J.C.P. 37.

79. *Ibid*., at p. 42.

80. *The Vortigen,* [1899] P. 140. The voyage was from Cebu (Phillipines) to Liverpool and the ship was allowed to call at Perim for coaling but due to oversight of the master, she took insufficient coal, with which she could not reach Suez, her next coaling port. It was decided by the court that, due to insufficiency of coal between Perim and Suez, the implied warranty of seaworthiness was broken at the commencement of that stage.

Art. III. r. 1 of the Hague Rules provides that, "the carrier(s) shall be bound before and at the beginning of the voyage to exercise due diligence, to make the ship seaworthy . . ." Thus this Article lays down the responsibilities of the ship-owner for the seaworthiness of his ship in two stages i.e. ". . . before and at the beginning of the voyage . . ." This has led to different interpretations by different judges to a doctrine of stages in the Hague Rules. In *Maxine Footwear v. Canadian Government Merchant Marine,*[81] the Privy Council declared that, 'before and at the beginning of the voyage' means the period at least from the loading until the vessel starts on her voyage. Then in 1961, the New York Court of Appeals, in *Zander & Co.* v. *Mississippi S. N. Co.*[82] interpreted the above phrase similarly. There was no English case on the above phrase until 1962, where in *The Makadonia,*[83] Hewson J.[84] said that, "The word 'voyage' in Art. III. r. 1. meant the contractual voyage from the port of loading to the port of discharge as declared in the bill of lading and that consequently 'before and at the beginning of the voyage' refers to the time before the ship leaves the port of loading." This decision falls in line with the Privy Council decision (above) and that the doctrine of stages can be read into the Hague Rules. It is *submitted* that, 'before and at the beginning of the voyage' means that the obligation starts from beginning of the loading and continues through the lying stage[85] (i.e. the stage between the loading and sailing) and ends when the ship sails.

At common law it has been held that the ship must be cargo-worthy i.e. fit to receive the cargo at the commencement of loading and not continuously during the loading stage.[86] The ship must be seaworthy at the commencement of the next stage whether this consists in the ship being in port awaiting to sail (what is commonly known as 'lying stage') or whether she actually sails.[87] If the ship calls at an intermediate port, either to load other cargo or to bunker, she must not commence the next stage of her journey in an unseaworthy condition, either by reason of overloading[88] or by reason of insufficiency of bunkers.[89]

There is however no mention in the Hague Rules of a recurrent obligation to make the ship seaworthy when calling during the voyage at an intermediate port in order to load more cargo, execute repairs or bunker,

81. [1959] A.C. 589 (P.C.), also followed by Canadian Supreme Court in *Western Canada S. S.* v. *Canadian Commercial Corporations,* [1960] 2 Lloyds Rep. 313.

82. [1961] 2 Fed. R. 511.

83. [1962] 1 Lloyds Rep. 316.

84. *Ibid.*, at p. 329.

85. "But such an intermediate stage does not arise until loading is completed and the operation of loading involves all that is required to put the cargo in a condition in which it can be carried." *per* Wright J. in *Svensons* v. *Cliffe S. S. Co.,* [1932] 1 K.B. 490 at p. 495.

86. *Mcfadden* v. *Blue Star Line,* [1905] 1 K.B. 697.

87. *Per* Scrutton L.J. in *Reed* v. *Page,* [1927] 1 K.B. 743 at p. 755 (C.A.).

88. *Biccard* v. *Shepherd,* (1861) 14 Moo. P.C. 471.

89. *The Vortigern, (supra)* and *Northumberian Shipping Co.* v. *Timm,* (*supra*).

unless the ship-owner has agreed to do so, in the contract of affreightment.[90] If he has agreed to properly bunker the ship and if he defaults, then he might be found liable for not exercising 'due diligence' to make the ship seaworthy. Hewson J.[91] observed that:

> The ship-owner is responsible to exercise due diligence to properly bunker the ship at the loading port for the first stage of the journey and also to make at that time arrangements for bunkering at the next bunkering port or ports . .

