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THE PRACTICAL AND LEGAL CONSEQUENCES OF WRECK.

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INTRODUCTION

The topic encompassed by the title to this paper is very wide. There could and perhaps should be a series of volumes written on the subject. As one would expect there is a considerable degree of overlap between the practical and legal consequences. The paper does not purport to provide a definitive analysis of the legal implications: what we have sought to do is to survey some of the legal and practical consequences that arise for a ship owner when a vessel suffers a casualty. If the paper serves as a reference point highlighting the various consequences which flow and which need to be addressed by the range of advisers a ship owner will be seeking assistance from in a casualty situation then it will we hope have been useful. It may highlight the need for caution in particular areas. It may provide the basis for discussion which will highlight a range of interesting, difficult and perhaps unresolved legal issues which flow from the existence of a wreck. We hope it will stimulate discussion on the consequences which arise for consideration when the drama of a casualty befalls an owner. There are a whole range of diverse problems which surface in any casualty - the dimension of which will vary dependant upon the nature of the vessel and the seriousness of the crisis. Before turning to those considerations as we see them we think it helpful to refer to some of the historical background.

HISTORICAL BACKGROUND

The starting point for all maritime law appears to be Rhodes, a Mediterranean Empire which flourished between 900 and 700 B.C. Rhodian sea law was evidently of great authority in the Mediterranean and in time it was adopted by the Greeks and then the Romans. By reason of trade this maritime code appears to have passed from the Mediterranean to the Atlantic sea board and in particular to Oleron, an island near Bordeaux. By the 12th Century the Rolls of Oleron formed an ordered maritime code in a period when there was no maritime legislation. Richard I was introduced to the Rolls during one of his Crusades and later was responsible for their translation and introduction into England. In the latter part of the 14th Century they were incorporated into the Black Book of Admiralty. At the same time the Rolls of Oleron travelled north and they can be further traced in the code known as the Laws of Wisbuy which developed later in the Baltic.

While these maritime codes undoubtedly had a considerable effect on the development of English maritime law they were complemented from time to time by various statutes. In ancient times, the common law presumption was that wreck was the property of no-one and consequently belonged to the Crown. However, the finder of such wreck was entitled to a reward, generally a moeity of the property salved, and this was payable to the salvor either by the Crown or by the grantee who had been enfranchised with rights to wreck of the sea by the Crown. The harshness of the common law was somewhat ameliorated in 1275 by the Statute of Westminster which provided that if any live thing - man, dog or cat - escaped to land from the ship, the presumption was changed and the wreck was preserved for a year and a day in order that the owner might assert and prove his claim to possession. In the following year, 1276, it was enacted that coroners should enquire into cases of wreck and value the same.

The first statute directly relating to salvage was passed in 1353; the relevant text is set out below:-

> "And in case that any Ships, going out of the said Realm and Lands, or coming to the same, by Tempest or other Misfortune, break upon the Sea Banks, and the Goods come to the Land, which may not be said Wreck, there shall be presently without Fraud or evil Device delivered to the Merchants to whom the goods be, or to their servants, by such Proof as before is said, paying to them that have saved and kept the same, a proper reward for their work; that is to say, by the Discretion of the Sheriffs and Bailiffs, or other our Ministers, in Places Guildable, where other Lords have no Franchise, and by the Advice and Assent of four or six of the best or most sufficient discreet Men of the Coutry; and if that be within the Franchise of other Lords, then it shall be done by the Stewards and Bailiff, or Wardens of the same Franchises, and by the Advice of four or six discreet Men of the Country, as afore is said, without any delay". [1353 - Wreck of the Sea (27 Edw. 3, St 2, C 13)].

While this statute was important in so far that it codified the existing common law right to salvage, it was essentially local in character and only provided that the salvors of shipwrecked goods were entitled to a reward. The development that persons were similarly entitled to a reward if they acted to <u>prevent</u> vessels from being wrecked did not take place until many centuries later.

Towards the end of the 13th Century the first Admirals were appointed to be followed later by the establishment of Admiralty courts. The Admiralty Jurisdiction Act of 1391 defined the original jurisdiction of the Courts of Admiralty which then appears to have been in existence for about 30 years. At an early date, the rights of the Crown to unclaimed wreck found on the high seas were granted to the Admiral and in time the Admiral's Court exercised jurisdiction over all flotsam, jetsam, lagan and derelicts while the Common Law Courts remained responsible for all wreck that was washed ashore. There appears to have been considerable rivalry between the two jurisdictions and it was not until the 19th Century with the passing of the Admiralty Court Act in 1840 and

the Wreck and Salvage Act in 1846 that the jurisdiction of the High Court of Admiralty was extended from the high seas onto the land.

