

# **TOWARD IMPROVING THE IMPACT OF CONDITION AND VALUATION SURVEYS ON SAFETY OF CREWS OF U.S. COMMERCIAL FISHING VESSELS**

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*This is a follow-on to a paper first presented at the International Fishing Industry Safety and Health Conference held at Woods Hole, Massachusetts in October 2000. That presentation and a later presentation to the New England Section of the Society of Naval Architects and Marine Engineers has provoked substantial discussion over how safety for fishing vessel crews can be improved in the absence of a more comprehensive mandatory regulatory scheme.*

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Marine Surveys are done for buyers, sellers, financial institutions, and insurance underwriters. The Condition & Value (C&V) or Insurance Survey – routinely carried out on Commercial Fishing Vessels for a variety of interests – is subject of this discussion.

The primary goal of this discussion is to improve the safety of fishermen through both preventative and remedial actions. That approach is necessarily quite comprehensive, starting with high level design, construction and maintenance of fishing vessels, through ensuring that fishing crews are able to manage any situation which confronts them using their knowledge and equipment, to ensuring the survival of those who may come upon misfortune at sea. Routine Condition & Value surveys are variously described as a “visual” examination of the vessel “to determine whether the vessel is an acceptable risk,” and to “assist insurance underwriters in making underwriting decisions.”

There are two purposes of the C&V: (1) identifying the vessel, its equipment, condition and general value, and (2) identifying defects, damages or hazardous conditions that pose a potential threat to the safety of the vessel and its crew.

C&Vs are not intended to certify that the vessel is built, or conforms to, any standard, nor is there any requirement that the machinery or equipment be tested for proper operation. One Coast Guard Board of Investigation stated, “the surveys [conducted on the subject vessel] were mostly inventories for insurance purposes.”<sup>1</sup> As the result of fishing industry resistance to regulation more comprehensive than that contained in the Commercial Fishing Vessel Safety Act of 1988,<sup>2</sup> (the “CFIVSA”) other measures are required to improve safety. Because fishing vessels are surveyed routinely for purchase, insuring and financing purposes, a mechanism exists which could result in better safety for fishermen, but it will take a proactive approach to succeed.

## **A. Introduction**

*The Perfect Storm*, in both book and movie form, has rendered readers and viewers alike in awe of the ocean's power and aghast at its dangers. But, for most, that effect is vicarious.

For those involved in the marine community the dangers are real. First and foremost, the list of tragedies continues to grow, from the *A-boats*, to the *Andrea Gail*, the *Cape Fear*, the *Two Friends*, and, most recently, the *Arctic Rose*. Second, we know the fishermen who set out to sea to earn their living. Third, we know that the sea conditions faced by the crew of the *Andrea Gail*, while dangerous, were not as portrayed in the movie, and that fishing vessels are lost in sea conditions far less extreme. Fourth, we know that the risks of commercial fishing are manageable, and casualties are preventable, yet they continue at what should be unacceptably high numbers.

This paper focuses on a document that is a key element of the business of commercial fishing, the Condition and Valuation survey or “C&V.” Insurers and Lenders require a vessel owner to provide them with a C&V before issuing a policy of insurance or lending money and using the vessel as collateral, as the case may be. As for any business, the owner’s or operator’s skill, performance and experience provide the primary basis, apart from the C&V, upon which the business risks can be assessed. In the case of commercial fishing, safety risks take on a dimension far greater than those in any other industry; as evidenced by the extraordinary casualty rate, yet these risks receive little attention particularly when compared with other high-risk occupations.

Improvement in fishing vessel safety can be built on a substantial, existing fund of knowledge. The government (primarily through the U.S. Coast Guard and NIOSH), academia, classification societies, and fishermen’s organizations, has published mountains of material on steps that can be taken to improve safety on commercial fishing vessels.<sup>3</sup> Potential sources of economic and political pressure to improve fishing vessel safety are limited particularly given the recent emphasis on ‘smaller government.’ A lender’s risk of loss due to casualty is ordinarily covered by insurance, thereby reducing its level of concern. Insurers continue to write coverage leading one to conclude that the fishing vessel insurance business remains profitable even in the face of continuing vessel losses. Congress has declined to regulate beyond the CFIVSA, by arguing, in short, that additional regulation would be too expensive. Indeed, it might be argued that both the Death on the High Seas Act, 46 U.S.C. §761, and the Limitation of Liability Act, 46 U.S.C App. §§181-189, act to reduce financial risks to owners, and, therefore, their insurers.

