

A TENDENCY OF ARGUMENTS ON THE PRINCIPLE OF *CAUSA PROXIMA*

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I

The principle of *causa proxima* in marine insurance was a theory which had, since former times, been introduced in England. It was already clearly stated in Arnould's well-known work "On the Law of Marine Insurance and Average",¹ that this was one of the fundamental principles in the law of marine insurance. Regarding the reason why the principle of *causa proxima* had come to be recognized as a fundamental principle in marine insurance, he described, in quoting the dictum of Lord Francis Bacon² who was well-known as a great father of empirical philosophy, that it were infinite for the law to consider the causes of causes, and their impulsion one on the other; therefore it contenteth itself with the immediate causes. Because, in marine insurance, they makes the existence of causality between perils insured against and loss as a major premise, in order to decide whether the insurer is liable to indemnify or not. When an event is of complicated relation involving a number of causes, it would become a very difficult problem to make inquiry into the true cause.

Article 416 of Japanese civil law provides that the claim of compensation for damages aims at getting the losses compensated, which ordinarily take place by dint of non-execution of liability, and in this case, the meaning of the losses ordinarily taken place is based on the theory of Adequate Causality or the idea which is generally adopted by German scholars as "Die Theorie von Adäquaten Verursachung". But, when we accept the theory of adequate causality, we must, as Mr. Elster asserted in early times, not only make the authentic problem of probability³ as its standard, but also refer to consideration of ethical factors, responsibility in business, appreciation of human being, appropriateness of scientific method, etc., in order to estimate the causal relations in a proper manner.⁴ If it is so, this theory is neither capable of solving a practical difficulty, nor might it make possible for us to solve it.

It is mainly due to the matter mentioned above that the principle of *causa proxima* in marine insurance has formerly been prevalent in England. But in France,

¹ 1st ed. 1848, 2nd ed. 1857

² Francis Bacon, 1561-1626.

³ "lotgerechte Wahrscheinlichkeitsfrage".

⁴ Dr. Otto Hagen, Seeversicherungsrecht. S. 59.

Germany and other countries as in England, the principle of *causa proxima* has become a key in solving the problems in so far as marine insurance concerned.

Dr. Carl Ritter said in his "Das Recht der Seeversicherung" that the development of the principle of *causa proxima* has generally been accepted as a formula due to the particular features in marine insurance.⁵ Otto Hagen stated as well in his work "Die Regel der *causa proxima*" that since former times, the rule of *causa proxima* had been discussed and developed as a legal conception in Germany regarding marine insurance, and recently Mr. Ritter firmly asserted this point in particular. He mentioned, quoting Ritter's words, that this formula was much more crude than those which had hitherto been adopted in usual losses, but it was far simpler and the most convenient in order to deal with mass phenomena of events in insurance, because, it is always convenient to the economic world that verification will be made in concise and clear manners, further he said that, an argument based on an elaborate philosophy would not necessarily be adopted.⁶

The law of *causa proxima* has been adopted for a long period of time. Well then, when many causes successively occur, by what kind of standard shall we be able to divide them into proximate and remote causes? From legal precedents in England, we can see that they generally chose one cause which is seemed to be the nearest to the loss simply due to the time order and regarded it as its true cause.

The Hatteras case⁷ which happened during the American Civil War in 1863, and Pink v. Fleming in 1890 may be good examples. In Germany, among many cases which mainly happened during World War I, The Romulus (1907); The Totmes (1916); The Canadia (1916); or The Sappho (1819); for example, were all suitable cases to show the judgments making the time order as their standard. In any of these judicial precedents, the word "Proxima" was expounded with great severity or stringency and explained it as an essence to pursue the cause of loss in the order of time; as a result, in later times, the word was used with meaning as a more ultimate cause or relation i.e., *causa ultima non prior* and it was understood as its true object without looking for the preceding causes. The following examples will show the legal cases⁸ belonging to the same category as above referred to.

