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Establishing Fault in Collision Cases

NICHOLAS J. HEALY* AND JOSEPH C. SWEENEY**

I.

BURDEN OF PROOF, PRESUMPTIONS AND PERMISSIBLE INFERENCES

A. Collisions Between Moving Vessels

In collision actions, as in other tort cases, the burden of proof rests upon the party asserting a cause of action against another to establish its existence, and this burden never shifts.¹ In the usual collision case, the owner or operator of each vessel alleges fault on the part of the other; where both vessels have suffered damage, and the owner of one institutes an action against the other, it is rare that the other's owner does not file a counterclaim against the first vessel, or her owner, or both. In such a case, each owner has the burden of establishing a cause of action against the other.

In the case of a collision between two moving vessels, neither of which is shown to have committed a statutory fault, the burden of proof is normally met by evidence alone. However, as will be seen, in some collision cases presumptions and permissible inferences may be important factors in meeting the burden, e.g., when one vessel is stationary, or when one or both of the vessels are shown to have committed statutory faults.

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¹See the dissenting opinion of Holmes, C.J., in *The Victor*, 153 F.2d 200, 1946 AMC 431 (5th Cir. 1946).

B. *Collisions of Moving Vessels with Anchored, Moored and Grounded Vessels, and with Fixed Structures*

When a moving vessel collides with one that is properly moored and anchored, or aground, and complying with the applicable rules, e.g., those relating to the display of lights or shapes and the sounding of signals, there is a presumption of fault on the part of the moving vessel.² Similarly, there is a presumption of fault on the part of a moving vessel which collides with a fixed structure, such as a pier, a wharf, a bridge or a buoy.³

Some courts have held that the owners of the stationary vessel or fixed object must first prove compliance with any pertinent statutes or regulations before obtaining the benefit of the presumption,⁴ while others have held that it is for the owners of the moving vessel to establish non-compliance as a defense.⁵ It is submitted that the cases requiring the plaintiff to first establish compliance were correctly decided. It would not seem right, for example, to apply the presumption in favor of a vessel anchored in a fairway at night without displaying anchor lights.

In most cases, the question is not of major practical importance: the plaintiff will usually plead facts indicating compliance with the law, and will offer evidence in support of his allegations without waiting for the moving vessel's owner to attempt to prove violations on the part of the plaintiff.

C. *The Pennsylvania Rule*

The most frequently invoked "presumption" in collision cases is the *Pennsylvania Rule*—a rule called after the 1874 U.S. Supreme Court decision involving a vessel of that name.⁶ The case arose out of a collision in dense fog between the British Bark *Mary Troop* and the British Steamer *Pennsylvania*, off Sandy Hook, New Jersey. The bark sank, her master and five crew members were drowned, and her cargo was totally lost. In litigation brought by the cargo owners in England the Privy Council held that the collision resulted solely from

²The Oregon, 158 U.S. 186 (1895).

³See, e.g., *City of Boston v. The Texaco Texas*, 773 F.2d 1396, 1986 AMC 676 (1st Cir. 1985), holding that F.R.Evid. 307 does not affect the presumption.

⁴See *Rogers v. Saeger*, 247 F.2d 758, 1958 AMC 71 (10th Cir. 1957); *Willis v. The Tugs Tramp and Mars*, 216 F.Supp. 901, 1965 AMC 411 (E.D. Va. 1962).

⁵See, e.g., *Georgia Ports Authority v. Atlantic Towing Co.*, 1985 AMC 332 (S.D. Ga. 1983).

⁶86 U.S. 125 (1874).

the excessive speed at which the steamer was proceeding in the fog. While noting that the bark had been sounding a bell instead of the fog horn required by the rules for sailing vessels underway, and recognizing that the bark was at fault for so doing, the Privy Council found that the fault was not a contributing cause of the collision.⁷

Subsequent litigation in the United States between the two vessel owners, however, culminated in the Supreme Court decision holding both vessels to blame. In holding that the bark's statutory violation, as well as the steamer's excessive speed, contributed to the collision, the Court enunciated the now famous *Pennsylvania* Rule:

The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.⁸

In many cases the presumption of causation against a vessel violating a statute designed to prevent collisions is impossible to overcome, but there are instances where the offender is able to prove absence of causation. Thus, if two vessels are on crossing courses, those on the port hand vessel will be unable to see the starboard hand vessel's green side light, because the screening of that light will prevent it from showing across the vessel's bow so as to be visible from a vessel on her port side. Therefore, if the green light has burned out, and has not been replaced, the starboard hand vessel will be able to prove that the absence of the green light—a statutory violation—could not have contributed to a collision caused by the port hand vessel's failure to keep out of the way, as required by the starboard hand rule.⁹

The *Pennsylvania* Rule is applicable to violations of regulations issued pursuant to statutory authority,¹⁰ as well as to statutory

⁷The *Pennsylvania*, 28 L.T.R.N.S. 55 (1870).

⁸86 U.S. at 136.

⁹Rule 15, COLREGS and Inland Rules.

¹⁰See *Afran Transport Co. v. United States*, 435 F.2d 213, 1971 AMC 335 (2d Cir. 1972).

violations. It has been applied not only to collisions but to other casualties, such as strandings resulting in cargo damage.¹¹

Application of the rule to structures other than vessels was at one time a debatable question, but it is now plain that the rule applies to violations of statutes and regulations relating to the construction or operation of bridges and other fixed structures with which vessels may collide.¹²

Commencing in 1929 with the Second Circuit's two-to-one decision in *The Mabel*¹³ the courts have tended to interpret the *Pennsylvania Rule* realistically. In *The Mabel* a tug ran through an anchorage and collided with an anchored barge whose lights the tug contended she did not see because instead of the 15 feet required by the applicable statute, there was a difference of only three feet between the heights of the forward and after anchor lights. The tug further alleged that the statutory violation prevented the barge from being seen against lights on the shore. In exonerating the barge, the court said, "All things are indeed possible, but even in applying the [*Pennsylvania Rule*] we are limited to the reasonable probabilities."¹⁴

In *The Aakre*,¹⁵ the same court went even further, stating:

Indeed, however the *Pennsylvania Rule* was originally stated, the history of its application shows that it has done no more than shift the burden of proof with regard to causality.¹⁶

Citing *The Mabel*, the First Circuit stated, in *Seaboard Tug and Barge, Inc. v. Rederi AB/DISA*:¹⁷

We cannot believe that the Supreme Court in *The Pennsylvania* intended to establish as a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote. Indeed, our interpretation seems to be supported by the decision in *The Umbria*, 166 U.S. 404 (1897), and we do not see anything in *Lie v. San Francisco & Portland S.S. Co.*, 243 U.S. 291 (1917), that militates against it.

¹¹See, e.g., *The Denali*, 112 F.2d 952, 1940 AMC 877 (9th Cir. 1940). The Second Circuit, however, has limited application of the *Pennsylvania Rule* in other than collision cases. See, e.g., *In Re Marine Sulphur Queen*, 460 F.2d 89, 1972 AMC 1121 (2d Cir. 1972).

¹²*Dorrington v. City of Detroit*, 223 F. 232 (6th Cir. 1915).

¹³35 F.2d 731, 1929 AMC 1688 (2d Cir. 1929).

¹⁴35 F.2d at 732, 1929 AMC at 1690. (Emphasis added).

¹⁵122 F.2d 469, 1941 AMC 1263 (2d Cir. 1941).

¹⁶122 F.2d at 474, 1941 AMC at 1270. See also *Lind v. United States (The Abner Doubleday—The Mary)*, 156 F.2d 231, 1946 AMC 971 (2d Cir. 1945).

¹⁷213 F.2d 772, 775, 1954 AMC 1498, 1502 (1st Cir. 1954).

Notwithstanding the dictum in *The Martello*, 153 U.S. 64, 75 (1894), that the offending ship has the burden of showing that its statutory fault "could not by any possibility have contributed" to the collision, we nevertheless feel that in applying the rule of *The Pennsylvania* "we are limited to the reasonable probabilities."

