

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

2000

(Panelist) Collision, Towage, Salvage and Limitation of Liability

Joseph Sweeney

Fordham University School of Law

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Joseph Sweeney, *(Panelist) Collision, Towage, Salvage and Limitation of Liability*, 24 Tul. Mar. L. J. 405 (2000)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/806

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Admiralty Law Institute
Admiralty Law at the Millennium
Tulane Law School

PANEL DISCUSSION OF
COLLISION, TOWAGE, SALVAGE, AND
LIMITATION OF LIABILITY

March 18, 1999

FACILITATOR:

The Honorable Morey L. Sear, Chief Judge, United States District
Court for the Eastern District of Louisiana

PANELISTS:

Geoffrey Brice, Q.C., Barrister, 4 Field Court, Gray's Inn, London,
England; Visiting Professor of Law, Tulane Law School

Richard H. Brown, Jr., Partner, Kirlin, Campbell & Keating, New
York, New York

Raymond P. Hayden, Partner, Hill Rivkins & Hayden, LLP, New
York, New York

Nicholas J. Healy, Partner, Healy & Baillie, LLP, New York, New
York; Adjunct Professor of Law, New York University School of
Law

Charles E. Lugenbuhl, Partner, Lugenbuhl, Wheaton, Peck, Rankin &
Hubbard, New Orleans; Adjunct Professor of Law, Tulane Law
School

Richard W. Palmer, Partner, Palmer, Biezup & Henderson, LLP,
Philadelphia, Pennsylvania

Joseph C. Sweeney, Professor of Law, Fordham Law School, New
York, New York

MR. BRICE:

Now, I've come to tell you about something that is entirely new.
It only really came out in the last few weeks, in fact, while I've been
here at Tulane, and it is something which is quite revolutionary and it
is something which emulates the thinking of an American

professional salvor who is also an attorney, Mr. Arnold Witte, and it really is a striking development.

The title of my paper, which you may or may not have seen, is "No Cure, No Pay, No Good?" And you all will know the concept of no cure, no pay, which is fundamental to English salvage law and American salvage law. In other words, the salvor gets absolutely nothing, no matter what money he's spent, no matter how hard he's worked, unless he achieves success—that's the cure provided there is an adequate salvaged fund. That's the value of the salvaged property at the time when the services end. Now, that's been the rule for centuries, and it certainly was operative in this country. Fortunately, American salvage law and English salvage law are largely identical in many respects. The problem is this: The number of casualties in the world has dropped, but when they occur, they tend to be, in many cases, very serious indeed, and third parties are affected. You may get a case of a ship which is ablaze, drifting near a lee shore, and carrying fuel oil or some other toxic cargo such that services are urgently needed.

Now, the only people who in reality can do this are professional salvors or tugboat companies with professional expertise, and unfortunately, it costs a lot of money for tugs, salvage personnel, and salvage equipment to be kept on the speculation that there may be the need for a salvage service. So, no cure, no pay can operate as a disincentive in those cases where services are urgently needed but the prospect of getting any sensible salvage remuneration is very low. Efforts were made in the 1989 Salvage Convention in cases affecting the environment to deal with this problem, and in many ways those efforts were successful but in other ways they were not successful.

Now, what is it that Mr. Witte started about a year or two ago? I was in a taxi with him in London, and he spelled out his ideas to me, which were quite revolutionary, and thereafter there has been wide consultation with all business interests, salvors, shipowners, cargo owners, underwriters, and P & I clubs, to come to a solution to this problem. The way it works is this: They've drafted this new contract they call SCOPIC, the terms of which will be set out in a paper I wrote in the *Tulane Law Review*. The new contract at the moment is in its final draft stage. I'm told it is hoped that the new contract will be operable from about June of this year.

Now, the way it works is this: At the moment, it only operates in cases where a Lloyd's Form of salvage agreement has been signed. This is the salvage contract most widely used by professional salvors. . . . If the salvor having arrived on the scene realizes that the

prospects of getting paid a proper salvage reward are low, he gives a notice to the shipowner to say that he's now relying upon SCOPIC. What then happens is the shipowner must within two days put up a guarantee for the salvor's claim for \$3 million, a fixed figure, but that figure could be modified up and down as circumstances become clearer. If the security, the guarantee of the \$3 million, is not put up within two days, the salvor can say, "Right. Forget SCOPIC. I'll have to go with the Lloyd's Form." Now, there's no point in having a remedy of any sort unless somebody is willing to pay it. What has happened is this: The P & I clubs have indicated that although it is not automatic, in the ordinary course of events, they will give the guarantee. So it is a guarantee by the shipowners' P & I clubs to the salvor. The cargo plays no part in this at all. So how does SCOPIC work? Well, you know with salvage we have to make an assessment under what is now article 13 of the Salvage Convention or *The Blackwall* in America. We have to assess through litigation just what the salvage remuneration should be. Under SCOPIC tariff rates, that's all gone.

This is what's revolutionary. There is an annex to this new SCOPIC contract setting out rates of remuneration, tariff rates of remuneration for different types of tug, salvage master, salvage equipment and the like, and there's also a guarantee the salvor gets his out-of-pocket expenses.

To give you a practical idea of it, if you've got a 5,000 horsepower tug, then that tug automatically gets \$10,000 per day plus twenty-five percent. So that's \$12,500 per day. If it is a 10,000 horsepower tug, it is \$17,500 per day plus twenty-five percent. If it is a very large, 20,000 horsepower tug; you get \$27,500 per day plus twenty-five percent. So the rates are generous, and the bonus, the twenty-five percent, is a fixed one. Now, what happens, is there a risk of the salvor, having got onto these attractive rates, ripping-off the shipowner and the P & I club?

Well, this has been looked into with careful negotiations. What is happening is this: There's a panel of experts who are going to be set up and approved by the industry generally. There's going to be a committee of twelve who will set up this panel of experts who can go to the casualty. They are going to be known as Shipowners' Casualty Representatives. They will board the casualty and keep an eye on everything that's going on, and the salvor, through the salvage master, must make regular reports to the shipowner, and he must consult with the Shipowner's Casualty Representative on board, and if there's any difference of opinion, then this has to be noted. But the idea is to get

cooperation. This is not a lawyer's contract. It is a contract drawn up by businessmen who are actually involved in salvage operations and they want to see the thing operate successfully.

In addition to that, cargo owners are also entitled to send along their own representative. So this is entirely new. Instead of no cure, no pay, if you opt for SCOPIC, you have a guaranteed remuneration for the salvor. That means the professional salvor has an incentive to have sufficient craft and men go to the scene of a casualty and stay there even though in the ordinary course of events there would be no adequate salvage remuneration.

Now, the contract is, I'm afraid, fairly complex. I've just given it to you in outline. What I feel myself is this: The present system has had its disadvantages. If the business community got together to form this contract, to draw it up, then we as lawyers should give every support that we can to see that it works. Because if the salvage industry falls apart, then there will be nobody available when a casualty occurs off the coast of Florida, in the Gulf of Mexico, or wherever, to actually save it. If they know they are going to get guaranteed remuneration on a generous basis, then in those circumstances they'll be more encouraged.

