

SOME PRACTICAL THOUGHTS AND SUGGESTIONS ON MANAGEMENT OF LARGE CASUALTIES

*By: Vincent M. DeOrchis, Managing Partner
DeOrchis & Partners, LLP*

Frankly, my speech this afternoon before the London Seminar was going to focus on my experiences in respect to the casualty of the M/V MSC CARLA back in 1997. The ship broke in half, and its bow section sank shortly thereafter. The case triggered nearly \$150,000,000 worth of cargo claims and charter party disputes. However, as I was this writing paper, I received instructions to investigate another casualty which recently occurred. In the process of my giving instructions and advice to the lawyers who would be conducting the onboard investigation, it occurred to me that a more practical and perhaps relevant paper to be given at this seminar would be a checklist of things that should be done, and not be done, in the course of handling a large casualty.

Obviously, much of my advice is mechanical in nature, and perhaps more relevant to the American legal system. However, I think it is always helpful, when faced with the urgency and critical timing of investigating a major casualty, that any law firm assigned to the matter have some guidelines set up in advance to assist the team, and the client, in conducting an effective, efficient and economic handling of the casualty.

Following is my list of recommendations, which hopefully may prove of some assistance to those of you who handle such investigations.

- Communicate with the client from the outset about your instructions. Not only should the underlying facts as relayed by the client be noted in detail, but just as importantly, exactly what it is the client expects his attorney to do.
- Identify clearly who the firm is to represent. Are there P&I clubs or hull clubs or other insurance companies involved? Are there foreign subsidiaries, agents,

management or charterers who may also be involved in future litigation? If you don't know those companies or individuals, get their details.

- Immediately confirm in writing to the client the underlying facts which have been reported to you, who you are to represent, your instructions, and list the documents or information which you believe you will need to begin investigating the loss or incident immediately.
- Establish a folder for notes that are taken in respect to conferences or communications with the client. Each note should obviously be dated and reflect the persons who were in attendance. The notes should be filed chronologically and placed in a secure location in the office. Often, those notes may contain very sensitive information.
- Persons who will be assigned to the team in your office should be identified. It is very important that they be given a clear description of their duties and responsibilities in the handling of the case so that there is a minimal overlap of work. Clients are very conscious about multiple persons working on a case; it should be made clear to the client exactly what each lawyer, associate or paralegal's function will be.
- One member of the team should be assigned to investigating and collecting all media information concerning the casualty. This means not only trade magazines, newspapers and television stations, but also the internet. Often new information or videos can be obtained from the media. On occasion, reporters can even be contacted to find out if they have additional information. One should be careful, however, as reporters like to ask questions rather than answer them.
- Clients should also be prepared for possible contact by the news media. It is best that the news media be referred to one person for all communications, so as to make sure that there are no cross signals sent. While lawyers often handle this job,

if the casualty is significant enough, consideration should be given to engaging a public relations expert for advice. Ignoring the media can be just as harmful as providing the media with inaccurate or too much information.

- All communications with the client in writing should be carefully drafted and marked confidential given the potential that the communications may be sought by opposing parties. The attorney-client confidentiality privilege must be maintained. At least in the United States, this means making sure that the communications with the client are not copied to third-parties, which can even include the underwriter, or a surveyor or expert. Obviously, the same instruction is true regarding communications from the client to the lawyer. This is often forgotten, and the client frequently copies a number of third parties on the communication which may threaten the attorney-client privilege and result later in demand for documents and reports. It is important to assign a lawyer to head an investigation team because, under U.S. laws, not only are the attorney-client communications protected from disclosure, but the same is true of the lawyer's work product. He can rarely be asked, even by a court, what it is his investigation revealed.
- Someone on the team should be assigned to creating a timeline of events in the case. The timeline should include not only the events of the casualty, but also the events post-casualty, including the firm's investigation and contacts. Often, after litigation has ensued, everyone is trying to piece together exactly when events happened and how certain communications occurred within those particular events. The timeline may help avoid those confusions.
- Assuming that experts are required, immediate thought should be given in coordination with the client as to which experts should be considered. Even if the experts are frequently used by your firm, their track record should be checked against the internet and legal research devices so as to make sure that there has been no negative publicity concerning the expert, or recent testimony which may

be contrary to or in conflict with the issues in the present casualty. Don't rely on the expert's "say-so." Check him out independently.