The Fifth Circuit gave the rule a similar interpretation in *China Union Lines, Ltd. v. A.O. Anderson & Co.*:¹⁸

Appellants would have us give birth to a rule, that every vessel guilty of a statutory fault has the burden of establishing that its fault could not, by any stretch of the imagination, have had a causal relation to the collision, no matter how speculative, improbable or remote. *The Pennsylvania* does not go that far and this Court so stated in *Compania De Maderas v. The Queenston Heights*, 220 F.2d 120, 1966 AMC 1653 (5th Cir. 1955), cert. denied, 350 U.S. 824 (1955).¹⁹

Griffin advocates restricting application of the *Pennsylvania* Rule to navigational faults.²⁰ That eminent authority expresses doubt whether the rule was correctly interpreted in cases such as *The Denali*,²¹ where a divided court held it applicable to a violation of the "watch and watch" statute,²² requiring three licensed mates. However, as brought out in Zapf, *The Growth of the Pennsylvania Rule: A Study of Causation in Maritime Law*,²³ the rule has been applied in cases concerning violations of statutes and regulations such as the Load Line Act,²⁴ the Wreck Statute,²⁵ and a Coast Guard regulation requiring the owners of oil barges to notify the Coast Guard of leaks in cargo tanks.²⁶

When *Reliable Transfer* sounded the death knell of the old divided damages rule and replaced it with proportional fault, there was speculation that the *Pennsylvania* Rule would also be held defunct, along with the major-minor fault rule. While there are such suggestions in several early cases, it is now clear that the *Pennsylvania*

¹⁸364 F.2d 769, 1966 AMC 1653 (5th Cir. 1966).

¹⁹364 F.2d at 782, 1966 AMC at 1669.

²⁰See Griffin, *The American Law of Collision* 579 ("Griffin, Collision").

²¹Supra note 11.

²²Now 46 U.S.C. § 8104(d).

²³J. Mar. L. & Com. 521 (1976).

²⁴Now 46 U.S.C. §§ 5101-16. See *Petition of Long*, 439 F.2d 109, 1971 AMC 1147 (2d Cir. 1971). But see *India Supply Mission v. The Maru*, 459 F.2d 1370, 1972 AMC 1238 (2d Cir. 1972).

²⁵33 U.S.C. §§ 409, 411, 412, 414 and 415. See *Peoples Coal Co. v. Second Pool Coal Co.*, 181 F. 609 (W.D. Pa. 1910), aff'd, 188 F.2d 892 (3d Cir. 1911).

²⁶46 C.F.R. § 35.15-1. See *Commercial Transport Co. v. Martin Oil Service*, 374 F.2d 813, 1967 AMC 2185 (7th Cir. 1967).

Rule, although occasionally subjected to criticism, is still very much alive.²⁷

One of the rule's severest critics is Professor William Tetley, who traces its origins in his article, *The Pennsylvania Rule—An Anachronism? The Pennsylvania Judgment—An Error?*.²⁸ Professor Tetley points out that its continued adherence to the rule puts the United States out of step with the countries subscribing to the 1910 Collision Convention, which provides that "there shall be no legal presumptions of fault in regard to liability for collision."²⁹

In reaching its decision in *The Pennsylvania*, the Supreme Court cited § 29 of the British Merchant Shipping Amendment Act of 1862, which provided:

If in any case of collision it appears to the court before which the case is tried that such collision was *occasioned by the non-observance of any regulation* made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary.³⁰ (Emphasis added.)

Professor Tetley notes that the British Act cited by the Supreme Court in formulating the *Pennsylvania* Rule did not create a presumption of *causation*, but simply imposed liability when a collision was "occasioned by the non-observance of any regulation," i.e., when causation was first proved. In such a case, non-observance of the regulation shown to have been a cause of the collision was to be deemed a fault unless it could be established that the circumstances made a departure from the regulation necessary.

Professor Tetley further states that the British Merchant Shipping Act of 1873 adopted a presumption somewhat similar to the *Pennsylvania* Rule.³¹ Section 17 of that Act, which became § 419(4) of the

²⁷The cases so holding are reviewed in Peck, *The Pennsylvania Rule Since Reliable Transfer*, 15 J. Mar. L. & Com. 95 (1984).

²⁸13 J. Mar. L. & Com. 127 (1982).

²⁹International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, Brussels, Sept. 23, 1910 ("the 1910 Collision Convention"). The French text, the only official one, is reprinted in 212 Consol. Treaty Series, at 178. The English text appearing in Griffin, *Collision at 852-856* is a translation included in the 1911 Report of the American Delegation to the Secretary of State on the 1910 Diplomatic Conference at which the Convention was adopted. The official British Translation, Parliamentary Paper, Miscellaneous, No. 5 (1911), is reprinted in Marsden, *Collisions at Sea 891-894* (11th Ed., K. McGuffie, editor, 1961) ("Marsden, Collisions"). The American translation differs slightly in wording from the British. Id., at 891, note 2.

³⁰25 & 26 Vict. c.63 (1862).

³¹13 J. Mar. L. & Com. at 131.

Merchant Shipping Act of 1894,³² provided:

Where, in a case of collision it is proved to the court before which the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

It will be observed that unlike the 1862 Act, application of the 1873 Act was not expressly conditioned on a showing of causation. If a collision regulation was found to have been "infringed," the "infringement" was to be deemed a fault unless the circumstances made a departure from the regulation necessary. The *Pennsylvania* Rule, on the other hand, did not create a "presumption" of fault, but rather a "presumption" of causation. A violation of a safety statute is itself a fault, and a violation must first be proved before the *Pennsylvania* Rule may properly be applied as a substitute for evidence that the violation, i.e., the fault, was a cause of the collision.

In the relatively unusual case where special circumstances dictate a departure from a statute or regulation designed to prevent collisions, the departure is not a violation of the statute or regulation, and therefore the *Pennsylvania* Rule never begins to apply. Thus, if in a head-on situation Vessel A improperly alters course to port, A's statutory violation creates a special circumstance which may dictate a turn to port by Vessel B. B's port turn is a departure from COLREGS Rule 14, which provides that vessels meeting on reciprocal or nearly reciprocal courses should pass port to port, but it is not a statutory violation. Thus, the use of the term "infringement" in the 1873 British Act appears to be less accurate than the term "non-observance," used in the 1862 Act. Under the British provision, to escape liability the party whose vessel departed from the regulation was not required to prove that the departure could not have been a cause of the collision; he was simply required to prove that the departure from the regulation was necessary.

The United Kingdom is a party to the 1910 Collision Convention,³³ and in 1911 the British Parliament enacted the Maritime Conventions Act,³⁴ implementing the Convention, which, as stated, abolishes "legal presumptions of fault." One of the principal reasons given for

³²57 & 58 Vict. c.60 § 419(4) (1894).

³³See CMI 1990-91 Yearbook 86.

³⁴1 & 2 Geo. 5, c. 57.

the refusal of the United States to ratify the Convention was the inclusion of the provision in Article 6 abolishing "legal presumptions," which the U.S. authorities interpreted as meaning "presumptions" such as the "presumption" of causation under the *Pennsylvania* Rule.³⁵ This interpretation has been questioned. Thus, Benedict translates the term "presomptions legales," used in the official French text, as "statutory presumptions."³⁶ If this were an accurate translation, the Convention would not affect the *Pennsylvania* Rule, even if "fault" could be stretched so as to include, *inter alia*, "causation when statutory fault exists." The rule is the creature of the judicial, rather than the legislative branch. Benedict's view, however, differs from those of Griffin, Professor Tetley, and the Ninth Circuit Court of Appeals, and it is submitted that the latter authorities are correct.

Griffin points out that presumptions such as that of fault on the part of a moving vessel which strikes a stationary one are not rules of law or even evidentiary rules: "They merely express inferences of fact, based on experiences and probabilities, and their only effect is to put upon the vessel subject to the presumption the burden of going forward with evidence to show that in the particular case the inference is unwarranted. They do not alter the burden of proof."³⁷

After quoting Article 6 of the 1910 Collision Convention Griffin continues:

The meaning of this is not clear. It is inconceivable that the intent is to forbid a court to draw such inferences of fact as are illustrated above. The words just quoted are a translation from the original French text of the Convention; and the words "legal presumption" are very likely to be taken as the equivalent of the "presomption legale," which is defined in sec. 1349 of the Code Napoleon as "one which a special law attaches to certain acts or certain facts."³⁸

Professor Tetley explains:

France ratified the 1910 Brussels Collision Convention which at Article 6 Para. 2 abolished all legal presumptions of fault.

Although the abolition is part of French law, the text of the French National Law does not contain such a prohibition, for two reasons: a) the signing of an international convention is sufficient in French law to

³⁵Senate Executive Report No. 4, 76th Cong., 1st Sess. (1938).

³⁶Benedict, Admiralty § 620, at 246-251 (7th ed. 1989, M. Cohen, Editor) ("Benedict, Admiralty").

³⁷Griffin, Collision 43.

³⁸Id. at 44.

impose the stipulations of the international convention by preference on internal laws; b) a presumption such as the *Pennsylvania* Rule could not really exist in a civil law jurisdiction.

[T]he civil law only recognizes two presumptions, being those written in a text of law, and those which each trial judge draws from his appreciation of the facts of each case. The two presumptions are set out in article 1349 c.c. (France) and its equivalent, article 1238 c.c. (Quebec).

Article 1349 c.c. France provides: "Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu a un fait inconnu," i.e., "Presumptions are conclusions which the law or the magistrate draws from known facts in respect to unknown facts."

