Administrative legality of shipping inquires, casualties and investigations

Aaron Teneng Azamah
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THE ADMINISTRATIVE LEGALITY OF SHIPPING INQUIRIES, CASUALTIES AND INVESTIGATIONS

BY

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CAMEROON

This paper was submitted to the faculty of the World Maritime University as part fulfilment for the award of a MASTERS OF SCIENCE DEGREE, M.Sc. in General Maritime Administration.

While the views expressed are the author's alone, they are not necessarily endorsed by the University nor reflect those of the International Maritime Organization (IMO).

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Date:

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Co-Assessed by: Professor Edgar Gold
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DEDICATION

This masterpiece is dedication to:

NDOMAGHA MICHAEL,
MOTHER LYDIA TAWAH MAGHA AZAMAH and
WIFE ESTHER GHANG

who have spend so much in their lives making me what I am today. It was so hard for my wife to live my absence from home during my period of studies abroad but she made it.
Having read Law in the University of Yarunde in Cameroon as well as for some years, the Deputy Head of the Legal Department in the Ministry of Transport prior to joining the World Maritime University I found it not only necessary but equally important to examine the legal procedural issues involved in marine casualties and investigations. While this work only illuminates the issues involved and intended basically for administrators and managers of shipping companies, it does not claim to be a full and embracing document at all.

Nor was such a masterpiece easy, especially in a field where so little attention has been given. Moreso, as we will see in the main body, the issues and scope vary from country to country or more appropriately, from one legal regime to another.

At this juncture, I wish to express my thanks and appreciations to all those who, directly or indirectly assisted me in the course of my research work in one way or another. In particular, I am indebted to Professor Monsef of the World Maritime University who gave me necessary courage, advice and valuable material; C.J. Parker, Secretary to the Nautical Institute in London; Mr. John Froese of Transport Canada to whom I owe so much; Mr. Richard Poisson of the University Library for their initial support and encouragement to undertake this task. May I venture to say that without the special contributions of the above persons in the development of my ideas and expression of my thoughts on the subject, it would have been difficult though not impossible. Nevertheless, none of them is to be held responsible, however for what I have written.

Similarly, my thanks go to my typist for the diligence and great patience in typing out the original draft and manuscript respectively. My thanks and apologies are also especially due to all those around me who patiently had to bear up with me throughout
and whose close understanding and cheerful disposition helped me in no small way and at vital moments. May I say bravo to my wife, parents and brothers who have done so much in their lives towards enabling me study at this University. I also want to thank the then Secretary General of the Ministry of Transport, His Excellency, Mr. Mahamodou Talba who made all governmental arrangements vis-a-vis my admission in this famous school - a symbol of world co-operation. Finally but never the least, my thanks go to the authorities of the friendly and beautiful city of Malmö whose help and contribution towards the soutenance of the university, has been in the language of the Secretary General of the International Maritime Organization unequalled in the history of mankind. They provided us during our stay in Malmö a number of facilities such as the sport complex at Kockums, the Malmö City Library among a number of several other things.

If the reader now has a more indepth knowledge of the subject and if I have made a small valid contribution in this field then my task has been worthwhile.
INTRODUCTION

As said elsewhere this study of the legal phenomena and consequen-
tial safety issues involved in marine inquiries, casualty and
investigations has partly been motivated by my academic and profes-
sional background. Also because of absence of complete literature
or even where it exist, it is hadzardly done thereby disallowing any
formula for global practice such as it differs from country to
another.

In doing so, the following plan has been adopted:-

The preliminary chapter will examine not only the place of sea
transport in the world economy thereby substantiating more and more
the reasons for the study but it would also examine the raison
d'etre for having investigations done in the advent of ship accident
or the capsiding of an oil rig. Nor will some brief knowledge of
the different accidents as well as examination of the casuative
factors be unimportant. Such will be of vital importance once in
the process of an enquiry and all the consequential matters, legal,
technical and/or political issues arising thereof.

The second chapter will among several other things, examine the
nature, type of investigation, the format of a report and also what
is known as the International Maritime Organization formula. This
will lead us to examining other countries legislations and practices
most notably the United Kingdom, France, the United States of
America and the others.

Having done that, we examine the international law of marine
casualty vis-a-vis matters associated with or closely related to the
above namely such things as assistance to vessels in distress,
arrested of accidented vessels and the legal implications involved
in such an exercise and so on. It is proposed to examine especially
court practice and/or jurisprudence on claims on insurance policies,
legal steps from casualty to collection of claim as well as the presentation of the above and evidence entailed thereof. This section should be of special interest to administrators and managers who will in every day life and in the life of the vessels they deployed be involved in things or the other and should have the rudimentary legal knowledge of the things involved especially where vessels caused damage, pollution and where they sink. It is however not intended that such acquisition of knowledge supersedes the role of well trained lawyers whose advice must always be sought.

Nor is this all, some section will be devoted to examining ways and means of curbing or reducing accidents at sea and to put it in the language of the International Maritime Organization, "to provide for safety of navigation and cleaner oceans." Also are some analysis and recommendations at the end especially as concerns, conduct of marine investigations and investigators, terminology and language as well as a proposed formula for the introduction of an investigating branch in Cameroon’s Ministry of Transport, in view to safeguarding navigation. This will future towards the end.
CHAPTER I

BACKGROUND STUDY OF MARINE CASUALTY AND INVESTIGATION

1. Sea Transport and Public Interest
2. What is the Purpose of an Investigation
3. Knowledge of the Different Accidents at Sea
4. The Causative Factors
1. SEA TRANSPORT AND PUBLIC INTEREST

On hundred and fifty years ago, as recently as that, the world's population was not dependent on sea transport. Now it is so. One hundred and fifty years ago there were many ships at sea but food and fuel did not have to cross the oceans in any significant quantity. Populations are now much larger and sea transport for many has become a life support. Hence the interest in examining those things that plague it. Life for example for many in the Soviet Union depends on millions of tons of imported grain. In Japan, it depends on imported fuel. Agriculture, where mechanised, often depends on sea-shipped oil and steel. The scale is indicated by figures supplied by FEARNECY & EGER, RADHUSGATEN 27, OSLO 1.

In the year 1980 shipments totalled:-

<table>
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<th>Commodity</th>
<th>Quantity</th>
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<tr>
<td>Iron Ore</td>
<td>314,370,000 Metric tons (*)</td>
</tr>
<tr>
<td>Coal</td>
<td>188,445,000 &quot; &quot;</td>
</tr>
<tr>
<td>Grain</td>
<td>198,147,000 &quot; &quot;</td>
</tr>
<tr>
<td>Crude Oil</td>
<td>1,361,900,000 &quot; &quot;</td>
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Unfortunately, no effective international regulation of this sea transport has been established. Badly managed and maintained ships with incompetent about 250 ships, large quantity of cargo and many hundreds of millions of pounds worth of property being 'needlessly wasted every year for want of a regularity system. Clearly this is a matter of public interest for those concerned with their environment and future of this vital means of transport.

At this point, I should mention that the International Maritime Organization which has done a lot of good work is not and has

(*) Source: Liverpool Underwriters Association Figures
never claimed to be a regulatory system or organ capable of enforcing the observance of international conventions. Nor have been the courts. The laws and the obligations that are embodied are those tied to the sovereignty of the states-recipients. By which individuals and indeed the states may decide to implement or not. It seems that IMO (1) alone will not bring sea transport standards under control. It cannot impose penalties upon recalcitrant parties. During the twenty years following its establishment in 1959, as IMCO (2), it saw ship losses in terms of tonnage increased severalfold.

In 1959, the total lost figures for the year of ships over 500 tons was 100 ships totalling some 338,070 gross registered tons, GRT, (3) a total loss ratio to ships in service of 0.28%. In 1979, the total loss figure was 278 ships totalling 2,258,221 gross registered tons, a loss ratio of 0.56%. In 1981, losses are less at 248 vessels (0.38%) but still unacceptable, being needlessly high. The recent being rather a mere fluctuation than a trend.

The public is concerned when it hears of loss of life at sea and the loss of life of life-boat men. The public should also be concerned at the hundreds of millions of pounds of loss and damage to ships and cargo every year. To me, my concern being to examine the numerous legal questions is that might come up in the event of a single accident. It may be pollution claims and insurance on life and cargo. Whatever it may be, the public pays for it, all of it, whenever it purchases goods, any goods. Insurance may spread costs - it does not meet costs, the public pays the entire costs of casualties and pollution in the form of prices which will include the above. This has been

(1) IMO - International Maritime Organization formerly,
(2) IMCO - International Maritime Consultative Organization
(3) G.R.T. - Gross Registered Tons being total weight of
the prime reason, indeed the motivation behind this study. Nor
is this all. We must inquire into the various casualties and/
or occurrences that occur at sea but before we do so, we must
once be informed about the peculiar reasons or philosophy that
render by such investigations - be they legal, technical and/or
public acts of investigations.

2. WHAT IS THE PURPOSE OF AN INVESTIGATION?

Here one is got to be very careful in affording an answer to
this question as we shall later-on see that the objective of a
marine inquiry will vary from country to country or more
appropriately from one juridical system to another one. Never­
theless, we should first stress very strongly that in priciple,
it is not a blame attachment exercise. It is not important
that this fact be made quite clear right from the beginning
because failure to do so, will give rise to the with-holding of
information by witnesses or even in some cases, deliberate
falsifications of evidence, so that the truth becomes obscured
behind a smoke-screen of lies calculated to mislead the
investigator.

The main purpose of the investigation then must be fact finding
so that the investigator can ascertain what actually happened
and see what lessons are to be learned. A statement of the
purpose of accident investigation was given by the American
National Safety Council in a document published a few years ago
and to the best of my knowledge a more concise description has
never been issued. The statement is quoted below:

- To learn accident causes so that similar accidents can
be prevented by mechanical improvements, better supervi­sion or employee training. Here, enough evidence is
available in an investigation report into the circums­
tances attending the grounding of the Philippine Vessel
"Testarosa" whilst she approached the berth at Port-
Cartier, Quebec on March 23, 1986, where Articles 542 and 545 of the Canada Shipping Act are quoted as saying that "reports are released for accident prevention purposes only and are confined to cause-related circumstances".

- To determine the change or deviation that produced an error that in turn resulted in an accident.

- To publicise the particular hazard among employees and their supervisions and to direct attention to accident in general.

- To determine facts bearing on legal liability. An investigation undertaken solely for this purpose, though, will seldom give enough information for accident prevention purpose. On the other hand, an investigation for prevention purposes may disclose facts which are important in determining liability.

The first of these objectives is fairly straightforward to learn accident causes so that similar accidents can be prevented, the only trouble with this particular objective is that it is somewhat negative in character, in that it has to wait until an accident has occurred before you learn about it. One of the most depressing things about accident investigations is that part that almost inevitably one of the witnesses or some member of the crew will say, "I always knew there would be an accident there one day; I nearly fell down that ladder/off the stage, or whatever, myself the other day". Here is a person who had a "near miss" but did not, for one reason or another, consider that there was a point in reporting the occurrence so that positive steps could be taken to avoid any further accidents. It is therefore important that the accident investigator should listen out for the "near misses" incidents that may be discussed in off duty hours, because the chances
are that if nothing is done he will be hearing of the real thing during the course of his work.

The second objective "to determine the change or deviation" is a reflection of growing importance of systems analysis in the field of operations and accident prevention. If such an analysis is not carried out trying to overcome a problem then the cure may be worse than the disease because the cure builds in the possibility of an even greater problem. The classic example of this is of course the Flinborough chemical plant disaster where an operational fault on the plant was dealt with by bypassing the fault unit. Unfortunately when bypassing the system there appears to have been a complete lack of calculation to ensure that the pipe used was of sufficient strength, or to ensure and appreciate the possible consequences should a failure occur.

Having investigated an accident, objective number three becomes of paramount importance and it is essential that senior management both on ships and on shore should realise that any case of an accident discovered by an investigator must be widely publicised if a re-occurrence is to be prevented. There is a well documented case where a failure on the part of one department to pass information to another caused a loss to a known company of some five hundred thousand pounds. Why had not the information been passed? Who knows, perhaps they were too busy to do so, or they did not think it was their job or even perhaps did not like the look of the person's face. All these factors will determine the amount and scope of each person's liability vis-a-vis his company.

This of course brings us to the fourth objective of accident investigation, the question of legal liability and here we can say that more often than not the accident investigator will run into conflict with legal advisors. I do not suggest that for one minute that the legal people attempt to subvert the course
of justice but if an accident investigator who must have some notion of law turns up some piece of information that is contrary to his employers' interest his company's legal advisers will not withhold this information if the otherside's solicitors ask for it, but it will not be volunteered if it happens not to be the case. Despite the fact that the investigator may reveal something detrimental to the employer's interests, the investigator must be completely open and honest about it and not be party to a hide-out. His must not be liable for perjury.

Having therefore examined as well as identified the importance of sea transport in world economy also scope and purpose of accident investigations as part of our preliminary study to the legal issues occasioned by incidences of navigation, we will now with the same intention in mind examine and as though to complete the above examined what I have described as knowledge of the different accidents at sea and also the casual factor(s).

3. KNOWLEDGE OF THE DIFFERENT ACCIDENTS AT SEA

It is important that we give a run-down description of the several casualties that may occur at sea since this is necessary to understand thereof the varying issues and actions that may arise from them. For action based on collision damages may be different from those upon a grounding - the latter being a complete loss.

- Collisions:
  These ones occur when visibility is poor, where tracks converge, traffic is dense and the water restricted. In any case it involves two vessels colliding together. To obviate such collisions internationally-agreed rules were introduced in 1840 and have been revised from time to time. In recent years traffic separation schemes; vessel management systems and port signal and radar
stations have been established. The IMO document "International Regulations for Prevention Collisions at Sea" gives steering and sailing rules for vessels in any condition of visibility (including look outs, safe speed, proper use of radar equipment and plotting or equivalent systematic observation of detected objects.) Traffic separation schemes for vessels in sight of one another and for those in restricted visibility; lights and shapes; and sounds and light signals, including distress signals.

Some authorities have local regulations; e.g. for the Great Lakes, the St. Lawrence Seaway and US inland waters, while the routes and relevant instructions for traffic separation schemes are printed on navigation charts and compliance is compulsory. A good example of a collision among several was the loss of the SS Titanic in April 1912 where she struck an iceberg and sank killing some 1502 souls.

- Explosion:
  This will arise from heating a certain proportion of air and flammable vapour in a confined space, for example from:- introducing ignition in a boiler furnace where fuel or fuel vapour is present in the furnace, furnace brickwork or gas passages; also overheating and evaporisation of lubricating oil and condensation into a mist in a crank-case, gear case or other enclosed and lubricated mechanism, forming an explosive moisture with the air, and ignition by a hot-spot, this type of emphasis can also occur when opening the crank-case, etc. after shut down. They can cause serious injury and death, put machinery out of action and cause structural damage leading even to shipwreck. A 38-foot charter fishing vessel Jack Tar had just finished
loading 140 gallons of petrol at Pelican Islands, Galveston when Captain Paul V. Marvel, the only person on board pressed the starter button and there was an immediate explosion below deck, whereof it subsequently burnt and sank while he suffered burns on his arms, hands and face.

- Stranding:
This is the commonest form of total loss of ship. Information about the seabed, reefs, coasts, etc. is given on nautical charts; while changes to the latter is given in Notices to Mariners. Among other publications may be mentioned the UK Admiralty List of Lights, Radio Signals, Tide Tables as well as the Admiralty Sailing Directions. Also the Hydrographic authorities of some marine states issue similar publication. Similarly, chart agents offer facilities for ensuring that Notices to Mariners are transmitted to a vessel or its owners, that the vessel's charts are kept corrected, and that the relevant charts are available also when the vessel changes its area of operation. The Greek ship Sinergasia ran aground in a snowstorm outside Holnund after engine breakdown on December 18, 1986. She broke into two but non of the crew survived in an attempt to swim ashore.

- Weather Casualties:
Heavy weather and high seas may produce structural damage, resulting in flooding, shift of cargo leading to instability. Lightning may cause fires. Ice accretion on superstructure, masts and rigging may cause a capsize. Bad weather may cause mess to be washed overboard from ships and boats, thus ship designs has been directed towards an improvement in seakeeping qualities and protection of personnel. Standards maintained are given in the International Load Line
Convention 1966; it controls the amount of weight that can be put on a ship and provides for data to guide the Master in its disposition.

War Casualties:
Maritime countries suffer their greatest casualties at sea when at war. Out of about 27,000 persons involved in shipwreck in the British Merchant Marine from 1940 to 1944, 32% died - 26% in the water and 6% in lifeboats. During the period 1939-45 between 30,000 and 40,000 men in the British Navy (or 66% of the total Naval casualties for the war) probably lost their lives due to drowning; the number of people who died after reaching some temporary lodgement in the waters was very large and sent to drowning, cold and from immersion and exposure were the most frequent causes of death. War damage to ships frequently results in fuel oil spreading over the surface of the sea, and the oil catches on fire. While extensive damage will cause the ships to sink very quickly with greater likelihood of suction being created in the water.

Now that we have discussed some of these sea disasters, we must look closely into some of the causes. In doing so, we cannot help examining some of the technical inadequacies which by and large also explained why the accident happened as it did.

4. THE CAUSATIVE FACTORS

This will answer the question why it happened.

Human Factors:
It is not unusual for a casualty to have more cause facets than are obvious to the casual observer and whilst human factors usually act as the trigger, there
are other matters also worthy of mention. In a multi-
discipline investigation it may well be found that the
trigger is in a crew area, but owners, managers,
bUILDERS and even designers are not without fault.

