

UK P&I CLUB



US Bodily Injury News

NOVEMBER 2011

Round Table Seminar 2011

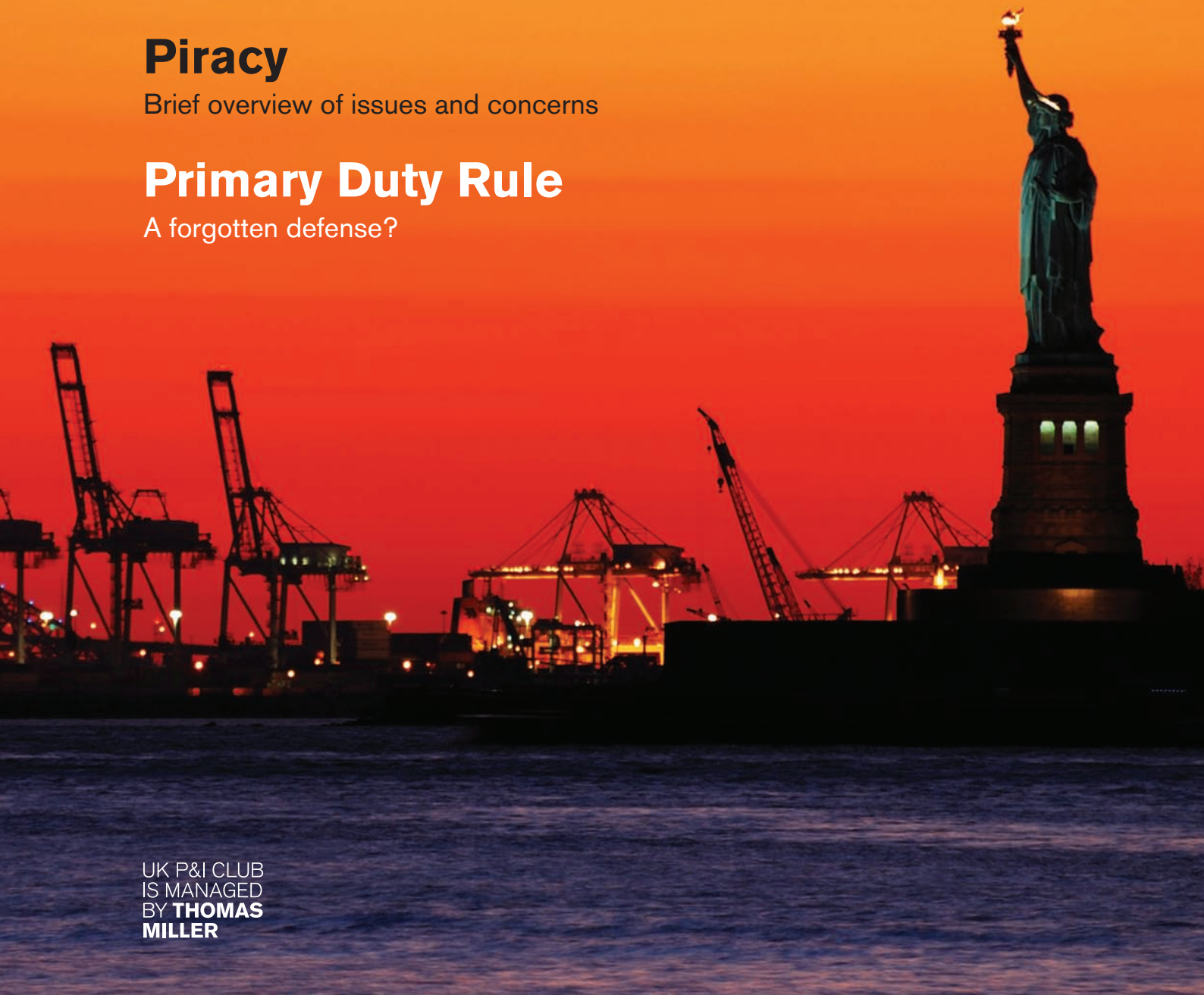
Civil and criminal investigation of
a maritime casualty

Piracy

Brief overview of issues and concerns

Primary Duty Rule

A forgotten defense?



UK P&I CLUB
IS MANAGED
BY **THOMAS
MILLER**

Editorial



Mike Jarrett
President & CEO,
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US Bodily Injury News

The TMA Bodily Injury newsletter enables a wider sharing of the Team's expertise and experience. We always welcome your feedback on the topics we cover in these newsletters. Suggestions for subjects for future coverage are also particularly welcome. Please send your comments or suggestions to Louise Livingston at louise.livingston@thomasmiller.com

Further information on these topics can be obtained directly from the TMA Bodily Injury Team (see back cover for contact details).