- a) Cargo was insured against "war risks only"⁹. After the war broke out, the voyage was for a while made without the occurrence of any event, the belligerent of one side declaring prohibition of exports and goods-wagons being in short supply, the delivery of the cargoes at final destination was delayed. On account of this, the demurrage and cost of transshipment were claimed and the Supreme Court held that the insurers were not liable

⁵ Dr. Carl Ritter, Das Recht der Seeversicherung Hamburg 1922. S. 470.

⁶ Otto Hagen, Seeversicherungsrecht. Berlin 1938. S. 55.

⁷ The Hatteras case, Ionides v. Universal Insurance Assn., 1863.

⁸ Dr. Julius von Gierke, Versicherungsrecht unter Ausschluss der Sozialversicherung. Zweiter Band. 1947, S. 269.

⁹ „nur gegen Kriegsgefahr“.

to indemnity the loss, judging that war risk was deemed to be a remote cause.

- b) Risks of Collision; the risk of collision of insured vessels was increased on account of unseaworthiness. The vessel collided with another by dint of the captain's fault. Though the vessel had already been unseaworthy at the inception of her voyage, the collision would have been prevented if the captain had operated skilfully. The Supreme Court held that in this case the insurer was liable for the event, notwithstanding the unseaworthiness, adopting the *causa proxima* rule.

Furthermore, many judicial cases, enumerated by Otto Hagen in his work "Seeverversicherungsrecht" 1938, to which the principle of *causa proxima* was applied, also were based upon the view that the most proximate cause, from the view point of time, was nearest to the loss namely,—

- 1) The Romulus Case¹⁰

In winter, 1904–1905, during the Russo-Japanese War, the Romulus was insured against "marine risks only"¹¹ according to the General Rules of Marine Insurance, 1867. She set out from Cardiff to Vladivostok laden with 3,500 tons of coal. The vessel sailed east of the Philippines & Japan on the way to Vladivostok, but as she sustained severe damage in the area of Chishima Islands on account of ice blocks she was forced to enter Hakodate Harbour as her port of refuge. Nevertheless, she was, on the way to Hakodate, captured by a Japanese cruiser, "Iwata", and held as captured by reason of carrying contraband goods in time of war. The ship, therefore, intentionally stranded in Aomori Harbour owing to the infiltration of water. The Japanese Prize Court declared that her cargo was confiscated as a prize, and it was sold. While the buyer was conveying the damaged cargo from the stranded place to Hakodate, the ship sank and became a total loss together with the cargo. Though the Supreme Court took also into account the damage sustained by this time before the Japanese intervention, the Court held the damage was caused by a marine risk.

- 2) The Totmes Case¹²

Cargo insured against "marine risks only"¹³ was loaded on board the Totmes, a German vessel, and carried from Antwerp to Chile, but owing to the outbreak of war, she was prohibited to sail from the port by the Belgian Government. The vessel with cargo was detained. The crew was ordered to get out of the vessel and two Belgian inspectors were substituted for them. On September 28, 1914, as a fire broke out in the coal-chamber, the cargo was all unloaded and laid on the pier. By November of the

¹⁰ Rechtsfall RG. I. 18. 12. 1907 Entsch. 67, 251. (Romulus)

¹¹ „Nur für Seegefahr.“

¹² Rechtsfall RG. I. 29. 11. 1916 Entsch. 89, 139; APU. 1917, 34 gegen OLG Hamburg 10, 5. 1916, 106 (Totmes).

¹³ „Nur für Seegefahr.“

same year and during the military occupation of Antwerp, the cargo was stolen. The Supreme Court held that the insurer was liable to indemnify and a plea for war risk as its cause was rejected.

3) The *Canadia* Case¹⁴

A German cargo, cotton, was insured against "war risks only" for shipment from Galveston to Christiania. A Danish ship, the *Canadia*, was seized by the British cruiser, "Hilary", on March 11, 1915 and ordered to direct to Kirkwall together with escort. The next day, the captain thought it dangerous to sail on the route between Shetland Islands and Fair Isle because he knew the light at the Fair Isle was put off, so he intended to wait till the next morning, but nevertheless, the commander of the cruiser compelled him to sail as he feared torpedo attack by a German sub-marine. Thereupon, the vessel stranded on a rock at Fair Isle and the total loss of the ship and cargo was sustained. The Supreme Court having the same opinion as the Hamburg High Court, held the loss caused by a marine risk.

