"Constructive Total Loss" -- an Illegal Alien in Tort Law

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Introduction--Confusions

Three common words, constructive total loss, can be used together in their ordinary English senses to describe the fact that a thing not completely destroyed is beyond all use to its owner, and they are sometimes so used by lawyers and judges. Constructive Total Loss (C.T.L. according to its traditional abbreviation), by contrast, does not describe fact, however important fact is to it. It denotes not even a rule or doctrine but a feature of marine insurance concerning indemnity. There are increasing confusions of two sorts about these words. One is the confusion of the factual description with the insurance device. The other is the notion that either or both have anything useful to do with damages. Both are red herrings drawn across the track of a damages claim, usually without affecting the result and only perplexing the reader by the deviousness of the route followed to reach it.

Total Loss—Definition and Recovery

Lay the insurance contract aside for the moment and examine loss in the law of damages. Loss is total when the subject is beyond economical recovery, most obviously when a vessel is sunk in deep water. Loss is also total if a wreck can be recovered but the cost of recovery and restoration would exceed the restored value. This is the consequence of the simple logic that the owner cannot have lost more than he had. The rule therefore is that, apart from expenses and liabilities incurred, the loss is measured by the market value of the vessel before the loss, together with any pending freight and interest (less any salvage value of the wreck). If no market can be shown, other approaches are taken to value, none of them simple. In any case, if the parties do not agree, a trial is needed to determine the value on the conflicting opinions of experts. Future earning power of the vessel is not separately considered but treated as reflected in market value.

The treatment of expenses exceeding the value is described in more detail and to the same effect by the Second Circuit, quoting and reaffirming its earlier decision in The Reno, where the owner of a vessel sunk in a collision had her raised and repaired:

1 The Umbria, 166 U.S. 404, 421 (1897).
2 See B&M Towing Co. v. Wittliff, 258 F.2d 473, 1959 AMC 145, 147 (5th Cir. 1958).
4 See, e.g., The Fire Island, 188 F.2d 962, 1950 AMC 873 (5th Cir.1950) (exemplifying conflict); see also Nicholas J. Healey and Joseph C. Sweeney, THE LAW OF MARINE COLLISION 345 (1998) (commenting on difficulties in determining market value).
5 The Umbria, supra note 1 at 421.
6 134 F. 555, 556 (2nd Cir. 1904).
The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, to which interest many be added to afford complete indemnity; and to this may also be added the necessary expenses of raising her, when that is necessary to determine whether she can be repaired advantageously; and when she is sunk in a place where she is liable to be an obstruction to navigation, the expenses of removing her may also be added. If she was not a total loss, then the measure of damages is the reasonable expense of raising and repairing her to an extent sufficient to put her in as good condition as she was before the collision. The burden is upon the owner to prove the amount of his loss, either by showing the vessel to have been a total loss, actually or constructively, or by showing the extent and cost of the necessary repairs and the incidental expenses.

The word “constructively” here is reasonably understood in its factual sense and its use makes clear that the recovery for total loss is the same under either epithet.

The court then cited *The Havilah*, in which it had held that where a vessel was raised and repaired at cost greater than her value, “the wrongdoer was liable only for the value of the ship, cargo, freight and personal effects which were on board before the collision and not for the cost of repairs except in so far as they did not exceed the foregoing value.” The court concluded: “[t]he effect of both of the above decisions was to limit recovery of damages arising from a collision to the actual loss suffered, and not to allow to the injured party expenses of repair exceeding that limit." Recovery may also be limited by the duty of the owner to minimize damages.

Thus in a tort case there is no way, short of agreement, to avoid fixing the loss by taking contested evidence of value, while C.T.L.’s significance in marine insurance—its only practical significance—is the avoidance of that burden.