Article 1238 c.c. Quebec provides: "Presumptions are either established by law or arise from facts which are left to the discretion of the courts."

Articles 1353 c.c. France and 1242 c.c. Quebec are even more explicit.

Thus, France had no difficulty in abolishing this presumption of law which was never really honoured and was really an imposition from English law. However, the presumptions of fact which the judge alone decides from his appreciation of the facts, remain.³⁹

The one American case that has decided the precise issue rejects Benedict's view and reaches the same conclusion as Griffin and Professor Tetley. In *Ishizaki Kisen Co. v. United States*,⁴⁰ a Japanese hydrofoil and a small U.S. Army vessel collided in Kure Harbor, Japan. The owners of the hydrofoil sued in the U.S. District Court for the Northern District of California, and the United States filed a counterclaim. If navigation of the two vessels was governed by the International Rules, the hydrofoil was required to give way as the port hand vessel in a crossing situation. The Japanese Port Regulations, on the other hand, provided that "Miscellaneous Vessels must give way to other than Miscellaneous Vessels in harbors." However, the hydrofoil owners argued that the Army vessel failed to fly her international call sign, which the Japanese Port Regulations required to be flown by all vessels transiting Kure Harbor which were *not* "Miscellaneous" vessels. They further argued that this failure contributed to a mistaken belief on the part of the captain of the hydrofoil that the other vessel was a "Miscellaneous Vessel" and was required to give way. The trial court, placing on the hydrofoil owners the burden of proving that the violation contributed to the collision,

³⁹13 J. Mar. L. & Com. at 138-139.

⁴⁰510 F.2d 875, 1975 AMC 287 (9th Cir. 1975).

found that there was no evidence that the failure affected the judgment of the hydrofoil captain in any way.

On appeal, the hydrofoil owners contended that the district court should have applied the *Pennsylvania* Rule. In rejecting this contention, the Ninth Circuit Court of Appeals held that since the collision occurred in the territorial waters of Japan, it was governed by Japanese law. The court continued:⁴¹

[T]here is no showing that Japanese law ever contained a rule similar to the *Pennsylvania* Rule and, in any event, it is our view that any such rule would not have survived the Japanese adherence to the International Convention with Respect to Collisions, 1910

Nor should the *Pennsylvania* Rule here be considered a part of the procedural law of the forum. Were the Rule designed merely to shift to the violator of the statutory rule the burden of going forward with the evidence, its characterization as "procedural" would be proper. § 134 *Restatement, Conflict of Laws 2d* (1971). The Rule, however, does much more. Its effect has been described as follows:

"The shift in burden resulting from application of the *Pennsylvania* Rule is twofold. Not only must the violator meet the burden of producing evidence to counter the presumption of causation, but he must also persuade the trier of fact that his explanation should be adopted. In order to carry this burden of persuasion under the Rule as it was created, it appears that a statutory violator would have to demonstrate beyond all doubt that his violation did not cause the loss." (Citing *The Pennsylvania Rule: Charting a New Course for An Ancient Mariner*, 54 *Boston U. L. Rev.* 78, 80 (1974)).

* * *

Under the currently prevailing view with respect to the distinction between substance and procedure in the conflict of laws setting, rules designed to affect the decision of a particular issue are classified as substantive. *Restatement, Conflict of Laws 2d* (1971)

We conclude, therefore, that the *Pennsylvania* Rule is more akin to substantive law than to rules of procedure concerned primarily with judicial administration. The consequence is that it should not be applied to this case merely because it constitutes a part of the law of the forum

Our conclusion is not in conflict with the rather sketchy existing case law. We have been cited to no case involving a collision in foreign territorial waters in which a finding of liability was necessarily predicated on application of the *Pennsylvania* Rule. *Richelieu Navigation Co. v. Boston Marine Insurance Co.*, 136 U.S. 408 (1890), has at times been read as applying the Rule to the stranding of a vessel in foreign waters In *Richelieu*, a Canadian vessel stranded on an island in Canadian waters after failing to reduce its speed in fog and maintain a

⁴¹510 F.2d at 880-883, 1975 AMC at 292-296; footnotes by the court omitted.

lookout as required by Canadian law. Although the Supreme Court discussed the *Pennsylvania* Rule in *Richelieu*, a careful reading demonstrates that its finding of liability was based on a burden similar to the *Pennsylvania* Rule which was imposed by Canadian statute. See *The Pennsylvania Rule; Charting a New Course for an Ancient Mariner*, 54 Boston U. L. Rev. 78, 93 n. 91 (1974).

* * *

We believe that Article 6 [of the 1910 Collision Convention] is addressed to presumptions such as the *Pennsylvania* Rule without regard to whether they rest on judicial or legislative authority. Consistency in the interpretation of Article 6 requires this result because such presumptions in some nations may be contained in statutes while in others in the opinions and judgments of courts. The *Pennsylvania* Rule, for example, is a judge-made rule in the United States while in the United Kingdom its equivalent was contained in the Merchant Shipping Act of 1894, which was repealed shortly after the United Kingdom signed the International Convention. To interpret the Convention to require the repeal of a statutory presumption, but not one different in substance, derived from case law, irrationally enhances the source of the presumption at the expense of uniformity in the undertaking and application of the Convention.

It does not follow from this that Article 6 is intended to make inoperative all presumptions. Some, such as those which place upon a vessel the duty of going forward with the evidence, are not presumptions "in regard to liability for collision." They do not affect liability in the strong and direct way that the *Pennsylvania* Rule does. . . . The *Pennsylvania* Rule . . . establishes an almost insurmountable burden of proof that virtually insures that some liability will be imposed upon the ship that is charged with such a burden. It strains reason to insist that it is not a legal presumption of fault "in regard to liability for collision."

Summarizing, the following conclusions may be drawn from the authorities cited:

(1) The *Pennsylvania* Rule is not a procedural device, but a rule of substantive law; its application *vel non* should therefore generally depend on the law governing the other substantive aspects of the collision.

(2) The *Pennsylvania* Rule is a legal presumption, and such presumptions are abolished by the 1910 Collision Convention.

(3) Therefore, even where the Rule is part of the law of the forum state, in the absence of extraordinary supervening circumstances it should not be applied by the forum in the case of a collision governed by the substantive law of a state subscribing to the Convention, e.g., because the collision occurred in a harbor of that state, or because it occurred on the high seas and the vessels involved were of Convention countries.

It is submitted that the many critics of the *Pennsylvania* Rule are correct, and that it should be abolished. As Professor Tetley has explained, it is based on a false premise. In the United States, it has received varying interpretations among the circuits, and is therefore a hindrance to the cause of national uniformity in the maritime law. It is contrary to the 1910 Brussels Convention, so that its abolition would narrow the differences between U.S. collision law and that of the other major maritime countries remaining after adoption of the proportional rule by the United States in 1975. Whatever useful purpose may have been served by the Rule before *Reliable Transfer*,⁴² it is outmoded in a regime of law which permits the courts to apportion damages in accordance with the degree of fault chargeable to each of the colliding vessels.

D. *The Pennsylvania Rule and Improper Manning or Equipment*

Proof that a collision was caused by improper manning or equipment will of course subject a vessel to liability for collision damage.⁴³ What has not always been as clear, however, is whether proof of causation is required when a statute or regulation relating to manning or equipment has been violated. Although, as stated, Griffin expresses the view that the *Pennsylvania* Rule should be applied only to violations of statutes and regulations relating to navigation,⁴⁴ most of the recent cases have interpreted the Rule more broadly.

The leading case on the application of the *Pennsylvania* Rule to violations of statutes and regulations relating to vessel equipment is *The Chickasaw*.⁴⁵ In that case a vessel ran aground on Santa Rosa Island, off the coast of Southern California, and her navigational equipment, including her radio direction finder and fathometer, was found to have been in deplorable condition. The district court, in denying both exoneration and limitation of liability, rested its decision on negligence of the master in failing to check the fathometer after being notified that it was defective, and privity of the owner, who had delegated the entire responsibility for vessel repairs in the Far East to the master.

⁴²United States v. Reliable Transfer Co., 421 U.S. 397, 1975 AMC 541 (1975).

⁴³See *Chamberlain v. Ward*, 63 U.S. 548 (1859); *The J. Rich Steers*, 228 F. 319 (2d Cir. 1915); Griffin, *Collision* 547-550.

⁴⁴Griffin, *Collision* 579.

⁴⁵*Waterman Steamship Co. v. Gay Cottons (The Chickasaw)*, 414 F.2d 724, 1969 AMC 1682 (9th Cir. 1969).

The decision was affirmed on appeal, but on the ground that the vessel was in violation of a statute requiring an efficient radio direction finder, properly adjusted and in operating condition. After citing its decision in *The Denali*,⁴⁶ where the *Pennsylvania* Rule was applied to a vessel that was improperly manned, the Ninth Circuit continued:

Although the *Pennsylvania* Rule has been applied mainly in "rules of the road" and "manning" cases, it is also applicable to failure to provide equipment required by statute.