While it is fair to say that there has been a statistically significant decrease in casualties after the implementation of the Act, there are still far too many casualties. Is our society willing to say that the risks are acceptable as long as fishermen are willing to take them? Or is there a mechanism to raise the standards for fishing vessel safety at a relatively low cost?

## B. Background

Condition and valuation surveys have long been a component of the business of commercial fishing. In concept, they are empirical examinations of a commercial fishing vessel conducted to establish its condition and appraise its value at the time of the survey. C&V surveys are, for the most part, not conducted on a regular schedule. Instead, they are conducted when the vessel owner needs to renew a policy of insurance, or at the request of a lender for the purpose of supporting a new loan or continuing an existing loan facility. In addition, a prospective purchaser of a fishing vessel usually has a surveyor of his choice conduct a C&V on the vessel.

Marine Surveyors are not regulated. Some hold membership in organizations such as the National Association of Marine Surveyors (NAMS) or the Society of Accredited Marine Surveyors (SAMS), or are certified to conduct surveys on behalf of classification organizations such as the American Bureau of Shipping (ABS). Some surveyors are registered professional engineers. But, in the final analysis, there exists no uniform standard for the performance of or reporting on surveys of commercial fishing vessels. As a consequence, the reliability of a C&V survey as a tool for evaluating the risks a vessel presents to its owner, master, crew, and others having an interest is inherently suspect.

A surveyor used the following language to conclude the report, after noting that no stability analysis of the vessel had been done:

This survey sets forth the condition of the vessel including hull, equipment, machinery, fittings and gear to the best of the surveyors [sic] ability. **This survey was performed without the removal or opening up to expose ordinarily concealed spaces, without taking borings, ultrasonic or audible soundings to determine thickness or soundness of structures or members; the use of moisture testing equipment to**

**determine moisture content; testing for tightness, trying or testing machinery and/or equipment for proper function and [sic] operation.**

This survey represents **the honest and unbiased opinion of the surveyor**, but, in submitting this survey, it is understood by all parties that such a survey is not to be considered a guarantee of its accuracy, nor does it create any liability on the part of the surveyor or its agents arising out of reliance on the information contained herein. [Emphasis added.]

Such language presents two questions. The first is, “Why bother with getting a survey at all?” if the report itself both is cursory and disclaims its accuracy. The answer is that it establishes a paper record of some sort, but it is not valuable for anything else.

The second question is, “What if in fact, someone relies on the survey, takes the vessel to sea and suffers a casualty resulting from some reasonably discoverable condition that the surveyor did not report?”

As shown in the example above, there are two features of C&V surveys that are worthy of further emphasis to achieve the goal of greater safety for fishing vessel crews.

The first is that the surveyor generally characterizes him or herself using the word “independent” or other words having a similar import. Taken in its ordinary sense, the use of the word “independent” suggests that the surveyor has no affiliation with any party to or beneficiary of the C&V, and conducted the C&V on a purely objective basis without regard to any specific interest in the vessel.<sup>4</sup>

Second, the surveyor almost without exception uses the words “without prejudice” (read: “honest and unbiased,” as above) often in combination with others, to conclude the C&V report. When read with the word “independent,” those words reinforce the proposition that the C&V is intended to be as objective as its author can make it. The words “without prejudice” are a nullity unless the C&V is intended to present an objective, accurate statement of the vessel’s condition. If the words are not used, the C&V is immediately suspect and, therefore, of no value to anyone. As a consequence, anyone who issues a C&V report, must, warrant its accuracy for the survey to have any utility at all.