The human factors connected with marine casualties go
far deeper than would be realised at first glance.
There are the well known and often repeated factors
such as poor seamanship or lack of experience, but
there is also negligence and ignorance. These factors
apply to the onboard situation and shore based deci-
sions also have a distinct bearing on cases. If we
start with the concept and design parameters, go on
to ownership practices, communications, staffing,
training, maintenance, supplies and consider charterer
and other user aspects - no matter where we look there
will be cause or contributory factors so there is
no room for complacency in any part of this great
industry.

- Chain of Events:
If we consider the chain of events in some major
catastrophies it looks a bit like this:-

Catastrophe - inadequate isolation
Accident - inadequate containment
Incident - inadequate safeguards
Failure - inadequate redundancy
Defect - inadequate load-line limitation
Error - inadequate inbuilt safety factors

When this chain of events is considered we will realise
that to arrive at the proximate cause of any accidental
occurrence requires considerable thought and careful
evaluation; Fortunately the shifting of these matters
in fine detail is not usually performed by the surveyor
in the field but is entrusted to the Average Adjuster.

**Prime and Proximate Causes:**
Before proceeding further it may be as well to consider the commonly used term "prime cause" and "proximate cause". The former could be defined as the first in order of time or occurrence whereas the latter is the dominant or immediate cause, the greatest or nearest in a chain of causation. Where there are inter-acting causes the efficient or dominating cause is deemed to be the "proximate cause". It is clear that in all but the most simple cases there will be several causative factors and it has been held for example not really concerned with the "cause of causes". Lord Bacon said "It were infinite for the law to judge causes of causes, and their impression one on another, therefore, it contented itself with the immediate cause." In fact an eminent judge decreed that even damage caused by negligence or unskilful navigation could rightly be held as proximately caused by the peril of the sea. In this case (Westport Coast V McPhail 1898) the loss was regarded as caused by the peril of the sea and only remotely by negligence or unskilfulness of the master or crew.

Now that we have examined the possible doctrinal matters involved in the issue of finding out what happened, we will look at some of the general explanations as concerns causes thereof.

**Latent Defect:**
This has been defined as "defect which could not have been discovered by a person of competent skill and using ordinary care". The general rule is that Latent Defect does not mean latent in the eye. It means latent to the senses, i.e. detectable by physical means
of examination, hammer, heel or forceful persuasion.

The criterion is that if a competent surveyor is employed, he must also be diligent. It does not extend to carrying out a special survey at the commencement of each voyage. It is not obligatory for a ship’s officer at the start of a voyage to go and tap every rivet to find if it has defect or not as held in (Cranfield Bros. V Tatem Steam Nav. Co. 1964 LIR 264. 270). However, there has been considerably difficult in interpretation and it is not the surveyor’s job to interpret policy conditions. In view of the varying opinions of owners, their Adjusters, Underwriters and others where a claim is made and is alleged the damage has been caused by a latent defect, the surveyor, if there is no doubt, and if possible, agree the manner in which the damage has been sustained without agreeing that the term latent defects applies, thus leaving the Underwriters to interpret the meaning of the words within the context of the policy.

- General Average:

The accident might have been caused in an attempt to save the rest of the adventure or cargo on board for example to extinguish fire, refloat after grounding or whatever it may be. Nevertheless the decision as to whether or not a particular item falls under general average is the subject of discussion and negotiations with Average Adjusters and Owners.

The law of general average derives from the principle that "all must contribute to that which has been sacrificed for all", or in other words, "when one who part-takes in a maritime venture insures loss for the common benefit it (the loss) should be shared ratably by all who participate in the adventure". Modern law
and practice relating to the adjustment of general average is determined generally by the York-Antwerp Rules of 1974.

We will not examine the procedure of inquiry and investigations in the next chapter.
CHAPTER II

PROCEDURE OF INQUIRY AND INVESTIGATION

1. Nature of Inquiry
2. Type of Investigations
3. Reporting - What Style?
1. NATURE OF INQUIRY

The purpose of this exercise is to give some guidance to Safety Officers and Representatives on the way and nature that an accident and/or occurrence should be conducted in order that they may comply with whatever domestic regulations regarding the above. Nevertheless, we must first of all define what an accident is and one such description would be "an unlooked for and unwanted occurrence that may or may not result in personal injury to one or more persons. Yet another definition that is sometimes used in one that at first sight may appear to be somewhat philosophical but in actual fact it is absolutely correct in ninety-nine percent of all accidents and serious occurrences. The definition states that "an accident is the manifestation of the last link in the chain of events." When you bear in mind that almost all accidents occur because of domino or "knock on" effects of a series of mistakes or departures from the normal operations by a person or group of persons, you will see that the definition makes sense and that a good investigator is not so concerned with the accident as with the chain of events that led up to it, because of that chain would have been broken then the accident would not have occurred. Enough, however, for the meantime of the philosophical angle, we turn now and examine those peculiar things concerned with inquiries into shipping casualties.

a) Timing of an Accident Investigation:

This is of great importance and as we mentioned earlier, it should always be carried as soon as is reasonably practicable after the incident has occurred. If a fatal accident has occurred, apart from removal of the deceased persons, the actual scene of the accident should, as far as is practicable, remain untouched until such time as the investigating officer is satisfied that all necessary evidence has been gathered. If the reason was equipment
failure, then should be taken to ensure that any piece of material that have been involved are gathered up and retained or tested by interested parties. It is also essential that these be labelled as well.

b) Must be, if need be, be conducted by persons who have juridical habits of inquiry, thus magistrates.

c) The deciding court upon which jurisdiction and competence has been recognised must be endowed with competent nautical, naval or engineering knowledge. Such persons or individuals who furnish such knowledge must be independent of all interests concerned.

d) These courts are administrative in nature, and appointed by supreme authority in Britain The Board of Trade, they will combine as far as provide, the merits of an administrative court in the ordinary sense with those of a court of justice. The qualifications necessary for such courts have been stated: "..... it is necessary to remember what are the absolute requisites for those inquiries. In the first place they must be summary local and inexpensive. If they are not so they will be oppressive to the parties, they will be impracticable to the Government, and they will be ineffectual. It is impossible to keep seamen and witnesses for long in port; you must produce your witnesses and take the evidence at once, or the thing is at end. In the second place, the courts must be perfectly impartial as between the shipowners or insurers or passengers on the other. Similarly, these courts have no power to take away any right which can be asserted in a court of either civil or criminal justice."

e) Tact confidentiality and diplomacy are essential for the investigator; and a break for a cup of tea or a cigarette during the course of statement taking can often pay
dividends especially if the witness is in some way emotionally involved, such as may be the case in a fatal or serious injury investigation.

f) Finally, we should mention that irrespective of the above factors, the nature of an injury will be determined by the domestic laws and customs of the host countries. In Canada as opposed in France where it is essentially inquisitional and premitive and conducted by the so-called "Administrateur des Affairs Maritimes", it is basically for accident prevention serves no more purpose and conducted in principle by people of nautical, naval and engineering experiences.

2. TYPES OF INVESTIGATIONS:

Now that we have examined some of the various reasons for carrying out accident investigations in the preliminary chapters as well as nature there of such inquiries, it is now proposed to examine the various types of investigations that are carried out. Note however that the decision to investigate or not lies with the government concerned. Principally two types in most maritime countries, Britain, France and Norway to mention just a few, there are some other types by private interest groups. We will examine all.

1. The Principal Types

- Preliminary Inquiry:

This inquiry which can be said to be quasi-judicial in nature, is usually conducted by a responsible officer with the necessary experience of the Maritime Safety Administration, duly notified as the proper officer for the purpose under the Merchant Shipping Act. Such an officer needs to be a highly experienced profes-
sional officer, duly trained for the purpose, who needs to appreciate fully that he is undertaking a solemn duty, during which he would have to:

i. Show great patience and understanding in examining witnesses, since they are likely to have been through a traumatic experience.

ii. Remember to place himself "in the shoes" of the witness when recording his statements, so as to be able to understand the relevant circumstances properly.

iii. Appreciate the fact that his conclusions and/or recommendations may have far-reaching consequences affecting the careers of the seafarers concerned, and perhaps, the shipowners themselves.

iv. Distinguish clearly between "error of judgement and negligence" as regards his conclusion regarding an act of omission or commission on the part of any seafarer concerned.

v. Give the benefit of doubt to the seafarer concerned, remembering the difficulties of seafaring.

vi. Ensure that the proceedings and the report of the inquiry are such as to be capable of forming a proper basis of his Government as regard further follow-up action(s), even though it shall remain the prerogative of his superiors to differ with any or all of his conclusions/recommendations.
The duties of the officer conducting a preliminary inquiry can be summarised as follows:

1. To inform the Government (Ministry concerned) of the shipping casualty having occurred within its jurisdiction.

2. To hold a preliminary inquiry, when considered necessary, into the shipping casualty, and for this purpose:
   i. To go on board the ship and inspect the same or any part thereof, or any of the machinery, boats, equipment or articles on board thereof, not unnecessarily detaining or delaying her from proceeding on any voyage.
   ii. To summon under his hand, require the attendance of all persons as he thinks fit to call before him and examine for such purposes and require answers or returns as deemed necessary for the purpose.
   iii. To require and enforce the production of all books, papers or documents which he considers important for the purpose.
   iv. To administer oath, or in lieu thereof, require any person to be examined by him to make and subscribe a declaration of the truth of the statement made by him in his examinations.

3. To submit the proceedings and reports of inquiry to the Government (relevant Ministry).
4. To make an application to a court or commissioner empowered under the Merchant Shipping Act, for a Formal Investigation to be done, if he considers it necessary and in any case, if the Government directs him to do so.

However, preliminary investigations were used in the following incidents: The sinking in 1972 of the "San Nicolas", stranding in 1971 of the "Panther" and also the explosion and subsequently sinking of the "Vainqueur" in 1969.

- Formal Inquiry:

It should be realised that all casualties are studies in order to determine which investigation to be used for there are costly both to governmental branches concerned as well as to other parties involved.

What is a formal inquiry? This is a public (judicial) inquiry, to be held in addition to or instead of a preliminary one as may be decided by Government. It is held by the court (or commissioner) empowered under the Merchant Shipping Act, assisted by assessors of the expropriate expertise, drawn by the court or (commissioner) from a panel maintained for the purpose by the Maritime Safety Administration. Usually a formal investigation is ordered by the Government or any other official so empowered but usually according to the following circumstances:

i. Whether light can be thrown on the cause of the casualty over and above that gleaned from the preliminary inquiry.

ii. Whether a formal investigation would be likely to
establish the circumstances of the casualty so that they may be published as a means of preventing the recurrence of similar casualties.

iii. Whether an inquiry may help to restore public confidence if the casualty involved heavy loss of life or in some other way attracted considerable public interest.

iv. Finally, a formal investigation will be undertaken if the preliminary inquiry indicates that there has been default and negligence on the part of the Master or officers and disciplinary action is considered desirable.

When so decided, the court (commissioner) conducting the hearing, the rules/procedures, powers, etc. and the provisions for rehearing, appeals, etc. are those that flow from the national legislation concerned. While it is not necessary the purpose of this paper to delve into the functions of the aforesaid court (commissioner), it is necessary to point out that the role of the Maritime Administrator is to assist the court or commissioner in every possible manner. Such assistance would cover such things as providing a panel of assessors, facts and evidence and make visits, if need be to any ship or place where relevant, and provide any other assistance that will be needed by the court or commissioner.

Whatever the situation, the Administration must advise the parties of the case which is considered to exist, and does so by means of a statement of case setting out the details of the casualty together with a draft list of questions which the Department intends to ask the court. The questions seek the court's opinion on all relevant points of the casualty and they may be added to or
amended during the course of the hearing as required.

One of the final questions in the draft is usually to the effect of "was the casualty caused or contributed to by the wrongful act or default of any person or persons?" The court will be asked to consider this point especially if the Department (Governmental Body) has any reason to believe that a particular person or body was guilty of such wrongful act or default. This might apply to the owner or a master or officer. In the case of an owner the question as posed may prove to be a critical one, which if answered positively could result in forfailing of his statutory right to limit his liability in civil proceedings associated with the casualty. In the case of the master or an officer, if the question of fault is answered positively the court may also be asked to deal with his certificate.

While we must not again remind the necessity of assistance of assessors depending upon the matter(s) adjudicated, not that it is usual for parties to be represented by counsel. Counsel for the Department will open the proceedings and introduce the various parties and their representatives. He will continue by reading the order of formal investigation and the statement of case, and by signifying if the Department is of the opinion that a certificate of competence is to be dealt with, or if any parties should be criticised. The Department's case will then be represented and evidence adduced by documents and witnesses. The other parties are given the opportunity to cross-examine the Department's witnesses and to introduce further documentary evidence and/or call more witnesses. Each party may cross-examine any other party's witnesses.

Opportunity is given for anyone to apply to become an
additional party to an investigation and such opportunity is usually left open during the course of the proceed­ings. In this respect it is not usual for prospective additional parties to be present from day one of the hearing, and be represented by counsel. For example, a classification society may want to maintain a watching brief in a case where a party may raise certain allega­tions with respects to surveys, etc. In such a case, the society could apply to become a party to defend itself against such allegations.

Before the close of the proceedings counsel for each party will address the court. Before counsel for the Department closes he will hand the questions in their final form to the court. Applications for costs will also be made before the court retires to consider its findings. However, no decision with respect to costs will be finalised until a report of findings is either read in open court or published, and the commission is bound to exercise judicial discretion in making an award on costs, as the case of:

RV a Wreck Commissioner ex-parte knight (2LLR 1976) clearly illustrates.

The case concerned an appeal to the Divisional Court of the High Court following a formal investi­gation into the circumstances attending a collision between the "BRITISH FERN" and the "TEVIOT" on December 24th, 1973 in the North Sea.

The investigation occupied some eight days and a report of court followed. In addition to deter­mining the circumstances in which the collision occurred, the court was concerned with deciding whether there had been, on the Master of either
vessel, some wrongful act or default causing the collision. The seamanship of both Masters was accordingly placed under critical review and for this reason both were represented by counsel. In the report of court, the total blame for causing the collision was found to be upon the Master of the "TEVIOT" and Captain Knight of the "BRITISH FERN" was duly dissolved from blame.

At the conclusion of the formal investigation, the commissioner heard applications for costs on behalf of Captain Knight, the owners of the "BRITISH FERN" and the disponent owners of the "TEVIOT". Both latter applications were refused but in the case of Captain Knight the commissioner said that in the exercise of his discretion he award the sum of 1,500 pounds to Captain Knight in respect of his legal costs. As his costs came to 3,600 pounds he decided to apply to the court for an order to rectify what he considered to be an unreasonable outcome, namely that he was completely exonerated from blame but was nonetheless left to bear 2,000 pounds of his costs.

In considering the application, the Divisional Court remarked that insofar as the commissioner gave no reasons for the decision to award only 1,500 pounds, it seemed impossible to support such decision on the grounds of the exercise of judicial discretion. It was not at all clear to the court that there was any material placed before the commissioner upon which he could have exercised judicial discretion, and in such a circumstances it was impossible to say that he had so exercised discretion and that his decision could therefore be supported on that ground. The Court therefore made
an order of "certiorari" quashing the commissioner's award and an order of "mandanuis" requiring him to reconsider the application for costs. And the Court added that, if in the exercise of the commissioner's discretion he decided to award a lesser amount than 3,600 pounds expended then a clear statement of his reasons for so doing would demonstrate that such discretion had been exercised judicially.

Meanwhile, to return to more general matters, after due deliberation the report of court will be published setting out in full the findings of the court with answers to the questions appended. Occasionally a report will be published promptly but often a considerable length of time may elapse, particularly if the proceedings were lengthy and complex. Provided the tribunal is properly constituted, a court of formal investigation is empowered to pronounce judgement which may entail the temporary suspension or cancellation of the certificate of a Master, Mate or Engineer.

In all cases involving questions as to the cancellation or suspension of a certificate the court is required by the Merchant Shipping Acts to state its decision in open court and there is an automatic right of appeal to the High Court of Court of Sessions as the case may be. In such cases involving professional certificates the court must at all times exercise caution with respect to procedure. This is clearly illustrated in the case of Captain Northcott's appeal:

(The "CORRCHESTER" 2 LLR 1956)

Following a collision between the "CORRCHESTER" and the "CITY OF SYDNEY" during the early morning of
February 19, 1956 with the loss of eight lives - a court of formal investigation was set up to inquire into the attendant circumstances. The court which consisted of a wreck commissioner assisted by two assessors found that the collision was caused by the fault or default of those in charge of both ships. Consequently the Master's certificate of the "CITY OF SYDNEY" and the Mates Home Trade Certificate of the second officer of the "THE CORRCHESTER" were suspended for twelve months. The court also suspended the Master's certificate of Captain Northcott (Master of "CORRCHESTER") for a period of three months, notwithstanding the fact that he had left the bridge some twenty-five minutes prior to the collision and only returned a few seconds before impact.

On the basis that he had no actual part in the navigations at the time, having left the second officer in sole charge, Captain Northcott appealed to the Divisional Court. In considering the appeal certain irregularities on matters of procedure came to light making it unclear whether his certificate had in fact been cancelled by the court of formal investigation.

When the report of court came before the Court it was not in the same terms as that originally read in open court, insofar as the draft read out in that court "recommended" that Captain Northcott's certificate be suspended for three months. The report which was subsequently published differed in material respects and more specifically stated that the court "suspended" Captain Northcott's certificate for three months.
The discrepancy was explained in the following manner. After the original draft was read in open court it was sent to the Treasury Solicitor's office. The representative at the Treasury Solicitor's office conceived immediate doubt as to the validity of the report insofar as it concerned the Captain's certificate, having regard to the fact that it contained no operative order for suspension of his certificate but merely a recommendation upon which the Department of Trade was powerless to act. He therefore called upon the commissioner privately and pointed out the difficulty. After discussion the commissioner decided to meet the difficulty by amending the terms of the report. This proceeded to do, altering the wording of both the report and annex. The whole report was then re-typed and re-signed by the commissioner and the two assessors, forwarded to the Ministry, and subsequently published.