It is not known precisely when salvage in the modern sense began, that is salvors being remunerated for services designed to prevent the occurrence of a maritime casualty; but in 1713 was passed the first of a line of statutes [12 Anne, St 2, C1, 1713] from which has evolved the wreck and salvage provisions of our own Shipping & Seamen Act 1952. By 1713 the activities of wreckers had become a cause of great concern but it is possible to understand if not sympathize with the mentality of the wreckers. They were entitled to salvage only if they could gain possession of shipwrecked goods, they got nothing for assisting a vessel in distress. The Act of 1713 went a long way towards changing this by providing that Sheriffs, Justices of the Peace, Customs Officers and other should have power to co-opt assistance from ashore or from any other vessels to aid a vessel in distress. It was further enacted that to encourage such assistance, reasonable salvage should be paid within 30 days to the salvors and in default that security should be provided. The Act also laid a duty on both naval and merchant vessels to give salvage assistance to vessels in distress and provided that a reasonable reward should be paid for those services.

In 1753 a further Act was passed. It would seem that wreckers were still very much a problem. A new principle was introduced with this Act in that it provided for salvage to be paid to persons acting voluntarily to assist a vessel in distress as opposed to those acting under the orders of one of the Officers referred to in the 1713 Act.

The law was further developed by Acts passed in 1809, 1813 and 1821. In 1846 the Wreck and Salvage Act consolidated the rights to salvage separately conferred by previous acts. This Act also sees the introduction of the forerunner of the

Receiver of Wreck with the establishment of a Receiver of Droits of Admiralty.

By 1846 the law concerning wreck and salvage was well developed and there has been little substantial change since then. The enactments of 1846 passed into the Merchant Shipping Act of 1854 and subsequently, upon the repeal of that Act, into the Merchant Shipping Act of 1894. Minor changes were made with the passage of the Merchant Shipping Act 1906 and the Maritime Conventions Act 1911.

The New Zealand legislation - the Shippibg and Seaman Act 1952 - is modelled on the 1894 English Act so it enjoys the same history.

WHAT IS A "WRECK"?

The Termes de la Ley, the old dictionary of the law defined the term as:

> "'Wrecke' or 'varech" (as the Normans, from whom it came, call it) is where a ship is perished on the sea, and no man escapeth alive out of the same, and the ship or part of the ship so perished, or the goods of the ship come to the land of any lord, the lord shall have that as a wrecke of the sea. But if a man, or a dog, or a cat, escape alive, so that the party to whom the goods belong, come within a yeare and a day, and prove the goods to be his, he shall have them againe, by provision of the statute of Westm. I,c.4, made in King Ed. I dayes, who therein followed the decree of Hen I before whose dayes, if a ship had been cast on shore, torne with tempest, and were not repaired by such as escaped alive within a certaine time, that then this was taken for wrecke."

At common law it was recognised that property became wreck only when cast ashore between the mean high water and low water marks. 35 Halsbury (3rd ed.,) para. 1092 p.721 states:

> "Wreck may be defined as property cast ashore within the ebb and flow of the tide after shipwreck; the property must be a ship, her cargo or a portion thereof. Jetsam,

> Flotsam and lagan are not wreck at common law so long as they remain in or upon the sea, but if they are cast up on the shore they become wreck.
>
> For the purposes of the provisions of the Merchant Shipping Act, 1894 relating to wreck and salvage, however, the expression "wreck" includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water, unless the context otherwise requires; the intention of so extending the meaning of the term "wreck" evidently being to bring under one term the rights which pertained to the land and those that belonged to the admiral. All fishing boats, all their small boats, their rigging gear and other appurtenants, nets, lines, buoys, floats and other fishing implements whatsoever found or picked up at sea, whether marked or unmarked, are deemed to be wreck within the meaning of the foregoing definition."

For the purposes of this paper we adopt the slightly wider definition currently set out in s.348(2) of the Shipping and Seaman Act 1952 (N.Z.) which defines wreck as including:-

> "any ship or aircraft which is abandoned, stranded, or in distress at sea or in any river or lake or other inland water, or any equipments or cargo or other articles belonging to or separated from any such ship or aircraft which is lost at sea or in any river or lake or other inland water:"

EXCLUSIONS

Also for the purposes of this paper it is necessary to exclude certain aspects ordinarily covered by the definition "wreck". Unless that is done there will be some area of duplication but the paper would be so all encompassing as to have made it even more of an impossibility for us to complete. Since maritime fraud has already been discussed in the course of this conference we exclude wreck arising from fraud from the compass of the paper. Neither will we examine the consequences which arise from wreck caused by barratry or a war loss which may be germane given the Falkland Islands crisis. Interesting and complex though they are, neither will we examine the law relating to flotsam, jetsam and lagan - we happily refer anyone interested in pursuing these topics to the old but nonetheless relevant authority in Sir Henry Constable's Case 5 Co Rep. 106a; 77 E.R. 218.

