



NOVEMBER
2013

CREW NEWSLETTER



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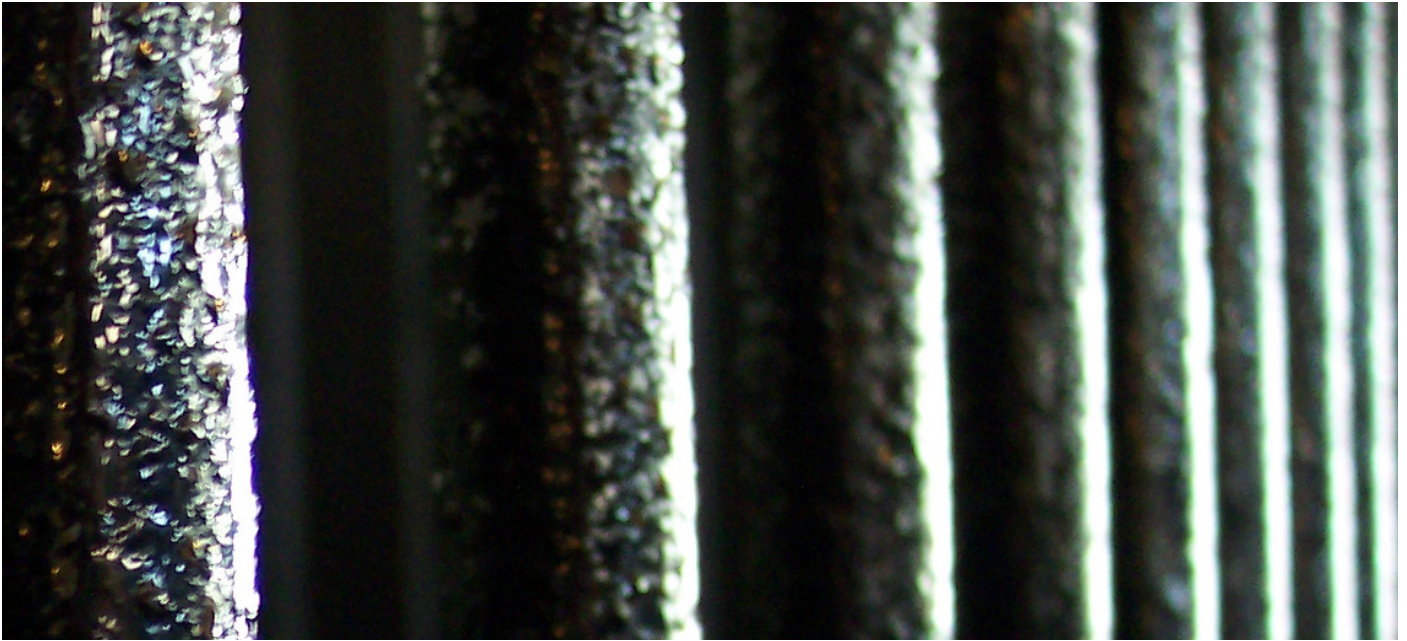


Photo: C.P. Strom

THE INCREASING CRIMINALISATION OF CREW

Criminal Law and the Blame Game

Readers will be aware of the increasing trend by politicians and Governments to play the blame game with oil spills and the rush to criminalise masters and crew after any pollution incident. This knee jerk reaction is an all too familiar response as evidenced by the well-known cases: Nissos Amorgos (1997); Erika (1999); Prestige (2002); Hebei Spirit (2007).

For a summary of high profile criminal cases, please visit https://www.seafarersrights.org/seafarers_subjects/abandonment_topic/high_profile_cases

In fact, this criminalization of Seafarers is not limited to oil pollution but extends to personal injury and death cases as well. A seafarer is held responsible to a much higher standard and can be found guilty and incarcerated for mere negligence alone.

Most Seafarers will be aware that if there is a death incident, a personal injury, a theft, or pollution, a criminal investigation is likely. However, there are numerous other offences which also carry criminal penalties:

- Collision
- Breaching port rules
- Drug abuse
- Drugs found on board
- Diesel smuggling
- Illegal cargo
- Assault
- Shipwreck
- False logbook entry
- Pollution
- Death
- Injury
- Theft

What do Seafarers think?

In a recent survey conducted by Seafarers Rights, an international centre for advancing the legal protection of Seafarers, the following was highlighted:-

... "Of the seafarers who had faced criminal charges and who answered the question, 160 seafarers (80.00%) considered that they had been intimidated or threatened,

which is 57.76% of charged seafarers who considered they had been intimidated or threatened;

Of the seafarers who had faced criminal charges and who answered the question, 39 seafarers (18.75%) considered that they had been treated fairly; 169 seafarers (81.25%) considered that they had not been treated fairly, which 61.01% of all seafarers who had faced criminal charges is considered that they had not been treated fairly.

Of the seafarers who had faced criminal charges and who answered the question, 19 seafarers (9.79%) did have legal representation; 175 seafarers (90.21%) did not have legal representation. Thus a seafarer taken at random from all seafarers who had faced criminal charges is 1.72 times more likely not to have legal representation than to have legal representation."

For further reading on this survey, please visit www.seafarersrights.org

Human Rights - Only a right for the privileged few

The corner stone of most people understanding of human rights is that they will be treated fairly, free from intimidation and if subject to investigation and prosecution, have adequate legal representation. The Seafarers Rights Survey as seen above shows a far different conclusion. In fact, seafarers seem to have less human rights than most other workers as they will trade in many different jurisdictions which all have their own criminal law systems. Each country will also have their own way of dealing with criminal matters. In some countries there is no automatic right to a lawyer when being questioned by police. Some countries may not allow proper translation before being obliged to sign the statements, even if the seafarer cannot understand what has been written. Some may offer no bail conditions or you may need to petition expressly for bail. Criminal laws themselves vary in different countries such as public acts of affection in some jurisdictions may be deemed a crime, or taking sweepings of food cargoes in some places can be viewed as theft.

Be prepared – remember education

Educating your crew about the various customs and laws of the places the vessel usually trades to may be a good way for Owners and their crew to be prepared and avoid some of the more unusual criminal charges. At the start of any criminal investigation the attitude of the seafarer is extremely important and can set the tone for the rest of the investigation. Many times seafarers will be frightened and confused by the legal regimes in place. Thus, having an experienced criminal lawyer who is fluent in the crew's language and in the local language and familiar with the local laws and customs can mean the difference between freedom and jail.

How fatigue can expose Seafarers to criminal prosecution

In one case Skuld had many years ago, the vessel was in Colombia and a drug search was taking place by a local Coast Guard officer. The search was still in progress but the Master mistakenly thinking he saw the flag giving the all clear, gave the order for the engines to be started. This resulted in the death of the Coast Guard officer, disruption of the search and the immediate arrest and detention of 7 members of the vessel's crew. The master was exhausted and afraid, and unfortunately lied at the initial investigation being conducted by the Marine Police. Severe charges were brought against him. After several months in detention and many efforts by local criminal lawyers acting on his behalf, the Master was eventually released. Had the Master not lied and trusted the local lawyer's advice, the situation would have resolved quickly.

Readers may recall the Shan Neng 1 in Australia in 2010, where 3-4 tonnes of oil was spilt. The cause was a simple accident due to the C/O being exhausted. The result was that the C/O was sentenced to 18 months in prison. Fortunately he only served 3 months in addition to a AU \$2,000 fine and 2 year good behaviour bond. However, this could have been avoided had he not been fatigued.

Some unusual criminal cases

When taking sweepings was mistaken for theft:

In another case many years ago, a vessel was discharging wheat in a Middle Eastern country. The crew noticed a lot of the wheat had spilt on the quay and started to collect the sweepings to avoid any shortage claims. The local correspondents acted quickly when local port authorities charged the crew with theft – the penalty for which would have been the loss of one hand. Skuld's local correspondents were able to quickly explain to the authorities that the crew were collecting the cargo for the receivers and that no theft was involved. This is a useful reminder that perception in different cultures matters and cultural awareness and training can assist to avoid such problems.

Medicine on board:

Taking medicine on board a vessel may seem a relatively straight forward matter. However, in some countries strict regulations apply to what drugs a Master is allowed on board. Even natural remedies may cause problems. In some countries it is illegal to import certain natural remedies and in one case, tiger balm, a substance commonly used in Asia was viewed by local authorities as illegal and caused a delay to the vessel while the situation was explained to customs that tiger balm did not in fact have any tiger in the balm.



Photo: CBP Photography

HOT TIPS

GOOD TO KNOW

- There are generally two types of interview
 - a. The first stage involves the crew who are witnesses to the event being questioned. Legal representation is not guaranteed at this stage. However, do ensure good experienced lawyers are appointed early as they can advise and guide crew on the various stages of the investigation and the crew rights.
 - b. The second stage of the investigation will be "suspect interviews". Legal representation is usually permitted but not guaranteed at this stage.

