"AMICUS CURIÆ" - CARGO, SALVAGE AND POLLUTION ISSUES
THE SHIPOWNER'S POSITION

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The purpose of this paper is to provide by way of analysis of a given fact situation insight into a number of maritime law issues. It is hoped that the result will be informative and entertaining both in this written paper and in the more limited review that will be given at the scheduled seminar.

Counsel's function in dispute resolution is to put forward the most presentable position possible for the client in the circumstances of the case. This requires the advocate to be imaginative and resourceful, but at the same time not to sacrifice integrity or objectivity. In cases involving collisions or grounding and salvage the best traits of admiralty lawyers often come to the surface. It is not unusual for both the cargo and carrier or salvor and salved to take the position through their counsel that they are totally in the right and entitled to succeed.

Carriage or cargo issues occupy a good deal of the time of maritime lawyers and the courts. Sometimes the case involves only evidentiary problems where the question is who had custody of the cargo or responsibility for the cargo when the damage was done. On the other hand, complex issues of privity and interpretation of contract and questions such as general average or marine insurance coverage will often arise to challenge the lawyers and the courts.

In this analysis an effort will be made to point out the various issues which arise in the brief but complex fact pattern presented to us by the Chairman of this Seminar. Not all of the problems will be solved in the course of our discussion, but some insight into the position which can be expected to be taken by each of the parties should be revealed.

The facts are set out in Schedule 1 entitled "The Plight of the AMICUS CURIAE". They have been supplemented and massaged by both

sides in an attempt to focus on issues that could arise in these circumstances. By way of brief summary, it can be set out here that the AMICUS CURIAE, a vessel of approximately 40,000 tons deadweight, was outbound from Vancouver harbour to the Far East. She was being navigated by the master and the first mate who was on watch along with a Canadian compulsory pilot. She had hazardous cargo in No. 1 hold and an especially expensive type of baled wood pulp in holds 2 - 5.

The vessel grounded near Calamity Point in First Narrows near the Lions Gate Bridge. She took water into the doublebottoms of holds 1, 2 and 3 and, according to the facts as provided, into the forepeak which indicates that this was a rather catastrophic grounding. The vessel was salved by a tug which had earlier been towing two barges containing crude oil and jet fuel. The tug had anchored the barges in the harbour while it went to the rescue of the AMICUS CURIAE. Subsequently the tide floated the barges from their anchorage positions and they collided together resulting in the escape of product from each. On the basis of this general picture and the greater detail set out in the Schedule, this analysis of the issues is presented on behalf of the shipowner on issues of cargo and salvage and on behalf of the barge owner with respect to pollution.

Carriage and Cargo Issues

The fact pattern as expanded presents numerous carriage of goods issues. The determination on behalf of the shipowner of the extent of exposure to liability begins with the supposedly simple process of identifying the parties and determining the contractual obligations and remedies between them.

If we assume that the ship has booked cargo with the carrier on the terms of a booking note, then the bill of lading and booking note should be compared to be sure that they contain the same terms or

create a paramountcy for the bill of lading. On the facts before us it seems quite likely that no bill of lading will have been issued at the time of the grounding. The court must therefore consider what in fact are the terms of the contract of carriage. Although the court will wish to look beyond the bill of lading to other documentation including tariffs, if any, a contract of affreightment, published advertizing and the booking note to define the terms of the contract of carriage, the terms in most cases will be as contained in the bill of lading. In this case where the bill of lading has not actually been issued the court should have little difficulty in following the line of cases which conclude that the terms of the contract of carriage are those evidenced by the carrier's usual bill of lading which was intended to be issued with respect to the carriage of the cargo in question.

> *Pyrne Co. Ltd. v. Scindia Steam Navigation Co. Ltd.*, [1954] 2 Q.B. 402;
>
> *Anticosti Shipping Co. v. St. Amand*, [1959] S.C.R. 372
>
> *A.R. Kitson Trucking Ltd. v. Rivtow Ltd.* (1975), 55 D.L.R. (3d) 462
>
> *Grace Plastics v. The BERND WESCH II*, [1971] F.C. 273

The contract will in any event be governed by the *Carriage of Goods by Water Act*, SC 1993, ch. 21. This legislation enacted in May of 1993 repealed the Hague Rules which were set out in the former legislation and replaced them with the Hague-Visby Rules which are set out as Schedule I to the Act.