JUDGE SEAR:

I first want to ask you, Geoffrey Brice, whether or not you think in the area of salvage there is uniformity, and secondly, if you will tell us whether you think uniformity is important.

MR. BRICE:

Well, as far as the United Kingdom and the United States are concerned, you had a judge in 1791 who had the good sense to say, after the passing of your Judiciary Act that, in effect, as the courts in America had been applying English salvage law before 1791, they would continue doing it, and that is why our laws are the same.

I think that the sort of uniformity which started with the Brussels Convention of 1910—so that's, what, ninety years ago—was a valuable step because then people knew where they were. I'm afraid there are some parts of the world where the governments are not very scrupulous, and a shipowner can be held over a barrel. So I think, first of all, there is uniformity of salvage law, in fact, in most countries since the 1910 Convention. The 1989 Convention is operative in most maritime states.

So I think uniformity is important when, after all, ships are traveling from one jurisdiction to another, cargos, maybe a container ship. You have over a thousand interests. I think it is important that people should know where they stand. And this, again, is one of the advantages of Arnold Witte's proposal. Provided the Lloyd's Form is signed, everybody will know where they stand as far as the amount they have to pay.

Yes, I do think uniformity is important. And if you go back in history, the systems varied enormously port to port, let alone jurisdiction to jurisdiction.

JUDGE SEAR:

How about areas like limitation?

MR. BRICE:

As far as limitation is concerned, the United States and the United Kingdom had a very similar system up to about the 1850s. We both operated on the theory of limiting to the value of the ship and the freight in the course of being earned. We changed our limitation system in the 1850s (when the trans-Atlantic immigrant traffic started) to tonnage, because you might have a ship, which was of little value, and it was fair that the owner of the ship would have to pay at least some compensation; so we did it on a tonnage basis. Again, I personally am in favor of limitation on a tonnage basis, which operates through most of the commercial world, but I realize it is impractical to get it changed in this country.

JUDGE SEAR:

Well, doesn't it take both the United States and Great Britain if it is just the two countries that have this difference between them—had the same and now they are different—shouldn't they in consultation with each other decide on the changes?

MR. BRICE:

My feeling is this: If I could just in one moment explain, the reason why we changed our rule to a tonnage basis in the 1850s, which was, then, I think adopted pretty worldwide, is because that was thought to be fairer. I do believe, in fact, there's much to be said for the United States coming into line with the other jurisdictions of the world which are tonnage-based, because under that system, you're

guaranteed a limitation fund; whereas, under your system, if the ship is lost, you may get nothing.

So yes, Morey, I do think that there's something to be said for the United States thinking again about whether or not it should accede to ratify the Limitation Convention of 1976. But I realize that's a matter of politics, and it is very hard to get Congress interested in that type of thing.

MR. PALMER:

Geoffrey, could you just fill in for us a little bit about the new relationship that may exist between SCOPIC and the Lloyd's Form and the other arrangements that might be made?

MR. BRICE:

Yes. The way it will work is this: If you have a pure salvage case, then SCOPIC will have no application. If you have a contract for salvage under Lloyd's Form, then it is solely for the salvor to decide whether he wants SCOPIC. He's the person who decides. There is, however, nothing to stop parties agreeing privately to have SCOPIC.

SCOPIC is well ahead of the Salvage Convention. That Convention of 1989 was drawn up by lawyers. It in some respects has guaranteed remuneration, what we call special compensation, and it may not have worked as well as what was intended. So if it goes as pure salvage, ordinary salvage law applies together with a special compensation regime in environmental cases. In contract salvage, SCOPIC only applies at the moment, as is intended, if the Lloyd's Form is signed. Lloyd's Form is signed by professional salvors.

JUDGE SEAR:

I'd like to ask you, Charlie, whether you think there's uniformity in towage and whether there's a need for it. If not, why not?

MR. LUGENBUHL:

Is there uniformity in towage? No. Is there a need for it? Perhaps. But I suspect that in the United States, and particularly from what I heard yesterday and last night, I suspect that uniformity in the United States means just about the same as bipartisanship means to Democrats.

I would like to see the United States at least change the *Bisso* rules so that we can, like other maritime nations of the world, have the

freedom to contract. I think *Bisso* is our big outstanding black mark on what we would like to see in the towage area.

JUDGE SEAR:

How about you, Nick? How about in collision?

MR. HEALY:

Well, as far as the International Rules are concerned, of course, we have complete uniformity. We have some differences between the International Rules and the Inland Rules, but I do not think they really affect the question of uniformity. The principal difference, of course, is with respect to the meaning of the one and two short blasts maneuvering signals.

Under the Inland Rules, they are signals of intention, not turning signals. They must be sounded when the conditions are appropriate, even if neither vessel is required to make a turn in order to effect safe passage; whereas, under the International Rules (COLREGS) the signals are turning signals. They are never sounded except when a turn is made, with one exception: Under COLREGS, when there is an overtaking situation and the facts are such that an overtaking can be made safely only if the vessel ahead takes avoiding action, the overtaking vessel is required to sound a signal of two prolonged blasts followed by one short blast when the intention is to pass on the starboard side of the vessel ahead, and two prolonged blasts followed by two short blasts when the intention is to pass on the port side of the vessel ahead. And if the vessel ahead agrees, she must respond with one prolonged, one short, one prolonged and one short blast, regardless of the side on which the overtaking is to take place. But the Inland Rules are effective only in pilotage waters and if the vessels concerned are navigated by pilots licensed for the particular waters, there should be no problem, assuming the pilots know their rules and obey them.

In the collision area, the significant areas of disagreement are (1) with respect to *The Pennsylvania* Rule, which seems to be unique to the United States and (2) with respect to the "innocent cargo" rule.

The *Reliable Transfer* case put us on the same footing as the subscribers to the Brussels Convention of 1910 insofar as the two vessels are concerned. But the effect of a both-to-blame collision where there is cargo damage is quite different. Under the Brussels Convention of 1910, each ship is liable only in proportion to her own degree of fault as far as cargo is concerned; so that if the carrying

vessel is protected by the Hague Rules or the Carriage of Goods by Sea Act or the Harter Act or a charter party provision against liability to its own cargo, the cargo ends up bearing a percentage of the blame corresponding to the degree of fault on the part of the carrying vessel and recovers from the noncarrying vessel only in proportion to the degree of fault on her part; whereas, under American law, cargo recovers 100% from the noncarrying vessel. That is a big difference between our law and the law of most of the rest of the world.

MR. BROWN:

I guess my first question concerns the criticism leveled in the paper against the decision in *Stevens v. White City* back in 1932. The paper suggests that it may be better to make the tower the bailee of the towed vessel and impose the consequent burdens on the tower as a bailee. The *White City* case really involved a tow that was manned at least for part of the trip and could have been manned for the entire trip. The most plausible reason given for the damage to the tow in that case was that it might have struck some driftwood or some flotsam and jetsam that, to my mind at least, should not be something that the tower automatically should be liable for.

As for the burden of proof, there's an analogous 1841 case by the Supreme Court, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, holding that in a noncommon carriage situation the burden of proof remains with the bailor and, in this case, that would be the owner of the towed vessel. So I think the notion of making the tower the bailee of the vessel is really not entirely appropriate, and I think *Stevens* was rightly decided.