IN THE EVENT OF A CRIMINAL INVESTIGATION, OWNERS SHOULD:

- Expect lengthy delays and disruptions
- Expect prolonged interviews of crew
- Arrange replacement crew
- Provide support facilities ashore
- Make sure family members are constantly kept up to date
- Provide a liaison person to assist the families

QUESTIONS TO BE ASKED:

- What offences have been committed?
- What are the punishments of such offences?
- What powers do the marine police have?
- How will the police investigation be conducted?
- Are crew entitled to be legally represented?
- Will simultaneous interviews be conducted on the crew? If yes, you will need to make sure your criminal lawyers appointed have the man power to represent more than one crew at a time.
- Can the crew be taken into custody before the trial?
- How will the criminal proceedings be conducted?
- How long will the proceedings take?
- Is bail available? ■

by Nicola Mason
Senior Vice President
Deputy Head of Syndicate
Skuld Hong Kong

THE HUMAN SIDE

Judge sentences captain to time served

By AL.COM

Wolfgang Schroder, jailed for the last four months as a criminal after his conviction for a fatal collision between a cargo ship and a dockside crane at the state port in downtown Mobile, became a free man this afternoon.

Chief U.S. District Judge Ginny Granade ignored both the prosecution's request for a longer sentence and advisory guidelines and sentenced Schroder to time served. She gave the German native and longtime seaman 72 hours to leave the country or be deported.

The judge's decision elicited elation from the captain's daughter, representatives of the German government and two rows of supporters in the maritime community who had gathered in the second-floor courtroom in Mobile.

Massive relief. I couldn't stop worrying, said Schroder's daughter, Sharon Schroder, who lives in England. My mum has been sick because of all the worry.

Advisory sentencing guidelines called for a prison term of 10 to 16 months, and Assistant U.S. Attorney Maria Murphy urged the judge to impose punishment at the top of that range. But Granade said she did not feel more time behind bars would serve any useful purpose. She noted that the law required jurors to find only that Schroder was guilty of simple negligence, a lower standard more commonly associated with civil disputes.

SOURCE:

News from the trial of Wolfgang Schroder, captain of Zim Mexico III's, convicted by a U.S. federal court jury in the death of a quayside electrician at the Alabama port of Mobile on 8 May 2007.

Source: al.com

While I certainly do not discount the terrible consequences that have resulted from this negligence, what he has been convicted of is something that is really a civil offense, Granade said.



THE SITUATION IN HONG KONG

The Increasing trend in the criminalization of crew can also be felt in Hong Kong, evidenced by 3 recent high profile cases that made the news. In Hong Kong, seafarers can face charges under s72 of the Shipping and Port Control Ordinance (Cap. 313) for Endangering the Safety of Others at Sea. The maximum penalty for this charge is a fine of HKD 200,000 and 2-4 years imprisonment. Seafarers can also face more serious charges under s.7 of the Offences against the Person Ordinance (Cap. 212) for Manslaughter, under which the maximum penalty is life imprisonment.

RECENT CASES IN HONG KONG

Yao Hai c/w Neftegaz 67 - 22 March 2008

Crew charged under s.72 of the Shipping and Port Control Ordinance with

- Captain of N67: 3 years 2 months imprisonment, reduced to 18 months on appeal
- Captain of YH: 2 years 4 months imprisonment, sentence quashed on appeal
- Pilot of YH: 3 years imprisonment, immediately released on appeal
- Co-pilot of YH: 2 years 4 months imprisonment, sentence quashed on appeal

For more information on this case, please read the article on page 8

Run Ze c/w Hui Jin Qiao - 7 December 2010

Crew charged under s.72 of the Shipping and Port Control Ordinance

- Master of the HJQ sentenced to 3 months imprisonment, which was reduced to 2 months following a guilty plea
- Helmsman of HJQ sentenced to 9 months imprisonment, reduced to 6 months following a guilty plea

Sea Smooth c/w Lamma IV – 1 October 2012

Crew charged for manslaughter under s.7 of the Offences against the Person Ordinance

- Decision pending

For more information on this case, please read the article on page 9 ■



NARROW CHANNELS - A NEW LEGAL TEST?

Case study: Neftegaz – 67 collision with Yao Hai

Captain Kulemesin was in command of the vessel Neftegaz-67 (“N67”) when she collided with the Yao Hai (“YH”) in Hong Kong on 22 March 2008. The damages sustained on collision caused the N67 to sink rapidly with the tragic loss of the lives of 18 of her crew. The cause of the collision was immediately investigated by the Hong Kong Marine Police and Captain Kulemesin was subsequently charged with endangering the safety of the lives of others at sea contrary to section 72 of the Shipping & Port Control Ordinance which provides –

“Any person who by any unlawful act, or in any manner whatsoever without reasonable excuse, endangers or causes to be endangered the safety of any person conveyed in or being in or upon any vessel or in the sea commits an offence and is liable –

(a) on conviction on indictment to a fine of \$200000 and to imprisonment for 4 years...”

The “unlawful act” relied upon was a breach of the COLREGS; in particular, breaches of Rules 5, 8, and 9. Captain Kulemesin was subsequently arrested on 27 March 2008, and later released on bail pending trial.

The trial took place in 2009, and the decision of Court of First Instance was handed down in January, 2010. Captain Kulemesin was found guilty of the offence charged, and sentenced to 38 months imprisonment. He was later released on bail pending an appeal after spending 45 days in prison.

The appeal was heard in 2011. The Court of Appeal upheld Captain Kulemesin’s conviction but reduced his sentence to 18 months imprisonment. He immediately sought and

was granted leave to appeal to the Court of Final Appeal (“CFA”). The CFA gave judgment in January of this year upholding Captain Kulemesin’s conviction; and he is currently serving his prison sentence in Hong Kong and will not be released before 5 January next year.

As the CFA observed, the “critical case” established against Captain Kulemesin was his “unreasonable failure” to appreciate that the buoyed channel through which he was navigating the N67 at the time was a narrow channel where Rule 9 applied; and his consequent failure to keep to the starboard side thereof in breach of this Rule. Quite how the judges considered this failure to be “unreasonable” – and “unreasonable” beyond all reasonable doubt – in circumstances where the Marine Department as the competent authority for marine matters in Hong Kong also did not consider the buoyed channel to be a narrow channel where Rule 9 applied, is particularly disturbing.

It appears that in the eyes of judges two lines of red and green port and starboard hand buoys can be said to mark a channel; and if that buoyed channel is of narrow width it will be a narrow channel where Rule 9 applies. That is not what most mariners understand a narrow channel to be. It also takes no account of the purpose for which the lines of buoys may have been laid by the competent authority; in this case, by the Marine Department to mark the deep water route for vessels drawing more than 16 metres. ■

**by Harry Hirst
Partner/Master Mariner
Ince & Co (Hong Kong)**

CASE STUDY: THE 'LAMMA IV' TRAGEDY

At about 20:20 on 1 October 2012 the 27 metre passenger launch 'Lamma IV' came into collision with the 28 metre twin hulled fast ferry 'Sea Smooth' off Lamma Island, Hong Kong. The 'Lamma IV' took less than two minutes to sink taking with her the lives of 38 of her passengers. One more died 4 days later making it the worst maritime disaster in Hong Kong for 40 years.

Just 3 weeks later on 22 October, a Commission of Inquiry (COI) was formally appointed by the Chief Executive of the Special Administrative Region's Legislative Council to inquire into circumstances leading to and surrounding the collision and, given the significant political sensitivity of the case, was tasked with reporting to the Chief Executive within just 6 months.

Following a 50 day hearing during which 767 witness statements were considered and 100 witnesses heard, the COI's report was passed to the Chief Executive on 19 April 2013. It was published on 30 April after a short delay while the Government took legal advice on the vexed question of how to avoid prejudicing criminal charges that had in the meantime been brought against the two captains involved.

Each had been charged with 39 counts of manslaughter.

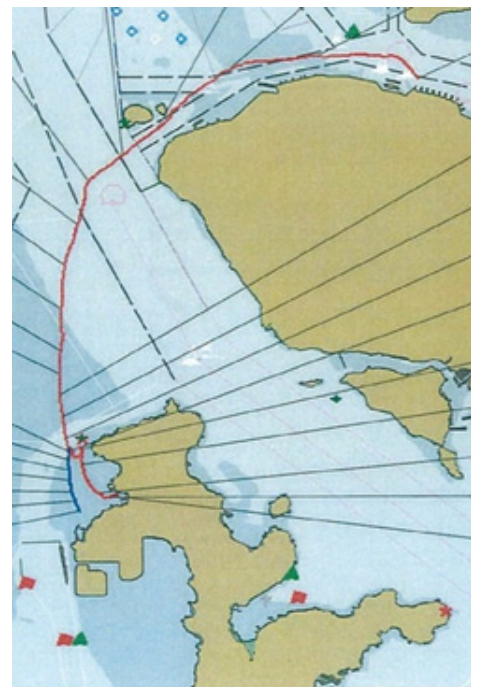
The report (in redacted form) recounts the events of 1 October 2012. Much of the population of Hong Kong was enjoying a public holiday but for the two captains involved it was another working day.