* * *

"[T]he navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transfer unseaworthiness into bad seamanship." *Maria*, 91 F.(2d) 819, 824, 1937 AMC 934, 943 (4th Cir. 1937).

We hold that the court's finding that the stranding was not caused by the ship's failure to have an efficient radio direction finder is, in the light of the *Pennsylvania* Rule, clearly erroneous.⁴⁷

Like the Ninth Circuit, the Second⁴⁸ and Fourth⁴⁹ Circuits have held the *Pennsylvania* Rule applicable where there has been a violation of a statutory manning requirement.

E. Failure to Call Material Witnesses

If the owner or operator of a colliding vessel fails to call a material witness within his control, without a satisfactory explanation, the court may draw an inference that if he had been called the witness's testimony would have been adverse.⁵⁰ Thus, in most deep sea collision cases, the practice is to call the master, whether or not he was on the bridge at the material times, the watch officer, the helmsman, the lookout and the engineering officer on duty in the engine room, if they are still in the owner's employ. The oiler on watch usually testifies if there is an issue relating to the receipt or execution of orders from the bridge to the engine room, as recorded in the engine bell book. In the case of a fully automated vessel the

⁴⁶Supra note 11.

⁴⁷414 F.2d at 737, 1969 AMC at 1699-1700.

⁴⁸The *New York Marine No. 10*, 109 F.2d 564, 1940 AMC 347 (2d Cir. 1940). In the context of tort law a similar problem frequently occurs when a criminal statute admitting no defenses is applied in a civil litigation to establish the standard of care. In these cases courts may conclude that violation of the statute was reasonable, if made to avoid more serious injury or damage. See *Tedle v. Ellman*, 280 N.Y. 124, 19 N.E.2d 987 (1939).

⁴⁹The *City of Baltimore*, 282 F. 490 (4th Cir. 1922).

⁵⁰The *New York*, 175 U.S. 187 (1899).

number of witnesses to be called will of course be fewer; if the engine is controlled from the bridge, and the vessel is on automatic pilot, the watch officer and the helmsman-lookout may be the only material witnesses in addition to the master.

No adverse inference will be drawn against a party for failing to call a witness who is no longer in his employ. Thus, in *The Merry Queen-The Tug Minerva and Tow*,⁵¹ the Third Circuit held that a showing that the lookout was no longer employed by the party rebutted the inference that if called his testimony would have been adverse. Similarly, the court held that no unfavorable inference should be drawn for failing to call the helmsman, who was shown to be in an institution, suffering from a nervous breakdown.

F. Failure to Produce Log Books and Other Records

An unexplained failure to comply with a request for the production of a log book, bell book, or other material record, like an unexplained failure to call a material witness within the party's control, will give rise to an unfavorable inference.⁵²

There is surprisingly little case law, however, on the effect of the destruction of preliminary writings, such as rough notes made before entering the events leading up to a collision in the vessel's log. It is submitted that the practice should be frowned upon, but it was excused in the one case found which deals with the precise problem.⁵³

G. Alterations and Erasures in Log Books and Other Records

In a leading case on this subject, *The Chicago-The Silverpalm*,⁵⁴ the Ninth Circuit stated the rule as follows:

The alteration of log books by erasure and substitution . . . has long been condemned in courts of admiralty. It not only casts suspicion on the whole case of the vessel, but creates a strong presumption that the erased matter was adverse to her contention.⁵⁵

⁵¹202 F.2d 575, 1953 AMC 482 (3d Cir. 1953).

⁵²*Cary-Davis Co. v. United States*, 8 F.2d 324, 1925 AMC 1630 (1925); *Griffin*, Collision 636-637.

⁵³*Staley Mfg. Co. v. Porto Rico Lighterage Co.*, 1970 AMC 2152 (E.D. La. 1970). In that case there was testimony that it was customary on tugs to destroy rough notes after entering their contents in the log. But see *The Eureka*, 84 F. 2d 496, 1936 AMC 1179 (9th Cir. 1936).

⁵⁴94 F.2d 754, 1937 AMC 1427 (9th Cir. 1937).

⁵⁵94 F.2d at 762, 1937 AMC at 1441-42.

If an error has been made in a log book or other record, it should be corrected by drawing a line through the erroneous words in such a manner as to leave the original language legible.⁵⁶

H. Failure to Stand By

Title 46 U.S. Code § 2303 requires the master or individual in charge of a vessel involved in a marine casualty to render necessary assistance to save persons from danger caused by the casualty, so far as he can do so without serious danger to his own vessel or those on board. He is also required to give his name and address and the identification of his vessel to the master or person in charge of any other vessel involved in the casualty, and to injured persons and the owners of any damaged property. A violation of this provision carries a fine or imprisonment for not more than two years, and renders the vessel liable *in rem* to the Government for the fine.

Section 2303 is based upon the Stand-by Act of 1890,⁵⁷ which, however, related only to collisions. The Act was repealed in 1983, when portions of Title 46 were recodified.⁵⁸ After setting forth the obligations of the masters of the colliding vessels to render assistance and exchange information it provided:

If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

No similar provision is contained in § 2303, and the rebuttable presumption created by the Stand-by Act has thus been abolished.⁵⁹ The result is that in this respect U.S. law is now in accord with that of the 1910 Collision Convention countries. As stated previously, Article 6 of that Convention provides that there shall be no legal presumptions of fault in regard to liability for collision. Article 8 is very similar to § 2303, except that it applies only to collisions; it requires the master of each colliding vessel to assist the other vessel, her passengers and crew, as far as he can do so without serious

⁵⁶The Eureka, *supra* note 53.

⁵⁷26 Stat. 425, Sept. 4, 1890, 33 U.S.C. former §§ 367-368. The text is contained in Griffin, Collision 858.

⁵⁸Pub.L. 98-89, 97 Stat. 599, Aug. 26, 1983.

⁵⁹See Answers of the Maritime Law Association of the United States to the Comité Maritime International's Questionnaire on Implementation of International Conventions, 18 J. Mar. L. & Com. 589 (1987).

danger to his own vessel, her passengers and crew, and also requires an exchange of identification. Article 8 then provides:

A breach of the above provisions shall not of itself impose any liability on the owner of a vessel.

The British Maritime Conventions Act of 1911, implementing the Convention, contains a similar provision.⁶⁰

II. ADMISSIONS IN PLEADINGS

Fault may of course be established by admissions in pleadings. On occasion, the owner of one colliding vessel may confess fault but litigate an issue of contributory fault on the part of the other vessel, or the damage issues, or the right to limit his liability. Likewise, without conceding fault, the owner may admit facts which the court finds constitute fault.

Fed.R.Civ.P. 36(a) entitles a party to serve upon any other party a written request to admit the truth of any matters within the scope of Rule 36(d), relating to statements or opinions of fact, or the application of law to fact, including the genuineness of any documents described in the request. Rule 36(b) provides that any matter admitted under the rule "is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

Under Fed.R.Civ.P. 8(d), averments in a pleading to which a responsive pleading is required, other than averments as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted are taken as denied or avoided.

Admissions and agreements made at pre-trial conferences and incorporated in pre-trial orders in accordance with Fed.R.Civ.P. 16 may of course be used to establish fault on the part of one or both of the vessels involved in a collision.

III. JUDICIAL NOTICE

Rule 201 of the Federal Rules of Evidence governs judicial notice in all proceedings in the federal courts, including admiralty proceed-

⁶⁰See § 4(2) of the Act, 1 & 2 Geo. 5, c. 57; Marsden, *Collisions* 422-444.

ings, with a few immaterial exceptions. Paragraph (b) of the rule defines a judicially noticed fact as "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

A case illustrating the first type is *Mid-America Trans. Co. v. National Marine Service, Inc.*,⁶¹ where the court took judicial notice of the fact that the stretch of the Mississippi River between St. Paul, Minnesota, and St. Louis, Missouri, "is navigated daily in complete safety by many vessels."

An example of the second type is *United States v. The Monsoon*,⁶² an oil pollution case, where Chief Judge Bailey Aldrich of the Court of Appeals for the First Circuit said that an admiralty court must take judicial notice of "a seaman's ready knowledge of tides and currents."⁶³

IV.

EVIDENCE ADMISSIBLE IN COLLISION LITIGATION

A. Introduction

At the outset it is necessary to take note of the historical support for the idea that admiralty courts were not "imprisoned by procedural niceties"⁶⁴ and were free to adapt themselves to whatever evidentiary rules and procedures would adduce the facts necessary for decision.⁶⁵ This proposition can be explained by the facts that during the period from 1789 to 1845 United States courts sitting in admiralty fashioned their own rules, and that in the period from 1845 to 1966 the Supreme

⁶¹497 F.2d 776, 780, 1974 AMC 1943, 1948 (8th Cir. 1974).