The author, Mr. Lugenbuhl, suggests it would be desirable to have a judicially fashioned rule that delivery of a tow in good order and condition and receipt in bad order requires the tug to explain that the damage was not due to its fault. I would like to pose the question to him: Why would that be desirable, or is it all that desirable under the circumstances?

MR. LUGENBUHL:

We have to remember *Stevens* really is a twofold decision. I think *Stevens* correctly stated the duty of the tug to its tow, that is, to use that degree of care that reasonable mariners similarly situated would use. That duty of care has been cited in almost every towage case that you can see that's followed *Stevens*. I have no quarrel with establishing what the tug's duty is to that tow. My concern with

Stevens is that it is as close to bailment as you can get. You say the DRIFTER was probably manned for part of the time and so forth. I would suggest that such an able practitioner as yourself would have no trouble in today's world if you represented the DRIFTER getting a successful judgment against the WHITE CITY.

The towage law has evolved to such an extent that we now have all sorts of exceptions to *Stevens*. We even, God forbid, use the doctrine of *res ipsa loquitur*. We shift the burden of proof. So all we're talking about is the burden of proof in *Stevens*, and in today's world, I see nothing wrong with a tug having to explain that it used that degree of care that *Stevens* required to exculpate itself, but the burden would just shift to the tug.

It would also enable us to properly present the true relationship of the tug to the tow. I think the *Stevens* court misunderstood and a lot of courts do. I think the Supreme Court in *Bisso* obviously misunderstood the relationship of the tug to the tow because they referred to a phantom monopoly and the degree of care exercised by bailees and common carriers, treating the tugs just as if they were a common carrier or a bailee. I doubt that any court will change *Stevens*, but I think it shows what the relationship is or ought to be.

MR. PALMER:

Charlie, is there any reasonable chance that *Bisso* can be overturned in order to achieve freedom of parties to contract, for instance, if they are of equal bargaining power?

MR. LUGENBUHL:

Well, Dick, I guess the simple answer to that is if you can figure out a way for the Supreme Court of the United States to take a towage case involving a release from liability clause, I think it would be overturned. But how you'll get them to take it is another matter.

JUDGE SEAR:

But aren't we kind of skirting the issue anyway? Aren't we going around through the back door in all of those cases and ignoring the Supreme Court's decision in *Bisso*?

MR. LUGENBUHL:

Yes. What do you do about deductibles? What do you do about self-insurance? What do you do in the instance where your insurer goes belly up?

MR. PALMER:

Name and waive.

MR. LUGENBUHL:

Name and waive. Why do we go to these subterfuges when, in essence, what we ought to do is just have the courts tell us: *Bisso* isn't the law anymore. There is no monopoly. *Bisso* was wrong about the monopoly. *Bisso* was wrong about the relationship of the tug to the tow, and by God, you people are in equal bargaining positions. You ought to be able to contract the way you want to, and that would include a release from liability. Our English friends permit that.

MR. BRICE:

If I could chip in on that one, to an English lawyer, this discussion is simply amazing because we have, first of all, standard forms of towage contract in the United Kingdom and also in Europe.

Secondly, those contracts are approved, in fact, by public bodies like monopolies' bodies, but the other thing is we often allocate risks according to insurance. So the tug bears all risks for damage to the tug no matter whose fault it is, and the tow bears all damage to the tow even if it is the tug's fault.

So we definitely have freedom of contract. We even have an Act in England called the Unfair Contract Terms Act, and towage is expressly excluded from that Act so that there can be total freedom of contract in towage. I say in reality we have these standard towage contracts. I do not know if you have them in America, but they are used in England.

PROFESSOR SWEENEY:

Let me be the devil's advocate and say that there's nothing wrong with *Bisso*. It should be extended. It should be extended to get rid of the pilotage clause. The differentiation between pilotage clauses and towage clauses was always unconvincing, and perhaps if the court ever looked back at this thing many years later, they should get rid of the pilotage clause.

MR. PALMER:

A brief comment: The pilotage clause has been the law for a long time and has worked out, I think, quite consistently between shipowners and tug owners who are contracted to transport a vessel from one place to another in a port. There have been less, I believe,

cases on that than there used to be, and I think the industry has settled down.

MR. HAYDEN:

But why should that be upheld and not *Bisso*?

MR. PALMER:

Well, *Bisso* is a more general kind of a problem. Towage is all over the world with the drill rigs; it goes into other regions of the country, and in the pilotage clause case, we have separate agreements in separate parts of the United States. You have a certain clause in New York and perhaps in other east coast places, but out in southern California your pilot is an employee, not an independent contractor, and the law is quite different in various regions. That may be one of our problems.

MR. BROWN:

If I may contribute, there's another distinction between the pilotage clause and the *Bisso*-type decision; that is, the pilotage clause affects a pilot acting on a ship that is manned normally under the command of a captain who has at least a certain degree of supervision, maybe a lot of supervision, over what the pilot does.

In the unmanned tow situation, you do not have that sense of control, which I think was one factor in the decision. But I think it all boils down to a question of price and who picks up the insurance for the deal, and I must say, basically, that I think there should be freedom of contract. And if that's allowed and there's no overreaching on the part of one side or the other, there ought to be a way around *Bisso*.

JUDGE SEAR:

We talk about the Supreme Court overturning *Bisso* and coming out with a new rule or a new theory. If it is so much in demand, why don't the maritime associations seek legislation that changes the rule? It is done all the time.

MR. LUGENBUHL:

Well, I know of no efforts on behalf of any of the associations to seek such a change, but I'd like to ask you: Why can't the courts at least consider this?

It seems to me—and it is really in response to what Joe said—that almost all of the courts since *Dixilyn*, in any event—because

Dixilyn was a travesty—but since *Dixilyn* it seems to me that the courts have gone out of their way, through the back door to try to get around *Bisso*, recognizing that it is wrong. And I think most of the courts that have considered it today, with the exception of that Ninth Circuit case *Dillingham* and recently the *Twenty Grand* case in the Fifth Circuit, all really have to swallow their tongues to say that getting the benefit of insurance is not giving the benefit of an exculpatory clause. That's a recognition that *Bisso* is wrong. And I'd just like to see it come back up through the courts. I suspect maybe we'd get another case out of it. But in today's world where we have choice of rates, where we have the allocation of risk by means of insurance, we ought to give the towing industry the freedom to contract and not be stymied by a hasty decision on a record not supportive of its conclusion, which *Bisso* was.

SPEAKER FROM THE FLOOR:

The question is whether or not the *Bisso* doctrine can effectively be met by a requirement in the contract that the towed vessel maintain insurance for the benefit of the towing vessel. And going perhaps beyond that a little bit, would it be proper and possible to obtain an arrangement whereby the towed vessel names the tower as a named insured in the policy? Now, would that overcome *Bisso*?

