

## The distinction between ‘crew negligence’ and ‘crew incompetence’ and the consequence thereof.

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### Introduction

Assume a ship with only two valves (No.1 & No.2). Valve No.1 is the one that should be handled, the correct valve. Valve No.2 is the wrong valve and should be kept closed during cargo operations because, if handled, there will be a cargo contamination. Both valves are properly marked and labelled and located in the same room at a distance from each other.

Whilst cargo operations are in progress at the port, the Chief Officer instructs, over the walkie-talkie, a deck cadet (who is for the first time at sea) to go into the valve room and open valve No.1. The deck cadet does so but, instead of opening valve No.1 as instructed by the Chief Officer, he opens valve No.2 resulting in cargo contamination and a huge cargo claim. Will the shipowner be required to satisfy the cargo claim? Or, will he manage to escape liability by relying on the cadet’s negligence?

In other words, was it negligence or incompetence? If it was the former the shipowner might be able to rely on the ‘crew negligence’ defence, but if it was the latter the ship would be held unseaworthy due to having an incompetent crew. Such unseaworthiness would be causative and the shipowner, then, should pay for the cargo claim.

Therefore, in the above factual context, the crucial question is: negligence or incompetence?

The answer is simple: it can be either negligence or incompetence. On an ultimate analysis, the starting point is the mental state of the cadet at the time of his mistake. If he opened valve No.2 believing, at that very moment, that he opened valve No.1 then we are entering the path of negligence. If, however, he opened valve No.2 believing, at that very moment, that the valve he opened was the valve he should open, i.e. the correct valve, then we are led to the path of incompetence.

This is, however, the starting point only and a whole range of inquiries would be required to establish the cadet’s negligence or incompetence. Do not rush to conclude that it was incompetence from the mere fact that it was his first time at sea. All those who have served on board merchant ships are well aware that handling valves is a daily routine for cadets. Otherwise, a master in command for the first time would be, by definition, incompetent as would anybody else holding a post for the first time and such an outcome would violate common sense. This brief article gives some guidance as to what may constitute incompetence as derived from the existing case law.

## Crew negligence vs crew incompetence

The distinction between ‘*crew negligence*’ and ‘*crew incompetence*’ is of crucial importance in shipping. Depending on the legal and factual context, the answer as to whether a shipowner<sup>1</sup> will be answerable to another party (e.g. a cargo interest) or deprived of some of its rights against another party (e.g. the insurer) may be determined by whether the vessel was, at the material time, seaworthy or whether the shipowner exercised due diligence to make the vessel seaworthy. In this context, when a crew member’s actions or lack of actions are involved, the seaworthiness of the ship may be dependent upon whether those actions or lack thereof resulted from the crew’s negligence or incompetence; a ‘*negligent crew*’ may not render the vessel unseaworthy whereas an ‘*incompetent crew*’ almost certainly will.

To be *negligent*, a crew member must fall below the expected standard of care required by that particular crew member. The test is that of the ‘reasonable man’. The most common definition of negligence is the one given in *Blyth v Birmingham Waterworks*:<sup>2</sup> “[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do”. This standard of care onboard ships is a professional standard and relates to the post the particular crew member occupies on board. The standard of care expected of a master, chief officer, chief engineer, bosun, AB etc. is that of the reasonable person of that rank (i.e. of the master, chief officer, chief engineer, bosun, AB etc. respectively) in the shoes of the person in question, with the skill and knowledge which the person in question had or ought to have had.<sup>3</sup> Pilots are also included in the above list of crew members.

On the other hand, an *incompetent* master, chief officer, chief engineer, bosun, AB etc. does not possess the level of capability or skill to be reasonably expected of an ordinary person of his rank. An incompetent crew member is not able, i.e. does not possess the necessary skill, to carry out the particular task or duty, whereas a negligent crew member is actually able, i.e. possesses the necessary skill, but fails to carry it out.

