

AVERAGE ADJUSTERS ANNUAL MEETING ADDRESS

by John M. Woods

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The title of my address today is perhaps not the most exciting: Maritime Lawyers and Average Adjusters: Past, Present and Future. I had originally thought of adding a more provocative subheading. Like: Admiralty Lawyers and Average Adjusters: Friend or Foe? Or: Admiralty Lawyers and Average Adjusters: Are Both Doomed to Extinction? However, in retrospect I am glad that I chose the subheading that I did, for while I know that Maritime Lawyers and Average Adjusters have a past and present, I am also convinced that they have a future. What the future will look like will, of course, very much depend on what both professions look like in the years ahead. But I am pleased to say that from my experience as Chairman of this Association over the past year, I can see that positive steps are being taken, both on this side of the pond and over in London, which I believe will secure the future of the Average Adjusters. I wish that I could be as optimistic about the future of maritime lawyers, but more about that in a minute.

Let's start with past and present. Oftentimes, I think, Average Adjusters and Maritime Lawyers eye each other warily across the same table, particularly when involved in the same case. This reminds me of a famous story told about an official luncheon held some years ago by Herbert Vaughan, the Archbishop of Westminster. Presiding over the luncheon, the Archbishop asked the Chief Rabbi of London, Dr. Herman Adler, 'Dr. Adler, when may I have the pleasure of helping you to a slice of this most excellent ham?' The guests gasped, knowing that the Rabbi could not eat pork. Without missing a beat, the quick thinking Dr. Adler replied, 'How about at your Eminence's wedding?'

Similarly, parry and thrust has always played a part of the relationship between the Lawyers and Adjusters. That is perhaps because of the similarities between the two professions, as well as the common roots from which both spring. Both average adjusting and maritime law derive from man's attempt to put a framework around the conduct of maritime commerce that is based on fair and just principles, and which facilitates international trade and commerce, favoring neither any particular country or region, nor any particular party to the transaction. Importantly, both, at their heart, are based on mercantile practice and custom which goes back not just hundreds, but rather thousands of years.

Indeed, while references to “a taker of averages” and to “a settler of averages” appear in English case law decisions from the early 1800s,¹ it is clear that the practice of general average itself goes back much farther than that, and that the practice long predates the arrival on the scene of the professional average adjuster.² The equitable nature of general average, as well as the historic reasons for its invention, are well known to everyone in this room.

Similarly, “the Law Merchant,” as it was known, arose from custom and practice as it evolved in nations engaged in maritime commerce dating back thousand of years, consisting of principles which general convenience had established to regulate the dealings of merchants with each other in differing countries.

One of the pleasures of researching the topic of this address—and I actually mean this – was reading some of the addresses from many years ago by past Chairmen of both the U.S. and U.K. Average Adjusters Associations, many by giants of the profession. One, by Charles McArthur of the U.K. Association, made this point in an address in 1883:

If it be asked which was the earlier, law or custom, it would seem that the priority should be assigned to custom, for it was not until usages which commended themselves as just or convenient had become general that they would be converted into laws by the impress of legislative or judicial authority. Thus, the Rhodian law, which, as embodied in the Digest of Justinian, is the earliest system of maritime jurisprudence recorded in history, is supposed to have been derived from the maritime customs which prevailed amongst the nations established on the shores of the Mediterranean.

Charles McArthur was the author of a famous treatise on insurance law, and is widely recognized as instrumental to the drafting of the Marine Insurance Act of 1906, which was, I believe, the first English Codification of marine insurance law.

Mr. McArthur goes on to note that legal decisions concerning the common law of the sea and of merchants were few and far between in England, until Lord Mansfield became the Chief Justice of the Queen’s Bench in 1756. Until then, decisions in commercial cases were often made by tribunals of commercial men, or

¹ See: *Crafts v. Marshall* (1836) 7 C&P 597, 606; *Pirie v. Steele* (1837) 8 C&P 200, 203.