This year's Bodily Injury Round Table was held in mid-September in our New Jersey office. To start the seminar off, Karen Hildebrandt, Dee O'Leary and John Turner from our London office presented a brief overview of issues and concerns in piracy incidents a subject raised in the preceding year's feedback. Karen discussed the types of issues presented in the Jones Act and unseaworthiness lawsuits alleged in the Maersk Alabama litigation and the legal questions presented by it. Issues include notice of the risk of piracy to the defendants; the existence of a USCG approved security plan; the criminal nature of the pirate attack and whether the defendants could be held liable; and if the ship was fit for her intended purpose. Dee then led the discussion of the coverage available under P&I in the event of a pirate attack confirming cover on the usual types of claims such as death injury, illness, repatriation and loss of crew effects. Dee also discussed the implications of carrying armed security guards. John Turner then spoke about the Club's experience with piracy incidents to date and the lessons learned. He further explained how the Club can assist in the aftermath of a pirate attack.

The balance of the seminar focused on the civil and criminal implications in the investigation of a marine casualty and the do's and don'ts of interviews and depositions which follow such a casualty. We were very pleased to have Mike Fernandez of Freehill, Hogan & Mahar in New York and Greg Linsin of Blank Rome in Washington DC lead the lively discussion about the civil (P&I) counsel's role in the initial stages of an investigation and the potential for rapid development of criminal issues to arise during such an investigation. Greg Linsin shared the perspective and issues from a criminal counsel's role in an investigation. Mike and Greg illustrated their points using pre-recorded videotaped interviews and depositions prepared by our third lawyer, Gary Hemphill of Phelps, Dunbar in New Orleans.

We then boarded the Rendezvous on Thursday evening at the Hyatt Jersey City and spent a lovely evening with cocktails and dinner cruising the New York Harbor. Friday morning was a continuation of the discussion and we wrapped up in time for long distance travelers to make their flights home. The participation of the Members and their feedback was outstanding and a gratifying reward for the lawyers and the Bodily Injury Team who worked very hard to produce the event. The Team is already at work planning the 2012 event, as usual dates will be advised in the Spring.

The Team has grown again in 2011 with the addition of Markus McMillin from the San Francisco office. Markus is a California lawyer who joined Thomas Miller San Francisco in March 2006. Markus handles all types of claims, including bodily injury claims, for both the UK P&I Club and our sister club Through Transport.

At the moment, we are further refining our VFM data to include details of attorneys with trial experience. By collating this information on the success of attorneys at trial, we will enhance our decision making by relying on hard evidence rather than anecdotal information. More details of this initiative will be discussed in our next issue.

Round Table Seminar 2011 highlights

At this year's Thomas Miller Americas Round Table, three of the Club's preferred lawyers gave presentations on civil and criminal investigations of maritime casualties and best practices in interview and depositions.



Michael Fernandez
Freehill, Hogan & Mahar

Michael Fernandez of Freehill, Hogan & Mahar in New York presented a step-by-step analysis of P&I counsel's investigation of a maritime casualty including preliminary concerns for safety of people, the ship and environment, identification of preliminary documents, establishing communications protected by the attorney client privilege and indications of potential criminal acts.

Protecting attorney-client privilege in an investigation

The appointment of a P&I attorney should be made as soon as possible so that owners' and managers' interests are provided full legal protection. To that end, Mr. Fernandez recommended making the P&I attorney the point of contact from the start by ensuring that all communications are addressed to counsel. Once appointed, counsel will contact the Master to identify who they represent and their role. Counsel may also advise, recommend and appoint experts who may be necessary to assist with the investigation to keep all communications privileged.

Mr. Fernandez stressed the importance of the initial instructions to the Captain to include:

- Alerting to possible investigation by USCG and others
- Advising not to alter, modify, destroy, hide or falsify any documents or evidence

- Significance of securing the casualty scene
- Critical importance to tell the truth at all times
- Advising to call counsel with any questions
- To alert counsel as soon as USCG, etc. boards.

Best practice

Mr. Fernandez and Mr. Linsin summarized their advice jointly providing a Best Practices list.

Members can use these guidelines provided by Mr. Fernandez and Mr. Linsin, to properly protect their interests and rights in the event of a marine casualty and avoid criminal issues.

Manage communications

- Immediately notify all company contacts and establish communication links
- Identify and notify all external parties in a timely and consistent manner
- Recognize that all post-incident conduct and communications will be scrutinized.

Secure scene, documents and records

- Issue directive to vessel that all physical and documentary evidence must be preserved without alteration
- Suspend all auto-delete functions
- Secure the scene of the incident
- Let counsel know when USCG boards.

Work through counsel

- Have counsel serve as Point of Contact (POC) with all investigators
- Ensure attorney-client privilege is protected
- Have counsel review all critical communications that come from vessel or company
- Have counsel retain any consultants or surveyors
- Have counsel advise crew of their rights
- Make initial assessment of evidence – safety of crew, vessel, cargo and environment
- Have counsel quickly evaluate need for criminal counsel.

Crewmember Checklist

See page opposite for guidance on the use of this checklist.

Vessel:

Date:

Port:

1. Representatives from the United States Coast Guard or some other law enforcement agency may attempt to question or interview you about an investigation they are conducting on board your vessel.

2. If approached, you have the right to request proper identification of anyone who comes aboard the ship or wishes to ask questions or conduct an interview. You should record the name of the person who approaches you.

