

LOOKOUT

Navigating the complex world of P&I insurance for Japanese Members

**Latest loss
prevention initiatives**

Collecting evidence

**The role of VDR
in accidents**

Limitation of liability

**Marine casualties
and legal privilege**

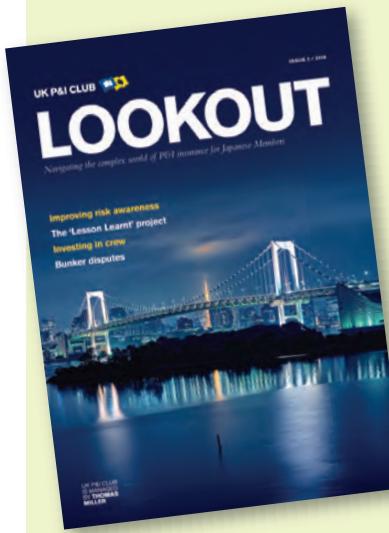
**Post casualty
media response**



EDITORIAL

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LOOKOUT

Lookout is a bi-annual newsletter from the UK P&I Club that collates the most relevant and topical content from across the Club's global network and shares it with our Japanese Members. It covers subjects such as people claims, loss prevention, defence and industry specific items.

The information in this newsletter is not legal advice and should not be relied upon as such.

THE AUTHORS

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Loss Prevention Director



Stuart, a Master Mariner, joined Thomas Miller's Loss Prevention department in 2014. Prior to this he worked as casualty investigator for a leading shipping law firm and was at sea on a variety of different ship types including crude oil tankers, freight ferries, passenger ships and offshore drilling units, where he sailed as Barge Master.

Capt. Hiroshi Sekine

Senior Loss Prevention Executive



Before joining Thomas Miller K.K. in July, 2019, Capt. Sekine held various senior roles across his 43 years within the maritime industry, including Captain and Managing Corporate Officer in a leading international shipping line, and more recently, Managing Director and President at a marine consultancy firm. He is also a Lecturer at Tokyo University of Marine Science and Technology and the Japan Coast Guard Academy, as well as a Visiting Professor at Kobe University, Japan.

Aki Tsukui

Director of Claims



Aki joined Thomas Miller in 2004. She was on secondment to the New Jersey office and the Tokyo office before moving back to London in 2013. She is a qualified solicitor, having worked for a major maritime law firm in London, and is responsible for the handling of claims for Japanese Members. Aki speaks Japanese and is a director of Thomas Miller.

Luke Lane

Syndicate Manager, Thomas Miller K.K.



Luke trained as a barrister and in 2013 he joined Thomas Miller, after working for a number of finance and shipping companies based in Singapore and South East Asia. Luke joined TMKK in September, 2019.

Yosuke Tanaka

Lawyer and Senior Partner at Tanaka & Partners, LPC



Yosuke Tanaka is an Attorney-at-Law, qualified in Japan, and a Senior Partner at Tanaka & Partners, LPC (<https://tylpc.jp>). He has been working as a maritime lawyer for more than 20 years in the area of marine casualty, international litigation or arbitration and ship finance, as well as an escrow agent for ship sales etc. He obtained an LL.M. at University of London (UCL) in 2003 and has been teaching Japanese Maritime Law in Kwansei Gakuin University in Kobe as a part-time lecturer since 2017.

ようこそ

Typhoon Hagibis – the worst typhoon to hit Japanese shores in six decades – brought deadly flooding and landslides to large parts of Japan in October last year. The UK P&I Club, the Japan Branch and the Managers send condolences for all those who lost their lives and offer heart-felt sympathies to all those impacted by the typhoon. We wish for a speedy recovery for all affected communities.

2019 marked three significant landmarks in the history of the UK P&I Club.

First, the UK P&I Club celebrated its 150th anniversary of its foundation. As part of the year's celebrations, the UK P&I Club organised a competition "Investing in a Safer Tomorrow" which challenged a new generation of shipping professionals to identify new safety initiatives. Over 200 applicants worldwide entered the competition. On 4th July 2019, the UK P&I Club announced the winner of its 'Investing in a Safer Tomorrow' global maritime competition at the UK P&I Club's 150th Anniversary Gala at the National Maritime Museum, Greenwich, London. There were three winning entries announced but the entry of Mr. Puiyush Jian from India took the top prize with his innovation to improve the current 'passive' Deadman Alarm System. Jian designed a cost-effective, simple and easy-to-install 'active' system using a wireless hand-held transmitter.

It was also a fitting occasion for the UK P&I Club to launch the new UK P&I Club logo at the National Maritime Museum. The gala was attended by many leading industry figures. The UK P&I Club focused on the support of two worthy charitable projects for 2019: The Mission to Seafarers and Mercy Ships.

Secondly, the UK P&I Club Japan Branch celebrated 30 years of it having its licence here in Japan. The Japan Branch started its insurance business as a branch of the UK Bermuda Club in April 1989. In 2013, it obtained a new licence, following the Club's restructure, and it became the Branch of the UK Europe Club.

Finally, 2019 marked the founding year of the new service company, Thomas



Miller K.K. by the Managers of the UK P&I Club. Operating out of Tokyo and Imabari, TMKK offers a full correspondency and claim service to all UK P&I Club Members. The establishment of TMKK also underlines the UK P&I Club's renewed commitment to its Japanese membership as TMKK works alongside and provides valuable support to the UK P&I Club's Japan Branch. TMKK is already enhancing local resources and aims to streamline the delivery of bespoke claims and advisory services direct to UK P&I Club Members in Japan, as well as to Japanese Members based in Singapore.

Following a celebratory year, this edition of Lookout has some special features. Stuart Edmonston details what is new in Loss Prevention and the latest initiatives launched by the UK P&I Club, including a link up with the

aviation industry on safety training.