Article X of the Hague-Visby Rules deals with application as follows:

"The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different states if:

(a) the bill of lading is issued in a contracting state or

(b) the carriage is from a port in a contracting state or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any state giving effect to them are to govern the contract

whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

The Plaintiffs in making claim for damage in this case will strive to demonstrate that cargo as described in the booking note or bill of lading, if issued, was delivered into the carrier's care in good order and condition and that no contrary notation was made on the face of the bill of lading or on the mate's receipt by the vessel. The claimant will then endeavour to prove that the cargo was lost, that is, not delivered at destination or was received by the consignee in a damaged condition. Finally, the plaintiffs must quantity their damage.

In the circumstances as described there would be at least two claimants but probably many more. We will assume one claimant for the pulp damage and one as shipper of the dangerous cargo. The defences in each of these two claims may well vary as will be described below. Often charterers, stevedores and other carriers such as railways, truckers or feeder vessels will be joined as parties to any suit. As with any case, these additions will increase the legal and factual complexities.

Before actually considering the merits of the claim, counsel for the carrier will look at a number of preliminary matters. These will include the following:

(1) whether the claim has been brought within the one-year limit prescribed by section 6 of the Act;

(2) whether the Court has jurisdiction *in personam* over the defendant. This will be determined by considering if the carrying ship is in the jurisdiction when process is served or if the court will take jurisdiction over the defendant on some other basis and allowed service ex juris;

(3) Whether the bill of lading contains a jurisdiction or arbitration clause which might be grounds for a stay of proceedings with the result that the case is arbitrated or litigated in another jurisdiction. The court has a discretion in these matters but this will be exercised in favour of upholding the contract between the parties unless strong reasons are shown to support the maintenance of local jurisdiction.

Defendants should be aware of the effect of time in raising jurisdiction and arbitration clauses in support of stay of proceedings applications. By taking steps in the action, a defendant will lose the right to insist on arbitration and by waiting too long to enforce a jurisdiction clause the defendant may be taken to have attorned to the jurisdiction of the Canadian court. See *Commercial Arbitration Act* RSC 1985 (2nd Supp) c. 17. See also *Ruhrkohle Handel Inter GmbH et al v. Fednav Ltd. (THE FEDERAL CALUMET)* [1992] 3 F.C. 98, Federal Court of Appeal, and *Trans-Continental Textile Recycling Ltd. v. M.V. "ERATO" and "MSC GIOVANNA"*, Federal Court Trial Division, T-2754-94, Reasons of John A. Hargrave, Prothonotary, November 9, 1995.

In addition to certain responsibilities the shipowner (carrier) has the benefit of immunities set out in Article IV of the Hague-Visby

Rules. The responsibilities are principally those contained in Article III and include:

(1) at the beginning of the voyage to exercise due diligence to make the vessel seaworthy;

(2) to properly man, equip and supply the ship and to make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.

(3) subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

(4) after receiving the goods the carrier or his agent shall on demand of the shipper issue a bill of lading which shows, amongst other things, leading marks for identification of the goods as furnished by the shipper, the number of packages or pieces or the quantity or weight as furnished by the shipper.

The defences or immunities available to the shipper include those listed in Paragraph 2 of Article IV as items (a) to (q). Examples are fire unless caused by the actual fault or privity of the carrier, perils of the sea, acts of God, war or public enemies and insufficiency of packing.

With respect to the events giving rise to the damage alleged in this case, item 2 (a) applies directly and some attempt might be made to argue Article IV 2 (q) which provides that the ship shall not be responsible for loss resulting from any other cause (other

than those enumerated above) arising without the actual fault and privity of the carrier or without the fault or neglect of the agents or servants of the carrier. The provision goes on to state that

> "The burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Other provisions of the Hague-Visby Rules are relevant to the circumstances of this case as follows:

Article IV Rule 5

This Rule provides that neither the carrier nor the ship shall <u>in any event</u> be liable for loss or damage in an amount exceeding 666.67 units of account per package or unit or two units of account per kilogram of gross weight of the goods lost or damaged whichever is higher. The limitation will be available in all cases unless the nature and value of the goods have been declared by the shipper before shipment and recorded in the bill of lading.

The unit of account referred to is the special drawing right as defined by the International Monetary Fund. A quote for the value of the SDR in Canadian dollars can be obtained from the Bank of Canada or, more easily, from the currency exchange column in the *Globe and Mail*. It is presently valued at approximately $2. which would then give a per package limitation of approximately $1333. per unit or $4. per kilogram of gross weight whichever is greater.

Article VI Rule 6

> relates to goods of an inflammable, explosive or dangerous nature and enables the carrier either on gaining knowledge of the dangerous nature or where they have been loaded without the carrier's consent, to land or destroy the goods without compensation to the shipper and, at the same time, to make the shipper liable for all damages and expenses directly or indirectly arising out of resulting from the shipment of such goods. (This is echoed in sections 389 and following of the *Canada Shipping Act*.)