If there is nothing mentioned in the contract, then it appears from the wordings of Art. III. r. 1 and Art. IV. r. 1[92] of the Hague Rules, that improper bunkering due to miscalculation of the master or the chief engineer at an intermediate bunkering port would not amount to unseaworthiness but to negligence in the management of the ship and as such would be exampted by Art. IV. r. 2 (a) [93] of the Hague Rules. But it must be noted that the necessity of making the ship seaworthy at each stage is present in voyage policies.[94]

(5) *Time of Seaworthiness:*

The so-called doctrine of stages is an exception to the rule of time of seaworthiness, for in law the ship must be seaworthy, due diligence being exercised to make her so, (under Art. III. r. 1 of Hague Rules) ONLY at the commencement of the voyage. Before the time of sailing, a modified form of seaworthiness is required i.e. while in port the vessel must be fit to lie in port and to take her cargo. So the undertaking of seaworthiness is up to the time of the vessel's sailing. This undertaking as we have seen, begins to operate at the time of loading and continues up to the time of sailing. Further, this obligation to exercise due diligence in and about the provision of a seaworthy ship imposed by Art. III. r. 1 is not cut down by the protection given by Art. IV. r. 2 (a) .[95] Whenever the voyage is resolved into stages the ship-owner must have excercised due diligence to make the ship seaworthy at the commencement of each stage.

90. *The Makadonia,* [1962] 1 Lloyds Rep. 316. Where the shipowner was held liable for actionable fault in other respects, but regarding proper bunkering at the intermediate port, he had exercised due diligence. *Northumberian Shipping Co.* v. *Timm, (supra).* The ship was declared unseaworthy because of improper bunkering at the commencement of the second stage of the voyage and the shipowner was held liable for not exercising due diligence in making the ship seaworthy.

91. [1962] 1 Lloyds Rep. 316 at p. 321.

92. Art. III. r. 1. "The carrier(s) shall be bound before and at the beginning of the voyage to exercise due diligence to (a) make the ship seaworthy ..." Art. IV. r. 1. "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 . . ."

93. Art. IV. r. 2(*a*). "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from — Act or neglect or default of the master or pilot or the servants of the carrier in the navigation or management of the ship . . ."

94. S. 39(3) of the Marine Insurance Act, 1906.

95. *Goose Millard* v. *Canadian Government Merchant Marine,* [1929] A.C. 223.

(6) *Charter-party contracts and undertaking of seaworthiness*:

The obligation of seaworthiness in a charter-party can be both express as well as an implied undertaking, unlike the bill of lading and marine insurance (voyage-policies) contracts, where the undertaking is implied by the Hague Rules and at common law. It is advisable to note that, failing an express provision, often found in the charter-parties, neither the common law nor the Hague Rules impose on the ship-owner the duty to keep the ship in a seaworthy condition constantly during all the periods of performance under the contract of affreightment. This applies to both the voyage and time[96] charter-parties.

(a) *Voyage Charter-party* —

A clause in the voyage charter-party that the ship is to be tight, staunch and strong and in every way fitted for the voyage' relates only to the preliminary voyage i.e. from the port chartered to the port of loading. It refers to the time at which the contract is made[97] or to the time of sailing for the port of loading. Whereas the undertaking of seaworthiness implied by law (common law or the Hague Rules) relates only to the port of loading and does not apply to the preliminary voyages. So the condition of seaworthiness can be applied to the preliminary voyage, *only* by an express clause in the charter-party. The undertaking of seaworthiness has been implied by law only to voyage charter-parties and to none other.

It is *submitted* that the insertion of an express undertaking of seaworthiness does not negative the implied undertaking in the voyage charter-party and both continues to operate together. There is a distinction in the operation of the implied and express undertaking of seaworthiness. An implied undertaking of seaworthiness includes cargoworthiness of the ship, while the express undertaking only refers to seaworthiness and not to cargoworthiness, perhaps because it only applies to a preliminary voyage where there is no cargo yet loaded under the contract.

(b) *Time Charter-party* —

In an ordinary time charter-party the position is not the same as in the voyage charter-party, for there is no implied undertaking of seaworthiness [98] in the former owing perhaps, to the hardship of requiring the ship-owner to undertake that his vessel is seaworthy at a time when she is at sea beyond his control, a time at which usually such a charter-party or a marine-policy begins to run In such a case, a clause in common use provides that the owner will maintain the vessel in a thoroughly efficient state in hull and machinery during service. This maintenance clause places the obligation on the owners of bearing the expenses of such

96. *Giertson* v. *Turnbull,* (1908) 16 Scottish L.T. 250. *Tynedale S.S.* v. *Anglo-Soviet Shipping Co.,* (1936) 54 LI. L.R. 341 (C.A.).

