CHAPTER 1

INTRODUCTION

1–001 The aim of this edition of Marsden is to set out the current law of England on the rights and liabilities arising from collisions at sea on October 1, 2014, but it has been possible to reflect the amendments to the Convention on Limitation and Liability for Maritime Claims 1976 which entered into force on June 8, 2015 in Chapter 18 and Appendix 4. In view of the substantial overlap of this subject with a number of other specialised subjects, it has been necessary to confine the consideration of these subjects to the basic principles and to refer the reader who requires a detailed consideration to the relevant standard works on these subjects.[1]

1–002 In considering the civil rights and liabilities arising out of collisions at sea, it is important to appreciate the distinction between the substantive rights and liabilities and procedural methods by which those rights and liabilities may be enforced in an English court. A particularly important feature of this procedure which England shares with many other countries is the action in rem. In addition to the normal procedure which permits a claimant to proceed in personam against a named defendant,[2] a claimant in an action concerning a collision at sea may be entitled to bring an action in rem[3] against a defendant who is only described as the owner of a particular piece of property.[4] The cases where an action in rem may be brought are set out in ss.20 and 21 of the Senior Courts Act 1981 and are considered in Chapter 2. An action in rem enables the claimant to serve the claim form on and arrest the property of the defendant in the circumstances set out in that Act.[5] The property may be arrested once the claimant has issued a claim form[6] or served it.[7] This has two important results. It gives an English court jurisdiction where the only connection between England and the cause of action is the service of the claim form on property within the jurisdiction of the English court. The arrest of the property enables a claimant to obtain security[8] for his claim from the outset of his action, subject only to other claims against the property which have a higher priority.[9]

[1] See particularly the British Shipping Law series.
[2] Senior Courts Act 1981 s.21(1).
[3] Senior Courts Act 1981 s.21(2)–(5).
[4] Practice Direction 61—Admiralty Claims para.61.3.3.
[5] Senior Courts Act 1981 s.21(2)–(5).
[6] Provided it remains valid for service at the date of execution.
[7] CPR r.61.5(7).
[8] The claims may be secured by the vessel remaining under arrest and by the court's power of sale. More often the vessel is released from arrest when the defendant provides an acceptable guarantee (usually from a third party), or alternatively pays money into court.
[9] For the order in which claims take priority, see British Shipping Laws, Vol.1, paras 1561–1574 and British Shipping Laws, Vol.14, Ch.9.

1–003 An important feature in this area of the law is that much of the relevant English statute law is based on international conventions, which are intended to achieve a degree of uniformity between the laws of the states which are parties to those conventions. The most pertinent example of this feature is the Collision Regulations themselves.[10] Other examples are to be found in the law relating to carriage of goods by sea, pollution, the division of loss between ships in collision, limitation of liability, and the jurisdiction of the courts. An important consequence is that the English courts may consider the relevant convention in order to construe the meaning of any statute or statutory instrument giving effect to that convention.[11] If there is any difference between the language of the statutory provision and the corresponding provision of the convention, the language of the statutory provision will be construed in the same sense as the language of the convention provided the words of the statutory provision are reasonably capable of bearing that meaning.[12] If the English text of a convention is ambiguous, it is open to the court to look at the French text, although it would be necessary for the court to ascertain the meaning of the French text with the assistance of expert evidence.[13] If the *travaux preparatoires* for a convention are public and accessible and if they clearly and indisputably point to a definitive legislative intention, they may be used to construe a statutory provision based on an international convention.[14]

1–004 It is also important to note that apart from rights and liabilities under the civil law, a collision at sea may give rise to criminal liability.[15] It may also result in a shipping inquiry being held.[16] In certain circumstances, the person holding the inquiry has power to cancel or suspend a certificate of competence of an officer of a ship involved in a collision.[17] Other certificates may be suspended or cancelled by the Secretary of State.[18] The holder of a certificate may be censured.[19]

1–005 This book is concerned with "collisions between ships at sea". Normally the meaning to be attached to these words is straightforward. Nevertheless, difficulties of definition do arise. The meaning of these words varies according to the context in which they are used. The principal purpose for which readers of this book are likely to be interested in the precise definition of these words is to

[10] The International Conference on Revision of the International Regulations for Preventing Collisions at Sea 1972, see BSL Singh, Vol.1, p.1, International Maritime Conventions.
[11] *The Acrux (No.3)* [1965] P. 391; *Salomon v Commissioner of Customs & Excise* [1967] 2 Q.B. 116; *The Annie Hay* [1968] P. 341; *Post Office v Estuary Radio Ltd* [1968] 2 Q.B. 740; *The Banco* [1971] P. 137; *The Andrea Ursula* [1973] Q.B. 265, *R. v Federal Steam Navigation Co Ltd* [1974] 1 Lloyd's Rep. 520; *The Eschersheim* [1976] 2 Lloyd's Rep. 1; *The Antonis P. Lemos* [1985] A.C. 711.
[12] *The Eschersheim* [1976] 2 Lloyd's Rep. 1.
[13] *The Antonis P. Lemos* [1985] A.C. 711.
[14] *Gatoil Inc v Arkwright-Boston* [1985] A.C. 255, see also *Landcatch v IOPC* [1999] 2 Lloyd's Rep 316 for a case in which reference to *travaux preparatoires* was not found to be of much assistance.
[15] See Ch.22.
[16] See Ch.23.
[17] Merchant Shipping Act 1995 s.61.
[18] Merchant Shipping Act 1995 s.62.
[19] Merchant Shipping Act 1995 ss.61 and 63.

determine whether the following statutes or statutory instruments apply to the circumstances of the particular case with which they are concerned: the Merchant Shipping Act 1995 (particularly the provisions relating to division of loss, joint and several liability, contribution, time bars and limitation of liability) the Carriage of Goods by Sea Act 1971, the Senior Courts Act 1981 (particularly the provisions relating to jurisdiction), the Collision Regulations and the Civil Procedure Rules (particularly the rules relating to the assignment of collision actions to the Admiralty Court and to the filing of collision statements of case). The meaning of these words may be relevant to whether a claim can be brought on a policy of insurance. In many cases, the meanings given to these words and the application of the relevant statutory provisions are wider than might be expected from the everyday use of the word.

Type of property involved in collisions at sea

1–006 This book is primarily concerned with collisions involving a ship. However, many of the statutory provisions relating to collisions involving a ship also apply to hovercraft[20] and to aircraft. With some modifications, the statutory provisions relating to jurisdiction of the High Court, the Collision Regulations, carriage of goods by sea, oil pollution, division of loss and limitation of liability, apply to a hovercraft as they do to a ship.[21] The Collision Regulations apply to seaplanes on the surface of the water.[22] The Admiralty jurisdiction of the High Court[23] includes jurisdiction in respect of claims for salvage, towage and pilotage of aircraft. The jurisdiction relating to towage and pilotage of aircraft only arises in respect of towage and pilotage while the aircraft is waterborne.[24]

Definition of a "ship"

1–007 The modern approach is to treat the word "ship" as an ordinary English word which requires no judicial interpretation to distinguish its characteristics. Whether a particular structure falls within the meaning of the word "ship" is not a question of law but a question of fact.[25] The word has been defined in a number of statutes, and those definitions have been considered in a number of cases, but the guidance those cases offer on what is a question of fact to be determined on the facts of each case is necessarily limited.

Merchant Shipping Act 1995

1–008 The definition of "ship" in the Merchant Shipping Act 1995 is to be found in s.313 of that Act. Section 313 provides that "'ship' includes every description of vessel used in navigation".

[20] Hovercraft are dealt with in greater detail in Ch.8 at para.8–028.
[21] Hovercraft Act 1968 s.1, the Hovercraft (Civil Liability) Order 1986 (SI 1986/1305) (as amended) and the Hovercraft (Application of Enactments) Order 1972 (SI 1972/971) (as amended).
[22] Merchant Shipping Act 1995 s.85(4).
[23] Senior Courts Act 1981 ss.20–21 and *The Glider Standard Austria* [1965] P. 463.
[24] Senior Courts Act 1981 s.24(1).
[25] *Perks v Clark* [2001] 2 Lloyd's Rep 431 at 437.

1–009 A ship must be "used in navigation" to come within the definition. This expression is the key to the interpretation of this definition.[26] This expression applies to dredging up and carrying away mud and gravel,[27] an incomplete vessel just after her launch,[28] a pontoon crane with the crane removed and carrying goods[29] and a motor boat plying for hire along half a mile of river and one mile of a canal connected by locks to the sea.[30] A vessel just launched and incapable of self-propulsion or self-direction is used in navigation because it is waterborne.[31] The use of the word "includes" means that the definition is not exhaustive. The expression "ship" does not include the ship's cargo.[32]

1–010 This definition does not apply for all purposes. For the purpose of limiting liability, the right to limit applies to the owner of a ship that is seagoing.[33] By virtue of the Merchant Shipping Act 1995 s.185(2) and Sch.7, Pt II, the right to limit applies by para.2 to "any ship whether seagoing or not", and by para.12 to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship. This extended definition applies also to Her Majesty's Ships as it applies in relation to other ships.[34] The two-year time bar provisions contained in s.190 of the Merchant Shipping Act 1995 applies to Her Majesty's Ships[35] except that there is no power to extend time if there has not been a reasonable opportunity to make an arrest.[36] The Secretary of State has power to provide that a thing designed or adapted for use at sea is or is not to be treated as a ship for the purposes of any provision of the Merchant Shipping Act 1995.[37] This power has not yet been exercised.

Collision Regulations

1–011 The Collision Regulations apply to a "vessel" rather than to a "ship". Rule 3(a) provides that:

> "The word 'vessel' includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water."