4) The *Sappho* Case¹⁵

During April-May, 1915, S. S. *Sappho* set out from Calamata to Venice with 1743 bags of galleen, and loaded, on the way, iron materials. They were insured with a clause of transit and processing risks against war risk to Zürich. When war broke out between Austria-Hungary and Italy, the vessel arrived at Venice. There, cargo was discharged and the vessel had to wait for a long time. An order of export prohibition was issued, and a licence from Rome was required. Furthermore, goods-wagons were in very short supply, due to hostilities, so that the carriage was much delayed. For these resulting losses, lighterage and warehouse rent were claimed. The Supreme Court held that the war was a remote cause of the delay of carriage. Thereupon, the Supreme Court held that the insurer of war risks was not liable because the Supreme Court could not consider the war as its true cause.

Concerning marine insurance in France, as in U.K. or Germany, they make it a rule to decide whether the insurer is liable or not, resting on the principle of *causa proxima*.

Ripert,¹⁶ as an instance, said as follows:—

"La jurisprudence française base en générale sa décision sur la *causa proxima*" in France, and he went on to say about the loss:

"La *causa* immédiate du sinistre . . . la *causa* matérielle immédiate de la perte . . . La formule est vague, mais il est impossible d'en donner une plus précise . . . La jurisprudence montre sur ces questions une indécision regrettable."

In other words, according to French law, the insurer is also liable for the loss in marine insurance, basing generally upon the *causa proxima* rule. Even

¹⁴ Rechtsfall RG. 1. 23. 2. 1916 Entsch 89, 142. (*Canadia*)

¹⁵ Rechtsfall RG. 1. 23. 2. 1918 Entsch. 92, 247 APV 1918, 78. (*Sappho*)

¹⁶ Ripert, Nr. 2418; Ritter *a. a. O.* S. 497.

though the cause is assumed something direct or material in the loss, there remains yet room of something vague and it is considered impossible to attain sufficient precision.

Since early times in England, the *causa proxima* rule has been recognized as a great maxim as to the relation between loss and risk insured in marine insurance and it is indeed such a famous rule as Chalmers said "No principle of marine insurance is better established than the rule *causa proxima non remota spectatur*."¹⁷ But none the less in early times, there were not few law cases based on a simple formalism, that is to say, laying excessive weight on time order but intentionally neglecting the other major factors.

Among these, the most famous case was the one which involved the liability of an insurer against losses on 6,500 bags of coffee, occasioned by the Confederates who had extinguished the light on Cape Hatteras during the American Civil War. The insurance policy had a clause "warranted free from capture, etc., and from all consequences of hostilities, etc."

The vessel belonging to the Federals at that time went ashore near Cape Hatteras. During the war, the Cape and adjoining country were in possession of the Confederate forces. It happened at one night that the ship met high waves and sank, but 120 bags out of her cargo was safely discharged so that no question arose. At the same time, 1,000 more bags might have been saved but for the interference of some Confederate officers who had come on board and taken possession of the ship. Consequently, the ship with her remaining cargo was totally lost by the action of the waves.

In the case mentioned above, considering that if it had not been for the intervention of enemy, unloading might have been possible, the insurer would have been exempted from the liability of the consequences of hostilities, but on the other hand, the loss of the remaining cargo with the vessel was, no doubt, recognized as loss caused by the perils of the seas from the moment of her stranding. So that the loss was held to be the insurer's liability.¹⁸

In this case, as in the other cases formerly held, "*consequence*" was assumed to have the same meaning as "caused by", and to all similar cases as this, the rule of *proximate cause* has been applied with equal stringency. Thus in case of *Pink v. Fleming*, 1890, Lord Esher applied this rule with the same severity as in the Cape Hatteras case, to the judgment of "damages consequent on collision".¹⁹

¹⁷ Chalmers, *ibid.* 76; Kent 3. 302; Ritter, *a. a. O. S.* 470.