97. *Scott* v. *Foley,* (1899) 5 Com. Cas. 53.

98. *Gibson* v. *Small,* (1853) 4 H.L.C. 353. The position is same in time policy — Marine Insurance Act, 1906, s. 39(5).

maintenance and of taking reasonable and proper steps for restoring the vessel's efficiency after accidents. Just because the vessel under this clause keeps breaking down during the course of the voyage, it does not entitle the charterer to repudiate the contract, unless the delay in repairing the ship is so great as to frustrate the commercial purpose of the contract.[99] Further, this stipulation only commences from the time of hiring and not before to cover a preliminary voyage, if any.

(c) *Demise (time) Charter-party —*

In a demise (time) charter-party the position is different again. As this is truly a contract for the hire of a chattel, there will in the absence of an express stipulation to the contrary, be implied in such charter-parties, an undertaking that the ship is as fit for the purpose for which it is hired as reasonable care and skill can make her. This is borne out by the only decision in the demise charter-party, namely *Reed v. Dean*[1] where, Lewis J. made the defendant liable, for not providing any firefighting apparatus on the launch, which was abandoned by the plaintiff when it caught fire. He said that as the motor-launch was not fit for the purpose for which it was hired, it was unseaworthy.

In the voyage (or demise) charter-party, a breach of an implied undertaking of seaworthiness at the port of loading entitles the charterer to refuse to load and if she could not be made fit within reasonable time, the charterer is entitled to repudiate the charter-party,[2] but a breach of an express undertaking does not so entitle[3] unless it is such as to frustrate the commercial purpose of the charter. This difference arises from different times to which the express and implied undertakings of seaworthiness relate. The charterer's obligation to load is conditional upon the ship being seaworthy at the port of loading, not upon her being seaworthy at the time when the contract was made.

(7) *Proof of Unseaworthiness*:

The burden of proving unseaworthiness as a fact rests upon the party who asserts it and he must plead it with sufficient particularity.[4] There is no presumption of law that a ship is unseaworthy because she breaks down or even sinks from an unexplained cause, unless such occurrence can be accounted for by sufficient evidence of unseaworthiness.[5] It is

99. *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha,* [1962] 2 Q.B. 26 (C.A.) (affirming Salmon J.) it was decided that the circumstances did not frustrate the contract.

1. (1949) 1 K.B. 188.

2. *Stanton* v. *Richardson,* (1872) L.R. 7 C.P. 421. Where the Court decided that the charterer was entitled to load wet sugar and as the pumps of the ship could not be made ready in a reasonable time, he could repudiate the contract.

3. *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha,* [1962] 2 Q.B. 26 (C.A.).

4. *Madras* v. *P. & O. S. N. Co.,* (1924) 18 LI. L.R. 93. at p. 96.

5. *Ajoom Goolam* v. *Union Marine Insurance,* [1901] A.C. 362.

then for the ship-owner to rebut it by either proving that the vessel was seaworthy in fact[6] or failing that, that he had exercised due diligence to make it so, as required by the statute.[7]

The principle that a ship is not presumed to be unseaworthy is no doubt sound but this principle does not impair or preclude certain presumptions of fact i.e. presumptions arising from age, low classing or non-survey of the ship or machinery, the admitted defects and generally the poor and worsening record of the vessel together with final breakdown of machinery immediately or almost immediately on the ship putting to sea. It is *submitted* that the principle of 'res ipsa loquitur' is handy here, for the mere fact that the damage has occurred raises a prima facie case that the ship was unseaworthy at the commencement of the voyage. In *Fiumania v. Bunge,*[8] their Lordships decided that an unexplained fire in the coal bunkers at the port of loading afforded a reasonable presumption that it was due to defect or unfitness of the bunker coal which in turn amounted to unseaworthiness and gave the judgment for the charterer who suffered general average expenses due to another unexplained fire in the coal bunkers.