² See: *Wavertree Sailing Ship Company, Limited v. Love* (1897) AC 373 (PC).

by juries who applied principles of common sense and fairness to reach a decision, but whose judgments were not recorded and were therefore of little precedential value. This may have reflected a general mistrust of the Courts to arrive at the commercially reasonable, and therefore correct, decision. Lord Mansfield changed all that, setting down a body of caselaw that formed the nucleus of a system of shipping and insurance law that carries weight to this day. His decisions and the principles he laid down were based on multiple sources: “old sea-laws, the general custom of merchants, the usages of particular trades, and the opinions of writers upon marine insurance.” Charles McArthur goes on to note: “Indeed, it is not too much to say that, at this time, usage was allowed to make the law, almost without qualification.”

Maritime law was therefore based on common sense, and the common good interest of shippers, carriers and their insurers. It is for this reason that we call these Judge-made rules the maritime common law. As an aside, that term is why I do not laugh at all at the jokes about average adjusters merely being “average.” I am, after all, just a “common” lawyer.

Why do I dwell on this point—that both Average Adjusters and Maritime lawyers base their professions on rules laid down based on custom and usage? To show that both professions, at their core, are based on and thus in a sense are beholden to, the commerce and industry which they serve, and without which they would not exist. They are reflections of a pragmatic application of rules to every day activity, and thus they must evolve and change to meet and serve the changing world of commerce that they attend and to some degree govern.

Of course both professions do change and have evolved, although some would say at a glacial pace, and others would say not nearly enough. Examples abound. In maritime law, a good example is the Reliable Transfer decision,³ announced in 1975, in which the Supreme Court of the United States decided that it was time to do away with the divided damages rule in collision cases and instead instituted in the maritime common law a liability regime based on proportionate fault. The Court’s reasoning, in part, was that the both-to-blame rule, which was created to provide at least rough justice, had outlived its usefulness, and was no longer providing an equitable result. A more recent example is found in the current tug-of-war between creditors holding maritime claims and the New York money center banks over Maritime Rule B attachments of EFTs, or Electronic Fund Transfers, which is taking place in the Southern District of New York. There a rule designed to attach ships is being used to catch what amounts to little more

³ *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975).

than a fleeting computer entry, and hold it for security for maritime claims. The jury, as they say, is still out on that as it remains to be seen if Judge Haight's decision in the Winter Storm case,⁴ which permitted the practice, will survive challenges by the banks.

Of course, average adjusters in both the U.S. and U.K. vote on and make changes to their Rules of Practice frequently, reflecting the changing custom and practice of their particular locales. Perhaps more importantly, the York-Antwerp Rules are subject to review and revision on a regular basis. In fact, lately the York-Antwerp Rules seem to be changed even before the last version has found widespread commercial use, which seems somewhat strange. The most recent changes, in 2004, were the culmination of an assault on general average that was perhaps the most serious ever, led by cargo interests (or their insurers) that sought to reduce the scope of general average based on the "common safety" concept, a radical restriction of the traditional "common benefit" principle applied to general average. While the "common safety" revision failed at the 2004 Vancouver meeting of the CMI, other changes were passed which did have the effect of reducing the scope of general average: including exclusion of salvage from G.A. unless paid by one party on behalf of all, and excluding crew wages at a Port of Refuge. These I believe are changes that illustrate not only the adaptation of general average to the modern times, but also something more profound: the desire of the customers of G.A., the insurance and shipping worlds, to reduce the cost, expense and complexity of General Average. One need only look as far as the proliferation of General Average Absorption Clauses in marine insurance policies to see that this is the commercial will and present day reality. The U.K. Average Adjusters' website notes that these G.A. absorption clauses have removed some 50% of general average cases.

Here I have to pause and read another quote from a U.K. Chairman's address which I found during the course of my research. Please listen carefully, because there is a test afterwards.