3. It is important for you to understand that if you have any concerns about the questions you are being asked by the United States Coast Guard or some other law enforcement agency or the interview process you have the right under the laws of the United States and perhaps under the Flag State to remain silent and request a lawyer.

Such a lawyer will be appointed either by the company or the government as per your choice. It is your decision to request the assistance of a lawyer.

4. Such a lawyer will protect your individual rights and give you guidance on whether to answer questions or be interviewed by the United States Coast Guard or some other law enforcement agency. You also have the right to have your lawyer present during any questioning or interview process.

5. If you agree to answer questions or participate in the interview process, the following is important to remember:

- (i) It is a serious and separate crime to lie to the United States Coast Guard or other law enforcement officer. Accordingly, make sure that if you do say something, it is the truth,
- (ii) Answer directly and honestly. Do not guess about things you do not know, and
- (iii) If English is not your first language, you have the right to request a translator before you answer any questions or are interviewed.

Remember, if you decide to answer questions, you must tell the truth.

6. Do not coach or tell other crewmembers what to say. If you or other crewmembers have any questions about how to respond to questions you should direct them to the company.

7. During an investigation, the United States Coast Guard or other law enforcement officers may remove documents or other things from the vessel. If this happens, be sure to request an inventory of what is taken. You should never use force or physically prevent law enforcement from taking or searching.

8. Under no circumstances should you tamper with, hide or destroy any documents or evidence aboard the vessel.

9. Normally, in order to remove any personal belongings a search warrant is needed.

You have the right to consult with counsel if the United States Coast Guard or any other law enforcement agency attempts to remove your personal belongings.

10. It is the strict policy of both the vessel owner and manager that if you decide to speak with the United States Coast Guard or some other law enforcement agency, you **must tell the truth at all times**. If you fail to tell the truth:

- (i) you will be deemed to be acting without authority and outside the bounds of your employment contract,
- (ii) it will be deemed that such untruth is intended to benefit only you and not the company, and
- (iii) your employment with the company will be immediately terminated.

Do you have any questions?

I sign my name below in agreement that I fully understand the above paragraphs numbered 1-10, which have been read and explained to me and, if necessary, translated.

Crewmember:

Attorney:

Witness:

Date:

Avoid witness interviews before speaking with counsel

There is *no privilege* which protects vessel documents/logs, communications on the ship (VDR), between the ship and the company, equipment, computers, reports, cell phones, in-house communications/memos not addressed to counsel, etc.

The attendees viewed a pre-recorded reenactment of a risk manager discussing the circumstances of the hypothetical accident with the injured crewmember (and witness). At first glance the interview appeared harmless but Mike Fernandez and subsequently Greg Linsin explored the different interpretations the risk manager's comments were subject to and the potential for charges of criminal conduct.

Comply with reporting requirements

Certain marine casualty rules require ship's compliance within days of an incident. Reporting should be done with the assistance of counsel.

- 46 CFR 4.05-10: filing of a written report of a marine casualty within five days (USCG form 2692)
- 46 CFR 4.05-1(a): requires immediate notice
- 46 CFR 4.06: Drug and Alcohol Testing
- Alcohol: within 2 hours
- Drug test specimen: within 32 hours

P&I counsel will assess and advise if criminal conduct may have occurred

During the investigation, if inconsistencies in the documents or witness interviews suggest the truth was not told, records were amended, evidence tampered with – the P&I attorney will advise owners/managers of the need to hire criminal counsel. If a criminal investigation is possible, the crew must be advised of their rights. To assist in properly advising the crew, Michael Fernandez developed a Crewmember Checklist which can be used by the Member's attorney or risk manager. (See page 4 opposite). It is important that the check list be followed *exactly*; that it be translated word for word if necessary and that the crew/officers be asked to sign and date a copy acknowledging receipt.

Investigating agencies cooperate and share information

The USCG has broad authority to search and investigate incidents. The USCG has a criminal investigations unit, the CGIS (Coast Guard Investigation Service). In addition, other Federal and State agencies may be involved in a casualty.

These agencies freely exchange information gathered in their investigations with each other. Statements made to the various agencies may be binding upon an individual or the company for both civil and criminal matters. Thus it is important to obtain advice from counsel and follow it.

For more information and a full copy of the presentation, please contact Mike Fernandez (fernandez@freehill.com)



Round Table 2011 highlights continued: Criminal investigation

Greg Linsin, Partner of Blank Rome in Washington D.C. gave a criminal defense lawyer's perspective on an investigation of a maritime casualty.



Greg Linsin
Blank Rome LLP

Criminal issues arise rapidly

What could initially appear as a maritime civil case can sometimes quickly turn into a criminal investigation by the U.S. Coast Guard or other Federal, State or local authorities. Members should always anticipate the possibility of a criminal investigation (and potential criminal prosecution), especially on marine casualties involving death and/or significant pollution. Information obtained by and statements made to the U.S. Coast Guard inspectors or an Investigating Officer will be provided to and are useable by criminal investigators.