MR. LUGENBUHL:

In my view it would; and I think that view would be shared by at least the Fifth and the Ninth Circuits. I can't tell you what would happen to that situation in other circuits, but I think in those two circuits, *Dillingham* and *Twenty Grand*, I think those courts would go along with an obligation—a separate obligation on behalf of the owner to procure and maintain insurance on the tow for the benefit of the tug. I would still have some problems as to what happens if the insurance company, although seemingly proper, goes belly up.

Even the Fifth and Ninth Circuits would have problems with that. We would still have the same problem of how to dispose of any deductible that might be in the insurance. That could, of course, be taken care of by a contract, and you have the question of self-insurance.

But those questions remain after *Twenty Grand* and *Dillingham*, and we just do not have any solution to them because every time you try to turn around and do something, you're met with *Bisso* and *Dixilyn*. Because, remember, *Dixilyn* was a choice of rates and an

insuring provision where the tow did, in fact, agree to provide insurance and failed to provide it because the underwriter in that case said, "Well, we do not have to worry about this because *Bisso* will make this contract illegal." The Supreme Court per curiam reversed the Court of Appeals in *Dixilyn* and said *Bisso* rules. So the method you suggest is the best we can do in today's world.

SPEAKER FROM THE FLOOR:

I have a question on *Bisso*. A friend of mine and I have a case currently being considered in the District of New Jersey. We had reciprocal insurance provisions in our contract, and there were "hold harmless" provisions as well. The problem we ran up against is I represented the person that was, let's say, not the tower. We had reciprocal insurance, and the tower indicated that we would be named on their P & I policy. Now, as far as most people are concerned who are not completely sophisticated in P & I coverage, they would consider themselves, well, if I'm going to be an additional insured in a P & I policy, I've got the same coverage as the member. Well, lo and behold, in this particular situation—and I think probably in most situations—the P & I club comes back and says: "Guess what? You may be an additional insured, but we have what's called a misdirected arrow clause in our rules, and in the misdirected arrow clause, you might be named as an additional insured, but you do not really have the same coverage as the member has." The P & I club will also say: "You're only insured for those things which you were accidentally sued for which really were the responsibility of the member; so therefore, you do not have the same coverage that the tower has."

Now, most people who are negotiating these contracts for insurance are going to think if we've got reciprocal insurance provisions and I'm naming the tower on my policy and he's naming me in his, I'm going to have the same coverage as the tower. That apparently is not going to be the position of the P & I clubs.

So to some extent, it seems to me that *Bisso* might have some relevance in that the public is not aware of what we would think of conventionally as each party named on their insurances. So to that extent, I've got a little bit of a question about whether *Bisso* should be overruled and overturned, or perhaps it is just simply that the public has got to be educated and know all the ins and outs and sophistications of the P & I provision. But it is a practical problem in the business world, and I think that as long as *Bisso* is out there it will be an added protection for the other side that is not aware of the P & I provisions. But again, philosophically, I do not disagree with you.

Parties should be able to contract what they want to contract for. But *Bisso* might be an added protection that maybe should stay there.

SPEAKER FROM THE FLOOR:

I do not do anything with towing. I just want to know why you want to get rid of a warranty of workmanlike service, and what would you replace it with? I mean, it seems incredible to me that all this talk is trying to get people weaseling out of what they are supposed to be doing: driving the thing carefully so that the goods get undamaged to the far end. Everybody is trying to say: "No, no, no! Let's contract so that I do not have to drive carefully." What is this? Are you trying to turn them into New York cab drivers or something? Please.

MR. LUGENBUHL:

I think if that's a question it indicates a complete misunderstanding of the warranty of workmanlike performance that I referred to in the paper. The warranty of workmanlike performance that I referred to and that I say has no place in the law of towage is that created by the courts following the *Ryan v. Pan-Atlantic Steamship* theory, which is basically the warranty of workmanlike performance that led to the indemnity in the ship-stevedore-longshoreman triangle in which they engrafted into every stevedoring contract an implied warranty of workmanlike performance so as to give rise to a claim for indemnity, including attorney fees, against the offending stevedore. It has no place in the law of towage. The obligation of the tug would not change in any way if you eliminate the warranty. The warranty just doesn't belong.

Ryan—I'm sure that the panel on personal injury probably discussed it—is as bad a case to me as is *Bisso*. It should be dead now, particularly since the 1972 amendments to the Longshoremen and Harbor Workers' Act. Some courts still want to do *Ryan* indemnity, primarily because attorneys want attorneys' fees. I do not want to change what the tug owes to the tow.

JUDGE SEAR:

But isn't that, Charlie, what I was talking about earlier when I said that it seems to me the bar that is dissatisfied with *Stevens* and with *Bisso* just ought to change it legislatively like they did with the Longshoremen and Harbor Workers' Compensation Act. That was a good example of what the organized bar can do when it wants to.

MR. LUGENBUHL:

Well, Judge, most practitioners believe that the *Ryan* type of indemnity would fail after the 1972 amendments to the Longshoremen and Harbor Workers' Act.

JUDGE SEAR:

Well, it did. The legislation addressed itself specifically to longshoremen and harbor workers because it is different—it is a compensation scheme. And there was a quid pro quo that each gave.

MR. LUGENBUHL:

Well, I guess when the people who acted to get the '72 amendments passed thought they were killing *Ryan*, they neglected to have Congress bury it, because it has been resurrected in some areas unfortunately. Does that answer your question?

JUDGE SEAR

No, I think the gentleman's point is well taken. In those areas in which the legislation didn't cure *Ryan* and the areas that you're talking about, the gentleman says all you've got to do is what you're supposed to do and you've got no problems.

MR. LUGENBUHL:

But we use *Ryan*, which is a longshoremen-ship-stevedore situation, to invent an implied warranty of workmanlike performance. We kill that insofar as the longshoremen-stevedore-ship situation is concerned by the 1972 amendments, but we then take the *Ryan* theory of indemnity, which has its origin in that same triangle, and engraft it onto other areas of our law improperly, and towage is one of them.

MR. PALMER:

In the pilotage clause situation, you have a warranty anyway when a party contracts with somebody who doesn't own the ship, in other words, a contract with a charterer. The towage agreement has a warranty in it, and attorneys' fees and disbursements are included. There is, of course, no warranty when you have the contract with the owner of the ship. So it really doesn't belong. It was a freak case, if I remember correctly, and probably either Ray or Dick can remember the name of the case where the warranty was first applied in the transport situation.

MR. HAYDEN:

If I may ask a question of Mr. Brice now that under SCOPIC they are going to get guarantees, that is, the salvors will obtain guarantees from the shipowner, I presume that innocent cargo will no longer be required to give salvage guarantees.

MR. BRICE:

Unfortunately, that's not correct. The way it works is this: That the article 13 obligation still continue, so the cargo is required to put up security in the normal way. One thing I didn't have time to explain is this: The SCOPIC payment is only payable if the amount of the SCOPIC remuneration exceeds the article 13 or the *Blackwall* salvage.

MR. HAYDEN:

So it is a fall-back situation?

MR. BRICE:

It is a fall-back situation, yes. Of course, if, in fact, very little or nothing is going to be recovered under article 13, then the shipowner or really his P & I club foots the whole of the SCOPIC payment. But you do a balancing act in cases where there is going to be a *Blackwall* remuneration, albeit it is going to be at the low level.