The Divisional Court decided that the commissioner had made a mistake in law in that when preparing the original report he had not taken into consideration the precise duties and powers of the court in relation to the suspension of certificates. The Court remarked that in the case of a tribunal whose jurisdiction is wholly statutory, the commissioner must act within the four walls of the statute, otherwise he could have no jurisdiction. The statute provides that in the case of suspension of a certificate a decision must be stated in court. Thus the Court decided that the report in its amended form must be totally disregarded and the appeal treated as an appeal against the decision contained in the original report as read in open court.
In considering whether there had ever been any valid suspension of Captain Northcott’s certificate the Divisional Court concluded that the decision of the court of inquiry was at best ambiguous. They went on to say that they did not think it right that any officer should have his certificate suspended on the strength of an ambiguity. Finally it was pointed out that a court holding a formal investigation is exercising a quasi-penal jurisdiction and for that reason - if for no other - is under a duty to state its decisions in the clearest possible term.

It will be appreciated that courts of formal investigation are primarily of an inquisitorial nature and not concerned with matters of compensation. Questions of compensation following a shipping casualty are dealt with by the Admiralty and commercial courts of the High Court, which will deal with such matters as apportioning liability in collision cases, claims by cargo owners and marine insurance, etc.

So far as litigation following a casualty is concerned, it is usual for prospective litigants to postpone court actions until after a report of court is published, as this enables such to be used in evidence. Judges of the High Court will look to the report of court as valuable evidence and although not bound to accept the laws court’s findings will rarely disregard them in respect of fact, and therefore fault.

As already mentioned, a finding of fault on the part of an owner may lead to the forfeiture of his statutory right to limit his liability, which in some cases has very serious consequences. As courts of formal investigation are really only concerned with personal, as
opposed to vicarious, fault, a finding of fault or default on the part of an owner must raise the question "did the accident also occur with his actual fault or privity?" - this being the acid test for limitation purposes. If the High Court finds it did, the shipowner may thereby be placed in a situation where his liability is unlimited. It could, of course, be agreed that such liability should be unlimited in any event but this is quite another topic, and beyond the scope of this paper.

2. Other Types of Marine Investigations:

i. The Underwriters:

The depth of any investigation on behalf of Underwriters will depend upon policy conditions, and the technical investigator needs to be properly briefed before the survey is conducted. For example, where a vessel is insured for total loss only, it is pointless agreeing to the cost of opening out machinery to investigate the cause of mechanical damage. Where vessels are insured on liner negligence clauses, there is little to be gained in trying to blame the casualty on the negligence of the Owners' representative, although he alleges that the crew were at fault.

In investigations on behalf of hull Underwriters, if all the vessels certificates are in order it is accepted that she was fit for the purpose intended at the time they were issued. This state of affairs is quite different from the attitude of cargo interests, be they on behalf of cargo owners or Underwriters and because there is likely to be a conflict of interest there should be complete
iv. Unsatisfactory Investigations:

Investigations into the cause of Marine of Maritime casualties, whether by governments or other interest as seen elsewhere, are often less than satisfactory for many reasons and it is probably relevant to mention just a few:

a. Human nature being what it is, people have a built in protective mechanism and usually whatever they reveal about the casualty, or its circumstances will be affected by this - often quite unconsciously.

b. The prime cause of the accident of the casualty is often masked by the destruction of the necessary evidence, this could be due to the extend of damage, removal of vital evidence during repairs or even deliberate.

c. There are occasions where for commercial reasons the owners reveal less than the ful information which is available to them or hide behind Classification Certificates and the like.

d. On other occasions the expertise necessary to investigate a particular aspect of a casualty is either not used or even not available and after all no-one can be expected to have all answers.

3. REPORTING, WHAT STYLE?

An after dinner speaker once said, in reference to his speech, that a speech should be like a bikini on a pretty girl, brief
he may abandon the report at this stage for some more juicy information about freight rates or new buildings or whatever, and pass the report to his subordinate who may want to hear the cause of the fire. The next section then should be entitled "conclusions" and will be based on the main bulk of the report, with cross reference as appropriate.

Taking the same incident we may come up with some appropriate conclusions such as:

a. The cause of the fire was spontaneous ignition of a drum containing calcium hypochlorite for sewage treatment.

b. The fire spread to an adjacent shelf, igniting a bag of waste which in turn set fire to a drum of grease.

c. Although the fire-fighting operation was effectively carried out the initial attack was not successful due to the wrong type of extinguisher being used (here referring to the relevant section of the report).

For the reasons mentioned earlier, keep the conclusions section as brief as possible, they can always be explained in the main bulk of the report. They are also the key as to what should be done in future to reduce the possibility of a recurrence of the incident and recommendations should therefore come next in the report. Again taken our example we can say:

"As a result of this incident it is recommended that the following actions be taken:

a. That instructions be issued as a matter of urgency informing the Fleet that chemicals, oils, and greases, and waste must not be stored in the same room;

b. that instructions be issued to the effect that quantities
of calcium hypochlorite should be kept to a minimum and in a steel container;

c. advice be circulated to all crew members as to the correct fire extinguishing medium to be used in dealing with chemical fires."

Having got the most important point of the report set out along the lines of the above we can now turn to the narrative section. And this is the part of the report which is of interest to the professionals, inspectors and similar persons who have a statutory interest in what happened and last but not the least, the lawyers who are going to spend the next three or four years arguing over whose fault it was and whether or not any compensation will have to be paid; the latter point of cause is of particular relevance in the event of a personal injury accident occurring. It follows then that the narrative section must be factual, concise and explicit. It must not contain guesses as to what happened unless there are no witnesses available, in which case the investigator/report writer must obviously make some attempt to explain what could have happened. If, however, the report is in the form of a hypothesis then it must be made absolutely clear that this is the case and that the writer is stating an opinion as to what may have happened.

Any report of an incident, therefore, should take the following format and depending on the Company’s procedure:

a. Summary
b. Conclusions
c. Recommendations
d. Narrative

Secondly, a final point about report writing is that most companies insist that reports are privileged documents to be utilised by their solicitors only. It is therefore imperative
that any person who may be called upon to prepare a report about any incident, or personal accident, should know exactly what the rules of the game are. If for example the Company requires that all such reports be classified as, "Confidential, for the use of the Company solicitors only", then this means exactly what it says.

It is the author’s opinion that there has been far too much emphasis in the past and still is today on the questions of confidentiality and many of the legal delays occur as a result of lawyers attempting to discover documentation instead of pressing ahead with the main purpose of establishing what happened and whether or not an equable solution as to its costs and compensation can be achieved.
CHAPTER III

WORK OF THE INTERNATIONAL MARITIME ORGANIZATION IN RELATION TO INVESTIGATION OF MARITIME CASUALTIES

1. Report by the Organization Secretariat

2. Other Matters: Format of Marine Casualty Reports
1. REPORT BY THE I.M.O. SECRETARIAT:

The International Maritime Organization was established by a convention drawn up in 1948, as a specialised agency of the United Nations with responsibilities exclusively in the Maritime field. Its principal objectives are to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation with the prevention and control of marine pollution from ships, and to deal with legal matters related to the purposes set out in its constitutive treaty.

The Organization commenced operations in January 1959, following the entry into force of its Convention in 1958, at which time it assumed depository and related responsibilities in respect of the two major international treaty instruments relating to maritime safety and the prevention of marine pollution from ships, namely the International Convention for Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution of the Sea by Oil.

In the discharge of its general mandate and in the review and up-dating of the SOLAS Convention, the Organization gave early attention to measures and problems relating to investigations of marine casualties and other maritime incidents.

The principal treaty provisions on this subject are contained in the successive SOLAS Conventions. The 1948 SOLAS Convention, responsibility for which was assumed by IMO in 1959, contained a provision requiring states parties thereto to conduct investigations on casualties affecting their ships and to report thereon to the organization. The 1960 version of the Convention, adopted following revision of the 1948 Convention by IMO, retained this provision as Regulation 21 of Chapter 1 of the Regulations annexed to the treaty. That Regulation reads as follows:
"a. Each Administration undertakes to conduct investigation of any casualty occurring to any of its ships subject to the provisions of the present Convention when it judges that such an investigation may assist in determining what changes in the present Regulations might be desirable.

b. Each contracting Government undertakes to supply the Organization with pertinent information concerning the findings of such investigations. No reports or recommendations of the Organization based upon such information shall disclose the identity or nationality of the ships concerned or in any manner fix or imply responsibility upon any ship or person."

This provision has been retained in the 1974 version of the SOLAS Convention. A similar provision is contained in Regulation 23 of the International Convention on Loadlines, 1966, a treaty adopted under the auspices of IMO.

As part of its work in overseeing and promoting the implementation of the SOLAS Convention in particular, and the improvement of Maritime Safety in general, the Maritime Safety Committee of IMO has from time to time considered and taken measure deemed necessary to encourage and facilitate the effective use by states of casualty investigations in appropriate cases.

As early as 1961 the Maritime Safety Committee (MSC) examined the matter at its fifth session on the basis of a document submitted by the Secretariat (MSC V/13). Whilst the information then available to the Organization was not considered as proving "sufficient conclusions or guidance towards the object of the SOLAS Regulations on the subject", it did provide some help "in establishing clues to the main and most common causes of marine casualties".
In 1963 and 1964 the MSC gave further consideration to the subject and agreed on certain guidelines regarding the form of marine casualty reports, in particular the details to be provided, the forms to be used for reporting and manner in which information given in reports were to be presented to the committee.

Following the Torrey Canyon casualty in 1967 a Legal Committee was created in the Organization to consider legal questions arising from the incident and other legal issues within the field of responsibility of IMO. In 1968 the Committee submitted to the Assembly a draft resolution on participation in official inquiries into marine casualties. The resolution was described in the Assembly as a first step towards ensuring that interested states be entitled to be represented at inquiries into casualties such as the Torrey Canyon. One of the objectives of the resolution was to encourage administrations to work towards uniform practice in that field. The resolution was adopted by the IMO Assembly in November 1968 as resolution A.173 (ES. IV). It reads as follows:

"The Assembly,

Nothing that there is variation in the practices of Member States with regard to official inquiries into marine casualties, and other proceeding directly consequent upon such inquiries.

With a view to ensuring that States seriously affected by or having a substantial interest in maritime casualties, particularly where oil pollution to their coasts have resulted, shall have an opportunity of being represented at inquiries into, or other such proceedings relating to, such casualties, and

Desiring to encourage international unification of
practice in relation to such inquiries and proceedings.

Recommends to governments that if a State other than the State of the flag is known to have been seriously affected by or to have a substantial interest in a maritime casualty occurring to a ship of the flag State (particularly where the coast of that other State has been polluted by oil as a result of the casualty).

1. a. The State of the flag should, unless an inquiry is held by the State as a matter of course, consult with the other State as to the holding of an inquiry into the casualty by one or other of the States, complying with the provisions of the sub-paragraph (2);

b. if such an inquiry is held as a matter of course by the flag State, the other State should be informed of its time and place.

2. Such an inquiry should be so conducted that, subject to the national rules relating to the special conditions under which inquiries are held in camera.

a. The public is permitted to attend; and

b. arrangements are made which would, subject to the discretion of the authority holding the inquiry, allow a representative of the other State concerned to attend and participate in the inquiry at least to the extent of:

i. questioning witnesses or causing questions to be put through the authority concerned; and
ii. viewing all relevant documents.

3. If an inquiry is held by a State seriously affected or having a substantial interest, a representative of the State of the flag should be given similar facilities.

If one or other of the conditions of sub-paragraph (2) above cannot be compiled with at the inquiry itself, this recommendation shall be treated as being compiled with if the condition not previously satisfied is satisfied in proceedings directly consequent upon the inquiry. Nothing in this recommendation shall affect or apply to the holding of any preliminary or informal inquiry or any other proceedings.

A State shall not be treated for the purposes of the recommendation as being affected by or having a substantial interest in a maritime casualty by reason only that it is the flag State of one or two ships in a collision, nor should the fact that one or more of its nationals has a commercial interest in the ship or its cargo in itself confer such an interest."

After The Torrey Canyon incident, the IMO work programme reflected growing concern with marine casualties. The increase in the use of large tankers and the number of serious casualties involving such vessels, including casualties caused by explosions such as those on the King Haakon VII, the Mactra and The Marpessa led to the national inquiries and investigations in several countries.

As a further part of the follow-up action in connection with the requests of the Assembly in resolution A. 322 (IX), the Maritime Safety Committee established a procedure for the extended analysis of casualty data which in time led to the
Tanker Casualty Data Scheme, with its related Tanker Casualty Data Bank. Under the scheme data about tanker casualties are collected and analysed annually and the analysis are submitted to the appropriate sub-committees for consideration and action as it may be necessary. Information provided to IMO on investigation of serious casualties is fed into the scheme. The Organization is assisted by Lloyd's Register of Shipping in gathering and analysing data on serious casualties to tankers of 10,000 DWT and above. The decision to establish this ceiling was taken by the MSC at its 36th session in April 1977 when it considered and approved the report of an Ad Hoc Group appointed by it. The Group recommended that the serious casualty list be limited to ships of not less than 16,000 grt which are a total loss (including constructive loss) or involving loss of life.

At its thirty-ninth session in 1978 the MSC was informed that States in the North Sea Region had met in March of that year to adopt a "Memorandum of Understanding between certain Maritime Authorities on the Maintenance of Standards on Merchant Ships", and to consider the exchange of information on the investigation of marine casualties. In this connection, the attention of the Committee was drawn to the view of one Member Government that "in the case of casualties involving ships of different flag States official investigations are often hampered by the fact that some Administrations are, for legal reasons, reluctant or unable to provide detailed information to foreign Administrations." The Member Government concerned proposed that a study be made of the possibility of sanctions against mariners who refused to attend inquiries into casualties affecting the ships on which they served when the casualties occurred. The MSC agreed on a recommendation on the subject which was submitted for consideration by the Assembly at its eleventh regular session in 1979. The Assembly adopted resolution A. 440 (XI) which reads as follows:
"THE ASSEMBLY,

RECALLING ARTICLE 16(i) of the Convention on the Inter-Governmental Maritime Consultative Organization concerning the functions of the Assembly,

CONSIDERING Regulation 21 of Chapter 1 of the International Convention for the Safety of Life at Sea, 1974, which requires Administration to conduct investigation of any casualty occurring to any of its ships when its judges that such an investigation may assist in determining what changes in the requirements of the 1974 SOLAS Convention might be desirable,

NOTHING that the Maritime Safety Committee has considered reports of investigations into casualties and has recognised the importance of a free exchange of information between Governments and in particular, the need for providing details of those casualties,

BEING AWARE that investigations into casualties, specially in the case of collisions, are often hampered by lack of exchange of information where ships under different flags are involved,

HAVING CONSIDERED the recommendation made by the Maritime Safety Committee at its thirty-ninth session,

URGES Governments to co-operate on a mutual basis in investigations into marine casualties and to exchange information freely for the purpose of a full appraisal of such casualties."

The matter of inquiries into casualties remains of continuing interest to the Organisation and the Maritime Safety Committee and other relevant organs may be expected to deal with aspects
of the problem from time to time as and when specific questions arise, either in the course of the work of these bodies or at the request or proposal of Member Governments or interested organizations.

2. OTHER MATTERS: FORMAT OF MARINE CASUALTY REPORTS

The Maritime Safety Committee in continuance with its task vis-a-vis marine casualty inquiries approved at its fifty-second session revised procedures regarding the submission of information concerning investigations into serious casualties conducted by Administrations and forwarded to the Organisation in response to the enquiries made by the Secretariat pursuant to Assembly resolution A. 322 (IX).

i. Administrations are urged to complete this form in respect of casualties to ships of not less than 1600 gross tonnage which are a total loss, including a constructive loss, and to ships of less than 500 gross tonnage involving loss of life.

ii. The information to complete the form shall be based on:

- the report of court or board of formal investigation carried out by the Administration; or

- the report of an informal fact finding investigation carried out by the Administration.

iii. When possible, a copy of the report mentioned in paragraph 2 or an extract thereof should accompany this form.

iv. If sufficient space is not available then reference may be made to the report of an additional sheet of paper be used.
CLASSIFICATION FOR CAUSE

Notes:

1. Where incident involves more than one type of casualty then entry should indicate sequence, i.e. a collision leading to fire and foundering should read "1-5-3".