C. The Necessary Scope of the Surveyor’s Undertaking.

Generally stated, courts are reluctant to allow the shipowner to evade or pass off their historic primary duty to furnish a seaworthy vessel. Even so, a surveyor is charged with the duties of (1) detecting all perceptible defects of the vessel during the survey; (2) using due care in making recommendations and (3) notifying the owner thereof.<sup>5</sup> In addition, disclaimers made by surveyors or classification societies in survey reports and documents exculpating them from liability are generally not enforceable.

Once that standard is applied, the scope of the surveyor’s obligations can be viewed as expanding dramatically, particularly when viewed in the context of far more complex and therefore more dangerous fishing environment.

In the seminal case of *Mitchell v. Trawler Racer*,<sup>6</sup> in which a fisherman was injured after slipping on a railing covered with “fish spawn” left there after unloading, the Supreme Court noted that “the decisions of this Court have undeviatingly reflected an understanding that the owner’s duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care . . .”

The majority concluded: “. . . The duty is absolute, but it is a duty only to furnish a vessel **and appurtenances** reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather any conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably **suitied for her intended purpose.**” [Emphasis added]

The standard for the suitability of appurtenances is found in *The T. J. Hooper*,<sup>7</sup> where a tug was found to be unseaworthy for not having a radio to receive weather reports, even though it was not the practice in the towing industry at the time for vessels to be so equipped.<sup>8</sup>

Accordingly, it is quite clear that a more thorough approach to C&V surveys must be implemented so that C&V surveys of commercial fishing vessels provide the owner or underwriters, particularly those of protection and indemnity coverage, with a categorization of all perceptible defects of the vessel. In today’s fishing world, surveyors must evaluate safety, navigation and communications equipment, “intangibles” such as stability, and even crew training to determine if any of these elements present perceptible defects to be resolved in the Owner and Captain’s mind before the vessel sails.

In these circumstances, surveyors should be held to the depth or quality of reports comparable to those in other industries where businesses retain independent evaluators to audit, evaluate, or troubleshoot the financial, operating or administrative components of the business. As more fully shown below, they ordinarily do not contain sufficient analysis of factors that are material to the safe prosecution of a fishing voyage.

#### D. Improving Today's C& V Reports

In the ordinary case, a C&V will contain a description of the vessel, describing in general terms the condition of the hull and machinery, list the electronics and safety equipment aboard, and, perhaps report on the skill and competence of the Captain. Most importantly the report provides a VALUE (usually on the last page) of the vessel – vitally important to financiers, insurance brokers and underwriters. Unfortunately, the value alone often drives the business decisions while the substance of the report is of only limited relevance to those decisions.

The usual C&V survey focuses on the physical condition of the hull, plating, and framing. Recommendations regarding material that needs to be cropped and renewed are prevalent, as are evaluations of the quality of the coatings. In addition, if the vessel is hauled, the C&V will report on the condition of stuffing boxes, rudderpost packing, through hull fittings, and other under-water appurtenances.

Machinery will be reviewed for age, general condition, cleanliness, fastening of flanges and couplings, and other tangible or perceptible conditions observed without tearing down any of the equipment. But, there is no documentation that the machinery operates in accordance with manufacturers' specifications. A similar evaluation is done of fishing equipment, including winches, booms, and other equipment for handling fishing gear.

The C&V will provide a listing of electronics for navigation and communications. But, again there usually is no determination made as to the proper operation of the equipment.

Importantly, the C&V should (but may not) examine the emergency rescue equipment required by 46 CFR Part 28.<sup>9</sup> And, few surveyors make recommendations regarding compliance with the training and familiarization requirements in those regulations.

Further, in many cases a C&V survey will state that a vessel is “fit for its intended service” without ever having described what the intended service is. [See *Mitchell v. Trawler Racer* above.]