MR. HAYDEN:

So you pray for enough salvaged property and also pray for a good reward?

MR. BRICE:

You do, indeed, yes.

MR. PALMER:

Geoffrey, what do you think can be done to resolve the conflict between salvors and the marine archeologists with reference to the convention that's working its way up and other salvage and preservation considerations?

MR. BRICE:

Thanks for that question. This is, in fact, a pressing problem. With modern technology, it is now possible for artifacts to be recovered all over the world, not only here in the Caribbean, for

example, but all over the world. And archeologists and historians are very worried about this.

What I'd like to commend the United States courts for is this: They have developed principles, which say, yes, certainly you can salvage ancient wrecks and the like, but you have to apply the highest scientific standards. I've been running a campaign back in Europe to say we should adopt that principle so the salvor who invests money and time and effort in recovering artifacts can get his salvage reward once he does so. At the same time, he must cooperate with scientists, archeologists, and historians on site to see that the information they require is carefully preserved and that he doesn't damage the cultural heritage.

It is a continuing conflict. As I say, in April of this year in Paris, there is going to be another meeting to try and push through this new convention. The new convention, by the way, seeks to ban salvors from all historic wrecks. I do not wish to be cynical, but just think how you'd do that worldwide. It is difficult enough here in America, but to seek to do that worldwide is an objective which I do not think will be obtained.

MR. PALMER:

Interesting. Thank you. I just have a short follow-up on the *Titanic*. There is a recent decision which I haven't read but it is reported to hold that taking photographs at the sunken wreck was a salvage service. Is there anything worthwhile to consider about that in the salvage law?

MR. BRICE:

This is, indeed, a most interesting and, if I might say, bold and courageous decision by a judge I think on the Second Circuit, a case called *Lindsay*. The learned judge appears to have held that taking photographs of a sunken wreck can make the photographer a salvor or cosalvor. I find that a difficult concept because salvage is about the recovery of property of value. But I do support the policy behind the decision that the gathering of information is useful.

In ordinary salvage law, if you provide another person with information which enables him to salvage property, then the provision of information to the salvor is part of the salvage service. I found it difficult, however, to understand how the mere taking of photographs of a sunken wreck, although it adds to one's knowledge and information, can be a salvage service. What's the salvaged fund?

What's the danger, et cetera, et cetera, et cetera? But that case, I gather, is going on appeal in the Second Circuit Court of Appeals; so I await the results with considerable interest.

MR. LUGENBUHL:

Geoffrey, you've already explained what SCOPIC is, and I assure you that I'm not dealing from a learned position on this one. But I'm trying to understand it. Could the existence of SCOPIC remuneration lead to a reduction in the general level of salvage awards to professional salvors when made by courts?

MR. BRICE:

Yes. You see, if a salvor says, "I hold myself out in business as being a person who does salvage on no cure, no pay terms," the court says, "Well, that's very commendable in the interest of the whole maritime community; therefore, we give you an added incentive." But once you take that away because you have SCOPIC, it could lead to a situation where salvage rewards to professional salvors in general are reduced.

I'm hoping, however, that in the Lloyd's Form—we are drafting a new Lloyd's Form—that there will be an express provision which says: Notwithstanding the fact that there's SCOPIC, you proceed with salvage awards in the ordinary way. You're not going to be influenced by that. I think that's what the businessmen who drafted SCOPIC wanted. But I do see the objection. It is one which I think is a serious one and something that we're going to have to try and overcome. Thanks, Charlie.

MR. LUGENBUHL:

One other thing about SCOPIC. When SCOPIC creates a so-called Shipowner's Casualty Representative, doesn't that create a conflict between that Casualty Representative and the salvor-salvage master?

MR. BRICE:

Yes. It can well do unless the two behave professionally. That's why the Shipowner's Casualty Representative must come from an approved panel which is being drawn up by all members of the industry. So it is intended that you'll get a knowledgeable person who is not there to foul things up but there to assist the salvage master in giving advice. We're hoping, in practice, the conflict will not occur.

JUDGE SEAR:

All right, Mr. Brown.

MR. BROWN:

Geoffrey, this is related to SCOPIC also. Do you see any significant risk that having SCOPIC as a fall-back position might result in the salvor putting out less effort than he might otherwise do to salvage the ship and cargo?

MR. BRICE:

The answer is, of course, when you give any commercial organization a guaranteed remuneration, you've got that risk. On the other hand, that's what the SCR, the Shipowner's Casualty Representative, and other representatives are there to avoid. So if they see the salvor doing that, they make a complaint, and that complaint must be dealt with straight away. But you're absolutely right. As I see it, it would be a possibility unless care is taken to avoid it.

MR. PALMER:

I just had one question, Geoffrey, about a salvage problem in the States where the new statute requires or permits the federal government to give ownership of a piece of salvage property that's embedded in the shore lands of the state to that state. What does that do to the general motivation of salvors to bring up wrecks and other property to get compensation for their efforts?

MR. BRICE:

Well, in the United States, you have concepts such as the Submerged Lands Act, Abandoned Shipwrecks Act, and your concept of treasure salvage or law of finds, which we do not have in any shape or form in England and as far as I know nowhere else in the world. It is, as you know, rather complex legislation in America, but the fact that property can be diverted to the states or to the United States could act as a disincentive to salvors. But that's the sort of thing which the new UNESCO Convention on protecting the cultural heritage is seeking to achieve worldwide. I do not think it is a good idea. I attended the meeting of our state department about three weeks ago with somebody else in this room, and we were lawyers facing a lot of archeologists. And we made the point, well, it is all very well, but the museums, if they want to have artifacts there for the public to see or

scientists to study, they've got to be obtained, found and obtained. It is very often the professional salvors as opposed to the tomb robbers who, in fact, do the necessary research and get the artifacts to put in the museums.

So I think to blacken salvors as if they are all tomb robbers is wholly wrong, and you in the United States have proved that because in case after case after case the courts have commended the efforts of the salvors operating in a scientific manner. That is what I am seeking to persuade those in Europe to change, in other words, to adopt a solution which your courts have already found.

PROFESSOR SWEENEY:

Judge, thank you. Further to what Mr. Palmer asked about, the 1987 Abandoned Shipwrecks Act abolishes the law of salvage and the law of finds in the case of abandoned and embedded shipwrecks. So salvage is entirely out. The purpose of the legislation was to put the question of who can remove abandoned and embedded shipwrecks solely to state governments. They are going to have the entire say as to that kind of salvage.

MR. BRICE:

Well, that is what they are seeking to achieve in this new convention worldwide, in other words, the banning of salvage operations worldwide. But the assumption is that states are all good—I'm not talking about the United States—but countries, other nations, are not all good boys.

Well, I was involved in a case where my clients had invested a lot of money in searching for medieval treasure—it was porcelain—near the coastline of a particular state, but on the high seas. What happened was that state, when this property had been recovered, sent out gunboats. They pointed machine guns at my clients. They took everything they had. It has never been seen since. I'm afraid—and this is a point I seek to make to the archeologists—in international politics there are some bad guys as well as good guys, and it is hopeless, in my view, to seek to legislate worldwide, to say no salvage, no recovery of artifacts on the water, because it is impossible to police, and I think it will mean that artifacts which should be in museums will not be there. How does it work in the States? Do you find this prohibition under the Abandoned Shipwrecks Act leads to a discouragement of salvors recovering artifacts for your museums?