As part of the P&I seminar programme that the UK P&I Club ran in November on post casualty management, Capt Sekine highlights the importance of gathering evidence from the ship. Taking the incident of the Cosco Busan which allied with Delta Tower of the San Francisco-Oakland Bay Bridge in November 2007 and caused a fuel spill that contaminated 26 miles of pristine shoreline, Capt Sekine illustrates some important lessons that were learnt from that unfortunate incident.

Aki Tsukui, Claims Director explains the rights of shipowners to limitation under Japanese law, whilst Yosuke Tanaka of Tanaka & Partners provides some guidance on legal privilege under Japanese law, and how ship's officers and crew should approach the interview by Japanese maritime authorities as part of the post casualty investigation.

Finally, Luke Lane, Syndicate Manager of TMKK explains just why media response is just as important a part of any handling of the maritime casualty and how a well co-ordinated team effort provides the recipe for a successful crisis management and PR response.

We hope you find this edition informative and we would welcome any feedback on any of the articles or suggestions for future topics. ■

Masaki Oiwa
*The Representative in Japan
UK P&I Club Japan*

Paul Sessions
*UK P&I Club Regional Director for
Japan/TMKK*

The latest loss prevention initiatives of the UK Club

Stuart Edmonston, Director of Loss Prevention at UK P&I Club discusses the latest initiatives to be launched by the UK P&I Club, including a link up with the aviation industry on safety training.

We are committed to safety. Our full-time, worldwide loss prevention team provides Members with proactive and inclusive loss prevention support. The team provides technical and operational advice as well as participating in crew seminars and training days.

There is no one-size-fits-all approach to loss prevention: every shipowner is different. The Club has therefore developed a unique series of bespoke loss prevention services for Members across crew health, ship safety and operational safety.

Ship risk assessments

Every year the UK Club handles thousands of claims. The insight gained from this has enabled us to develop an in-house inspection scheme on board our Members' vessels, focused on threats that we know from past experience have caused claims. As such, we invite Members to commission our

experienced team of inspectors, all ex Masters or Chief Engineers, to conduct risk analyses on entered ships.

This scheme which operates completely separately to our condition surveys, is voluntary and available to all Club Members at no additional cost – the sole aim is to assist in identifying and mitigating threats based on five main risk areas: personal injury, navigation, pollution, machinery & equipment and cargo. The analysis will show how major hazards could occur, and suggest safeguards to prevent them.

CAE partnership – Aviation standard human element training

The Club has recently partnered with the world's largest aviation training company, CAE, to encourage a step change in crew training and safety outcomes. Launched in September during London International Shipping

Week (LISW), this new safety initiative led by the Loss Prevention team looks to provide Members with high quality aviation standard learning materials which can be used for initial, refresher training or in parts to emphasise particular human element training needs.

CAE are leaders in the manufacture of flight simulators and aviation training, both technical and human element. The programme aims to "train the trainer" to identify and use all available resources in everyday situations from an aviation perspective, as well as those occasions that require deep collaborative problem solving in complex and rapidly changing environments.

Reflective learning training – Lessons learnt

Our reflective learning series is one of the Club's more recent initiatives. Each month the Loss Prevention team aims to share in-house claims experience through short-form case studies to help Members avoid similar incidents.

The recent addition of training videos to complement the written reports have been utilised by many for onboard as well as shore-side training. The videos are aimed at providing an inter-active learning experience for seafarers of all ranks and experience by examining incidents and suggesting actions which may have prevented them from happening or to mitigate their consequences. At the end of each video, the seafarer is invited to reflect upon lessons learnt arising from the incident and how they could apply to their own shipboard working practices or systems.



BEST PRACTICE

Crew health

A healthy crew is vital for the safe and successful operation of a ship. Crewmembers who fall seriously ill at sea often result in a repatriation causing diversions, disruption and delays. While illness can strike at any time, it is far less likely to happen if each crewmember has received an enhanced medical examination prior to joining a ship. The Club's pre-employment medical examination (PEME) service has been operating for over 20 years and has become one of the most effective loss prevention initiatives.

CASE STUDY

Diabetes and pneumonia

A crewmember who failed to pass the UK Club PEME carried out on behalf of a Member joined another Member's ship after a basic Department of Health examination. Shortly after joining the ship, he suffered a high fever and fell unconscious. The ship had to divert back to port in the USA to hospitalise the crewmember. After a lengthy stay in intensive care following complications caused by pre-existing diabetes and pneumonia, total costs to the Member were US\$237,000.



The aim of the service is to reduce the volume and value of crew illness claims which are caused by a pre-existing illnesses or disease. These underlying conditions often impact on the crewmember's fitness for service and can endanger not only the health of the seafarer, but also the safety and wellbeing of the whole crew and ship.

Operational security

The shipping industry has long been a target for criminal activity. The high



value and volume of maritime cargoes, the perceived 'deep pockets' of shipowners, and the inherent difficulty of making anything on or next to the sea entirely secure, continues to attract opportunist and organised crime. Increasing reliance on information technology has also exposed owners and operators to the growing risk of cyber attacks.

The Club therefore provides a unique criminal investigation and security advisory service to Members known as Signum Services. Led by former senior detectives from London's Metropolitan Police Service, the service has been solving crimes against Members for over 60 years.

The service is designed to provide a prompt, confidential and professional response to any maritime crime involving our Members worldwide. Cases our investigators have been called upon to investigate include cargo thefts, bunker frauds, fraudulent claims, forged bills of lading, cyber attacks, drug smuggling, people smuggling, arson attacks, homicide, sexual assaults and threats. Signum Services travel across the globe to make their enquiries, supported by extensive high-level contacts within national law enforcement agencies, intelligence services and military special forces. ■

CASE STUDY

Copper theft at load port

Signum was asked to investigate a cargo claim against a Member who delivered a container with sand inside it rather than US\$2 million of copper wire. The cargo owner had seen the container being stuffed in the Philippines and had even followed the truck to the load port. However, from analyses of weights and times, Signum proved the truck had diverted just before the port to another location, where the copper was substituted for sand. The culprits were also identified as members of an organised crime gang, which had committed similar frauds in recent years. As a result of the investigation, the Member was able to defend the claim and the perpetrators were brought to justice.