**Constructive Total Loss Distinguished**

While there are sometimes factual issues in it, the idea of total loss in marine insurance is pretty clear. If the insurance is by a valued policy, as it commonly is, the stated amount is paid without proof of value and, except for the possibility of suing and laboring expense considered as if a separate insurance, there is no payment or valid claim for loss of use or other expenses, as there would be in the case of partial loss. On payment of the total loss, the insurers acquire ownership of the lost vessel or cargo without the need of a formal abandonment to them. It is seldom of much use to them,

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7 50 F. 331 (2nd Cir. 1892).
9 See The Baltimore, 75 U.S. (8 Wall.) 377, 387 (1869).
although exceptions appear in recent treasure salvage cases. The point is more significant in C.T.L. cases, where salvage value is more likely and where abandonment is therefore a central element.

The working or “doctrine” of C.T.L. has been variously described but, when allowance is made for style and discursiveness, the descriptions are substantially consistent in all respects relevant to this discussion. Arnould, treating it as English insurance law, into which it was embraced with the many other usages in the Marine Insurance Act 1906, has said that “[a] constructive total loss in Insurance Law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment.” He explains that it “exists when the subject-matter insured is not in fact totally lost, but is likely to become so, from the improbability, impracticability or expense of repair or recovery.” A leading Canadian authority says that a C.T.L. “occurs where the insured property exists in form, but has no economic value because the cost of retrieving and repairing it exceeds its insured value.” A standard insurance dictionary distinguishes the use of the words apart from marine insurance: “In non-marine insurance the insured has no right of abandonment but the term is used when repair of the subject-matter would be uneconomic.”

Formal rules are more discursive. The Marine Insurance Act 1906 provides in part:

60.—(1) subject to any express provisions in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual loss.

Earlier, an international conference of distinguished jurists had issued the Glasgow Rules, somewhat more detailed in dealing specifically with vessels and cargo and with abandonment. They were entirely consistent with the definitions above and significant because they represented a consensus in Europe and America.

The applications of C.T.L. and its intimate connection with abandonment were summed up with his usual felicity by Story:

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14 Arnould’s para. 1081.
15 Strathy and Moore 155.
16 HUGH COCKERELL, WITHERBY’S DICTIONARY OF INSURANCE 82 (3rd ed. 1997).
17 MIA §§ 60, 61.
The right of abandonment has been admitted to exist, where there is a forcible
dispossession or ouster of the owner of the ship, as in cases of capture; where
there is a moral restraint or detention, which deprives the owner of the free use of
the ship, as in case of embargoes, blockades, and arrests by sovereign authority;
where there is a present total loss of the physical possession and use of the ship,
as in case of submersion; where there is a total loss of the ship for the voyage, as
in case of shipwreck, so that the ship cannot be repaired for the voyage in the port,
where the disaster happens; and, lastly where the injury is so extensive, that by
reason of it the ship is useless, and yet the necessary repairs would exceed her
present value.\textsuperscript{19}

These are not merely incidental applications of a general rule to marine insurance;
Arnould’s says:

The doctrine is peculiar to marine insurance; there may for some purposes be a
constructive total loss though there has been no insurance, but the expression has
no other meaning than that which is given to it by the law of marine insurance.

The doctrine appears to have originated in cases of capture, to mitigate the great
hardship that would be suffered by an assured whose ship was captured, if he
must await the chance of her being recaptured before he could make a claim on
his policy. It was, however, soon extended to losses of other kinds. (Footnotes
omitted.)\textsuperscript{20}

The words turn up in some fire insurance cases, where, however, they refer to the facts
and not the doctrine. Typically, they describe the situation where a building has not been
totally destroyed but cannot be repaired or reconstructed in place and kind because of
zoning or building codes and payment of the face amount of the policy is required by the
state’s standard fire policy.\textsuperscript{21}

If C.T.L. has to do with anything but marine insurance, that connection has
escaped the attention of the writers of legal encyclopedias,\textsuperscript{22} and statutes,\textsuperscript{23} where it
appears in marine insurance but is not mentioned in connection with fire and property
insurance generally. This limitation is not arbitrary but based on the circumstances in
which C.T.L. has any practical application. First, it can only apply to property that can be
abandoned to the insurer, since a prerequisite is a notice of abandonment, an act of the