PROFESSOR SWEENEY:

Well, it has not been in effect long enough, but I do not think it has yet discouraged the museums. They are negotiating with the states and getting the rights to the abandoned shipwrecks from the states.

SPEAKER FROM THE FLOOR:

Thank you. I'm, from Canada, and I just want to make one brief observation and then put a question to Geoffrey Brice. The observation I want to make is that just as a matter of information, Canada too has ratified the 1989 Salvage Convention. As between the United States, the United Kingdom, and Canada at least, since the theme has been about uniformity, on that subject anyway, there is a high degree of uniformity.

My question to Geoffrey Brice is one that I think he might expect because I've already talked to him about it, and that is this: Is there a conflict between the new arrangements under SCOPIC and the Salvage Convention? The reason for putting that question is that there has already been perhaps a somewhat premature discussion in the Legal Committee of the IMO as to whether something has to be done about article 14 in view of the fact that there are difficulties in interpreting and applying that particular provision. So I would be interested to hear Geoffrey Brice's views on that question. Thank you.

MR. BRICE:

Thanks very much indeed for that. The 1989 Salvage Convention is a private law convention. It is not a public law convention. Article 6.1 of that Convention makes it quite clear that with one limited exception freedom of contract exists under the Convention. So parties are free to do whatever they want and to exclude the Convention altogether if they want. Therefore, I do not think SCOPIC in any way is inconsistent with the 1989 Salvage Convention. The exclusion deals with the environment, which I need not go into in detail.

So no, I think that the IMO is quite right to look at the operation of article 14 of the Convention. The CMI is already doing it, and it does need, I think, a radical rethink. But what has happened here is this, and I think it is so important. You can sit in committees—and I was involved with the 1989 Convention, from 1981 through to 1989—for years of discussions, and then you come up with a

wonderful shiny convention and only a limited number of states will ratify it. So all the work, while it is being done, it is of some use, but life moves on and businessmen, salvors, and shipowners and insurers and the like come to their own solutions. I think it is very important in organizations such as the IMO that they should look to see what the business community is, in fact, doing. And if the business community wants SCOPIC, then I think something might be done when looking at perhaps the articles of the 1989 Convention to see if something can be done which reflects what the business community actually wants.

SPEAKER FROM THE FLOOR:

My question is to Geoffrey Brice. First, I guess, a statement on the legislation in the United States with regards to treasure salvage. There is the Florida Keys National Marine Sanctuaries Act that essentially has halted all salvage, for all practical purposes treasure salvage, within the Florida Keys. It extends out to the boundaries of the contiguous zone, and through there we had the privilege, I guess, of representing Mel Fisher in a recent case in the Southern District of Florida where the Southern District essentially said if you do not have an existing salvage right, salvage claim at the time of the passage of that act, then you have to get a permit. The negotiations with the government for acquiring that permit are rather one-sided.

So I think that the effect—regardless of the Abandoned Shipwrecks Act—what we have is the federal government now going in and laying claim to all of that, and it has essentially—when Mel Fisher died just recently here, many thought with his death that ended the treasure salvage, but, really, it seems the federal government has ended it with the passage of this Act.

My question is how that relates to the international convention that you've talked about and the goals that seem to be going on through there if they are environmentally related. That goes on to my next question, which is: In the SCOPIC provisions, is there any allowance of environmental salvage for claims of saving the shipowner from the claims of the fishery, the fishermen, and any type of environmental salvage that's included within SCOPIC?

MR. BRICE:

Well, dealing with the second question first, as far as SCOPIC is concerned, it in no way alters the obligations of a salvor which exist, for example, in the Salvage Convention to take measures which will protect the environment or put another way not to harm the

environment. So I do not think SCOPIC has any adverse effect on that.

So far as the Florida legislation is concerned, that is something I specifically raised in London because one can understand given the nature of the wrecks which exist off Florida why special legislation existed. The point that I sought to make was this, and I hope it is a good one: That when you have a state, such as the State of Florida, which is faced with a specific problem and which comes to its own solution, there's no point in the name of so-called uniformity of having an international convention which seeks to impose a new regime.

So this I think, Morey, is an example of where uniformity can go too far. So I think the UNESCO Convention would go too far. There's much to be said to support the Florida solution.

SPEAKER FROM THE FLOOR:

That's fine, sir. I was wondering if the panel had any comment or observations about what we see sometimes in representing salvage of recreational vessels and the continuing blurring between the traditional definition of towage versus salvage. I was wondering if the panel had any comments on that? Specifically, the question would be that people are claiming that it is salvage versus a tow under a variety of policies and what can the Convention do for that?

MR. BRICE:

Well, I suspect this is very much an American-oriented question. There are certainly quite a number of cases where especially expensive recreational vessels are salvaged. I've just had one recently from the U.S. Virgin Islands. As far as we're concerned, the ordinary law of salvage applies. Whether it is towage or salvage is a matter of fact. You do have cases here in America I think under your Federal Arbitration Act where all the parties are American and there are recreational vessels. The courts have refused to send cases under Lloyd's Form to London saying, really, the arbitration agreement is not meant to affect that sort of case. It is not a very common problem, but as an English lawyer, I do not see any particular problem with recreational vessels.

SPEAKER FROM THE FLOOR:

My question is for Mr. Brice as well. I've read your paper and I heard what you were talking about before on SCOPIC. My question

is coming from the comment in your paper where it said that the salvor can elect SCOPIC during the salvage and then either the carrier or insurance provider or whatever then follows. My question is this: Can the carrier's insurer invoke SCOPIC as a defensive measure? I say "defensive" in the sense that a lot of times as the insurer of a vessel you have no idea what the ultimate salvage award is going to be. When I listen to you talk about SCOPIC, I'm thinking, well, if there's an appendix that's going to put some certainty on what the end award can possibly be, depending on the equipment used, maybe it would be a good idea for the vessel's attorney to invoke SCOPIC as soon as he is advised that the captain has been given the Lloyd's Open Form. Can you do that as the captain of a vessel or the insurer for the vessel, or is it solely a situation where the salvor can choose to elect SCOPIC and the appendix that comes with it with the schedule of charges?

MR. BRICE:

Well, you've pinpointed a most important and fundamental point, and that is that only the salvor who has signed a Lloyd's Form can invoke SCOPIC. There's no right on the part of the shipowner or any other property owner to invoke SCOPIC. It is an option for the salvor. It means that if he goes on with the services and he's obviously not making enough money under the ordinary *Blackwall* award, then he knows he gets his guaranteed remuneration. So it is entirely for the salvor to do. I'm afraid if you had your shipowner client, no, you couldn't invoke SCOPIC on his part.

SPEAKER FROM THE FLOOR:

I just wanted to note that I think SCOPIC first came into public debate in the 1995 Institute meeting in this hall here. So good things come out of lively discussions such as we've had today.