Clause 8 of Article III says that any provision in the contract of carriage relieving the carrier or ship from liability for loss or damage or lessening such liability otherwise than as provided in the Rules shall be null and void. However, both general average and limitation of liability as provided for in the *Canada Shipping Act* (Section 574 and following) and described hereunder are rights which are preserved to the shipowner under Articles V and VIII of the Rules.

In his book on *Maritime Cargo Claims*, Professor Tetley sets out the elements of proof for the claimant and the defence at page 142. The defence must show in this case the cause of the loss and that that cause was not a result of unseaworthiness of the vessel. Under this obligation the carrier must show that before and at the beginning of the voyage due diligence was exercised to make the ship seaworthy and that it was properly manned, equipped and supplied. Article IV (1) provides as follows:

> "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and

> preservation in accordance with the provisions of paragraph 1 of Article III.
>
> Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article."

Cases relating to the exercise of diligence to make the vessel seaworthy include the following:

> *Maxine Footwear Company Ltd. and another v. Canadian Government Merchant Marine Ltd.*, [1959] 2 Lloyd's Rep. 105
>
> *Northumbrian Shipping Co. Ltd. v. E. Tim & Son Ltd.*, [1939] A.C. 397
>
> *Norman v. Canadian National Railway*, 111 APR 91
>
> *Kruger Inc. v. Baltic Shipping Co., (THE MEKHANIK TARASOV)*, (1989) 57 D.L.R. (4th) 498.
>
> *THE ANTIGONI*, [1991] 1 Lloyd's Rep. 209

Finally, having dealt with the question of cause and unseaworthiness, the shipowner must then prove any defence that is available under the exculpatory provisions of Article IV Rule 2. In this case the defence is under IV 2 (a) error in navigation.

Accepting that the grounding of the vessel resulted from the act, neglect or default of the master, mariner or pilot, the question then arises whether the error was one with respect to the navigation of the ship or, alternatively, a failure to care for the cargo. This issue has been debated in many cases but in a case of grounding or a pure error in navigation resulting in a collision, the facts will generally favour the shipowner.

Kalamazoo Paper Co. v. C.P.R. (THE NOOTKA), [1950] S.C.R. 356

THE OAK HILL, [1970] 2 Lloyd's Rep. 332 and in the Supreme Court of Canada [1975] 1 Lloyd's Rep. 105

President of India v. West Coast Steamship Co. (THE PORTLAND TRADER), [1964] 2 Lloyd's Rep. 443 (U.S. Appeals Court)

THE ALIAKMAN PROGRESS, [1978] 2 Lloyd's Rep. 499

Seven Seas Transport Ltd. v. Pacific Union Marine Corporation (THE SATYA KAILASH and OCEANIC AMITY), [1984] 1 Lloyd's Rep. 586

Cases on the failure to care for cargo include the following:

Gosse Millerd v. Canadian Government Merchant Marine Ltd. (THE CANADIAN HIGHLANDER), [1928] All E.R. Rep 97 (House of Lords)

Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd., [1958] 3 All E.R. Rep 261

Lavel & Co. Inc. v. Colonial Steamship Ltd., [1961] 1 Lloyd's Rep. 560 (Supreme Court of Canada)

In the facts before us there is little question that the grounding resulted from an error in navigation by either the bridge crew or the pilot or both. It will therefore be the issue of seaworthiness on which the shipowner's success will stand or fall. Undoubtedly, the plaintiffs will allege that the failure to have the ECDIS system working given that it was in place on board was causative and further the plaintiffs will argue that the vessel was not properly manned in that only two officers were capable of using the ECDIS system. This argument would in practice be relatively easy to overcome as it is unlikely that the pilot would be relying on electronic chart display information to navigate the ship in the circumstances described. However, it would appear that the mate

was relying on the alarm for the ECDIC to sound if the ship strayed from her intended course. The fact that the alarm had been turned off is an error in navigation in itself and it does not necessarily follow that the ship was not well manned simply because the mate had not completed the training course for the ECDIS system. The unseaworthiness or inadequate manning must have been the cause of the grounding before the shipowner would lose its right to rely on the defences under Article IV.

