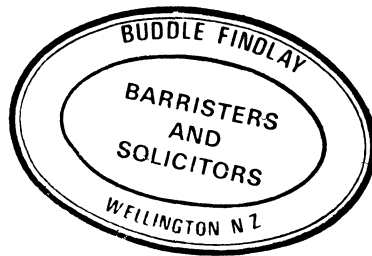


Underwriters in New Zealand are also not helped by out of date legislation concerning maritime matters. With the short three-year terms of Parliament, governments appear to give low priority to maritime legislation as they are not vote catching issues. However, it is time that the Sea Carriage of Goods Act 1940 is amended to include the Hague-Visby Rules and that the Shipping and Seamen Act 1952 is brought up to date.

With all these modern trends and their associated problems it would appear that the marine underwriter is in for a lean time over the next decade. However there have always been problems like this looming over any type of business and sooner or later they are resolved. It was not long ago that insurance companies in New Zealand dealing in marine cargo insurance were fearing the introduction of the Carriage of Goods Act 1979 where they saw local transit insurance being taken over by accident departments through Carriers' Liability. This has not occurred and in fact the Carriage of Goods Act 1979 has probably made the commercial world more aware of their insurance responsibilities, thus increasing premium income growth as a result. However, with the more complicated Contracts of Carriage, cargo underwriters will be dealing far more in the future with solicitors than they have in the past regardless of which side of the table the solicitor is sitting on.



Marine legislation

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This paper presents a layman's view of marine legislation with particular reference to the part that the Marine Division of the Ministry of Transport plays in preparing and implementing it. The paper was prepared as a lecture for Masters students in maritime law at Victoria University.

The safety of a ship, its passengers and crew, and its cargo may be at risk from a large number and variety of hazards arising either from factors within the ship or from the environment in which it sails. The task of the legislator has been, and continues to be, to develop, through legislation, requirements for ensuring that the ship itself is intrinsically safe and able to be handled in a safe manner, is staffed by people who can safely and competently handle it and that it is properly and safely loaded with its cargo. If that safety is compromised by any particular situation then regulatory requirements aim to provide for means to rectify that situation and in the ultimate if the ship is lost, to maintain the safety of passengers and crew and provide for their rescue, and also to re-imburse or compensate the owner and those who have entrusted cargo to the ship, or who have tried to salvage the ship.

To accomplish these objectives legislation has been developed to cover all relevant aspects of ship safety both at sea and in port. These include detailed requirements for the construction of the hull and machinery, for the carriage of safety equipment and navigational aids, for the provision of trained personnel to operate the ships and deal with emergency situations, for preventing collisions between ships, and so on. The protection of the environment is also legislated for — particularly in respect of the prevention of pollution of the sea by oil or noxious substances, sewage discharge from ships and the disposal of unwanted materials into the sea. The identity and ownership of ships is legislated for through registration and tonnage measurement and the latter is also used as a measure for collection of dues and levies. There is also legislation which deals with other aspects of the shipping industry such as insurance of ship and cargo, salvage, wreck, and so on but this paper concentrates on those particular aspects which are concerned with safety of life and navigation.

In New Zealand the relevant law is almost entirely contained within the following statutes:

(a) The Shipping and Seamen Act 1952 and some 70-odd sets of regulations, notices and orders that are made under it;

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- (b) The Harbours Act 1950 and regulations;
- (c) The Marine Pollution Act 1974;
- (d) The Hovercraft Act 1971.

To implement and administer this legislation requires a head office and field staff of ship surveyors, lighthouse staff, shipping office staff and administrators from a variety of disciplines. The task of keeping all this legislation up-to-date, and just as importantly, keeping each set of requirements consistent with and not repugnant to or anomalous with its fellows is a major one at which the Marine Division is only moderately successful.

Maritime safety legislation can be multilateral, bilateral, or unilateral in character and application, and can result from internationally desired and agreed upon standards, perceptions by maritime and government organisations as to national requirements, and government response to community pressures.