⁶²433 F.2d 95, 1971 AMC 269 (1st Cir. 1970).

⁶³433 F.2d at 98, 1971 AMC at 271.

⁶⁴See *Levinson v. Deupree*, 345 U.S. 648 (1953). The quoted language of Frankfurter J. at 651, is useful to convey the relaxation of land law rules and procedures which have been tolerated by the Supreme Court. At issue in *Levinson* was the applicability of a state statute of limitations to a state-created wrongful death claim (pre-*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 1970 AMC 967 (1970)). Not only is the rule in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), not applicable to federal courts sitting in admiralty, but the analogy to the time bar could be rejected under the laches doctrine.

⁶⁵A limitation on that tolerant and relaxed attitude was struck in *Miner v. Atlass*, 363 U.S. 641, 1960 AMC 1287 (1960), invalidating local admiralty rules for discovery-type depositions, since only depositions *de bene esse* were permissible to preserve testimony. In 1961 the Supreme Court adopted a new Rule 30A(a) for examinations before trial in admiralty for purposes of discovery.

Court adopted minimal rules applicable solely on the admiralty side of the federal courts.⁶⁶ Thus, Judge Benedict could say:

Courts of admiralty are not bound by all the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved.⁶⁷

It should be noted, however, that except in certain Great Lakes cases, trials in admiralty were always by judge alone (pre-*Romero*)⁶⁸ and appeals were regarded as trials *de novo*, at which new evidence could be taken (pre-*McAllister*).⁶⁹ It was undoubtedly because of the absence of a jury that the courts found it unnecessary to adopt common law rules of evidence in admiralty cases.

Two dramatic changes have affected the tolerant and relaxed attitude of the past, so that procedural cases before 1966 and evidentiary cases before 1975 must be used with caution as precedents. The changes are the unification of the Supreme Court General Admiralty Rules and the Federal Rules of Civil Procedure in 1966,⁷⁰ causing the disappearance of the separate admiralty "side" of the federal district courts (with its own docket and its own terminology), and the adoption of the Federal Rules of Evidence in 1975.⁷¹ Even after 17 years it does not appear that evidentiary hearings have become more technical under the Federal Rules of Evidence than under the tolerant and relaxed attitudes of the district courts when sitting in admiralty before their adoption. The statement made by Griffin in 1949 still holds true:

In admiralty cases, where there is no jury, doubtful evidence should be received subject to objection "unless, indeed, it be so utterly irrelevant or immaterial that there could not possibly be any doubt about it" . . . in order that the appellate court may have the evidence

⁶⁶The Supreme Court Admiralty Rules, 44 U.S. IX (1845). The Court acted under the rule-making power granted by the Congress in 1842 (Act of August 23, 1842, c. 188 § 6; 5 Stat. 518 (R.S. §§ 862, 917)).

⁶⁷The *J.F. Spencer*, 13 F. Cas. 614 (E.D.N.Y. 1869) (No. 7,315), quoted by successor judges of that court in *The Boskenna Bay*, 22 F. 662, 667 (S.D.N.Y. 1884) (Brown, J.), and *The Rosalia*, 264 F. 285, 289 (2d Cir. 1920) (Hough, J.).

⁶⁸*Romero v. International Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959).

⁶⁹*McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 1958 AMC 1754 (1958).

⁷⁰The Supreme Court Admiralty Rules were rescinded, effective July 1, 1966; the Supplemental Rules for Certain Admiralty and Maritime Claims were added to the Federal Rules of Civil Procedure on Feb. 28, 1966, and became effective July 1, 1966.

⁷¹See generally H.R. Rep. No. 93-650, 93d Cong. 1st Sess. (1974).

before it, if it should consider it admissible.⁷²

B. *Depositions "de bene esse"*

Despite the common law preference for oral testimony before the fact-finder at the trial and the relatively few exceptions to the hearsay rule dealing with recorded testimony, the High Court of Admiralty in England inherited the "civil law" traditions of the courts with which it was associated in Doctors' Commons, favoring written testimony and evidentiary hearings at intervals over a prolonged period, since juries were not used. The Admiralty Court also recognized the perils of the sea and the likelihood that oral testimony by mariners at the time of trial would be impossible, since the mariners might be absent on long voyages or might have perished in disasters at sea, which were then all too frequent. Accordingly, depositions of seagoing witnesses were commonly taken in the English Admiralty as part of the custom and usage of the sea. Depositions of mariners "to preserve testimony" have traditionally been referred to as "*de bene esse*" (literally "as being good" (for the time)), or as taken "*provisionally*," meaning that the testimony has been preserved lest the witnesses later be unavailable to testify. Since the purpose of depositions *de bene esse* was preservation of testimony, the deposition could be taken, on notice to the opponents, by the party who might wish to use it. Traditionally it was not considered as part of discovery of the opponent's case.⁷³

The first Congress of the United States, possibly influenced by the admiralty proctors in their midst, enacted the "*de bene esse*" deposition statute in 1789 as part of the first Judiciary Act. It provided that the testimony of witnesses living at a distance from the place of trial greater than 100 miles, or bound on a voyage to sea, or about to leave the United States, or about to be at a distance greater than 100 miles from the place of trial, could be taken by deposition under oath before various federal and state authorities, on notice to the opposing party, unless urgent necessity would justify a judge's ordering the deposition without notice.⁷⁴ The 1789 legislation also provided for the

⁷²Griffin, Collision 623, citing *Minnesota S.S. Co. v. Lehigh Valley Transp. Co.*, 129 F. 22, 30 (6th Cir. 1904). The last phrase of the quotation reflects the former practice, when admiralty appeals were trials de novo.

⁷³See *Miner v. Atlass*, supra note 65.

⁷⁴Act of Sept. 24, 1789, c. 20 § 30, 1 Stat. 88, subsequently amended by Act of Mar. 1, 1817, c. 30, 3 Stat. 350; Act of Feb. 26, 1853, c. 80 § 3, 10 Stat. 618; Act of July 29, 1854, c. 159 § 2, 10 Stat. 315, and Act of May 9, 1872, c. 146, 17 Stat. 89.

admissibility of the deposition at trial (it having been taken down in writing and *subscribed* by the deponent) if the court was satisfied that the witness was then dead, outside the United States, more than 100 miles from the place of trial, or unable to attend the trial by reason of age, sickness, bodily infirmity or imprisonment.⁷⁵

The 1789 statute passed into the Revised Statutes,⁷⁶ was subse-

⁷⁵Act of Sept. 24, 1789, c. 20 § 30, 1 Stat. 88.

⁷⁶R.S. §§ 863-865, subsequently renumbered as §§ 1472-74; also amended by Act of March 9, 1892, 31 Stat. 182. The 1874 revision preserved *de bene esse* depositions at law only, although under earlier versions they could be used at law and in equity as well as in admiralty. By a subsequent revision, R.S. §§ 863-865, as amended, they became applicable only in admiralty proceedings.

R.S. §§ 863-865, not subsequently repealed, although superseded, are reproduced here from the notes preceding Chapter 117 (§§ 1781-84) of Title 28 U.S.C.A.—“Evidence; Depositions”: *Depositions in Admiralty Cases*. Revised Statutes, §§ 863-865, as amended, which relate to depositions *de bene esse*, when and how taken, notice, mode of taking, and transmission to court, provide as follows:

Sec. 863. The testimony of any witness may be taken in any civil cause depending in a district court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

Sec. 864. Every person deposing as provided in the preceding section [R.S. § 863] shall be cautioned and sworn to testify the whole truth, and carefully examined.

His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. (As amended May 23, 1900, c. 541, 31 Stat. 182.)

Sec. 865. Every deposition taken under the two preceding sections [R.S. §§ 863, 864] shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it

quently codified in Title 28⁷⁷ and was included in the General Admiralty Rules of the Supreme Court.⁷⁸ It was finally included in the Federal Rules of Civil Procedure,⁷⁹ where it remains as Rule 30(b)(2).⁸⁰ It is not, however, part of the 1975 Federal Rules of Evidence. Accordingly, depositions of unavailable mariners which have been taken, on notice, either for the purpose of preservation of testimony or for discovery may be admitted in evidence at trial.⁸¹

appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.

R.S. §§ 863-865, as amended, quoted above, were applicable to admiralty proceedings only. Proceedings in bankruptcy and copyright are governed by Rules 26 et seq. of the Federal Rules of Civil Procedure. See also General Orders in Bankruptcy Nos. 37 and 38, following § 53 of Title 11 (Bankruptcy) and Rule 1 of the Copyright Rules of Practice, following § 101 of Title 17 (Copyrights).