* * *

MR. PALMER:

Do you believe it is possible that the primary and the excess underwriters should have the same benefit of limitation as the owner and/or bareboat charterer?

MR. BROWN:

Well, I guess the answer is you were talking about shipowner's limitation of liability, and any claims against the underwriters would not be direct claims against the underwriters except maybe in Louisiana but they would be claims against the shipowner, and the underwriters who stand behind the shipowner would ultimately be entitled to any of the benefits the shipowner is able to obtain by reason of the Limitation of Liability Act.

MR. PALMER:

Some P & I rules also provide that it is a provision, a covenant, that the right to limit be asserted when it is proper to do so. Another question that relates to limitation is kind of a perennial question, and that is: What is the level of a corporate officer whose actual and/or constructive knowledge is sufficient to support a finding that the corporation has privity and/or actual or constructive knowledge of the operational deficiencies or the administrative inadequacies which caused or contributed to the vessel's disaster? And it is a factual question, but it would be interesting to get your slant on what the state of the cases is now about that level, and then we think in terms of what is the level in Great Britain, and we can ask Geoffrey about that. But I was thinking, Dick, you might give us the latest on that.

MR. BROWN:

Well, I'm not sure it is the latest. The basic definition, which doesn't help much, is that it has to be someone high enough in the corporate hierarchy so that his actions or inactions can be considered that of the corporation. I think there have been cases where port captains and people on that level have sufficed. I do not know of anybody below that level who has been held to be, in effect, the alter ego of the corporation.

MR. PALMER:

Would you say that perhaps you measure that by the extent of his discretion and power to bind the corporation?

MR. BROWN:

I think his discretion and his authority are all questions that would come into play in determining whether he is that sort of person.

MR. HAYDEN:

I think that under the new ISM rules you're going to have some very clear definitions of who's got what knowledge and authority because it goes all the way to the top through the ISM rules.

MR. PALMER:

The designated person will have to have some very specific knowledge under the new ISM Code.

MR. HAYDEN:

And if he doesn't have it, they are also inadequately staffed.

MR. PALMER:

You may be stuck if you do, and you'll certainly be stuck if you do not know if you're a designated person. By provisions of the ISM Code, the management is committed, is it not, to that knowledge, or is it presumed that the designated person's knowledge is the corporation's knowledge?

MR. HEALY:

I can't imagine any court in the United States holding that the person named by the corporation as the designated person for ISM purposes is not the alter ego of the corporation for purposes of limitation of liability. I think it is almost a foregone conclusion. Whoever is named as the designated person, his privity will definitely be considered that of the owner.

MR. PALMER:

Yes. Would you say, then, that perhaps some of the major issues thereafter will be whether or not the deficiency has a causal connection to the disaster? And perhaps if the managers have set up the proper system and have tried to have it enforced but the people on the scene do not actually conduct themselves in accordance with the regulation, would that not give the owners the defense that they tried to prevent this kind of thing and had it all laid out and there was negligence of somebody on the scene that did not execute?

MR. HEALY:

I think that's a separate issue. I'm talking about privity, actual privity of the designated person. His privity, I'm convinced, will be attributed to the corporation. But in the case of a seaman, or even a

ship's officer on the scene, his privity would not be considered the privity of the corporation. In this country it seems to be coming down to a question of whether the fault is that of shipboard personnel or shoreside personnel. If the fault was that of shoreside personnel, it is almost a foregone conclusion that limitation will be denied. The rule, as I understand it, is quite different in England.

* * *

PROFESSOR SWEENEY:

Well, good morning. The good news is that collision lawyers will not become obsolete despite scientific advance and technological developments. Excessive speed, fog, carelessness, ignorance, stupidity . . . they all will preserve the profession we love. My paper is a fantasy dealing with a future collision in the year 2025 in the English Channel. A new mega-ship a little bit smaller than an aircraft carrier carrying jumbo containers crosses the Atlantic in three days propelled on the open ocean by a new engine that still burns fossil fuel but is forced to operate on battery power near port cities because of new regulations to prevent air pollution. My vision is clouded as to the source of these antipollution measures—possibly a new part of the MARPOL Convention or possibly a new global warming treaty that sweeps maritime source pollution into all other major sources of pollution.

I believe, before we get into the open ocean, that towage and pilotage will probably change radically. Omnidirectional power sources may make harbor tugs and docking pilots obsolete except for the salvage after collisions and groundings. Compulsory pilots may also disappear as the Coast Guard assumes the direction of all vessel maneuvers into and out of harbors. Of course, initially the government lawyers will argue that vessel traffic control centers merely advise masters, who remain in command of their vessels. But eventually, one or two spectacular disasters accompanied by large numbers of private bills in Congress will persuade a hesitant Congress to assume liability for vessel traffic center negligence even as it penalizes master and vessel failures to comply with the direct orders of the vessel traffic control center. It does seem to me that privacy seems doomed in the presence of video cameras on the bridge, video cameras throughout the ship, as well as the omnipresence of black boxes, which we call voyage data recorders. Those black boxes will remove mystery and inscrutability from collisions. Instantaneous satellite communications will give the home office of the shipowner

the exact same information that is available to the master and watch officers on the bridge. This knowledge of the shipboard conditions in the home office, together with what we've already heard about the 1998 ISM Code, will make it difficult, if not impossible, to prove the absence of privity and knowledge, thereby eliminating shipowner limitation of liability.

By 2025, COLREGS will have been in force for almost fifty years, roughly the same length of time from the 1897 Rules of the road to the 1948 Safety of Life at Sea where we began the process of changing the rules of the road from the age of sail to the age of diesels. I do not envision major changes in COLREGS before 2025.

Our collision problem is loaded with navigational errors, most of which will be familiar to you. One change may come with respect to the human naked eye lookout. It seems that the helmsman or watch officer may fulfill the lookout function in an age of electronic charts and ARPA. Also, vessel traffic separation schemes will probably be mandated so that a vessel's presence in the wrong traffic lane will be an automatic fault. We do not envision any changes with respect to the crossing rules and collision avoidance.

So what we have set up for our audience is the problem of this collision, and we ask you to assess the percentages of fault. What kind of argument would you make for a fifty-fifty, what kind of argument for a two-thirds/one third or three-fourths/one-fourth? That's the question that I ask you, and my colleague Mr. Hayden will now ask me some questions.

MR. HAYDEN:

Well, Joe, let's assume that the situation you've depicted was a crossing situation. As such was the OLERON STAR, our vessel of the future, entitled or obligated to maintain its course and speed? Let's start with that simple question right there.

PROFESSOR SWEENEY:

Absolutely. Maintain course and speed. And I can't see any reason to change that rule.

MR. HAYDEN:

Was the OLERON STAR's alteration of course, the ten degrees to starboard that you have depicted at approximately 0430 appropriate under the circumstances?

PROFESSOR SWEENEY:

No, not enough. They should have made a course change of perhaps thirty to forty-five degrees so that it would become obvious to the approaching vessels.

MR. HAYDEN:

Well, if that course change of a minor ten degrees was not appropriate, what rules was it in violation of?

What COLREGS were violated by its alteration to starboard of ten degrees?