International legislation is usually in the form of conventions which are often developed as the result of major disasters. The loss of the Titanic in 1912 resulted in international acceptance of better subdivision and more lifeboats whilst more recently the loss of the Torrey Canyon in 1967 and the Amoco Cadiz in 1978 gave rise to legislation on oil pollution and more stringent constructional requirements in respect of large tankers.

National requirements usually stem from industrial and society needs and regulations of coastal shipping. Conditions of employment of New Zealand seafarers are examples of this type of legislation.

Community pressures frequently arise from a particular incident or incidents and are often contrary to what regulatory authorities see as being necessarily based on a perception of incipient risk. For example, recent river rafting accidents involving two or three deaths, and a single jet boat accident in Queenstown have brought tremendous pressure on the Ministry through the news media and other sources for restrictive legislation. Contrast this with the situation on the roads where double figure fatalities over a weekend rate front page news only if there is a sufficiently horrific accompanying photograph. Because of the frequency of road accidents there is a community acceptance of a high fatality rate and pressure for more regulation is therefore comparatively low.

There has never been a single central international agency to control and regulate international shipping such as, for example, the International Telecommunication Union or the International Civil Aviation Organisation which control almost every aspect of radio communication and civil aviation operations respectively.

Since World War Two however, we have witnessed an extraordinary growth in the number of conventions and laws dealing with international shipping and these have codified much of what was previously accepted as the "traditional custom of the sea". The organisation which has been responsible for most of these Conventions is the International Maritime Organisation (I.M.O.), an agency of the United Nations which came into being in 1958, and now has a membership of some 125 states. In addition a number of international organisations associated with ships and shipping have consultative status and participate in its work. I.M.O.

deals with technical and safety aspects of shipping and environmental protection. Another U.N. agency, the United Nations Committee on Trade and Development (U.N.C.T.A.D.) plays a prominent part in economic and commercial maritime matters and is probably best known for its "Code of Conduct for Liner Conferences" (which includes the 40-40-20 cargo sharing provisions) and for its efforts to eliminate open registries on flags of convenience. The International Labour Organisation (I.L.O.) also plays an important role in the area of seafarers' welfare and working conditions, but unlike I.M.O. and U.N.C.T.A.D. which are intergovernmental in composition, I.L.O. is tripartite and employers, employees and governments have equal status.

Some of the international conventions which have been drawn up in the last decade and which have already, or will in the future, significantly influence maritime safety legislation are:

- The 1969 Tonnage Convention
- The 1972 Safe Containers Convention
- The 1972 Prevention of Collisions at Sea Convention
- The 1973 Marine Pollution Convention (Marpol) and its 1979 Protocol
- The 1974 Safety of Life at Sea Convention (S.O.L.A.S.)
- The 1978 Standards of Training, Certification and Watchkeeping (S.T.C.W.)

Some of the consequences of these conventions have been, or will be:

- (i) Improvements in, and more stringent requirements for, ship construction, safety equipment, and for the transportation and handling of hazardous cargoes and goods;
- (ii) Improved and more uniform standards of personnel training and watch-keeping;
- (iii) A new system of tonnage measurement which, although it will take some time to come completely into force, will ultimately remove many of the anomalies that exist under the present systems;
- (iv) More stringent controls over pollution of the sea and means whereby countries can be more easily and realistically reimbursed for the costs of cleaning up pollution damage, which in some cases are enormous;
- (v) More control over substandard ships by national and port authorities.

These conventions, not all of which are yet in force internationally, must, of course, be incorporated into domestic law before they become effective for individual countries. New Zealand has ratified a number of conventions but has still to ratify several important ones, which include the 1974 S.O.L.A.S., the 1978 S.T.C.W. and the 1973/79 Marpol. Some other matters which are causing concern on the international scene are piracy, barratry, marine, fraud and arson, all of which appear to be on the increase, and for the prevention of which there is an increasing demand for some effective legislation.