Although the definition differs from the definition of a "ship" in the Merchant Shipping Act 1995, the distinction does not appear to be significant.

[26] *Perks v Clark* [2001] 2 Lloyd's Rep 431 at 438.
[27] *The Mac* (1882) 7 P.D. 126; *The Mudlark* [1911] P. 116.
[28] *The Andalusian* (1878) 3 P.D. 182.
[29] *Marine Craft Contractors Ltd v Erland Blomquist (Engineers) Ltd* [1953] 1 Lloyd's Rep. 514.
[30] *Weeks v Ross* [1913] 2 K.B. 229; cf. *Southport Corp v Morriss* [1893] 1 Q.B. 359 (a launch on an artificial lake not used in navigation) and *Curtis v Wild* [1991] 4 All E.R. 172.
[31] *The St Machar* (1939) 65 Ll. L. Rep. 119.
[32] *The Milan* (1861) Lush. 388 at 399, 400.
[33] See art.1(2) of the Convention on Limitation of Liability for Maritime Claims 1976 which has the force of law pursuant to s.185 of the Merchant Shipping Act 1995.
[34] Merchant Shipping Act 1995 s.185(3).
[35] Merchant Shipping Act 1995 s.192.
[36] Merchant Shipping Act 1995 s.192(1).
[37] Merchant Shipping Act 1995 s.311.

Carriage of Goods by Sea Act

1–012 The Carriage of Goods by Sea Act 1971 provides that "ship" means any vessel used for the carriage of goods by sea.[38] In a bill of lading the expression "vessel" may have a wider meaning than the expression "ship".[39] With certain modifications the Act applies in relation to the carriage of goods by hovercraft.[40]

Jurisdiction

1–013 Section 24 of the Senior Courts Act 1981 provides that for the purpose of the sections relating to the Admiralty jurisdiction of the High Court:

> "'Ship' includes any description of vessel used in navigation and (except in the definition of 'port' in section 22(2) and subsection 2(c) of this section) includes, subject to section 2(3) of the Hovercraft Act 1968, a Hovercraft";

unless the context otherwise requires.[41] The term "ship" applies to all ships, not only British ships.[42]

Rules of court

1–014 The Civil Procedure Rules provide[43] that, among other claims,[44] claims for damage done by a ship must be started in the Admiralty Court. The Civil Procedure Rules provide that a "ship" includes any vessel used in navigation.[45]

Insurance

1–015 The Marine Insurance Act 1906 provides that, for the purposes of a policy of marine insurance in the terms set in the first Schedule to the Act or similar terms, a "ship" includes the hull, materials and outfit stores and provisions for the officers and crew and in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade and also in the case of a steamship, the

[38] Carriage of Goods by Sea Act 1971 Sch., art.I(d).
[39] *Weiner v Wilson Furness Leyland Line Ltd* (1910) 102 L.T. 716, affirmed 103 L.T. 168.
[40] Hovercraft (Civil Liability) Order 1986 (SI 1986/1305) art.4 (as amended).
[41] Cf. *The Champion* [1934] P. 1; *Everard v Kendall* (1870) L.R. 5 C.P. 428; *The Upcerne* [1912] P. 160; *Marine Craft Constructors Ltd v Erland Blomqvist (Engineers) Ltd* [1953] 1 Lloyd's Rep. 514 (decided on different wording in earlier acts).
[42] *The Mecca* [1895] P. 95 at 105, 106.
[43] CPR r.61.2.
[44] These include claims for loss of life or personal injuries specified in s.20(2)(f) of the Senior Courts Act 1981, collision claims and limitation claims. In so far as the scope of these claims depends on the meaning of the word "ship", they refer to the definition in either the Senior Courts Act 1981 or the Merchant Shipping Act 1995.
[45] CPR r.61.1(2)(k) and see *The Craighall* [1910] P. 207 (a floating landing stage is not a vessel and the rules do not compel a party to a collision between a vessel and a pier to file a collision statement).

machinery, boilers and coal, and engine room stores if owned by the assured.[46] The words "ship" or "vessel" used in different policies have been considered in a number of cases. It has been held that for the purposes of the Institute Time Clauses a flying boat is not a ship or a vessel.[47] It has also been held that, for the purposes of the Protection and Indemnity Association's rules, a pontoon crane is not a ship or a vessel.[48] It has been held, however, that damage by an anchor attached by its cable to a ship is damage by a vessel for the purpose of a policy.[49] A barge, temporarily sunk, is a ship or a vessel for the purposes of a Lloyd's Policy,[50] and for the purpose of a running down clause.[51] A tug towing a vessel which collides with a third vessel may be within the meaning of the word "ship" in a policy covering a collision between the towed vessel and a third ship or vessel.[52]

Other cases

1–016 There are numerous other acts where the expression "ship" or "vessel" is statutorily defined. The courts have considered these expressions where they are used in contracts[53] and statutes[54] without defining them. A registered British ship may only be transferred by a Bill of Sale. The courts have considered whether particular objects were ships for this purpose.[55]

Hovercraft

1–017 Hovercraft are defined in s.4(1) of the Hovercraft Act 1968. This provides that "hovercraft" means a vehicle which is designed to be supported when in motion wholly or partly by air expelled from the vehicle to form a cushion of which the boundaries include the ground, water or other surface beneath the vehicle.

[46] Marine Insurance Act 1906 Sch.1, r.15 and *Marine Craft Construction Ltd* (1953) 1 Lloyd's Rep. 514.
[47] *Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd* [1943] K.B. 161.
[48] *Merchants' Marine Insurance Co Ltd v North of England P. & I. Association* (1926) 25 Ll. L. Rep. 446; 26 Ll. L. Rep. 201.
[49] *Re Margetts v Ocean Accident & Guarantee Corp Ltd* [1901] 2 K.B. 792 at 794, 795.
[50] *Chandler v Blogg* [1898] 1 Q.B. 32.
[51] *Pelton Steamship Co Ltd v North of England P. & I. Association* (1925) 22 Ll. L. Rep. 510.
[52] *McCowan v Baine* [1891] A.C. 401.
[53] *Heard v Holman* (1865) 19 C.B. N.S. 1 at 11; *Coltman v Chamberlain* (1890) 25 Q.B.D. 328, ship mortgage.
[54] *Union Bank of London v Lenanton* (1878) 3 C.P.D. 243 (an object can be a ship for the purposes of the Bills of Sales Act 1854 which is not a ship for the purposes of the Merchant Shipping Act 1854). *Gapp v Bond* (1887) 19 Q.B.D. 200. A dumb barge propelled by oars carrying cargo is a vessel, but not a ship, within the exception of the Bill of Sales Act 1878 and 1882. *Hedges v London and St Katherine Docks Co* (1885) 16 Q.B.D. 597. A barge is not a vessel for London and St Katherine's Docks Co's Act 1864 27 & 28 Vict. Ch.xxviii; *Blanford v Morrison* (1850) 15 Q.B. 724 at 731; *Marlin v Leaners* (1882) 43 J.P. 807 (steam tug was a vessel for the Trent Navigation Act 1868), *The Von Rocks* [1998] 2 Lloyd's Rep. 198 (whether a back hoe dredger was a ship for the purposes of the Irish Jurisdiction of Courts (Maritime Convention) Act 1989).
[55] *The European and Australian Royal Mail Co Ltd v The P. & O. Steam Navigation Co* (1866) 14 L.T. 704 (an object which was a ship but was a coal hulk for four years before the transfer is not a ship).

Seaplane

A seaplane is defined in s.97(6) of the Civil Aviation Act 1982. This provides: **1–018**

> "'Seaplane' includes a flying boat and any other aircraft designed to manoeuvre on the water."

The Collision Regulations apply a similar definition.[56] In an insurance case it was held that a flying boat was not a ship or a vessel.[57]

General

It will be apparent from the foregoing that the definitions of a ship and a vessel may vary according to the purposes for which they are used and may include hovercraft, aircraft or seaplanes for particular purposes. In the rest of this book, the expression "ship" means a ship as defined in s.313 of the Merchant Shipping Act 1995 and a "vessel" means a vessel as defined in r.3(a) of the Collision Regulations, unless the contrary is indicated. **1–019**

Collision

The normal use of the word "collision" connotes two vessels coming into contact with each other.[58] In the law relating to collisions, however, the word has a rather wider meaning. Many of the relevant statutory provisions do not require a contact at all. If damage is caused by one vessel to another, a cause of action will arise. This is so even though no contact takes place where, for example, one vessel causes damage to another by "putting her by",[59] or by her wash,[60] or by showing misleading lights or signals.[61] A cause of action may also arise if a vessel makes contact with a pier, a breakwater, the bed of the sea or a river, and causes or suffers damage. The real question is not whether two ships come into contact but whether the actionable fault of one person causes damage to another person or their property. **1–020**

Merchant Shipping Act 1995

The application of the material provisions of the Merchant Shipping Act 1995 does not depend on a contact between vessels. The provisions relating to division of loss,[62] joint and several liability for loss of life and personal injuries,[63] and the right to recover contribution in respect of damages recovered for loss of life and **1–021**

[56] Collision Regulations r.3(e) at Ch.5.
[57] *Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd* [1943] K.B. 161.
[58] *Chandler v Blogg* [1898] 1 Q.B. 32, per Bingham J; *The Normandy* [1904] P. 187 at 198; and *The Upcerne* [1912] P. 160.
[59] *The Niobe* (1888) 13 P.D. 55 at 60.
[60] *The Eschersheim* [1976] 2 Lloyd's Rep. 1.
[61] See generally Ch.4 at paras 4–026 to 4–027.
[62] Merchant Shipping Act 1995 s.187.
[63] Merchant Shipping Act 1995 s.188.

personal injuries,[64] depend on establishing that the damage, loss, loss of life or personal injury has been caused by the fault of two or more vessels. The provisions relating to limitation of actions[65] also depend on whether damage or loss to a vessel, her cargo or freight or loss of life or personal injuries suffered by any person on board her, has been caused by the fault of another vessel. They do not apply where a ship has collided with a jetty.[66] The right to limit liability in respect of one or more claims depends on showing that the claims fall within the category of claims listed in art.2 of the 1976 Limitation Convention.[67] These claims include claims for damage, loss, loss of life or personal injuries caused by a contact between vessels. They also include claims where there is no such contact.