(8) *Excluding liability for Unseaworthiness*:

The ship-owner can, however exempt himself from liability for unseaworthiness: in charter-parties by using exlusion or excepting clauses and in bills of lading by agreeing to be governed by some other law other than Hague Rules. But such limitation of liability should be worded in clear and unambiguous language.[9] Whenever the bill of lading terms govern the contract, it is obligatory for it to contain a general paramount clause incorporating the Hague Rules[10] but if such a contract fails to comply with this direction, the contract does not become illegal though such terms as goes against Art. III. r. 8 (of Hague Rules) will be declared void. Moreover, where there is an express statement by parties of their intention to select the law of contract, it is difficult to see what qualifications are possible, provided that the intention expressed is bona fide and legal and provided there is no reason for avoiding the choice on law on the ground of public policy.[11] Again, the liability of seaworthiness is possible to be limited in those cases where the Carriage of Goods by Sea Act, 1924 does not apply[12] apart from charter-party contracts.

(9) *The Legal Effects of Unseaworthiness*:

The undertaking as to seaworthiness is a condition precedent. Hence

6. *Silcock & Sons* v. *Maritime Lighterage Co.,* (1937) 57 LI. L.R. 78.
7. *Union of India* v. *N. V. Reederji Amsterdam,* [1963] Lloyds Rep. 223 (H.L.).
8. [1930] 2 K.B. 47.
9. *Chartered Bank of India* v. *British India S. N. Co.,* [1909] A.C. 369 at p. 375.
10. Carriage of Goods by Sea Act, 1924, s. 3.
11. *Vita Food Products* v. *Unus Shipping Co.,* (1939) A.C. 277 at p. 290. See also Hague Rules, Art. VI.
12. *Supra,* p. 5.

if the charterer or shipper discovers that the ship is unseaworthy before the voyage begins and the defect cannot be remedied within a reasonable time, he may repudiate all further liabilities and sue for damages.[13] But if the charterer or shipper accepts the unseaworthy ship at the commencement of the voyage, knowing it to be unseaworthy, then he will be deemed to have waived his right of repudiation and will be estopped from pleading initial unseaworthiness.

After the voyage has begun, the undertaking becomes merely a warranty, if it does not give rise to circumstances frustrating the contract.[14] Further, although the vessel is unseaworthy the ship-owner can still rely on the exception clauses in the charter-party to limit or exclude his liability, if the loss has not been caused by unseaworthiness. In *The Europa,*[15] the court held that, a ship-owner whose ship was unseaworthy at the commencement of the voyage though liable for damages caused directly by that unseaworthiness, was not liable for injury not caused by that unseaworthiness but by an excepted peril, of collision (in this case). Even where a fire results from unseaworthiness, the ship-owner can still invoke the protection of the Merchant Shipping Act, 1894, section 502,[16] and so escape the liability, so long as the unseaworthiness was without the ship-owner's "actual fault or privity . . ." The leading case in which this section was applied by House of Lords was in *Louis Drefus* v. *Tempus Shipping* Co.,[17] where the ship-owner was relieved from liability for loss or damage to the cargo caused by fire in the coal bunkers because it was found that the ship-owner was not privy to the unseaworthiness of the ship which caused the fire. If a person seeks to rely upon the protection of this section the onus is upon him to prove that the loss was without his fault or privity. It must be noted that the exception of "fire unless caused by the actual fault or privity of the carrier" occurs in Art. IV. r. 2 of the Hague Rules, but the operation of these provisions of the Merchant Shipping Act is expressly saved by the Carriage of Goods by Sea Act, 1924, s. 6(2) and Art. VIII. of the Hague Rules.

The effect thereof of a breach of the seaworthiness undertaking is not, as it is sometimes thought, to avoid the contract ab initio and to throw the ship-owner upon his onerous common law position. In *The Europa,*[18] the court also decided that a breach of the 'warranty' of seaworthiness does not discharge the special contract of affreightment or precludes the ship-owner from relying on its terms. This case was approved and followed by the House of Lords in *Kish* v. *Taylor.*[19] In that case the charterers contended that the ship-owner was disentitled

13. *Stanton* v. *Richardson, supra.*

14. *Hong Kong Fir* case, *supra.*

15. [1908] P. 84.