- Obviously the client should be made aware of the options with respect to available and recommended experts, the pros and cons, and given a copy of their CV, together with their fee rates. Many experts today require substantial amounts of monies up front as a retainer.
- The selection of an expert may, in large part, be motivated by "conflicting out" the key experts in a particular field. I won't comment on the ethics of this, but it is a practice that is obviously done worldwide. Certainly, if it is learned that the opponent has appointed a particular expert, thought must be given to whether there are particular experts who have proved in the past that they can effectively stand up to the opponent's experts.
- Care must be taken in communicating with the expert. The outline of facts provided by the attorney or the client, as well as the documentation given to the expert, can all be ordered by a U.S. Court to be produced at a later stage in an effort to determine the basis for the expert's opinion. Perhaps one of the biggest mistakes lawyers make is sending copies of their opinion letters to the client and to the experts as well. It can be very embarrassing when those letters end up in the hands of opposing counsel under our court discovery rules.
- Consultations with experts should be done as much as possible verbally, so as to avoid the expert having to commit himself in writing to particular theories of causation or damages. My rule, at least, is that an expert should not put anything in writing until he is absolutely certain as to the basis of his opinion and there is little possibility that he is going to change his mind. Consulting with an expert should be verbal until the lawyer asks him to prepare a report.

- In the M/V MSC CARLA case, the shipyard's expert initially wrote its counsel that it took a position that was also very favorable to the shipowner. Two years later the shipyard's expert changed his mind after the shipyard was sued for contribution. This diametrical change in opinion certainly appeared to have an impact on the trial judge.
- Someone on the team should be assigned the job of making a master database of all of the names and contact details for all persons who are involved in the case, regardless of whether they are on your client's side, or on the opposing side.
- As soon as the opponents appoint their experts, research on the internet and legal databases should be conducted in order to determine if there are any issues with that particular expert. Many firms today hold onto transcripts of testimony by experts who have testified over the past decade or more. Certainly, an email to other lawyers in your firm concerning any knowledge of the opponent's witness or the opponent's experts may prove helpful. A meeting or conference call should be scheduled with the experts and client as soon as possible, so that the expert understands exactly what is the client's position, the client's concerns, and the underlying strategy in the case, if any. The expert should be asked not to take notes of such meetings.
- Assuming that there is an on site or onboard investigation of the casualty, preparations for that should be made as soon as possible. One person should be put in charge of all of the mechanical details, including flights, reservations, equipment to be taken along, files, etc. Without a "point" person, I can assure that what will happen is that several members on the team will all assume that someone else has taken care of certain basic steps. If the U.S. Coast Guard goes on board to investigate, the lawyer in charge should be present on the ship as well. The client and its employees have a right to legal advice when being questioned by a government agency.

- Research should be made as to whether visas will be required to attend the geographic location of the onboard investigation. Arrangements should be made to contact the local agent of the client, assuming there is one. The agent can often assist not only with accommodations, but also help to gain entrance to the pier facility and/or securing local transportation. He may also be of assistance in securing a translator, if needed.
- Cell phones are certainly very useful today in communicating with members on the team, as well as your office and client during the course of on site or onboard investigations. However, occasionally the location of the casualty does not permit the use of cell phones. This should be anticipated with the possible need for a satellite phone and hand held walkie talkies for communication amongst team members.
- For the legal team member in charge of photographs, he should be asked to make a log by hand, or by tape recorder, of each photograph that is taken. It is exceedingly frustrating when after returning to the office and reviewing hundreds of photographs, one is not sure what the photograph depicts or where it was taken. If the photographs are critical, they should be taken by a professional photographer so that the photographs can be authenticated at trial and received in evidence. A lawyer cannot testify at the trial to introduce his own photographs. Like the experts, the professional photographers should be hired by the lawyer so as to come within the work product privilege.
- The client should be called during the course of an investigation on site. He is as anxious to know what is going on as anyone else. The communication should be succinct, with advice on how long the completion of the investigation will take and what is anticipated in concluding the investigation. With today's handheld electronic gadgets, there is no reason why emails cannot be sent directly from the

vessel reporting on progress with attachments including photographs that were taken onboard the ship.

- One problem that is often encountered during onboard investigations is obtaining copies of the vessel documents. Often the Master will not allow them to be removed because he is required to keep originals aboard the vessel. One can try to take photographs of pages of log books, engine log, charts, etc. These photographs often prove unreadable at a later date. A better option is to consider using the ship's photocopy machine if it has one. If it does not, there are handheld scanners that can be brought onboard and are often very effective. Otherwise, the Captain should be told to have one of his crew take the relevant documents to a local photocopy store.
- A member of the team should be in charge of making a list of all documents that are being physically removed from the vessel, a list of all documents which have been copied aboard the vessel and a list of all documents that are relevant, but had to be left aboard the vessel. A list should also be made of all documents which could not be located aboard the vessel, but may later prove to be critical.
- As regards the crew, they should necessarily be interviewed as soon as it is convenient with permission of the Master. Generally, the American procedure on interviewing crew members differs from that of the British or Continental system because statements of crew members cannot be introduced into evidence in a courtroom, unless the facts are absolutely undisputed by the other side, or, for example, the witness has died. The American system requires cross-examination of the witness to establish the veracity of his testimony. The only purpose that a signed statement can provide is to be used by the opponent against your witness for purposes of impeaching the testimony of the witness. In short, written statements sometimes only serve to discredit your own witness. Therefore, American attorneys will recommend that the witnesses be interviewed by the attorney, but no

statement be taken. The notes of the lawyer are protected under the attorney-work product privilege.