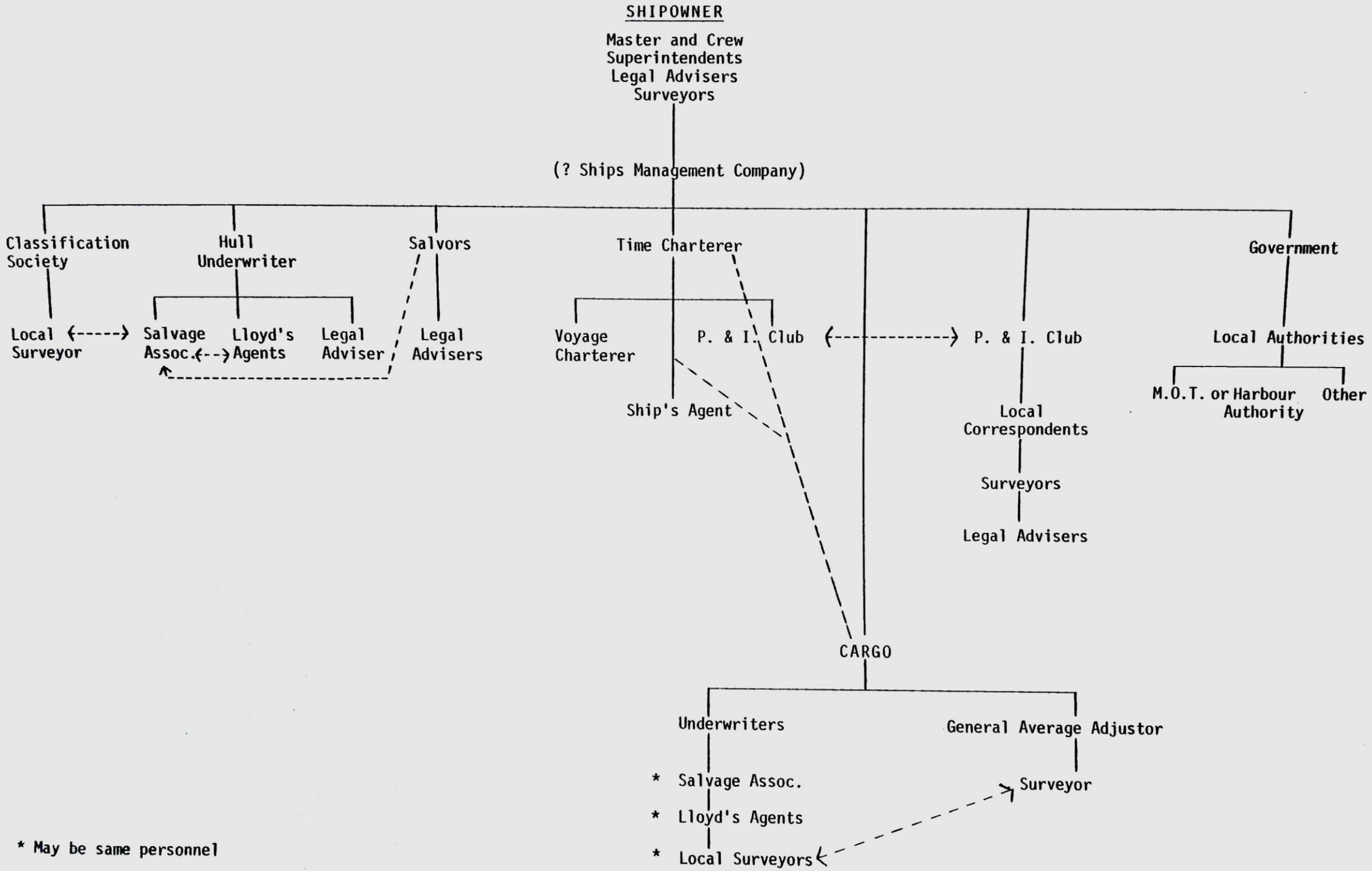
The major assumption that we have made is that prior to the casualty the vessel with which we are concerned was trading lawfully and profitably as part of a normal commercial enterprise.

Because of the dimensions of the subject we have, as indicated in the introduction, approached the paper by preparing an outline identifying the principal areas in which both practical and legal consequences arise and overlap. The two are inextricably linked. There are so many topics within the subject that would benefit from close study and research but constraints on time and limits of both ability and endurance prevent us from undertaking other than a brief survey of a range of consequences which will require consideration in any casualty of moment.

We should also declare a bias; the paper is written from the stand-point of a ship owner and its advisers: we have not endeavoured to cover a cargo owner's or salvor's approach or the approach which could be expected from the range of other interests who might become involved in a casualty. This audience will appreciate that depending upon the hat being worn, the approach and emphasis may well vary - markedly in some instances.

THE PEOPLE INVOLVED IN A CASUALTY

It is perhaps useful to start with the range of people (and personalities!) who may be involved. Diagramatically the position is likely to look something like that depicted in the following chart. The dotted lines indicate areas of common interest and likely close relationship - at least for a time during the investigation.