16. As amended by the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, s.3 (l).

17. [1931] A.C. 726 (H.L.).

18. [1908] P. 84.

19. [1912] A.C. 604.

from exercising a lien for dead freight because he had failed to provide a seaworthy ship and was therefore in breach of a condition precedent of the charter-party. The House of Lords held that it was not so; that a breach of the 'warranty' of seaworthiness did not put an end to the contract of affreightment; and that the ship-owner was not therefore debarred from asserting the lien. But still the legal position of the effect of unseaworthiness continued to be doubtful, possibly because the undertaking of seaworthiness could operate as either a condition or a warranty and more so, by being equated with the 'warranty' of non-deviation. The Court of Appeal in the recent case of *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha,*[20] tried to solve the problem by setting down the limits of the right to repudiate by the aggrieved party and Diplock L.J.'s dicta in that case ". . . unseaworthiness is not a condition at all ... Unseaworthiness is a breach of an obligation but it does not entitle the injured party to avoid the contract . . ." should be limited to time charter-party cases, of which that case was one. Again, his Lordship was dealing with the breach of an express undertaking of seaworthiness and therefore his dicta cannot be applied to voyage charter-parties and bills of lading contracts where the undertaking of seaworthiness is implied.

The position of a ship-owner was uncertain as to whether he could take protection of exception clauses in the contract if he had not supplied a seaworthy ship or had failed to exercise due diligence to make it seaworthy. By application of an important test laid down by the House of Lords very recently regarding fundamental breach and exception clause, it is submitted that the position is now much, clearer. In *Suisse Atlantique Societe d'Armament Maritime S. A.* v. *N. V. Rotterdamasche Kolen Centrale,*[21] the charterer under a consecutive voyage charter-party had delayed, causing loss to the ship-owner in the form of further charter-freight which he would have earned had the charterer performed more voyages during that delay. The ship-owner contended that he was entitled to damages for loss of further freight and that the charterer was not entitled to protection of exception clauses, as he had committed a fundamental breach of the contract. The House of Lords allowed the charterer to limit his liability by taking advantage of exception clauses and their Lordships[22] *emphatically* said that:

> "There is no rule of law that an exception clause is nullified by a fundamental breach of contract or breach of a fundamental term, but in each case the question is one of construction of the contract, whether the exception clause was intended to give exemption from the consequences of fundamental breach; if a breach occurs entitling the other party to repudiate the contract, but if he elects to affirm it, the exception clause continues unless on the true construction of the contract the exception clause is not intended to apply and to continue after such a breach in which case the party in breach is unable to rely on the exception clause."

So, now unless the shipper or charterer expressly limits the operation of the exception clauses in the contract of affreightment, it seems that the ship-owner can protect himself under the general form of exception clauses

20. [1962] 2 Q.B. 26 (C.A.).

21. (1966) 2 All E.R. 61 (H.L.).

22. *Ibid*., at pp. 67, 71, 78-79 and 80.

found in practice even when there is failure to supply a seaworthy ship.

(E) CONCLUSION:

Having traced the history and practice of seaworthiness from the ancient times to the present day and having analysed it from various directions, now we shall turn to its practice in the shipping market and anticipate new pitfalls which may await it, as it develops more and more.

The *Riverstone Meat Case* [23] created much agitation and it led the London maritime lawyers (through British Maritime Law Association) to formulate a proposal for amendment to the Hague Rules, along with several other proposals. The relevant proposal was for the amendment of Art. III. r. 1 and it was as follows:

> "Provided that if in circumstances in which it is proper to employ an independent contractor (including a Classification Society), the carrier has taken care to appoint one of repute as regards competance, the carrier shall not be deemed to have failed exercise due diligence solely by reason of an act or omission on the part of such an independent contractor, his servants or agents (including any independent sub-contractor and his servants or agents) in respect of the construction, repair and maintainance of the ship or any part thereof or of her equipment. Nothing contained in this proviso shall absolve the carrier from taking such precautions by way of supervision or inspection as may be reasonable in relation to any work carried out by such an independent contractor as aforesaid."