Collision Regulations

1–022 The regulations do not define the word "collision". By their nature they apply to vessels in certain defined situations before a collision has occurred. However, a number of the rules use the word "collision".[68] It is submitted that where the word is used in the regulations, "collision" has the wider meaning of causing damage to another vessel whether by direct contact or by putting her by, and is not limited to a contact between two or more vessels.

Carriage of goods by sea

1–023 Where one vessel is in collision with another, the collision may affect the legal position of a charterer or the owner of the goods laden on board those vessels, or the consignee or endorsee under a bill of lading. The collision may be within an off-hire clause[69] in the charter or it may be an excepted peril under the contract of carriage.[70] If it is the former, the charterer will not be liable to pay hire for the vessel for the period of off-hire. If it is the latter, the carrier will not be liable on the contract of carriage for damages to the goods. In *Hough and Co v Head*,[71] Grove J considered whether grounding damage was a collision for the purposes of an off-hire clause in a charterparty and held that:

[64] Merchant Shipping Act 1995 s.189.
[65] Merchant Shipping Act 1995 s.190.
[66] *The Niase* [2000] 1 Lloyd's Rep. 455.
[67] Merchant Shipping Act 1995 s.185 and Sch.7.
[68] Collision Regulations rr.5, 7, 8, 12, 14, 15, 17 and 19.
[69] *Hough and Co v Head* (1885) 52 L.T. 861 at 864.
[70] A collision without fault by the crews of either vessel is within an exception for "accidents of the sea" (cf. Hague Rules art.IV 2(c)). If the collision is caused by the fault of those on board the non-carrying vessel it is within an exception for "perils of the sea" and also within an exception for "collision". If the collision is caused by the negligence of those on board the carrying ship it is not within an exception for either "accidents of the sea" or "collision" but it is within an exception for "any consequences of neglect or default whatsoever of the master or any other servant of the company in navigating the ship shall be excepted from this liability" (cf. Hague Rules art.IV2(a)). See *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Co* (1883) 10 Q.B.D. 521 and *The Xantho* (1887) 12 App. Cas. 503; *Lloyd v The General Iron Screw Collier Ltd* (1864) 3 H. & C. 284; *Grill v General Iron Screw Collier Ltd* (1866) L.R.I.C.P. 600; *Buller v Fisher* (1799) 3 Esp. 67.
[71] *Hough* (1885) 52 L.T. 861.

> "Collision appears to me to contemplate the case of a vessel striking another ship or boat or floating buoy or other navigable matter, something navigated and coming into contact with it. It so to speak incorporates two things. It may be that one is active and the other is passive, but still in one sense they each strike the other. That does not apply to striking the ground on the bottom."

However, since the House of Lords' decision in *The Xantho*[72] (where it was held that a collision caused either without any fault or by the fault only of those on board the non-carrying vessel was a peril of the sea) and the Court of Appeal decision in *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Co*[73] (where it was held that a collision caused by the fault of those on board the carrying vessel was neither within an exception for "perils of the sea" nor for "collision"), it has been unnecessary to consider the exact definition of a collision for the purposes of most contracts of carriage. There is no judicial authority on whether damage to cargo caused by a vessel being put by, by another vessel is a collision in the context of a contract for carriage of goods by sea or whether some contact between the vessels is necessary.

Jurisdiction

1–024 Claims arising out of collisions at sea are within the scope of the Admiralty Jurisdiction of the High Court. This jurisdiction is conferred respectively by ss.20–24 of the Senior Courts Act 1981. The scheme of the Act is to list a number of claims which fall within the Admiralty jurisdiction, and to provide the mode by which these claims may be enforced either in personam or in rem. A collision at sea may give rise to claims which fall within the scope of those claims which by statute fall within the Admiralty jurisdiction. The Admiralty jurisdiction, however, is very much wider than a jurisdiction to try claims arising out of collisions at sea. Typically, a claim arising out of a collision will fall within the Admiralty jurisdiction of the court if it is a claim for damage received[74] or for damage done by a ship,[75] or for loss of life or personal injury of the type specified by the Acts,[76] or for loss or damage to goods carried in a ship.[77] On the facts of a particular case, however, the claim may fall within one of the other claims set out in the Acts. There is a restriction on the exercise of the jurisdiction in personam and the Act requires such claims to have a defined connection with England and Wales.[78] The precise scope of the Admiralty jurisdiction in rem and in personam is considered in more detail in Chapter 2.

[72] *The Xantho* (1887) 12 App. Cas. 503.
[73] *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Co* (1883) 10 Q.B.D. 521.
[74] Senior Courts Act 1981 s.20(2)(d).
[75] Senior Courts Act 1981 s.20(2)(e).
[76] Senior Courts Act 1981 s.20(2)(f).
[77] Senior Courts Act 1981 s.20(2)(g).
[78] Senior Courts Act 1981 s.22.

CHAPTER 15

CAUSATION[1]

It is not every act of negligence committed at or about the time of a collision that is actionable. To found a claim for damages on an act of negligence, whether a breach of the Regulations or of the rules of good seamanship, it must be proved in addition that it had some effect in bringing about the damage suffered by the claimant.[2] **15–001**

So much is obvious. Causation, however, is a much less straightforward concept than it seems at first sight. In particular, the question whether the defendant vessel's fault "caused" the claimant's damage is not a simple or unitary one.[3] In practice, it breaks down into two separate points to be proved by the claimant, namely that: (1) the collision and the damage resulting from it would not have happened but for the defendant's fault[4]; (2) the defendant's fault was a substantial cause of the claimant's loss, and that no event amounting to a novus actus interveniens has intervened between the two. We deal with each in turn below.

I. Causation in general

1. General rule: no liability unless damage would not have been suffered but for breach of duty

The defendant vessel may have been in fault in a collision and the claimant may have suffered damage: nevertheless, unless the plaintiff can show in addition that the collision would not have taken place, or that he would not have suffered the damage, but for the defendant's fault, he will normally fail.[5] **15–002**

In *The Statue of Liberty*,[6] for instance, the House of Lords found that a vessel involved in a collision off Cape St Vincent had culpably failed to keep a proper

[1] For treatment of causation in the general law of tort, see *Clerk & Lindsell on Torts*, 21st edn, Ch.2.

[2] *The Tempus* [1913] P. 166 at 172, per Evans P; *The Karamea* [1922] 1 A. C. 68 at 71, per Lord Finlay; *The Global Mariner and The Atlantic Crusader* [2005] EWHC 380 (Admlty), [2005] 1 Lloyd's Rep. 699 at [98], per Gross J, citing the 12th edn of this work. See too the Canadian decision in *The Irish Stardust* [1977] 1 F.C. 485 at [33], [1977] 1 Lloyd's Rep. 195 at 204, per Dubé J).

[3] Brandon J has pertinently observed that a causation issue often has to be dealt with "on common sense principles as a jury would probably deal with it" (*The Ballylesson* [1968] 1 Lloyd's Rep. 69 at 78). See too Lord Birkenhead in the earlier *Admiralty Commissioners v SS Volute* [1922] 1 A.C. 129 at 145 (liability for contribution to collision depends on "the ordinary plain common sense of this business"), and similar observations on causation by Aikens J in *The Fedra* [2002] 1 Lloyd's Rep. 453 at 463.

[4] Subject to the exceptions of concurrent liability, and of damage caused partly by the negligence of the defendant and partly by that of the claimant.

[5] Compare, for the position under the general law, *Barnett v Chelsea & Kensington HMC* [1969] 1 Q.B. 428.

[6] *The Statue of Liberty* [1971] 2 Lloyd's Rep. 277. See too *The Princess* (1886) 5 Asp. M.C. 451; *The Tempus* [1913] P. 166 (failure to give sound signal: signal would have had no effect); the Canadian decision in *The Irish Stardust* [1977] 1 FC 485, [1977] 1 Lloyd's Rep. 195 (collision would have happened even if navigational light not misplaced); *The Stella Antares* [1978] 1 Lloyd's Rep.

look-out. Nevertheless, this was held to be irrelevant since they also found that the collision would still have happened even if the proper look-out had been maintained. More recently, in *The Merchant Venture*,[7] a vessel grounded in a misbuoyed channel. Her owners' action against the body responsible for marking the channel nevertheless failed, since it was found that she would still have grounded even if the buoys had been correctly positioned.

15–003 Not only must it be shown that the collision would not have occurred but for the defendant's fault: the same goes for the claimant's damage or other loss. Thus, in *The Santander*,[8] after a collision in the Mersey estuary clearly due to the defendants' negligence it transpired that the claimant vessel's propeller was bent. Nevertheless, her owners could not prove that this damage was the result of the collision and hence failed to recover for it. Again, in *The York*[9] a ship suffered minor damage due to the defendant vessel's fault; her owners did not repair it immediately, but took the opportunity to do so when she was next in dry dock. Their detention claim for the time spent in dry dock failed for the simple reason that the vessel would have had to be dry-docked anyway, damage or no damage.