The consequence of crew incompetence is unseaworthiness. The test is whether a reasonably prudent shipowner, knowing the relevant facts, would have allowed the vessel to put to sea with the particular master and crew, with their state of knowledge, training and instruction.<sup>4</sup> If the answer is no, then the ship is not manned by a competent crew and is, therefore, unseaworthy.<sup>5</sup>

Incompetence or inefficiency<sup>6</sup> is a question of fact. Each case needs to be examined on its own merits and sometimes it is difficult to draw the line between crew negligence and incompetence. Incompetence may be proved from one incident and need not be demonstrated by reference to a series of acts. On the other hand one mistake, or even more than one, does not necessarily render the particular crew member incompetent.<sup>7</sup> Anyone can make a mistake, for making mistakes is human nature.

<sup>1</sup> The term ‘*shipowner*’ is used in this article in its widest sense and includes the ship’s bareboat charterer and shipmanager, as well as the sea ‘carrier’, as the case may be.

<sup>2</sup> *Blyth v Birmingham Waterworks* (1856) 11 Ex R 781.

<sup>3</sup> *The Amstelslot* [1963] 2 Lloyd’s Rep. 223 at p. 230 per Lord Reid.

<sup>4</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1961] 1 Lloyd’s Rep 159 at p.168.

<sup>5</sup> *The Roberta* (1938) 60 Ll L Rep 84.

<sup>6</sup> The word ‘*inefficiency*’ has been used by some judges interchangeably with the word ‘*incompetence*’.

<sup>7</sup> *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and La ReUnion Europeane (The Star Sea)* [1997] 1 Lloyd’s Rep 360, per Lord Justice Leggatt at pp 373-4, approved by the House of Lords [2001] 1 Lloyd’s Rep 389.

There is extensive case law on this topic with the leading case being *The Eurasian Dream*<sup>8</sup> where Creswell J gave valuable guidance as to what may constitute incompetence.<sup>9</sup> In this brief article, however, a summary only of the forms or different types of incompetence as derived from the existing case law can be given.<sup>10</sup>

In broad terms, and from a legal perspective within the context of cargo and insurance claims, incompetence and negligence may be mutually exclusive terms: for any specific activity, an 'incompetent' crew member cannot be 'negligent' and vice-versa. Incompetence, in turn, may be distinguished between 'general' and 'specific' incompetence. Therefore, a crew member's action(s) or inaction may be held to have resulted from and range between the following four categories.

(1) '**General incompetence**': this means total, complete incompetence and unsuitability of the crew member for the assigned role, not least for a particular task or duty. A crew member may be found to be 'generally incompetent' regardless of whether he is fully certificated for the assigned role.<sup>11</sup>

(2) '**Specific incompetence**': this is when a crew member is generally competent but either:

- a. ignorant and/or lacks training and/or familiarisation on specific elements concerning:
  - i. a particular type of vessel;<sup>12</sup> and/or
  - ii. a particular vessel;<sup>13</sup> and/or
  - iii. a particular system on board, or feature of, the vessel;<sup>14</sup> and/or
  - iv. a particular operation or situation;<sup>15</sup>
- b. has such physical or mental disability or incapacity as well as habits and/or characteristics that render him unfit or unsuitable (ie incompetent) for the assigned task, duty or role onboard the vessel;<sup>16</sup> and
- c. has the propensity to casualness, lack of effort and failure to use ability even though theoretically capable of performing the job properly (ie a disinclination to perform the job properly) that, again, renders him unfit or unsuitable (ie incompetent) for the assigned task, duty or role on board the vessel.<sup>17</sup>

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<sup>8</sup> *Papera Traders Co Ltd and Others v Hyundai Merchant Marine Co. Ltd. and Another (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719.

<sup>9</sup> *The Eurasian Dream* [2002] 1 Lloyd's Rep 719, at p.736.

<sup>10</sup> For a detailed analysis and account of the existing case law see: K Bachxevanis "'Crew Negligence' and 'Crew Incompetence': Their Distinction And Its Consequence" (2010) 16 JIML, pp 102-131.