Whether or not criminal investigators are present on the ship, the Member can be confident that those investigators will receive all of the results of the administrative investigations. If there is a criminal investigation it will most likely be led by the Coast Guard Investigative Service and will be closely monitored by the Department of Justice. It is possible the ship's customs clearance will be withheld and some officers or crewmembers may be asked to remain in port. Grand jury subpoenas for documents, testimony and possibly ship's equipment could be issued. Ultimately, the Department of Justice will determine whether to file criminal charges and which companies or individuals will be charged.

Criminal liability exists for negligent conduct

There are various United States statutes that criminalize what could otherwise be viewed as negligent conduct. For instance, under the Seaman's Manslaughter Statute (18 U.S.C. Section 1115) it is a crime for a ship's officer, crewmember, owner, operator or manager to cause the death of another person through misconduct, negligence or inattention to duty. (See page 8 for summary of cases). As noted, the government need only prove simple negligence, i.e., a failure to do what a person of ordinary prudence would do under the circumstances. This crime is a felony and conviction can result in a ten year prison sentence.

Under the Unseaworthiness Statute (46 U.S.C. Section 10908) it is a crime to knowingly send a ship to sea in an unseaworthy state that is likely to endanger the life of another. There are other criminal statutes as well, but these two examples illustrate that Members (and their employees) must be cognizant of possible criminal consequences of their operations.

Post-incident conduct can negatively affect government view of the company

Post-incident conduct is scrutinized closely. If there is also evidence of (1) post-incident false statements, (2) alteration or concealment of evidence or (3) obstruction of justice that evidence will influence the evaluation of the entire incident for possible criminal prosecution. The stakes are high: a criminal case could result in a significant fine for the company or a potential loss of liberty for the shipboard and shore side personnel.

Evidence of false statement and obstructive post-incident conduct will negatively impact a government investigator's view of the company's knowledge, motives and intentions in connection with the casualty.

Government investigators are not required to warn witnesses of their rights

Importantly, there is no requirement for investigating authorities to provide witnesses with a warning regarding their rights.

Criminal counsel's role

When criminal counsel is engaged to assist a Member, their first job is to clearly identify and verify who he or she is representing – the owner, the technical manager, individual officers or crewmembers.

It is important that all communications with the U.S. Coast Guard and government investigators be coordinated through counsel. Normal patterns of communication do not apply.

Counsel will help secure and manage the casualty scene; issue a litigation hold for all documents and records; identify companies and/or individuals who may be subjects of the government's investigation; engage technical consultants; evaluate the need for interpreters; identify, collect and review key documents; identify shipboard and shore side personnel to be interviewed; and begin to develop an event chronology to include events prior to the casualty, the casualty, and the post-incident events.

Unlike many civil investigations, criminal counsel will carefully select the participants in the interviews, the order of the interviews and the interview location. Counsel will be alert for a request by any crew witness for separate counsel and make it clear that corporate counsel is generally unable to represent the interests of individual employees. Counsel will generally avoid taking signed statements or recording interviews but will have interview notes which are generally protected by the attorney work product doctrine.

Counsel also needs to interact with the investigators, monitor investigation activity, and be in a position to express and protect the Member's interests. For example, it is important to have counsel advise individual crew members of their rights before they agree to be interviewed by investigators. Further, counsel needs to establish that the company has a parallel interest in conducting its own investigation to determine the facts.

Counsel will work with the Member to structure the internal corporate investigation. The lawyer

needs access to the ship's officers and crew and is entitled to originals or copies of documents seized by investigators.

Criminal counsel remains in close communication with prosecutors during the investigation to manage subpoena response, handle requests for cooperation by the company, and to evaluate the status of the investigation. Counsel will also communicate with other counsel in any Joint Defense Agreement to coordinate strategy, monitor new investigative developments and ensure timely notice to his client. One of the critical objectives of the internal investigation is for counsel to be in a position to develop and present a corporate "white paper" – which explains the company position – to the appropriate supervisory personnel in the Department of Justice if charges against the company are imminent. It could possibly avoid or reduce against the company.

In conclusion, it is critical for the Member to engage criminal counsel if there is any hint of facts that many lead to a criminal investigation after a significant marine casualty. Criminal counsel has a different, yet equally important, role in protecting the Member's interests than civil counsel and the Member should always keep criminal counsel in mind when a marine casualty occurs.

For more information and a copy of the complete presentation, please contact Greg Linsin (linsin@blankrome.com)



US courts' interpretation of manslaughter statute

Greg Linsin provides a summary of recent court decisions.

United States v. Devlin (2011)

Pilot of the *M/V Caribbean Sea*, which was towing the barge *The Resource*, was indicted with one count of violating the Seaman's Manslaughter Statute ("SMS") in connection with the "Duck boat" accident on the Delaware River. In this accident, the barge being towed by the *Caribbean Sea* ran over a boat operated by the tourism company Ride the Ducks International LLC, resulting in the death of two passengers aboard the tour boat. The criminal information alleges that the pilot was distracted by his use of a cell phone and laptop computer to attend to personal matters; elected to pilot the *Caribbean Sea* from its lower wheelhouse, where he had significantly reduced visibility in comparison to the upper wheelhouse; and did not maintain a proper lookout or comply with other essential rules of seamanship. The pilot has entered into a plea agreement in which he has agreed to plead guilty to the charge. The case is pending sentencing.