2. Need for breach of duty to be a substantial cause of loss

15–004 It is not enough for the defendant's breach to be a "but-for" cause of the claimant's loss suffered in a collision: it must also amount to a substantial cause of it.[10] If the damage would not have occurred but for the facts alleged to constitute negligence, but the connection between the defendant's fault and the claimant's damage is entirely fortuitous, then the defendant will excape liability.[11] Thus in *The Estrella*[12] a collision occurred in the open sea off Cape St Vincent, no other vessels being in the area. Brandon J left out of account the fact that one of the vessels happened to be at fault because she was travelling the wrong way in a traffic separation zone. Even though in one sense this had caused the collision (since had the vessel observed the traffic separation rules she would

41 (failure to signal turn had no effect); *The Global Mariner and The Atlantic Crusader* [2005] EWHC 380 (Admlty), [2005] 1 Lloyd's Rep. 699 (collision would still have occurred even if vessel had acted properly to prevent yaw).

[7] *The Merchant Venture* [1997] 1 Lloyd's Rep. 388. See too the similar Canadian decision in *The Irish Stardust* [1977] 1 Lloyd's Rep. 195.

[8] *The Santander* [1966] 2 Lloyd's Rep. 77. A similar case is *The Fedra* [2002] 1 Lloyd's Rep. 453 (no proof whether ingress of water found after collision due to impact or previous failure of corroded plating; claimant fails).

[9] *The York* [1929] P. 178. See in particular Scrutton LJ at 185, giving other examples of irrecoverable loss, such as detention damages for a vessel that at the relevant time would have been detained by ice or embargo (on which see too Viscount Sumner in *The Ikala* [1929] A.C. 196 at 205, and generally *Giles v Thompson* [1994] 1 A.C. 142 at 167, per Lord Mustill).

[10] For a general discussion of what amounts to a substantial cause of a given loss, see *Clerk & Lindsell on Torts*, 21st edn, paras 2–30 et seq.; and compare the non-collision case of *The Windfall* [1998] 2 Lloyd's Rep. 664.

[11] See, generally, the non-maritime case of *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] A.C. 191 at 212–213, per Lord Hoffmann.

[12] *The Estrella* [1977] 1 Lloyd's Rep. 525.

have been somewhere else), it was fortuitous negligence that had nothing else to do with the collision at all.[13]

3. The "but for" test: concurrent causation

Although in general the principle is that a defendant is liable for damage only if **15–005** it would not have happened but for his fault, this is not invariably so. In particular, there are important exceptions to it.

First, an event may in law have two or more concurrent causes, albeit that each was sufficient on its own to bring it about. As a matter of general tort law, it follows that if the defendant's fault contributed materially to the damage suffered by the claimant, the defendant will be liable for it,[14] and furthermore liable in full.[15] Suppose, for instance, that a vessel in a narrow channel is driven aground partly by a freak tide but partly by the negligent navigation of another ship. It is submitted that the other vessel will be liable for the grounding if its navigation was found to be a substantial cause of it, even if the action of the tide might itself have been sufficient. Again, imagine that the cumulative action of a minor collision with a negligently navigated vessel owned by a defendant and heavy seas encountered shortly afterwards causes a ship to become unseaworthy and necessitates immediate dry-docking. It is suggested that damages for detention and dry-dock charges can be recovered from the defendant.[16]

Secondly, as will appear elsewhere, if a collision is due partly to the fault of the claimant and partly to that of the defendant, each being sufficient on its own to cause it, liability is apportioned.[17]

4. Damage to vessel already damaged

If the defendant's negligence merely exacerbates existing damage, or some loss **15–006** which would have been incurred in any case as a result of some past event, then under the principles outlined above it follows that he is only liable for the excess,

[13] See also *The Empire Jamaica* [1957] A.C. 386 (shipowner employs uncertificated first mate, thus being guilty of personal fault at a time when this precluded limitation: collision due to unrelated conduct of mate: shipowner does not lose right to limit owing to his personal fault, even though collision would not have occurred if that mate not employed in the first place).

[14] Cf. the non-maritime case of *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613; also *McGhee v National Coal Board* [1973] 1 W.L.R. 1 (as explained in *Wilsher v Essex HA* [1988] A.C. 1074) and *Environment Agency v Ellis* [2008] EWCA 1117, [2009] P.I.Q.R. P5. See, generally, *Clerk & Lindsell on Torts*, 21st edn, para.2–30.

[15] *Environment Agency v Ellis* [2008] EWCA 1117, [2009] P.I.Q.R. P5 at [39], per May LJ (distinguishing *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All E.R. 421, where the defendant had been held liable only to the extent of its contribution, as a case limited to industrial injury caused by the negligence of serial defendants).

[16] Cf. the personal injury case of *Environment Agency v Ellis* [2008] EWCA 1117, [2009] P.I.Q.R. P5 (debilitating fall due to combination of injuries that were, and those that were not, the result of an employer's negligence). The distinction between this situation and *Carslogie SS Co Ltd v Royal Norwegian Government* [1952] A.C. 292, above, is that here the effect of the heavy weather is not so drastic as wholly to eclipse the effects of the previous collision.

[17] See Ch.16.

if any, for which he himself is responsible.[18] This would be the case, for instance, if a vessel went aground and suffered some damage through nobody's fault, but subsequently was driven harder aground, and suffered further damage, because of the defendant's negligence. The defendant would be liable only for the further, and not for the original damage. This point arose neatly in *The Haversham Grange*.[19] The claimant vessel, having been in a previous collision, needed repairs in dry dock lasting 22 days. She was then further damaged by the defendant vessel, again in such a way as to require dry-docking. The claimants put her in dry dock for 22 days, during which they took the opportunity to do both sets of repairs. They failed in their claim against the defendant for loss of the use of the ship since their negligence had not caused her to be laid up for any longer than she would have had to be anyway. And it is now clear that a similar principle applies to repair costs.[20]

5. A special case: causation, subsequent damage and the effect of hindsight[21]

15–007 A difficult question arises where the claimant's vessel suffers damage as a result of the defendant's fault, but it appears from hindsight that the claimant would in any case have suffered the same loss as a result of subsequent events. Examples would be a vessel in port damaged so as to be put out of action for a month but sunk (say by an explosion) at her moorings a few days later[22]; or a vessel damaged in a collision so as to necessitate immediate repairs, but which while unrepaired suffers heavy weather damage that subsumes the original damage and requires even longer to repair.[23] Assuming the defendant was in fault in causing the original damage, how is his liability affected by the supervening events? Two kinds of claim have, it is suggested, to be distinguished here: on the one hand, claims for repair costs and diminution in value, and on the other, claims for damages for detention and lost profits.[24]

[18] Cf. *The Europa* [1908] P. 84 (actually on carriage of goods by sea) and *Performance Cars Ltd v Abraham* [1962] 1 Q.B. 33 (on damage to motor vehicles), both of which illustrate the point. Note that a different rule may apply to insurance claims against hull underwriters: cf. *Marine Insurance Co Ltd v China Transpacific Steamship Co Ltd* (1886) 11 App. Cas. 573 (insured damage to ship already in need of cleaning: dry-dock charges to be apportioned for period when work carried out simultaneously).

[19] *The Haversham Grange* [1905] P. 307 (although the decision was partly disapproved in *Carslogie SS Co Ltd v Royal Norwegian Government* [1952] A.C. 292, this point remains good law: see [1952] A.C. 292 at 303, per Earl Jowitt); and generally, paras 15–010 et seq.

[20] *The Chekiang* [1926] A.C. 637 at 653, per Lord Phillimore; *Carslogie Steamship Co v Royal Norwegian Government (The Carslogie)* [1952] A.C. 292 at 303, per Earl Jowitt; cf. *Performance Cars Ltd v Abraham* [1962] 1 Q.B. 33. In *The Haversham Grange* a different result was reached on the issue (it being held that dock dues, as against damages for detention, fell to be apportioned), and a similar result was reached by Bateson J in *The Royal Fusilier* (1926) 25 Ll. L. Rep. 566. But it was made clear in the *Carslogie* case that *The Haversham Grange* was wrong on this point.

[21] J. Knott, "Successive and supervening events: damage, injury and loss of profit" (2013) 6 J.I.M.L. 469.

[22] Cf. *The Glenfinlas* [1918] P. 363n.

[23] As in *Carslogie SS Co Ltd v Royal Norwegian Government* [1952] A.C. 292.

[24] A distinction rightly referred to as "fundamental" by Aldous LJ in the (non-maritime) case of *Burdis v Livsey* [2003] Q.B. 36 at [84]. See para.15–008.

(a) Claims for repair costs or diminution in value

Where any chattel suffers damage, the general rule of the law of tort is that its owner is entitled to recover any diminution in capital value due to that damage, such diminution being presumptively measured by reference to the cost of carrying out repairs,[25] though not conclusively so.[26] Such recovery is available as of right, independently of any actual expenditure or financial loss to the claimant.[27] The same rule applies in collisions at sea. From this it follows that the owner of a vessel damaged in collision is entitled to recover repair costs in respect of the damage caused by the collision without reference to subsequent events.[28] Hence it is irrelevant that such costs will never in fact be incurred, for instance because of subsequent loss of the vessel.[29] It also follows (it is suggested) that, even if the damaged vessel later suffers further damage subsuming the original damage which would have required the self-same expenditure on repairs, this does not take away the owner's right to claim the would-be reasonable costs of repair arising from the original collision.[30] 15–008

(b) Claims for detention damages

As regards detention damages, apparently it is necessary to distinguish two situations here: first, cases where the subsequent cause of damage is due to accident or bad luck, and secondly, cases where the supervening damage is due to negligence.[31] 15–009

[25] *The London Corp* [1935] P 70 at 77, per Greer LJ; *Payton v Brooks* [1974] R.T.R. 169 at 173, 176, per Edmund Davies and Roskill LJJ; *The Maersk Colombo* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep. 275 at [76]–[77], Clarke LJ; *Dimond v Lovell* [2002] 1 A.C. 384 at 406, per Lord Hobhouse; *Coles v Hetherton* [2013] EWCA Civ 1704, [2014] 3 All E.R. 377 at [28], per Aikens LJ.

