Incompetent or Negligent?

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Negligence or Incompetence?

Incompetence Claims

- Incompetence as a cause of action
- The “Seaworthiness” claims
- What is seaworthiness?
- Your crew - negligent or incompetent?
  > The question
  > Applying the law
- Preventing / defending incompetence claims
Negligence vs. Incompetence

- Is there a difference?
- Does it matter?
- What are the key issues?
- How do I prove competence?
- But he’s got a certificate of competency!

The Claims

Why would cargo interests allege unseaworthiness?
- Salvage
- General Average
- Physical damage to cargo
- Losses arising from delay in delivery of cargo.
What is Seaworthiness - I?

Implied Obligation:

“fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of the voyage.”

*Kopitoff v Wilson* (1876)

What is Seaworthiness - II?

Seaworthiness:

“The ship must have that degree of fitness which an *ordinary careful owner* would require his vessel to have at the commencement of her voyage having regard to *all the probable circumstances* of it.

Would a *prudent owner* have required that it (the defect) be made good before sending his ship to sea, had he known of it?”

*F. C. Bradley v Federal Steam Navigation Co.* [1926]
Case Study - The Torepo

- Loaded tanker
- Grounded South America - 1997
- No pollution/loss of cargo
- Salvage services required
- Cargo interests paid their portion of salvage
- Cargo interests claimed damages.

The Grounding

- Pilot on board
- Master resting in cabin
- Chief Officer on bridge
- Alter course position approaching
- Pilot transferring chart positions
  - Discrepancy/distraction
- Chief Officer took no action
- Controlled grounding!!!
Court’s assessment of Chief Officer

- Not monitoring V/L progress before turn
- Assumed pilot delaying turn
  - Knowledge of area
  - Currents
- Faith in efficiency of pilot
- Chief Officer
  - Negligent, or
  - Incompetent?

Who Pays for Loss?

See the contract of carriage!

Division of responsibilities, liabilities, rights & immunities
The Contract of Carriage - 1800s

- Carrier had strict liability to transport cargo safely
- Subject to the common law exceptions
  - Act of God
  - Public enemies, and,
  - Inherent vice.
- However - freedom of contract applied
- Adoption by carriers of extensive exclusion clauses
- Introduction of consignee protecting legislation
- Multiple legislation - too fragmented.

The Carriage Conventions

- Hague (1921) & Hague Visby (1977) Rules
- Incorporated into B/L - can’t contract out
- Seaworthiness obligation - carrier bound:
  - Before and at beginning of voyage
  - To exercise due diligence
  - To make V/L seaworthy
  - (Includes competent crew)

Health Warning:
- Obligation non-delegable.
The Negligence Defence

- Providing seaworthiness obligation complied with, neither carrier or ship, is responsible for loss / damage which:

Arises or results from:
- The act, neglect or default,
- of Master, crew, pilot & the servants of carrier,
- in navigation or management of ship

Health Warning:
- Defence does not apply to management of cargo.

What is Incompetence?

- Inherent lack of ability
- Lack of adequate training or instruction
- Lack of knowledge of ship/systems
- Disinclination to perform job properly
- Physical/mental disability or incapacity

Health Warning:
- This is not an exhaustive list
Negligence

- Fine line between negligence/incompetence
- Negligence is the failure:
  - on a particular occasion,
  - to meet required standard of care

Torepo - Steel J.’s Question
- Negligent navigation by competent officer, or
- Negligent navigation by incompetent officer?

Negligence or Incompetence?
Incompetence - The Defence Issues

Objective:
- Demonstrate to opponent litigation is pointless
- Negotiate settlement

The key issues:
- Pro-actively manage evidence collection
- Must be “Causal Link.”
- Respond to OCIMF / PSC reports
- Avoid “exception reporting” mentality
- Seaworthiness obligation “non-delegable”

Defending Against Incompetence

- Recruitment - Skill, knowledge, experience
- Training - Office based / pre-departure
- Soft systems - Induction to SMS
- Hard systems - Shipboard equipment
- Monitor commitment, attitude, motivation
- Identify and provide training / education
- All ship visitors have a responsibility
- Appraisal section in visit reports / records
- Record, record, and record again
- Above all: Record the Good Stuff!
Summary

- STCW Certificate does not = “competence”
- Be alive to the issue of seaworthiness
- Understand the defences - i.e. negligence
- Create paper trail of “competence”
- Manage creation of post incident documents
- Early evidence collection by lawyer
- Expert survey of damage - treat like crime scene
- The Ince E-Brief.

Does your paper trail evidence the exercise of due diligence to ensure competent crew?