'In the practice of their profession the duties of average adjusters seem to become each year more onerous. The great increase in the size of vessels and the multitudinous interests which are to be found on board them, render the task of a modern average adjuster in many cases one of gigantic proportions. The size of the volume embodying

⁴ *Winterstorm Shipping, Ltd. v. TPI*, 198 F.Supp.2d 385 (S.D.N.Y. 2002), 310 F.2d 263 (2d Cir., 2002), cert. den. 539 U.S. 927 (2003).

an adjustment in a heavy case gives an ocular demonstration of this.”

Here’s the test: how long ago do you think that was written? I’ll tell you: 1902. Mr. Justice Gorell Barnes wrote that in 1902. I wonder if he could possibly have imagined what shipping would look like today. Equally, I wonder if we can imagine what shipping will look like 105 years from now.

The demand for less cost, complexity and delay is not just pressuring average adjusters, but it is hitting the maritime lawyers as well, of course, when at the same time there has been an overall decrease in the number of cases and claims. This has been particularly true in the area of cargo damage cases, which has seen significant declines since the advent—and now wholesale adoption—of containerization. The perfect storm for maritime lawyers was complete when the marine insurance industry began a run of many years of unprofitable results, and P&I Clubs began to react to the rising cost of claims by taking more cases in-house to be handled. The result has been an almost single-minded focus on lawyers’ fees, particularly their hourly rates, which has had a drastic impact on the profession. Even though admiralty lawyers practice in what is undoubtedly one of the most specialized areas of the law, handling claims of high value and potentially serious consequence to their clients, admiralty lawyers are routinely asked to accept hourly rates well below what is needed to attract top lawyers into the profession. This is, I fear, causing a downward spiral in the quality of maritime lawyers, as experienced practitioners retire or leave the field. Of course, maritime lawyers are perhaps their own worst enemy in this regard, undercutting each other on rates in a last-ditch effort to retain business. The result of this suicidal strategy is plain in the number of famous and venerable U.S. maritime law firms that have closed their doors for good in the last dozen years.

Now I know that a lawyer standing in front of this audience (or any audience) complaining about his fees is not going to get a very sympathetic reaction.. Particularly since most of you probably agree that the definition of “a crying shame” is a busload of lawyers plunging off a cliff..with three empty seats. But there really is a problem in my business attracting good young lawyers to the maritime area. Ask the lawyers you use to introduce you to the young lawyers in his or her firm with five to ten years experience—the future leaders of the admiralty law—and I think you will find that they are few and far between. That is a growing problem not only for the lawyers, but the maritime industry in general, that simply must be addressed.

But now is not the time to solve that problem, so back to the topic at hand: the relationship between Average Adjusters and Maritime Lawyers. Another famous chairman of the U.K. Association, Mr. Manley Hopkins, gave an address in 1875 which asked the provocative question: “Should the adjuster also be a maritime lawyer?” Given my pessimistic view of my own profession, I guess the answer to that now is the question: “why would he want to be?” But even in 1875, the answer Mr. Hopkins gave was a resounding “no.” That should come as no surprise, given the distinction between the roles of the two professions. Although Mr. Hopkins advised that “the adjusters should have a competent, thorough, general knowledge of the law . . .” he went on to explain that “The Adjuster should and must be also, more read in that section which relates to maritime commerce and insurance.” In his view, the adjuster was not a solicitor, nor was he an arbitrator or an advocate. Instead “the Adjuster is not called on to make new laws or customs; his business is to understand them intelligently, and apply them impartially.” Manley Hopkins then wrote:

Life is short, and the law is long. An equitable and prompt remedy is the *sine qua non* in modern commerce. In many cases Themis cannot keep pace with the winged feet of Mercury.

Themis is, of course, the Greek goddess of divine law and order, whose Roman equivalent, Justitia, is portrayed in sculpture as blindfolded and holding the scales of justice.

Manley Hopkins’ view was therefore that the roles of lawyers and adjusters should remain entirely separate. In fact, he also wrote: “The Adjuster, then, does not invade the province of the Solicitor. As soon as the matter before the Adjuster introduces questions of pure law, he directs his client in the proper channel for their solution.” How many adjusters do that today I wonder?