By the unification of the Supreme Court Admiralty Rules and the Federal Rules of Civil Procedure, R.S. §§ 862-865 have been superseded. Rules 26 and 32, Fed. R. Civ. P., now apply to all civil actions. See *Republic of France v. Belships Co.*, 91 F.Supp. 912, 1950 AMC 1625 (S.D.N.Y. 1950). See also *Application of A. Pellegrino & Son*, 11 F.R.D. 209 (S.D.N.Y. 1950).

⁷⁷28 U.S.C. §§ 639-641 (1948). See *Standard S.S. Co. v. United States*, 126 F.Supp. 583, 1955 AMC 104 (D. Del. 1954). See also former § 1781 of Title 28 U.S.C. (1948).

⁷⁸Former Supreme Court Admiralty Rule 32C. In *Miner v. Atlass*, supra note 65, 363 U.S. at 644-645, 1960 AMC at 1270-71, the Supreme Court accepted the view that admiralty depositions under this rule were not available for discovery purposes, extending the prohibition to local admiralty rules which purported to authorize depositions for discovery purposes. 363 U.S. at 651-652. The Supreme Court Admiralty Rules were amended in 1961, before those rules were rescinded in 1966.

⁷⁹Fed. R. Civ. P. 32(a)(3), applicable to discovery and testimony at trial, provides:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition.

⁸⁰Fed. R. Evid. 804(a)(5) requires the party seeking the admission of deposition testimony to show inability to procure attendance through process or other reasonable means.

In *Cary v. Bahama Cruise Lines*, 864 F.2d 201, 1989 AMC 852 (1st Cir. 1988), the Court of Appeals held that the trial court had not abused its discretion in admitting deposition testimony of crew members who were at sea at the time of trial, even though they remained employees of defendant. The court concluded that the testimony was admissible under Fed. R. Civ. P. 32, and distinguished "procuring absence" from "doing nothing to facilitate presence." There was no showing that the employees had been concealed or deliberately removed. See also *Complaint of E.M. Queeny*, 752 F.2d 874, 1986 AMC 74 (3d Cir. 1986).

⁸¹See Fed. R. Civ. P. 32.

*C. Documentary Evidence: Business Records Aboard Vessels
(Logbooks and Other Records of Regularly Conducted Activities)
(Fed.R.Evid. 803(6)).*

(1) *Relevance and materiality.* Fed.R.Evid. 401 sets up a broad rule that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without [it]" is relevant.⁸² Further, by Rule 402, all relevant evidence is admissible unless otherwise provided.⁸³

(2) *Prior evidentiary problems.* Griffin on Collision reflects the narrow common-law view prevailing in 1949 that logbooks were admissible *against* the vessel keeping them, but as they were considered "self-serving" documents they could not be offered *for* the vessel, although witnesses' recollections could be refreshed with them.⁸⁴

Griffin also gives a very narrow reading to the 1936 Statute on Admissibility of Logbooks,⁸⁵ noting that a collision narrative would not be admissible, whereas "entries customarily made with respect to navigation, engine orders, etc." would be admissible.⁸⁶

(3) *Modern rules on admissibility.* The Federal Rules of Evidence now provide a number of justifications, under the exceptions to the hearsay rule, for the admissibility of log books, in addition to the principal exception for business records under Fed.R.Evid. 803(6). These other exceptions are:

- (a) Present sense impressions;⁸⁷
- (b) Regularly conducted activity;⁸⁸
- (c) Absence of an entry in records of regularly conducted activity;⁸⁹
- (d) Public records and reports;⁹⁰

⁸²Fed.R.Evid. 401.

⁸³Fed.R.Evid. 402.

⁸⁴Griffin, Collision 635-636.

⁸⁵49 Stat. 1561, 28 U.S.C. § 695 (1982). See also 28 U.S.C. § 1732 (1982).

⁸⁶Griffin, Collision 636. Griffin, however, noted that the admissibility of logbooks did not appear to have been settled by the courts as of the time he wrote (1949). See, however, *International Produce v. The Frances Salman*, 1975 AMC 1521 (S.D.N.Y. 1975), and *Texas Eastern Transmission Corp. v. Garber Bros., Inc.*, 494 F. Supp. 832, summarized at 1982 AMC 302 (E.D. La. 1982).

⁸⁷Fed.R.Evid. 803(1).

⁸⁸Fed.R.Evid. 803(6).

⁸⁹Fed.R.Evid. 803(7).

⁹⁰Fed.R.Evid. 803(8).

(e) Absence of public record or entry.⁹¹

The older rules for admissions against interest⁹² and *res gestae* or spontaneous utterances⁹³ may also be available to justify the admission of logbooks.

(4) *Categories of logbooks customarily maintained on merchant vessels.*

(a) *The official log (smooth copy).* This mandated official record is *not* usually written concurrently with the events which it describes but is prepared from materials contained in other, unofficial logs. Failure to preserve the contemporaneous records in unofficial logs and notebooks may give rise to adverse inferences.⁹⁴

(b) *Other logbooks and similar records customarily carried on merchant vessels.* These are the following: rough deck log; maneuvering order book; bridge bell book; navigator's log book; engine room bell book; radio log; bridge to bridge radiotelephone log (required by 47 C.F.R. § 83.368). All of these are admissible as business records or under the broad list of exceptions to the hearsay rule.⁹⁵ These records may not be maintained on board a vessel indefinitely and owners' requirements will vary as to their preservation. After two or three years it can be expected that these records will have been sent to the owners or destroyed in due course.

(5) *Logbooks customarily carried by U.S. Navy and U.S. Coast Guard Vessels.* These include the rough deck log; smooth deck log; junior officer of the deck log—maneuvering orders; bridge engine order book; navigator's log book; first lieutenant's log book; Captain's night order book; combat information center (CIC) log; engine room bell book; message log.

(6) *Automatic record-keeping devices.* The previous discussion makes two assumptions: (1) that the bridge does not control the engine room directly; (2) that there is no automatic gyro compass recorder or other automatic record of courses, speeds and times (the equivalent of the "black-box" of aviation lore). It should be noted, however, that while such automatic recording devices are not now

⁹¹Fed.R.Evid. 803(10).

⁹²Fed.R.Evid. 804(b)(3) and (5).

⁹³Fed.R.Evid. 803(2).

⁹⁴See Section IF, *supra*.

The official log of a United States flag merchant vessel is deposited with the U.S. Coast Guard at the destination port where the shipping articles are closed out.

⁹⁵See Federal Rules of Evidence cited *supra* in notes 87-91.

mandated, they are becoming increasingly common and the recording devices and their products are admissible in evidence.⁹⁶

(7) *Notebooks in frequent use as business records.* Among these are the chief officers' notebook (or formal logbook), containing principally cargo loading plans and other stability information; navigator's notebooks; the boatswain's notebook; quartermaster's notebook (on U.S. Navy and U.S. Coast Guard vessels); electrician's notebook; electronic navigation notebook; deck notebook (first lieutenant's notebook).

(8) *Other documents that may be pertinent in a collision case.* General documents include navigational charts; dead reckoning computations (Loran and Decca); maneuvering solutions (plots); radar, sonar and fathometer notebooks, plots and traces; cargo loading plans; classification society certificates. Documents concerning personal injuries resulting from collisions, including the Medical Officer's log (if any), and medical treatment records.

(9) *The master's protest.* Laws or customs in many countries require the master (or senior surviving officer) of a vessel in collision to prepare a document giving the general details of the collision, including the vessels' names, and the location, time and date of the collision, within a very short time after its occurrence. This document may trigger the running of the statutory limitation period in some legal systems and may have great weight in subsequent official investigations. It also serves to notify hull and P&I insurers of the possibility of claims under the vessel's insurance. This document has no special legal position in the United States, but it would be admissible, at least as a business record, and possibly as a public record or an admission against interest, although it has been characterized as unreliable because of its self-serving nature.⁹⁷

⁹⁶Cf. *The Statute of Liberty*, [1968] 1 Lloyds Rep. 429 (Adm. Div. 1968), where defendant argued that a mechanically recorded film of radar pips or echoes was inadmissible because they were produced without human intervention and therefore did not come within an exception to the hearsay rule. The film was admitted on the analogy of a tape recorder or any camera. See also *Burgess v. The Tamano*, 1975 AMC 2174 (D. Me. 1975), where the court noted that course recorder tapes need not be given more weight than other evidence, since they are not capable of highly precise interpretation. It should be noted that photographs with date and time affixed are often made of radar screens in vessel traffic control centers around the world. Cf. *Akron Shipping Co. v. The Militos*, 1975 AMC 1717, 1722-23 (S.D.N.Y. 1975):

Since there was no proof that failure to use the course recorder contributed to the collision, nor was there any proof that defendant was required under applicable regulations to use the device, defendant's failure to use the course recorder was of no consequence.

⁹⁷*Id.*, 1975 AMC at 1724. See generally *Newark S.B. Co. v. The Tug Cumeo*, 1941 AMC 1492 (E.D.N.Y. 1941).

