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THE ERRORS OF OUR WAYS!

By

Dr. Phil Anderson BA(Hons.), D.Prof., FNI, MEWI, AMAE, Master Mariner

Article IV, rule 2(a) of the Hague Visby Rules allows a carrier a defence of ‘error in the navigation or management of the ship’ – should cargo become lost or damaged whilst in its custody say, for example, following a collision. However, it should not be considered a foregone conclusion that the carrier could automatically rely on the availability of that defence – indeed it may be extremely difficult!

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The Hague Rules were an equitable compromise between the strict obligation of seaworthiness of the English Common Law and the wide exclusion clauses which shipowners wrote into their Bill of Lading contracts exonerating themselves for any liability for loss or damage to the cargo ‘howsoever caused’. It was recognised and accepted that the carriage of goods by sea is fraught with a wide range of dangers and risks which were outside of the direct control of the Shipowner carrier. Provided the carrier could demonstrate that it had ‘exercised due diligence’ before and at the commencement of the voyage not only to make the ship seaworthy but also to ‘properly man and equip’ the ship then it could rely on any of the 17 specific defences which are set out in Article IV Rule 2.

The maritime law books are bulging with legal cases dealing with all aspects of the carriage of goods by sea. Many of these legal cases establish precedents which bind courts of the same level and below. Even after 80 years and more, the legal interpretation of the Hague Rules continues to develop since its first introduction in 1924. It is quite likely that further interpretations will take place post ISM – particularly with regard to determining what is now required to actually demonstrate that the appropriate level of due diligence has been exercised.

In addition Shipowners may need to defend their position with regard to their own liability insurers and their Hull and Machinery insurers should their own fault and privity be called into question following a collision.

One famous case which went to the Court of Appeal as far back as 1965 was ‘*The Lady Gwendolen*’¹ should be constantly brought to mind by all ship operators. Indeed, they would be well advised to regularly remind themselves of their obligations, as made clear in this case, to carefully monitor the conduct of their Masters and Officers and be aware of the potential consequences which may now enter the equation following ISM implementation if they fail in those obligations.

The Lady Gwendolen was actually a case involving the right of a ship owner to limit its financial liability under the 1957 limitation Act – although this specific problem is

¹ *The Lady Gwendolen* [1965] 1 Lloyd’s Rep. 335

unlikely in the future since the 1976 Convention involves a much more onerous test. However, the judgement does have wider reaching implications with regard to potential consequences under contracts of marine insurance, where the Marine Insurance Act [1906] applies and liability cases. The judgment made it very clear that a ship operator has an obligation to positively monitor carefully how its Masters and Officers are behaving in the conduct of their job and positively intervened when and if it became necessary.

A carrier who intends to rely upon the 'error of navigation defence' will have to demonstrate that the ship operating company provided guidance on navigational related issues and also had controls in place to monitor what was going on, on board, and to check that those requirements were being complied with.

The court determined that *The lady Gwendolen* was proceeding at excessive speed in reduced visibility, the Master was not using the radar correctly and had not been properly trained in its use and these were causative factors in the circumstances which led to the collision. Without a doubt the collision was caused as a result of an 'error in the navigation of the vessel'. However, a carrier will not be allowed the benefit of that defence where the fault also lay with the ship operator itself. The Shipowner would have to demonstrate that it had procedures in place to check and monitor whether ships were being navigated in a responsible and careful manner by its Masters and Officers, specifically, for example, to check that they were not routinely proceeding at excessive speed in reduced visibility. The Shipowner would also had to demonstrate that it would, if necessary and appropriate, positively intervene to ensure that its Masters and Officers did follow correct procedures.

It is perhaps worth looking at the circumstances of *The Lady Gwendolen* case in a little more detail to understand its full significance and to consider the potential consequence of the requirements of the ISM Code. This case pre-dated the ISM Code by more than 30 years – but the obligations required of a prudent ship operator, as identified by the court, were an uncanny prediction of things to come!

The Lady Gwendolen was operated by a company better known for its brewing of a very famous Stout in Ireland than as ship owners. On her entry into a very foggy River Mersey she collided, at full speed, with the *Freshfield* – which was at anchor. Liability was not in dispute but the owners of *The Lady Gwendolen* attempted to limit its financial liability. It was necessary for the owners of Lady Gwendolen to prove that the collision had not occurred because of its own fault and privity. The allegation being that they had:

- 1 (a) failed to instruct the master to place considerations of safety above those of keeping schedule, or to see that such instructions were observed, and
(b) failed to instruct the master not to proceed at excessive speed in fog or to see that the master complied with their instructions; and
- 2 (a) failed to ensure that the master and / or mate were properly instructed in the use of radar (including the fact that radar did not entitle them to proceed at full speed in fog), and
(b) failed to instruct the master as to the necessity of the mate being on the bridge when using radar.

There was evidence that the master habitually proceeded at excessive speed in fog and that, at the time of the collision, the master was alone on the bridge with the helmsman. The radar was switched on and the vessel was proceeding at full speed (10 knots) with the engines on 'stand-by'.

Both the High Court and the Appeal Court Judges were very critical of the company and concluded that it had failed to monitor and control the activities of the Master on board their ship and, consequently, there was fault and privity on its part.

Post ISM the whole question about the state of knowledge of the ship operating company will be very much easier to demonstrate than it was in 1965. Indeed the 'expectation' of what is in place by way of control mechanisms and the evidence which should be available to demonstrate compliance is now at a much enhanced level.

What the Company requires of its Masters and bridge officers with regard to navigation and collision avoidance will be set out in its 'Bridge Procedures Manuals' or similarly titled section of its SMS procedures – possibly along with checklists and circulars – possibly with cross references to standard industry publications such as the Nautical Institute 'Bridge Team Management' or the ICS 'Bridge Procedures Guide' or similar. There must then be objective evidence to demonstrate that it really did comply with those requirements and follow the guidance. There must also be evidence that the Company was 'verifying, reviewing and evaluating' the evidence and satisfying itself that things were being done as they were supposed to be done. This will involve a careful look at the role of the Designated Person, and other line managers as well as the activities and involvement of senior levels of management.

Clearly with good procedures in place, objective evidence to demonstrate that those procedures were being followed and evidence to confirm that the Company was keeping a careful eye on what was going on, then the Company will be in a very strong position indeed – even if something does go wrong – for mistakes can still be made even in the best run companies with robust systems. However, a Company with poor systems or even with good systems which are not being properly implemented and / or are not being properly monitored and controlled by the office ashore - then such a Company is likely to find itself in very serious difficulty – not only with potential claimants but also, quite possibly, with its own insurers who are becoming increasingly aware of the potential as far as withholding cover is concerned.

The buck is likely to stop on the boardroom table!

Dr Phil Anderson is the immediate Past President of the Nautical Institute and author of many books and papers on the ISM code and related topics – his latest being: 'The Masters Role in Collecting Evidence – in light of ISM' published by the Nautical Institute in 2006.

He is Managing Director of his own specialist ISM consultancy company - Consultism Ltd and is involved in numerous legal cases around the world as ISM Consultant and Expert Witness. His company produces a quarterly electronic newsletter 'Reportism' which is dedicated to ISM related issues. Individuals can subscribe to Reportism free of charge through the Consultism Ltd website www.consultism.co.uk where back copies can also be accessed.