2. Enter primary cause and, when appropriate, any secondary cause.

CODES FOR TYPE OF CASUALTY

1. Collision and Contacts
2. Strandings and Groundings
3. Floodings and Founderings
4. Lists and Capsizings
5. Fires and Explosions
6. Hull and Machinery Damage
7. Other
8. Unknown

CODES FOR CAUSE OF CASUALTY

Personnel Faults:

01. Failure to comply with Regulations
02. Failure to obtain ship's position or course
03. Improper watchkeeping or lookout
04. Improper maintenance
05. Incorrect operation
06. Failure to secure closing arrangements
07. Improper stowage of cargo
08. Improper loading or overloading
09. Incorrect ballasting
10. Negligence
11. Illicit smoking or use of smoking materials or uncontrolled use of heat source
12. Inadequate training
13. Unable to fulfil duties
19. Other

Failure of Ship, Its Machinery or Equipment:

20. Propulsion machinery
21. Essential ancillary machinery
22. Steering gear
23. Navigational or communication equipment
24. Closing arrangements
25. Structural failure
26. Hull fittings or shaft seals
27. Subdivision arrangements
28. Bilge pumping
29. Spontaneous combustion
30. Component failure
39. Other

Note Related to Ship:

40. Force of wind, tide or current
41. Failure to provide instructions, charts or nautical publications
42. Failure of aids to navigation
43. Uncharted obstruction
44. Weather damage
45. Faulty design or construction
46. Blame (in whole or part) attributed to third party
47. Arson
59. Other

99. Unknown
<table>
<thead>
<tr>
<th>Name of Ship</th>
<th>Distinctive No. or Letters</th>
<th>Type of Ship</th>
<th>Year of Build</th>
<th>Flag</th>
<th>Gross Tonnage</th>
</tr>
</thead>
<tbody>
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<td></td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Date of Casualty</th>
<th>Time of Casualty (Local Time)</th>
<th>Type of Casualty i.e. Fire, Foundered, etc.</th>
<th>Name(s) and Flag(s) of Other Ships Involved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Day Month Year</td>
<td></td>
<td></td>
<td></td>
</tr>
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<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name or Place or Sea Where Casualty Occurred</th>
<th>Latitude and Longitude of Casualty</th>
<th>State of Sea, Weather &amp; Visibility at Time of Casualty</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Port Last Sailed from and Date of Sailing</th>
<th>Port of Destination</th>
<th>CARGO</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Status (i.e. Loaded, part loaded, ballast)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Brief account of the sequence of events of the casualty:

Brief account of any assistance given to the ship and/or rescue services provided:

Brief account of the extent of the damage to the ship:

<table>
<thead>
<tr>
<th>Will the ship be:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Repaird *</td>
</tr>
<tr>
<td>- Salvaged *</td>
</tr>
<tr>
<td>- Broken up *</td>
</tr>
<tr>
<td>- Not removed *</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of lives lost</th>
<th>Did pollution occur? (From subject ship only)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crew:</td>
<td>Yes / No *</td>
</tr>
<tr>
<td>Passengers:</td>
<td>Pollutant</td>
</tr>
<tr>
<td>Other:</td>
<td>Amount, if known</td>
</tr>
</tbody>
</table>

* Delete as appropriate
Cause of Casualty
(Ascertained / Probable)*

Indicate the form of investigation carried out (see note 2)

State principal findings:

State action taken:

State findings affecting international regulations:

Is a further investigation to be carried out?
Yes / No *

If yes further information should be forwarded in due course.

Signature and title of person providing information:  

Date:  
On behalf of: 

* Delete as appropriate
CHAPTER IV

OTHER COUNTRIES LEGISLATION AND PRACTICES

1. The United Kingdom
2. France
3. United States of America
4. The Republic of Liberia
INTRODUCTION:

As already seen the table of content required that studies be made of "foreign legislations and investigatory practices and procedures". The countries to be examined includes, the United Kingdom, France and the others and the choice of such countries is partly justified by their contribution and important role played in world sea trade and developments. Such is quite clear of the example of Great Britain which I did not only at one point of history owned more than fifty percent of world tonnage but continues nowadays to be the sit of most insurance markets as well as international institutions concerned with developments in the marine industry. This is the case with the International Chamber of Shipping and International Maritime Organisations. The case of the republic of Liberia as could have been that of Panama and the other countries presents an essential feature of its own. Here, we are talking about the case of "open registry ships" a situation in which a country gives its nationality to a vessel for some financial arrangements and thereof in the life of the vessel, management is placed in the hands of individuals far removed from the country of registry. In other words, there will be no connection between the flag-state and the vessel except the registration. The case in issue will be examined by the Liberian investigatory procedure to see whether there are no abuses interest in the system.

Secondly, it should have been clear by now that the system may vary to a lesser or greater degree from one country to the other and in order to present a useful job came to the conclusion that each country's legislation and practices should be examined in comparable fashion. Therefore, in each case, the following nine subjects are analysed:

1) General Overview;
2) Casualties Reported and Investigated;
3) Disciplinary and Penal Aspects;
4) Civil Liability Aspects;
5) Investigatory Process and Examination of Witnesses;
6) Privilege Attached to Witness Evidence;
7) Reports and their Publications;
8) Public Hearings and Procedures; and
9) Role of Safety Recommendations.

1. THE UNITED KINGDOM:

1. General Overview:

The U.K. probably has the longest history of casualty investigations dating back two centuries or more. The present statutory enactment came about through the original Merchant Shipping Act of 1894, which was amended by various other Acts but more particularly in respect of casualties, by the Merchant Shipping Act (1970) and by the Merchant Shipping Act (1979).

Although certain charges were brought about by these amending Acts, the system has remained basically the same consisting mainly of preliminary inquiries and formal investigations into casualties.

The present structure of the Marine Directorate of the Department of Transport (formerly the Board of Trade) indicates that the Under-Secretary heads its various divisions, one of which is that of the Surveyor General, which in turn is sub-divided into four components listed as "A" to "D". The "D" section is that of the Deputy Surveyor, General Marine Division, which includes the casualty investigations sub-section. Only three casualty officers from that sub-section, with some support staff.

There also exists what is called a "flying squad" in which six headquarters and surveyors hold continuous
appointments to carry out important preliminary inquiries; otherwise the inquiries are carried out by surveyors and inspectors of field officers or the Department. It is to be noted that the investigators at headquarters are not permanent investigators since they are not employed full time in that occupation and they carry out other duties as principal surveyors.

The question of conflict of interest has been raised in the House of Commons, where the opposition transport critics have alleged that the Department acts as judge, jury and enforcer. Some criticisms have been voiced from the industry but the problem is somewhat different from the one which hitherto to face Canada in that the British system of responsibility for various aspects of marine transport is more divided than the responsibilities entrusted to the Canadian Coast Guard. Whereas in Canada, all operations, such as ship safety, aids to navigation, the fleet, etc. are under the Coast Guard, in Britain, these responsibilities are divided in the sense that the Department of Transport handles the Regulatory Branch and the Inspection Branch, but the aids to navigation are the responsibility of Trinity House, and some other responsibilities, such as vessel traffic services, are vested upon part authorities.

2. Casualties Reported and Investigated:

All casualties which fall within the definition of the word have to be reported i.e., the loss or presumed loss, stranding, grounding, abandonment of or damage to a ship, a loss of life, or serious personal injury caused on board or any damage caused by a ship. Apparently compliance with the reporting requirements is not totally satisfactory but there have been no prosecutions as yet for failure to report. The total number of reported
casualties from 1981 to 1983 ranged from 630 to 678 per year. In 1982, out of 664 reported casualties (collisions count as one casualty), 5 preliminary inquiries were held, 44 casualties were subject of "declarations", 156 resulted in a surveyors report whereas the remaining 459 were dealt with in a manner equivalent to our desk audit.

3. Disciplinary and Penal Aspects:

As in Canada, the person presiding over a formal investigation has the power to suspend or revoke the certificates of ship's Masters or officers. However, there have been discussions about the possibility of taking discipline out of that process.

4. Civil Liability Aspects:

There is unanimity in England to the effect that the formal investigation hearings are used extensively for civil liability purposes, to such an extent that hearings in which the cause of a casualty could easily be determined very early on are prolonged for months. The parties that are allowed to participate fully in these hearings are numerous and include cargo representatives. At the preliminary inquiry stage the owner's representative is admitted at witness interviews, at the discretion of the investigator and provided the witness agrees. In any event, witness statements obtained at preliminary inquiries are made available at subsequent formal investigations and are used in civil litigations.

5. Investigation Process and Examination of Witnesses:

In addition to the previously mentioned desk audits there are three levels of investigations:
Surveyors' Reports:
This is the action taken when the circumstances, although not serious suggest a need for more information which the surveyor obtains without taking declarations. This is somewhat informal process. The surveyor then submits a report based on the verbal information obtained.

Declarations:
This form of investigation is carried out for some serious casualties where the surveyor may be appointed to take "declarations" from specific persons and he produces a report accompanied by such declaration. In this instance, the surveyor receives a formal appointment which gives him the powers of an inspector to go on board premises and to inquire signed declarations.

Preliminary Inquiries:
In these cases a more formal process is followed. The investigator has extensive powers to compel testimony, to seize or copy documentary evidence or to seize physical evidence. The power to detain a ship may be exercised but it is stated that nothing authorises the investigator "unnecessary" to prevent a ship from proceeding on a voyage.

Whenever a formal statement is required, it will be in the form of a declaration. Since the 1979 Act, the obtaining of testimony under oath has been abolished but the investigator has the power to require a declaration which will be set out in a narrative or other form, the declaration is usually prepared by the inspector or the investigator and read to the witness, who can then sign it with the statement that he believes the declaration to be true. There is no mechanical recording.

The witness is allowed to be assisted by a lawyer who
nevertheless is allowed to cross-examine in any manner. As stated earlier, other persons may be present as observers, as representatives of shipowners, but only at the discretion of the investigating officer and with the consent of the witness.

6. Privilege Attached to Witness Evidence:

Section 27(7) of the 1979 Act states that "no answer given by a person in pursuance of a requirement imposed hereunder, shall be admissible in evidence against that person or the husband or wife of that person in any proceedings..." which will relate to perjury or failure to answer questions. The Guide for use by investigators indicates that a declaration nevertheless can be used in formal investigations or disciplinary proceedings against other persons. This Guide also indicates that the declaration cannot be used in criminal proceedings for an offence committed by the declarant but it can be used in criminal proceedings against a third party; it may also have to be produced under an order of a court. The investigating officers are instructed to advice the witness of the fact that his declaration may be used in subsequent proceedings.

7. Reports and Their Publications:

Investigating officers' reports are the officers' sole responsibility although they may be asked to submit supplementary ones. The report identifies the ship, owner and the witnesses whose declarations are attached to the report.

Generally as we have been elsewhere and after given the background factual information, the report deals with events leading to the casualty and the sequence of events.
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following the casualty, including search and rescue and other relevant circumstances. It should also contain an opinion as to the cause or probable cause of the casualty. They are required to make recommendations on any action necessary to prevent a recurrence and they are also required to make a recommendation on whether or not there should be a formal investigation. These are often very specific and often also deal with problems of regulations.

There is no publication of reports as such. On request, a "factual statement" will be given out which contains the factual narrative but which excludes the conclusions or comments and recommendations of the investigator. Whenever such a factual statement is given out, it is also sent to all parties interested in the casualty. In any event, no general publication is made of such reports or factual statements. Reports of formal investigations are, however published.

8. Public Hearings and Procedures:

The criteria for holding a formal investigation of which an average of one or two are held per year are as seen before but for reasons of simplicity and clarification the followings:

a. If, after the preliminary inquiry, the cause of the casualty ought to be more clearly determined;

b. if there has been considerable loss of life;

c. if there is great public concern;

d. if it seems likely that there are lessons to be learned from the casualty; or
e. if the Department of Transport considers that the Master, Mate or Engineer should have his certificate of competency cancelled or suspended by the Court.

It should be noted that jurisdiction for casualty investigations covers all U.K. ships or any ship within the three miles territorial waters of the U.K. A provision similar to the one in Canada.

The hearing rules are in the process of being revised in order to conform to the new requirements of the two recent Acts. These rules have had restricted circulation and are still confidential. One important change may be that formal investigations may be limited in scope, for instance, in the case of collision, the Court could be asked to deal only with the question of why the ship sank and not with the cause of the collision itself. Before the new Acts came into effect, there was a requirement that, besides the officer whose certificate may be in jeopardy, the owners and Masters should automatically be made parties, but this is no longer required under the new rules.

The original decision as to who should be a party is similar to the Canadian process in that the Secretary of State determines who will be the original parties and who will be served with the Notice of Investigation. Subsequently, the Wreck Commissioner presiding over the investigation may agree to admit other parties, apparently the practice has been very flexible allowing even next-of-kin representatives to be admitted.

Sometimes, the Commissioner will suggest that a person hold a watching brief as an observer. If during the course of the investigation it appears that this person's
interests may be in jeopardy, he will then be allowed to become a party or allowed simply to reply.

A permanent list of assessors is currently kept by the Home Office but this will be transferred shortly to the Lord Chancellor's Office; this list is prepared totally independently from the Department and appointment to which is considered a high honour and there are strict criteria to be made in order to be placed on it.

There may be up to four assessors appointed in a formal investigation, but among these there will always be a peer to the party whose certificate may be in jeopardy. Nor are preliminary inquiry reports introduced as part of the evidence although the declarations of the witnesses are distributed to all parties in advance of the formal investigation.

Very often the investigators who carried out the preliminary inquiry will be called as witness to testify about evidence they gathered and evidence they observed, but they will not be questioned about their conclusions. There is, however, some argument to the effect that the investigator is an expert and could be asked his opinion. The Department does not try to prevent investigators from being called as witnesses.

As far as the tremendous costs are involved, a number of persons have indicated that fundamental changes should be bought about. Some of them feel that the true purpose of safety may not be properly served by this process and that even the liability aspects may not be really useful, especially in view of the already described huge costs involved. For the last three years the questions of changing the system has been examined and it may one day result into a better system put in place.
9. Role of Safety Recommendations:

Since the recommendations of the few preliminary inquiries are not made public the recommendations of formal investigations are the only ones of which the public is aware and they can carry considerable weight. There are no set rules as to official response to such recommendations, which rely mostly on public pressure to be implemented.

2. FRANCE:

1. General Overview:

The French casualty investigation system is penal in nature rather than orientaled towards finding cause. The current "Code Disciplinaire et Penal de la Marine Marchande" (Disciplinary and Penal Code of the Merchant Marine) was enacted in 1926 and although there have been numerous amendments since then, it is still the principal law relating to casualties. In view of the strict secrecy procedures provided by the Code, the possibility of using the process to improve safety is very limited and especially following such serious events as the "Amoco Cadiz", a Decree was passed on January 20, 1981, to permit the conduct of technical and administrative inquiries, the purpose of which is to determine causes and the lessons which can be drawn from them for marine safety.

The investigations are carried out in all cases by employees of the Department of Transport ("Administrateurs des Affaires Maritimes - Secretarial d'Etat auprès du Ministre des Transports Chargé de la Mer").
2. Casualties Reported and Investigated:

Casualties to French ships anywhere and casualties to foreign ships in French territorial waters must be reported to an "Administrateurs des Affaire Maritimes". A summary fact finding inquiry is carried out by an investigator who then has no powers whatsoever to question, etc. Upon consideration of the preliminary facts, the "Administrateur" may proceed to "une instruction" (preliminary inquiry) if there are indications that there has been an infraction of the code.

3. Disciplinary and Penal Aspects:

The main, and practically the sole, purpose of regular investigations is to impose penalties. If a mariner is found guilty he is subject to have his certificate suspended or revoked, to fines of up to 500,000 francs and to imprisonment of up to five years. The inquiries that are conducted under the 1981 Decree do not deal with penalties but the inquiry commission is required to hand over its report and documents upon request to those conducting a penal inquiry.

4. Civil Liability Aspects:

Since the preliminary inquiry is conducted under very strict rules of secrecy, the participation of persons concerned with civil liability is not possible. Furthermore when the case goes to a public penal hearing, unlike any penal proceedings in France, "no partie civile" is allowed to intervene and the tribunal has no authority as to damages. In view of this fact, however, the court record is available for use in subsequent common law courts dealing with civil liability questions.
5. Investigation Process and Examination of Witness:

The "Administrateur" appointed to conduct the preliminary inquiry has all the powers of a magistrate acting as a "Juge d'instruction" (inquiry judge) in criminal cases. He may be assisted by technical people. He questions witnesses under oath (except persons who may be charged with an offence in total secrecy and without the presence of counsel. Upon the completion of his inquiry the "Administrateur" may conclude that there has been a breach of the Penal Code, in which case the file remains secret. If, on the contrary he finds that there has been a breach, he then issues an "ordonnance de renvoi devant un Tribunal Marine Commercial" (an order that a formal penal charge be laid and heard by a commercial maritime tribunal) which then proceeds to a public hearing.

Although this may appear to be an inquisitorial system, it is presumed that the "Juge d'instruction" will act impartially, both for and against the persons who may eventually be charged.

If it appears during the preliminary inquiry that urgent safety measures should be taken to prevent other casualties, the "Administrateur" may so inform the relevant authority but he is in somewhat conflicting situation if he does so, since the procedure prohibits him from giving any information. This is another reason why the 1981 Decree was passed.

6. Privilege Attached to Witness Evidence:

The statements obtained at the preliminary inquiry are not made public but they are made available to the prosecution and to counsel for the accused at subsequent public hearing where they can be used at will and where it is not necessary to have the witness heard again.
7. Reports and Their Publication:

The report of the "Administrateur" (procès verbal) becomes public only if there is a subsequent hearing. The judgement of the "Tribunal Maritime Commercial" is public. Both, however, deal mainly with breaches of the Code and are not intended to determine the causes of casualties. As for commissions created under the recent Decree, their reports are made public at the sole discretion of the Minister, and if he so decides, they are published in the "Journal Officiel" (Official Gazette) of the French Republic.

8. Public Hearings and Procedures:

The "Tribunal Maritime Commercial" is headed by another "Administrateur des Affaires Maritimes" and four additional persons: a Magistrate of the "Tribunal de Grande Instance" (High Court), an "Inspecteur de la Navigation" (Steamship Inspector), a retired foreign-going Master who has served at least four years as Master and another mariner who must be a peer of the accused. This tribunal has all the powers and attributes of a penal tribunal and it is exceptional in the sense that there is no appeal from its decision. The main offenses which are looked into by the Tribunal are absence from duty, abuse or lack of exercise of authority by the master, inebriety when on duty, refusal to obey orders, infringement of regulations including the Collision Regulations, etc.