\textsuperscript{20} Arnould’s, para. 1081, citing Lord Atkinson in Moore v. Evans, [1918] A.C. 185, 193-94 (H.L. 1917);
\textit{see also} Herbert M. Lord, \textit{The Hull Policy: Actual and Constructive Total Loss and Abandonment}, 41 Tul.
\textsuperscript{21} \textit{See, e.g.,} City of New York Fire Ins. Co. v. Chapman, 76 F.2d 76 (7th Cir. 1935) and cases collected in
\textsuperscript{22} Compare 44 Am. Jur.2d Insurance and 2004 Pocket Part § 1519 (marine) \textit{with} § 1489 (fire), and 46
C.J.S. Insurance and 2004 Pocket Part § 1218 (marine) \textit{with} §§ 1103, 1104 (fire).
\textsuperscript{23} Compare Cal. Ins. Code Div. 2, Part 1, Ch. 1, Art. 5. Loss in Marine Insurance \textit{with} Ch. 2. The Fire
assured that signals his election to treat the loss as total and forego the expense of reparation.\(^{24}\) Next, if there is to be any advantage to the assured, it must entitle him to a liquidated sum, obviating a detailed proof of actual loss. This is unlikely to be found outside of property insurance with an agreed value on the property involved, a feature of the typical marine “valued” policy.

The advantage of C.T.L. is that, without incurring and proving actual expenses, and on showing broadly and not necessarily in detail that the expense of reparation would exceed the agreed value or a stated percentage of it,\(^{25}\) the assured may presently receive the stated amount of total loss. It doesn’t work if there is no such stated amount. The reason for the device has been eloquently explained long ago as the commercial importance of prompt resolution and payment in many cases where promptness is more important than precision.\(^{26}\) Finally, a C.T.L., like any total loss, is alternative, and never supplemental, to a partial loss claim,\(^{27}\) and so the amount recovered on C.T.L. is the full sum insured, as on total loss itself, and nothing additional, except for suing and laboring expenses, and offers the considerable advantage of earlier payment and procedural savings.

**Mischief in the Courts**

**Why?**

The maritime rule of damages has been explained above, and it requires proof of value, which C.T.L. does not require because value has been agreed. Why then is the notion of constructive total loss (hereinafter “CTL” to distinguish it from the genuine article) urged in a case where value is not agreed and therefore must be proven, and where the recovery for total loss must be the same under whichever epithet, actual or constructive? In the tort cases referring to “CTL”, we see no abandonment, spirited trials of market value on contested evidence and similar contests over reasonable repair expenses because owners are trying to recover them and must prove them rather than merely show that they would exceed the values of the vessels. Thus the distinctive features of C.T.L. are absent. Nor do we see that any of those cases serves C.T.L.’s purpose of prompt resolution and payment or suggests any motive or means of doing so. Not only is there no possible advantage in C.T.L. but the device is turned inside out and stood on its head. Some prominent authors have noticed references to “CTL” by the courts in damage cases but have not sought to legitimate them or suggested any use for

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\(^{24}\) See, e.g., Lord at 350-51; MIA § 62; STRATHY & MOORE 159; Cal. Ins. Code § 1971.

\(^{25}\) The critical percentage may vary. Rule 5 of the Glasgow Marine Insurance Rules, 1901 fixed it at 75% in agreement with practice in France and Germany and in some deference to the rule of 50% then prevailing in the U.S. In England by MIA § 60, and doubtless elsewhere, the rule is full value unless otherwise agreed. In the U.S. the rule of “common law” (presumably representing a usage) was declared to be 50% in Bradle v. Maryland Ins. Co., 37 U.S. (12 Pet.) 378, 398-99 (1838), but modern policies generally specify full value. Lord at 351-52.