If you would like to know more about the work of the Club's loss prevention initiatives, please contact the team:
lossprevention.ukclub@thomasmiller.com

The mariner's role in collecting evidence

Capt. Hiroshi Sekine, Senior Loss Prevention Executive highlights the importance of gathering evidence from the ship.

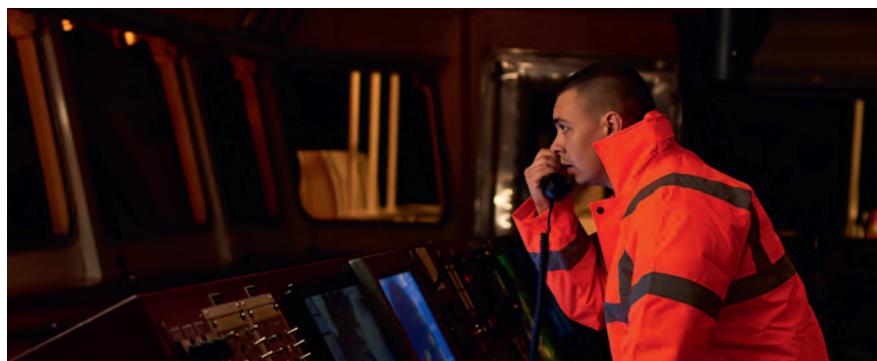
The Mariner's role in the aftermath of an incident at sea is of vital importance. The information detailed and preserved immediately after an incident often provides the key factual evidence relied upon at a later date. The success of any claim will depend highly on the quality and contemporaneous evidence gathered on board.

There are two main reasons why it is important to capture and properly record evidence in the immediate aftermath of an incident on board:

1. Details of the incident are fresh in the minds of the witnesses – the more accurate the information gathered at this time, the more helpful it will be to understand and present to a tribunal at a later date.
2. The more detailed the witness evidence, the less likely the witnesses will have to be called on to explain their account of events at a later date.

It is necessary for all those involved in an incident, no matter how junior their position, to record as accurately as possible the facts of what happened from their perspective as soon as possible after the incident has occurred. When recording their statement evidence, it is important that the witnesses *concentrate only on the facts*; do not allow emotions to dilute the details with opinions or conjecture.

It follows that evidence recorded immediately after an incident carries more weight with a tribunal than witness statements taken months or even years after the event. Of course, obtaining such timely and accurate witness evidence might be challenging depending on the circumstances, particularly when the crew are dealing



with the aftermath of an upsetting or particularly traumatic incident on board, a significant casualty situation or death of a crewmember.

Before commencing the process of gathering evidence and recording witness statements, the Master must first ensure that everyone on board is safe and suitably calm and coherent. It is highly recommended that whoever is managing the situation with the crew encourages them to sketch out rough drawings of the incident, where the relevant crew were standing at the time, depicting how the incident occurred as accurately as possible. Again, the witnesses should be instructed to stick strictly to the facts of the case, avoiding any speculation or thought as to cause.

The most effective method of recording evidence is simple and contemporaneous note taking, accurate record keeping and photographs. A record should be kept of all evidence preserved and where it has been kept. In the immediate aftermath of any incident, the officers should regularly be entering data into the deck and engine log books as completely and as accurately as possible, making additional notes about what happened with as much detail as possible. Important elements to note include the names and ranks of the crewmembers involved,

details of what happened, what actions were taken to minimise any losses and what actions were taken to investigate the cause of the incident. As mentioned above, the more detailed the information recorded at this time, the less likely it will be that the witnesses are required to give additional evidence at a later date.

Electronic evidence including VDR, ECDIS output and any photographic and video evidence (e.g. from mobile phones) should be saved and downloaded to secure storage devices. It is vital that VDR data is saved, carefully following the manufacturer's instructions, as soon as possible after a casualty as the storage capacity of the VDR may be limited and overridden within a short period.

It is imperative that none of the witnesses attempt to revisit their evidence or try and alter any logbook entries or notes taken at a later date. Falsified or altered records are easily identifiable. If any of the records or statements appear to have been modified, it can potentially taint and discredit all the evidence of the crew on board, potentially affecting the final judgement and outcome of the case. Furthermore, it may be seen in some jurisdictions as a serious offence that can lead to the detention of the ship and/or crewmembers. ■

COSCO Busan bridge tower allision and the role of VDR

Capt. Hiroshi Sekine, Senior Loss Prevention Executive, uses the case study of the COSCO Busan to illustrate some practical lessons that were learnt from this unfortunate incident.

Overview

VDRs and their effective use

A VDR (Voyage Data Recorder) is required to be installed on ships with a gross tonnage of 3,000 tons or more, according to SOLAS Chapter 5, Rule 20. VDR has been installed on ships since 2002. The purpose is clearly stated in paragraph 1 of the Regulations as follows:

To assist in casualty investigations, ships, when engaged on international voyages, subject to the provisions of regulation 1.4, shall be fitted with a voyage data recorder (VDR)

In other words, VDRs have a role in maritime investigations, and have brought about significant changes in marine accident investigations, which have traditionally relied on documents and witness statements. They have become extremely effective in helping to analyse and investigate the causes of maritime accidents.

VDR performance standards are defined in IMO Resolution (MSC.333 (90)), and the following data must be recorded: date and time, ship's position, speed, heading, bridge audio, communications audio (VHF), radar data, ECDIS, echo sounder, main alarms, rudder order and response, engine order and response, hull openings status, watertight and fire door status, hull stress, wind speed and direction, and so forth.

The information stored on the VDR in the event of a marine accident has been indispensable in marine accident investigations. The COSCO Busan bridge tower allision accident was a remarkable event that demonstrated its effectiveness. Let us explain as follows what role it played.