On the domestic front, work is progressing on the preparation of legislation to establish a New Zealand Register of Ships. Australia, Canada and some other Commonwealth countries have already set up their own registers and the United Kingdom intends to do so shortly. These registers will replace the existing "British" Register and when completed there will be "United Kingdom registered ships",

“New Zealand registered ships” and so on, and in marine law the term “British ship” will disappear.

Ship board efficiency and productivity, which includes manning levels, are also subjects under current review and have received a certain amount of publicity. In the course of this review it would not be surprising if some traditional shipboard customs and social patterns changed and a few sacred cows were quietly put down. For example, the advent of electronics (both on the bridge and in the engine room) and the development of satellite communication systems, have already put the future of radio officers and conventional ships’ electricians in doubt. There is clearly becoming a need for a new category of electronics officer, to deal with all shipboard electronics. He or she will have to be fitted into the ship board hierarchy somewhere and legislated for.

I agree with those people who complain that we have too many rules and regulations, and yet I never cease to be amazed that whenever there is a marine accident, or when some new development or innovation like white water rafting or charter yachting is introduced many of those same people clamour for more controls. Contrary to the view held by many, that bureaucrats spend their time devising more and better laws, I seem to spend an inordinate amount of time staving off requests and demands for more legislation whilst at the same time correcting anomalies and plugging loopholes in existing law. Some laws are obviously necessary and those dealing, for example, with minimum standards for ship construction and safety equipment, safe loading and so on are obviously very desirable and indeed essential in order to achieve minimum and uniform standards, especially in international shipping. In some cases however, I think those rules are too detailed and tend to inhibit progress and development. For instance, as long as a lifebuoy will support a certain weight in the water and conforms to certain basic criteria I am not sure that it is critical that the inside diameter should be exactly 18 inches and the outside diameter exactly 30 inches. However, I am only too well aware of the dangers of lack of particularity in legislation.

I am a great believer in the use of codes of practice and although these do not always have the full force of law they can be modified and adapted to changing circumstances very much more quickly than legislation. I would like to see much more use made of them in marine law despite their lack of legal precision.

I am very conscious that a law is only as effective as its policing and enforcement. If it cannot be effectively policed and enforced or if the punishment for breaking it is inadequate, then the law is probably either unnecessary or bad or both. Many of our maritime laws fall into this category and I find it difficult to get enthusiastic or to instil enthusiasm into my staff about spending time and effort trying to secure evidence which will satisfy a court that somebody has broken the law, only to have the case dismissed on a legal technicality or a nominal punishment imposed which leaves the offender quite unimpressed and certainly undeterred from repeating the offence.

I have discussed this with members of the legal fraternity and the reaction I get is that courts which impose relatively light sentences for serious crimes such as

dangerous driving, burglary and so on are not likely to get tough about what to them, may seem unimportant breaches of the maritime law. The fact that securing evidence in the marine field is usually much more difficult than ashore or that the potential for disastrous consequences is usually greater afloat than ashore seems to count for little. For example, the prosecution of a launch owner for illegal carriage of passengers may appear of little consequence to a court and a nominal fine is usually the worst punishment meted out. It certainly is no deterrent! However, if that launchman's incompetence or the unseaworthiness of the boat results in a number of people getting drowned public reaction is to say "Why doesn't Marine Division stop that sort of thing?"

The owner or skipper of an improperly manned or ill-equipped and unsurveyed fishing boat if caught may receive a modest fine but if caught with undersize fish is not only likely to be given a substantial fine but the boat and fishing gear are also automatically forfeited to the Crown! There are times when I wonder if our scale of values is all it should be!