Chow Chi Wai boarded 'Lamma IV' at about midday to begin his duty, which was to convey his fellow employees of The HongKong Electric Company Limited, their relatives and friends on an organised excursion involving a visit to the company's power station on Lamma Island before transporting them later that evening to Victoria Harbour to enjoy the spectacle of the National Day fireworks display. The original sailing time from the company's power station was 20:00 but wary of arriving in Victoria Harbour too early and subjecting the passengers to possible discomfort in the choppy waters, it was decided that the sailing be delayed. At 20:15, with 127 persons on board, 'Lamma IV' set sail.

Lai Sai Ming started his duty as captain of 'Sea Smooth' at 07:30, which involved seven round trip voyages between



Lamma IV sank within 2 minutes of the collision resulting in the death of 39 of her passengers



The fateful route of Sea Smooth (red) and Lamma IV (blue) as captured by VTS radar and reproduced in the Report of the Commission of Inquiry.

Central and Yung Shue Wan on Lamma Island before beginning the fateful journey towards Yung Shue Wan from Central at about 20:00.

The report goes on to describe how shortly after leaving the typhoon shelter of the power station, 'Lamma IV' increased speed to 13 knots at which time Chow Chi Wai saw the navigation lights of 'Sea Smooth' ahead at a distance of three cables. Judging the situation to be an 'end on' one he turned the wheel to starboard only to see the 'Sea Smooth' turn to port.

For his part Lai Sai Ming told the COI that in preparation for the vessel's arrival at Yung Shue Wan the crew left the wheelhouse while Lai brought the 'Sea Smooth' to port to approach the harbour. The vessel was making 25 knots when the shadow of what he described as an unlit vessel was seen just 2-3 boat lengths ahead, which transpired to be 'Lamma IV'.

The reasons as to why 'Lamma IV' sank and so quickly, and why so many lives were lost, occupy about half of the COI's report's 186 pages but its conclusions as to why the vessels collided at all has been withheld pending the criminal proceedings against Chow and Lai.

It is unusual in the extreme for manslaughter charges to be brought in the context of a case such as this in Hong Kong where a successful conviction would bring a maximum penalty of life imprisonment. Less unusual, however, is a charge of endangering the safety of others at sea contrary to Section 72 of the Shipping and Port Control Ordinance, Cap. 313. Whilst also an indictable offence it carries a lesser maximum penalty of a fine of HK\$200,000 and imprisonment for 4 years.

The collision between the 'Neftegaz 67' and 'Yao Hai' is discussed in the article on page 6 of this newsletter. In

that case the masters of the respective vessels and the senior and junior pilot on board 'Yao Hai' were convicted for Section 72 offences when 18 of the 25 crew of the 'Neftegaz 67' lost their lives as a consequence of the collision.

In a more recent case the river trade vessels 'Run Ze 001' and 'Hui Jin Qiao' were in collision on 7 December 2010 resulting in the sinking of 'Run Ze 001' and the loss of 8 of her 14 crew. Those in charge of the navigation of 'Run Ze 001' were among those who lost their lives but the District Court was in no doubt that they were principally to blame for the collision, having been navigating the wrong way along a traffic separation lane at all material times. Nevertheless, the master (who was off duty at the time of collision) and watchkeeper of 'Hui Jin Qiao' were also found to have been at fault and were convicted under Section 72. The master received a 3 month sentence of imprisonment, reduced to 2 months for his plea of guilty, suspended for 2 years. The watchkeeper received a 9 months sentence of imprisonment, reduced to 6 months for his plea of guilty, also suspended for 2 years.

As for the captains of the 'Lamma IV' and 'Sea Smooth' the case continues. ■

by Ron Clark
Admiralty Manager
Reed Smith (Hong Kong)

RSRB represented the owners and crew of the 'Lamma IV' at the COI into the collision with 'Sea Smooth'. With more than 1,700 lawyers and 24 offices across Europe, the Middle East, Asia and the United States, Reed Smith is ranked as one of the 20 largest law firms in the world.



Sea Smooth was able to continue with bow damage and safely disembark her passengers



Lamma IV at the Government Dockyard following her salvage



Photo: Liam Quinn

MARITIME LABOUR CONVENTION - (MLC) 2006 ENTERS INTO FORCE

MARITIME LABOUR CONVENTION (MLC) 2006 HAS NOW ENTERED INTO FORCE

As many members will be aware, MLC has now entered into force and various States are expressing their enthusiasm to ensure full compliance with MLC obligations. We highlighted the importance of MLC in our last issue and in this issue included some interesting articles which we hope members will find useful.

WHO IS THE OWNER FOR THE PURPOSE OF THE MLC?

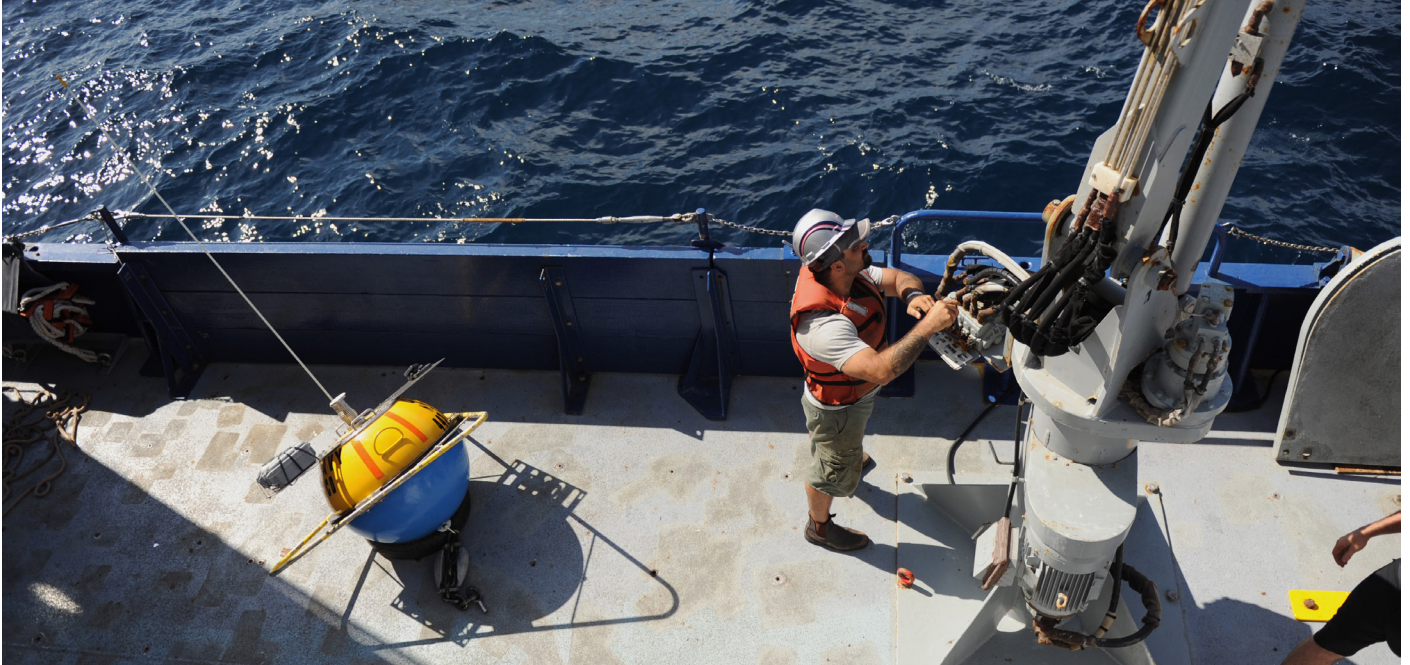


Photo: Office of Naval Research

It is early days and controversy is in the air with Ship Managers concerning the definition of who is the ship owner for the purpose of the MLC.

Under the MLC, the shipowner is described as

“the owner of the ship or another organisation or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this convention, regardless of whether any other organisation or persons fulfil certain of the duties or responsibilities on behalf of the shipowner”.

Ship Owners and Managers argue that this definition is vague, confusing and ambiguous and will lead to serious disputes and confusion as to who has the overriding responsibility. In many cases you have the registered owner of the vessel, you may have a commercial owner of the vessel, a technical manager and a crew manager. Some have argued the confusion means that depending on who signs that entity, even if he has little or nothing to do with the daily role and lives of the crew/ management of the vessel, may end up being the de facto ship owner for the purpose of the MLC.