Outline of COSCO Busan bridge tower allision accident

On 7th November, 2007, around 08:30 local time, the Hong Kong flagged container ship "COSCO Busan" (274m) made contact with the pier of the Delta Tower of the San Francisco – Oakland Bay Bridge after leaving the Port of Oakland (Berth 56) for Busan, Korea.

Contact with the bridge tower created a 64m long by 3m high by 2.4m deep gash in the forward port side of the ship and breached the Nos. 3 and 4 port fuel tanks and the No. 2 port ballast tank. No injuries or fatalities resulted from the accident, but about 200m³ of fuel oil was spilled into San Francisco Bay.

The fuel spill contaminated about 50km of shoreline, killed more than 2,500 birds of about 50 species, temporarily closed a fishery on the bay, and delayed the start of the crab-fishing season. Total monetary damages were estimated to be \$2.1 million for the ship, \$1.5 million for the bridge, and more than \$70 million for environmental cleanup.

The National Transportation Safety Board (NTSB) determined that the accident was the probable cause of an unsafe voyage of a vessel with limited visibility; namely:

- the pilot's impaired cognitive performance from his use of prescription medication;
- the absence of a comprehensive pre-departure master/pilot exchange and a lack of effective communication between the pilot and the master during the incident voyage;

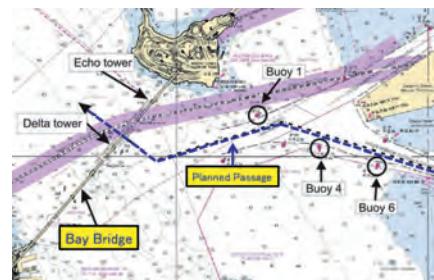
- the master's ineffective oversight of the pilot's performance and the vessel's progress.

As the NTSB report concluded, the VDR played a very important role in this investigation and analysis process.

Details of the accident and the VDR

Ship's planned route and progress

The planned route of this ship is shown in Fig. 1 (dashed line). It sailed out of the bay from the Port of Oakland in the following circumstances, with limited visibility.



The following exchanges were made on the ship at the time of departure. ([VDR]: audio recording extracted from the VDR)

06:20

The pilot arrived at the ship's bridge and gave his Bar Pilots pilot card to the captain. The officer of the watch gave the vessel's pilot card to the pilot. After he signed this card, the pilot wrote "rec'd only"

06:37

The pilot informs the VTS (Vessel Traffic Service) of his plan to pass through the Delta-Echo span (approx. 670m between bridge towers D and E)

VOYAGE DATA RECORDER

08:00

The vessel departs berth 56.

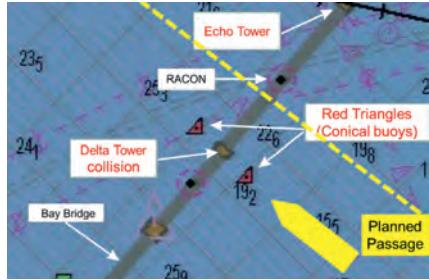
08:22

[VDR] The pilot, referring to the electronic chart, said (to the master), "What are these... ah... red (unintelligible)?"

[VDR] The master responded, "This is on bridge."

[VDR] The pilot then said to the master, "I couldn't figure out what the red light... red... red triangle was."

The "red triangle" refers to the red conical buoys installed north and south of the Delta Towers (the tower that the ship would make contact with later).



After the accident, the pilot explained to the investigator the VDR voice recording as follows.

"The symbols on the...electronic chart didn't look similar to me to the symbols that are on paper charts."

"So I asked the captain 'Where is the center of the Delta-Echo on this electronic chart?'

The captain pointed to one position on the chart, which had two red triangles on both sides of the bridge. So I said, 'Well, what are these?' The captain replied: 'Oh, those are to mark the lengths for the center of the span.'

I see probably 10 different ECDIS during a week" but "I have never seen a red triangle on any piece of navigation information, electronic, paper or otherwise... That's why I asked him, I said, 'What does this mean?'"

However, the above conversation that this pilot had with the captain was not recorded by the VDR. Therefore, this statement which the pilot asked the captain was not accepted as evidence

but was taken as unilateral statement by the pilot. (The NTSB concluded that there was no such conversation between the pilot and the captain in the post-accident investigation.)

A veteran pilot who guides 10 or more ships a week (from his testimony above) claims he did not know the meanings of the marks on the ECDIS (electronic) charts. He also says that he had to ask the captain, and that he guided the ship according to information from the captain (with the resulting misunderstandings and communication problems). Such statements can be said to be an excuse for having caused an accident, which is a very unfortunate response from a professional. Does such a statement itself come from the "decreased cognitive ability caused by prescription drugs" that has been raised as a probable cause?

Navigation status immediately before the accident

Five minutes before the allision, the ship was about a third of a mile away from the bridge, and the VTS operator questioned the pilot about the ship's heading. The following communication records are taken from the VTS's records and the ship's VDR.

Communication recorded the following conversation between the VTS and the pilot:

08:27:48

VTS: Unit Romeo, Traffic. AIS shows you on a 235 heading. What are your intentions? Over. (Romeo: Pilot designator name)



08:27:57

Pilot: Well, I'm coming around; I'm steering 280 right now.



08:28:04

VTS: OK, understand you still intend the Delta-Echo span. Over.



08:28:15

Pilot: Yeah, we're still Delta-Echo.

08:28:21

VTS: Uh, roger, Captain.



The communication between the two seems to be quite normal and no concern is raised. But about one minute later the ship made contact with the tower.

08:29:30

Pilot: Hard Port!