Other arguments to assist the shipowner in resisting the claims of cargo include issues with respect to the hazardous cargo which was shipped without proper labelling and without the required declarations as provided for in Part V of the *Canada Shipping Act*, R.S.C. 1985 c. S-9 and the Dangerous Goods Shipping Regulations 1981 SOR/81-951 and SOR/94-554. These regulations require proper packaging, labelling and handling by the shipper of dangerous goods which are precisely described in the legislation. If the nature of the goods causes damage or loss to the goods or the carrying vessel the shipper will be responsible. The words of Article IV Rule 6 of the Hague-Visby Rules are as follows:

> 6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before the discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

In this case the cargo in number 1 hold was 20% destroyed after the grounding. Given its value the loss would total approximately $1,000,000 for about 400 drums or $2,500 per drum. The shipowner will argue that the nature of the cargo caused some degree of that damage and, secondly, that the plaintiffs' flagrant breach of the strict liability statutes prohibiting shipment of dangerous cargo

without compliance with the requirements take away the plaintiffs' right to recovery.

In any event, the shipowner would succeed in maintaining the per package limitation provided by Article IV Rule 5.

The shipowner would argue that each drum of chemical was a single package with a resulting limitation of 666.67 units (SDRs) of account or approximately $1334. per drum or 2 SDRs (or $4.) per kilo for the weight of each drum which were actually damaged. So, if 400 drums (weighing 200 kg. each) were totally lost, the limitation would be about $800 on the basis of 2 units per kilo or $1334. which is the greater amount. The statute says the higher limit will apply and thus the shipowner's liability would be $533,600. rather than the c.i.v. value of $1,000,000.

The pulp claim has been presented by the consignee on the basis of a percentage of damage as determined by surveyors, including the underwriters', who concluded that the consignment was to be subject to a 50% depreciation allowance. They agreed without prejudice that the claim was to be determined by deducting their estimate of the arrived damaged market value from the arrived sound market value of the cargo.

Although underwriters paid the claim on this basis, it was later determined that the pulp could be used to make paper as originally intended although it took a bit longer. Therefore, in addition to the defences described above, the shipowner would then argue that in any event the damage alleged could not be proved because it did not in fact occur. The court must take cognizance of the actual loss to the plaintiff and not simply proceed on the basis of a settlement which occurred between the cargo and his underwriters. Once the pulp was in fact used as opposed to being sold for salvage there was an obligation on the plaintiff to record and calculate the actual loss.

Redpath Industries Ltd. v. THE CISCO, [1992] 3 F.C. 428

Canastrand Industries v. The "LARA S", [1993] 2 F.C. 553

In the above two cases the court was faced with determining the proper test for assessing damages in a carriage of goods situation. The Federal Court of Appeal in *The Cisco* had little difficulty in accepting the proposition that damages would be calculated by deducting the arrived damaged market value from the arrived sound market value. The problem was how to properly determine the damaged value and it was resolved in the circumstances of the case. Further, the court examined the scope of the duty to mitigate. Mr. Justice Letourneau said:

> "It is well established that a party who suffers damages as a result of a breach of contract has a duty to mitigate those damages, that is to say that the wrongdoer cannot be called upon to pay for avoidable losses which could result in an increase in the quantum of damages payable to the injured party. The injured party must take all reasonable steps to avoid losses flowing from the breach."

Later in his Reasons Mr. Justice Letourneau compares the damage done in the ship to damage that might have occurred in the warehouse of the claimant. Viewing the matter as one of common sense, he concluded that whatever steps one might expect the claimant to take where the damage had arisen in his own warehouse should be taken to mitigate in the case where the damage was done by another party.

Finally, the shipowner will claim an entitlement to limit its liability as provided for in section 574 and following of the *Canada Shipping Act*. These sections establish a maximum liability based on the limitation tonnage of the ship. Section 575 (1) reads as follows:

> "The owner of a ship whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely,
>
> (b) where any damage or loss is caused to any goods, merchandise or other things whatever on board that ship,
>
> liable for damages beyond the following amounts:
>
> (f) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to 1,000 gold francs for each ton of that ship's tonnage."

The value of the gold franc is set by the *Canada Shipping Act* Gold Franc Conversion Regulation SOR/78-73 which is a regulation passed pursuant to these provisions of the Act.

The cases and practices in admiralty courts in Canada on the subject of limitation of liability demonstrate the following:

(1) there is a heavy burden on the shipowner to establish its right to limit liability;

(2) whether or not a corporate shipowner will be entitled to limit its liability will be judged by whether the central personality or alter ego of the company has been guilty of actual fault or privity.

Lennards Carrying Company v. East Asiatic Petroleum Co., [1915] A.C. 705

Stein v. The Ship "KATHY K", [1976] 2 S.C.R. 802

THE "MARION", [1984] 1 A.C. 563

Wishing Star Fishing Co. Ltd. v. The B.C. BARON et al, [1988] 2 F.C. 325

THE "RHONE" and Peter A.B. Widener, [1993] 1 Lloyd's Rep. 600, SCC

(3) A single fund will be created for all claimants. Interest and costs will be awarded in addition to the share of the fund.