United States v. Egan Marine Corp. and Egan (2010)

Captain and owner and operator of the tank barge known as the EMC-423, being pushed by the tow boat *Lisa E*, which was transporting approximately 600,000 gallons of clarified slurry oil ("CSO"), were each charged with one count of seaman's manslaughter and jointly charged with one count of violating the Clean Water Act. The indictment alleges that the captain and owner and operator of the vessel negligently directed a crewman aboard the barge to use a propane-fueled open flame from a handheld rosebud torch to heat a cargo pump on the barge deck, where they were negligently venting combustible vapors. An explosion resulted, which killed the crewman, and caused the discharge of thousands of gallons of oil into the Chicago Sanitary and Ship Canal. The case is pending trial.

United States v. Schroder (2007)

Master of *M/V Zim Mexico III* was convicted of violating the SMS by negligently failing to advise the vessel's pilot that the ship's bow thruster had previously malfunctioned and failing to arrange for an assist tug. The vessel allided with a shoreside crane as the ship was deberting, which caused the crane to collapse, resulting in the death of a dockside electrician. After spending four months in jail between his conviction and sentencing to ensure that he would not flee, Shroder was sentenced to time served and immediately released from prison upon the judge's finding that he was essentially convicted of a "civil offense."

United States v. Oba (2007)

Captain of *M/V Sydney Mae II*, a charter fishing boat that was returning from a fishing trip off the Oregon coast with four passengers aboard, pled guilty to violating the SMS. Although the captain was advised that the Coast Guard had established a restricted zone around the mouth of the Umpqua River and that he should not attempt to cross the hazardous bar, he approached the mouth of the river. The boat was struck by a large wave and three of the four passengers were killed. The

captain was the only one wearing a life jacket. He was sentenced to six years imprisonment upon the judge's finding that he acted recklessly in entering the restricted zone and failing to ensure that his passengers were wearing life jackets. The captain appealed his sentence and the United States Court of Appeals for the Ninth Circuit reduced his sentence to four years and three months imprisonment.

Staten Island Ferry Incident [U.S. v. Smith] (2004)

Pilot and director of ferry operations each pled guilty to violating the SMS in connection with the allision of the *Andrew Barberi* with a concrete maintenance pier, killing 11 people and injuring 73 others. The pilot pled guilty to 11 counts of seaman's manslaughter and making a false statement to the government. He admitted that he was overly tired, taking painkillers, and in such pain he was not in the proper physical condition to operate the vessel. He was sentenced to 18 months in prison. The director of ferry operations pled guilty to one count of manslaughter stemming from his failure to ensure that the vessel was in the control of a qualified pilot and to enforce the two-pilot rule, which required that two pilots be in the pilothouse during docking operations. He was sentenced to one year in prison. The captain, port captain, and pilot's physician were also indicted on other charges stemming from false statements made to the government.

United States v. Shore (2004)

Captain and first mate pled guilty to violating the SMS in connection with the death of an underage woman on a booze cruise. After several hours of partying, the vessel's anchor dragged and it collided with a moored sailboat, causing a section of the rail to break. The first mate motored away, knowing the rail was broken, and a woman fell overboard and drowned. The captain and first mate were sentenced to six months home detention with electronic monitoring, 500 hours of community service, and a \$10,000 fine, and were ordered to pay \$40,000 in restitution.

United States v. O'Keefe (2004)

Cocaine-impaired tugboat pilot, who caused an accident resulting in the sinking of the vessel and the death of his ex-wife, was convicted of violating the SMS. The pilot was sentenced to one year in prison and ordered to pay \$640,000 in restitution. He appealed the conviction, arguing that gross negligence rather than simple

negligence was required to trigger criminal liability. The Fifth Circuit Court of Appeals confirmed that simple negligence was all that was required to sustain a conviction.

United States v. Mitlof (2001, aff'd 2d Cir. 2004)

Owner and captain of a water taxi, which capsized, killing one passenger, were convicted of conspiracy, manslaughter, and wire fraud. The owner had allowed the vessel to operate with numerous mechanical and structural deficiencies and did not have the required Coast Guard Certificate of Inspection, despite the owner's knowledge that it needed one.

United States v. Fei (2000)

Mastermind of a human smuggling scheme, who endeavored to smuggle 298 Chinese aliens aboard the *Golden Venture* into New York, pled guilty to violating the SMS in connection with the death of six people aboard the ship, among other charges. When Fei's plan to send small vessels to disembark the passengers fell through, he ordered the ship to ground in NY, which resulted in ten people drowning while trying to swim ashore. Fei's plea followed a worldwide manhunt and a subsequent extradition battle; he was sentenced to 20 years in prison.