<sup>11</sup> *The Roberta* (1938) 60 Ll L Rep 84; *The Patraikos 2* [2002] 4 SLR 232; *The Makedonia* [1962] 1 Lloyd's Rep 316.

<sup>12</sup> *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719.

<sup>13</sup> *Standard Oil Co. of New York v The Clan Line Steamers (The Clan Gordon)* [1924] AC 100; *Robin Hood Flour Mills Ltd. -V- N. M. Paterson & Sons Ltd. (The Farrandoc)* [1967] 2 Lloyd's Rep 276; *Seaboard Offshore Ltd. v Secretary of State for Transport (The Safe Carrier)* [1994] 1 Lloyd's Rep 589; *The Makedonia* [1962] 1 Lloyd's Rep 316.

<sup>14</sup> *The Farrandoc* [1967] 2 Lloyd's Rep 276; *The Star Sea* [2001] 1 Lloyd's Rep 389 HL; and all other mentioned in the previous footnote.

<sup>15</sup> *The Star Sea* [2001] 1 Lloyd's Rep 389 HL; *The Eurasian Dream* [2002] 1 Lloyd's Rep 719.

<sup>16</sup> *Moore v Lunn* (1923) 15 Ll L Rep 155; *Rio Tinto Co Ltd v Seed Shipping Co Ltd* (1926) 24 Ll L Rep 316.

<sup>17</sup> *The Makedonia* [1962] 1 Lloyd's Rep 316; *The Eurasian Dream* [2002] 1 Lloyd's Rep 719.

The revised STCW Convention<sup>18</sup> caters for both (1) and (2) above as well as for the crew complement's 'collective competence',<sup>19</sup> the effective communication of the crew with each other,<sup>20</sup> including the crew's good command of the English language, and the provision for adequate rest periods<sup>21</sup> (lack of which may lead to incapacitation of a crew member which might arguably be interpreted by a court as an instance of 'specific incompetence').

(3) '**Competence with negligence**': this is when the crew member was neither 'generally' nor 'specifically' incompetent but failed nevertheless to perform at the standard reasonably expected on that particular occasion.<sup>22</sup> This is what the ISM Code and the industry's standards cater for: the prevention of human error.

(4) '**Competence without negligence**': this is when a competent crew member was not at fault, i.e. he performed at the standard reasonably expected on the particular occasion. In this situation, the crew member did exactly what the reasonable ordinary competent crew member in that position and in those circumstances would have done, but nevertheless the damage or loss occurred. This is regardless of whether a more knowledgeable individual, viewing the situation dispassionately, might have concluded and done differently and thus have prevented the damage or loss.<sup>23</sup> Again, the ISM Code and the industry's standards are relevant here.

For cargo<sup>24</sup> and insurance claims purposes, general and specific incompetence mean improper manning and an unseaworthy vessel. This is the consequence. For this consequence to in turn affect the shipowner's rights and liabilities, two further elements need to be considered. For cargo claims these are causation and lack of due diligence on the part of the shipowner (carrier), and for insurance time policy claims causation and privity of the shipowner (assured). In insurance voyage policies the consequence of unseaworthiness has an immediate consequence on the shipowner (assured), who may not be indemnified by the insurer owing to breach of the implied warranty of seaworthiness regardless of whether or not the incompetence in question was causative to the loss.

In cargo claims, the shipowner (carrier), once an 'incompetent crew' has been found, bears the burden of proving that 'due diligence' was exercised in this respect. The exercise of due diligence by a shipowner is equivalent to the exercise of reasonable care and skill.<sup>25</sup> Lack of due diligence is negligence and it is relevant to consider "*what other skilled men do in comparable circumstances*".<sup>26</sup> In other words, the standard, again is what the reasonable prudent shipowner would have done in the circumstances.<sup>27</sup> This includes the initial selection and appointment of crew<sup>28</sup> and the necessary specific instruction of the crew in relation to a specific vessel and/or her systems and/or voyage.<sup>29</sup> The continuous supervision and training

<sup>18</sup> The International Convention on *Standards of Training, Certification and Watchkeeping for Seafarers (STCW)*, 1978 as it has been completely revised in 1995 by the, so called, *STCW '95*.

