

MALICE IN MARINE INSURANCE LAW: NAVIGATORS INSURANCE CO LTD V ATLASNAVIOS-NAVEGACAO LDA [2018] UKSC 26

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Introduction

What is malice? This was not the question the United Kingdom Supreme Court was originally asked to determine. Yet, the answer ultimately decided the case. Lord Mance's opinion in *Navigators Insurance Co Ltd v Atlasnavios-Navegacao LDA*¹ may have been a surprise to many given that it was based on an issue that was not in dispute. It was common ground that the drug smugglers involved in the case were acting maliciously, but Lord Mance found that their covertly strapping cocaine to the hull of the vessel was done without malice, and consequently the ship was not covered by the marine insurance policy. Lord Mance clarified he was not making new law but merely reverting it back to what it should have been had subsequent decisions not been erroneously thought to have broadened its scope. Though the case may be correctly decided, this case serves as a cautionary tale that the courts can raise issues not in dispute and even base their decisions on what was originally common ground. Such *sua sponte* or *proprio motu* action occurs from time to time and should be a consideration for parties when deciding whether to appeal.

Facts and Procedural History

Shipowner Atlasnavios-Navegacao LDA, the Appellant, and the insurers, the Respondents, entered into a marine insurance contract for a period of one year for the vessel *B Atlantic* from July 2007 to June 2008.² This was a war risks insurance policy under the terms of the Institute War and Strikes Clauses Hulls-Time (1/10/83), which provides cover for loss or damage to the vessel caused by, inter alia, 'any terrorist or any person acting maliciously or from a political motive'.³ Clause 3 of the policy governs constructive total loss:

In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of 12 months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery.

The 12-month period was later reduced to six months by agreement.⁴ The policy is subject to exclusions in Clause 4 of the policy, which excludes, among others, 'loss damage liability or expenses arising from ... arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations'.⁵

In August 2007, the *B Atlantic* was required to undergo underwater inspection by authorities in Lake Maracaibo, Venezuela after loading of coal bound for Italy was completed.⁶ The divers noticed bags of cocaine weighing 132kg hidden ten meters below the waterline strapped to the hull of the ship.⁷ For the purposes of the insurance claim, neither the shipowner nor crew were deemed responsible for the smuggling, but the ship was detained and the crew was arrested per *Anti-Drug Law 2005* (Venezuela).⁸ After long exceeding a detention period of six months, in June 2008, the shipowner served a notice of abandonment to the insurers and treated the vessel as a constructive total loss.⁹ The insurers found no defect with the notice and only disputed that the peril was covered by the insurance policy.¹⁰

At issue in the case is 'whether the vessel sustained a loss by an insured peril, entitling the owners to recover the vessel's insured value from the respondents, her war risks insurer'.¹¹ This case began in the Commercial Court in

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¹ [2018] UKSC 26 ('*Navigators Insurance*').

² *Ibid* [2].

³ *Ibid*.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *Ibid* [7].

⁷ *Ibid*.

⁸ *Ibid* [8]–[9].

⁹ *Ibid* [10]. See *Marine Insurance Act 1906*, 6 Edw 7, c 41, ss 60–3.

¹⁰ *Ibid*.

¹¹ *Ibid* [1].

2014.¹² There, Flaux J ruled for the shipowner, finding that it was entitled to recover from the insurers because the loss was attributable to the hidden cocaine, which both parties agreed was a malicious act and the exclusion due to customs detention in Clause 4 did not apply to the malicious act.¹³ The Court of Appeal reversed and found that the exclusion clause did bar the shipowner from recovering from the insurance policy because it was applicable to the insured peril.¹⁴

Supreme Court Judgment

The shipowner appealed and the Supreme Court affirmed the judgment of the Court of Appeal based on a separate ground. It had been submitted by both parties in the lower courts that the act of drug smuggling constituted malice, but the Supreme Court did not accept this assumption and ultimately found that there was no malice.¹⁵ Consequently, the Supreme Court reasoned, it was unnecessary to rely on the exclusion clause when the incident itself was not committed with malice and therefore not an insured peril.¹⁶ Lord Mance, with Lords Sumption, Hughes, Hodge, and Briggs in agreement, held that for a person to be acting maliciously, ‘an element of spite, ill-will or the like is required’.¹⁷ He added:

An act directed with the relevant mental element towards causing the loss of or damage or injury to other property or towards a person could lead to consequential loss of or damage to an insured interest ... whether the actor was a terrorist, a person acting maliciously or a person acting from a political motive.¹⁸

He further pronounced that the target of the malicious attack is not limited to the insured vessel.¹⁹ Rather, it could be other properties or persons, as long as the ship is subsequently damaged or lost as a by-product. Based on this definition, even though the smugglers were engaged in criminal activity, they did not act with malice because their action was not designed to injure anybody or damage the vessel.²⁰ In fact, they did not want the ship to be damaged at all because their desired result was that the ship with the concealed cocaine would reach the destination safely without being noticed.²¹