In applying the analysis contained in the above cases to the facts of this case, the owners would argue that the ECDIS system was being phased in on board the ship and that specific instructions had been given to the captain and officers not to use the system in confined waters but only to conduct practice or training sessions when the vessel was on the high seas. Given the recent installation of the equipment, there had been no time for owners to determine that the instructions were being violated by reference to ship's log books etc, It is therefore possible for the owners to maintain that they were not guilty of any actual fault or privy to the violation of their instructions on board. Obviously owners would also argue that the ECDIS system failure was not causative of the loss because the pilot working with V.T.S. would have known where the ship was.

Assuming therefore that the court upholds the owners' right to limit their liability, the calculation would be made as follows:

1. Limitation tonnage calculated by taking the gross tonnage and deducting spaces used for propelling power; assumed at 25,000 tons.
2. Gold franc equivalent converts the gold franc into SDRs at the exchange rate of 15.075 gold francs per SDR.
3. SDR rate in Canadian dollars - $2.00
4. Therefore:

   $\frac{1,000}{15.075}$ x $2.00 = $132.67 per ton x 25,000 = $3,316,750.

   This is the amount available for all claims except perhaps pollution arising from the incident.

General Average

The booking note and the carrier's usual form of bill of lading both contain the provision:

> "General average to be settled and paid according to the York-Antwerp Rules 1974 as amended 1990 and shall be adjusted in Montreal in accordance with Canadian law and practice."

General average considerations arise where a loss or expenditure has resulted when both the ship and cargo are exposed to a common danger. The loss or expense will be the subject of a general average contribution apportioned in accordance with the salved values of the ship and cargo. The York-Antwerp Rules, which act as a guide to the adjuster in dealing with general average, provide as follows:

> Rule X Expenses at port of refuge, etc.
>
> (a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances, which rendered that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average...
>
> (b) The cost of handling onboard or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge shall be admitted as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage...
>
> (c) Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be admitted as general average.

The above is a somewhat abridged version of Rules X (a), (b) and (c).

The owners of the AMICUS CURIAE have declared general average and an adjustment is being prepared by which owners expect the following items will be included as general average expenditure.

1. Expenses of port entry (if any), alongside stay and departure including port fees, berthage, agency etc.

2. Salvage costs.

3. Costs of dealing with cargo, i.e. discharging, storage, sorting including stevedores' triple time if customary in the circumstances, all made necessary by the water entering the holds as the result of the grounding.

4. Damage to the engine room resulting from the piercing of the hull by the salvage tug on the basis that the damage would be considered a sacrifice for the common safety of the ship. A possible calculation can be made under this heading to take into account any advantage that the owner has derived from having new work in place of old (see Rule XVIII).

5. Ship's crew wages and maintenance during the time at the port of refuge along with other ship operational costs including fuel and stores used.

6. Damage to cargo which was incurred during the removal of the swelling pulp from the ship.

7. Cost of pumps mounted on the deck to keep the vessel afloat during the discharge of the cargo.

One of the principles of general average is that the danger to the ship and cargo must not have arisen through the fault of the person claiming in general average. Therefore, a person whether shipowner or a cargo interest cannot recover in general average where he has committed a fault which is actionable. On the other hand, if the individual claiming in general average is protected from the results of his negligence or fault by exceptions in the contract of carriage, then the fault cannot be imputed to him to deny recovery in general average.

THE CARRON PARK, [1890] 15 P.D. 203
THE OAK HILL, [1975] 1 Lloyd's Rep. 105

In the *OAK HILL* the Supreme Court of Canada found that the owners' right to recover general average contribution was not barred by the negligent navigation where the charterparty exempted owners from liability for loss caused in that way.

In this case the owners will argue that any negligence of the crew or pilot which might have caused the grounding would be exempted by the error in navigation exclusion in Article IV 2 of the Hague-Visby Rules. Given that the right to claim in general average is preserved in the Rules, the argument is supportable. It is anticipated that cargo interests will raise some arguments with respect to seaworthiness and take the view that the owners are not entitled to obtain general average contribution from cargo due to the fact that the vessel was unseaworthy at the beginning of the voyage.