These proposals were accepted at the Stockholm Conference of International Maritime Committee in June 1963. But unfortunately, the relevant Committee at Hague has not yet met to convert these proposals into amendments of the Hague Rules. If these proposals are accepted by the Committee in future, it will negative the House of Lords' decision in *Riverstone Meat Case.*

Another question which is causing concern in the shipping world is, with what kind of equipment the ship must be equipped so as not to fall foul of the legal liability of seaworthiness? There has been no direct case on this question in Britain. In the United States of America, in the recent case of *President of India* v. *West Coast Steamship Company,* [24] it was argued by the cargo-owner that the ship-owner had failed to equip the vessel with radar and loran and therefore the ship was unseaworthy, which fact caused her to ground on a reef in the darkness in the Sulu Sea and that damaged the cargo. It was held by the court that the ship-owner had exercised due diligence and therefore had met the burden required under the U.S. Carriage of Goods by Sea Act, 1936, and also that the "Employment of radar and loran in navigation of a tramp vessel is not so essential that their absence would give rise to a finding of unseaworthiness . . ." [25]

23. *Supra.*

24. [1963] 2 Lloyd's Rep. 278 (U.S. District Court, Oregon), affirmed by (U.S. Court of Appeals) reported in [1964] 2 Lloyd's Rep. 443.

25. (1963) 2 Lloyd's Rep. 278 at p. 282.

It may be that the area in which the tramp vessel was operating, radar or loran was not essential for a ship to be seaworthy, but it may be considered very essential if a ship was operating in certain latitudes in the Atlantic Ocean or in the English Channel or in any crowded seaway. Again, it depends whether the ship is a passenger liner, a tramp vessel or an ordinary cargo-ship. So the ". . . obligation in the last analysis is the duty to furnish a ship and equipment reasonably suited for the intended use or service . . ."[26]

Two recent cases in Britain suggest what the ship-owner may have to anticipate from the courts in future. It must be noted that these cases are not on seaworthiness directly but are cases dealing with the ship-owner's liability in regard to equiping the vessel with radar and proper usage thereof by the crew. It was decided by the court in *The British Aviator,*[27] where two vessels equipped with radar, collided in the English Channel, that both vessels were to be blamed in that they used radar information as if it were visual information and as an excuse for maintaining speed. Cairns J.[28] observed, that "radar should be used as an additional safeguard and not as a reason for disregarding precautions which were laid down before radar existed but which are still as necessary as ever."

In the recent case of *The Lady Gwendolen,*[29] there was a collision due to the excessive speed maintained by the master of the ship equipped with radar and the ship-owners tried to limit their liability under s. 503(1) of Merchant Shipping Act, 1894. It was held by the Court of Appeal (affirming Hewson J.) that the ship-owners were liable for the collision as they had not impressed upon the master the gravity of the risk he was taking by not using radar properly and proceeding at high speed in fog. Sellers L.J. said:[30]

> "... A primary concern of a ship-owner must be safety of life at sea. That involves a seaworthy ship, properly manned, but it also requires a safe navigation. Excessive speed in fog is a grave breach of duty and ship-owners should use all their influence to prevent it. In so far as high speed is encouraged by radar the installation of radar requires particular vigilance of owners . . ."

So, from the American decision in *President of India* v. *West Coast Steamship Co.* and the two English decisions of *The British Aviator* and *The Lady Gwendolen,* it seems that it is not absolutely necessary that the ships must be equipped with every latest equipment to be seaworthy. It is *submitted* that if a ship is fitted with modern and up-to-date machinery, it may yet become unseaworthy if this machinery is improperly used or that the crew has not been trained to employ it adequately. It must be noted that in the insurance market the ships having the latest equipment including radar have to pay higher premia then those without radar,

26. (1963) 2 Lloyd's Rep. 278 at p. 281, *per* John Kilkenny (D.J.).

27. (1964) 2 Lloyd's Rep. 403.

28. *Ibid.*, at p. 411.

29. [1965] 2 All E.R. 283 (C.A.).

30. *Ibid.*, at p. 288.

perhaps because the presence of radar leads to overconfidence and which in turn has led to accidents.

Ships in modern days carry more and more dangerous cargoes including chemicals, the proper stowage and carriage of which creates new problems for a ship-owner who must provide a seaworthy ship. The new trend of 'container traffic' developed in Europe and the U.S.A. enhances the problems of the ship-owner more so to provide a seaworthy ship.

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