[26] If despite repairs the chattel will still be worth less than its pre-damage value, the residual shortfall may also be claimed: *Payton v Brooks* [1974] R.T.R. 169. Conversely, if repairs are entirely uneconomic, the simple figure of diminution in value will be taken: see *The Minnehaha* (1921) 6 Ll. L. Rep. 12; *Darbishire v Warran* [1963] 1 W.L.R. 1067; *Payton v Brooks* [1974] R.T.R. 169 at 173, 176, per Edmund Davies and Roskill LJJ; *Coles v Hetherton* [2013] EWCA Civ 1704, [2014] 3 All E.R. 377 at [30], per Aikens LJ; and paras 17–030 et seq.

[27] *The Endeavour* (1850) 3 W. Rob. 283; *Dimond v Lovell* [2002] 1 A.C. 384 at 406, per Lord Hobhouse; *Lagden v O'Connor* [2003] UKHL 64, [2004] 1 A.C. 1067 at [77], per Lord Scott; *Bee v Jenson* [2007] EWCA Civ 923, [2007] 4 All E.R. 791 at [15], per Longmore LJ; *Coles v Hetherton* [2013] EWCA Civ 1704, [2014] 3 All E.R. 377 at [28], per Aikens LJ.

[28] *The Glenfinlas* (1917) [1918] P. 363n (sinking); *The London Corp* [1935] P. 70 (scrapping); see too *The York* [1929] P. 178 at 184–185, per Scrutton LJ. More generally see *Burdis v Livsey* [2002] EWCA Civ 510, [2003] Q.B. 36 at [84]–[95], per Aldous LJ; *Coles v Hetherton* [2013] EWCA Civ 1704, [2014] 3 All E.R. 377 at [27], per Aikens LJ.

[29] As in *The Glenfinlas* (1917) [1918] P. 363n (vessel damaged: before repairs could be done, struck a mine and sank: admitted that repair costs available). See too *The York* [1929] P. 178 at 184, per Scrutton LJ.

[30] There is no English collision case directly in point: but see the road traffic case of *Performance Cars Ltd v Abraham* [1962] 1 Q.B. 33, esp. at 37–38, per Lord Evershed MR (where car damaged so as to need respray, irrelevant to tortfeasor's liability that damaged again two weeks later, which would have necessitated same respray). The decision in *Carslogie SS Co Ltd v Royal Norwegian Government* [1952] A.C. 292, denying recovery in respect of the loss caused by the subsequent event, is distinguishable here, as involving a claim for detention damages, which are awarded on different principles.

[31] The distinction is admittedly a little illogical, but seems to have been cemented in the law by the (non-maritime) decisions in *Baker v Willoughby* [1970] A.C. 467 and *Jobling v Associated Dairies Ltd* [1982] A.C. 794. It is, however, criticised by the Canadian Supreme Court in *Sunrise Co v The Lake Winnipeg* [1991] 1 S.C.R. 3, esp. at [31].

(i) Where subsequent damage accidental

15–010 The leading case here is *Carslogie SS Co Ltd v Royal Norwegian Government*.[32] The claimants' ship was damaged in a collision (due to the defendants' fault) off Oban. As a result repairs were necessary (though not urgent[33]), which would necessitate putting her out of commission for 10 days. Before these repairs could be done, however, she received further damage in the Atlantic owing to heavy weather, in no way the result of the original injury, which eventually caused her to be out of action for 30 days. The House of Lords held that the claimants could recover nothing for loss of use. The fact that the heavy weather damage would have occurred anyway meant that the defendants' fault was not the cause of the laying-up of the vessel.[34] A similar rule, said the House, applied to the actual costs of repair (as opposed to damages for loss of use). Thus the defendants equally escaped liability for the fixed costs of repair (such as dry dock dues) incurred by the claimants, on the grounds that they too would have had to be incurred anyway. An alternative solution, that the defendants should pay a proportion of those costs, was rejected.[35]

(ii) Where subsequent damage not accidental

15–011 Logically, the reasoning in the *Carslogie* case should apply in any case where the ship was fated to suffer further damage, whether or not that damage was accidental. In fact, however, it seems that it does not. Where a vessel is damaged successively by the negligence of two defendants, her owner can, it appears, claim from the person responsible for the first collision for the whole of the time that he is deprived of the use of his ship while damage done in that collision is being repaired.[36] It does not lie in the defendant's mouth to argue that the plaintiff would in any case have had to take the vessel out of service for some time in order to repair the damage arising from the second collision.[37] Although there is no authority directly in point, it is submitted that a similar principle applies to the costs of repair.

[32] *Carslogie SS Co Ltd v Royal Norwegian Government* [1952] A.C. 292.
[33] If the repairs had been immediately necessary in order to render the vessel seaworthy, it is possible that the result might be different. This seems the best way to distinguish the Canadian decision in *Sunrise Co v The Lake Winnipeg* [1991] 1 S.C.R. 3, where on otherwise similar facts the original wrongdoer was held liable for the whole loss.
[34] See too the earlier *Vitruvia SS Co v Ropner Shipping Co Ltd* 1925 S.C. (HL) 1 at 5, per Lord Dunedin; and *The Hauk* (1928) 30 Ll. L. Rep. 32 (collision followed by heavy weather damage to rudder). Cf. also the wartime decision in *The Glenfinlas* [1918] P. 363n (no claim for would-be detention when ship sunk by mine before repairs could be done). Note also that this situation is entirely different from that where damage necessitates repairs, during which the defendant seizes the opportunity to do his own work simultaneously: on which, see *The Ferdinand Retzlaff* [1972] 2 Lloyd's Rep. 120; and paras 17–043 et seq.
[35] See too *Beoco Ltd v Alfa Laval Co Ltd* [1995] Q.B. 137; and, in the context of damages for personal injury, the analogous result in *Jobling v Associated Dairies Ltd* [1982] A.C. 794.
[36] This seems implicit in *The Haversham Grange* [1905] P. 307. See too *The Hauk* 1928 S.L.T. 71 at 76–77, per Lord Constable.
[37] See too in this context the personal injury cases of *Baker v Willoughby* [1970] A.C. 467 and *Jobling v Associated Dairies Ltd* [1982] A.C. 794.

II. Causation and the effect of intervening events[38]

1. The doctrine of novus actus interveniens

15–012 As mentioned above, even if the claimant's loss would not have happened but for the defendant's fault, he may nevertheless fail if the latter was not a substantial cause of the former. In particular, the claimant may be barred if there was interposed between the defendant's negligence and his own loss some other novus actus interveniens.[39] By this latter doctrine, a defendant escapes liability for given damage suffered by the plaintiff if there intervenes between his own fault and the damage some further extraneous factor: something referred to by Wright J in *The Oropesa*[40] as "ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, some thing which can be described as either unreasonable or extraneous or extrinsic".[41] To put it another way, the question is whether the defendant's negligence is still operating as a legal cause of injury, when the plaintiff suffers his damage,[42] or (conversely) whether the original cause went beyond a "mere 'but for' cause which does no more than provide the occasion" for some other factor to operate.[43]

2. What amounts to novus actus interveniens?

15–013 What sort of events amount to novus actus interveniens? Most cases concern allegations that the claimant vessel herself showed fault in not taking proper steps to preserve her safety or prevent further damage, or that fault by a third party intervened. But this is clearly not necessary, and other events may equally have the same effect of breaking the chain of causation.

Thus the claimant's deliberate act may amount to novus actus interveniens even though the claimant is not at fault.[44] In *The Paludina*,[45] the *Paludina* was at fault in colliding with the *Singleton Abbey* in Valletta harbour. When the latter vessel, in manoeuvring to escape from the place of the collision, damaged her propeller by contact with a third vessel, the question arose whether the *Paludina* was liable for that damage too, or whether the *Singleton Abbey*'s act had broken the chain of causation. Lord Sumner put the question thus:

[38] See *Clerk & Lindsell on Torts*, 21st edn, paras 2–103 et seq.
[39] For a more recent exposition of this principle, see *The Vysotsk* [1981] 1 Lloyd's Rep. 439 at 451, per Sheen J.
[40] *The Oropesa* [1943] P. 32.
[41] *The Oropesa* [1943] P. 32 at 39. This statement has been followed on several occasions: e.g. *The Spontaneity* [1962] 1 Lloyd's Rep. 460 at 467, per Hewson J; *The Fritz Thyssen* [1967] 1 Lloyd's Rep. 104 at 112, per Karminski J: judgment affirmed in CA, [1967] 2 Lloyd's Rep. 199.
[42] *The Fogo* [1967] 2 Lloyd's Rep. 208 at 223, per Cairns J. More graphically, one can ask whether the "hand of the original wrongdoer was still heavy" on the claimant vessel: see *The Paludina* [1927] A.C. 16 at 27, per Lord Sumner and *The Oropesa* [1942] P. 140 at144, per Langton J.
[43] *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No.2)* [2012] UKSC 17, [2012] 2 A.C. 164 at [12], per Lord Sumption.
[44] A point that may equally arise in the context of damages. See *The SS Amerika* [1917] A.C. 39 (no claim by Crown for pensions voluntarily paid to families of victims); and compare *The Esso Bernicia* [1989] A.C. 643, which could have been, but was not, decided on the same basis (negligence caused tanker to spill oil: no claim for TOVALOP clean-up expenses, since voluntarily incurred).
[45] *The Paludina* [1927] A.C. 16.