The lengths to which it is necessary to go to secure evidence sufficient to satisfy a court can be quite extraordinary and in many cases not worth the effort for the results achieved. For example, the seabed in the vicinity of the Cook Strait electric power cable is a prohibited anchorage, and we have had endless trouble chasing away one or two persistent fishermen. Detection from shore is easy but apprehension is almost impossible because as soon as the offender sees a boat approaching she or he up-anchors and away. It then becomes virtually impossible to prove to the satisfaction of a court that that vessel was actually at anchor. On one occasion it was decided to attempt an aerial approach by helicopter. This was duly done but the offender was far too cunning. Not only had he covered the ship's name and fisheries identification numbers with sacks but as the chopper came in low he jumped overboard to avoid being identified. Our man came home with mission unaccomplished. However, there was a sequel! A complaint was laid to the Civil Aviation Division that a helicopter had been buzzing this boat and had come so low that the downdraft had blown the complainant overboard. Far from being able to prosecute the man who was endangering millions of dollars worth of electric cable and the North Island power supply I had quite a job to prevent Civil Aviation Division prosecuting Marine Division for a breach of low flying regulations!

Some laws should be there but are not. It is really only with the advent of the 1978 S.T.C.W. Convention and I.L.O. Convention 147 on sub-standard ships that we have tackled the question of medical fitness of seamen and the formulation of certain minimum international requirements for the training and medical fitness of ships' crews. Ship owners, unions, and administrators (including me) have all shied off this thorny problem, unlike our colleagues and counterparts in the civil aviation industry, who impose and enforce very rigid standards of fitness and training amongst aircrews.

In both international and domestic forums legislation is often influenced more by political, economic or industrial considerations than by good sense and unfortunately marine legislation is no exception. The maritime industry is also extremely

conservative and any significant change in maritime law has to be approached somewhat cautiously. In the first place there is very much maritime law and it is so interwoven and inter-related between safety, insurance, liability and so on that an apparently straightforward amendment to one part of the maritime law can have wide ranging consequences. For example, for many years, regulatory authorities have wanted to change from the tonnage parameter used in so much marine law to the much more practical parameter of length but the legal consequences have been too formidable. In the second place maritime legislation is so international in application that unilateral changes can only be made after consideration of and an understanding of possible multilateral implications. For example for New Zealand to deviate from the international "Rules of the Road" and establish local rules for New Zealand ships, as has been suggested by some fishermen, would cause all sorts of problems for foreign ships plying to and from and around New Zealand. In the third place getting an internationally agreed set of rules is a difficult and lengthy business. All sorts of issues — often remote from logical or practical considerations — can arise and take a lot of resolving. For example it had long been recognised that the various methods used by different countries for measuring ships' tonnages did not in many instances accurately reflect either the size of a ship or its cargo carrying capacity, and indeed gave rise to many inconsistencies and anomalies. The working parties and committees which considered various options for reform and the diplomatic conference which met in London in 1969 to try and formulate a common international system were almost all agreed that the time was opportune to replace the old gross tons and net tons parameters with one new gross tonnage parameter which would more accurately reflect the actual size of a ship. The U.S.A. for various reasons unconnected with logic or practicality insisted on retention of a net tonnage and in order to achieve a result and a convention this was agreed to — albeit that the net tonnage figure derived under the 1969 Convention bears no more accurate a relationship to cargo carrying capacity than it did under previous methods of measurement.

Another example is the universal buoyage system introduced by I.A.L.A. (International Association of Lighthouse Authorities). There are two systems, A and B, which in most respects are identical but in one very important feature are completely opposite. In system A the channel marker buoys are green on the starboard hand and red on the port when entering harbour, whereas in system B they are red on the starboard and green on the port hands when entering. Need I mention that the USA was the principal advocate and user of system B!

Anomalies and loopholes in the legislation abound and it is a never-ending task to try and rectify anomalies and plug loopholes before they become significant, or too embarrassing. The difficulties of trying to define what are fairly common nautical terms into legal phraseology and legal exactitude is another constant problem. For example, the definitions of "new" and "existing" ship have in recent years been amended on several occasions and in several ways. Gone are the days when the date of starting to build a ship was clearly identified by the laying of the keel. Nowadays keels are not laid, so alternatives have to be defined, and these have included the date of signing a contract, or the assembly of so many tonnes of steel. These apparently unimportant dates become critical when changes in