SHIPOWNER
Master and Crew
Superintendents
Legal Advisers
Surveyors
(? Ships Management Company)
Classification Society
Hull Underwriter
Salvors
Time Charterer
Government
Local Surveyor
Salvage Assoc.
Lloyd's Agents
Legal Adviser
Legal Advisers
Voyage Charterer
P. & I. Club
P. & I. Club
Local Authorities
M.O.T. or Harbour Authority
Other
Ship's Agent
Local Correspondents
Surveyors
Legal Advisers
CARGO
Underwriters
General Average Adjustor
* Salvage Assoc.
* Lloyd's Agents
* Local Surveyors
Surveyor
* May be same personnel

It can be readily seen just how these respective interests at times can merge and at times diverge. In the initial stages the ship owner, hull underwriter, cargo underwriter, P. & I. Club and salvor are all dedicated to seeing a successful operation in respect of ship and cargo. The ship owner understandably wants his vessel back in service as soon as possible; the hull underwriter understandably wishes to avoid being called upon to meet a total loss; cargo interests understandably want delivery of the cargo and completion of the voyage as quickly as possible; and the P. & I. Club underwriter understandably wishes to avoid having to face the liability for wreck removal and the salvor, who will invariably be operating on a "no cure - no pay basis" can only be remunerated if the salvage operation is successful so he understandably desires to achieve that objective.

However, if the salvage operation is successful the unity of these participants quickly dissipates and each tends to adopt an adversary role viz-a-viz the other, the object now being to shift financial responsibility to some other party. This propensity makes life difficult at times in unravelling both the legal and practical consequences arising from the casualty.

With that background analysis we turn then to the major implications facing the owner and these various interests. We would identify these as follows:

(1) Crew and personnel responsibilities - personal injury obligations.

(2) Financial consequences.

(3) Salvage Consequences - the contract - negligence - awards.

(4) Cargo - liability, limitations, completion obligations.

(5) Loss consequences - wreck removal, oil pollution, Receiver of wreck.

(6) Marine Inquiries.

(7) Repairs to the vessel.

The list is not intended to be exhaustive - there are many other areas both legal and practical which can be highlighted. As we see it these are the main areas which will always require consideration by advisers in a wreck context.

CREW/PERSONNEL RESPONSIBILITIES

(1) Medical Expenses

The owner must assume responsibility for medical expenses and treatment of injured crew. This duty arises under most statutes governing relationships between owner master, crew: Alternatively it can be expected to be covered under the contract of employment. See section 143 Shipping and Seaman Act, 1952 (N.Z.). This obligation continues (according to the statute) until the poor crewman either dies or is returned to his home port In the former case the owner is responsible for burying him.

(2) Repatriation

This is normally covered by the statute law. There is a duty to return the crew to the Port at which articles were signed. A concommitant duty to maintain the crew until that time is imposed by most legislation - see section 124-130 Shipping and Seaman Act, 1952 (N.Z.) and the regulations thereunder.

Ordinarily the owner has P. & I. cover for these repatriation costs - subject to deductibles on occasion. It cannot of course be assumed that repatriation will always be necessary. There may be obligations remaining with the ship owner which prevent that from being done. Attention is drawn, for example, to clause 2 of the

.

Lloyds Standard Form of Salvage Agreement 1980 which provides that "the owners, their servants or agents shall co-operate fully with the contractor (salvor) in or about the salvage operation ...". This obviously imposes some restriction on the ability of the owner to simply withdraw his crew - certainly without the consent of the salvor. Should an owner take that unilateral action he is likely to find himself in breach of the salvage contract. If the salvor is unsuccessful because of the lack of the crew a claim in damages would no doubt arise.

Assuming that the voyage will not or cannot be furthered, repatriation duties are obligations which the ship owner must proceed with not only in the interests of the crew but perhaps in his own interests and those of his various underwriters. Sometimes the sonner the better. Timing will to some extent depend upon Government authorities and Marine enquiry obligations. Litigation may also place an embargo on the ability of the crew to be returned as quickly as one might desire. In recent litigation involving the "Pacific Charger" in New Zealand, cargo interest's solicitors subpoenaed the entire crew to make depositions!

(3) Personal injury

The fact that a casualty is involved does not increase the obligations towards injured crew that an owner otherwise has at law. Most statutes currently have limitation of liability provisions (section 460 Shipping and Seaman Act, 1952 for example) but the value of these limitations is perhaps suspect in the modern day climate. The Courts have not found it difficult in recent times to establish "fault or privity" on owners part in circumstances where the inadequacy of $NZ16.00 or $NZ30.00 per limitation ton is obvious. Perhaps this will be so in most cases involving crew injuries. Recent authorities of interest are:

HMS Truculant	[1951] 2 Lloyd's Rep. 308
The Princess Victoria	[1953] 2 Lloyd's Rep. 619
The Norman	[1960] 2 Lloyd's Rep 1
The Anonity	[1961] 2 Lloyd's Rep 117
The Lady Gwendoline	[1965] 1 Lloyd's Rep 335

In New Zealand the Accident Compensation Act, 1972 has for the most part rendered this an academic issue. The Act introduces a statutory right to compensation not regarded by many as being particularly generous, but which has removed the delays and uncertainties of litigation. Interestingly enough we note that section 5 of the Act prevents proceedings in the New Zealand courts; it does not appear to restrict the ability of injured personnel to take proceedings in some other jurisdiction assuming that one can be found which will entertain suit and in which some asset for enforcement purposes can be located. With in rem jurisdiction this should not be difficult in most cases. Most ship owners will have vessels of the same or beneficial ownership calling at jurisdictions which have not yet seen the merits of Accident Compensation legislation and which might provide an opportunity for injured crew/passengers to pursue the somewhat larger dollar figures than our Accident Compensation Act allows.