(10) *Business records, generally.* The broad scope of this exception to the hearsay rule is still being developed by the courts and as of this writing (1992) it is not yet possible to conclude whether the effect of the Federal Rules of Evidence will be to imprison admiralty within procedural niceties.⁹⁸ But even if the record itself is held

⁹⁸Cases decided under Fed.R.Evid. 803(6) which seem to broaden the admissibility rules are the following:

Fernandez v. Chios Shipping Co., 542 F.2d 145, 1976 AMC 1780 (2d Cir. 1978) (testimony by carrier's cargo claims manager that marine surveyors' reports as to cargo's condition and stowage were ordered and received in the regular course of the carrier's business made the reports admissible as business records under Fed.R.Evid. 803(6); *Morrison Grain v. Utica Mutual Ins. Co.*, 632 F.2d 424, 1982 AMC 658 (5th Cir. 1982) (an ocean bill of lading is entitled to probative weight and is admissible even against third parties because it records a regularly conducted activity and constitutes an important commercial document which is relied upon by sellers, buyers, and banks everywhere; clean on board bill of lading adequately satisfied assured's burden of proving cargo's good condition prior to attachment of marine cargo policy); *Liner v. J.B. Talley & Co.*, 618 F.2d 327, 1982 AMC 2693 (5th Cir. 1982) (admission of business records into evidence through a witness unfamiliar with recordkeeping procedure was harmless error); *Capital Marine Co. v. The Roland Thomas*, 719 F.2d 104, 1984 AMC 905 (5th Cir. 1984) (in action on a note secured by a preferred ship mortgage, mortgagee properly established the amount due by introducing computerized business records, since they provided the necessary assurances of accuracy required for admissibility under Fed.R.Evid. 803(6)); *Saks International Inc. v. The Export Champion*, 817 F.2d 1011, 1987 AMC 1899 (2d Cir. 1987) (vessel's mate testified that it was customary for shoreside stevedores to prepare loading tallies and for the vessel to rely on them in issuing bills of lading; this foundation adequately supported trial judge's conclusion that the tallies were sufficiently reliable to justify their admission into evidence under Fed.R.Evid. 803(6) as business records); *Bergen v. The St. Patrick*, 816 F.2d 1345, 1987 AMC 2024 (9th Cir. 1987) (admission of fishing vessel's earning records in the absence of any testimony by the bookkeeper who prepared them was within trial judge's discretion under Fed.R.Evid. 803(6)); *United States v. Farrell*, 1982 AMC 1904 (D. Md. 1982) (survey reports made and signed by Lloyd's agent in the normal course of business shortly after cargo was discharged at destination are admissible under Fed.R.Evid. 803(6)); *Black Sea & Baltic General Ins. Co. v. The Hellenic Destiny*, 575 F.Supp. 685, 1984 AMC 1055 (S.D.N.Y. 1984) (Fed.R.Evid. 803(6) permits documents to be admitted into evidence if deemed sufficiently trustworthy, and magistrate did not err in accepting permits and commercial invoices where witnesses testified that they had been received in the ordinary course of business; it was not necessary for the invoices to have been prepared by the witnesses testifying as to their authenticity); *Kansas Packing Co. v. The Lash Italia*, 1984 AMC 277 (S.D.N.Y. 1984) (under Fed.R.Evid. 803(6) a bill of lading is admissible under the business records exception to the hearsay rule; there is no requirement that the witness proffering a document be the person who prepared it.)

A case which has narrowed the admissibility of business records is *Barnett v. Howaldt*, 757 F.2d 23, 1985 AMC 2048 (2d Cir. 1985), where the court held that a port captain's accident report was not admissible as a business record under Fed.R.Evid. 803(6) or as an opinion of a lay witness under Fed.R.Evid. 701, since there was no showing that the facts underlying his opinion were within his knowledge.

See generally the "harmless error" rule, Fed.R.Evid. 103:

Rulings on Evidence

(a) Effect of Erroneous ruling

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and

inadmissible it may be used to refresh the recollections of witnesses.

D. *Public Records (Fed.R.Evid. 803(8))*

The Federal Rules of Evidence contain a general exception to the hearsay rule for public records and public documents, in Rule 803(8). The limitation on this exception is the requirement for authentication by way of official certification under Fed.R.Evid. 902(3).⁹⁹

(1) **Objection**

In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof**

In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

⁹⁹Fed.R.Evid. 902(3):

Extrinsic

(3) **Foreign public documents**

A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

See generally on the issue of certification *United States v. Central Gulf Lines, Inc.*, 747 F.2d 315, 1985 AMC 1982 (5th Cir. 1982) (survey reports and shortlanding certificates relating to a government food shipment were properly admitted into evidence under the public records exception to the hearsay rule, since such documentation satisfied the rule's requirement even though not authenticated); *Midwest Nut and Seed Co. v. The Great Republic*, 1979 AMC 379 (S.D.N.Y. 1978) (although Turkish government cargo inspection certificates might qualify as "public documents," excepted from the hearsay rule under Fed.R.Evid. 803(8), it was still necessary to show that they were authentic public documents, by complying with the certification requirements of Rule 902(3)); *Black Sea & Baltic General Ins. Co.*, supra note 98 (Saudi customs certificates were properly admitted into evidence as foreign public documents, even without the "final certification" specified in Fed.R.Evid. 902(3), where defendant ocean carrier failed to produce any evidence casting doubt on their authenticity, despite having had an ample opportunity to do so); *Ins. Co. of North America v. The Italica*, 567 F. Supp. 59, 1984 AMC 136 (S.D.N.Y. 1983) (since defendant carrier had a reasonable opportunity to investigate the authenticity and accuracy of weather records at the Italian loading port, they were received in evidence even without the final certification of genuineness required by Rule 44(a)(2), Fed.R.Civ.P.).

E. Records of Official Investigations (Fed.R.Evid. 803(8)(c))

Two separate issues are here involved: accessibility and admissibility. Generally speaking, official investigations are conducted for a public safety purpose, so that use of these records in private litigation is, at best, a by-product. Nevertheless, since witnesses can be compelled to attend and testify (always saving the Fifth Amendment privilege against self-incrimination) and documentary production can be compelled, the official investigation may offer a preview of subsequent litigation and the testimony itself may be admissible therein.

(1) *Accessibility.* Records of official investigations under the control of U.S. Government agencies such as the National Transportation Safety Board (N.T.S.B.), the U.S. Coast Guard, the U.S. Navy, and other agencies operating vessels, are governed by the Federal Freedom of Information Act,¹⁰⁰ the Federal Right to Privacy Act,¹⁰¹ and relevant departmental regulations.¹⁰² The statutory restrictions on the disclosure of these reports are to protect trade secrets¹⁰³ and disclosure of documents which have been formally classified for national security purposes.¹⁰⁴ Coast Guard Regulations add additional restrictions.¹⁰⁵

(2) *Admissibility of entire reports (Fed.R.Evid. 803(8)(c)).* The reports of U.S. Government investigations, whether informal or formal, or of the proceedings of courts of inquiry, have the same format:

- (a) Findings of fact, supported by specific testimony or documents;

A Southern District of New York case dealt with the admissibility of records of shareholders' and directors' meetings. See *Morgan Guaranty Trust Co. v. Hellenic Lines Ltd.*, 621 F.Supp. 198, 1986 AMC 626 (S.D.N.Y. 1985):

Minutes of corporation's directors meetings are admissible as business records under Fed.R.Evid. Rule 803(6) when supported by the testimony of a director present at those meetings, even though he was not the custodian of the records. Since Greek law requires the filing of all minutes of shareholders meetings of Greek corporations, the minutes are admissible under Fed.R.Evid. Rule 803(8) to prove that they were made and properly recorded, although not as evidence of the truth of their contents.

¹⁰⁰5 U.S.C. § 552 (1982).

¹⁰¹Id.

¹⁰²See, e.g., Department of Transportation Regulations, 49 C.F.R., Part 7, 46 C.F.R. § 4.13-1; 5 MSM 72-5-30 and 72-6-45.

¹⁰³18 U.S.C. § 905. See also 49 C.F.R. § 7.67 (1987).

¹⁰⁴18 U.S.C. § 798.

¹⁰⁵Certain Boating Accident Reports, 46 U.S.C. § 6102: Boating Accident Reports submitted to state authorities under 33 C.F.R. § 173 App. A(a). (It should be noted that such reports submitted directly to the U.S. Coast Guard under 33 C.F.R. § 173 App. A(b) are accessible.)

- (b) Opinions (or conclusions) based on specific findings of fact;
- (c) Recommendations to prevent recurrences and improve safety.