¹⁸ Though the light on Cape Hatteras had been kept burning just until the causality occurred, it had been extinguished by the Confederates during the American Civil War. Thereupon, if the light had been kept burning on, the captain could have taken a proper measure for this case without miscalculation of his sight. But in this action, it was held that the stranding was not considered as a direct consequence of hostilities, furthermore, the court held that the absence of the light and the loss of the ship were too distantly connected to stand in the relation of cause and effect, and to make the other one the consequence of the other.

¹⁹ Lord Chorley, "Arnould on the law of Marine Ins." 14. ed. Vol. II, s. 790, p. 711.

II

As mentioned above, in England, Germany and France, they recognize the proximate or direct relation between the perils insured against and the loss in marine insurance, as an essential element but in former times, regarding the *causa proxima* rule in these countries, it may be proved from a number of law cases in England and Germany as above referred to, that only a mechanical or rather superficial understanding was prevalent as to the "*causa proxima*", which laid a great stress upon the most proximate cause in order of time, without picking specially up the more predominant causes, if any.

Though such an understanding of *causa proxima* as to decide whether liabilities come to the insurer or not, according to the cause in time²⁰ is quite simple and clear in practice, and may meet the demand of the business world where they expect prompt decisions, but on the other hand, depending upon such understanding, a number of dominant remote causes might necessarily be neglected. At the same time, it can not be denied that this understanding will conflict with our principle of justice and give us sufficient apprehension to threaten the law consciousness.²¹ Therefore, the understanding of the *causa proxima* rule as in former times, is said to be too crude to obtain a fair result on one hand and to deal simply and promptly with many actions at issue of this sort as mass phenomena responding to the demand of the business world on the other hand. A passage from Julius von Gierke is as follows, "die Causa-proxima-Regel leicht zu einer nicht gerechtfertigten Geringschätzung entfernterer Ursachen führen kann, die unserem Rechtsbewusstsein widerspricht"²². Gierke also criticized that such an understanding would tempt the science of law to fall into a mere vulgar hand-work, to commit a crime by violence mercilessly and to distort the many sidedness of human life.²³

Thereupon, in adopting the *causa proxima* rule as a starting point in marine insurance, it has become necessary that the understanding should always be much more improved by allowing for the other causes.

Accordingly, from these view points, the German law case (a) as above referred to, will quite differently be assumed as that held by the Supreme Court, and war will be looked on as the decisive cause.²⁴ Any cases to which the rule of *causa proxima* were applied in marine and war risk, as quoted by Otto Hagen, happened during World War I. The so-called great judgment on the Sulfmeister²⁵ held by

²⁰ Die zeitlich nächste Ursache, die letzte Ursache. (*Causa ultima*).

²¹ Rechtsbewusstsein.

²² Julius von Gierke, „Versicherungsrecht.“ Stuttgart 1947. S. 270.

²³ „Vielgestaltigkeit des Lebens brutal vergewaltigt.“

²⁴ Gierke stated on this point as follows; "Man mag sie daher in Seeversicherungsrecht zum Ausgangspunkt nehmen, muss sie aber immer einer Korrektur unterwerfen. Dann aber wird man in dem Beispiel aber unter (a) zu einen anderen Ergebnis als das Reichsgericht gegangen und den Krieg als die entscheidende Ursache ansehen".

²⁵ Rechtsfall RG. I. 5. 12. 1936. Entsch. 153. 113 vgl. das Berufungsurteil OLG Hamburg 3. 1. 1936 Hans. RG. Z. 13 1936. 107 (Sulfmeister).

the German Supreme Court on January 1, 1936 about two decades after World War I, gave rise to many controversies in the legal world.

Because, in this case, notwithstanding the vessel was already unseaworthy at the beginning of voyage²⁶ by reason that the collision would have been prevented by the captain's prudent care in operating the vessel, the Supreme Court considering the captain's error in navigation as its true cause in this case, held that the insurer was liable, judging from the *causa proxima* rule reviewing the processes in the German court as mentioned above, it can not be denied that the dominant position which the rule of *causa proxima* occupies in marine insurance is now on a firm basis. Because according to the theory of adequate causality which has hitherto occupied a predominant position in German law, it is inevitable that many useless controversies arise from picking up its true cause in so far as marine insurance is concerned. Evidently, since the judgment of the Sulzmeister case, the constant efforts have, for the first time, given the general effects on judgment.²⁷

From the preceding fact, we would say that, the *causa proxima* rule in marine insurance in Germany should be understood as essential that loss is directly caused in time. As this criterion is not simple or mechanical as in former times and the ultimate cause in time is a standard in judging only when there is doubt on the occurrence of loss, then, when the court makes a misjudgment, it is, duly possible to appeal to a higher court by proving the more predominant causes.