PROFESSOR SWEENEY:

Failing to maintain course and speed because the vessels were in sight at that time.

MR. HAYDEN:

Can that ten degrees starboard alteration be justified under COLREGS?

PROFESSOR SWEENEY:

No.

MR. HAYDEN:

What about its failure at the time since they were in sight of each other and approximately or somewhat less than three miles apart to use sound signals?

PROFESSOR SWEENEY:

Well, here we had a turn to starboard and no whistle signal. Of course, that's another statutory fault.

MR. HAYDEN:

Your beautiful scenario indicates if there was a lookout it was inadequate, and the use of ARPA and radar were both improper. Would that alone be a contributory fault on the part of the OLERON STAR?

PROFESSOR SWEENEY:

Yes. Now it seems the lookout requirement must be fulfilled and that would be a statutory violation. Of course, inattention on the bridge is always a violation of good seamanship.

MR. HAYDEN:

You have depicted a situation whereby the owners knew everything, knew everything because of the instantaneous reporting to home office. That means they would know course and speed. They would know weather conditions, speed and fog, and they would also have the ability to observe from the black box the voyage data recorder sometime later what the practices were on that bridge. In light of that, do you think that an owner will ever be able to show that the owner has exercised due diligence in manning or crewing or operating the vessel if the home office has instantaneous monitoring of what's going on and they do not counteract or correct what's being done on the bridge?

PROFESSOR SWEENEY:

I think the instantaneous monitoring is going to change the world. What I see in my problem, I had the instantaneous knowledge being communicated to the home office but nobody was home at the home office at the time of the collision.

JUDGE SEAR:

But if somebody is home, Joe, you're saying that limitation would never lie?

PROFESSOR SWEENEY:

I think limitation would not lie, sir, because the Supreme Court back in *The Linseed King* said that the ability to do something, to change the dangerous situation was enough. *The Linseed King* involved the corporate owner sending a letter to his masters saying do not operate in icy conditions in the river. There were icy conditions in the river. The ferry sank, and eighty people were killed. The Supreme Court found no possibility of limitation of liability because there was privity and knowledge in the operation.

So it seems to me that the possibility of control is going to make it less likely under the existing limitation law to achieve proof of the absence of privity or knowledge. That is, of course, the requirement

of the law: that the parties seeking limitation of liability prove the absence of privity and knowledge.

MR. HAYDEN:

Well, I think that the law as it currently stands in the States is if the owner interferes or tells the master what to do, the owner is going to be held at fault and there will be no limitation; *a la* the carrier in the Great Lakes where the port captain told them to run for shore, the ship ran for shore and capsized and killed everybody, and there was no limitation. The same thing will happen if they have instantaneous knowledge available to them and they do not act. If there's no one there to act and give instructions, they are going to be found responsible anyhow and without limitation.

JUDGE SEAR:

Isn't the situation on the scene somewhat different? The navigational decisions that have to be made are not made in a vacuum. They are made at the time that they exist, at the time that they transpire, and that can't be conveyed back to some other source.

MR. HAYDEN:

Well, an instantaneous alteration, of course, or a requirement of that nature, such as the blowing of a whistle, cannot be sent back home to get authorization, and then be given. But under the scenario presented by Joe, I think that you've got an owner who can monitor the fact that they are navigating in dense fog in the English Channel at the moment and they are still going full speed and they are not paying attention to what they're doing. We haven't got a lookout posted. We only have a single man on watch at the time.

Where do we go from there? The owner has to know the conditions if he's receiving instantaneous communications; not so much the instantaneous change of course in an extreme situation, but constant proceeding in fog or in a perilous situations the owner has to know it. He has the weather report right in front of him. He should know what's going on under this scenario.

But I think that we're going to run into another very, very serious situation when we get into the port safety authorities; where they start directing the movement of the vessels. What are we going to do with them? Who's going to assume responsibility? Joe, what happens if the vessel follows the "you are ordered to" requirement under port safety and the master does what he's told to by the port safety

authority? Who's got the liability when the collision occurs? Who's going to take it down to the bottom? Is the owner going to pay?

PROFESSOR SWEENEY:

Well, unless we change our laws radically, the in rem liability of the vessel will continue. The master may be criminally liable for failure to comply with the orders of the port safety authority. As I envision it, the government will initially reject the idea of imposing liability on itself, but it will eventually decide to assume that liability.

MR. HAYDEN:

But if you take a master proceeding anywhere where there's a port safety directive and he's ordered to do something and he does it, the government should have responsibility just like they do for the acts of an air traffic controller. When he makes a mistake, the government is responsible. The government steps in, and the government does pay. Why shouldn't they be responsible here?

PROFESSOR SWEENEY:

Well, the government had to be dragged into the question of responsibility from that first crash some forty years ago when the air traffic controller ordered two planes to land on the same runway at the same time. Air traffic controllers have been occasionally held liable under the existing law. I foresee that the same kind of principle would apply as the port safety directives begin to force masters to comply with the orders of the Coast Guard.

MR. HAYDEN:

Would the owner be responsible in personam as opposed to the vessel being responsible in rem? That might be a difference right there.

PROFESSOR SWEENEY:

That's a difference. I do not foresee in personam liability unless we change the statute, but the in rem liability would continue.

SPEAKER FROM THE FLOOR:

Joe, isn't it likely that in the handout, the diagram showing the collision would probably be an exhibit from the OLERON STAR, but that the exact same tracks might be used as an exhibit by the BISBY EXPRESS except that the boundary would be below the collision site.

Thus, there would be a great deal of discrepancy between both sides as to where the actual collision occurred, and that would complicate the question as to whether the vessels were in violation of the boundary?

PROFESSOR SWEENEY:

Yes, there would be considerable debate as to the actual site of the collision. I foresee in the future with the black box and with the constant patrol of the radar picture from the Dover headquarters that you would have information available for any court which would show the actual site of the collision in the eastbound lane; that the westbound ship was in the eastbound lane. I foresee that in the future that would be considered a statutory fault.

SPEAKER FROM THE FLOOR:

Why do you pick on the ten degree course change by the OLERON STAR as a fault? You stipulated that it was already driving with its left wheel on the line. Isn't it just doing something to place itself more properly in its traffic lane?

MR. BROWN:

I think the real problem with being at fault has to do with Rule 17(a)(2). By the time that course change is made, the vessels are in sight of each other; so therefore the regular crossing rules ought to apply. Under 17(a)(2) of the COLREGS, the so-called privileged or stand-on vessel—and I'll quote this—"may take action to avoid collision by her maneuver alone." That means that the stand-on vessel's action should be such as to result in avoidance of collision by her maneuver alone.

In that situation, a ten degree course change is not enough to avoid collision *by her maneuver alone*. It would have to be a hard course change, hard right. I think Joe said thirty to forty-five degrees. You might want to come right around another fifty or sixty degrees to make sure that the give-way vessel is not able to hit you, because if you're avoiding collision *by your maneuver alone*, you must take action that's drastic enough to accomplish that result, no matter what the give-way ship might do.

* * *

REPORTED BY:

Lisa Bode, CSR, Certified Shorthand Reporter, State of Louisiana