It is fair to say, therefore, that the tangible qualities of the vessel are reviewed. However, both through testimony and anecdotal evidence, there are too many circumstances where either (a) a surveyor will prepare a punch list of work that needs to be done on the vessel and makes conclusions about the fitness of the vessel for sea based on the assumption that the work will be carried out; but, there is no recommendation for a follow-up survey, or indication that a follow-up survey was conducted;<sup>10</sup> or (b) a surveyor sees a vessel while it is in a shipyard, either hauled or in the water, undergoing repairs and anticipates the completion of the work in a good and satisfactory manner without reporting that the vessel is, in fact, a work in process.<sup>11</sup> In either case, the C&V is not valuable for the purposes of assessing the condition of the vessel, or its fitness to go to sea, or as an insurable risk, because there would be no “independent” evaluation of the vessel as completed.

More importantly, the usual C&V does not deal with issues of stability or structural integrity. In reviewing the laundry list of those matters that are reviewed by the surveyor, one can ascertain from the C&V whether the vessel will operate, and if there is a casualty, whether there is some, but perhaps not enough, equipment aboard designed both to alert others of the casualty and to enable the crew to withstand it. The greatest risk to any fishing vessel at sea is water entering the hull thereby impairing its ability to float, and, because the usual C&V does not address questions of stability or the adequacy of the scantlings of the vessel, one can draw no safe conclusions about the seaworthiness of the vessel from such reports.

There is, therefore, no “seaworthiness” report taking into account all relevant factors - there is only a material condition report upon which very serious personal and business judgments are grounded.

Properly done, each vessel should be evaluated for intact, reserve, special conditions, icing, pumped catch, and other conditions that would impair its stability. The surveyor should conduct a comprehensive review to ascertain that there is sufficient compartmentalization, watertight openings are provided for all compartments, and the vessel itself has sufficient capacity to withstand any number of potential impairments of its stability or seaworthiness. The vessel should be provided with a stability book (instructions) that “provide the master or individual in charge of the vessel with loading constraints and operating restrictions which maintain the vessel in a condition which meets applicable (appropriate) stability requirements.”<sup>12</sup>

#### D. Recommendations

In considering all of the above it is our recommendation that a Condition & Value (C&V) Survey of a Commercial Fishing Industry Vessel should follow the American Bureau of Shipping (ABS) “Guide for Building and Classing Fishing Vessels” (May 1989), and applicable American Society for Testing and Materials (ASTM) standards: Volume 01.07 “Ships and Marine Technology.” Volume 3.03 “Nondestructive Testing” and Volume 3.02 “Wear and Erosion: Metal Corrosion” and other applicable standards.

The C&V should pay particular attention to structural integrity, stability, and watertight integrity, and should document the adequacy and proper operation of all systems, including but not limited to - propulsion, electrical, hydraulic, steering, fuel, water, mechanical, bilge pumping, communications / navigation, alarms (bilge and fire), and fire extinguishing. And the C&V should not be considered complete until the vessel is “ready for sea,”<sup>13</sup> even if that means a “follow-up” survey to ensure that all recommendations have been completed and all systems are operating properly.

In addition the C&V should document that the vessel is in compliance with all Coast Guard regulations for Commercial Fishing Industry Vessels (46 CFR Part 28) and other applicable Coast Guard regulations, including but not limited to pollution prevention and the Navigation Rules, and specifically referring to safety training, safety orientation and required drills.

In this context, it would make great sense for insurers and lenders to require each vessel owner or operator to certify that the Vessel is in compliance with applicable standards, supported by the independent evaluation of a Marine surveyor.<sup>14</sup> This process is not unlike a business owner providing financial statements, reviewed or even audited by a certified public accountant, before obtaining financing. Because voluntary inspections under the Coast Guard's program reach less than ten percent of the fishing fleet, and the insurance and banking industries are involved with forty to fifty percent of the fleet, "market penetration" would be dramatically higher. In addition, the participation of the Owners and crewmembers in the review process prior to certification would serve to raise the level of consciousness among those most to benefit from the certification process.

There is no doubt that the cost of this approach will be passed on to the fisherman or vessel owner. But, relative to the risks, the cost is low, and absent governmental regulation, there is no other pressure point to effect change. Once the standard is set, the remedy may "only" be litigation – but it would take only a few cases holding surveyors liable for failing to detect and report perceptible defects to reshape the surveying process, and the need for improvements in fishing vessel safety would be well served.