If the State is involved in the casualty and is at fault, this may be a factor in reducing the penalties which would otherwise be imposed on the mariner involved.

The "Commissioner d'enquête technique et administrative," created under the new Decree, proceeds informally and
hears witnesses in camera except that where a foreign ship is involved, a representative of the flag country may be present and may question witnesses and he has access to the various documents filed.

9. Role of Safety Recommendations:

As seen above, the principal inquiry system in France is not oriented towards safety recommendations except in special cases. This is, however, the main role of the commissions created under the new Decree. Within one month of their appointment, the Commissioners must deliver an interim report to the Minister. The draft of the final report is first submitted on a confidential basis to the parties involved in the casualty, who have one month to formulate comments, after which the report is "finalised" and sent to the Minister with the supporting documentation. Already by November 1983, there had been four of such commissioners.

3. UNITED STATES OF AMERICA:

1. General Overview:

The U.S. casualty investigations are carried out under a dual system whereby the United States Coast Guard carries out almost all the investigations and the National Transportation Safety Board (NTSB) acts as a participant in some of the major accidents. Discussions have taken place over the years about the possibility of (NTSB) taking over entirely but this has not occurred, although working arrangements have been concluded from time to time between the two organizations. It is difficult to determine whether the present situation will become permanent or whether it is of an interim or transitional nature. While the (NTSB) does not carry out most of the investigations
in the marine mode of transport, it is actively involved in those of aviation accidents. The administrative law judges system is also special interest in the U.S.A. for it has resolved the question of separation of discipline from safety related matters. For these reasons, we will examine in some detail the role of the United States Coast Guard vis-a-vis inquiries into marine accidents.

The U.S. Coast Guard (U.S.C.G.) acquired its name in 1915 and was reporting under the Department of Commerce for a certain period of time before being transferred to the Department of Transportation. It carries out a broad range of marine responsibilities affecting both commercial and non-commercial activities. In particular, it is responsible for vessel traffic management, inspection and certification, licensing and personal schemes, federal pilotage, regulations and enforcement. Responsible also for search and rescue except for certain inland waters where the responsibility would fall under the individual state authorities, it has its own radio stations available for search and rescue, distress calls, etc., it is not possible for regulating them since this is handled by the Federal Communications Commission.

The Commandant is in full charge of the Coast Guard but himself not directly involved in investigations. Under him there are various offices, one of which is the Merchant Marine Safety Office which is headed by an Admiral. This office has five divisions: Inspection, Licensing, Documentation, Investigation, and Marine Technical and Hazardous Materials. At the field level, there is a District Commander who is an Admiral; under him there is the Marine Safety Division and under him there are Officers in Charge of Marine Inspection (OCMI); under the OCMI there is the eleven districts. In major field offices, there are Senior Investigating Officers plus
others, whereas in some smaller offices there might be only one Investigating Officer. A Senior Investigating Officer is one who has had one or more years' experience. The investigators are acting basically on a full-time basis, although in some small offices they might be assigned other duties. The average investigator acts as such for about one year. All investigators report to the OCMI and all such reports eventually go to the headquarters, some of them may go through the district office first.

The Coast Guard still has full jurisdiction to investigate all casualties. NTSB has concurrent jurisdiction to investigate "major marine casualties" involving loss of six or more lives, loss of self-propelled vessels over 100 gross tons, damage exceeding US $500,000, or serious threat to life, property or the environment by hazardous materials. In such cases, NTSB participates in the investigation, which is then carried out by the Coast Guard according to its own rules. On the other hand, NTSB investigates exclusively all collisions between a Coast Guard vessel and a non-public vessel involving at least one fatality or US $75,000 in property damage. The last arrangement results from a Memorandum of Understanding signed between the Coast Guard and NTSB in September 1981. If a major marine casualty occurs, the Coast Guard informs NTSB; there is then consultation as to the participation of the latter in the investigation or, eventually, in a public inquiry.

2. Casualties Reported and Investigated:

The requirements for reporting casualties appear in Part 4 of the Regulations and generally cover all groundings, losses of propulsion, impairment of a vessel's seaworthiness, loss of life, injury causing incapacitation for a period of more than seventy two hours, and any
accurrence where the property damage is in excess of US $25,000.

The Coast Guard is satisfied with the effectiveness of the reporting systems, especially as to vessel losses and loss of life, although there are still problems with the fishing fleet, where it is difficult to estimate what percentage of casualties is not reported; it could be estimated as high as 50%. It has subsequently taken enforcing measures, mostly by way of the civil penalty procedure, for failure to report casualties; sometimes it goes as far as taking enforcement action with respect to licences.

The U.S. Coast Guard received approximately 9500 casualty reports in 1980 and the scope of inquiry would of course vary from a simple verification to a full-flaged public hearing. In principle, all reported casualties are investigated.

3. Disciplinary and Penal Aspects:

The safety related investigation is separate from the disciplinary process. Part 4 of the Regulations (Marine Investigation Regulations), specifically states that:

"The investigations of marine casualties and accidents and the determinations made for the purpose of taking appropriate measures for promoting safety of life at sea, and are not intended to fix civil or criminal responsibility."

However, the safety investigation may be used for determining that disciplinary proceedings be instituted but it cannot go beyond that preliminary step:
"The investigations will determine as closely as possible" (The cause, failures of material, etc., and...). Where there is evidence that any act of misconduct, inattention to duty, negligence or wilful violation of the law on the part of any licensed or certificated man contributed to the casualty, so that appropriate proceedings against the license or certificaste of such person may be recommended and taken under..." (Part 5)

Even a Marine Board of Investigation during the process of public hearings or in its report can recommend that disciplinary charges be laid. Whenever a recommendation is made to that effect, the matter is then referred back to the investigating officer who either carries out a separate investigation under Part 5 or lays a charge immediately. It sometimes occurs that the investigating officer will be the same one who carried out the casualty investigation but apparently this has not created difficulties because the charge is heard by an administrative law judge.

Disciplinary action is frequently taken as a result of casualties and for various reasons, such as violation of the Rules of the Road or use of narcotics or alcohol. The investigating officer is not required to submit a report before preferring charges although he usually discusses the matter with his superior before doing so.

A civil penalty may also be imposed in preference to revocation or suspension proceedings. The authority in this respect lies with the District Commander, who generally delegates it to hearing officers who proceed very informally, usually these officers merely send a letter assessing a penalty and the recipient has a period of thirty days to respond as to whether he accepts the
penalty or whether he requests a hearing. The amount of the penalty varies with different laws; violations relating to pollution, for instance, may involve penalties of up to US $100,000 per day. These penalties may be assessed against persons other than certificate holders, e.g. shipowners. The decision can be appealed to the Commandant, where final agency action is taken.

The Rules further provide that if, as a result of any investigation or other proceedings, evidence of criminal liability on the part of any licensed officer or certificated person or any other person is found, such evidence shall be referred to the U.S. Attorney General.

4. Civil Liability Aspects:

The U.S. Coast Guard casualty investigation system is a totally open and therefore to parties having an interest from the point of view of eventual civil liability claims. The term "party in interest" is very broadly defined as meaning any person having a direct interest in the investigation including, but not limited to, the owner, the charterer, or their agent, and all licensed or certificated personnel whose conduct may be in question. The tendency is to recognize more and more people as parties in interest, for instance, cargo owners and unions.

In the formal investigation process the investigating officer has the duty to open the investigation by advising parties concerning their rights to be represented by counsel, to examine or cross-examine witnesses, and to call witnesses in their own behalf.

Public hearings are extensively used as a discovery process. The Board of Investigation tries to cut short on
"fishing expeditions" but it is difficult in practice and success in this respect usually depends on the experience of the Chairman. Previously there was a rule that Coast Guard reports could not be used in civil litigation (this is still the case for NTSB reports) but that rule was changed and the reports are now admissible before civil courts. They often carry fair amount of weight because of the expertise behind them.

The participation of those eventual claimants, and of those whose civil liability may be in question, is therefore a major aspect of U.S. Coast Guard investigations, creating the same difficulties that have been observed in the public hearing process of the United Kingdom and of Canada, for example, less spontaneity on the part of witnesses, length of investigations and costs. However, it appeared to me that there is a basic policy recognizing that the system should serve equally private interests and also the interests of safety.

5. Investigation Process and Examination of Witnesses:

The 9500 reported casualties in 1980 were the subject of one of the following levels of investigation:

a. Desk Audit:
A report form is reviewed by the investigating officer in order to determine whether it is complete. In minor cases, he determines the apparent cause of the casualty on the form itself and signs it. This then becomes the report of the investigator which is reviewed and approved by a superior. One would expect that a high proportion of casualties would be handled in this manner.
b. Informal Verification:
This process is followed for some casualties and it consists of a low-key routine investigation where the investigator adds only notes to the casualty form. Recommendations can be added to the report, which goes through the normal approval process by the investigator's superior. The evidence taken by him can be made available to anyone requesting it even though the report is not finalised.

c. Formal Investigation Process:
This is a type of investigation carried out in more serious cases by the investigating officer, who gathers testimony from witnesses under oath. This is then taken down by a court reporter and transcribed. In these cases, parties in interest are named according to the procedure in Part 4 of the Regulations. The decision to carry out this type of investigation is generally taken by the District Commander or by Headquarters in view of the costs involved. Approximately a dozen such investigations are carried out each year.

In the formal investigation process the investigating officer conducts a public hearing in some sort of hearing room, where parties in interest, which have been named, may examine or cross-examine witnesses. These are sometimes referred to as "one-man boards of inquiry". Witnesses who appear before an investigating officer, whether for informal verification or during the formal investigating process, and who are not parties in interest "may be assisted by counsel for the purpose of advising such witnesses concerning their rights, however, such counsel will not be permitted to examine or cross-examine other witnesses or otherwise partici-
pate in the investigations". However, as mentioned earlier, should such witnesses be recognised or designated as parties in interest their counsel can then examine and cross-examine all witnesses and all witnesses of his own.

d. Marine Boards of Investigation:
These are ordered by the Commandant of the Coast Guard, who appoints the members of the Boards; they are held only for serious casualties, the composition and procedure of which is beyond the scope of this paper to explain.

6. Privilege Attached to Witness Evidence:

Since all the evidence gathered by an investigating officer is publicly available, witnesses are not entitled to any rights, privileges or immunities with respect to their statements, whether oral or written. However, a witness is not obligated to incriminate himself and in such a case he can plead the Fifth Amendment under the United States Constitution and refuse the answer, this plead is available only in the case of possible self-incrimination for criminal offenses but not for disciplinary offenses. It must, however, be noted that some officers who are the subject of disciplinary action may also be subject to criminal charges for the same offense, thereby permitting the Fifth Amendment plea. In some cases and for some valid reasons, immunity from prosecution may be obtained from the Attorney General's office.

7. Reports and Their Publication:
The casualty investigation report is that of the investigating officer, and he is totally responsible for it. He must however follow a standard format. He may consult his superiors or other investigators but a superior officer
will not intervene except possibly to inquire that the report be more complete or more accurate in specific areas. Once finalised, it is not changed but reviewed by the Officer in Charge, Marine Inspection, who separately adds his own comments and his agreement or disagreement as to certain findings or recommendations. Therefore up to three additional analyses and conclusions are attached to the original investigating officer's report. Somewhat the same procedure is followed in respect of reports of Marine Boards of Investigation.

Reports identify the ship, the owner and the officers or crew involved and occasionally mention the names of important witnesses. They usually mention the notion of cause by referring to the "proximate cause" and to "contributing causes". They are public but not interested parties. However, those published as those of the Marine Board of Investigation.

8. Public Hearings and Procedures:

In addition to the dozen or so "one man boards of inquiry" held each year, four or five full Marine Boards of Investigation are ordered each year to hold public hearings in the case of casualties where a considerable loss of life has occurred, where there has been loss of an inspected vessel or where the casualty is one of high public visibility and sensitivity. The hearing may be suggested by an OCMI or District Commander but the decision is taken by the Commandant after headquarters evaluation.

Those appointed to Marine Board of Investigation are all Coast Guard officers, normally three are appointed but occasionally four or two can be appointed. A senior officer is designated as Chairman and he does not
necessarily need a legal background. A junior officer is appointed as a Board Member and acts as Recorder. The members are chosen for their expertise as related to the specific casualty under investigation. The role of the recorder is to determine who shall be heard as witnesses, he generally asks the basic questions himself and then the other Board Members ask additional questions. After that, there is cross-examination by parties in interest who, of course, can also bring evidence of their own.

Marine Boards of Investigation are usually convened very soon after the casualty, usually the same week. In the case of the "Ocean Ranger", the Board was formed two days after the accident.

The Rules state that since these hearings are administrative in character, "strict adherence to the formal rules of evidence is not imperative. However, in the interest of orderly presentation of the facts of a case, the rules of evidence should be observed as closely as possible". The evidence taken by "investigating officers can be filed before the Board, as can the recording tapes and interviews, but generally the witnesses are re-examined fully and completely by the Board. They themselves can be called as witnesses, but only on factual evidence, since the rules of evidence are followed as closely as possible.

Testimony by deposition or interrogatories is provided for and is allowed by the Board "for good cause shown".

All sessions of the Marine Board are open to the public unless evidence of a classified nature or evidence affecting national security is to be received.

The length of these hearings varies considerably and it
is not uncommon for them to last two weeks, although four weeks would be unusual. It is felt that they are expensive for the government but there have been no major criticisms from the parties in interest since the casualties investigated usually involve multi-million dollar litigation and the hearings are extensively used by parties to resolve or advance their civil liability cases.

9. Role of Safety Recommendations:

The reports of investigating officers usually include recommendations that are first reviewed, accepted or rejected by the District Commander. If their accomplishment is within the latter's authority he has the duty to put them into effect, if not, he then forwards them together with his own comments to the next superior who may take the final decision.

Marine Boards of Investigation usually make a number of recommendations which are decided upon by the Commandant "as he may deem necessary for the better improvement of life and property at sea".

Recommendations may arise out of any safety deficiencies observed even though such may not be related to the cause of the casualty. They are all published with the reports, which also include the Commandant's decision. When NTSB makes recommendations to the Coast Guard the latter is required to respond within ninety days and the former has a follow-up system whereby it keeps a recommendation in the open status until the appropriate action has been completed.
4. THE REPUBLIC OF LIBERIA:

1. General Overview:

Under the flag of the Republic of Liberia sails one of the world’s largest deep sea fleets, tonnage-wise, which includes many Very Large Crude Carriers (VLCCs) under the arrangement known as the "open registry" which we have already seen in the attribution of a country’s nationality to vessels who consequently fly her flag usually for some financial rewards even though ownership and interest thereof in the vessels does not belong to the country of registry. This is all we can say since we do not intend to go into the legal ramifications of the whole exercise as was never our attention. The question is see how the problem of accident investigation is carried out by such a country, we have chosen Liberia as could have been several others namely, The Republic of Panama, and Cypus, which has no other form of connection with the vessels under her flag except the flag linkage. Usually these vessels trade far and wide and may never be seen again during their entire life at sea.

The Ministry of Finance has formed a Bureau of Maritime Affairs headed by a Commissioner in Monrovia, Liberia. All operations, however are contracted out to the International Trust Co. of Washington, which has established Liberian Services Inc., a company with offices in Reston, Virginia near (Washington). These provide all operational services to the Office of the Deputy Commissioner of Maritime Affairs, also situated in Reston. This Office is the Operations Centre with various divisions in charge of registration, licensing, safety and inspections, casualty investigations, publications and general services. The Rules and Notices also originate from this Office. The Liberian Maritime Law generally adopts the United States
Maritime Law. There are field operations offices covering various areas, such as in London, Piraeus, Europort and Hongkong. These are about 200 inspectors in various countries, most of whom are employed on contract.

The only service activity of Liberia which could present conflict of interest problems is that of Ship Safety Inspection. Since ship inspections are mostly carried out by six classification societies recognised by Liberia, the inspection services is limited mainly to the inspection of documents, charts, publications, navigational aids, crew accommodation and general safety. Nevertheless, the Investigation Department was removed, a short while ago from the Ship Safety Division, and now this Department reports directly to the Administration. The idea being to avoid the situation of "judge and party" in the same case. However, a Liberian official has expressed the opinion that total impartiality may be an illusion since you can only get qualified investigators from within the other services of a marine administration or people who, at one time or another, served in these services.

2. Casualties Reported and Investigated:

The owner or master of a Liberian ship is required to report a casualty resulting in:

a. Actual physical damage to property in excess of US $50,000;

b. Material damage affecting the seaworthiness or efficiency of a vessel;

c. Standing or grounding;
d. loss of live; or

e. injury causing any person to remain incapacitated for a period in excess of seventy-two hours.

Between 100 and 150 such casualties are reported yearly and although it may be difficult at times to obtain reports, the casualties are all eventually reported. Failure to report may result in a fine or ultimately in the cancellation of the Liberian registration. Major casualties, or casualties where there are unknown or unusual facts, are investigated hence some one hundred reports have been published since 1967 and are available to the public.

3. Disciplinary and Penal Aspects:

The investigating officer conducting a preliminary inquiry into a casualty or a Marine Board of Investigation reporting on a formal investigation may recommend that disciplinary action to be taken against licensed officers. The recommendation may be general or specific. Upon receipt of the report the Commissioner of Maritime Affairs reviews the recommendation and may revoke or suspend a licence or may censure or admonish. An appeal can be made to the Ministry of Finance.