<sup>19</sup> *Burnard & Alger Ltd v Player & Co* (1928) 31 Ll L Rep 281.

<sup>20</sup> *The Makedonia* [1962] 1 Lloyd's Rep 316.

<sup>21</sup> Section A-VIII/1 (mandatory) and Section B-VIII/1(guidance) of the STCW Code. The *ILO Convention* is relevant in this respect too.

<sup>22</sup> *The Amstelslot* [1963] 2 Lloyd's Rep. 223; *Koninklijke Rotterdamsche Lloyd (NV) v Western Steamship Co Ltd (The Empire Jamaica)* [1956] 2 Lloyd's Rep. 119; *Owners of cargo lately laden on board the Torepo v Owners of the Torepo (The Torepo)* [2002] 2 Lloyd's Rep 535.

<sup>23</sup> *Stephen v Scottish Boatowners Mutual Ins Assn (The Talisman)* [1989] 1 Lloyd's Rep 535.

<sup>24</sup> Cargo claims within mainly the context of Hague/Hague-Visby Rules.

<sup>25</sup> *The Eurasian Dream* [2002] 1 Lloyd's Rep 719 at p 737.

<sup>26</sup> *The Amstelslot* [1963] 2 Lloyd's Rep 223 at p 230 per Lord Reid.

<sup>27</sup> *The Garden City* [1982] 2 Lloyd's Rep 382.

<sup>28</sup> *The Makedonia* [1962] 1 Lloyd's Rep 316; *The Patraikos 2* [2002] 4 SLR 232; *The Garden City* [1982] 2 Lloyd's Rep 382.

<sup>29</sup> *The Farrandoc* [1967] 2 Lloyd's Rep 276; *The Clan Gordon* [1924] AC 100; *The Star Sea* [2001] 1 Lloyd's Rep 389 HL.

of crew is an element of the shipowner's 'due diligence'<sup>30</sup> which may extend even to inquiries for the discovery of crew's 'latent' incompetence insofar as, at least, there is a concern of emergency preparedness;<sup>31</sup> hence the importance not only of general training but also of emergency preparation training. The duty of seaworthiness is non-delegable;<sup>32</sup> the obligation, therefore, and liability for crew selection, appointment, supervision & training is also non-delegable and cannot be avoided by appointing even the best manning agent.<sup>33</sup> The ISM Code, insofar as it requires the shipowner (company) to have in place proper and documented procedures, according to the industry's minimum standards, may prove to be either the shipowner's friend or worst enemy.

In insurance time policy claims, questions of causations apart, once an 'incompetent crew' has been found, the insurer is burdened to show that the shipowner (assured) was personally 'privity' in this respect.<sup>34</sup> Again, the ISM Code, with its associated trail of documents and creation of the DPA, who must have access to the highest levels of management, appears highly relevant and important. However, if its actual implication on the shipowner's 'privity' for insurance time policy purposes (and for other purposes as well) is to be made clear, this provision still needs to be interpreted by a court in a future case.

I will close giving another example, but remember first the example of the deck cadet mentioned at the beginning of this article and his mental state at the time he opened the wrong valve. The second engineer, who is a heavy smoker, habitually and consciously breaches the smoking prohibition on board the ship and causes damage by a discarded cigarette. What do you think would be the chances of a court finding him incompetent?

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<sup>30</sup> *Grand Champion Tankers Ltd v Norpipe A/S (The Marion)* [1984] 2 Lloyd's Rep 1.

<sup>31</sup> *The Star Sea* [2001] 1 Lloyd's Rep 389 HL.

<sup>32</sup> *Riverside Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] 1 Lloyd's Rep 57; *The Colima* (1897) 82 Fed Rep 665.

<sup>33</sup> *The Patraikos 2* [2002] 4 SLR 232.

<sup>34</sup> *The Star Sea* [2001] 1 Lloyd's Rep 389 HL.