\(^{27}\) See, e.g., MIA § 61; Cal. Ins. Code §§ 1960, 1961; STRATHY & MOORE 159.
them.\textsuperscript{28} The answer to “why” must lie in misunderstandings, with the particulars somewhat conjectural.

An owner as plaintiff may be interested in cashing out a property, as one who would prefer the proceeds of his fire insurance to the continued enjoyment of the old building. Or he may have a sentimental attachment to the old structure that would never be shared in the market. At one node of this syzygy he would prefer to take the value, whether market or insured, and not rebuild; at the other node he would rebuild and want the cost of it. In either case he’ll also want any lost future profits from it. The defendant feels none of this tension and wants only to pay the least possible. Total loss appeals to the owner who wants to cash out and partial loss and costs of repair to the one who will rebuild. What the cases that follow really present are contested issues of actual total or partial loss and the reasons for styling the total loss as constructive are obscure but appear in some instances to involve the transposition from marine insurance of the conclusion that recovery for C.T.L. can (by its definition) include nothing for repair costs or future profits, and the false assumption that, in the tort law, freed of a contract limit, the result might be different. Whatever the source of these impressions, we find defendants contending for “CTL” as an unnecessary ground for denial of any recovery beyond market value, or insured value in some instances.

\textbf{In the Circuits}

The Second Circuit’s \textit{O’Brien Brothers}, in 1947, quoted above, is an excellent guide on the rules of actual total and partial loss. It is sometimes cited in support of “CTL” because of a dictum supporting that idea where cost of repairs exceeds market value.\textsuperscript{29} Nothing in the case turns on that idea and the opinion indicates that it leads to the same result as actual total loss rule that salvage and repair costs in excess of actual market value are ordinarily unreasonable and therefore not recoverable.\textsuperscript{30} The reference to “CTL” did not introduce any doctrine to the case and made, and could make, no difference in the result. It is best regarded as simply a description of the facts where costs exceed value.

A case from the Fourth Circuit is also cited in support of “CTL” and illustrates one of its pitfalls. The opinion cited the dictum in \textit{O’Brien Brothers} and decided that repair costs could be recovered because the defendant who contested them failed to bear the burden of proving that the vessel’s market value was less than the repair costs, a burden that the defendant assumed under the logic of ““CTL”.\textsuperscript{31} It is questionable whether the same result would have been reached by requiring the plaintiff to prove all the elements of its loss under the standard tort law.

\textsuperscript{28} See Healy and Sweeney 350-51; Paulsen at 1050-51; Michael A. Snyder, \textit{Maritime Collision Damage to Vessels and Fixed Structures}, 72 TUL. L. R. 881, 886-88, 905 (1997).
\textsuperscript{29} Supra note 8, 160 F.2d at 505, 1947 AMC at 499.
\textsuperscript{30} See id., 160 F.2d at 504, 1947 AMC at 496.
\textsuperscript{31} Hewlett v. Barge Bertie, 418 F.2d 654, 1969 AMC 2238 (4th Cir. 1969).
In the Fifth Circuit, counsel tried to insert “CTL” into a 1982 case against a repair yard and that approach was summarily rejected on the ground that a contract, rather tort, measure governed damages.\footnote{32 Turbine Service, Inc. v. S/S Katrin, 674 F.2d 401, 415, 1982 AMC 1976, 1994 (5th Cir. 1982).} Mischief, however, has acquired its momentum in that circuit and returned there for refreshment. \textit{King Fisher Marine Service, Inc. v. NP Sunbonnet},\footnote{33 724 F.2d 1181, 1984 AMC 1769 (5th Cir. 1984).} a case of undoubted actual total loss, was concerned with valuation where there was no market and the award of interest. In connection with the interest claim the court said, “[t]he generally established rule is that in a case of total loss the owner is not compensated for the loss of use of the boat.” There was no mention of “CTL”. The case would go on to be cited several times as a phantom authority on “CTL”. In the Fifth Circuit’s \textit{Ryan Walsh Stevedoring} case\footnote{34 Ryan Walsh Stevedoring Co. v. James Marine Services, Inc., 792 F.2d 489, 1987 AMC 1611 (5th Cir. 1986).} of 1986, often cited since, the defendant argued that the damaged vessel was a constructive total loss and therefore loss of use while being repaired was not recoverable, and contended on appeal that the trial court was in error in concluding that value exceeded the cost of repairs. The court was led into consideration of “CTL” by the citation of a case in which a similar contention was made and rejected almost scornfully as irrelevant,\footnote{35 Turbine Service, Inc. v. S/S Katrin, supra note32, 674 F. 2d at 415, 1982 AMC at 1994.} and then said, “[d]amages for loss of use may not awarded when the vessel is a constructive total loss,” citing \textit{King fisher Marine} where the correct statement referred to total loss generally. The court upheld the trial court’s findings based on testimony of the owner’s experts that value exceeded the cost of repairs and so affirmed the conclusion that it was a case of partial loss and loss of use was recoverable. In short, constructive total loss had nothing to do with the case, should not have been mentioned, and was brought in by reference to opinions that gave no support to it. It did little harm here beyond contributing to the cost of an unsuccessful appeal but it would go on as a virus to confuse further discussions.