Accordingly, when many successive causes are in the state of co-operating relation at the happening of a loss, most proximate in time, is *prima facie* deemed to be the true cause of the loss. This is the position in Germany at the present time. This is the meaning of "*causa proxima non remota spectatur*". But in this case, it does not necessarily mean that appropriate allowance for the fact of which cause gives more effect on the happening or scope of the event in question, basing upon the influences held by each cause, is by no means to be excluded.²⁸

²⁶ According to ADS § 55, when the vessel is, unseaworthy at the beginning of a voyage the insurance is *ab initio* null and void and so far this is the same in England.

²⁷ However, in this decision proximate cause was neither dealt as signifying the most effective cause, nor was captain's miscalculation deemed as the predominant cause, that is to say, there were no questions about the causality between these causes, and it can not be denied that the reason for the decision aimed at co-operating the former law cases in marine insurance and seemed as if simply agreeing the former decision. Therefore, according to the law cases as mentioned above, it is said that the direct cause in time, i.e., "die zeitlich nächste Ursache als *causa proxima*" should be taken as the proximate cause. Thereupon, it can be said that the rule of *causa proxima* always assumed a direct cause nearest in time. Otto Hagen, *a. a. O. S. 59*, Anm. 8.

²⁸ A passage from Otto Hagen (*ibid. a. a. O. S. 59*) as follows; „Haben bei einem Schaden mehrere Ursachen zusammenwirkt, so ist als massgebende Schadenursache diejenige zu betrachten, die dem Schadenereignis zeitlich am nächsten steht (*causa-proxima-Regel*). Dabei ist eine billige Rücksicht auf das Mass des Einflusses nicht ausgeschlossen dass die eine oder andere Ursache auf den Eintritt des Versicherungsfalles oder auf den Umfang des Schadens ausgeübt hat.“

III

We have hitherto observed the understanding of the *causa proxima* rule in early times, mainly in England, France and Germany. Among them England has, in particular, made a remarkable change in the idea of the *causa proxima* rule since the beginning of this century, particularly since World War I and II. That is to say, war is considered as a criterion to decide which parties are liable for both marine and war risks, depending upon the understanding of the *causa proxima* rule.

The fact that almost all the cases in Germany as above referred to, also were taken up as a legal problem, from the viewpoint of the war, will show the point clearly. The cases on war risks in England, also depend mainly on this point. A particular case which opened quite a new field and took a different way from the conception of former times on the application of the *causa proxima* rule during World War I, was the St. Oswald case.

The St. Oswald,²⁹ engaged in the transportation of the army from Gallipoli to Marseilles sailed without lights and came into collision with another vessel. Since the vessel was engaged in warlike operations as shown above, the damage of collision in this case, was held as a consequence not of marine but of war risk.

We can take another example like this, i.e., the case of the Warilda.³⁰ The Warilda was employed by the Admiralty and engaged in the warlike operation of transporting wounded combatants under T. "99" charter party and was steering fast to her country at night without lights and through the negligence of her master came into collision with a merchant ship, also sailing without lights, and both vessel were damaged. In this case, too, both the House of Lords and the Court of Appeal, held that the collision was a consequence of warlike operations. "The negligence of the master", said Lord Cave, "may have contributed to the loss, but its predominant and effective cause was the operation in which the vessel was engaged, and the liability therefore attaches". "It appears to me", said Lord Shaw "when a ship requisitioned by the naval authorities and actually engaged in a warlike operation came into collision with another vessel under, of course, the exceptional conditions of speed with lights doused and such other warlike precautions, the category of war risk can not be changed into the category of sea risk by reason of the negligence of those engaged in conducting these operations. The conduct may have been faulty but it was a warlike operation though faultily conducted"³¹

Where a warship convoying a number of vessels was broken up by enemy action and in the confusion that followed, one of the vessels came into collision

²⁹ The St. Oswald, *British & Foreign S.S. Co. v. The King* [1917] 2 K. B. 769: [1918] 2 K. B. 879.