In a recent article in Tradewinds, the ILO department of standards director, Cleopatra Doumbia-Henry, said *“thus a third-party manager can be the MLC shipowner even if another entity, which could even be the owner of the ship, who is no longer the MLC shipowner, is carrying out certain shipowner duties and responsibilities”.*

The MLC aims to ensure that seafarers only have to look to one entity as the shipowner. Dr Doumbia-Henry said she did not see any major problem in this - *“We are confident that shipping companies are aware that, where other entities are performing certain duties and responsibilities, appropriate agreements should be concluded between all the entities concerned to protect their respective interests.”* The article made it clear, notwithstanding Owners and Ship Managers concerns over the ambiguity that, *“MLC aims to ensure that seafarers only have to look to one entity as the shipowner.”* (ILO stands by the Labour Convention’s Shipowner Definition, Friday 23 August 2013, 09:21 by Liz McMahon Tradewinds)

The debate as far as Owners are concerned is not over, however, only time will tell how this issue will eventually be resolved. ■

OWNERS BEWARE: IGNORING THE IMPORTANCE OF FOOD COULD BE EXPENSIVE!

The undersigned recently had the pleasure of meeting with Mr. Jonathan Jones (Managing Director of JLJ Maritime S.A, Athens) at the Willis Asia Marine Conference 2013 in Hong Kong, where on behalf of Skuld, she spoke about MLC and the implications for Owners.

An area often overlooked is the importance of food. Regulation 3.2 of the MLC seeks to address this by laying down standards to ensure seafarers “*have access to good quality food and drinking water provided under regulated and hygienic conditions*”.

Mr Jones introduced me to the organization ‘Food Inspection and Training Ltd’ (“FIT”), which is run by Mr. David Steele, who has 30 years’ experience in the catering industry. He is a fully qualified chef, formally trained in the British Army. FIT is the first company of its kind to assist the maritime community with the special requirements needed to ensure compliance with Regulation 3.2 of MLC. Mr. Steele takes a hands on approach and personally visits the vessels to conduct audits, assist with training, get a first-hand look at how stores and provision are delivered, handled and maintained on board and inspect how the galley is run.

For Owners employing various nationalities on board their vessels it can be a challenge to cater to everyone’s needs. However, under the MLC, Owners must ensure that all crew are treated equally and this will mean ensuring their religious, cultural and health needs are fully catered for. Mr. Steele can assist the Cooks on board with menu suggestions that cater to all the crew’s needs, whether dietary, religious or cultural.

With regard to health, the role food can play on board a vessels is vital. The increase in the incidence of hypertension, for example, means the traditional role of a ship’s cook has expanded to that of a dietician and a health professional. As many of you know, hypertension can be prevented and treated with a good diet and adequate exercise. *(For more information on hypertension, please read page 19 of this newsletter)*

The Benefits of Good Food

In the article on page 11 in this Newsletter, you will see how AMSA in Australia are ready to enforce the provisions of the MLC and are keen to ensure that the mental wellbeing of seafarers, in addition to physical and safety requirements are taken care of. As David Steele says “*It’s common knowledge that a crew supplied with quality and healthy food and beverages will be happier, and therefore will carry out their duties more diligently*

and professionally. A good healthy balanced diet has been proven to make us more alert.”

Cost to Owners

If Owners of vessels are found to breach MLC provisions, this could result in delays, fines, charter party disputes, or even on a worst case scenario, the revocation of the MLC certificate. However, looking beyond MLC, getting food and food hygiene right just makes good common sense. Skuld has had members who have faced claims in the past as a result of food which has been supplied to the vessel in an unhygienic condition causing sickness on board and resulting in medical fees, port charges, ancillary costs and for the owners delay to his vessel’s schedule. All of which add up to a substantial claim.

Mr Steele had the following to say on the subject “*The cost to owners if the ship is “not fit to sail” because the crew all have food poisoning is punishing. Ship provisioning companies have also to “wake up” to the vital role they play in making sure what is ordered by the ship, arrives in a safe and healthy manner, so the ship is not delayed nor is the crew put in danger. At all steps in the ‘food chain’ these days, everyone must take responsibility for their actions.*” MLC aims to ensure Owners take responsibility for the food and water provided to Seafarers and that Owners also take responsibility for their suppliers.

Going Green

In a world focusing on the environment and greener ways to do business, it is often open to Owners to take advantage of local produce at ports to ensure good quality and a variety in the food supplied to the vessel. However, to get the best out of the local produce, a cook has to be trained to identify which local produce will best suit the vessel and Seafarers needs.

For Members wishing to learn more about MLC, please visit our website: <http://www.skuld.com/mlc>

*Our thanks go to **Mr Jonathan Jones of JLJ Maritime S.A, Greece (www.jljmaritime.com) and Mr David Steele Food Inspection and Training Ltd (www.foodinspectiontraining.com) for their assistance with this article and bringing to our members attention the vital role the vessels cooks will now play in assisting their owners to comply with MLC 2006 obligations.** ■*

**by Nicola Mason
Senior Vice President
Deputy Head of Syndicate
Skuld Hong Kong**

MARITIME LABOUR CONVENTION – AN AUSTRALIAN PERSPECTIVE



Photo: Richard Taylor

On 20 August 2013, having been ratified by 47 ILO Member States representing over 75% of the world's tonnage, the Maritime Labour Convention 2006 ("MLC") entered into force. Australia ratified the MLC in December 2011 and has prepared for its enforcement by careful drafting of the Navigation Act 2012 (Cth) and Marine Order 11 (Living and Working Conditions on Vessels) 2013.

Marine Order 11 applies to both Regulated Australian Vessels and Foreign Flagged Vessels in Australian Ports. Article V, paragraph 7 of the MLC requires members to implement the MLC in such a way as to ensure that ships that fly the flag of non-ratifying states receive "no more favourable treatment". Australia will do so and Marine Order 11 provides for MLC compliance for all foreign flagged vessels in Australian Ports (including documentary evidence of MLC compliance) from 21 August 2013.

MLC compliance will be policed by the Australian Maritime Safety Authority (AMSA). AMSA have wide powers to board and inspect vessels and request delivery up of ships certificates by way of formal Port State Control (PSC) inspection or otherwise. PSC inspections may include an inspection of the living and working conditions on board the vessel and will include an inspection of MLC Certificates.

AMSA have indicated that they will detain (pursuant to powers under section 248 of the Navigation Act and elsewhere) vessels that are found not to conform to MLC if "the conditions on board are clearly hazardous to the safety, health and security of seafarers or the

non-conformity constitutes a serious breach of the requirements of MLC (including seafarers' rights)"

Foreign shipowners and operators should be aware and appreciate that Australia has highly developed and prescriptive occupational health and safety regulations. The welfare of employees and workers is taken very seriously and the benchmark for compliance is generally considered high. This will no doubt translate into how AMSA approach MLC compliance whether the vessel is Australian or foreign flagged.

We recently attended an informative AMSA Seafarers Welfare Forum which addressed the coming into force of the MLC. The day was well attended and much of the focus was on welfare for the mental health of seafarers. While physical health and safety are of course also paramount and were addressed, it is noteworthy that so much of the forum was focused on the mental health of seafarers which is often overlooked. Such issues may appear secondary to some but owners and operators should take note that compliance with all aspects of MLC will be important to AMSA including [but not limited to] on board medical care, living conditions and on board complaint procedures. ■

**by Joe Hurley and Chris Sacré
HWL Ebsworth Lawyers, Sydney**



Photo: Ingrid Taylor

IS MLC 2006 BEING EFFECTIVELY ENFORCED?

PORT STATE RESULTS ONE MONTH AFTER INTRODUCTION:

Numerous inspections and a handful of detentions in the very first month of the introduction of MLC 2006 has dispelled some concerns about its enforcement and effectiveness.

A recent press release from the Paris Memorandum of Understanding (MoU) on Port State Control (PSC) has identified 8 ships that were detained due to MLC related deficiencies. These MLC related detentions accounted for 12% of the total number of detentions during this period. The detentions were imposed by 4 different port States: Canada, Denmark, Russia and Spain.

“Only member States of the Paris MoU who have ratified the MLC 2006 on or before 20 August 2012 are entitled to conduct PSC inspections on MLC 2006 requirements from 20 August 2013. As a result the following 12 member States have started enforcing the MLC, 2006: Bulgaria, Canada, Croatia, Cyprus, Denmark, Latvia, the Netherlands, Norway, Poland, the Russian Federation, Spain and Sweden.”

Source: *Bimco 4 Oct 2013*

OTHER INTERESTING FIGURES DURING THE FIRST MONTH OF MLC IMPLEMENTATION:

- “A total of 4,260 deficiencies have been recorded;
- 494 deficiencies out of the 4,260 recorded (11.5%) were related to any of the ILO Conventions listed as relevant instrument;
- Of these 494, 30 (6.1%) were considered to be serious enough to be a ground for detention;
- 23 of those 30 (76.7%) were related to breaches of the MLC and resulted in the detention of 8 individual ships;
- The total number of detentions was 68 during 1,532 inspections, which resulted in a detention rate of 4.4%.” ■

Source: *Bimco 4 Oct 2013*

For more information on one of the MLC related detentions in the Paris MoU area, please visit <http://officerofthewatch.com>.