- Photographs of the crew members or other witnesses should be taken to assist in remembering who the witnesses are and their appearance. If the crew members or witnesses have any seaman's card or other identification on them, that should also be duplicated. A note should be made of whether a crewmember would make a good witness, or not.
- There are 3 exceptions to my rule about never obtaining a signed written statement from a witness: (1) if it is clear that the witness intends to leave the company and may not be around in the future to cooperate by providing oral testimony, or (2) the witness is very ill, and again may not be able to cooperate in the future. The third (3) reason for obtaining a statement from a crew member or other witness is because the witness is hostile to the client. Presumably, that witness will continue to be hostile in the future, and a signed statement (assuming he will give one) will at least delineate exactly the reasons why the witness is hostile. Should that witness change his mind later on and provide different testimony, then the signed statement can be used to impeach that witness.
- Any onboard investigations should keep in mind the possibility that crew members may have taken videos or pictures during the course of the casualty. Arrangements should be made to obtain copies of these materials. The witnesses should also be advised to hold onto the cameras and not to delete the videos or photographs until they receive further advice from you. The same may also be true of shipboard computers or monitors.
- To the extent that any onboard or on site investigation is being done jointly with the opposition, it is important that a member of the team be assigned to escort the opposition team around the ship or facility controlled by your client. They should

not be allowed to talk to any employees or workers on ship or the facility, and their opponents' photographs should be restricted to those areas that are relevant to the incident.

- Strong consideration should be given to having the opposing investigation team sign off on waivers or releases before coming onto a site or boarding a vessel that has been the subject of a casualty, and which may pose a threat of personal injury. The Master or site manager should be told beforehand by the client the name of the lawyer who will head the client's team. The crew should be cautioned not to speak to any other lawyer without clearance.
- The opposing team should be warned in writing not to remove any materials, documents or evidence from the site. An agreement should be jointly made between each team's experts as to which materials and evidence should be marked, tagged and preserved.
- A member of the team should be assigned the task of recording a chain of custody of each of those pieces of material or evidence so that at all times it is known where the evidence is located and in whose hands it has traveled through.
- When preparing the report on the results of the on site investigation, it is equally important to advise the client of what information, documentation, witnesses or data was missing and remains critical to the assessment of the case. Otherwise, the client will rightfully assume that everything that was required during the course of the on site investigation was indeed obtained.
- The experts who are involved in the onboard or on site investigation should not be instructed to prepare any reports of their activity, so as to avoid the potential for creating a paper trail as to their speculations during the investigation. Rather, the expert should first sit down with the lawyer and/or the client shortly after the investigation, in order to review the expert's considerations, initial thoughts, and

suggestions for future strategy. To the extent that more than one expert may be involved on the team, consideration should be given to having the experts appear at a joint meeting so as to make sure that their reports are, if possible, coordinated and not conflicting. This is also the time to give thought to whether additional experts are needed, or whether there are already too many experts.

- Often the documents that are collected from an investigation are in foreign languages. It is exceedingly expensive to have every document translated. On the other hand, the most innocuous of documents may indeed contain very critical information. Therefore, lawyers should consult with the client to see whether the client has a trustworthy employee who can be relied upon to scan through the documents with you to determine those which may have some relevance, however weak. Obviously, the size of the loss and legal liability may influence the extent of the investigation required.
- Where governmental authorities, such as the Coast Guard, are involved in a particular casualty, it is important that they be added to the Master list of all relevant persons involved in the case. Their bios and governmental positions should be obtained from websites, and their superiors identified. Again, other lawyers in the office should be consulted as to whether they have had any experience with the particular government officials in the past. The client may be very sensitive to lawyers communicating with government officials to the extent that it may interfere with or jeopardize the company's operations. Therefore, any communication with any government agency should be first discussed with the client.
- After the investigation, a report should be prepared for the client, on a confidential basis, outlining future strategy by stages. This advice is the basis for the attorney/client and attorney-work product privilege. The findings of private investigators or surveyors not hired by lawyers are not protected under U.S. law.

The investigator or surveyor hired by a lawyer should make clear that his report is issued under instruction from the lawyer, and is addressed to the lawyer. An estimate of expenses for each stage may very well be required by the client or its insurer.

I believe that the above-mentioned steps will take most law firms through the basics of the preliminary investigation of a major casualty. I am sure that other speakers here today can equally provide important points to be remembered when handling a major casualty. Keeping an internal investigation private and protected by legal privileges is the name of the game. Doing it right can well determine the legal and financial consequences.

I thank you for this opportunity to speak.

Vincent M. De Orchis