³⁰ *Adelaide S.S. Co. v. The King* [The Warilda, 1923 A. C. 292]

³¹ Even after the Warilda case, it now appears clear that negligence, whether of the one ship or the other or of both, does not prevent a collision from being a consequence of a warlike operation. (*Board of Trade v. Hain S.S. Co., Ltd. (Trevention)* [1929] A. C. 534)

with another without any negligence on the part of either. Shearman, J. held that the loss was the direct and natural result of blowing up of the warship, and therefore proximately caused by a war risk³².

As we can understand from a few cases during World War I, as above referred to, the British rule of *causa proxima* in modern times is no longer of the formula as in former times, which decided the liability of insurer depending simply upon the conception of cause and effect in order of time, but has given rise a new formula which requires the fact as an essential condition that the loss is a direct and natural result.

But under the "Free from Capture and Seizure Clause" (F.C.S Clause) a tendency to distinguish marine from war risk was enforced by a new interpretation since World War I, especially after World War II.

A widely known case during World War I, was the *Ikaria* case, 1918.³³ The vessel was insured against the perils of the seas, but, on this contract, the insurer was warranted free from the consequences of all the hostilities. "Though the vessel was torpedoed by a German submarine about 25 miles from Havre, she was brought into harbour, where she remained for two days taking ground each ebb tide but floating again with the flood. Finally, her bulkheads giving way, she crumpled up and sank and became a total loss". "In an action on the policy, the plaintiff contended the torpedoing could not be regarded as the *causa proxima* of the loss, owing to the intervention of a new cause, viz., grounding and the breaking of her back by the consequent stranding. However, it was held that the train of causation from the acts of hostility to the loss was unbroken and that the defendants were therefore protected by the warranty".³⁴

Thus, when the loss is due to a combination of causes, the question which the proximate cause is—the *causa proxima* rule—is solvable by a mere cause last in time.³⁵ "For, causation is not a chain but a net.... The cause which is truly proximate is that proximate in efficiency. That efficiency may have been preserved although other causes may, meantime, have sprung up which have yet not destroyed it or truly impaired it, and it may culminate in a result of which, it still remains the real efficient cause to which the event can be ascribed."³⁶ Therefore, in *Pink v. Fleming* [1890] 25 Q.B.D. 396, Lord Esher's words "only the cause last in time could be looked to", must be said not to be compatible with the present understanding of the rule.³⁷

As soon as the criterion of the cause last in time was abandoned the problem which was imposed upon the courts became much more difficult. Moreover, "In marine insurance, most results are brought about by a combination of causes"

³² *The Caloline* (1921) 37 T. L. R. 617.

³³ *The Ikaria*, *Leyland Shipping Co. v. Norwich Union Fire Ins. Society* [1917] I. K. B. 873, [1918] A. C. 350.

³⁴ Arnould, *ibid.* s. 822, p. 742.

³⁵ Per Lord Dunedin in *Leyland Shipping Co. v. Norwich Union Fire Ins. Society* (1918) A. C. 350.

³⁶ Lord Shaw in *Leyland Shipping Co. v. Norwich Union Fire Ins. Society* (1917) and (1918)

³⁷ Arnould, *ibid.* s. 783. p. 704, f. n. 35.

it has become necessary to make a "search for the cause" and this "involves a solution of the governing explanation in case".³⁸ This choice of the real efficient cause from out of the whole complex of the facts must be made by applying commonsense standards.