The relatively harmless confusion in the \textit{Ryan-Walsh} case was easily surpassed by a trial court in the Eleventh Circuit in the \textit{Self Towing} case. Market value far exceeded insured value. Repair cost was more than insured value but much less than market value. The court was persuaded that there was a “CTL” based on insured value and awarded damages in the amount of market value. This was a windfall that owners tried unsuccessfully to retain on appeal, where the court said that the “district court confused the concept of constructive total loss for \textit{insurance} purposes with the concept of constructive total loss for \textit{tort damages} purposes,” and continued:

Insurance policies frequently provide that a vessel is declared a constructive total loss when repair costs exceed the \textit{insured value}. The rule for tort damages, however, differs: “The legal principles are well settled: A vessel is considered a constructive total loss when the cost of repairs is greater that the \textit{fair market value} of the vessel immediately before the casualty.”
For this quotation the court cited *Ryan-Walsh*, where the word “constructive” was irrelevant.\textsuperscript{36} The statement was true there without that word and the word was irrelevant here, too, where it led to error and produced a successful appeal.

Now to the First Circuit, where a magistrate, in *DiMillo v. Sheepscot Pilots*,\textsuperscript{37} found the value of the vessel to be less than the repair costs, which he nevertheless awarded. On appeal, the court styled the vessel a “CTL”, citing *Ryan-Walsh* and *Self Towing*, to reach the conclusion that only value and not repair cost should be awarded, a conclusion that follows from the rule of total loss without any constructiveness. No harm done except a short misleading digression and the further propagation of misleading citations.

Next the doctrine returns to the Fifth Circuit for refreshment. The district court in the *Gaines Towing* case had said that the “damages may have exceeded the value of the vessel and, therefore loss of income is essentially out of the question,” but then awarded cost of repairs and something for “lost income”\textsuperscript{38}. The court vacated the judgment for “failing to make a clear determination of whether the damages exceeded the value of the vessel and in failing to apply consistently the appropriate legal principles required by that determination”. The court thought those principles lay in the doctrine of “CTL”. It cited *Ryan-Walsh*, which it amplified by citing *O’Brien Brothers*, quoted above, which dealt only with total loss and explained the general rule that made reference to constructiveness irrelevant. Vacation of the judgment was clearly necessary but the court in doing it gave directions that could only foster more confusion by setting them in bastardized C.T.L. doctrine, laying the foundation for future confusion.