Furthermore, Lord Mance explained that the Institute War and Strikes Clauses must be read in its temporal context.²² It was drafted in 1983 when the London insurance market sought to update its insurance policy forms. Rather than creating new terms, the update was meant to ‘bring fresh order and clarity to ... many of the time-honoured concepts used in the market’.²³ The drafters would have had in mind *Nishina Trading Co Ltd v Chiyoda Fire & Marine Insurance Co Ltd*²⁴ and *Shell International Petroleum Co Ltd v Gibbs*²⁵. The element of malice was not found in either case because there was no spite.²⁶ With this as the backdrop, when updating the marine forms, the malice language would have been understood as necessitating spite or ill-will.²⁷ According to Lord Mance, the parties, and possibly other owners and insurers prior to this case may have thought persons acting maliciously should be interpreted more broadly due to two subsequent cases, *Strive Shipping Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd*²⁸ and *North Star Shipping Ltd v Sphere Drake Insurance plc (No 2)*.²⁹ He dismissed this interpretation and reasoned that Colman J in both cases was only applying the particular facts of the cases before him and was not making a general pronouncement on the definition of malice that expanded its scope.³⁰

Lord Mance went on to discuss the shipowner’s arguments in favour of a broader interpretation of the language that cites the concept of malice in tort law and criminal law.³¹ Dismissing the definition of ‘a wrongful act done

¹² Ibid [3].

¹³ Ibid [5].

¹⁴ Ibid.

¹⁵ Ibid [29].

¹⁶ Ibid [30].

¹⁷ Ibid [28].

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid [29].

²² Ibid [15].

²³ Ibid [16].

²⁴ [1968] 1 WLR 1325 (*The Mandarin Star*).

²⁵ [1982] QB 946 (*The Salem*).

²⁶ *The Mandarin Star* (n 24) 462H; *The Salem* (n 25) 965–6.

²⁷ *Navigators Insurance* (n 1) [22].

²⁸ [2002] EWHC 203 (Comm) (*The Grecia Express*).

²⁹ [2005] EWHC 665 (Comm) (*North Star Shipping*).

³⁰ *Navigators Insurance* (n 1) [24].

³¹ Ibid [25]–[27].

intentionally without just cause or excuse' in the context of the Riots and Civil Commotions Clauses, Lord Mance found the importation of a definition from another area of law unpersuasive.³² Similarly, malice in the now largely invalid *Malicious Damage Act 1861* was also inapplicable because the contexts differ and the mental element required for malice under that Act would have been very dissimilar.³³ Though Lord Mance acknowledged a single definition between criminal law and marine insurance law would simplify the jurisprudence, he nonetheless found the purposes too different to make harmonization desirable.³⁴ Having dismissed the appeal because the act of smuggling was not deemed malicious and therefore the exclusion of detainment based on custom regulations applied, Lord Mance ventured on to discuss how the case would be ruled if the common ground that the cocaine smugglers did act maliciously were to be accepted.³⁵ The same conclusion that the appeal should be dismissed was reached because of the longstanding marine insurance law rule that if there are two concurrent causes and one is an insured peril (person acting maliciously) and one is an excluded peril (detainment due to violations of customs regulations), there would be no coverage.³⁶ This obiter reaffirmed the position of marine insurance law on concurrent causes and is uncontroversial.³⁷

Implications of the Judgment

Lord Mance's holding in this case turned on an issue that was common ground between the parties. His Lordship seized the opportunity to clarify what he believed was a wrongful interpretation of *The Grecia Express* and *North Star Shipping*, an issue he raised with the parties during the hearing. This should serve as a warning to parties when they decide whether to appeal decisions. Though in this case, the result would have been the same had the Supreme Court restricted itself to the points raised in the appeal, future litigants must be prudent when deciding whether a partial victory should be appealed because the Supreme Court has indicated it would not hesitate to decide a case on an entirely different point that the parties may not have anticipated.

Whether the parties' mutual understanding of the definition of a more expansive definition of malice was indicative of the general understanding in the industry is unclear, but it certainly was not a point they originally wished to dispute. During the hearing, Lord Mance expressed doubt that there was malice in this case and because neither party was able to convince him otherwise, they were directed to make further submissions on this point after the hearing.³⁸ The opinion sheds little light on the arguments in the written submissions, though they were most likely unpersuasive because the final opinion did not include additional arguments or case law that Lord Mance did not already allude to during the hearing.

Conclusion

The reasoning of the opinion may have been a surprise to both parties, as the Supreme Court's holding departed from the judgment of the Court of Appeal and held to the contrary of the common understanding of the parties. Lord Mance clarified that malice requires a motive, and that motive was not met in this case. Therefore, in future marine insurance cases where there is no ill-intent or spite, there would be no malice. Shipowners must weigh whether similar incidents of third-party smuggling are of such significant risk that they need to obtain separate cover from the marine insurer. Likewise, insurers must determine whether they should provide such coverage when it is possible that the smuggling operations involve the master and crew, as it was in this case, at least from the point of view of the Venezuelan court. In the long run, this case offers clarity for shipowners and insurers alike. Finally, in high stakes litigation involving shipping or marine insurance law, counsel should be prepared to argue points that were previously common ground to be ready for unexpected questions from judges.

³² Ibid [26], quoting *Allen v Flood* [1898] AC 1, 24 (Lord Herschell).

³³ Ibid [27].

³⁴ Ibid.

³⁵ Ibid [31]–[54].

³⁶ Ibid. See Howard N Bennett, *The Law of Marine Insurance* (Oxford University Press, 1996) 126–7.

³⁷ See, eg, Meixian Song, *Causation in Insurance Contract Law* (Taylor & Francis, 2014) 49–80.

³⁸ *Navigators Insurance* (n 1) [6]. The hearings can be accessed on the UK Supreme Court website: 'Case Details', *Supreme Court* (Web Page) <<https://www.supremecourt.uk/cases/uksc-2016-0192.html>>.