Photo: CBP Photography

STOWAWAYS - A RECURRING OWNER'S NIGHTMARE

In recent months, there has been a dramatic increase in the number of stowaways found aboard. Last year, Skuld was involved in 62 cases in which a total of 100 stowaways were offloaded. The costs involved with stowaways have significantly increased and include the cost of

- food/lodging
- repatriation
- paper work
- security guards hired for the repatriation
- fines levied by ports to allow disembarkation
- fines imposed by ports for escaped stowaways
- damage to the cargo/ vessel by stowaways
- medical treatment of stowaways
- deviation expenses
- loss of hire/ time to Owners

The cost of offloading a stowaway can range from USD 17,000 in West Africa to USD 70,000 in South America. In addition to the cost, there are numerous other problems with finding a stowaway on-board. Often stowaways are hostile and may carry weapons on them, endangering the safety of the crew.

Members should be especially careful when calling in ports in Africa, South America and the Caribbean Islands. All precautions must be taken to prevent the embarkation of stowaways at these ports. Any extra costs incurred as a result of hiring private security companies or watchmen to prevent stowaway embarkation will be a lot cheaper than having to deal with a stowaway found on-board after sailing.

The problem of stowaways is usually found on board bulk, container and general cargo vessels, with a majority linked to car carriers.

PRECAUTIONARY MEASURES

Prior to loading

- Have in place an effective system to prevent all unauthorized persons from boarding the vessel. Arrange a pass system and tally all visitors
- Beware of stowaways boarding the vessel as stevedores with fake identification papers or when wearing stevedore clothing
- Maintain a vigilant and continuous gangway watch

STOWAWAYS

throughout the whole period while at anchor or in port, if needed supplemented by hired watchmen

- Whilst at anchor, the lookout should be doubled at night or during reduced visibility and there should be frequent deck patrols
- Depending on the location, the port authority should not be completely relied on to provide adequate security
- Often stowaways are assisted by individuals involved in port operations and sometimes even the crew themselves.
- Ensure all crew are well aware of the dangers and problems of having stowaways on-board and consider offering financial incentives to crew who discover and prevent stowaway incidents
- Carefully check and re-seal all containers presented for loading with no seals or faulty/ tampered seals
- All open top containers should be inspected
- Particular attention should be paid to containers that arrive in the terminal late, shortly before the vessel loading commences
- Containers with obvious weight discrepancies should be identified and searched
- Ensure all deck stores are locked whilst at anchor

After loading

- A systematic search of the entire ship, including all open spaces must be undertaken before sailing. For many vessels a thorough search is not practicable but at least a check of unlocked storage areas and the lifeboats should be made.
- Consider hiring private security companies that undertake thorough searches
- Consider the use of CO2 detectors/ heat detectors or sniffer dogs
- Check hatch cover structures when stowed ashore before being replaced
- The club has been informed of several cases concerning stowaway hiding in the ships' rudder housings and the opening should be restricted in size to prevent access

For further guidance, please consult the **IMO Guidelines - Annex 1 Resolution FAL. 11(37)**

ON FINDING A STOWAWAY ON-BOARD

- Immediately inform vessel operators and your P&I Club of the known facts

Treatment on-board

- In the meantime, treat them humanely and ensure they are confined to a secure area
- If there is more than one stowaway, detain them separately, if possible
- Adequate food, accommodation and medical assistance must be provided
- It is recommended not to put them to work or be allowed to interact with the crew
- The crew can face criminal charges on mistreating stowaways. Authorization of such treatment by the shipowner can make him vicariously liable.

ISPS COMPLIANCE

Under the ISPS code, all vessels must designate a

- **Company Security Officer (CSO)**, responsible for the development and oversight of the **Ship Security Plan (SSP)**
- **Ship Security Officer (SSO)** responsible for the implementation, maintenance and audit of the SSP

The presence of stowaways on board a vessel may be considered by port authorities as 'clear grounds' of ISPS non-compliance. This may result in serious consequences: the vessel may not be allowed into the port, be detained or be subjected to additional security control measures.

STOWAWAYS

Documentation

- Urgent attempts should be made to communicate with the stowaway to determine his nationality, health, and how he got on-board
- Advise the Master to use the standard IMO Form of Stowaway Details (Annex 1 Resolution FAL. 11(37); page 13) as part of their reporting procedure
- Collect all of the stowaway's identification papers. If none are available, note down all his details and take a photograph and finger prints. In order to obtain travel documents, the identity of the stowaway must be established
- Stowaways without documents will not be allowed to disembark in most jurisdictions, with the exception of those seeking political asylum or those in need of medical attention
- Countries such as Japan, Singapore, Korea and Taiwan do not usually allow disembarkation even if the stowaway possesses identification papers

Repatriation

- If the ship has already sailed when stowaway is discovered, immediately consult with the owner's office and the Skuld correspondent on the possibility of turning back. The cost of diverting to land stowaways are covered by Skuld (Rule 11)
- Before calling at a port, inform your local agent and the port authority that a stowaway has been found on-board that needs to be discharged on your return
- Your Skuld syndicate can help in obtaining permission to return them to their own country.
- If the stowaway is disembarked in a country other than his own, the stowaway is usually required to leave the country before the Vessel is allowed to depart from the port
- Most countries require an escort or other security personnel to repatriate stowaways

YOUR SKULD COVER

- Skuld covers the following expenses: the cost of the food/ basic amenities, repatriation costs, escorts hired for repatriation, medical expenses of stowaway, fines imposed by local authorities and deviation costs
- However, the following are not covered: any damage to the vessel or cargo caused by the stowaway, consequential losses and measures taken to prevent stowaways boarding the vessel as these are considered to be operational matters

PROTECT YOURSELF WITH STOWAWAY CLAUSE!

Generally, Owners are responsible for all costs incurred as a result of having a stowaway on board. However, some charterparties incorporate a stowaway clause that transfer this responsibility onto charterers. **Skuld recommends Owners to include a stowaway clause in any charterparty entered into.**

The **NYPE '93 clause 41** and **BIMCO Stowaways Clause for Time charters** attempts to allocate risks and costs between Owners and Charterers in a balanced manner. Therefore, once a stowaway has been found, it becomes crucial to establish how he gained access to the vessel.

Case Profile:

- The vessel had finished loading and departed Pointe Noire in the Republic of Congo
- Four stowaways were discovered during the vessel's journey from Pointe Noire to Durban who alleged being stevedores and having boarded the vessel via the gangway
- It became imperative to arrange for the stowaways to be disembarked in Durban as the next port of call was Singapore followed by various ports in China
- The stowaways did not have any documentation on them and it is not easy to obtain travel documents in South Africa unless the stowaways are interviewed by the Embassy officials
- The stowaways were finally discharged at Durban after obtaining temporary travel documents from the Embassy

STOWAWAYS

there and were arranged to fly to Johannesburg

Liability:

- The NYPE '93 charterparty incorporated clause 41, the stowaway clause, making charterers liable for stowaways who gain access to the vessel by secreting away in the goods and /or containers shipped
- By an implied or express provision in the charterparty, charterers could also be held liable for stowaways who gain access to the vessel with the help of dishonest or corrupt stevedores/ agents

Lessons Learnt:

- Check ID of all stevedores entering and leaving the vessel
- Check with local agents before arrival if stowaway problems present at the port

HOT TIPS

Finding out exactly how stowaways got on board can:

1. Assist in any recourse claim against charterers if they came on with stevedores/ agents help or as part of the cargo
2. Assist future loss prevention for the vessel
3. Discuss stowaway problems with the crew so they are aware of the location and issues
4. Timely information is of utmost importance in such cases! ■



by Nikita Lulla
Claims Assistant
Skuld Hong Kong



Photo: George Terezakis

THE DANGERS ASSOCIATED WITH MOORING

The first operation performed by any vessel on entering port is the mooring operation. This is one of the most critical operations that the vessel has to perform. Over the last 10 years, Skuld has dealt with numerous personal injury claims caused in the course of mooring operations. These claims are significantly large, reflecting the grave nature of mooring injuries, which are often extremely severe or fatal.

The majority of accidents involving mooring operations are a result of the parting of mooring lines. Mooring lines carry great loads and when put under excess tension are at a risk of breaking or snapping back. **Ports which are open to the sea and where it is difficult to control the movement of the vessel have a higher risk of mooring line parting than others. Bad weather and swell conditions also result in exasperating the danger.** When the rope breaks or parts under tension, it will swing back in its snap back zone and hit anyone standing there with a large amount of force. It is, therefore, absolutely crucial to highlight mooring line snap-back zones to alert crew to the danger, allowing them to be more careful when working in these areas.

The second biggest hazard involved in the mooring operation is rope bights. Mooring ropes naturally tend to form a coil or ring shape when stored or under operation. A crewman caught in a rope bight can get entangled and dragged along with the rope. Crew must be aware of this danger and always monitor where they are standing. A rope bight is not always obvious, highlighting the need for only well trained crew to undertake this operation.