There is available a mechanism to improve the overall quality of the vessels and enhance safety for the men and women who fish commercially, but for it to work there must be proactive approach by *everyone* involved in the industry – the owners, the operators, the fishers and most importantly the underwriters who insure the vessels, the bankers who lend on them and the surveyors who evaluate them for participation in their intended service. Absent such heightened concern, fishing crews are left with a false sense of security and correspondingly little hope for the implementation of much needed safety improvements.

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<sup>1</sup> Marine Casualty Report, Uninspected Fish Processing Vessel, *Aleutian Enterprise*, Flooding, Capsizing and Sinking in the Bering Sea on March 22, 1990 with nine persons missing and presumed dead. Report dated, November 6, 1991, page 134.

<sup>2</sup> Codified at *inter alia* 46 U.S.C. §§4502, 4506, 6104, 10603

<sup>3</sup> For example: U.S. Coast Guard NVIC 5-86, 46 CFR Part 28; North Pacific Fishing Vessel Owners Association Vessel Safety Manual; National Cargo Bureau Stability for Fishermen; NIOSH, Commercial Fishing Fatalities in Alaska, Current Intelligence Bulletin 58, September 1997

<sup>4</sup> *Caveat emptor*. One organization of marine surveyors, after describing the nature and purpose of surveys, takes the following position: "Once you retain the surveyor, he or she works only for you and reports to no one else. The surveyor is there to protect **your** interests." (emphasis in the original) [www.marinesurveyor.org/samsfaq.html](http://www.marinesurveyor.org/samsfaq.html)

<sup>5</sup> See generally, Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 Tul. Mar. L.J. 75 (1997); Beck, *Liability of Marine Surveyors for Loss of Surveyed Vessel: When Someone Other than the Captain Goes Down with the Ship*, 64 Notre Dame L. Rev. 261 (1982); C. M. Davis, *Maritime Law Deskbook*, 316-319 (2000 Supp.)

<sup>6</sup> 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 2d 941 (1960)

<sup>7</sup> 60 F.2d 737, 740 (2<sup>nd</sup> Cir. 1932), *cert. den.*, *Eastern Transp. Co. v. Northern Barge Corp.*, 287 U.S. 662, 77 L. Ed. 571, 53 S. Ct. 220 (1932).

<sup>8</sup> See also, *Stevens v. Seacoast Company, Inc. and M/V Elena S*, 414 F.2d 1032, 1039 (5<sup>th</sup> Cir. 1969).

<sup>9</sup> Requirements for Commercial Fishing Industry Vessels.

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<sup>10</sup> Marine Casualty Report, Investigation into the Circumstances Surrounding the loss of the Commercial Fishing Vessel *Adriatic*, O.N. 579941, Eight NM East of Barnegat Light, New Jersey on January 18, 1999 with the Loss of Four Lives. Report dated August 4, 2000, page 31.

<sup>11</sup> U.S. Coast Guard, Investigation into the Sinking of the F/V *Two Friends* on January 25, 2000, Transcript, Day Two, February 2, 2000, Pages 361-362.

<sup>12</sup> 46 C.F.R. Part 28 Subpart E.

<sup>13</sup> That is, to fish on the Flemish Cap in October or in the Bering Sea in April.

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**Richard C. Hiscock** has been a fishing vessel safety advocate for over 25-years – authoring the *Fisherman’s Digest* for the First Coast Guard District, *Safety Notes for Fishermen*, testifying on fishing vessel, and drafting H.R. 1836 to require “licensing, inspection and additional safety requirements for fishing vessels” in 1987. He served on the Fishing Vessel Casualty Task Force in 1999, the Commercial Fishing Industry Vessel Advisory Committee from 1991 to 1998, and edited the *Personal Survival and Emergency Drills Course – A National Standard Curriculum* in 1995. He is a charter board member and Vice-President of the Marine Safety Foundation, and is a member of the Society of Naval Architects and Marine Engineers. In 1991 he founded *ERE Associates Ltd.* a marine consulting firm dedicated to vessel safety and served as its president and principal investigator until 2002. Mr. Hiscock is living in Vermont.

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