(iv) Passenger Liability

Certainly the most traumatic wreck in recent New Zealand maritime history was that involving the loss of the Wahine on 10th April 1968 in which over 50 passengers were drowned. Apart from the loss of life/personal injury implications, passenger involvement introduces to

a casualty a highly emotive element which is not normally present with a "commercial casualty". This requires the immediate establishment of "lines of communication" with relatives, the various Government agencies who become involved and the media. Good public relations require more than a bald "no comment". The appointment of a spokesman of compassion but with equal ability to watch what is said is essential. So far as damages are concerned limitation of liability provisions may apply but with the same shortcomings as noted earlier.

FINANCIAL IMPLICATIONS

Unfortunately, ships do not run without a cash flow. We have already made the unlikely assumption that the casualty vessel was trading profitably as part of a normal and lawful operation at the relevant time. What is likely to be a tight cash flow in the ordinary situation will be immediately subjected to pressure with a casualty. Revenue ceases dramatically whilst expenditure increases even more dramatically. The owner will be called upon to outlay cash for crew, consultants, agents - a whole host of items of abnormal expenditure must be met. Fixed costs such as leverage lease payments and standard overheads will remain. Although much of the initial outlay may be recoverable in due course, either in whole or in part, from underwriting sources, the circumstances of the casualty will not permit these services to be procured without cash outlay in the short term. As would be expected this has serious implications. If the vessel is on time charter it will certainly go off-hire from the time of the casualty and depending upon the circumstances, the time charter may be totally frustrated and any advance hire may be refundable immediately. (See for example clause 16 of the Baltime Charter - lines 102-103). Failure to make some accommodation with the charterer reasonably quickly may result in even further pressures being added to the owner with sister ship arrests in other jurisdictions. Such an arrest would be founded upon the

contractual obligation to make a refund and not upon a cause of action which would realise a Club letter of undertaking in terms of security.

Pending charter arrangements/obligations must also be reviewed. An owner in liner service may not be able or desirous of taking advantage of the principles relating to frustrated contracts. Ongoing affreightment committments and commercial considerations may require earnest efforts to procure alternative tonnage. Specialised trading may make this difficult - compatability/suitability of replacement vessels create problems of their own. (Combined transport obligations similarly). Dependent upon the cause of the casualty, arbitrations as to responsibility and rights to take the vessel off hire will arise.

SALVAGE

As this audience knows, salvage involves the rescue of the ship and cargo either jointly or severally. This may be effected with or without the assistance of professional qualified salvors.

Although there are some rare exceptions, where the crew by their own endeavours rescue the vessel there is generally no entitlement to a salvage award. This follows because of the implied term in the articles of employment under which the crew are required to render all necessary and reasonable assistance to the vessel.

The more serious casualty will more likely than not involve professional salvors. Depending upon the urgency of the situation the master will leave it to his owners to arrange the salvage contract which will ordinarily be on a no cure no pay Lloyds form. However, the master does have authority at law to commit owners to a salvage contract where the exigencies of the case prevent his making contact with his owners. The master

may bind cargo similarly - see Scrutton Article 143 p.287. This authority is derived from necessity. The master's authority does not extend as far as binding cargo interests as to amount; cargo owners retain a general right to arbitrate quantum - see also Kennedy p.330.

Owners will doubtless be guided by Hull Underwriters and possibly by the Salvage Association insofar as selection and appointment of a salvor is concerned. (For the role of the Salvage Association refer to the useful extract in the Lloyd's Calendar.) In most cases the salvage contract will be Lloyd's Open Form No Cure No Pay 1980 Revision. This form appears to be universally popular and undoubtedly a large number of salvage operations are regulated by its provisions. In particular situations where the circumstances permit, towage contracts or fixed sum salvage contracts may be negotiated but these are not common unless one is dealing with a statutory authority such as a harbour or port authority. This type of salvor generally operates on an actual cost (their figures!) basis but reserving at the same time a right to claim salvage if successful. (In other forums it is known as "having ones cake and eating it too"). Lloyd's Open Form leaves the quantum of salvage in respect of the ship, its cargo, freight and bunkers to be determined by arbitration at a later date and it is important that the arbitrator hears both sides of the story on its merits.

KEEPING A RECORD

An accurate record is vital. A diary of events, photographs, film and other supporting evidence. Modern science and technology have made the actual recording of salvage operations much easier these days. In the more dramatic salvage situations the salvor is likely to claim most of the credit for the success and not to give sufficient credit to the crew. This is because of the temptation on the part of same salvors to show that they are deserving of the highest possible award. The salvor is generally best placed to provide the records.