Another extremely important factor that significantly affects the safety of mooring is the communication between the bridge and deck. Communication can be a challenge due to poor walkie talkie reception, high levels of external noise, crew not speaking the same language or not being fluent in English. It is of utmost importance that all crew involved in the mooring operation train together and prepare for the operation well in advance to ensure effective communication between the bridge and deck crew.

Poor weather conditions make the mooring operation a lot more dangerous. Ice formation on the deck, oil spillage from the mooring equipment, poor lighting during the operation, strong winds affecting the movement of the ship and stability of the crew and low visibility due to fog, are all hazards that significantly increase the likelihood of a mooring accident and must be guarded against with appropriate procedures, extensive training and well maintained equipment.

What makes mooring so dangerous?

- Old or damaged mooring ropes
- Improper line tending
- Mooring equipment not properly maintained
- Untrained crew
- Inappropriate PPE (personal protection equipment)
- Inadequate procedures and arrangements
- Discrepancies between procedures and practice
- Lack of non-slip mooring decks on vessels
- Badly maintained and unclear painted mooring area
- Mooring snap back zones not highlighted
- Crew not educated on dangers of rope bight
- No warning posters or signs
- Ineffective communication between bridge and deck

HOT TIPS

- Highlight hazards on board and caution crew of dangers in the mooring area
- Mooring plans should have safety procedures and guidelines incorporated into them
- A well painted mooring area, with hazard warnings is very effective in reducing claims
- Mooring equipment must be properly maintained
- Only crew trained in mooring operations should undertake them and be present at the mooring stations
- Good communication between the bridge and deck is of utmost importance

CAUSES OF PERSONAL INJURY CLAIMS

- Hit by parted ropes
- Caught in the ropes
- Hit by non-parted ropes
- Equipment misuse/ failure
- Untrained personnel

STAYING SAFE ON-BOARD: THE DANGERS OF MOORING

PERSONAL PROTECTION EQUIPMENT

The crew should always be wearing the proper personal protection equipment (PPE):

- Coveralls
- Safety boots
- Safety helmets
- Safety goggles
- High visibility vests
- Gloves
- Buoyancy vests if working near the shipside



LESSONS LEARNT

A clearly painted snap back zone with warning signs and crew awareness of the danger may have prevented this accident

Case Profile:

- The vessel was unberthing at Acajutla, El Salvador for the discharge of cargo
- The Chief Officer and 3 other deck crew were involved in the mooring operation
- Affected by swell, the mooring rope became tight and broke under the pressure
- The broken rope jumped back hitting the Chief Officer in the chest, resulting in immediate death

Recourse against Charterers:

- The port of Acajutla is open to the sea and is regularly affected by swell
- This makes it difficult to prevent the movement of the vessel and parting of mooring lines is common at this port
- The mooring rope was found to be in a satisfactory condition, without any signs of damage
- In these circumstances, a successful unsafe port claim could have effectively transferred liability onto charterers

HOT TIPS - FOR A SUCCESSFUL RECOURSE CLAIM AGAINST CHARTERERS:

If a mooring accident occurs:

- Preserve the mooring rope as it may be necessary to conduct tests on it
- Have a well-qualified surveyor collect the following evidence:
 - a. Statements from crew who witnesses the accident
 - b. Local weather, sea, swell conditions
 - c. How frequently this type of accident occurs
 - d. Whether the location was exposed or was of such a nature to generate unusual mooring conditions ■

by Nikita Lulla
Claims Assistant
Skuld Hong Kong

WORKING ALOFT – A HAZARDOUS TALE

Many areas on-board are unreachable from decks or built-in work platforms, making it necessary for crewmembers to go aloft or outboard to perform inspections, repairs or installations. From time to time, Skuld receives reports of death or personal injury resulting from working aloft. The greatest danger of working aloft is the possibility of a fall, but other hazards include electric shocks, radiation burns, asphyxiation, and dropping of objects.

In a recent case, a crewman fell down from a 3m height when working on a cargo hold tank top. He was provided with proper personal protective equipment but he did not wear it. He sustained fractures to legs and his backbone.

In another case, a crewmember sustained serious injuries as a result of falling from a height of 7m down a manhole during a routine safety patrol. The manhole was left open negligently by other crew who conducted repair work.

WORKING ALOFT CHECKLIST FOR CREW

- Before working aloft, crew members should make sure that they have:
- understood all applicable safety regulations
 - received proper training and instruction to handle this type of work
 - fully understood the nature of, and potential hazard associated with the work
 - obtained permission to work on the area
 - been provided with all safety equipment necessary for the work
 - examined all equipment before use to make sure it is in good condition
 - identified another crew member to supervise their work, if possible
 - made available lifeboats and lifebuoys should they require them
 - posted a warning notice that they are about to work aloft or announced the same

WARNING

- Do not work aloft in bad weather conditions.
- Always use appropriate safety equipment – safety harnesses, lifelines, buoyance garments

OWNER'S LIABILITY

Owners will be held liable for death or personal injury claims due to a failure of providing safety equipment, proper training or instruction. A great number of accidents have resulted from complacency or lack of proper training. The ship-owners should foster a positive safety culture on-board and provide all crew members with adequate training and instruction on working aloft.

HOT TIPS

- Always take a positive attitude towards risk management and have a strong awareness of potential hazards with working aloft
- Periodically review safety procedures, policies and compliance on-board
- Learn from past accidents and continually improve safety systems and procedures
- Always ensure all crew members are well-trained and instructed in carrying out the particular task assigned
- Always ensure crew have access to safety equipment which is in a good condition and are well-trained in using it
- Plan times for working aloft when weather conditions are optimal
- Discuss examples of accidents with crew to drive home the importance of safety
- Consider awarding prizes and bonuses to crew who demonstrate consistent safety awareness and who foster a culture of safety
- Consider publishing the bonuses/ incentive system as this may motivate crew ■



Photo: Official U.S. Navy

NOISE POLLUTION ON-BOARD

New mandatory IMO requirements for new ships to reduce on-board noise and to protect personnel from noise. The IMO has recently adopted a new SOLAS Regulation (Reg. II-1/A-1/ Reg.3-12) requiring new ships to be constructed to reduce noise on board. The newly adopted Noise Code deals with the effect of noise on health and comfort on board.

The Regulation makes the new Noise Code mandatory from July 1 2014. The code notes that *"...high noise levels on board ships could affect seafarers' health and impair the safety of the ship..."*

The new code will apply to ships of 1,600 GRT and above for which the building contract is placed on or after 1 July 2014, or, in the absence of a building contract, with laying date on or after 1 January 2015 or latest at delivery date on or after 1 July 2018. For ships delivered before that date, special measures to reduce machinery noise respective for protection against it may apply, following the old Code on Noise Levels on Board Ships (Resolution A.468(XII)).

The new SOLAS requirements, along with the code, set out mandatory standards for maximum noise level limits for machinery spaces, control rooms, workshops, accommodation and other spaces on board ships, as well as recommendatory provisions for operation. The code includes provisions on measuring equipment specifications and on how to carry out specific measurements. It also provides information about acoustic insulation and noise protection options, especially measures to be taken in high noise areas. A noise survey report will be required for all ships to which the Code is applicable.

MAIN SOURCES OF NOISE ON-BOARD

- Engines
- Electricity generators
- Ancillary machinery
- Steam valves
- Propellers
- Ventilation systems

EFFECTS ON SEAFARERS' HEARING

Excessive noise can cause permanent hearing loss either from a single very loud noise or from a lower long term exposure. If a person is exposed to noise greater than 80 dB(A) for 8 hours per day or more, this can harm the inner ear, bilaterally and more or less symmetrically, and this damage will worsen as the period of exposure lengthens.

Source: Textbook of Maritime Medicine v2 – 18.4

Engineers are exposed to the most noise on-board and consequently exhibit the highest degree of hearing loss.

NON-HEARING EFFECTS

Stress

Noise pollution, even at low intensity can cause psychological harm and significantly increase stress levels. It also results in annoyance and aggression.

Sleep deprivation

Noise on-board affects a seafarer's sleep patterns reducing the overall quality of sleep and total amount of sleep, leading to physical exhaustion and fatigue. A tired seaman is more likely to have to suffer from reduced intellectual performance, make more mistakes and injure himself more while on duty.

Cardiovascular problems

Numerous studies show a link between noise pollution and increased blood pressure problems. Seafarers exposed to excess noise are more susceptible to hypertension and myocardial infarctions. ■



Photo: Life Mental Health

HYPERTENSION

What is Hypertension?

Hypertension or high blood pressure is a chronic medical condition in which the blood pressure in the arteries is elevated, requiring the heart to work harder than usual to circulate blood throughout the body.