With respect to contributory values, once the full amount to be made good has been determined and those that should contribute have been identified, then it is necessary to calculate the basis of the contributory values. These will generally include the cargo, the ship and freight and perhaps the bunkers. Rule XVII provides that the contribution to a general average shall be made upon the actual

net values of the property at the termination of the venture except that the value of cargo shall be the value at the time of discharge ascertained from the commercial invoice rendered to the receiver. The value shall include the cost of insurance and freight and that damage suffered shall be deducted.

The ship contributes on the basis of the value at the completion of discharge. From that value must be deducted the costs of repairs carried out after the incident, but any sum made good in general average for damage to the ship must be added to the value. It is provided in Rule XVII of the 1974 Rules that

> "The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charter to which the ship may be committed."

Ship's bunkers, whether owned by the shipowner or a time charterer, should contribute as a separate interest to the general average based on their value at the time and place where the voyage ends. A valuable service is rendered by the average adjuster who gathers the documents, assesses the circumstances and, independently of either interest, adjusts the claims and apportionments in accordance with the established rules.

Salvage

The rights and remedies arising from the salvage service provided by the tug **FOREVER READY** will be analyzed from the cargo shipowner's point of view.

In order to make a claim in salvage the tug owner must show that the service was provided voluntarily to a vessel in danger with a successful result. To be a voluntary service the salvor must not have had any pre-existing obligations such as might exist under a towing or escort contract. Many of the older cases may be cited to

support these basic principles. They will be found in the work which is the bible on salvage, Kennedy *Law of Salvage*, 4th edition 1985.

The facts provide that no contract was signed but that the AMICUS CURIAE was ultimately salved and released by the tug. The cargo ship was grounded, holed and taking water which was causing the pulp to swell in two of the forward holds and effecting the dangerous cargo in No. 1 hold. It seems that cargo interests and the shipowner would have had a difficult time showing that there was no danger. Given that the cargo and vessel were freed from the position of the grounding, the services were successful and there appears to be no suggestion that they were not rendered voluntarily. In fact, the action of the tug anchoring the barges appears to have been not only voluntary but done with some reckless abandon.

Of course the deepsea vessel representatives would argue that the AMICUS CURIAE would have floated free of the ground in a short time as the tide rose and that the services of the FOREVER READY were of no value. However, given the multiplicity of cargo and hull problems, it is suspected that the argument would not be upheld. See *Gulf of Georgia Towing Ltd. v. the Ship "SUN DIAMOND"* (1977) 17 N.R. 356, Federal Court of Appeal, where the salvor's claim was dismissed on the basis of the absence of any danger. The circumstances with the SUN DIAMOND were quite different to those in this case. There, the ship was stable and basically watertight.

It would seem therefore that the tug owner is entitled to an award in salvage from both the shipowner and the owner of the cargo, subject to the rights of those parties to set off or claim for damage done as a result of the piercing of the hull and the flooding of the engine room of the AMICUS CURIAE. Kennedy in the *Law of Salvage* contains the following passage with respect to the effect of the salvor's negligence at page 416:

> "A salvor's negligence may affect him adversely in three ways. First, it will render him liable to pay damages. Secondly, it will depress or diminish the size of the salved fund in respect of which he is to be remunerated, either because the salved fund is measured as the unrepaired damaged, salved value or (which may be more or less) a repaired, salved value less the cost of repairing the damage negligently caused. Thirdly, regard is had to the salvor's conduct and misconduct in assessing his reward, which will accordingly be reduced by his negligence. Whilst proper regard must be had to the interests of the victim of the salvor's negligence, care must be exercised to avoid injustice to the latter by penalizing him three times over."

THE TOJO MARU, [1972) A.C. 242. Salvage services were rendered to a tanker by a salvage company on a no-cure no-pay basis under a Lloyds standard form of salvage agreement. During the course of the salvage a diver, operating from a position in the water and not on the salvor's tug, used a cox bolt gun to fire a bolt through the shell plating of the ship. An explosion resulted which caused substantial damage to the vessel.

The shipowners took the position that the salvors were not only disentitled from receiving an award even though they had ultimately achieved success in salving the vessel and a significant part of the cargo. Secondly, they claimed that the salvors were liable for the cost of repairing the damage that was done to the vessel. The views of the courts up to the House of Lords varied. The House of Lords, in allowing the shipowners' appeal, found that that there was in fact no protection for a salvor which would result in the court considering damage to the vessel being salved only as a factor in setting the award. Rather, it was decided that the owners could make a claim against the salvor for damages. In the end result it was determined that the salvor's negligence had caused such a large amount of damage that they forfeited the right which they would otherwise have had to salvage remuneration.