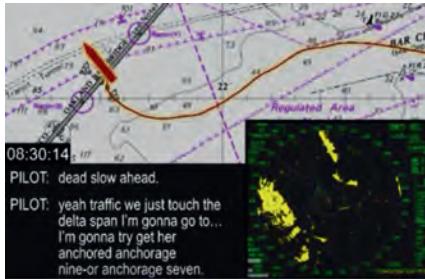


VOYAGE DATA RECORDER

The forward port side allided with the pier of the Delta Tower. In order to move the hull away from the pier the pilot ordered hard port rudder.

08:30:14

Pilot: Yeah traffic we just touch the delta span I'm gonna go to... I'm gonna try get her anchorage nine or anchorage seven.



Thus, the pilot and the captain did not expect the ship to make contact until one minute before the accident.

The above communication was taken from the VTS's recordings. During this communication, the following important conversation was exchanged between the pilot and the captain, which was recorded by the VDR.

08:28:08

[VDR] The pilot asked the captain: *This (apparently referring to a point on the electronic chart) is the center of the bridge, right?*

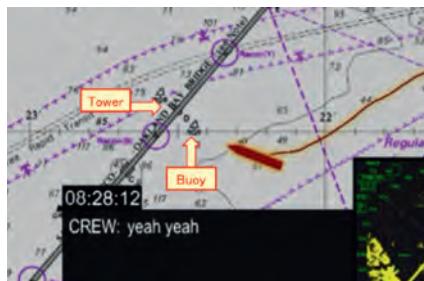
Captain: "Yeah, yeah"

08:29

The bosun used his radio to report in Mandarin, "*The bridge column, the bridge column*"

Captain answers in Mandarin, "*Oh, I see it, I see it*"

Pilot: "Yeah, I see it"



In other words, from this conversation, the pilot pointed at a buoy on the radar and tried to ask, "*Is this the center between the towers?*" The captain answered, "*This is the center of the whole of the bridge (not between the bridge towers)*" and misunderstandings occurred between the two.

This indicates the "vulnerability of the bridge team", and the following points, which are said to be the most important in BTM (Bridge Team Management), can be said to be obvious:

- Incomplete passage plan
- Lack of situational awareness (including lack of communication)

As described above, the NTSB has pointed out that "the Captain failed to monitor the pilot's performance and ship's progress" as the probable cause. But, of course that is not just a matter of poor pilot performance. It is understood that it is very important for the ship's crew to accept a pilot as a member of the bridge team and to share the passage plan and help maintain situational awareness.

Post-accident VDR recording

After the allision with the tower, the next conversation was recorded by the VDR.

Chief officer: *The ship is leaking oil.* (Mandarin)

Pilot: *Is the ship all right?*

Captain: No, no, no, it's leaking.

Pilot: OK, dead slow ahead. We're going to anchor.

In addition, while heading for the anchorage the pilot and the captain had the following conversation recorded by the VDR.

Pilot: (Unintelligible) You said this was the center of the bridge.

Captain: Yes.

Pilot: No, this is the center

That's the tower, this is a tower.

That's why we hit it.

I thought that was the center.

Captain: It's a buoy, (unintelligible) the chart.

Pilot: Yeah, see. No, this is the tower. I asked you if that was (unintelligible)...

Captain, you said it was the center.

Captain: Cen... cen... cen... center

Pilot: Yeah, that's the bridge pier (expletive). I thought it was the center.

After this conversation, the captain said in Mandarin: "*He should have known – this is the center of the bridge, not the center of the channel.*"

In this way, the pilot insisted that the information provided by the captain was wrong despite his misunderstandings (misconceptions). But as part of the duties and responsibilities of the local pilots, not knowing local area was gross negligence and cannot be excused.

In this accident, facts and events that were previously unknown, were revealed by the VDR recordings, and the importance of the role of the VDR was again highlighted. In the event of an accident, the VDR is an important piece of equipment that provides clear evidence for use by ship operators, ship owners (management companies), pilots, and other interested parties (including other ships). However, there is no doubt that it will always play a major role for each stakeholder, even if some parties advantaged and other parties are disadvantaged in a particular situation.

Damage locations on the ship (NTSB)



VOYAGE DATA RECORDER

Damaged area on the bridge (NTSB)



VDR Handling

Handling precautions

The VDR operates on a first-in-first-out basis. This means that as new data is recorded the oldest data is erased. In general VDRs, all the data from before the accident is lost 12 hours after the accident, and is replaced by new data.

Therefore, the captain must take care to ensure that:

- All duty officers should be familiar with VDR operations and they should thoroughly read and understand the equipment operation manuals.
- In order to save and download VDR data in the event of an emergency, the ship-specific procedure manual, based on the instruction manual, should be posted near that VDR, and all personnel should be familiar with how data storage works.

- The VDR must be in continuous operation at all times, except for the annual examination. During a shift, the VDR status should be checked regularly, and if an alarm is displayed, it should be dealt with immediately.

VDR ownership

As stated in the IMO regulations (Guidelines on voyage data recorder (VDR) ownership and recovery

(MSC/Circ.1024)), the owner of the VDR information is always the shipowner. In the event of a maritime accident, the ship owner must give complete instructions on how to collect the recorded data to the people who will carry that out. Under no circumstances should the accident investigator retain the original VDR information during the investigation. So, the ship owner has to provide the investigator with a copy of the VDR information. The captain and other crew members must not disclose any VDR information to any person other than the owner.

Accident investigators must also take steps to download and read the information, disclose everything to the shipowner, and in some cases they might need to get special assistance from an expert. ■

Reference: NTSB materials



Limitation of shipowner liability in major casualty at sea

Aki Tsukui, Director of Claims explains the rights of shipowners under Japanese law.

A major marine casualty may cause vast amount of damages, and may lay heavy liability on a shipowner or a charterer (together identified as the “Shipowner”). In such case, determining whether the shipowner is liable or not, and if he is, how much amount the shipowner is liable to indemnify in accordance with ordinary civil law rules imposes the risk of perils of the sea only on the shipowner, despite that sometimes such risk is difficult to predict and avoid. This may hinder developments of the whole shipping industry. Therefore, international conventions such as Convention on Limitation of Liability for Maritime Claims “LLMC”, or International Convention on Civil Liability for Oil Pollution Damage (“CLC”) have tried to set globally an unified shipowner’s limitation liability scheme, and tried to maintain the balance between promoting marine industry and recovery of damages, especially in the case of a major casualty.