Disciplinary action may also result from direct supervision and revocation proceedings which may result from another country's investigation of a casualty; for instance, in a case where the U.S. Coast Guard investigation report indicated fault on the part of Liberian licensed officers, a hearing officer appointed by Liberia, relying on that report recommended disciplinary action.
On the question of the effect of discipline in public hearings, Liberian authorities are of the opinion that it is unavoidable that people whose certificates may be in jeopardy will try to protect their interest at formal hearings whether they are parties or not. This is unavoidable even if there are two district hearings. Liberia examined the question of excluding discipline from the public hearing process and came to the conclusion that there was no benefit in it, that it may even be more prejudicial to the individuals concerned, if and that if there were a separate disciplinary proceedings, it would be avoidable that the facts of the casualty would be inquired into and therefore the same evidence would be repeated.

4. Civil Liability Aspects:

Liberia whose public inquiry system is very similar to the U.K. formal investigations, believes that this system is used extensively for civil liability purposes, such as for extensive discovery.

The Rules of Marine Investigations and Hearings were recently revised and an attempt was made to deal with this issue by restricting the number of parties to an investigation. For instance, cargo interests, which were previously given party status, are now allowed to participate only if they are bareboat charterers.

In a paper presented in 1982 in Shanghai, Dr. F. Wiswall, Admiralty Counsel for Liberia, stated:

"It is........, at formal shipping inquiry that the effect of other proceedings upon the investigation becomes most apparent.... Normally most of the
objective evidence and at least some of the testimony of witnesses presented at a formal shipping inquiry will be admissible in other proceedings. Very simply, this means that the lawyers for the directly-affected parties have a definite interest in the way in which the evidence is presented. At the very least, they will seek to influence the outcome of the formal inquiry in favour of their clients - which is of course their job. At most, it happens too frequently that lawyers will try to use the formal shipping inquiry for the purpose of building a record of testimony of witnesses, or of the destruction of opposing witnesses under cross-examination, which can be used to advantage at a subsequent trial of the civil or criminal issues."

5. Investigation Process and Examination of Witnesses:

Desk audits are carried out if the cause of a casualty is apparent and there is nothing mysterious about it, or there is nothing to be learned from investigating. A fact-finding inquiry may be conducted through informal interviews without any statement being taken. This is a very superficial inquiry on the basis of which a decision is taken as to whether or not a preliminary investigation should be carried out. Usually these fact-finding inquiries are carried out by local inspectors on their own initiatives. They first report verbally to Washington and in writing. No further investigation is carried out if the casualty is minor.

Preliminary inquiries are undertaken after a decision to the effect has been taken in Reston; they are ordered in the case of major casualties where a formal hearing is to be held, where the issue is in doubt as to whether there will be a public hearing, or where there will be no
formal hearing but the facts appear serious, possibly because certain of the facts of the casualty are not readily available.

The Rules also provide that it is "advisable" to hold a hearing in all cases of serious marine casualties resulting in loss of life, substantial pollution or property damage.

Witnesses are usually interviewed privately by the officer since it is believed that more information can be obtained on a "one-on-one" basis and that there is a better possibility for a candid recitation of the events. These interviews are mechanically recorded and are taken under oath. Investigations may also take a written record and read it back to the witness, who is not asked to sign it. Counsel declaring his representation of a witness may be present during the questioning. However, no counsel for any person other than the individual under questioning may be present unless such counsel also represents the individual and he clearly understands this and agrees to his presence.

6. Privilege Attached to Witness Evidence:

Witnesses are not entitled to any rights, privileges, immunity or any type of legal protection with respect to their statements, and investigators are prohibited from making any promise in this respect.

7. Reports and Their Publications:

The investigating officer conducting a preliminary inquiry writes his own report for which he has the sole responsibility; the report is not reviewed but is submitted as such to the superior authority, which appends its
own comments and conclusions. All such reports contain the identification of the ship and all persons involved. They are totally public. And the conclusions will deal with causes, although words that can be directly related to civil liability, such as fault or negligence are avoided. And the same Rules and practices will apply to public hearing reports.

Most preliminary inquiry and formal investigation reports are published. There is at present a list of approximately one hundred such reports which are available at a nominal cost.

A permanent distribution list of reports is kept and it includes approximately twenty-five individuals and organizations in addition to the Liberian staff across the world. Copies are also sent to I.M.O., to the owners and/or Managers of the ships involved, all parties and seamen charged. In certain cases, however, copies are sent to all Masters of similar Liberian ships.

8. Public Hearings and Procedures:

The Liberian public hearing process is very similar to the present U.K. and Canadian formal investigation hearings, these hearings may be carried out by a single hearing officer or, in more serious cases, by a Marine Board of Investigation consisting of not less than three and not more than five members. These are held anywhere in the world and usually as close as possible to the casualty site. Testimony is taken under oath.

The evidence is introduced by the representative of Liberia and formal parties are entitled to cross-examination, some parties having only an observer status are not entitled to question witnesses directly but may do so.
though the Chairman of the Board.

Liberia sometimes holds joint hearings with other countries. This has occurred in at least one case where a Liberian officer attended a U.S. Coast Guard Marine Board of Investigation as an observer and was allowed to question witnesses. In that case, the Liberian report was based on the USCG records. Often, however, the situation is reversed and representatives of USCG or NTSB attend a Liberian hearing; in such cases, they are allowed to participate fully in the hearings, ask questions and in the case of the United States Coast Guards, they usually take an active part in the proceedings.

Hearings are generally quite costly although there is a special levy on Liberian registered ships to cover these costs.

Liberian officials do not see how a proper public hearing can be carried out for less cost than at present although Liberia has tended to hold these formal investigations with one officer in cases of less serious casualties and they are then shorter. The average length is a week for most hearings and in the case of Marine Boards, it will take seven to ten working days on the average. However, some Liberian officials have recommended that the British one be followed more closely.

9. Role of Safety Recommendations:

The Liberian Investigation Rules state that reports shall include recommendations "directed to appropriate action in the instant matter and to prevention of recurrence". Most reports contain disciplinary as well as safety ones. In the latter case the effects of the investigation are found mainly in the Marine Notices, where there are
references to casualties as the grounds for new requirements or practices. Such Notices are sometimes issued before the investigation is completed. The manuals used by nautical inspectors contain guidelines which are often based on previous casualty experience and which help in better identifying safety deficiencies during vessel inspections.
CHAPTER V

COURT PRACTICE AND/OR JURISPRUDENCE

1. CLAIMS PRESENTATION AND EVIDENCE

2. SHIPOWNERS AND AGENTS: STEPS FROM CASUALTY TO COLLECTION OF CLAIM

3. CARGO CLAIMS - PROCEDURES AND EVIDENCE

4. THE LEGAL REGIME OF MARINE INSURANCE

5. SHIPOWNERS MAY LIMIT THEIR LIABILITY
INTRODUCTION:

In the event of a casualty so many issues will come up for examination and in many cases involving the responsibilities of people and institutions. We have examined prior to now not only the rudimentary processes involved thereto such as the investigatory practices but also the system as applying in other countries. In almost all of these, safety recommendations are usually made. Also are criminal and civil liability aspects. We will now in the coming paragraphs examine the above even though it will be more procedurally illustrative than the substantial laws involved. Nor was this unintentional. It is to give mariners, managers and marine engineers an inside of the legal issues they may be involved with in their activities.

1. CLAIMS PRESENTATION AND EVIDENCE:

In all cases, whether the claim is presented upon a policy of marine insurance or is submitted in general average, i.e., in cases of say collision, the claimant has the burden of substantiating his claim. For a claim on a marine insurance policy, this means that the assured must produce evidence to show:-

a. That the loss or damage was caused by insured perils; and
b. the extend of the claim.

In cases of general average, it will be observed that Rule E of the York Antwerp Rules requires similar standard of proof that the loss of expense claimed is allowable in general average. "General Average" here meaning an act or omission done for the purpose of saving the whole maritime adventure. For example where a master after a collision with another vessel as a result of no fault of his own undergoes some minor repairs in a port en route for his ultimate destination may claim on general average compensation if it is proved that as a result so many property interest were saved. Those whose interest are saved
will by and large make good the loss incurred by the master in repairs.

The list which follows, although not so comprehensive as to cover every possible circumstance, are intended to provide guidance to shipowners and their agents as to the documents which they will be in most cases of partial loss. It sets out the documents and information generally required in cases involving repairs of a ship.

Requirements in Cases Involving Repairs to a Ship:

1. Deck and engine room log books, or extracts therefrom.
   a. Covering the voyage from which the accident occurred from the commencement of loading until completion of discharge.
   b. Covering the full period under repairs.
   c. If the vessel specially removed for repairs, covering the removal passage to repair port.

2. a. Sea protest or ship's declaration, if made, together with account for cost thereof.
   b. Master's/Chief Officer's/Chief Engineer's casualty or damage report if relevant.

3. Reports of survey of the following surveyors at each port where survey is held or repairs made:
   a. Underwriter's Surveyor, e.g. Lloyds Agent and/or Salvage Association.
   b. Classification Society Surveyor.
c. Owner's Surveyor.

d. Diver, if such examination is made.

4. Accounts for fees and charges of the surveyors as in 3 above.

5. Specifications and tenders where taken.

6. Shipyards accounts for:

   a. All damage repairs.

   b. Dry docking and general repair expenses.

   c. All Owner's repairs effected concurrently with damage repairs, including scraping and painting bottom if effected.

7. If issued separately from survey report, Underwriters Surveyors' Letter is approval of repair bills.

8. Agents general accounts together with all supporting vouchers:

   a. Transporting the vessel to and from dry dock and/or repair berth including pilotage, and towage.

   b. Compass adjusting on completion of repairs, if carried out.

9. Vouchers for special payments made to the crew:

   a. In connection with damage repairs.

   b. For steaming and cleaning tanks and/or gas-freeing (tankers).
10. Statement of the quantity of bunker fuels consumed (if daily consumptions not shown in engine room log book):

   a. At ports of repair, for docking, undocking and on repairs.

   b. During removal passages to and from repair port.

   c. During periods at sea for steaming and cleaning tanks (tankers).

11. When spare parts or equipment are specially ordered on account of damage, accounts covering their transportation to the ship, insurance and reception at the port of repair.

12. In collision cases:

   a. Full details and vouchers in support of any recovery made.

   b. Receipts for many amounts paid in respect of liability to the other ship, or to other third parties.

13. Vouchers covering the cost of communication and other petty expenses as follows:

   a. Master's expenses at repair ports.

   b. Radio messages sent from the ship in connection with the damage or repairs. And finally,

2. SHIPOWNERS AND AGENTS:
STEPS FROM CASUALTY TO COLLECTION OF CLAIMS

Notice to Insurers:

When an accident has occurred, it is essential for notice of the accident, giving such details as are available, to be given promptly to the insurers through the insurance brokers. In addition, when the vessel is abroad, the master should notify the nearest Lloyd's Agent, particularly if there is likely to be any difficulty in communication between the ship and the shipowners office.

The object of giving notice is to enable the insurers or their agents to appoint a surveyor to attend the vessel and survey the damage. Most policies of insurance contain an express provision regarding notice, and the Institute Times Clauses, Hulls, for example, provides that in the event of non-compliance a penalty amounting to 15% is to be deducted from the total of the ultimately ascertained claim.

Notice should be given to the Protection and Indemnity Association in any case involving loss and damage to cargo, and/or when there is likely to be a claim for general average contribution from cargo interests.

Appointment of the Average Adjuster:

If the casualty takes place during the cause of a current engagement, and the ship has to put into a port of refuge or is likely to lose time in order to effect repairs, there is likely to be a case of general average. It is prudent at this stage for the owner to appoint his average adjuster and consult him regarding any possible general average claims.
Supervision and Reporting:

If the casualty is serious the shipowner will wish to send a Maritime Superintendent and/or engineer to the casualty, or to the port to which the ship is proceeding, in order to obtain their reports upon the situation:

From the Marine Superintendent - as to the navigability of the ship and as to the necessity for cargo operations, such as the discharge of cargo from a stranded ship to lighter or other crafts, in order to refloat, or the discharge, storing to the ship, from the engineer superintendent - as to the repairs to the ship which may have to be effected for the safe prosecution of the remainder of the voyage. Either or both of the superintendents should remain in attendance for the as long as necessary to supervision the cargo operations and repairs.

Arrangements for Survey:

It is desirable for the damage sustained by the ship to be surveyed jointly and currently by the owner's superintendent and the surveyor appointed by the insurers. Likewise, so far as possible, they should agree upon the recommendations for repairs and the instructions to be given to the shipyard or other repairs. At the final stage, when the repair accounts are submitted by the shipyard, they should be examined critically by both the superintendent and the underwriter's surveyor to check the level of pricing and negotiate any reductions that may appear necessary.

If London Market insurers are involved, they will probably appoint a surveyor from the Salvage Association, who have issued Notes for Guidance to assist shipowners in this connection (the latest of which are dated April, 1981).
Financing the Cost:

The shipowner will almost certainly be concerned at this stage at the extend of the extra expenses falling upon him by way of repair costs, port charges and ordinary ship's expenses during the delay for repairs.

He may therefore wish to ask the average adjuster to consider the preparation of an interim report or certificate recommending a payment on account by his insurers.

In this event the average adjuster will require as preliminary documents:

a. Log book extracts, or at the very least, an extended note of protest or ship's declaration giving details of the casualty.

b. Interim report of the damage as seen by the shipowner's superintendent and the underwriter's surveyor.

c. Firm evidence of the agreed cost of repairs.

If the approval of any of the repairs, or of the costs involved has not been communicated by the underwriter's surveyor to the shipowners via the owner's superintendent or ship's agents, then the average adjuster can, subject to leading underwriters' agreement, obtain the necessary approvals.

Prosecution of the Voyage:

If repairs to the ship are necessarily effected during the course of a current engagement, questions may arise relating to the continuation of the voyage. For example:
a. Will the ship still be able to make her port of destination, or other scheduled ports of call?

b. If the ship is in ballast under charter, will she meet cancelling date?

c. If considerable time has been lost, will the charterers want to exercise any option available under the charter-party to change the voyage?

These questions are of vital importance, the detail analysis which cannot be discussed here as the main objective of this paper is to illuminate the various legal issues occasioned by accidented vessels: inquiries and investigations. Nevertheless, a shipowner confronted with these questions may well wish to consult his average adjuster or his protection and Indemnity Association about them.

Documents for the Preparation of a Claim:

At this stage the shipowner should begin to assemble the documents which will be required in order to substantiate his claim as examined in the preceding sub-paragraph showing documents and information most frequently required in this connection.

The Average Adjuster's Task:

The average adjuster has a two-fold duty:

a. To his client, to see that the claim presented is fully supported by the evidence, and that it is as complete as possible, i.e. that nothing is missing.

b. To the underwriters, not to submit, without making an appropriate note or reservation, any item or claims which cannot be supported either in law or in practice.
In exceptional cases, however, the average adjusters may submit a claim "for the consideration of underwriters". Also in the event of a dispute, his role is attempt to reconcile the views of the parties concerned but if no reconciliation is possible, the average adjuster will have to form his own opinion as to the proper extent of the claim.

Agreement and Issue of the Average Statement:

The average adjuster will obtain the agreement of his client to the figures which he has prepared in his statement and this provides the final opportunity of ensuring that nothing has been overlooked.

He will then issue this statement to the parties concerned in it. In the case of a claim upon a marine policy, the adjuster's statement will be presented to the leading insurers by the insurance brokers. In the case of a claim in general average involving collection of contribution from the concerned in cargo, the practice varies from country to country but when the adjustment has been prepared in the United Kingdom, it is usual for the average adjuster to be instructed by his client to send out copies of the adjustment or extracts therefrom to various concerned in cargo.

Collection of Claim:

As indicated above, the collection of the claim from the insurers on ship will be handled by the claims department of the insurance brokers. If the insurers have any questions to raise, they may be addressed to the assured or referred back to the average adjuster for answering.

Collection of the amounts due from cargo interests will be handled either by the shipowner or by the average adjuster on his behalf.
3. CARGO CLAIMS - PROCEDURE AND EVIDENCE:

When Goods Arrive at Destination Subject to Loss or Damage:

When goods arrive at destination in damaged condition, or if there is a short delivery, the consignee should as soon as possible notify the following parties:

a. The agent or representative of the insurers:

This may be Lloyd's Agent or such other person or body stipulated in the contract or certificate of insurance. The purpose of this notification is to enable the agent or representative of the insurers to appoint a surveyor to carry out a survey on the goods in order to establish the nature of the loss and/or damage and to ascertain its extent. Whenever possible the consignee or his representative should accompany the surveyor in order to agree upon the nature upon the loss and/or damage as well as any steps which should be taken in order to arrest deterioration or realise proceeds for example, by reconditioning or arranging for sale.

Consignees should however bear in mind that under most conditions of insurance, the transit cover ceases at the time of delivery to the consignee's warehouse or place of storage, and consequently, strictly speaking, the transit insurers are not liable for any deterioration in the condition of the goods which could reasonably be avoided after delivery. For this reason the notification to the insurers' agents or representative should be given immediately, the consignee has taken delivery or become aware that the goods have sustained loss or damage.

b. The agent or representative of the Carrier:
The purpose of this notification is to keep open any rights which the consignee may have against the carrier for loss or damage occasioned by breach of the contract of carriage.

If upon delivery of the goods any loss or damage be apparent, the consignee should draw immediate attention to it and invite the carrier's representative to carry out a survey. Depend upon local circumstances, this survey may be carried out jointly with the survey effected by the insurer's representative, or it may be separate.

If the goods are in doubtful condition, the consignee should in no circumstances, except under written protest, give a clean receipt for the goods.