We are indebted to the assistance and expertise of Michael Fernandez of Freehill, Hogan & Mahar in New York, Gary Hemphill of Phelps Dunbar in New Orleans and Greg Linsin of Blank Rome in Washington DC whose hard work in collaboration with the Bodily Injury Team made our Round Table event such a huge success. It is impossible to give more than a glimpse of the issues and materials covered over the two days of the event in the pages of this newsletter.

However, if you would like to learn more about these topics as they were presented in the Round Table please do not hesitate to contact Mike Fernandez (fernandez@freehill.com) or Greg Linsin (linsin@blankrome.com).

If you have any suggestions of issues the Round Table of 2012 can address then please let us know. Member feedback and input is paramount in setting the agenda for these events.

Louise Livingston

For the Bodily Injury Team

Piracy – A brief overview of issues and concerns

Piracy is one of the most prominent issues that shipowners face today, and is likely to continue to grow as it has proven to be a lucrative business.



Karen C. Hildebrandt, Dolores O'Leary and John Turner

Pirate activity continues to increase off the coast of Africa and is now expanding to other areas as well. Just this past summer, the Club issued a bulletin alerting Members to pirate activity off the north coast of Venezuela.

Piracy is likely to continue to grow as it has proven to be a lucrative business, with pirates commanding ransom payments in excess of \$7 million.

One of the most highly publicized pirate attacks was the *Maersk Alabama*, which occurred off the coast of Africa in April 2009. Two lawsuits have been filed in Texas State Court by crewmembers who had been held hostage.

The Complaints are the usual Jones Act and unseaworthiness allegations:

- Defendants failed to provide a safe place for the crew to work
- Defendants knowingly sent the crew into “pirate infested” waters without adequate protection
- There were safer routes that the vessel could have taken
- Defendants were relying on the U.S. military and taxpayers to protect and rescue the crew
- The vessel was unseaworthy

The Plaintiffs allege that they have suffered serious and permanent injuries to mind and body as a result of being taken hostage by the pirates. There is also maintenance and cure counts with the usual demand for punitive damages.

At this juncture, the case has not progressed at all, with only procedural matters having been addressed. As a result, we are left to speculate as to what the defense will argue. One would expect that the “notice” issue will play a large part in the case. For example, what did the defendants know, when did they know it, what should they have known and when should they have known it, are all questions that will undoubtedly be raised.

It is likely that defendants will argue that they had no notice of the dangers or they acted reasonably in response to the perceived dangers. (After all, this was the first pirate attack on a U.S. ship in 200 years.) Further, the vessel had a security plan which had been reviewed and approved by the U.S. Coast Guard. Also, the pirate attack was a criminal act for which the defendants should not be held responsible. Finally, the vessel was seaworthy, i.e., it was fit for its intended purpose.

The plaintiffs, on the other hand, will argue that the defendants cannot say that they did not have notice of pirate activity in the waters off Africa since it had been in the news, and the IMO had confirmed 27 pirate attacks and hijacking of vessels from 1st January 2009 to 12th May 2009. Plaintiffs will likely refute the defendants’ argument that the attack was criminal by arguing that shipowners should have had prior notice of the criminal activity.

And what about the security plan which was reviewed and approved by the U.S. Coast Guard? Plaintiffs will demand to know when the plan was

drawn up, whether the plan was reviewed regularly, and how many revisions were made to the plan? The crewmembers themselves have already called notice into the spotlight by acknowledging that they had received security training, which included a focus on pirate attacks.

Of course, this cuts both ways. It can be argued that the crew had notice as well. In fact, some have wondered whether the crew in fact knew where they were going when they signed on and received extra pay as a result.

It will be very interesting to see how the court cases play out.

In the event your ship is ever attacked by pirates, what is covered by the Club?

P&I insurance responds only where an insured shipowner has a legal liability. There is no legal requirement or obligation to make a ransom payment and thus, the most costly item, a ransom payment, is not covered.

The P&I rules do not contain a piracy exclusion and the usual types of claims that the Club insures will be covered, such as, death, injury, illness, repatriation and loss of crew's effects.

P&I insurance excludes war risks. This exclusion is typically triggered by the use of "weapons of war." Interestingly, there is no definition of "weapons of

war," however, it is generally accepted that a weapon of war is something more than just guns, rifles or conventional ammunition. For example, the use of a rocket propelled grenade would probably be considered a weapon of war and would likely trigger the war risk exclusion.

Some war risk policies include piracy as a specific names peril, in which case, the P&I liabilities are covered by the war risk carrier and not the Club.

What about security guards?

There is no cover restriction or prohibition per se on having onboard security personnel. However, whether the guards should be armed has become quite a controversial issue. For many years, it was a strongly held view that guards should not be armed, however, there has been a shift lately, likely due to the failure of other measures to reduce pirate activity.

Several international organizations now appear to be moving towards endorsing the use of armed guards. There are several risks inherent with the use of armed guards onboard ships. First, there is the risk of escalation in violence in the event that the vessel is attacked by pirates. Secondly, there is an increased risk of a firefight between pirates and security guards that could lead to death or injury of the crew, pirates or innocent bystanders. Lastly, there is a risk of serious damage to the vessel, its cargo and other property.