As shown above, in England, they are now entirely free from the idea of cause last in time to which they could hitherto hardly bid farewell and in order to search for a true meaning of "*causa proxima*", they are now accustomed to make it clear by adding an adjective, e.g., dominant,³⁹ direct, determining or effective and predominant to the principle of causation. The most distinguished case during World War II, was the *Coxwold*.⁴⁰ The vessel was convoyed from Greenock to Narvik in Norway and stranded on her voyage. She loaded petrol as goods to be used by the British Force in Norway. Accordingly, this voyage was a warlike operation but her stranding must have clearly been an event occasioned by a marine risk. Therefore, the question in this case was whether this particular stranding might be deemed as the consequence of a warlike operation or not, allowing for the fact that the stranding occurred due to a maritime peril. The stranding had happened after about half an hour when the vessel turned to at right angles, aiming at avoiding an enemy by the order of naval authorities. The vessel stranded finally on rocks owing to an unforeseen current and there was no negligence to be found. Regarding the above case, the House of Lords overruled the decision of the Court of Appeal, and held that the loss was proximately caused by the warlike operation, not by the current. The decision of the *Coxwold* case gave rise to a great surprise in the market, for stranding was hitherto considered as a maritime peril. Thereupon, the insurer promptly undertook the revision of F.C.S clause (Free from Capture and Seizure Clause) so as to obtain a clearer border line between marine and war risks.

After consultation between the Ministry of War Transport and the parties interested, they decided to execute a newly revised clause, the contents of which were as follows:

"Collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of voyage or service which the vessel concerned, or in the case of a collision any other vessel involved therein is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power".

³⁸ Per Lord Wright's opinion in the *Coxwold* (1942) A. C. 691., afterwards he said in *Athel Line Ltd. v. Liverpool and London War Risks Ins. Assn. Ltd.*, (1946) 1. K. B. 117 that this legal theory of causation has in course of years had a remarkable history but it appears to have come to rest at the moment; laying down it that this type of question of contribution is really a matter for the commonsense and intelligence of the ordinary man, and at the same time that this criterion is not at all easy to apply

a) See, *The Prima Ocean S. S. Co., Ltd. v. Liverpool and London War Risks Assn. Ltd.*, (1948) A. C. 243.

³⁹ Per Dunedin in *Leyland Shipping Co. v. Norwich Union Fire Ins. Society* (1918), and Lord Porter in the *Coxwold*. Arnould, *ibid.*, s. 283. p. 705.

⁴⁰ The *Coxwold*, *Yorkshire Dale S. S. Co., Ltd. v. Ministry of Transport* (1942) A. C. 691.

As above referred to, in the case of the Coxwold, though the House of Lords held that the stranding was caused directly by a hostile act, the greater parts of dispute were concentrated on the problem how the *causa proxima* rule should be applied. Any of the courts in England hitherto attached an essential importance to the voyage and service on which the vessel was engaged.

By accepting, now, the revised clause which disregarded this point, it may perhaps be that, on its fact, the Coxwold of today would now be decided differently. Perhaps the same may be said of the well known case of the *Ikaria* in 1918.⁴¹ (*Leyland Shipping Co., Ltd. v. Norwich Union Fire Ins. Society*).

We have so far observed the fresh understanding of the *causa proxima* rule in recent times, by a few cases in England, where they are proud of being the mother country of the rule in marine insurance which came out from so primitive a stage as searched only for a simple time order, and has gradually developed to the present stage where an essential importance is attached to a dominant cause, i.e., it may mean at the same time nothing but a triumph by our consciousness of law.

Having started from taking a dictum of Lord Bacon as the causality in marine insurance, England has obtained a great benefit on her decision and now it may be said that she has entirely left out of the old husk and accomplished the new equipment.

Gierke's criticism, as above referred to, that the *causa proxima* rule as understood formerly in Germany has, not only given an ill effect of neglecting the dominant causes but also invited a result against our consciousness of law is truly worthy of appreciation.

IV

So far in England, the new understanding has been established through her judicial cases since World War I and II, and particularly undertaken to revive the *causa proxima* rule which has hitherto been depressed. At the same time, as a criticism on the *causa proxima* rule has become gradually to be vigorous in Germany and France, we can no longer come across with so simple a theory of cause proximate or direct in time as formerly.

Ritter asserted in his commentary remark on the General Rules of German Marine Insurance as follows: "When a number of causes exist in competing with each other and any one of which has an inevitable relation to a loss, that cause should be taken as the true cause of loss", and his remark is in line with those which are commonly approved by the decision in England. It has been stated

⁴¹ In the United States, as in England, the *causa proxima* is the prevailing rule and generally speaking, it may be said that the essentials of judicial case of the former country keep up with that of the latter.