"The *Singleton Abbey* herself is the cause of the damage she has suffered, not merely if her captain's action brought it about negligently. She will be the cause of that damage if her captain, freely and as the direct consequence of his own decision, brought it about at all."[46]

15–014 It was at one time believed that the concept of novus actus extended even further, to bar a claim by a vessel going to the aid of another. Thus in a 1922 decision where a vessel free from blame in a collision voluntarily attempted to salve and beach the vessel that was to blame (and which had been very severely damaged), it was held that she had no claim when she herself was stranded in consequence.[47] But this view is now discredited. A vessel is bound by statute to render assistance to vessels in distress if she can do so without serious danger[48]; and it was held in *The Gusty and the Daniel M* [49] that where she is so bound and suffers damage in giving assistance she can sue the vessel whose fault caused the danger: there can be no question of her being responsible for her own misfortune. Moreover, in the same case it was also stated that even where the duty to rescue did not apply there might still be liability: in line with the position as regards voluntary rescuers on land,[50] it was not apposite to regard volunteer rescuers as having consented to forgo any right to compensation.[51]

3. Novus actus interveniens: failure by claimant to take reasonable steps

15–015 Most commonly, the novus actus alleged to break the chain of causation is some subsequent negligence of the claimant vessel in failing to take proper care to prevent, or limit, damage.[52] In this kind of case the test appears to be twofold: (a) the claimant's employees must have acted highly unreasonably; and (b) their act must not have been such as should have been foreseen by the defendant as a likely consequence of his own fault.

(a) The effect of an unreasonable act by the claimant

15–016 The mere fact that the claimant acted negligently is not, without more, enough to break the chain of causation (though it may, of course, amount to contributory negligence leading to apportionment under s.187 of the Merchant Shipping Act

[46] *The Paludina* [1927] A.C. 16 at 26–27. In fact the *Singleton Abbey* was held to be in fault, so what Lord Sumner said was strictly obiter.
[47] *The San Onofre* [1922] P. 243.
[48] See Merchant Shipping Act 1995 ss.92–93, and the previous Maritime Conventions Act 1911 s.6.
[49] *The Gusty and the Daniel M* [1940] P. 159.
[50] *Haynes v Harwood* [1935] 1 K.B. 146 and subsequent cases such as *Harrison v British Railways Board* [1981] 3 All E.R. 679, on which generally, see *Clerk & Lindsell on Torts*, 21st edn, paras 2–127 and 8–31 et seq.
[51] *The Gusty and the Daniel M* [1940] P. 159 at 164–165, per Bucknill J. See too *The Coverdale and The Dorothy* (1945) 79 Ll. L. Rep. 30.
[52] For examples see *The Metagama* 1928 S.C.(H.L.) 22; *The Spontaneity* [1962] 1 Lloyd's Rep. 460; *The Hendrik* [1964] 1 Lloyd's Rep. 371; *The Fritz Thyssen* [1967] 2 Lloyd's Rep. 199; *The Djerada* [1976] 1 Lloyd's Rep. 50; *The Zaglebie Dobrowskie (No.2)* [1978] 1 Lloyd's Rep. 573, as well as the authorities cited below.

1995[53]). Entirely unreasonable behaviour is, however, another matter, and may well break the chain of causation. In *The Lucile Bloomfield*,[54] for example, the claimant vessel was hit and holed by the defendants' negligence. She was made fast to a mole, but later capsized. As to whether the defendants were liable for the sinking, Karminski J said this depended on: "Whether in the circumstances (which must include the lapse of time from collision to final sinking and all that happened between the collision and capsizing) [the plaintiff vessel] failed to take proper steps and in that failure was unreasonable or negligent." [55]

His Lordship went on to hold that she had not, and thus that the defendants were liable.

Again, in *The Fogo*,[56] Cairns J said, of a vessel that sank while being towed into Port Said after a collision with another ship, that: "if the sinking was due to some fresh negligence on the part of the plaintiff this must be treated as a *novus actus interveniens* which broke the chain of causation"[57] and proceeded to hold that the vessel's failure to have a tug standing by on arrival was a case of just such negligence.

Unreasonable action amounting to novus actus interveniens may take any number of forms. It includes failure by those on board a vessel to exhibit ordinary skill and courage in standing by her; failure to take assistance where necessary; unjustifiable abandonment of the vessel; undue neglect to repair collision damage; inefficient temporary repairs; neglect to beach where necessary; and, of course, a large number of other cases.

(b) Failure of those on board to exhibit ordinary skill and courage in standing by her

15–017 The fact of a ship being damaged in a collision does not justify those on board in neglecting to take all reasonable measures to bring her back under control,[58] to save her,[59] to beach her,[60] to lessen the effects of the collision, and generally to minimise the damage. They must exhibit ordinary courage in standing by their

[53] See Ch.16. A straightforward example is *The Bow Spring and The Manzanillo II* [2004] EWCA Civ 1007, [2005] 1 Lloyd's Rep. 1 (unpredictable manoeuvre by Suez Canal dredger cause of grounding of passing tanker, even though latter resulted from "hurried and ill-considered over-reaction" by tanker: see esp. at [54], per Clarke LJ). Earlier examples include *The Kazimah* [1967] 2 Lloyd's Rep. 163 and the important decision in *The Calliope* [1970] P. 172.
[54] *The Lucile Bloomfield* [1967] 2 Lloyd's Rep. 308.
[55] *The Lucile Bloomfield* [1967] 2 Lloyd's Rep. 308 at 313; also *The Sivand* [1998] 2 Lloyd's Rep. 97 at 103, per Evans LJ, and paras 17–014 et seq on mitigation of damage.
[56] *The Fogo* [1967] 2 Lloyd's Rep. 208. Cf. *The Magnolia* [1955] 1 Lloyd's Rep. 417.
[57] *The Fogo* [1967] 2 Lloyd's Rep. 208 at 223. But note the comment on this case by Brandon J in *The Calliope* [1970] P. 172 at 178–179, where he suggests that such matters may be better dealt with on the basis of contributory negligence.
[58] *Exxon v Sofec* 1996 A.M.C. 1817 (ship negligently torn from moorings: defendants not liable for subsequent loss due to master's failure to bring her back in control).
[59] Including jettison, and acts which may give rise to a general average contribution from the shipowner. See too *The Marpessa* [1891] P. 403 (disapproved in *Morrison SS Co Ltd v The Greystoke Castle* [1947] A.C. 265, but not on this point); *The Marigola* (1929) 34 Ll. L. Rep. 217 (where the master of the damaged ship got her aground by precipitate action); *The Margareta* [1993] 2 Lloyd's Rep. 13.
[60] *The Hansa* (1887) 6 Asp. M.L.C. 268. Cf. *The Scotia* (1890) 6 Asp. M.L.C. 541.

CHAPTER 23

SHIPPING INQUIRIES

Introduction

23–001 Collisions at sea like any other maritime casualty can give rise to matters of public interest which require either investigation to prevent further casualties of the same sort occurring or disciplinary measures to be taken against those responsible. In consequence, for many years there have been statutory provisions in the Merchant Shipping Acts which create the statutory basis for inquiries to investigate the causes of maritime casualties, to make recommendations for the future and to take disciplinary measures against those involved. There is also provision for an inquiry to be held when a person dies in a ship registered in the UK, or where a member of the crew of such a ship dies in a foreign country. In addition to inquiries under the Merchant Shipping Acts, an inquest may be held where a person dies in a collision at sea and the body is brought ashore within the jurisdiction of a coroner.[1]

Shipping inquiries

23–002 The Merchant Shipping Acts make provision for four types of shipping inquiry. They are:

(1) an investigation into various types of accidents by a Chief Inspector of Marine Accidents[2];
(2) a formal investigation, commonly known as a wreck inquiry[3];
(3) disciplinary inquiries into the fitness or conduct of officers[4] or seamen[5];
(4) inquiries into the deaths of persons on ships registered in the UK, or seamen abroad.[6]

These are discussed in the following paragraphs.

(1) Investigations by a Chief Inspector of Marine Accidents

23–003 The Marine Accident Investigation Branch of the Department of Transport was established in 1989 under a power conferred by statute.[7] It is a separate branch within the Department for Transport, Local Government and the Regions. Its task

[1] Coroners Act 1988 s.8(1).
[2] Merchant Shipping Act 1995 s.267.
[3] Merchant Shipping Act 1995 s.268.
[4] Merchant Shipping Act 1995 ss.61–62.
[5] Merchant Shipping Act 1995 s.63.
[6] Merchant Shipping Act 1995 s.271.
[7] Originally s.33 of the Merchant Shipping Act 1988, now s.267 of the Merchant Shipping Act 1995.

is to investigate accidents involving a ship or a ship's boat where at the time of the accident either the ship is registered in the UK or the ship or a ship's boat (in the case of an accident involving a ship's boat) is within the seaward limits of the territorial sea of the UK. It may also investigate such other accidents involving ships or ship's boats as the Secretary of State may determine.[8]

23–004 The Marine Accident Investigation Branch was established partly as a result of concern that in some situations the Marine Directorate of the Department of Transport which formerly carried out preliminary investigations into casualties, might appear to lack the necessary independence. When the department itself was subject to criticism in its role as a regulatory authority, it was in effect investigating itself. This was thought to be unsatisfactory because it created a conflict of interest.[9] It was also established partly as a result of concern about a tendency by parties (and their counsel) to Formal Investigations to further their interests or perceived interests in the litigation which is almost always contemplated after a serious casualty. This resulted in Formal Investigations lasting a long time and costing the public purse a great deal.[10]

Legal framework

23–005 An investigation by the Marine Accident Investigation Branch is a private investigation,[11] although its results are usually made public.[12] The accidents which the Marine Accident Investigation Branch may investigate are defined by the regulations. The current regulations in force are the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012,[13] which entered into force on July 31, 2012. These replaced earlier regulations of 1999[14] and 2005.[15] The regulations are to give effect to Council Directive 1999/35/EC of 29th April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferries and high-speed passenger craft services, which was amended by Directive 2009/18/EC of the European Parliament and the Council of 23rd April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and the Council.