LOF 1980
cl 17 - salvor entitled to limit liability

The owner's consultants need to be aware of this tendency and should be conscious of the requirement for careful documentation of their case as the drama unfolds. In this regard a specialist surveyor is a wise investment - particularly given the state of English law on salvorial negligence. Salvage liens may have to be accommodated by bonds or security, as will the security requirements in Lloyd's Open Form once the vessel has reached a safe port of refuge.

The Tojo Maru (1974)

CARGO

The Saint Blaise 1974 LLR

From the ship owner's point of view, cargo can be the source of major and ongoing problems where salvage is successful. The law seems clear in some areas, uncertain in others. It can, we believe, be stated with some confidence that:-

(1) Total Loss

Where repairs to a vessel are commercially impossible because of total loss, the shipowner is in consequence discharged from his obligation to repair the vessel and continue with the voyage. (See Carver Volume 2 ch. 7, p.762 and the York Antwerp Rules (ibid), para 706, p. 338.)

(2) Where the ship is repairable

Where the extent of repairs is such that a reasonable ship owner would attend to repairs and can do so within a time which will not visit risk upon the cargo, then the owner is obliged to continue his voyage obligations. He is permitted a reasonable time within which to make an election as to repair or transhipment but it must be remembered that transhipment is an option or liberty not a duty. (See Carver Vol 2 para. 766 p. 660.) In large measure the ship owner will be guided here by his P. & I. Club and General Average adjuster. Essentially it is a commercial decision.

(3) Completing the carriage

There is however much confusion as to the obligation to complete the contract of affreightment where the vessel is not a CTL within the insurance meaning of that term but will nonetheless take some time and considerable cost to repair. Is the shipowner then entitled to treat the voyage as frustrated and at an end? See generally Carver Vol 2, 760.

GENERAL AVERAGE BONDING

Once the vessel has been salved and brought into a port of refuge and has been handed back to owners it is likely that owners will declare general average. The normal general average procedures will then come into play. Bonds will be required from cargo prior to delivery and a separate record of all expenditure relating to the venture will need to be kept so that the adjuster can ultimately rule on recoverable costs and their apportionment.

Depending upon the circumstances which have given rise to the casualty the ship owner and his advisers together with the P. & I Club need to make a realistic assessment as to whether there is any liability in respect of loss or damage to cargo arising out of the casualty. So too, an assessment of cargo's proportion to any salvage award and cargo's contribution to general average will need to be made so that the proper bond/security formalities can be concluded. Irrespective of their conclusion, if major cargo losses are involved cargo interests can be expected to seek to recover them: nothing ventured nothing gained. Close attention to minimisation of loss is necessary: out turn condition surveys should be undertaken with appropriate expert/technical advice being procured as required. The owner should proceed at this point of time on the assumption that litigation will follow: some duplication in assessing the situation may arise (the general average assessor may cover similar ground to a local or

specialist retained assessor) but there is no substitute for thoroughness.

SECURITY

The use of Lloyd's Open Form removes the necessity for salvors to become concerned with the arrest of the vessel provided security is given as required. Cargo interests may decide that arrest of the vessel or its sister ship is in their best interests particularly if there has been abandonment of the voyage at some intermediate port between the port of loading and the port of discharge. Similarly, if the casualty has been caused by collision with another vessel or fixed object (Hobart Bridge) it is quite likely that the ship owner will be faced with the problem of arrest. He may even find his vessel arrested by cargo interests on a third party vessel.

In suits in rem the Plaintiff is concerned initially with procuring security for his claim. An approach may be made prior to the issue of proceedings for the provision of security. If this is not done, the owner will need to conclude some satisfactory arrangement prior to removing the arrested vessel. Those members of the audience who are not familar with the salvage of the vessel " Pacific Charger" will be interested to know that our Court of Appeal recently declared that a Club letter of indemnity constituted sufficient security for release from arrest in a claim involving $7 million (see "The Pacific Charger" C.A. 101/81 judgment 30 July 1981).

Legal advisers will carefully consider the issues of liability which will naturally vary, depending on the cause of casualty, the terms of the contract of affreightment, statute law in particular jurisdictions.

WRECK REMOVAL

If the salvage operation has not succeeded or has succeeded only in regard to cargo, then the hull of the vessel may create

a separate set of problems. If it is in deep water with no risk to navigation, no further involvement may arise. On the other hand, if the wreck is near the entrance to a port or navigable channel or stranded on a beach head obligations to remove may exist marking obligations may arise. The Wahine and Queen Elizabeth in Hong Kong are recent examples of large scale removal operations. The P. & I. Club will assume primary responsibility for this exercise - assuming of course that calls are paid and the owner is not otherwise in default of his obligations so as to relieve the Club of that responsibility.