Legal issues that arise when armed guards are on board ship

A. Use of force

There is currently no international convention or regulation which states what force or what measures can be used lawfully to defend against a pirate attack. In international waters, the governing law is the law of the flag state. In territorial waters, the governing law is the law of the coastal or port state.

On board the vessel, the security personnel should be bound by clear Rules for the Use of Force (RUF). The RUF should clearly set out the protocols and measures to be taken in the event of a pirate attack. The IMO guidance for RUF states that firearms should not be used against persons, except in self defense or in the defense of others, if there is an imminent threat of death or serious injury. The RUF should comply with the law of the flag state and ideally should be approved by the flag state before being implemented.

B. Chain of command

Both the SOLAS Convention and the ISPS Code require that the Master of the vessel have full authority and ultimate responsibility of the ship. However, security personnel onboard a vessel may want discretion to use force without the authorization of the Master, especially if they think it is necessary for self defense. Thus, there

may be a degree of tension between the security personnel wanting to have some degree of control and discretion in their use of force and the requirement that the Master have ultimate authority and responsibility for the ship.

This tension was mentioned by the master of the *Maersk Alabama* when he addressed the United States Senate a few years ago. He stated, "I am not comfortable giving command authority to others. In the heat of the attack, there can only be one final decision maker."

C. Weapons licensing

If a ship is going to carry weapons, they must be properly licensed. The laws which govern the carriage and use of the weapons are complex. There are serious civil and criminal penalties if there is a breach of the weapons licensing laws. On top of that, there are significant international concerns about the proliferation of arms – with worries that weapons could end up being used in crimes, terrorism or civil war. Shipowners must be careful to ensure that the security companies have obtained proper licenses.

Security Companies

There are currently no international regulations or accreditation for maritime security companies. The IMO and several P&I clubs have issued

Armed guards and other resources

Among the questions regularly asked by Members are what the cover and regulatory issues relating to armed guards.

A table of the regulations relating to the use of armed guards aboard merchant ships is published in the Maritime Security & Piracy section of our website.

www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/Piracy/privatearmedguardsflagstateregs.pdf

This table offers guidance on the regulations of 22 different flag states. For each of these states the table collates regulations relating to the authorisation of arms on board, terms and conditions to be noted in agreements with contracting providers of armed guards, any national official guidance available as

well as miscellaneous additional information.

This table is reproduced by kind permission of the International Chamber of Shipping and the European Community Shipowners Association. We would stress that the situation regarding piracy in the region and the rules and regulations relating to armed guards can change at short notice. This table is intended as general guidance and not as a substitute for professional advice or consultation with flag state authorities and their representatives.

The Club's piracy section has been reorganised in an effort to make the information it contains more accessible and easier to reference. Key references such as the BMP 4 and broad IMO guidance to shipowners on questions of armed guards are placed at the head of this section.

guidance to shipowners highlighting the due diligence that should be conducted when choosing a security company. In addition, it is important to have a contract in place. There are a variety of different contractual arrangements in use between shipowners and security companies. The contract may contain an obligation to provide insurance cover, it may contain indemnity or hold harmless provisions with respect to consequential damages. At a minimum, there is an expectation that the contract will contain reciprocal indemnities for liabilities arising from negligence, also known as 'knock-for-knock'.

Members are strongly encouraged to consult with the Club before entering an agreement with a security company so that they can be advised of any gaps or restrictions on cover.

The Club's experience with piracy to date

Fortunately, the Club has only been involved in a relatively small number of cases. A log is being maintained in the London office of all piracy related claims, principally to ensure consistency of approach in the handling of such claims

What we have learned thus far

Ships that have been hijacked have been detained for periods ranging from six weeks to eight months, and usually there are no armed guards on board.

There has been an escalation in the level of violence by the pirates towards crew through threatened use of firearms and other violent assaults.

How the Club assists in the aftermath of a pirate attack

The Club correspondent at Salalah, Oman has considerable experience in handling such incidents and has a particular expertise in looking after the crew and their needs post incident in terms of medical care and assistance.

The Club will, when asked to do so, work closely with the Member's appointed experts in arranging for the crew to be medically assessed and evaluated immediately. The Club will usually arrange for a consultant clinical psychologist to attend and assist with psychological evaluations and assessments of the crew.

What the shipowner should do

In the short term, the shipowner should ensure that it has in place policies and procedures to meet its early duty of care obligations to the officers and crew and family members affected by the incident.

One month after the date of the ship's officers and crew's return home, there should be a follow-up with all concerned to see if any problems related to the piracy incident have manifested themselves.

If practicable, a simple monitoring system should be put in place to monitor future work performance and work related adjustments of those involved in the piracy event to see if any unexpected problems arise.

A Humanitarian Response Programme

The IG has continued to support the development of the cross-industry Humanitarian Response Programme. The programme is designed to mitigate the risk of piracy induced trauma. At its core are good practice guidelines for shipping companies and manning agencies to help seafarers and families cope with the physical and mental trauma caused by torture and abuse at the hands of pirates.