Japan has ratified LLMC, CLC and their protocols and has enacted domestic statutes in accordance with those conventions; hence, in the case a casualty occurs in Japanese territorial water, rules for limitation of the shipowner’s liability are basically same as international rules under the above conventions.

LLMC / Act on limitation of shipowner liability

Types of liability under the Act

The most fundamental rule for limitation of the shipowner’s liability is the Act on Limitation of Shipowner Liability (the “Limitation Act”), which has been enacted in accordance with LLMC1996. The outline of types of the liability that are covered by the scheme are as follows (The Limitation Act, Art.3 (1)).

Liability limits

The liability limits are provided as follows, depending on the tonnage of the ship

Types of liability

1. Liability for damages resulting from a loss of life, personal injury, loss of or damage to property other than the ship in question.
2. Liability for damages resulting from a delay in the carriage of cargo, passengers, or their luggage.
3. Liability for damages resulting from an infringement of right other than above two items (e.g. fishery rights, other business interest).
4. Liability for damages incurred by the victim resulting from a measure, which is taken to prevent or mitigate damages.
5. Liability for costs incurred by the victims resulting from a measure, which is taken to prevent or mitigate damages.

(GT) and the nature of the damages (The Limitation Act, art7 (1) (2)).

Establishment of fund and limitation liability proceeding

The limitation for a shipowner’s liability comes into effect at the time the court issues the order of

commencement of the proceeding, which comes after the establishment of the fund through the payment of deposit money equivalent to the liability limit by the shipowner. After that, the court appoints an administrator; the claims subject to the limitation are notified to the court; the amount of money available for distribution and the distribution percentage are fixed; and then monies are distributed to each claimant. After the commencement of the proceeding, the person holding a claim subject to the limitation may not exercise any right against the property of the shipowner other than the fund (The Limitation Act, Art.33).

Loss of the right of limitation

If the damage resulted from the shipowner’s act committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, the shipowner loses the right to limit its liability (The Limitation Act, Art.3 (3)). However, a “shipowner” in the Limitation Act means the person who

Nature of the damages	Tonnage of the ship (X)	Liability limits (X=Tonnage of the ship / M=Million)
Property damages only	X≤ 2,000t	1.51M SDR
	2,000t < X≤ 30,000t	1.51M SDR+(X-2,000)× 604 SDR
	30,000t < X≤ 70,000t	18.422M SDR+(X-30,000)× 453 SDR
Loss of life, personal injury / loss of life, personal injury and property damages	70,000t < X	36.542M SDR+(X-70,000)× 302 SDR
	X≤ 2,000t	4.53M SDR
	2,000t < X≤ 30,000t	4.53M SDR+(X-2,000)× 1,812 SDR
	30,000t < X≤ 70,000t	55.266M SDR+(X-30,000)× 1,359 SDR
	70,000t < X	109.626M SDR+(X-70,000)× 906 SDR

Note: Notwithstanding the above, in the case of a ship of less than 100 tons, the liability limit for the Shipowner is an amount equivalent to 0.50736M SDR.

Note: Where the shipowner makes a claim against a person holding a claim subject to limitation that has arisen from the same accident, the limitation under the Limitation Act will apply to the liability of the shipowner that remains after the deduction of the amount of the shipowner’s claim (The Limitation Act, Article 5).

Note: 1 SDR = USD 1.36202 (as of 10/1/2019).

LIMITATION OF LIABILITY

can control its shipping business and if the shipowner is a company, "Shipowner" in the Limitation Act means a board of directors or other equivalent senior executive officer but not a master, crews or other employees. Therefore, if the shipowner is a certain size of company, it is rare that board of directors or equivalent senior officers recognise or have knowledge about certain damage before it arises; hence, it is extremely difficult to break the limitation of liability of the shipowner.

CLC1992 / Act on liability for oil pollution damage

For the liability of the tanker owner for the damage caused by the pollution resulting from the escape or discharge of the oil from a tanker, not the Limitation Act but only the Act on Liability for Oil Pollution Damage (the "Oil Pollution Liability Act") is applied (The Oil Pollution Liability Act, Art.5). The outline of liability limits for the oil pollution from a tanker are as follows (The Oil Pollution Liability Act, Art.6).

However, as is under the Limitation Act, where the tanker owner intentionally or recklessly with knowledge causes the damage, this limitation is not applied (The Oil Pollution Liability Act, Art.5, proviso).

The limitation liability proceeding, including the establishment of the fund, is the same as in the proceeding under the Limitation Act (The Oil Pollution Liability Act, Art.38). In addition to the claim against the fund, the victim of the oil pollution may claim to the international fund and supplementary fund, which are established under the Fund Convention 1992 and Fund Protocol 2003 (The Oil Pollution Liability Act, Art.22, 30-2).

As to the liability of the shipowner for the damage caused by the pollution resulting from the escape of the bunker oil from a ship other than tanker, the aforementioned liability limits under LLMC/the Limitation Act applies (The Oil Pollution Liability Act, Art.39-3).

Tonnage of the tanker (X)	Liability limits (X=Tonnage of the ship / M=Million)
X≤ 5,000t	4.51M SDR
5,000t < X	4.51M SDR + (X-5,000) × 631 SDR if the amount exceeds an amount of 89,77M SDR, the limit shall be 89,77M SDR

The other limitation of liability scheme

Other than aforementioned limitation schemes, the Act on International Carriage of Goods by Sea ("JCOGSA"), which has been enacted in accordance with Hague-Visby Rules and SDR Protocol, provides the carrier of the goods by sea with independent liability scheme, which purports to exempt or limit liability of the carrier for loss or damage on each carried good.