In New Zealand, wrecks within harbour limits are subject to special controls under section 208 of the Harbours Act, 1950. Whether the section is mandatory and absolute is an interesting legal question not resolved by our courts. From a practical point of view the costs/risk of removing a wreck which is not posing or is not likely to pose any threat to navigation or to the economic viability of the Port is not particularly compelling. Indeed its benefits as a tourist attraction may be quite positive. Whether the Harbour Board has jurisdiction to require removal in situations where there are no safety or navigational concerns is a question which requires consideration by the courts at some appropriate time. Equally fascinating are the inter-relationships of section 208 of the Harbours Act 1950 and sections 266 and 353 of the Shipping and Seaman Act 1952. Is the limitation provision of section 460 applicable if the Board proceeds with unilateral removal action given the preservation of the Shipping and Seaman Act provisions? We incline to the view that reasonableness of need for removal is a criteria and that section 460 applies: the opposing views are, however, clearly arguable - an unslightly but harmless located hulk giving rise to local indignation may one day supply the framework for a definitive judgment.

Pollution

The emergence worldwide of an "environmental consciousness" has forced Governmental agencies to a greater awareness of the

consequences of pollution. This in turn has required ship operators to assume a high degree of care in order to minimise oil and other pollutant spillage. There are a number of international conventions which have been brought into effect in domestic law which impose substantial obligations and liabilities on shipowners in the pollution context. Most English law jurisdictions have invoked the compulsory insurance provisions of the 1969 Convention.

A wreck casualty can be a potential serious pollutant risk. It is a risk which may involve discharge of oil bunkers and volatile chemical or contaminant cargoes at sea: it is a risk which may give rise to serious contaminants reaching coastal areas and fishing grounds with consequential impacts on livelihoods and property damage.

The domestic legislation in New Zealand (the Marine Pollution Act 1971) brings into our law the provisions of the International Convention of 1969. As we understand it, most other Commonwealth jurisdictions have enacted similar domestic legislation. Time does not permit of a thorough analysis of these conventions and their implications. Of interest is the introduction of a measure giving the Government power to direct master/owner/salvor as to steps to be taken or not to be taken with respect to ship or cargo or both, directed at avoiding or limiting the likelihood of pollution. It is to be noted that the Government may prevent the vessel entering territorial waters - perhaps a sign of the parochial sensitivity that pollution causes. Far better to have the offending vessel in someone elses backyard, not your own! The consequences of failing to effectively prevent, eliminate or contain pollution in terms of the civil law are far-reaching. Liability is now virtually absolute. The limitation provisions of Shipping and Seaman Act legislation or its equivalent do not apply - a less generous limitation to the shipowner is introduced. Clean up and removal costs are, as to be expected, fully recoverable: security for potential claims can be required and detention

orders in respect of vessels may issue. All these create the need for both practical and legal action quickly.

The owner's P. & I. Club will be vitally concerned about the prospect of pollution and the need to take steps to minimise the likelihood of any pollution occurring.

Time is of the essence. Containing the spillage is much the same as containing the loss. The consequences which can flow if pollutants spread to coastlines, wildlife areas, tourist resorts, harbours are immense - virtual absolute liability eliminates esoteric debates as to foreseeability and remoteness of damage arguments.

Just as prompt action is required from a practical stand-point, so too it is required from a legal stand-point. Investigation must be undertaken quickly when recollection of witnesses is best and when physical evidence is likely to be more readily procurable. A photographic record should be kept, samplings may be necessary, consultants to assist in estimating damage to natural resources and wildlife may need to be retained in addition to the usual raft of marine surveyors.

Receiver of Wreck

The role of this statutory officer will receive cursory mention only. It is an office with an ancient lineage now largely rendered redundant. Under the provisions of the Shipping and Seaman Act 1952 (N.Z.) and the Merchant Shipping Act 1894 (U.K.) the Receiver is given very comprehensive jurisdiction over wreck, jurisdiction which is really superfluous so long as there are owners, underwriters and persons having a legitimate interest in the vessel who will continue to protect those lawful rights. In theory though, it is the Receiver who is notified of the wreck; who has the duty to take personal charge of the operation for preservation of ship and life; and who is meant to suppress plunder and to resolve claims. Under the

U.K. legislation, if it becomes necessary he may resort to homicide!

As this audience knows, in practical terms all of these tasks are undertaken by interested parties or other Governmental authorities - police, search and rescue, customs. One can seriously question the need for any ongoing role of the type which the legislation recognises as being vested in the Receiver.

In cases where owners and underwriters abandon a wreck the legal and practical complexities of the exercise then presented to the lonely Receiver are immense. They may be far beyond what can reasonably be expected of such an officer who generally has a range of other roles in the marine division of the appropriate Government Department. In a one company/one ship structure the legal liabilities (if any) of the owner for removal, salvage services, pollution dispersal, cargo etc. may well be academic - a very sound practical defence at law is insolvency! The Act, however, contemplates that the Receiver will struggle on and will administer the wreck which has been foist upon him. His costs presumably must fall on the public purse if at the end of the day the owner has pocketed the insurance payout from the hull underwriter, discharged the first ship's preferred mortgage and otherwise taken up residence in some favourable jurisdiction. In New Zealand the problems of resolving the abandoned vessel Capitain Bouganville (a vessel salved but abandoned by all those having interests in her) were particularly complex. The Receiver did his best in a difficult situation. It was a question of practicality however, not the application of a series of rather archaic statutory provisions which have been brought through into modern day legislation which realised this result. There is a need for a review as to the continuation of this office and its precise role.