The programme talks about:

- How seafarers can be supported by their companies
- Preparation for coping during crisis
- Preparation and training for when an incident occurs
- What to do when ship is under attack
- What happens or may happen when the ship is captured and the crew are held hostage
- Preparation for when the ship is released
- Dealing with the practical needs of the seafarer
- The practical needs of the seafarer when they return home and ongoing and follow up care

These kinds of policies and procedures can help to mitigate potential claims. In addition, early payment of compensation to the crew can help to mitigate potential claims for stress and trauma.

Primary Duty Rule – A forgotten defense?

Much has been made of the special duties owed by a shipowner to their employee, the seafarer, pursuant to U.S. law.



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Under the Jones Act, a shipowner is liable for neglect that is, in any way, connected to a seafarer's injury. As for the seaworthiness obligation, a ship, and its equipment, must be fit for the intended use of each, or the owner will be liable for a resulting injury, even if the shipowner was not at fault. Lastly, if the seafarer falls ill or is injured in the service of the vessel, he is owed maintenance and cure. And as is well known, since there are no worker's compensation benefits for seafarers in the United States, courts evaluate claims of Jones Act negligence and unseaworthiness in favor of the injured seafarer.

But what of the duty owed by the seaman to his employer, the shipowner, as part of his employment? With every position aboard a vessel come certain responsibilities. What if the seaman fails to perform his duties – and he is injured as a result?

Seafarers owe duties to their employers too

The Primary Duty Rule is available to shipowners as a defense to a seafarer's Jones Act negligence or unseaworthiness bodily injury claim. The Rule recognizes that a shipowner or employer can only remedy unseaworthy and negligently-caused conditions aboard a vessel through the acts of employees, the crew of that vessel. The shipowner must be able to rely on its crew to remedy conditions which arise during a voyage. To find otherwise would require in the shipowner to

provide an accident free ship, which is not the standard under the Jones Act negligence or unseaworthiness causes of action. Pursuant to the Primary Duty Rule, a seafarer cannot recover for an injury which is proximately caused by his violation of his immediate duty, even if that duty was to remedy an unseaworthy condition, or a condition negligently created by the shipowner or its employees – the crew.

For example, in a 2004 New York case (*Modlin*), the court applied the Rule to a chief engineer injured while cleaning parts of a machine that lacked safety guards. He had been on the vessel for six months and took no steps to remedy the unseaworthy lack of safety guards, and he did not notify the owner of the problem. Importantly, the chief did not create the unseaworthy condition; *he failed in his duty to remedy it*. He could have done so safely but did not. He had "consciously assumed" the duty to fix the safety guards, because the task was part of his duty as chief engineer. The court rejected his argument that the Rule applied only to a master and not a subordinate. The court inferred the chief had "knowingly" violated his duty by not fixing the safety guards, or notifying the owner of the problem, during the four to six months he had worked in the engine room.

As mentioned above, the Rule applies even if the seafarer must remedy an unseaworthy condition which is caused by the shipowner. Also, the duty

at issue does not have to pertain to safety, and the crewmember's rank is relevant only in determining his duties. However, the Rule will not bar recovery when a seafarer tries to perform a duty but fails; the Rule pertains to duties the seafarer chooses not to fulfill.

Accordingly it would be a violation of the Rule *not* to act when action is required. A federal court in Pennsylvania (*Elliott*) applied the Primary Duty Rule to a suit by a master of the vessel after he slipped and fell on a "runner rug" on a waxed linoleum floor. Presumably, plaintiff's claim was the floor was slippery because a chambermaid had left excessive wax on the floor. However, the court found no evidence the floor was excessively waxed. Moreover, the court recognized that the matter of whether to wax the floor was *exclusively* left to the various masters on the vessel. Plaintiff said he verbally gave orders to the chambermaid not to wax the floors when he was on board. He

claims he also posted the order. However, he did not follow-up to ensure the order had been carried out. Therefore his suit failed.

The Rule however should not be confused with negligence or comparative fault, which determines the degree of shipowner, or seafarer, fault. The Primary Duty Rule pertains to the seafarer's conscious decision not to perform a duty he is obligated to perform. The duty is determined by his rank and the circumstances.

In a lawsuit the defendant shipowner has the burden of proof with regard to the Primary Duty Rule. The defense should be pled in the answer to the complaint. The shipowner would have to show, in essence, that the plaintiff seaman owed a duty to the shipowner as part of his employment; that he failed to perform the duty in the circumstances present; and that he was injured as a result of his failure.



Collective expertise



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More than half of the Club's personal injury claims over \$100,000 are brought in the American courts. The TMA Bodily Injury Team are a specialist group of executives from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with these demanding cases on our Members' behalf. Under the leadership of Louise Livingston, they apply collective expertise and experience to a variety of bodily injury matters. Louise, Karen Hildebrandt, Jana Byron, Dee O'Leary and Markus McMillin are all former practising attorneys in both Federal and State courts. Linda Wright has 29 years' experience as a P&I correspondent dealing with personal injury claims. The Team review and determine strategy and estimates in all major injury cases and attend settlement conferences and mediations and trials with, and sometimes on behalf of, our Members.

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