Hypertension typically develops over many years and one can have it for a long period of time without any symptoms. Uncontrolled high blood pressure is a major risk factor for serious health problems such as heart failure, strokes, heart attacks as well as kidney disease.

As a general guideline, blood pressure measurements greater than 150mmHg systolic and/ or 90mmHg diastolic should require referral to a seafarer's General Practitioner for lifestyle advice and investigation. Under these circumstances, the seafarer should be declared unfit pending

General Practitioner confirmation of adequate control of blood pressure.

Causes

Mostly, there is no identifiable cause of hypertension and it tends to develop gradually over the years. However, some cases of hypertension can appear suddenly and more aggressively. This is usually when high blood pressure is caused by an underlying condition such as kidney problems, adrenal gland problems, congenital defects, certain medication or illegal drugs.

Symptoms

Most people have no signs or symptoms, even if their blood pressure is dangerously high. Some people may have the following symptoms but these only usually occur when the problem is severe or at a life-threatening stage:

- Dull headaches
- Dizziness
- Nosebleeds

Early detection

Detection of hypertension is extremely easy and can be diagnosed by simply measuring your blood pressure. A routine blood pressure reading, at least every two years, can help in the early detection of hypertension.

Prevention

- Maintain normal body weight
- Reduce dietary sodium intake
- Exercise regularly
- Limit alcohol consumption
- Consume a balanced diet

- Manage stress

Dietary and lifestyle changes can aid in lowering blood pressure but often medication is required.

Training on Board

The 'Training on Board' project by the Norwegian Maritime Authority (on behalf of ISWAN) is a great initiative to promote exercise, nutrition and health on-board. It offers all seafarers an accessible, free and motivational training program aimed at improving fitness on board. ■

For various workout plans and useful information, visit www.trainingonboard.org

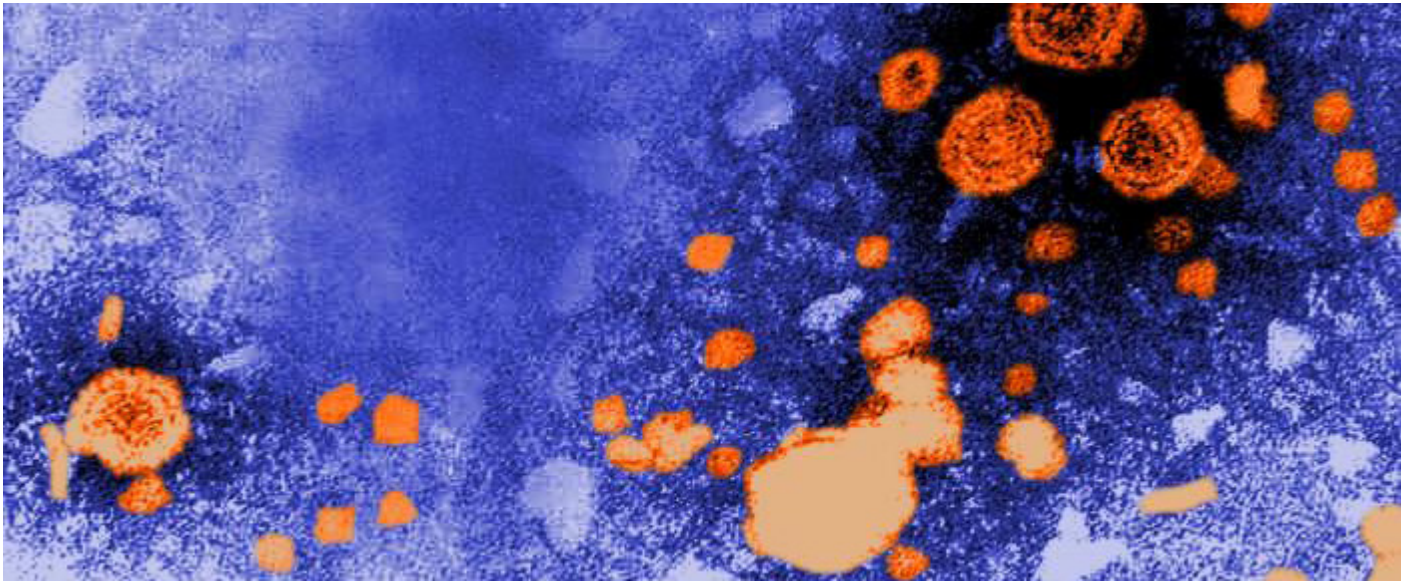


Photo: Microbe World

CHINA WATCH: CANCER SOARING AT SEA

Crew illnesses which involve cancer are alarmingly on the rise. Skuld had 4 cases reported this year, 2 involving Mainland Chinese seafarers, and 3 last year involving Chinese crew. Over the last two decades, although significant achievements have been made in understanding the nature, risk factors, diagnosis and treatment of cancer, progress in reducing the overall cancer mortality rate has been disappointing. From time to time, Skuld is notified of cases of seafarers developing cancer at even a terminal stage. It is of vital importance that members should raise the awareness of cancer risk among seafarers and ensure thorough PEME's are conducted.

Did you know?

- Every minute, six people in China are diagnosed with cancer
- Over 2.5 million people die of cancer every year
- Studies show that seafarers face an overall higher risk of various cancers
- Deck crews on tankers are more susceptible to renal cancer, leukaemia, and possibly lymphoma
- Engine crews are exposed to higher asbestos related risk of mesothelioma

Causes

Occupational exposure to dust, chemicals, fumes of gasoline, heat, and the strain of heavy physical work greatly increases the risk of cancers. A large portion of PRC seafarers are reported to be smokers and/ or drinkers. Tobacco smoking is a major contributing factor to lung cancer and excessive alcohol consumption is associated with oesophagus, liver and larynx cancer.

DECLARATION OF TRUTH

The Declaration of Truth in a PEME is as important as the physical tests involved in the PEME. It is crucial for ship owners, managers and manning agents to remind crew of the importance of truthful declarations and the consequences of incorrect declarations.

Incorrect declarations can prejudice a seafarers insurance, resulting in that seafarer being denied compensation.

A Seafarers' Increased Risk of Cancer

Seafarers are exposed to occupational risk factors as well as environmental risk factors daily, explaining why there has been a gradual increase in the number of cases of various types of cancers among seafarers.

Occupational hazards such as asbestos, benzene and benzidine, significantly contribute to lung, stomach and colon cancer. Although the use of these chemicals have been removed or substituted in newer vessels, it remains a danger on older ones.

The Environment and lifestyle of seafarers also increase their risk of cancer. Maritime activities involve the production of smoke, soot, dirt and dust which find their way into the respiratory tracts of seafarers increase the chances of lung damage and lung cancer. In addition, excessive exposure to the sun, radiation, stress and a lack of exercise all influence cancer rates and risks.

LIABILITY UNDER CHINESE LAW

Work-related cancer:

As per Art.17 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Compensation for Personal Injury*, seafarers suffering work-related injuries are entitled to compensation including medical expenses, loss of income, accommodation expenses, etc. Under the latest amended list of occupational diseases published by the Ministry of Health, cancer is deemed to be a work-related injury if it falls into the category of occupational tumours. If a seafarer dies, his dependents are also entitled to death compensation and funeral

expenses.

Non work-related cancer:

Pursuant to the *Provisions on the Period of Medical Treatment for Diseases or Non-Work-Related Injuries of Enterprise Employees*, if the cancer is not work-related, the seafarer still enjoys a certain period of medical treatment ranging from 3 to 24 months, during which employer is not allowed to terminate the employment contract and has to pay a certain portion of the salary depending on the length of employee's service. If the seafarer dies of cancer, the employer is responsible for funeral expenses, relief fund and living allowance to the dependents on the deceased.

CANCER SCREENING

Although most cancers are undetectable by a normal PEME, indicators like a low complete blood count and abnormal findings in x-rays can raise alarms that require further investigation. A comprehensive PEME from a reliable clinic is of utmost importance. Given the high rate of cancer, especially lung cancer, members should consider employing additional tests for candidates who are/ have been heavy smokers and/ or drinkers. Implementing strict no smoking policies on board may aid in alleviating the problem and reducing the crew's exposure to second hand smoke.

Skuld adopts in a number of countries an enhanced PEME program, which includes a complete blood test as well as a chest x-ray and lung function test, goes far beyond a normal PEME, ensuring employment of healthy crew.