I think times have changed, and I am not alone that observation. David Taylor, sitting among you today, wrote in his address as Chairman of the U.K. Association in 2004 that he had observed, even going back to his early days as a solicitor, a growing tension between average adjusters and lawyers, which he attributed in part to average adjusters seeing lawyers as competitors, not colleagues, and lawyers not fully understanding the value to be added by adjusters to efficient handling and resolution of claims. I might add the factor of the shrinking business faced by both professions as exacerbating this situation.

I think that David was correct in both aspects of his observation. I doubt that at the present time more than a very few maritime lawyers know even the rudimentary principles of general average, or indeed what an average adjuster does. Therefore, I recommend to my maritime brethren the paper delivered by Jonathan Spencer at this Association's Viewpoints Seminar in October, 2005, and which was reprinted by the Maritime Law Association in the Fall 2005 newsletter of the MLA's Committee on Marine Insurance and General Average. The title of the paper is "The Role of the Average Adjuster in Maritime Disasters." It is an excellent description of the many tasks undertaken by the average adjuster in a large casualty. However, and this illustrates David Taylor's point about competition, I think it is fair to say that at least some of the actions which Jonathan describes as within the average adjuster's domain would probably be seen by maritime lawyers as within theirs. For example, arranging for an angle of blow or accident reconstruction analysis, or looking at insurance coverage questions, or examining whether the cargo interests had a potential defense to general average contribution due to an unseaworthy condition on the ship. Should those jobs be performed by the average adjuster, or should they be left to the lawyers? Perhaps this is a debate we can continue over drinks and dinner this evening.

In any event, where do we go from here? Maritime lawyers, I fear, are somewhat constrained by the strictures imposed on the legal profession from doing very much in the way of changing their role or how they do business. They must instead educate their clients on the importance of what they do, the loss to the industry as a whole caused by the drain of good lawyers from the maritime field, and the need of the clients to recognize the need to pay competitive rates if they want competent service. That is not an easy task, of course, even in this day and age of improving profits in both shipping and insurance. More importantly, of course, the lawyers have to provide the highest quality service in the representation of their client's interests, or else risk the wholesale loss of confidence in the profession that I fear is creeping closer every day.

Average adjusters, on the other hand, are more free to react to their changing marketplace and to evolve to keep pace with the needs of their customers. And they are doing so. It was David Taylor again who suggested in his 2004 address that one way forward would be for the average adjusters to evolve into an association of claims professionals with recognized training, certification and status. He and others who have picked up this torch in London have gone so far as to suggest an International Association of Claims Professionals that the Average Adjusters associations could play a very big role in developing. I am extremely pleased to note that the U.S. association has already taken a major step in this

direction with the creation just this year of a new category of membership known as the Marine Hull Claims Professional. This designation requires the successful completion of two examinations consisting of written short answer questions and series of mini problems. Thus achieving this designation really means something; it is not an empty title. It is, in my view, vital for the marine insurance industry to get behind this very important and indeed revolutionary change in the recognition of knowledgeable claims handlers, which is being brought about by the average adjusters. The need for qualified claims handlers has never been greater, as companies both in the U.S. and U.K. are scrambling to find personnel to fill important claims handling positions. Unfortunately, the industry is paying the price for a lack of hiring and training that was epidemic five and ten years ago. Here is one important way to prevent that from happening again.

Equally, I would urge the U.S. marine insurers in particular to send delegates to and support the International Marine Claims Conference, the 'IMCC', which is holding its fourth annual event later this month in Dublin. This conference is the only one of its kind, and it gets better and better each year. The globalization of the industry makes it imperative that there be greater interaction between the claims handlers worldwide, and this provides the perfect forum for that.

In closing, I hope I have not painted too gloomy of a picture of the future of our professions. In truth, I think that both are actually quite bright, as long as our professions do not lose sight of the fact that we both spring from a common heritage of providing structure and frame work for the efficient and equitable carrying out of international trade. As long as we both continue to serve that purpose honorably and well, our futures are secure. Thank you.