If the loss or damage was not apparent at the time of taking delivery, the notification to the carrier's representative will probably have to be given in writing and as a general rule, it is recommended that this should be done within three days of taking delivery.

c. In appropriate cases, any sub-carrier or other bailee exercising responsibility over the goods between delivery by the ocean carrier and reception by the consignee.

d. When appropriate, The Port Authority:

The fact that the goods are insured does not absolve the consignee from giving prompt notices to the carrier and other parties regarding any loss or damage sustained. On the contrary, it is the duty of the assured under any policy of insurance to keep open the insurers' rights of subsogation, and this is re-stated in the Institute Cargo Clauses as follows:
"It is the duty of the assured and their servants and agents... to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised."

When such steps taken against carriers, bailees or other third parties involve expense on the part of the assured, the insurers will reimburse the assured for any charges reasonably incurred.

When The Goods Have Been Landed At An Intermediate Port:

Bearing in mind that it is the carrier's duty under the contract of carriage to deliver the goods to the destination named in the bill of lading, way bill or other carriage document if he possibly can, the fact that the goods have been landed at an intermediate port due to one reason or another could indicate:

a. That the carrier has abandoned the voyage or is treating the contract of carriage as frustrated; and/or

b. that the goods have sustained such damage or are in such condition that it may not be worthwhile to continue with their transit.

Institute Cargo Clauses provides that if there is a termination of the contract of carriage, or of the transit of the goods, at an intermediate port or place, even owing to circumstances beyond the control of the assured, then the insurance cover comes to an end unless prompt notice is given to the underwriters and continuation of cover is requested.

In these circumstances, the party interested in the insurance of the goods, whether shipper, consignee, freight forwarder or agent, should immediately:
a. Notify the insurers of the interruption of the transit, providing them with such information as is available as to the circumstances, and requesting them:

i. to continue the insurance in force; and

ii. to appoint a surveyor to examine the goods and make recommendations as to their reconditioning, forwarding or disposal.

b. Make such reservations to the carrier or his agent as may be appropriate in the circumstances.

When the Goods Arrive at Destination Subject to General Average:

When the carrying ship has suffered an accident on the voyage, giving rise to a general average situation, the consignee will be notified by the ship's agent at the port of discharge, in advance when time permits, or when the consignee tenders the bill of lading or other document entitling him to delivery. The consignee is then likely to be asked to furnish general average security by way of an average bond and/or as required by the law and custom of the port.

If the additional security is required in the form of an Underwriter's guarantee, the consignee should take such steps as he can to place the insurers in communication with the general average adjuster or the ship's agent, regarding the need to furnish a guarantee for the general average.

If a general average deposit is called for, the consignee (or receiver of the goods) will have to pay the amount demanded in the first instance, and will obtain a receipt for it. This receipt should be on Lloyd's Form other than in exceptional circumstances. If the goods are insured, the consignee should
immediately send the deposit receipt, together with the original policy or certificate of insurance, to his insurers and request reimbursement of the amount paid. Under some systems of law there is no obligation upon the insurers to refund the amount of the general average deposit, but in practice such refunds are invariably made by reputable insurers.

If the goods are not insured, the party making the general average deposit should notify the average adjuster whose name and address appears at the foot of the deposit receipt form. In these circumstances, the depositor should retain the receipt until the adjustment has been issued, whereupon the average adjuster will notify him of the balance of the deposit refundable after satisfying the claim against the deposit for general average, salvage or special charges.

If the goods have arrived subject to loss and/or damage, the consignee should, in addition to the notifications recommended in Section 1 above, also inform the general average adjuster of the extent of loss and/or damage suffered by his consignment.

This he may do by entering the details on the Valuation Form attached to Lloyd’s Average Bond (LAB 77). If, at the time when the consignee completes the details on the valuation form, the goods have been surveyed, it will greatly assist the general average adjuster if a copy of any survey report attached to the Valuation Form, together with a copy of the commercial invoice evidencing the sound value of the goods.

The reasons for notifying the general average adjuster of any loss and/or damage sustained by the goods are:

a. to enable him to make the appropriate reduction in the contributory value of the goods to reflect the loss or damage sustained on the voyage; and
b. to enable him to consider whether the loss or damage may have been due to general average causes, and in this event, to make the appropriate allowance in his adjustment.

Examples of loss/damage to goods due to general average causes:

Damages caused by water used to extinguish fire i.e. (Rule III of the York-Antwerp Rules).

Loss/damage caused by extra handling during a "forced discharge", i.e. when the cost of discharging is itself as a general average expense. (See also Rule XII of the York-Antwerp Rules)

However, the calculation of the amount to be allowed in general average for loss or damage to cargo is not based upon the insured value of the goods, but upon its c.i.f., i.e. (cost, insurance and freight) or invoice value at risk of the owner of the goods at the time of the general average act. (See also Rule XVI of the York-Antwerp Rules)

Evidence to Substantiate A Claim:

Bearing in mind that the claimant has the burden of substantiating his claim, he must produce evidence to show that the loss or damage was caused by insured perils and to prove the extent of his claim.

This list which follows of documents which may be required for the preparation of a claim upon a policy of insurance on goods, is intended to provide guidance to merchants and others. Nor is it comprehensive, on the other hand, not all the documents listed will necessarily be required for any one claim. Reference
therefore should be made under each sub-heading for an indication of the likely requirements, depending upon the nature of the claim.

Insurance Details:

1. Policy or policies of insurance.
2. Certificates of insurance of any.
3. If not shown in policies and/or insurance certificates, particulars as to how the insured value has been assessed.

Shipping Documents:

4. Official certificates relative to origin, condition and suitability of goods for export.
5. Detailed specifications giving a full description of the interests shipped and particulars of the weight and/or measurement thereof.
6. Pre-shipment survey report, if any.
7. Bills of lading and charter-party if any.

Voyage Details:

8. If the carriage vessel has sustained a casualty and/or heavy weather, an extract from the Master's log book relative thereto, and/or copy of the Master's extended protest.

If the Goods have sustained Damage:

9. Report(s) of survey and/or any other documentary evidence relating to the cause, nature and extent of damage;
10. If damaged goods have been disposed off by way of sale, the account sales, together with particulars of the sound value obtaining at the date and place of sale;

11. If damaged goods have been reconditioned, the accounts for the cost of reconditioning. And finally but not exhaustive;

12. Condemnation certificates relative to damaged goods destroyed on the orders of health authorities or other official bodies.

The above documentary evidence will assist the claimant in the recovery of damages inflicted upon his/her goods while at sea either due to the grounded or collided ship or any other reasons. However, the procedure will not be simple for explanations must also be given as to the facts leading to such damages.

4. THE LEGAL REGIME OF MARINE INSURANCE ON SHIPS:

Introduction:

Having by now examined the types and natures of the various claims involved in cargo damage and losses, all connected to shipping casualties and upon which some kind of adjudication may be requested, we now turn to insurance as concerns the various risk of loss that the vessel may be exposed to throughout its entire trading life. However, before this is done, some kind of historical analysis may be permitted in so far as it will enable a better understanding of the operation of marine insurance in general.

Marine insurance, the earliest form of insurance, remains an ancient concept of maritime law whose origin is "veiled in antiquity and lost in obscurity". It appears that bottomry, an
advanced of money on the security of a vessel, that is not recoverable if the vessel is subsequently totally lost before arrival, was practiced by the Phoenicians. Earlier, a form of bottomry was used by the Babylonians and possibly by the ancient Hindus. Bottomry was originally a type of marine insurance, as the lender of money on bottomry made the advance before the adventure was commenced and thereby financed the adventurer. Today, it is used in times of emergency to enable the master of a vessel to obtain advances to allow the voyage to be continued.

The concept of marine insurance as protection against loss by maritime perils has been traced back to at least 215 B.C. when the Roman government was required by the suppliers of military stores to accept "all risk of loss, arising from the attacks of enemies or from storms, to the supplies which they placed in the ships". Even then, it appears that an insurer was plagued by fraudulent claims.

"... the very shipwrecks which really did take place and were truly reported were occasioned by their own fraud and not by casualty. They would put a few things of trifling value on board old and shattered ships, and when they had sunk those ships in the sea, the sailors would escape in boats prepared for the occasions and then falsely pretend that a great deal of merchandise was on board."

Also we must be aware of the constant changing nature of marine insurance. It is not static for even case law and jurisprudence as had a great influence and I am sure it will continue to do so. Ships are becoming much more sophisticated and designed for their specialised trade with the consequent revision of specialised policies to cater for their various demands. Nor is it without interest to note that we have in London, three independent markets all writing Marine Hull business. These
are: Lloyds Underwriters; Member Companies of the Institute of London Underwriters; and other companies, not member of the Institute.

Claims on Policies of Insurance on Ship:

Any claim whatever nature and extent will depend on the nature of her insurance policy when by the operation of an insured peril, she for example sinks, collides with another vessel, there is fire and explosion on board. It is now proposed to examine the various policies as well as courts decisions passed in respect thereof. Also will be some hints on the actual operation of marine insurance i.e., considerations with respect to some principles used in the fixation of the amounts due for recovery.

1. Claims Generally:

There may be a claim upon a marine policy on ship when, by the operation of insured perils, any of the following occurs:-

A. Total Loss:

This may occur in two circumstances:

a. Actual Total Loss:

This will occur where the subject matter i.e. (the res extincta) insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereto, there is an actual total loss when a vessel sinks in deep water and cannot be salved. Such was the "ras judicata" indeed the basis of the court decision held in the following case:
GEORGE COHEN, SONS & Co. V. STANDARD MARINE INSURANCE LTD. (1925), 21 L.I.L. Rep. 30

Here, an obsolete ship was insured while being towed from Chatham to Brake in Germany where she was to be broken up. She went ashore on the Dutch Coast. Evidence was given that she could be got off, but the operation would be expensive. The Dutch authorities would not allow her to be moved in case the sea defences in the area were damaged thereby, but their decision was subject to appeal to a higher tribunal.

Held, by the King’s Bench Division, that the vessel was not an actual loss, for the assured had not been irretrievably deprived of her.

ROCHE, J. said:

"Having regard to the whole of the evidence, not merely the evidence for the defendant but the evidence given for the plaintiffs by several witnesses, and in particular by Captain Richards, to whose evidence I attach great importance, I am of opinion that this vessel physically could be got off. It would be an engineering feat requiring considerable preparation and, as I shall subsequently decide, very high expenditure, but it could be done so far as the physical feat was concerned."

b. Constructive Total Loss:

This arises should all or any of the following occur:
i. When the ship's actual loss appears to be unavoidable.

ii. When the shipowner is deprived of his ship and her recovery is unlikely.

iii. When the cost of recovery and repair damage would exceed the ship's insured value. Again the vessel must have such an insurance cover. Also notice of abandonment must be tendered to the insurers as soon as it is apparent that the ship is likely to become a constructive total loss. In the absence therefore of such a notice, a claim for constructive total loss cannot be made.

IRVIN V. HINE (1949) 2 All E.R. 1089:

During the Second World War a trawler was being towed to a dry dock. She stranded and was severely damaged. At all material times the assured would have been unlikely to obtain a licence to repair her or to place her in dry dock within a reasonable time. The assured claimed that she was a constructive total loss.

Held, by the King's Bench Division, that since the type of loss did not fall within any of the heads of loss stated in S.60 of the Marine Insurance Act 1906 which defines constructive total loss, there was no such loss. The assured
therefore was entitled to claim for partial loss only.

B. Partial Loss:

This includes claims for the following:

a. Particular Average:

This is made up of damages to a ship caused accidentally and does not include damage brought about by ordinary action of the wind and waves nor gradual deterioration on account of ordinary use nor unless otherwise provided, a defect in the hull or machinery in existence at the time the insurance attaches. Furthermore, it does not include damage brought about by a voluntary act (which, if done in time of peril for the common safety, will form a general average sacrificed. Examples of causes of particular average damage are collision, contact including stranding and grounding, heavy weather and fire.

b. General Average:

As already seen, to qualify as a general average act upon which a claim could lie, there cause now complained of must be a real one. Also it must be shown that the property benefited upon such an act. We will study only one case here.
WATSON (JOSEPH) & SON Ltd. V. FIREMEN'S FUND INSURANCE Co. of SAN FRANCISCO (1922), 127 L.T. 754

In this case, and upon a voyage the Master of a vessel saw something which appeared to be smoke coming from her hold and thought that there was a fire there. He therefore caused high-pressure steam to be turned into the hold to put out the supposed fire. The insured cargo of rosin was damaged by the steam, but the Master had been mistaken because there was, no fire in the hold. The assured claimed an indemnity from insurance company on the ground that a general average loss had been incurred.

Held, by the King's Bench Division, that there was no general average loss, for the damager was not, in fact, a real one, but one merely imagined by a Master in exist.

ROWLATT, J. said:
"I do not think that the evidence establishes that there was a fire in the hold. I accept the theory that the vapour seen by the captain issuing from the hold was given off by the rosin which had become heated by steam escaping from a broken pipe."

c. Salvage Charges:

These comprises of sum or sums paid in settlement of a claim by salvors for renumeration for salving the ship, or both ship and cargo from a position of danger, together with legal costs and other charges which may be incurred in this
connection. In nearly all instances, the amounts so paid will be treated as general average expenditure.

d. Charges incurred to avert or minimise a loss.

e. Third party liability arising from collision with another vessel. This arises when the shipowner liability to the owner of another ship or any property on it, arising out of a collision between the insured ship and the other vessel.

2. Amount Recoverable:

Where a claim is admitted the amount recoverable is matter of great complication in the law and as we shall see in subsequent discussions no generally accepted principles can be laid down as each case will and shall depend on its own merits.

However, in a total loss for example, the value to be recovered is the insured amount by the policy subject to the various principles of law. The following case fully illustrates:


A profit earning dredge was sunk in a collision in Patras harbour. The owners claimed (1) the market price of a comparable dredger; (2) the cost of adapting a new dredger and transporting and insuring her from her moorings to Patras; (3) compensation for disturbance and loss in carrying out their contract of dredging the harbour; and (4) a loss due to their inability for financial reasons to buy a substitute dredger and the resulting
delay in proceeding with the work.

Held, by the House of Lords, that the owners’ claim under heads (1), (2), and (3) succeeded, but that under head (4) failed because such damage was too remote.

LORD WRIGHT said:

"The substantial issue is what in such a case as the present is the true measure of damage(s). It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrong doing vessel, the owners of the former vessel are entitled to what is called restitution in intergrum, which means that they should recover such a sum as will place them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage. The respondents contend that all that is recoverable as damages is the true value to the owners of the lost vessel, as at the time and place of loss. Before considering what is involved in this connection, I think it desirable to examine the claim made by the appellants, which found favour with the Registrar and LANGTON, J., and which in effect is that all their circumstances, in particular their want of means, must be taken into account and hence the damages must be based on their actual loss, provided only that as the Registrar and the Judge have found, they acted reasonably in the unfortunate predicament in which they were placed, even though but for their financial embarrassment they could have replaced the Liesbosch at a moderate price and with comparative short delay...."
extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free of all engagements, either though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damages will be simply the market value, on which will be calculated interest at and from the date of loss to compensate for delay in paying for the loss.

...... I have only here mentioned such cases as the steps to considering the problem in the present case. Many varied and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise different questions before their true value can be ascertained. The question here under consideration is again different; the Liesbosrch was not under charter nor intended to be so, but, in fact was being employed by the owners in the normal course of their business as civil engineers, as an essential part of the plant which they were using in performance of their contract at Patras.

...... It follows that the value of the Liesbosrch to the appellants, capitalised as at the date of the loss must be assessed by taking into account:

i. The market price of a comparable dredger in substitution;

ii. Costs of adaptation, transport, insurance;
iii. Compensation for disturbance and loss in carrying out their contract and including for example, expenses of staff and equipment but neglecting any special loss due to the appellants' financial position. On the capitalised sum so assessed interest will run from date of the loss.


It will be necessary to say something at this point as concerns what is commonly called in marine insurance, the deductible i.e. the amount-fixed which the assured has to bear in respect of each claim to which the deductibles applies. The institutes Times Clauses, Hulls, for example, provide that the deductible shall be applied to the aggregate of all partial loss claims arising out of each separate accident or occurrence.

Recoveries from third parties. Under nearly every from marine insurance policy, there are circumstances in which the claim payable by the insurer is reduced by an amount which may be recovered from some source, either at the time when the claim is presented or subsequently. From point of view of the insurer, such recoveries can arise in two different ways:

a. Under the Doctrine of Abondonment:

This applies only when the insurer has paid for a total loss and has exercised his right to the proprietary interest in the subject matter of the insurance. For example, when a ship has been wrecked and the insurer has paid constructive total loss, he is entitled to take over the wreck and if it can be sold, he may retain the proceeds of sale. However, if the insurer decides to exercise his proprietary
rights, then he is likewise responsible to pay all charges attaching to the propriety as from the time of the casualty causing the loss. Note however that no notice of abandonment need be given in case of an actual total loss and also such notice when given, the acceptance by the insurer may be expressed or implied from the conduct of the latter.

b. Under the Doctrine of Subrogation:

For all practical purposes, recoveries under this heading comprise those sums of money which can be recovered from third parties on account of their liability for the accident giving rise to the loss or damage which is the subject of the claim on the policy. Examples could be:

i. A recovery from the owner of a ship which is in fault for a collision.

ii. From a charterer who is responsible for having ordered the ship to an unsafe berth where she sustains damage.

iii. A recovery from a repairer or dry dock owner for negligent work.

iv. General average contributions paid by other parties in respect of a sacrifice of ship or goods for which the assured has a direct claim on his policy.

From the point of view of the assured, it is necessary in practice to give the insurer due notice whenever there is a possibility of a recovery from a third party. The reason for this is two fold:
a. To give the insurer the opportunity of saying, even if he has not yet responded for the claim about which has been notified, whether or not he approves of proceedings being taken against the third party, and

b. In the event that the insurer wishes to exercise his right of recourse, to enable the assured to prosecute his claim against the third party in the sure knowledge that the insurer will respond in due course for the proportion of the costs and other charges incurred in the prosecution of that claim, in so far as it relates to losses for which the insurer would have been liable.