Operation

23–006 The regulations define an accident in reg.3. Where an accident within the meaning of reg.3 occurs, a duty to report this arises to the Chief Inspector under

[8] Merchant Shipping Act 1995 s.267.
[9] See paras 11.23 and 11.24 of Lord Justice Clarke's Final Report in the Thames Safety Inquiry dated December 22, 1999 2000 Cm.4558.
[10] Lord Justice Clarke's Final Report in the Thames Safety Inquiry dated December 22, 1999, para.5.6.
[11] Lord Justice Clarke's Final Report in the Thames Safety Inquiry dated December 22, 1999, para.8.6.
[12] See para.23–012.
[13] As amended from December 31, 2013 by the Merchant Shipping (Accident Reporting and Investigation) (Amendment) Regulations 2013 (SI 2013/2882).
[14] Merchant Shipping (Accident Reporting and Investigation) Regulations 1999 (SI 1999/2567).
[15] Merchant Shipping (Accident Reporting and Investigation) Regulations 2005 (SI 2005/881).

r.5. Rule 7 provides that a preliminary assessment is to be carried out by the Chief Inspector. Rule 8 governs the situations in which a safety investigation must then take place, namely a "very serious marine casualty". The Inspector retains a discretion to investigate a "serious marine casualty", or other accident within the meaning of r.3. These provisions are discussed in more detail below.

23–007 The regulations[16] impose on the master or senior surviving officer and the owners[17] of a vessel, to which the rules apply, an obligation to send a report of an accident by the quickest means available to the Chief Inspector of Marine Accidents. In addition, they are also required to ensure that the circumstances of every accident are examined, so far as is reasonably practicable and make a report giving the findings of such examination and stating any measures taken to prevent a recurrence to the Chief Inspector. In addition, various other persons may have to make a report to the Chief Inspector and carry out an examination if the accident happens within or adjacent to the limits of any harbour, on any inland waterway or within UK waters. There is no obligation on pleasure vessels[19] and various other craft to report accidents which occur in UK waters.

23–008 In the case of a serious marine casualty in relation to a vessel covered by Directive 2009/18/EC[21] the Chief Inspector must carry out a preliminary assessment in order to decide whether or not to undertake a safety investigation.[22] The Chief Inspector has the powers conferred by s.259 of the Merchant Shipping Act

[16] Rule 6 of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012.
[17] Unless they have ascertained that the master or senior surviving officer has reported the accident.
[19] "pleasure vessel" means (a) any vessel which is (i) wholly owned by an individual or individuals and used only for the sport or pleasure of the owner or the immediate family or friends of the owner, or (ii) owned by a body corporate and used only for the sport or pleasure of employees or officers of the body corporate, or their immediate family or friends, and is on a voyage or excursion which is one for which the owner is not paid for or in connection with operating the vessel or carrying any person, other than as a contribution to the direct expenses of the operation of the vessel incurred during the voyage or excursion, or (b) any vessel which is wholly owned by or on behalf of a members' club formed for the purpose of sport or pleasure which, at the time it is being used, is used only for the sport or pleasure of members of that club or their immediate family, and for the use of which any charges levied are paid into club funds and applied for the general use of the club; and no payments other than those mentioned above are made by or on behalf of the users of the vessel, other than by the owner, and in this definition, "immediate family" means in relation to an individual, the husband, wife or civil partner of the individual, and a brother, sister, ancestor or lineal descendant of that individual or of that individual's husband, wife or civil partner, see reg.2 of the 2012 Regulations.
[21] Article 2 of the Directive provides that it applies to marine casualties and incidents that: (a) involve ships flying the flag of one of the Member States; (b) occur within Member States' territorial sea and internal waters as defined in UNCLOS; or (c) involve other substantial interests of the Member States. The Directive does not apply to marine casualties and incidents involving only:(a) ships of war and troop ships and other ships owned or operated by a Member State and used only on government non-commercial service; (b) ships not propelled by mechanical means, wooden ships of primitive build, pleasure yachts and pleasure craft not engaged in trade, unless they are or will be crewed and carrying more than 12 passengers for commercial purposes; (c) inland waterway vessels operating in inland waterways; (d) fishing vessels with a length of less than 15 metres; (e) fixed offshore drilling units.
[22] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.7.

1995[23] for the purpose of making his preliminary assessment.[24] If the Chief Inspector is required to or decides to carry out a safety investigation, it should include the collection and analysis of evidence, the identification of causal factors and, where appropriate, the making of safety recommendations. The Chief Inspector has a wide discretion as how to give public notice that a safety investigation has been commenced.[25] The objective of a safety investigation is the prevention of future accidents through the ascertainment of its causes and circumstances. It is not the purpose of such an investigation to determine liability nor, except so far as necessary to achieve its objective, to apportion blame.[26]

23–009 The master or senior surviving officer of the ship covered by the Regulation and the ship's owners[27] are under an obligation to preserve documentary evidence, such as charts, log books, recorded information relating to the period preceding, during and after and all other pertinent records[28]; to refrain from making any alteration to recordings or entries in such records; and in so far as is practicable, to leave undisturbed any equipment which might reasonably be considered pertinent to the investigation of the accident. Pending investigation, an inspector has power to prohibit access or interference with any ship, ship's boat or other equipment involved in an accident.

23–010 If the Chief Inspector decides that a safety investigation must be carried out, it must be undertaken by one or more inspectors[29] or in certain circumstances by persons who are not inspectors. The inspector who conducts the inquiry has a wide discretion to decide the way in which he carries out the inquiry, and the scope of his investigations.[30]

23–011 With some exceptions, the names, addresses or other details of anyone who has given evidence to an inspector must not be disclosed. Various other records may not be made available for purposes other than the investigation, unless a court determines otherwise. However, a copy of a declaration or statement to an inspector given by a person to an inspector in the course of his investigation, may be made available to another person.[31]

23–012 On receipt of the inspector's conclusions the Chief Inspector must submit a report to the Secretary of State and cause the report to be made publicly available in the shortest possible time or within 12 months of the date of the accident being

[23] See para.23–014.
[24] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.7(4).
[25] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.8.
[26] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.5.
[27] Unless they have ascertained that the master or senior surviving officer has done so.
[28] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.10.
[29] Appointed by the Secretary of State under s.267(1) of the Merchant Shipping Act 1995.
[30] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.11.
[31] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.13.

notified to the Chief Inspector and in such manner as he thinks fit.[32] Before publication, a notice must be served upon any person or organisation whose reputation is likely to be adversely affected by the report,[33] and any representation relating to the report made by or on behalf of that person must be considered. Copies of the final report must be sent to anybody served with a notice, any body to whom recommendations have been addressed in the report, to the Secretary of State, IMO, any person or organisation whom the Chief Inspector considers may find the report useful or of interest, and the European Commission where the report pertains to vessels covered by Directive 2009/18/EC or where the Chief Inspector deems it appropriate.

23–013 The regulations provide powers to terminate an investigation at any time,[34] or to re-open an investigation.[35] The failure to notify an accident or to provide information without reasonable cause, or to falsely claim to have additional information or new evidence pertaining to an accident is a criminal offence punishable by a fine.[36] Failure to preserve records, the alteration of records, the disturbance of equipment and the disclosure of information without reasonable cause, are also criminal offences.[37]

23–014 The person conducting a preliminary assessment or a safety investigation has wide-ranging powers to obtain evidence.[38] He may enter premises in the UK, board any ship registered in the UK wherever it might be and any other ship which is present in the UK or its territorial waters. He may prevent the premises or ship being disturbed for as long as is reasonably necessary for the purpose of his examination or investigation. He has powers to take measurements, photographs, recordings and samples. He may order articles or substances which he considers to be dangerous, to be dismantled or subject to any process or test. He may take possession of any such article to examine it, or to ensure that it is not tampered with, and to ensure that it is available for use as evidence in any proceedings for an offence under the Merchant Shipping Acts or regulations made by virtue of any provisions of those acts. He can also compel any person whom he has reasonable cause to believe has information relevant to his examination or investigation to answer such questions as he thinks fit to ask. He may also require the production of documents. He may inspect and take copies of documents.[39]

[32] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.14.
[33] Or if that person is deceased upon such person or persons as appear to represent his interests, Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.14(4).
[34] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.11(9).
[35] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.9(2).
[36] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.19.
[37] Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 reg.19.
[38] Merchant Shipping Act 1995 s.267(8).
[39] See s.259 of the Merchant Shipping Act 1995 for the precise scope of these powers, the limits imposed on their exercise and the admissibility of answers to such question in any proceedings.