As for the exemption of the liability, Japan COGSA provides that the carrier is not liable for the damages arisen out of any act of master or crews in navigation or in management of the ship or fire on the ship (JCOGSA, Art.3 (2)). Further, Japan COGSA provides the list of exemptions which include: perils of the sea, act of god, act of war, act of piracy, act of shipper, strikes, salvage of life or property, inherent vice or latent defect of the goods, insufficiency of packing, etc (Japan COGSA, Art.4 (2)).

As for the limitation of the liability, Japan COGSA provides that the amount of the damage for which the carrier is liable is determined based on the market price of the good (Japan COGSA, Art.8 (the old Art.12-2)). This provision sets

the basic formula for calculation of the damage for each good and rejects the liability of the carrier for loss of profit or other indirect and remote damages arising from loss or delay of the good.

Further, Japan COGSA sets the liability limit based on the number of so called package or weight of the good as followed (JCOGSA, Art.9, the old Art.13). This liability limit applies together with aforementioned liability limits under LLMC/the Limitation Act (Tokyo district court case, 16 October 2003).

Same as under the Limitation Act and the Oil Pollution Liability Act, where the carrier intentionally or recklessly with knowledge causes the damage, the carrier loses the right to limit its liability, both for the calculation formula of damages and the liability limit based on the number of package or weight of the good, are lost (JCOGSA, Art.10 (the old Art.13-2)).

On the other hand, Japan has not ratified the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL) and there is no limitation scheme for liability of passenger carriers related to the damages resulting from a loss of life or personal injury (As for the liability for damages resulting from a delay in the carriage of passengers or their luggage, see paragraph 1 above). ■

Liability limit

The higher amount of the following which calculated based on goods which is lost, damaged or delayed

The number of package or unit of the good × 666.67 SDR

Gross weight of the goods kg × 2 SDR

Note: Where a container, pallet or similar article of transport ("Containers") is used for the carriage of the goods, the number of containers is deemed as the number of package or unit, unless the number of unit/ good or volume/weight of good is described in the bill of lading or waybill (Japan COGSA, Art.9 (3) (the old Art.13(3))).

Note: This liability limit does not apply where the kind and value of the good has been (i) notified to the carrier by the shipper at the time of consignment of the goods and (ii) described in the bill of lading if it is issued (Japan COGSA, Art.9 (5) (the old Art.13(5))).

Marine casualties and legal privilege under Japanese law

Yosuke Tanaka of Tanaka & Partners sets out the relevant Japanese law that applies to the investigation of a marine casualty, and how officers and ship's crew should approach the interview by Japanese maritime authorities as part of the post casualty investigation.

Introduction

In serious marine casualties in Japan, the Japanese Coast Guard may arrest and carry out an investigation of the ship and her crew. How the crew responds to the investigation has a bearing on the interests of not only the crew, but the shipowner too.

We examine the relevant sections of Japanese law that apply and how the crew should respond to the investigation by the authorities.

Procedures applied to the marine casualties

1. In the case of a serious marine casualty happening, the criminal offences for “The Obstruction of Traffic (Art. 124, section 1 in the Japanese Criminal Code (the “Code”)) and “The Endangerment of Traffic” (Art. 125 in the Code) apply.

The criminal offence for the “Obstruction of Traffic” is recognised when a person obstructs the flow of traffic “...by damaging or blocking... waterway or bridge” (Art. 124, section 1 in the Code) and such person may be punished with imprisonment of up to two years, or a fine of up to 200,000 yen. In case the person causes the death or injury to another person, such person shall face more serious charges.

The criminal offence for the “Endangerment of Traffic” is recognised when a person endangers the passage of a vessel “...by damaging a lighthouse or a buoy or any other means.” (Art. 125 in the Code) and such person may be punished with imprisonment for a



definite term of not less than two years. The person shall be punished for this crime not only when the person acts intentionally, but also when the person endangers passage negligently, without intention. The term “by...any other means” may include the cases when a vessel is sunk within a passage or when a vessel is grounded near a berth or in a port. This offence has been applied in most cases in marine casualties more than the criminal offence of the “Obstruction of Traffic”.

The above-mentioned criminal offences shall apply to not only Japanese crews, but also foreign crews. However, in most cases, it is only the Master who is arrested from the crew.

2. In Japan, the Coast Guard has the power to investigate the crimes caused at the sea in the same way as the police do

for crimes on land. Those in the Coast Guard and the police who investigate such crimes are called “Judicial Police Officers”. Accordingly, the Coast Guard has the power to investigate, arrest and interview any member of the crew who is reasonably regarded as the “suspect” for having committed the crime”. The law that regulates such investigation is the “Criminal Procedure Code” (the “Procedure Code”) which governs an investigation by the police.

3. The right of the suspect to refuse to respond, or right to keep silent are important in the investigation or interview by the authorities.

The right of silence is provided for in the Constitution, namely; it is provided that “No person shall be compelled to testify against himself.” (Art. 38, section 1 in the Constitution). The term,

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"against himself", means the testimony which may result in the punishment of the person.

The Procedure Code provides for the right in detail that "the suspect shall, in advance, be notified that he/she is not required to make a statement against his/her will." (Art. 198, section 2 in the Procedure Code) and that "The accused may remain silent at all times, or may refuse to answer particular questions." (Art. 311, section 1 in the Procedure Code).

The above-mentioned procedures are available to the suspect in the investigation by the Coast Guard.

4. Legal counsel. The Constitution also provides that "No person shall be arrested or detained...without the immediate privilege of counsel" (Art. 34) and the Procedure Code also provides that "The accused or the suspect may appoint counsel at any time." (Art. 30, section 1).

The "State-Appointed Counsel" is a lawyer who is appointed and supported by the government to defend the suspect or defendant. The "Private Counsel" is a lawyer appointed by the suspect or the defendant. In maritime casualty cases, the latter is more often appointed than the former, and sometimes appointed by the shipowner or the P&I Club.