Once more, we have to emphasis that under the doctrine of abandonment where the insurer may be called upon to exercise his proprietary interest, such were exercised does not affect the assured's claim of the loss. On the contrary under the doctrine of subrogation it does. The insurer is entitled to the benefit of any recovery from a third party but only up to the amount of the claim which he had paid or is liable to pay. However, each policy and under various legal systems may specify how these recoveries will be treated.

5. SHIPOWNERS MAY LIMIT THEIR LIABILITY:

In examining whether or not a shipowner may be entitled to limit his liabilities resulting from the operation of his vessel, we shall avoid going into the details as far as the various conventions are concerned namely the 1957 and 1910 just to mention these few but rather say that owners can always do so in so far as, such acts or omissions do not result from want
of care or negligence on their part. Therefore the conduct barring limitation will and shall be the personal conduct of the person liable. Nor shall everybody limit his/her liability.

NORTHERN FISHING Co. (HULL) LTD. v. EDDOM (1960) 1 Lloyd's Rep. 1

Where a shipowner seeks to limit his liability under Section 503 of the Merchant Shipping Act, 1894, the burden of proving that the loss or damage occurred without his actual fault or privity lies on him.

A trawler foundered on an unchartered rock off Greenland in fog. Mr. Hellyer, the joint managing director of the company which owned her, had failed to notify the Master of two circulars, which he had received relating to danger of such rocks in the areas in which would be navigating. The dependants of the drowned seamen brought an action for damages for negligence against the company. The company sought to limit its liability under Section 503 of the Merchant Shipping Act 1894 on the ground that the loss had occurred "without its actual fault or privity".

Held, by the House of Lords, that the company was liable for the full amount of the damages. The burden of proving that the loss had occurred without their actual fault or privity lay on the company and it had not discharged it.

a. Persons Entitled to Limit Liability:

Although there is still some confusion and uncertainty as to the persons who may limit liability in the event of damages caused by the vessels, there has been great unanimity that apart from the ship-
owners and insurers themselves, those involved in the operation of the vessels may also avail themselves of the benefit of limitation. These may include, the charterer manager and the operator. Charterers include any type of charterer and thus the demise or (bare boat) charterer, the time charterer and the voyage charterer; manager includes all persons who are entrusted with the management of a ship, though normally these persons are not personally liable since they act as agents on behalf of the owner or operator of the ship; operator is the one who operates the ship: in certain jurisdictions e.g. France, Italy, the operator (armateur, armatore) is only the person who employs the crew and thus is either the owner or the demise charterer of the ship; in other jurisdictions the concept is wider and may include the time charterer.

b. Claims Subject to Limitation:

The claims subject to limitation are substantially the same - be it in the 1976 Convention on Limitation of Liability for Maritime Claims, or the draft of the "Comite Maritime Internationale". Nevertheless, we will briefly analysed them below with some minor references to those set out in the 1957 Convention.

i. Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations and consequential loss resulting there-from. Sub-paragraphs (a) and (b) of Article
1, para. 1 of the 1957 Convention have merged together (except for what concerns infringement of rights) by making reference to loss or occurring on board or in direct connexion with with other operation of the ship. These latter words replace the more complicated language of the 1957 Convention whereby the claims referred to loss or damage occurring whether on board or in water, but where they were caused by any person not on board the ship for whose act, neglect or default the owner is responsible, limitation could be involved only if the act, neglect or default occurred in the navigation or management of the ship or in the loading, carriage of or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers. The link now is that, irrespective of whether the loss or damage is caused by a person on board the ship or ashore, the loss or damage must occur in direct connection with the operation of the ship. If the owner is liable, the question whether the loss or damage is due to the act, neglect or default of persons onboard or ashore is irrelevant.

Limitation can be invoked not only in respect of direct physical loss or damage, but also in respect of consequential loss. This is now made clear by the express reference to consequential loss resulting from loss of life or personal injury or loss of or damage to property. The words "loss of or damage to property" are so general to include any type of property. However, express reference to harbour works, basins and waterways is deemed
adviseable.

c. Claims in respect of raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.

Limitation of liability in respect of these claims was already provided both in the 1957 Convention (Article 1, paragraph 1(c)). As in the aforesaid conventions, the 1976 Convention permits States Parties to exclude the application of this provision for the reason that removal of wrecks may be required for safety reasons and state may not be prepared to allow shipowners to limit liability. Nor will the latter limit liability easily as concerns costs incurred in connexion with removal operations of such cargoes as dangerous cargoes and poisonous substances.

d. Claims excepted from limitation.

Added to those excluded in the 1957 Convention claims for salvage, contribution in general average and claims by servants of the shipowner or salvor, claims which are governed by other conventions, i.e. those for oil pollution damage, in respect of which specific reference is made to the 1969 Civil Liability Convention, and claims for nuclear damage, in respect of which general reference is made to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage.

e. The criteria for limitation of liability.
The principle of separate funds for personal claims and property claims, already adopted in the 1957 Convention has been retained. Also is accepted that the tonnage is the most practical criterion for determining the limitation figures.

However, the suggestion of C.M.I. (Comité Maritime Internationale) to vary the limit per ton according to the size of the ship was accepted and agreed that there should be a decreasing scale, with a lump sum figure for ships below 500 tons. The scale is not the same in respect of personal claims and property claims in that for the former there are two limits in respect of the tonnage between 501 and 30,000 tons, viz. from 501 to 30,000 and from 3001 to 30,000; for the latter on the contrary the limit per ton is the same.

The manner in which the limit is calculated is shown in the example which follows in respect of personal and property claims against the owner of a tanker of 125,000 GRT (Gross Registered Tons) i.e. a VLCC (Very Large Crude Carrier) of about 250,000 D.W.T. (Dead-weight Tons), the limits being calculated in SDR's i.e. Special Drawing rights and Poincaré francs:
### Personal Claims SDR's

<table>
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<th>Tons</th>
<th>SDR's</th>
<th>Poincaré Francs</th>
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</thead>
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<tr>
<td>1-500 tons</td>
<td>333,000 units</td>
<td>5,000,500</td>
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<td>501-3,000 tons (500 x 2,500)</td>
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<tr>
<td>3,001-30,000 tons (333 x 27,000)</td>
<td>8,991,000 units</td>
<td>135,000,000</td>
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<tr>
<td>30,001-700,000 tons (250 x 40,000)</td>
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<tr>
<td>700,001-125,000 tons (167 x 55,000)</td>
<td>29,759,000 units</td>
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### Property Claims SDR's

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<tr>
<th>Tons</th>
<th>SDR's</th>
<th>Poincaré Francs</th>
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<tbody>
<tr>
<td>1-500 tons</td>
<td>167,000 units</td>
<td>2,500,000</td>
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<tr>
<td>501-30,000 tons (167 x 29,500)</td>
<td>4,926,500 units</td>
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<td>30,001-70,000 tons (125 x 40,000)</td>
<td>5,000,000 units</td>
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<tr>
<td>70,001-125,000 tons (83 x 55,000)</td>
<td>14,658,500 units</td>
<td>219,000,000</td>
</tr>
</tbody>
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Note however that the following precisions are made:

1 Poincaré franc = 0.0018953 troy ounce of gold also
2 SDR = USD 1.0401.
CHAPTER VI

PROPOSED LEGISLATION FOR CAMEROON

1. AN INTRODUCTION

2. THE SOLE ROLE OF THE ADMINISTRATION
1. AN INTRODUCTION:

The Republic of Cameroon is made up of two essential entities namely: The French and The English speaking parts which give a total population of some 10 million people. As far as her maritime activities are concerned, we observe that Cameroon is not only involved in the offshore industry but is one of the maritime countries within context of the West African region. Unfortunately, not only is the legislation with respect to marine inquiries, casualties and investigations is poorly developed but the whole marine legislation inherited from the colonial past no longer effectively response to the essential issues posed by modern technology in the industry. This provides raison d'être for some comments as far as the administration of the legal issues involved in marine inquiries, casualties and investigations are concerned in Cameroon. In doing so, emphasis shall be put on "The Administration" as the essential catalyst.

2. THE SOLE ROLE OF THE ADMINISTRATION:

As we have seen elsewhere, "The Maritime Administration" shall in Cameroon be solely responsible as concerns investigations into shipping casualties, inquiries and investigations. In the event of the latter, the following should be done:

a. Where a shipping casualty has occurred, the Minister may appoint a fit person to hold a preliminary investigation or inquiry and such a person should be given full powers of an inspector. The reason is that he/she should perform the duties assigned without recurrent request for permission which may hamper progress of the work already begun.

b. The person so appointed shall, not later than a
period prescribed by such acts appointing him reports his findings to the Minister.

c. The Minister may from time to time and whether or not a preliminary enquiry into a shipping casualty has been held, by order also constitute a Board with a magistrate as it's president, to be known as "The Marine Board", to make investigations as to casualties affecting ships or to inquiry into charges of incompetency or misconduct on the parts of officers of ships flying the Cameroonian flag.

d. The Marine Board shall in my opinion, when holding any formal investigation into matters referred to it by the Minister, sit with one or more assessors of nautical; engineering, or other special skills or knowledge. The decision of the president shall be the decision of the Marine Board.

e. Where a formal investigation involves or appears likely to involve the cancelling or suspension of the certificate of a master, mate or engineer, the Marine Board shall sit with not less than two assessors having experience in the merchant service.

f. Assessors shall if they are not members of the Public Service be paid such sums as established by law.

g. Where a Marine Board holds a formal investigation it shall be deemed to be a court of summary jurisdiction and for such purpose shall have and may exercise all the powers of a Magistrates' Court.

h. For the purpose of an investigation, a casualty shall be deemed to occur:
i. When, or near the coasts of Cameroon, any ship is lost, abandoned or materially damaged; or

ii. where, any ship causes loss or material damage to any other ship, or

iii. when any loss of life ensues by reason of any casualty happening to or on board any ship on or near the coasts of Cameroon, i.e. within the three nautical miles established by international law.

The Marine Board in any of the following cases:

i. When as above, i.e. (i) to (iii),

ii. Where the incompetency has occurred on board a Cameroonian ship,

iii. where any officer of a ship who is charged with incompetency or misconduct on board that ship is found in Cameroon;

May make investigations respecting such casualties and may hear and inquire into such charges of incompetency or misconduct and for such purpose, the matter in question shall be deemed to be within the ordinary jurisdiction of a Magistrates' Court.

i. The participation of foreign bodies and institutions shall always be allowed in the event of any inquiries and investigations concerning such parties and/or where such requests are specifically granted by the Minister.

j. An appeal shall lie from the Marine Board to the
High Court from a decision in the case of an investigation into the conduct of a holder of a certificate of competency, and the High Court in its discretion may determine the case or remit the case for re-hearing either generally or as to any part thereof before the Marine Board, and shall remit the case:

a. if new and important evidence which could not be produced at the investigation or enquiry has been discovered, or

b. if for any other reason there is ground for suspecting that a miscarriage of justice has occurred.
The Administration of the Legal Issues involved in marine inquiries and investigations is such a wide and varied subject as can already be seen from my treatment of the subject matter. But as already said somewhere in the introductory chapters, it stresses the importance of shipping by partly laying emphasis on the safety aspects but essentially the legal questions posed in the event of a shipping casualties. A term which has received in my opinion, a broader meaning involving all the things that could happen to the vessel at sea, including the conduct of the people who sail her but also involving incidences connected to the loading and discharging of the vessels and above all the role of the law has been stressed. In doing so, we have examined not only the various types of investigations namely, the preliminary and formal investigation, those carried out by various parties concerned such as, the cargo owners, insurance and classification societies but also the ways in which some countries carry out investigations or inquiries whichever term you prefer. We have seen that while it is entirely penal in France, and to some extend involving directly the courts in the United Kingdom, in some, safety is greatly stressed. All these are conducted with aid of sets of legislations which empowered the various persons to perform their functions as ascribed by the law. Nor is this all, we have also examined three important issues namely:- The sort of evidence and/or court practice with respect to insurance of damaged ships and cargo and also the extent if at all, by which the shipowners and other entities may be allowed in law to limit their liabilities in cases of damages caused by their vessels to third parties. We agreed here that the sole factor will be the conduct of the person liable. In the case of my country - the Republic of Cameroon, it is a "melange" of all issues involved in the subject matter in a set of proposed legislations in which it be read off, that monopoly has been given "The Administration" incarnated in the person of the Minister of Transport but also that foreign interests will have access to such inquiries given that shipping by it's definition is also international. The reason is simple. "The industry" is solely owned by the state which has monopoly.
Having said that, it is now proposed to examine some recommendations.

RECOMMENDATIONS:

1. Terminology:

When studying foreign legislations and practices as we have just done, it is sometimes difficult to reconcile terms used to describe an accident to a ship, an accident abroad ship, an incident concerning ships, hazardous practices or dangerous occurrences or situations; likewise when dealing with the words "inquiries" and "investigations". "Casualty" has traditionally been used in the British Commonwealth and many European and other countries and has had its meaning restricted to situations involving the ship itself. An accident to a person aboard a ship or related to a ship, such as when going up the gangplank or during loading or unloading is not considered a "casualty" although one could easily argue that this person should be considered a casualty resulting from the operation of a ship.

Although I will not formally recommend the use of specific terms in any eventual legislation, my inclination would be to refer to "accidents" as encompassing both accidents to a ship and accidents related to the operation. Nevertheless in this study, I have constantly used the word "casualty" as a generic expression embracing all.

2. Purpose of Marine Inquiries:

As already underlined somewhere in the introduction to this study there are multiple reasons for carrying out marine investigations such as globally recognised - to improve the safety of life and property in this mode of transport. They are a form of preventive medicine through the process of finding out
the causes of the occurrences. What I have done is examined the legal phenomena involved in the process thereby inclining more on the legal side of things but also will recommend that any investigating system whatever while not principally concerned with discipline must by way of recommendations make allusions for the imposing of sanctions by a separate body. As stated succinctly by Mr. A. F. Mountain, Chief of Fleet Policy, Planning and Administration, Canadian Coast Guard:

"This option ensures that there is a link between the casualty investigation system (technical) and discipline process, but at the same time would ensure that these two processes operate at a distance from each other."

3. Civil Liability:

Casualty, especially in the case of commercial vessels, often result in considerable direct and consequential damages that can run into the million of dollars. Where such damages may have been caused partly or totally by a third party, everyone involved has a direct interest in the investigation of the casualty, whether to find grounds for attack or to prepare a better defence. The investigating authority is usually the only one having the immediate power to enter and inspect premises and to compel testimony or the production of documents. The question is whether involved parties can also do so and to what extend. It will depend upon the national law of each given country for through out our study of foreign jurisdictions, the U.S. Coast Guard system admits anyone having a "direct interest" (a term which is given a board interpretation) as a party to the proceedings. In the U.K., the formal investigation is used extensively for civil liability objectives. Even at the preliminary level, the owners' representative may be admitted at witness interviews with the consent of the witness and at the investigation's direction. Witness statements are made
available to the parties when a formal investigation is held.

In France, because of the confidential aspect of the inquiry there is no question of participation of persons concerned solely with civil liability considerations. Similarly, in the Netherlands, it has been noted that the system does not lend itself to these interests, although witness statements will be supplied for use in civil proceedings if all parties to the litigation agree. In the Federal Republic of Germany, interested persons such as shipowners, insurers and shipbuilders can attend as spectators but not as parties. However, proposed legislation suggests that more persons be allowed to attend as parties.

As Mr. MacInnis in Halifax Canada summed up: "........ in the real world it would be virtually impossible to effectively restrict civil liability objectives. People participating in formal inquiries may have such objectives and regardless of rules they may achieve it......." Nor is the opinion expressed by Mr. Sean Harrington in the brief of the Dominion Marine Association - Ottawa Canada unimportant. He said:

"Contrary to popular belief Formal Inquiries at present do touch upon civil liability because they are called upon to determine if there was any "wrongful act or default" on the part of those named as parties at interest. We understand that wrongful act or default means breach of a legal duty..... Although not binding on civil litigants the decision of the court of inquiry will considerably influence the stance they take in the ordinary court."

4. Jurisdiction of Authorities Concerned:

Wherever necessary and depending upon the national laws of the countries concerned, usually powers of appointing the investi-
gating officials are given to the Ministers of Transport or any other named authority. Those however appointed must always perform their duties with impartiality and should never be under any influence whatsoever. Also they must be given powers to go on board or enter any premises and to carry out such inspections as necessary for their reports.

5. Comprehensive Reporting, Etc., Etc...

We have already seen the need of a comprehensive report irrespective of its use, it should always be done according to established rules and regulations. In the case of the Republic of Cameroon, these reports are first submitted to the Minister of Transport for prior confirmation. Finally any suggestions or opinions expressed at the end of any inquiry may be implemented again and as usual it all depends on the countries concerned. Finally, the need of cooperation among states in matters of casualties, inquiries and investigations in the marine field.

6. International Co-operation:

Because of the nature of many fleets and the fact that most casualties take place out with the territorial waters of the flag state, many countries take steps to ensure that the recommendations contained in the IMO Resolutions which called for co-operation among states in issues of inquiries and investigations are fully complied with, but there has also been opportunity to observe wide divergences of co-operation between states ranging from the normal full co-operation to an absolute disregard for IMO Resolution A. 173. This problem of non-co-operation is particularly acute and most detrimental to the interests of world maritime community - where evidence is gathered by one of the states involved and access to that evidence is denied to the other state. In this connection, there is need for governments to co-operate on a mutual basis
in investigations and to exchange information freely for the purpose of a full appraisal of casualties.
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