Applying *THE TOJO MARU* reasoning to the case at hand would result in the salvor making a claim based on the usual factors to be taken

into account by the court in assessing the salvage award. The value of the vessel and cargo saved, the value of the salvor's equipment, the degree of danger, the amount of skill and time involved and a number of other factors as detailed in Kennedy's book and listed in Article XIII of the Salvage Convention would all be considered.

In addition, having regard for the fact that Canada has adopted the *International Convention on Salvage, 1989* it would, under some circumstances, be possible for the salvor to ask the court to assess special compensation on the basis that his efforts had resulted in preventing threatened damage to the environment, even though he had failed to earn an award under Article XIII which describes the criteria for fixing a traditional salvage award. In this case ship and cargo owners would argue that the circumstances fall under Article IV paragraph 5 which states that

> "If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this Article."

Although it can be argued on the facts that the salvor has prevented the hazardous goods in hold number 1 from entering our environment, he has at the same time by lack of proper skill and judgement allowed the barges to pollute a good portion of Vancouver harbour and, depending on the degree to which the scenario unfolds, perhaps burned down a good portion of Stanley Park.

In the ***NAGASAKI SPIRIT***, [1995] 2 Lloyd's Rep. 44, the English Commercial Court reviewed an arbitration award under a Lloyds Open Form Salvage Agreement which included Articles 13 and 14 of the Convention. The court found that special compensation provided for in Article 14 was for expenses and did not include a profit element.

Oil Pollution

It is difficult to determine whether the author of the facts describing the plight of the AMICUS CURIAE fully intended some of the issues which can be developed. Nonetheless, the analysis should be a broad one and therefore we should plunge on into the issues of pollution.

In the first instance, it is noted that the two fuel barges have been used as floating storage tanks in recent years. While of course there is little doubt that as barges these units would have been used at one time in navigation and would then fall within the definition of a ship under the *Canada Shipping Act*, as floating storage tanks they may not be ships as they would not be used in navigation. It is open for the barge owners, whose interests are now espoused in this paper, to take the view that these units are not ships and therefore that the provisions of the *Canada Shipping Act* Parts XIV and XV relating to both criminal and civil sanctions for oil pollution do not apply. On the civil side, section 677 (1) under the heading Civil Liability for Pollution reads as follows:

> "677. (1) Subject to this Part, the owner of a ship is liable
>
> (a) for oil pollution damage from the ship
>
> (b) for costs and expenses incurred by
>
> (i) a public authority in Canada, or
>
> (ii) a public authority in a state other than Canada that is a party to the *Civil Liability Convention*,
>
> in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from the ship, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures;

Section 677 (3) provides that the owner's liability under sub-section (1) does not depend on proof of fault or negligence and then provides certain very restricted defences including acts of war, intentional damage and the negligent or wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids.

It can be argued that if the two floating storage units are not ships then under the authority of *Regina v. STAR LUZON* (1984) 1 W.W.R. 527 which was a case of a criminal charge against the drydock BURRARD YARROWS NO. 3 for discharging oil contrary to the Oil Pollution Prevention Regulations and the *Canada Shipping Act*. The oil had escaped from a vessel into the drydock and flowed into the sea. The Provincial court found that the drydock was not a ship because it was no longer used in navigation. This finding was made with the knowledge of the fact that the drydock was towed from Japan to Vancouver on its original delivery voyage. The Appeal court did not disturb the trial ruling.

In the absence of the support of the civil liability sections of the *Canada Shipping Act* claimants, who might bring action against the barges or their owners, will be forced to frame their causes of action in nuisance or negligence. Given that the barge owners were not active participants in the scenario but had hired an independent tug company to perform the towing services, it will be difficult to demonstrate that they have been responsible for creating a nuisance or for causing the damage by their own negligence. Further, as a general proposition the barge owners are not responsible for the negligence of the contractor.

Phillips v. Britannica Hygenic Laundry, [1923] 1 K.B. 539; [1923] 2 KB 832 (CA)

Haseldine v. Daw and Son Ltd., [1941] 1 K.B. 343

Green v. Fibreglass Limited, [1958] 2 K.B. 245

It might be anticipated that parties claiming as a result of the pollution damage would suggest that the fuel oil barges constituted a special risk or a dangerous thing in the context of *Rylands v. Fletcher*, [1868] LR 3 HL 330 where the general rule with respect to non-responsibility for the negligence of an independent contractor might be overcome. Similarly, in the context of nuisance the case of *Balfour v. Barty-King*, [1957] 1 Q.B. 496 may well provide some authority for the same proposition.