**In the Districts**

How has this played out in the districts? In the Eastern District of Louisiana, *Ryan-Walsh* has not surprisingly set the framework, but the cases have not come out badly despite the irrelevance. Where a crane was knocked off a crane barge and was replaced, the court said:

When the costs of repairs to damaged property exceed the precasualty value of the property, the property is considered to be a "constructive total loss"; [footnote citing *Ryan-Walsh*] when the property is damaged beyond physical repair, it is considered an "actual total loss" [footnote omitted]. In either case, the measure of damages is generally the market value of the property just before the loss (less the value of any salved equipment or materials) [footnote citing *King Fisher*] and does not include loss of use or other consequential damages [footnote citing *King Fisher* and *Ryan-Walsh*].\textsuperscript{39}

\textsuperscript{37} DiMillo v. Sheepscot Pilots, 870 F.2d 746, 751, 1993 AMC 2699 [DRO] (1st Cir. 1989).
In a second case the vessel had sunk and been salved and the issue was recovery of vessel value only or also salvage and repair costs. Discussion was launched with a definition of “CTL” citing Ryan-Walsh and Self Towing and proceeded at length on the issue of whether value was insured value, as contended by the defendant, or the higher market value testified to by owner’s experts. Insured value was rejected and therefore lost profits were allowed along with salvage and repair costs. The evidence included an opinion that a “CTL” should be found when repair costs exceeded 85% of insured value, a notion apparently borrowed from marine insurance usage with no basis in law.\(^{40}\) Again a right result was reached but was reachable more simply on the basic rules of actual total and partial loss. Reference to constructive total loss was useless because value had to be tried as in the ordinary case of total loss and false doctrine increased the risk of error.

In the Southern District of Texas a shrimp boat damaged in collision was stipulated to be a constructive total loss and the owner sought lost profits. The court tipped its hat to Ryan-Walsh for a definition of constructive total loss and then stated a fundamental point: “The effect of a total loss—real or constructive— is identical in that the vessel is not reasonably repairable.” With this point understood, there would appear to be no reason for a detour into “CTL”. The court then cited King Fisher Marine for the proposition that there can be no recovery for loss of use in a case of “CTL”, although that case dealt with actual total loss and stated the general rule, which the court here applied in denying lost profits. The short detour here again contributed nothing to justice or efficiency and one may suppose the judge was led into it by the stipulation of the parties and the citation to him of Ryan-Walsh from his circuit.

The latest case haunted by “CTL” is F/V Sailor Incorporated v. City of Rockland\(^{41}\) in the District of Maine, where the judge probably felt compelled to entertain that specter by the DiMillo case in his circuit, following Ryan-Walsh, both of which were cited. A pier owner was sued for the sinking of a fishing vessel at its pier and sought partial summary judgment that the vessel was a “CTL”, so as to exclude claims inconsistent with total loss. The insured value was $50,000, maximum market value was agreed to be $180,000, and an estimated, but disputed, cost of salvage and repair was $187,000. The vessel had valuable fishing permits valued at $190,000. The owner raised the vessel, made minimal repairs and sold her for $25,000, transferred her permits to another vessel, and claimed more than a million dollars in damages for lost profit, expenses and consequential damages, contending that no “CTL” could exist because the vessel was salved and also because she was not abandoned. The court cited authority for the deduction of salvage in cases of C.T.L., and stated that abandonment had no application here, presumably because the defendant was not an insurer. It had to determine whether the value of the permits should be included in vessel value for the determination of “CTL” although not for damages. After several pages of treading through these facts to the measures of C.T.L.’s traditional tune, a process that needlessly


offered opportunities for substantial missteps, the court concluded that recovery was limited to fair market value. This was to say in effect that the loss was not partial, a result that would have been reached more simply and briefly and safely by the rule of actual total loss.

**Conclusion**

The injection of pseudo-C.T.L. into tort damages serves no positive purpose but confuses analysis, invites unsound contentions, not to say pettifogging, and supplies unneeded opportunities for error. In any claim for tort damages the suggestion of “CTL” should be summarily swept out of court as irrelevant.