

Ship Managers: Are you Managing your Exposure?

Anyone involved in shipping will know that it is an industry fraught with traps for the unwary, especially since the trend over the last few years has been that mistakes will not be tolerated. Quite often a party that alleges to have suffered loss or damage will name in legal proceedings every potential defendant that may have any exposure. The ingenuity of lawyers to go "forum shopping" means that those engaged in a substantive role in shipping must always be alert to such potential exposure.

Whilst third-party ship managers must always be alive to their contractual duties and liabilities, it is easy to overlook other potential liabilities to non-contracting parties. Under various legal systems, duties of care may exist separately from contract and may be owed to parties with whom managers have never contracted. Breaches of such duties may not only expose managers to claims for negligence, but may also lead to unexpected breaches of the management contract. Thus, managers may find themselves implicated in proceedings in foreign jurisdictions. Exposure for claims in negligence can range from claims by injured stevedores to claims by fishermen following an oil spill.

In law, employers are normally responsible for the negligent acts or omissions of their employees acting in the course of their employment (generally known as "vicarious liability").

Therefore, it is vital that managers properly train and equip their staff and ensure that the systems they have in place can withstand the scrutiny of lawyers, experts and judges in the event of any casualty or loss occurring.

A case that demonstrates how closely the courts will examine acts and omissions of the managers and their employees is *The Eurasian Dream* (2002). The judgement of Mr. Justice Cresswell runs to some 24 pages and makes very interesting reading. The "Eurasian Dream" was a pure car carrier that caught fire in July 1998 whilst discharging her cargo of cars, as a result of which the vessel became a constructive total loss and the cargo of new and second hand vehicles were either destroyed or severely damaged. Cargo interests sued the carrier under the Bill of Lading, who happened to be the time charterers. They alleged that the vessel was unseaworthy in many respects and that there was a wholesale failure by the vessel's technical managers to exercise due diligence. After a very careful analysis of the evidence of witnesses of fact (which included crewmembers, the superintendent, the designated person (DPA) and the deputy head of fleet personnel) as well as of the experts called by the parties, the judge concluded that as a result of lack of due diligence by the managers, the vessel was not in a seaworthy condition. She was neither suitably manned nor suitably equipped. Amongst many deficiencies, the judge found that:

- The vessel was not supplied with an adequate number of functioning walkie-talkies.
- Some of the fire-fighting equipment was

defective.

c. The Master and crew were ignorant as to the peculiar hazards of car carriage and car carriers and the characteristics and equipment of the vessel.

d. The crew were improperly or inadequately trained in fire-fighting.

e. The crew failed to supervise the stevedores properly.

f. The vessel should have been provided with a ship-specific manual dealing with fire prevention and control.

g. The vessel was provided with a large amount of irrelevant and/or obsolete documentation.

h. The documentation placed on board by the managers was too voluminous to be digestible.

i. The Emergency Procedures Manual failed to give guidance in many respects.

The judge held that the exercise of due diligence is equivalent to the exercise of reasonable care and skill and that lack of due diligence is negligence. He further held that such numerous failures and errors of judgement as those listed above amounted to professional negligence on the part of the managers relating to the vessel's equipment, competence and efficiency of the Master and crew and adequacy of the documentation supplied to the vessel.

Although the above case related to liability to cargo interests under Bills of Lading, nevertheless it demonstrates that the negligence of the managers and their employees could have far reaching effects. It could also, for example, lead the hull insurers to reject a claim by Owners of the vessel under a Hull & Machinery insurance policy. This would in turn leave managers in breach of their management contract.

Clause 6 of the Institute Time Clauses – Hulls (the standard set of clauses used when insuring Hull & Machinery risks almost worldwide) sets out the perils insured against. A number of such perils are in fact subject to the proviso that the loss or damage did not result from lack of due diligence by Owners or Managers. That is the wording used under the 1983 set of clauses and which, in the case of corporations, has been interpreted to mean lack of due diligence by "the directing will and mind" of the company. However, the 1995 clauses go well beyond that and exclude any loss or damage which resulted from lack of due diligence not simply by the Owners or Managers but also by "Superintendents or any of their onshore management". Thus, it is possible for Owners to forfeit their right of recovery under their Hull & Machinery insurance policy as a result of errors and omissions by the employees of their managers. This could obviously have very serious repercussions as between Owners and Managers.

The ISM Code plays a very important role in such situations. Since the DPA must have direct access to the highest level of management, the acts of the DPA can be closely and conveniently scrutinised to ascertain whether due dili-



In law, employers are normally responsible for the negligent acts or omissions of their employees acting in the course of their employment, warns Imad Elias, Managing Director of Elias Marine Consultants Ltd.

gence has been exercised by the "onshore management". The *Eurasian Dream* highlighted the importance of the ISM paper trail: during the hearing before the court, cross-examination of the DPA badly damaged the defendants' case (although at the time of the incident the vessel was not obliged to be ISM certificated, nevertheless she was intended by the managers to be ISM compliant).

Managers should also bear in mind that generally it is not open to them to protest that certain technical issues are the responsibility of the Classification Society. There has been a number of decisions whereby the courts have decided that Classification Societies act in the public interest and should not become a target for claimants.

Whilst it is vital for managers to consider their contractual duties line by line, it is also important for them to understand their duties in a broader sense. Negligent acts may lead to actions against them directly and to breaches of the management contract in ways they may not have readily contemplated. Therefore, managers would be well advised to keep their systems and their methods of training and assessment constantly under review and to ensure that they carry adequate insurance coverage for their potential exposure.

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