Given these differences one can anticipate that the various parties injured or affected by the oil pollution in the harbour will not be discouraged and certain claims will be made against the barges and their owners (as well as the tug and her owners and master). One might imagine at least the following:

1. If the barges were in fact ships and had a capacity in excess of 150 tons then, in accordance with Section 660 (2) (2) of the *Canada Shipping Act* they would have to have in place an arrangement with a designated response organization capable of supplying pollution prevention and clean-up services. In this case one might anticipate that the response organization would respond for a short time and then the barge owners would decline to employ them further given that they would take the position that they were not responsible. Thus, the Vancouver Port Corporation or, more likely, the Canadian Coast Guard would have to continue the arrangement and complete the pollution abatement. Therefore, one can anticipate a suit by one of those organizations or by the designated response organization against the barges *in rem* and against the barge owners. Interestingly enough, given that they are only storage units, the arrests will have little impact and it would not really be necessary for the owners to arrange for bail while they were defending the suit.

2. One would expect claims to be made by the Federal government for compensation for their out-of-pocket costs which will include

(a) Fisheries and Oceans monitoring costs which would include helicopter and vessel charges, overtime for regular personnel and employment of private contractors and scientists to observe and conduct studies. Past experience indicates that Fisheries may also make claims for damage to the fish habitat and sea life stocks.

Also it can be anticipated that the Federal Government would advance a claim for general damage to the environment and possibly for damages for "non-use value" which can best be described as the loss sustained by members of the public who would not actually use the areas or items damaged but would nonetheless have sustained a loss. The concepts are put forward in the United States by bureaucrats and economists but have never been upheld or even fully argued before the courts. Although in less favour today than a few years ago, governmental claimants have supported public survey results as means of calculating damages. The process has been called "contingent valuation" and, at least in this writer's view, is a less than credible method of attempting to prove damages.

(b) Department of the Environment - Similar costs to those of Fisheries for monitoring and assessing the pollution and advising and monitoring clean-up activities.

(c) Department of National Defence and, where appropriate, the Parks Branch can also become involved and would make claims for their expenses including salaries and overtime etc.

3. The Provincial government will mobilize the Provincial Emergency Program which will become involved in assisting workers with clothing and some training and will generally co-ordinate the Provincial effort. As well, one would expect that the Waste Management and Wildlife Branches of the Provincial Government along with the Department of the Environment would be monitoring and assisting where the clean-up effort involved shore-based activity such as debris disposal.

4. Vancouver Port Corporation - One might anticipate some claim for loss on the part of the Vancouver Port Corporation. On the direct side, the use of their patrol boats, tugs and personnel might have resulted. Some claims for damage to Port Corporation-owned facilities would probably also result.

5. The City of Vancouver and City and District of North Vancouver along with the Municipality of West Vancouver might well make claims as a result of oil coming onto their beaches and shoreline areas.

6. One would expect claims from the Squamish Indian nation who control some of the shoreline along the north shore of Vancouver harbour near the point where the AMICUS CURIAE grounded.

7. One would also anticipate a large variety of third party claims some of which would be as follows:

(a) Burrard Yacht Club for oil pollution to their facilities and perhaps to some of their members' vessels;

(b) The Royal Vancouver Yacht Club with the same type of claim;

(c) Individual vessel owners for pollution damage in the Coal Harbour area. A similar action was brought on behalf of a number of vessel owners in this Court a few years ago arising out of a discharge of oil from the deepsea ship OCEAN VICTORIA. The claims were small and the litigation was time consuming due to the large number of individual claimants involved.

(d) Although the law is less than clear, one would expect a number of parties would commence action for recovery of economic loss even though they could not specifically prove that they or their property had been physically damaged. Examples would be fishermen, terminal operators, railways and other vessel owners who might claim on the basis that they lost income due to the fact that the harbour had to be closed during the clean-up period as vessel movement would have aggravated the spread of the pollutant. Based on the *"JERVIS CROWN"* decision in the Federal Court and the Supreme Court of Canada, it is unlikely that these parties would recover.

Canadian National Railway v. Norsk Pacific Steamship Co. (the "JERVIS CROWN") [1992] 1 S.C.R. 1021

Winnipeg Condominium Corp. No. 366 v. Bird Construction Co., (1995), 3 W.W.R. 85, SCC

Conclusion

In the face of all of the above one certainty remains. If an incident in any way similar to the plight of the AMICUS CURIAE does occur in Vancouver harbour or any other location in Canada, the Courts, including primarily the Federal Court of Canada, will be burdened with a large number of disputes requiring a broad degree of knowledge and expertise on the admiralty side. It is hoped that this presentation will assist in some small way to enhancing the awareness of the Court and others with respect to the issues that could arise out of a simple grounding of a vessel departing from Vancouver harbour in the fog.