Such investigations, conducted in the interests of safety, may have come upon factors of causation and allocations of responsibility which the experience of the investigators, as experts in the field, would cause to be regarded as highly probative, if not determinative, in civil litigation. At the very least, there is substantial discovery of facts and witness behavior, since testimony is taken under the penalty of perjury, although cross-examination may have been minimal.

Before 1988 there were a number of decisions differentiating between *fact* and *opinion* holding that in the factual findings of official U.S. Government investigation reports were admissible, while opinions contained therein were inadmissible. However, the Supreme Court's decision in *Beech Aircraft Co. v. Rainey*¹⁰⁶ upheld the admissibility of opinions expressed in official investigative reports if otherwise trustworthy and based on fact. In that case, the Supreme Court resolved the interpretation of Rule 803(8)(c) of the Federal Rules of Evidence to permit the use of opinions of official investigators in official reports. While the decision involved a Navy Report of Investigation, it is apparent that it will also apply to reports of Coast Guard and other official investigations.

In *Beech Aircraft* a product liability claim was brought by the survivors of two Navy pilots killed in an aircraft accident, against the manufacturer and service contractor of a Navy aircraft, alleging defects in the fuel control system causing loss of power, known as a "rollback." Banking sharply to avoid another aircraft, the plane lost altitude and crashed, killing the flight instructor and her student during a training exercise at Middleton Field, Alabama. (The training exercise involved "touch and go" landings.) The Navy Investigative Report, which had been admitted in evidence, had concluded that the most probable cause of the fatal accident was pilot error. At trial, the issue was pilot error or equipment malfunction. The Court of Appeals for the Eleventh Circuit reversed judgment for the manufacturer after a jury verdict, on the ground that the opinions of the Navy investigators had been improperly admitted into evidence.

Traditionally, Navy Courts of Inquiry and later forms of investigations held in accordance with the Judge Advocate General's (JAG)

¹⁰⁶*Beech Aircraft Co. v. Rainey*, 488 U.S. 153, 1989 AMC 441 (1988). The decision is analyzed in Paulsen & Lambert, *Admissibility of Government Agency Reports in Maritime Cases*, 21 J. Mar. L. & Com. 111 (1990).

Manual made sharp distinctions between “findings of facts,” “opinion” based on the facts, and “recommendations.” In 1974, the drafters of the Federal Rules of Evidence, in a general prohibition of hearsay in Rule 803, listed an exception to the hearsay rule of “factual findings” made in public records and reports which resulted from investigations made pursuant to authority granted by law, unless the sources of information or other circumstances indicated lack of trustworthiness. (Rule 803(8)(c)). The issue before the Court was whether the use of the term “factual findings” by Congress was meant to keep out opinions and conclusions drawn from the facts, even though a sharp line between “fact” and “opinion” was very difficult to draw and was often inevitably arbitrary.

Justice Brennan, speaking for a unanimous Court on this issue, noted that the authors of the draft rule did not intend to make a sharp distinction between fact and opinion and that the legislative history of the rule was ambiguous, opposite conclusions having been drawn in House and Senate Judiciary Committee Reports. Further, the dictionary definition of a finding of fact included a conclusion by way of reasonable inference from the evidence. Accordingly, the “factual findings” exception does *not* exclude conclusions or opinions based on a factual investigation which satisfies the requirement of trustworthiness.

As of this writing the consequences of *Beech Aircraft Co. v. Rainey* are hard to predict. The decision dealt with the positive admissibility of a report under Fed.R.Evid. 803(8)(c) and was not concerned with statutory prohibitions on admissibility, such as will be found in 49 U.S.C. § 1441(e), involving the National Transportation Safety Board.¹⁰⁷ Judicial interpretations of 49 U.S.C. § 1441(e) have changed

¹⁰⁷Section 701(a) of the Federal Aviation Act of 1958 contained the original prohibition which is now found in the Department of Transportation Act of 1966, 49 U.S.C. § 1441(e) (1982). The duty of the N.T.S.B. to investigate aircraft accidents includes the duty to investigate the probable cause of the accident, 49 C.F.R. § 801.35 (1987), with the purpose of promoting safety and preventing similar accidents in the future, (49 C.F.R. § 831.4 (1987)); thus the Fifth Circuit interpreted § 1441(e) to mean that opinions in a report are admissible unless they are conclusions as to probable cause or concerned agency opinion as to negligence. *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969).

Interpreting both § 1441(e) and Fed.R.Evid. 803(8)(c), it has been held that no part of an N.T.S.B. Report may be admitted as evidence in a subsequent action for damages, *Travelers Ins. Co. v. Riggs*, 671 F.2d 810 (4th Cir. 1982), despite opinions chipping away at the absolute prohibition. See *American Airlines, Inc. v. United States*, *supra*; *Universal Airline v. Eastern Airlines*, 188 F.2d 993 (D.C. Cir. 1951); *Fidelity and Casualty Company of New York v. Frank*, 227 F. Supp. 948 (D. Conn. 1964); *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628 (3d Cir. 1963); *Kline v. Martin*, 345 F.Supp. 31 (E.D. Va. 1972); and *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845 (10th Cir. 1986).

over the years and it may be that courts will now apply the Supreme Court's 1988 view that the fact-opinion distinction is inevitably arbitrary, so that all parts of the report will be admissible under Fed.R.Evid. 803(8)(c), so long as otherwise trustworthy and based on facts. *Beech Aircraft Co. v. Rainey* may be a trend-setter on total admissibility of N.T.S.B. reports.

(3) *National Transportation Safety Board reports*. Respecting the National Transportation Safety Board, Congress has continued the policy, originating with aircraft accidents,¹⁰⁸ whereby:

No part of any report of the . . . Board, relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Beyond N.T.S.B. reports, however, Congressional authority respecting safety investigations has been viewed as authority for the regulatory rule that such investigations "are for the purpose of taking appropriate measures for promoting safety of life and property at sea and are not intended to fix civil or criminal responsibility."¹⁰⁹ The policy of the statutory prohibition has even been held to shelter the report from admissibility where the Government is a party defendant and the report is being sought as an admission against interest.¹¹⁰

(4) *Admissibility of Testimony in N.T.S.B. reports*. The public record exception to the hearsay rule permits use of testimony taken at an official investigation as former testimony if the declarant is unavailable as a witness and the party *against* whom the testimony is now offered, or a predecessor in interest, had an opportunity and

For post *Rainey* decisions, see *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1943 (D. Colo. 1989) (NTSB report admitted); and *In re Air Crash Disaster at Sioux City*, No. 270398 Westlaw (N.D. Ill. 1991).

¹⁰⁸49 U.S.C. § 1441(e) (1982). See also 45 U.S.C. § 33 (1982) concerning railroad accidents. By regulation, NTSB investigators may testify only as to the factual content within the report and not as to opinion (49 C.F.R. § 835 (1986)).

¹⁰⁹46 C.F.R. § 4.07-1(b) (1986). See *Huber v. United States*, 838 F.2d 398, 1988 AMC 1796 (9th Cir. 1988); *Smith v. Ithaca Corp.*, 612 F.2d 215, 1981 AMC 1029 (5th Cir. 1980); *Complaint of American Export Lines, Inc.*, 73 F.R.D. 454, 1977 AMC 2632 (S.D.N.Y. 1977) (NTSB and Coast Guard report opinion material excluded in collision case); *Reliable Transfer Co. v. United States*, 53 F.R.D. 24, 1971 AMC 647 (E.D.N.Y. 1971).

¹¹⁰Fed.R.Evid. 801(d)(2). See *Huber v. United States*, 838 F.2d 398, 403 (9th Cir. 1988), vacating and remanding the decision of the district court; Coast Guard accident report held inadmissible by analogy to congressional restriction in 49 U.S.C. § 1441(e).

similar motive to develop the testimony by direct, cross or redirect examination.¹¹¹

Another justification for use of the testimony is found in the broad exception for "factual findings resulting from an investigation made pursuant to authority granted by law."¹¹² Under this provision, however, the source of information or other circumstances may not indicate a lack of trustworthiness.¹¹³ There is no requirement that the witness be unavailable.

¹¹¹Fed.R.Evid. 804(b)(1). See *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, (3d Cir. 1978), cert. denied, 439 U.S. 969 (1978), where testimony at a Coast Guard license suspension and revocation proceeding was held admissible because the Coast Guard was a predecessor in interest to a party.

See Note, *Evaluation Reports and Predecessor in Interest Construed to Admit Coast Guard Hearing Report and Testimony Under Federal Rules of Evidence*, 4 Mar. Law. 155 (1979).

¹¹²Fed.R.Evid. 803(8)(C).

¹¹³*Id.* See, e.g., *Complaint of American Export Lines*, 73 F.R.D. 454, 1977 AMC 2632 (S.D.N.Y. 1977), where testimony during a Coast Guard investigation was considered eligible for admissibility but decision was reserved on the issue of the unavailability of the witness.