In the meantime, for the purposes of this paper, it suffices to remind readers that the Receiver does exist and it is necessary

to report a wreck to him because he is there. Having done that however, we recommend proceeding with operations as if he were not!

Marine Inquiries

With any serious casualty an inquiry is likely. In our respective jurisdictions, preliminary inquiries, which are general informal information gathering exercises, are undertaken soon after the casualty by Government officers. Their stated purpose is to provide a quick assessment at administrative level upon which the appropriate Minister can determine whether or not to hold a formal investigation. Representation of master, officers and crew is generally denied at this stage. One can query the fairness of this in today's climate, given the importance that is often subsequently placed upon statements made by these officers immediately they come ashore in circumstances in which stress and anxiety militate against the careful the logical explanations one would ordinarily expect to find associated with the seriousness of the occasion. There is a great need for legal advisers to protect master/crew at this time. As often as not they have lived through a fairly traumatic experience and are hardly in the frame of mind to undergo a searching questioning session with the Marine Division. The New Zealand Branch of the Association recently debated the inquiry sections of our legislation and we are currently drawing together a submission on the need for possible reforms. This was one of the areas which sparked a range of views.

If the Minister determines that a formal investigation is necessary, then the preliminary report is made available to the parties. A full scale inquiry is then embarked upon to ascertain the circumstances of the casualty. The Court has certain powers over certificates, although by and large these are confined to certificates issued by the Government of the country in which the inquiry is being held. Thereafter, any findings are merely transmitted to the Government of the

country to which the vessel or the certificate of competency relates - whether any action is then taken is for that Government, not for the Government initiating the inquiry itself.

Legal representatives must in our view be acutely aware of the need to confine the inquiry to its primary role. It is inquisitorial and as such can become the forum in which other parties seek to widen the real scope and purpose as a means of procuring information for use in later adversary proceedings, particularly civil claims. The marine inquiry is really concerned with safety implications: Why did the casualty happen? Should any steps be taken to prevent a reoccurrence? Are there professional shortcomings in the ability of the certificated officers involved. It appears from the published report of a recent New Zealand inquiry that the nature of the inquiry has become somewhat broader in scope and one can seriously question whether or not that the true function of a casualty inquiry, or whether some issues should be better left to the forum of the Admiralty Courts.

There will ordinarily be a need for separate representation of owners, masters and officers. Conflicts may well arise. The owner's solicitors may feel the need to pursue mismanagement defences adverse to the master; the master's certificate may be in jeopardy. Questions as to fault or privity may require different stands to be adopted by parties whom one would ordinarily expect to find marching arm in arm. These difficulties must be faced right at the outset in order to avoid potential embarrassment and disadvantage to the particular client interest.

REPAIRS

Finally, once the cargo has been discharged and all attendant matters dealt with, the owner faces the problem of repairing the vessel. This may be possible at the port of refuge but if

the port of refuge is an Australian or New Zealand port this is unlikely.

Again the unfortunate shipowner finds that he is receiving advice from or having to satisfy the requirements of various organisations. Obviously the hull underwriters are keenly interested in where the vessel is to be repaired, who will carry out the repairs and the cost of moving the vessel to that place.

Both the Salvage Association and the vessel's classification society will probably be involved and their surveyor's will ascertain whether the vessel is fit for the comtemplated voyage or whether temporary repairs are necessary. If the vessel is to be towed to the place of repairs the owner will have to negotiate a towage contract. This contract will have to be approved by the hull underwriter as will the tug and towing arrangements.

While the towage of a damaged vessel is not specifically dealt with under the Shipping and Seaman Act 1952, Part IV of the Act (which deals with construction, equipment and survey) appears to give the Marine Division of the Ministry of Transport ample authority to intervene and there is little doubt that the shipowner will find himself having to satisfy a whole range of new survey requirements before his ship can finally leave port.

Probably the most trouble free part of the whole affair will be the actual repairs but to deal with what happens in the shipyard beyond the compass of this paper.

CONCLUSIONS

As we observed at the outset of this paper, it does not purport to be a definitive statement of the law or practice relating to wreck. Perhaps it may have engendered sufficient interest for some aspiring (or retiring) maritime lawyer to seek the seclusion of a law library for the next decade to produce such

a work. We hope that this paper has highlighted a range of crucial and recurring overlaps which have both practical and legal consequences in most casualties. We are confident that participants in this conference will have far greater actual experience both legally and practically than we have and input is to be welcomed. It is an interesting and fascinating area of maritime operation and practice. There is a degree of romanticism associated with shipping casualties: this paper will we hope have given some indication of the dimension of the consequences which can be expected. For those involved there is little time for romantic daydreaming when the crisis bells sound.