(2) Formal investigations

23–015 Where an accident has occurred, the Secretary of State may cause a formal investigation into the accident or incident to be held by a wreck commissioner.[41]

23–016 By contrast to an investigation by the Marine Accident Investigation Branch, a Formal Investigation is a public inquiry.[42] The primary purpose of such an investigation is to assist in the preservation of a reasonable standard of safety of life and property at sea. The function of the wreck commissioner in this respect is purely investigatory. The second purpose is to determine why a casualty occurred. While this overlaps with the investigatory and disciplinary functions of the inquiry, the purpose of identifying the cause of the casualty is not to determine civil liability between the parties to the inquiry. The third purpose is to consider whether the casualty was caused by the wrongful act or default of any person and, if so, whether the wreck commissioner should impose penalties on those at fault. In so far as the wreck commissioner is called upon to decide whether the certificate of a master or other certificated officer ought to be cancelled or suspended, he is (subject to appeal) making a final and conclusive decision, which is judicial in character.[43] It is the purpose of a Formal Investigation as of other forms of public inquiry, to carry out a full, fair and fearless investigation into the relevant events and to expose the facts to public scrutiny.[44]

23–017 A formal investigation may be ordered whether or not the Marine Accident Investigation Branch has carried out an investigation.[45]

The court

23–018 The Admiralty Judge or a Queen's Counsel practising Admiralty law is usually appointed as the wreck commissioner. The wreck commissioner will have the assistance of one or more assessors, and will have the assistance of not less than two assessors when any question as to the cancellation or suspension of an officer's certificate is likely to arise.[46] Each assessor is required to sign the report of the wreck commissioner, or to state in writing that he dissents and the reasons for dissenting from it.[47] In dissenting, it is improper for an assessor to advance

[41] Merchant Shipping Act 1995 s.268(1).
[42] See para.8.6 of Lord Justice Clarke's Final Report in the Thames Safety Inquiry dated December 22, 1999 2000 Cm.4558.
[43] *The Speedlink Vanguard* [1986] 2 Lloyd's Rep. 266.
[44] See para.5.10 of Lord Justice Clarke's Final Report in the Thames Safety Inquiry dated December 22, 1999 2000 Cm 4558 and see paras 5.3 and 5.4 of that report for the purposes of any public inquiry.
[45] Merchant Shipping Act 1995 s.268(1).
[46] Merchant Shipping Act 1995 s.268(2).
[47] Merchant Shipping (Formal Investigations) Rules 1985 (SI 1985/1001) (as amended by SI 1990/123 and SI 2000/1623) r.13.

criticisms which the person criticised has had no opportunity of meeting.[48] The assessors will often be experts in a particular field which is relevant to the subject-matter of the particular inquiry. If any question as to the cancellation or suspension of an officer's certificate is likely to arise, the assessors must have qualifications and, where possible, experience relevant to the type of certificate in question.[49] The Lord Chancellor maintains a list of assessors who are qualified as masters, engineers, skippers of fishing vessels, naval officers, naval architects and persons with special skills or knowledge including managerial experience.[50]

The powers of the wreck commissioner

23–019 The wreck commissioner has the same powers to compel the attendance of witnesses and order the production of evidence as those conferred on a magistrates' court by s.97(1), (3) and (4) of the Magistrates Court Act 1980.[51] These include powers to issue a summons to compel the attendance of any person likely to be able to give material evidence or to produce any document or thing likely to be material evidence, to issue a warrant for the arrest of a person who fails to comply with a summons, and to commit to custody (for up to seven days) any person who refuses to be sworn or to give evidence or to produce any document or thing, without a lawful reason.

23–020 A wreck commissioner has power to administer oaths for the purpose of the investigation.[52]

23–021 If as a result of his investigation the wreck commissioner is satisfied:

(a) that an officer is unfit to discharge his duties by reason of incompetence or misconduct or for any other reason[53]; or
(b) has been seriously negligent in the discharge of his duties[54]; or
(c) has failed to comply with the obligation to give assistance and information after a collision[55];

and in the case of (a) or (b) is further satisfied that it caused or contributed to the accident, he may cancel or suspend any certificate of competence or censure the officer. In so far as the wreck commissioner is exercising these disciplinary powers, he is subject to the Human Rights Act 1998, and in particular art.6(1) of the European Convention on Human Rights. In consequence, any person who may be censured or whose certificate of competence may be cancelled or

[48] *The Seistan* [1959] 2 Lloyd's Rep. 619.
[49] Merchant Shipping (Formal Investigations) Rules 1985 (SI 1985 1001) (as amended) r.4(3)(4).
[50] Merchant Shipping (Formal Investigations) Rules 1985 (SI 1985 1001) (as amended) r.4(2).
[51] Merchant Shipping Act 1995 s.268(3).
[52] Merchant Shipping Act 1995 s.268(3).
[53] See para.23–041 for what constitutes unfitness to discharge duties.
[54] See para.23–042 for what constitutes serious negligence.
[55] See para.23–043 for the obligation to give assistance and information after a collision.

suspended "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[56] If the wreck commissioner cancels or suspends a certificate, the officer must deliver it forthwith to the wreck commissioner, or to the Secretary of State.[57]

23–022 During the course of a Formal Investigation, the parties will often criticise the conduct of other parties. The wreck commissioner may also criticise one or more parties in his report. Whether he will do so will depend on all the circumstances of the case. A party may be criticised if that party is blameworthy, although not in breach of any legal duty.[58] It is also open to the wreck commissioner to consider issues of legal duty. Whether he will do so depends on the circumstances.[59] It has been held that fairness requires that a wreck commissioner should only criticise the conduct of a master to the extent that it fell below the standards of the reasonable master and he should only criticise the conduct of the owners or managers of a vessel if their conduct fell below that of the reasonably prudent owner or manager. If there is evidence that a reasonably prudent master, owner or manager could have done or failed to do what the particular master, owner or manager did or failed to do, it would (save in exceptional circumstances) be wrong to criticise the act or omission concerned.[60] It has also been held that the same approach should be adopted in the case or regulatory authorities.[61] Although it is not necessary for a wreck commissioner to determine whether or when a legal duty was owed, it is or may be appropriate for him to have regard to the approach of the courts in deciding whether a particular person fell below acceptable standards.[62] The wreck commissioner will determine the standards against which to compare the conduct of a particular party as a question of principle and common sense in the light of all the circumstances and having regard to the experience of the assessors. Thus, a criticism of a party may be made even in the absence of evidence of better practice on the part of others. Indeed, such a criticism may be made even if the particular conduct was consistent with the practice of others.[63]

23–023 The wreck commissioner has a wide power to make such awards as he thinks just for the costs of the investigation or of any parties at the investigation, and by whom the costs of the parties should be paid.[64] However, the power must be

[56] See paras 36.1–36.17 of the report of Clarke LJ into the *Marchioness/Bowbelle* published in February 2001.
[57] Merchant Shipping Act 1995 s.268(5).
[58] See paras 6.69–7.72 of the report by Colman J in the Reopened Formal Investigation into the Loss of *MV Derbyshire* published on November 6, 2000 and paras 12.1–12.8 of the report of Clarke LJ into the *Marchioness/Bowbelle* published in February 2001.
[59] Report of Clarke LJ into the *Marchioness/Bowbelle*, para.12.8.
[60] Report of Clarke LJ into the *Marchioness/Bowbelle*, para.12.12.
[61] Report of Clarke LJ into the *Marchioness/Bowbelle*, para.12.12.
[62] Report of Clarke LJ into the *Marchioness/Bowbelle*, para.12.15.
[63] Report of Clarke LJ into the *Marchioness/Bowbelle*, para.12.24.
[64] Merchant Shipping Act 1995 s.268(8).

exercised judicially.[65] Where the wreck commissioner decides to award a party less than the full amount of the costs incurred by that party, reasons should be given.[66] By long usage and practice the Department of Transport bears the costs which are necessary for mounting the formal investigation, including the costs of producing sufficient factual and expert evidence for the tribunal. Any party who is notified that it will be subject to criticism and is vindicated by the findings in the report is likely to be awarded its costs against the party making the criticism. The general practice is that dependants of persons killed in the accident bear their own costs in the absence of hardship.[67] Legal aid is not available for public inquiries.

23–024 An award of costs may be made by an order of the High Court[68] and will be enforceable as such. The cost may be taxed in the High Court.[69]

The duties of the wreck commissioner

23–025 The wreck commissioner has a duty to conduct the investigation in accordance with the rules,[70] and to make a report on the case to the Secretary of State.[71]

Re-hearings

23–026 The Secretary of State has power to order the re-hearing of a formal investigation and is required to do so either if new and important evidence is discovered which could not be produced at the original hearing, or if there appear to be other grounds for suspecting that a miscarriage of justice has occurred.[72] The re-hearing may be held either by the wreck commissioner who held the original investigation, or by another wreck commissioner, or by the High Court.[73]

[65] In his judgment on costs in the Re-Opened Formal Investigation into the Loss of *MV Derbyshire* (unreported) given on May 15, 2001, Colman J held that the discretion in relation to costs had to be exercised by reference to public policy factors. Although in many cases the result would be that the costs lay where they fell, that was not an invariable rule or presumption. Balancing the policy factors was likely to be influenced by two fundamental considerations: (1) the underlying purposes of such investigations, namely the explanation of the casualty and recommendations for ship safety; and (2) that it would be unfair for a party which had proved that criticisms made against it were unfounded to have to bear the whole of the costs of refuting those criticisms. Among the policy considerations which could arise were: whether the party joined voluntarily or was joined by the tribunal, whether the party was a well-resourced public or commercial organisation; whether it had made a valuable evidential or other contribution; whether that contribution had been enhanced or otherwise by legal representation; whether the party had been criticised or was at risk of criticism in relation to the casualty and whether that party had been exonerated; whether the party could have participated without its costs being publicly funded; whether the party had impeded the efficient disposal of the investigation; and whether the party's participation was to further its own interests.
[66] *R. v A Wreck Commissioner Ex p. Knight* [1976] 2 Lloyd's Rep. 419.
[67] *R. v Darling Ex p. Swan Hunter Shipbuilders Ltd* [1992] 1 Lloyd's Rep. 492.
[68] Merchant Shipping Act 1995 s.268(8).
[69] Merchant Shipping Act 1995 s.268(9).
[70] Merchant Shipping Act 1995 s.268(2).
[71] Merchant Shipping Act 1995 s.268(10).
[72] Merchant Shipping Act 1995 s.269(1).
[73] Merchant Shipping Act 1995 s.269(2). The Re-hearing of the Formal Investigation into the Loss of the *MV Derbyshire* was a re-hearing in the High Court.