When the appointment by the shipowner or the P&I Club is first made, the lawyer is not yet appointed by the suspect. However, such lawyer has a right to meet the suspect under the title of "lawyer to be appointed by the suspect" and obtain the appointment from the suspect himself.

Important practical issues

1. One of the benefits of the right of legal privilege or the right to refuse the testimony is that it may avoid giving improper testimony in the situation where the suspect is under pressure by the investigator. It is said that many suspects come under pressure in the investigation and may admit to improper or incorrect answers without intention. The right assists the suspect

to avoid giving such improper responses during the interviews.

Secondly, the right to refuse to give testimony helps a foreign crew to respond to an interview in Japanese, which is not understood. It is the right of the foreign crew to refuse to give testimony in case the questions by the investigator are not understood.

2. On the other hand, one of the disadvantages of legal privilege can be seen when the suspect insists on giving his own story which is inconsistent with the clear and objective evidence. If the evidence is clear, such as the data from the vessel showing the cause of the accident, but the suspect insists on a contrary story, the investigator may consider that the suspect's testimony lacks credibility and decides to impose some heavy punishment. The Coast Guard and the prosecutor have a power to decide the level of the punishment within the range the law permits. Therefore, in such a case, the suspect should not exercise his legal privilege to deny clear evidence.

Secondly, as described above, the testimony, which is clearly wrong, may adversely affect the impression of the investigator. It should be noted that the investigator can decide the level of the punishment by taking account of such impression.

Thirdly, the unreasonable exercise of legal privilege may result in the length of arrest of the crew. In some cases, the ship itself may be arrested as important evidence for the authority's investigation to be carried out. Therefore, the decision not to resort to legal privilege may lead to the early release of the crew or the ship in some cases.

3. One of the important steps in the crew's response to the investigation is to confirm the cause of the accident through the presentation of objective evidence. The lawyer can collect such evidence from the Coast Guard and the crew who under investigation should confirm the cause and should not aim to contest in its testimony.

Secondly, in such steps, the discussion between the lawyers is very important. The lawyers can ask the Coast Guard or the court to be provided with an approved interpreter, however, some of them are not familiar with the terms specific to maritime practices.

Thirdly, it should be discussed between the lawyer and the suspect whether he should admit the criminal offence to effect the early release of the ship, or insist on his own story as to the cause of the accident. In whichever case, the crew member should act on his own consent and the lawyer should assist accordingly. ■



Post casualty management

Luke Lane, Syndicate Manager of TMKK looks at why media response is a key part of any successful crisis management and PR engagement.

In today's 24/7 multi-platform media environment, social media has become the single largest source of information. Billions of users' news, images and video can be broadcast within minutes on Twitter and YouTube.

In major marine incidents, there is no place to hide and "no comment" is no longer an option. Shipowners need to be alive to public perception as well as the legal necessities of incidents when and wherever they arise. How a shipowner responds in the aftermath of a major casualty can have a significant impact on the public perception of how well an incident is being managed, and the reaction by the relevant maritime authorities, as well as potential claimants. Commercial trading partners and investors can equally be influenced by the shipowner's handling of the casualty, the media and the potential damage to reputation in the market.

Crisis communications are a key component of effective incident management in the aftermath of a shipping casualty. If a shipping company responds and manages a crisis well, it can come out of the incident with a better reputation than before.

Ships owned or operated by large organisations usually have in-house or retained crisis PR mechanisms ready to bring into play. However, for many shipowners and operators, they do not have such in-house capability carrying out a public relations function. They may have little experience of how to deal with the local and international media and other parties not functionally connected with an incident but who have a social interest in the impact and consequences.

The combination of a serious incident, media interest and lack of in-house or retained PR does not come about frequently. But when it does, the UK Club can assist and will encourage

owners and operators to utilise the services of selected specialist consultants in crisis PR management around the globe. Indeed, if a PR response is to be part of the strategy dealing with a particular claim, then the Club, together with the appointed lawyers, will take an integral and co-operative role in that response in ensuring communication is both co-ordinated and timely.



Public relations response to major casualty incidents is a specialist area. Information will be demanded from very different quarters, including from various political and governmental organisations, individuals and the media, especially if life, welfare and the environment are threatened or impaired by a maritime incident.

A dearth of information in the hours after a casualty places great pressure on journalists from editors and broadcast producers to obtain news and comment. Information will emerge ad hoc because no single party controls the content or flow of information. Other involved parties may state or endorse inaccuracies, and a shipowner may find himself having to 'compete' with those other sources for public and media attention.

Without proper management, that demand for information can lead to hearsay and rumour being treated as fact that can damage the shipowner's reputation, as well as causing unnecessary and serious disruption of the claims handling process itself.

The shipowner, his shipmanagers and agents, therefore, need to supply information on the casualty and its circumstances quickly to media, governmental and official groups and other interested parties. A shipowner/operator who 'drives' this process has more influence on what the media says.

Professional and effective management of the media in the event of a major casualty will focus on communicating the facts of the situation to the public and seek to dispel speculation or unfounded comment on the situation. It will also fulfil a public expectation that the organisations involved are properly concerned by what has happened, and are well motivated by care for the welfare of those affected to rectify the situation as best they can.

Information and its flow needs to be managed effectively with a view to:

- minimising the impact that media and government/official groups have on the people working to solve the crisis, thereby allowing them to get on with the job relatively unhampered.
- avoiding complications in managing the claims, litigation and official enquiries.
- protecting the reputation of the shipowner and the other parties concerned.

Importantly, communication must constantly respond to the evolving perceptions of the situation. The Club and the media consultant will endeavour to co-ordinate the various parties involved, including the charterers, salvors, ship managers and lawyers to ensure information is consistent and agreed, and that information flowing from the incident is properly managed.

A co-ordinated team effort provides the recipe for a successful crisis management and PR response. ■

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