To know more, please visit our website - <http://www.skuld.com/products/liability/peme/>

HOT TIPS

- Safe work procedures should be strictly followed in order to reduce exposure to carcinogens on board
- Take measures aimed at counteracting the adverse effects of an unhealthy lifestyle, e.g. drinking, smoking and a lack of exercise among seafarers
- Take extra care when working on older vessels. Older vessels with apparent work-related cancer risks, including asbestos, are still sailing as secondhand ships today
- Provide crew with protective equipment to prevent or minimize exposure to carcinogens
- Crew who are requested as part of their duties to work in dry dock undertaking ship repair or refitting should be made aware and protected from the working environment where crew are exposed to excessive fumes and industrial radiography
- Ensure doctors conducting PEME alert the Crew Manning Agents to anything which may be a cause for concern such as a "high white blood count" on blood tests
- Remind the crew that they must make a declaration of truth before conducting the PEME and if they are suffering from an illness, they must declare it ■

by Rachel Wong
Claims Executive
Skuld Hong Kong



Photo: ILO

LATEST FROM USA:

SURVEYORS CAN BRING LONGSHORE CLAIMS AGAINST THE VESSEL

One type of claim that we are seeing more of in the US are claims involving temporary workers on-board vessels who are neither crew members nor longshoremen handling cargo.

By way of example, we recently settled a claim out of Texas that involved an injury to a surveyor who was on-board to inspect cargo. While on the vessel, the surveyor stepped over some pipes to access the cargo tanks and he slipped and fell. No one from the vessel witnessed the accident, but the vessel's crew was alerted that the surveyor was hurt. The surveyor at the time told the crew that he was okay to keep working and said that he did not require medical attention. As such, no incident report was prepared by the vessel and no statements were taken by the crew members on-board.

Similarly, SKULD was not put on notice of an incident and no investigation was performed. Over one year later the surveyor filed suit in Texas under the Longshore and Harborworker's Compensation Act (LHWCA) seeking recovery from the vessel for negligence. At that time the surveyor claimed that he was seriously injured and that

the Chief Officer on the vessel instructed him to step over pipes, rather than following a safer path to the cargo tanks on the vessel's walkway. The member was surprised to learn that surveyors had a right to sue them and even more shocked by the claim as the Chief Officer adamantly denied the allegations. Due to the fact that there was no documentation or investigation of the claim, liability came down to the surveyor's word against the Chief Officer's. While an amicable resolution of the claim was reached and a reasonable settlement obtained, a better result might have been achieved had a few things been done differently. ■

LESSONS LEARNT

Specifically, it is important for members to know that ANYONE injured on-board in the US could file a claim and, as such, to make sure to document all incidents and immediately put SKULD on notice so that proper investigations can be conducted.

by **Betsy Bundy**
Assistant Vice President
Skuld New York



Photo: Official U.S. Navy

NEWS FROM THE PHILIPPINES: DISABILITY SHOULD BE BASED MEDICAL CONDITION, NOT THE NUMBER OF DAYS

Since the beginning of the Millennium, the Supreme Court ("SC") decisions in the Philippines brought a substantive change for shipowners and their insurers. The 120 day ruling is one such decision.

The 120 day Ruling – what is it and why is it so important

In 2005, the SC introduced a new principle to determine compensation for Filipino seafarer claims. The essence of the determination being that if a Seafarer was unable to work for more than 120 days due to

1. his disability
2. because he is receiving medical treatment he would be deemed permanently and totally disabled. This meant that the seafarer would automatically be entitled to full disability benefits pursuant to the POEA

(The Philippine Overseas Employment Administration) and CBA (collective bargaining agreement).

As a result of this, a number of important cases were raised with the SC. For a summary of those cases, please refer to the article "Summary of the 120/240 days decisions of the Supreme Court" by Ruben Del Rosario of Del Rosario Pandiphil, Inc on their website www.delrosariolaw.com

Examining the 120 day Issue

There are 2 versions of the POEA in existence: the old 2000 version and the newer 2010 version.

The current wording of the POEA 2010 Section 20A states:

3. *“The period within which the seafarer shall be entitled to his sickness allowances shall not exceed 120 days. Payment of the sickness allowances shall be made on a regular basis but not less than once a month.”*

Based on this wording, in case of injury or illness, it should be very simple - the seafarer should be entitled to sick wages for 120 days. However, the determination by the SC means that when he reaches or even exceeds the 120 days period he is automatically entitled to 100% disability compensation. This ruling was based on the provisions of the previous POEA 2000 version which stated:

3. *“Upon sign off from the vessel for medical treatment, the seafarer is entitled of sickness allowances equivalent to his basic wage until he is declared fit to work or the degree of permanent disability had been assessed by the company-designated physician but in no case shall this period exceed one hundred twenty days.”*

120 vs. 240 days ruling

In 2008, the SC held that in case the seafarer exceeds the period of 120 days and the Company designated physician (CDP) does not declare him “fit for work” and he still requires medical treatment, he is deemed to be permanently and totally disabled and entitled to 100% disability compensation (“Vergara doctrine”).

Four years later, in 2012, the SC gave some relief to Owners, extending the “Vergara doctrine” to a period of 240 days. Within this period, the CDP could still declare the seafarer “fit for work”. However, if the 240 days were

reached and no “fit for work” declaration was announced, the seafarer was entitled to permanent total disability compensation.

What does “permanent disability “actually mean?

Confusion surrounded the definition of “permanent disability” in POEA 2000 Contracts. This has not been aided by contradictory decisions in the SC and subsequent clarifications, at various times permanent disability has been defined as

- i) the inability of a worker to perform his job for more than 120 days regardless of whether or not he loses the use of any part of his body
- ii) does not measure disability in terms of number of days but by grading
- iii) disability is permanent if as a result of the injury or sickness the employee is unable to perform any gainful occupation for a continuous period exceeding 120 days

On the basis of these decisions, it was almost automatic that seafarers exceeding the 120 day period filed a complaint for 100% disability and were likely to succeed, although from a logical point of view they would be either fit for sea duties or fit for work.

POEA 2010 resolves this problem of defining “permanent disability” by expressly stating that disability should be based solely on the disability grading provided under sections 32 of the POEA and should not be measured or determined by the number of days a seafarer is under treatment or the number of days in which sickness allowance is paid.

HOT TIPS

- Closely check the medical cases, at least every 14 – 21 days
- Monitor the period of treatment closer to the 120 days
- Get medical updates on prognosis to detect crew malingerers early
- In case of a complaint on the basis of the “Vergara doctrine”, be ready to fight it
- POEA 2000 may still be in effect for some crew and therefore, owners need to pay close attention to which version of the POEA, 2000 or 2010, is being used by their Manning Agent ■

by Alexandra Hunstig
Claims Executive
Skuld Germany

IMPORTANT PHILIPPINE SUPREME COURT DECISIONS

SECOND ENGINEER ONLY ON BOARD FOR TWO WEEKS DENIED DEATH COMPENSATION

The Estate of Posedio Ortega v. St. Vincent Shipping; G.R. No. 175005; April 2008

Facts:

- The Second Engineer, after just two weeks on board had to be repatriated due to lung cancer.
- He eventually died and his estate sued for death benefits.
- The deceased had been a heavy smoker for 25 years.
- He was declared fit in his Pre-employment Medical Examination (PEME)

Held:

- The Supreme Court of the Philippines denied the claim on the basis that the seafarer's lung cancer was not work related as evidenced by his medical history, medical records and physician's reports.
- The Second Engineer had only worked on board for two weeks and it was unlikely that he acquired lung cancer in such a short span of time
- A clean PEME did not estop the vessel interests from denying the claim as the PEME was not intended to be an in-depth medical examination and lung cancer could not have been detected by his PEME

COMPENSATION DENIED TO SEAFARER WHO DIED ON SHORE LEAVE

Susana R. Sy v. Philippine Transmarine Carriers, Inc., and/or SSC Ship Management Pte., Ltd; G.R. No. 191740. Feb 2013

Facts:

- A seafarer died while on shore leave after falling into a river and drowning

Held:

- The seafarer's estate was denied compensation as the death did not occur at his workplace nor while performing an act within the scope of his employment
- Under section 20 (A) of the Philippines Overseas Employment Administration (POEA), it is not

sufficient that that death occurred during the term of the employment contract

- There must be a causal link between the work actually performed by him and his death

COMPENSATION DENIED TO SEAFARERS NOT MEETING THE THREE DAY POEA REPORTING REQUIREMENT

Crew and Ship Management International v. Jina T. Soria; G.R. No. 175491; December 2012

Facts:

- A seafarer repatriated due to illness claimed that he had contacted the manning agents who referred him to the state social security system
- As a result, the seafarer chose to undergo treatment from his own physician

Held:

- The claim was denied as the Court found that the seafarer had failed to comply with the three day reporting requirement under section 20(3) of the POEA standard employment contract
- There was no evidence that the seafarer had reported to his manning agent as alleged

Loadstar International Shipping v. The Heirs of the Late Enrique C. Calawigan; G.R. No. 187337; December 2012

Facts:

- A seafarer suffering from burn injuries was repatriated
- He reported to the manning agent 9 days after his repatriation, soon after which he passed away from pneumonia
- His wife brought a claim against the owners alleging the pneumonia was a result of tetanus which was caused by the burn injuries

Held:

- The Supreme Court found there to be no connection between the pneumonia and the burn injuries
- They also set aside the claim on the basis that the seafarer had failed to comply with the mandatory three day reporting requirement under s20(3) of the POEA ■

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