The judicial cases in recent times, *Queen Ins. Co. of America v. Glove and Rutgers Fire Ins. Co.* (1929), *Link v. General Ins. Co. of America*, etc., will be taken for examples.

in the preceding section that Otto Hagen also arrived at the same conclusion.⁴²

The *causa proxima* rule has, since former times, been recognized as a great maxim in the British law of marine insurance, and it is written in the preceding section that this principle is legalized and prescribed in detail on § 55 in the Marine Insurance Act, 1906. Notwithstanding, the problem of what *causa proxima* means, was an extremely difficult question and so the British court often fell into confusion. Thereupon, this principle, as Ritter stated, was almost to lose the reason for its own existence, and it has often been asserted to be abandoned. Accordingly, it is natural that different theories substituting for it have appeared but at last a matter came out such as, any one of these theories has both merit and demerit, and there was no room for adequate application. Among them, there are the two most outstanding formulas, the one is the *theory of adequate causality* and the other, the *theory of most predominant cause*.⁴³

It was made clear by German scholars, particularly by Ritter, that these two theories contain many weak-points in themselves as a standard to decide causation in marine insurance.⁴⁴

Thus, seeing the process that the *causa proxima* rule has changed its feature, from the cause last in time formerly to dominant causation recently, it can not be denied that the rule has entirely lost its own feature as in former times and has reduced it to one like the theory of adequate causality, which stands in contrast with the principle of *causa proxima*. It is natural that Otto Hagen criticized the *Ikaria* case in England and stated in his treatise as follows:

"But when such a matter comes out, this principle fairly approaches German inherited conception and the difference between them can not be recognized."⁴⁵ We can say that it was rather a misunderstanding of Bacon's philosophy to grasp the *causa proxima* as the last cause "letzte Ursache" or the nearest cause in time "die zeitlich nächsten Ursache". Since then, the *causa proxima* rule seems to have been able to reach, at last, its own destination through a number of experiences of zigzag trials.

We may criticize that Otto Hagen was right, on facing the decision of the *Ikaria* case, when he said, "It never means that the British court made an overall change on the *causa proxima* rule, but on the contrary, it makes clear the decisions hitherto achieved in England, we must, by no means, misunderstand as to this fact".⁴⁶

⁴² See, Otto Hagen, *Seeversicherungsrecht*. S. 59.

⁴³ „Theorie von der adäquaten Verursachung und Theorie der Überwiegende Schadenursache.“

⁴⁴ The features of these two were described in detail in "Marine Insurance" written by Dr. Hiroshi Suguro, so I do not think it necessary to state them more in detail and would refer you to read.

⁴⁵ "Hiermit verschmelzt sich diese Regel aber so nahe mit der landläufigen deutschen Auffassung dass sie sich praktischen Unterschied mehr erkennen lässt" (Otto Hagen, *a. a. O.* S. 56.)

⁴⁶ The sinking of the *Ikaria* by torpedo was held to the effect that war risk insurer was liable, not because the sinking was the last cause but because it was an inevitable consequence by torpedoing.

So far, better or worse, the principle of *causa proxima* has made great strides since the revision on the General Rule of Marine Insurance, and consequently, these many theories act as powerful reinforcements to the *causa proxima* rule and the principle of proximate cause which had almost once lost its credit, seems to have left its old husk and arrived at the proper destination as a neo-principle, so to say, of *causa proxima*.⁴⁷

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"Man darf sich auf nicht darüber täuschen dass Ikaria Urteil keineswegs eine volle Veränderung der englischen Rechtssprechung bedeutet oder die heute dort zur Herrschaft gelangte Rechtsauffassung darstellt". (Otto Hagen, *a. a. O.* S. 56.) Moreover, it is justly said that the British judicial case such as *Montaya v. London Ass. Co.*, 1851 was a fair decision from this view point.

⁴⁷ It is said in the *Coxwold* case as follows: "though the theory of causation has a history for a long time, it appears to have come to rest at the moment—".