Welcome to TT Talk, No. 77 in the series and the first in 2006.
We wish all our readers a very happy and prosperous new year.

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1. Port authority not liable for pilot's negligence

On 15 April 2002 the 87,500 GRT bulk carrier SA FORTIUS was entering Port Kembla in New South Wales, Australia when it struck the bulk coal terminal, causing damage of approximately AUD16 million (USD 12 million). The port is a compulsory pilotage area and a local pilot, Captain Stephen James, employed by the port authority, Port Kembla Port Corporation ("PKPC"), was on the bridge at the time of the accident.

The coal terminal sued the owners of the ship, Braverus Maritime Inc, in the Australian Federal Court. The owners, in turn, cross-claimed against, PKPC alleging that the accident was due to its pilot's negligence. We are grateful to Michael Fisher, a partner in the Brisbane law firm of Thynne & Macartney for a synopsis of the decision, on which the following report is based.

The judge at first instance ruled that the incident was the result of the negligence of both the master and the pilot. The court ordered that Braverus reimburse the terminal operator's repair costs, but upheld the long-established common-law rule (now incorporated into the Australian Navigation Act) that the owner and master of a ship are responsible for the negligence of a voluntary pilot, and that this exemption also covers compulsory pilots, thanks to the wording of the act.

Braverus appealed, alleging that the trial judge had erred in confirming PKPC's immunity. At the end of December, the full court rejected the appeal. In doing so it upheld the first instance judge's finding of immunity. In this respect the decision is unremarkable. However the twist in the tail is that Captain James, while he did not lack the appropriate qualifications or experience, was not actually licensed at the time of this incident. He should have been, and everybody involved believed that he was, but due to a bureaucratic oversight he was not.

Braverus argued that the fact that Captain James was unlicensed altered the legal position, and robbed PKPC of its usual immunity. It maintained that the immunity of the pilot and his employer relied upon the pilot being a properly licensed officer. If the pilot was not licensed, the employer would remain liable for the negligence of its employee in the same way as it is for any other employee. PKPC's response was that during a voluntary pilotage a temporary master/servant relationship was created between the master and owners of the vessel and the pilot: that relationship was not dependant upon the qualifications or licensing of the pilot, and operated to the exclusion of any pre-existing employment relationship between the pilot and the corporation. As the Navigation Act specifically makes the position for compulsory pilotage equivalent to voluntary pilotage, the employer was not responsible for the negligence of the pilot, irrespective of his status: compulsory or voluntary, licensed or not. The court agreed with PKPC.

Braverus also appealed on the basis of section 52 of the Australian Trade Practices Act 1974, relating to misleading or deceptive practices in "trade or commerce". Other sections of the act make a corporation liable in civil damages to those who have suffered loss or damage as a result of reliance upon misleading and deceptive conduct in breach of section 52.

Braverus argued that the pilot's conduct in giving advice to the master during the pilotage was in trade and commerce, since pilotage formed part of PKPC's overall business in running the port and the corporation charged a fee for such services. Braverus alleged that that pilot's advice was, in this case, misleading and deceptive because the pilot implied that following his advice would result in the vessel being brought safely to berth when (as it happened) that did not occur. Finally, Braverus argued that because their master relied upon the pilot's advice he refrained from giving his own engine and steering orders that might otherwise have averted the collision.

The Court of Appeal agreed with Braverus that the pilot's activities came within the description of trade and commerce and that his conduct was misleading and deceptive. However the court agreed with the first instance judge who had found that, on the evidence produced in this particular case, the master had not placed relevant reliance upon the advice of the pilot. In fact the evidence was that at a particular point prior to the collision, the master had formed the view that the vessel was in danger and something had to be done to avert a collision. The reason he refrained from taking any such steps in time was because of his own negligent misjudgment and not as a result of any reliance on the pilot.

Overall, the decision is interesting in two particular respects, namely:

a. The confirmation that pilot licensing is not of itself relevant to the immunity of the pilot's general employer for his negligence; and

b. The perhaps slightly surprising confirmation that incorrect operational advice from a pilot is "in trade or commerce" and could constitute "misleading and deceptive conduct" in breach of the Trade Practices Act.

It is understood that the shipowners are intending to appeal to the High Court of Australia.

The full text of the decision can be found on the website of the Australian Federal Court at http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/256.htm

2. IATA Checklists for dangerous goods

The International Air Transport Association (IATA) has published three checklists on its website, designed to help acceptance personnel ensure that air shipments of dangerous goods are in compliance with the regulations in force as from 1 January 2006. The three checklists cover non-radioactive dangerous goods, radioactive materials and dry ice. They can be accessed on the IATA website at www.iata.org/whatwedo/dangerous_goods/download.htm, which also has the texts of the four addenda to the 2005 edition of the Dangerous Goods Regulations, guidance on the carriage of infectious substances and shipper's declaration forms.

3. Smoking bans in the workplace: an update

The item in TT Talk No. 75 about the introduction of smoking bans in workplaces reminded a colleague of a claim he dealt with a few years ago.
The company concerned had banned smoking in the offices and, during the day, this was enforced by both management and "peer pressure" (ie other colleagues' disapproval). However, the airfreight office worked very late each evening preparing documentation for late-night flights, and the night shift personnel were a good deal more relaxed and less regulated than their counterparts during the day. Although smoking was officially banned, there was no-one to enforce the ban, so they carried on smoking, but as a result of the company policy, there were no ashtrays on desks. A clerk thought that he had extinguished his cigarette before throwing it into the waste-paper basket. Unfortunately he hadn't, and it smouldered away until well after the employees had left the building. When the paper finally burst into flame, the heat and smoke triggered the automatic sprinkler system which put the fire out, but the water penetrated all the company's computers and other electric and electronic

equipment, putting it all out of action. The water also flooded the offices on the floor beneath, generating a claim from that tenant as well.

If, therefore, smoking is banned in workplaces, it must be banned at all times. There is a temptation for personnel working either outside normal hours, or in locations away from the main centre of activity, to have a cigarette "because there is no-one here to object". The bans must be
policed: occasional spot-checks by managers are generally very effective in this respect.

4. Why are we worried about hazmat?

Some readers may wonder why TT Talk gets so exercised about the proper declaration and packing of hazardous materials. For an answer, we repeat part of the opening remarks by District Judge Chin in his decision on DG HARMONY, reported in TT Talk 72:

"On 9 November 1998 the m/v DG HARMONY was off the coast of Brazil, en route from Miami. At approximately 07:20 the vessel shuddered. Within moments, dense smoke covered the ship. The master, Captain Michael Balitzki, rushed to the bridge. After checking the wind, he turned the ship to starboard. The wind cleared the smoke from the deck and he saw flames coming from cargo hold 3.

"The chief officer, who had the watch, had already sounded a general alarm and alerted the crew to assemble. The crew began fighting the fire, wearing fire suits and using hoses and pumps. The crew continued to fight the fire until late afternoon, when the captain ordered most of the crew to abandon ship. A lifeboat was launched at 18:00, carrying away fourteen crew members, leaving only the captain and a handful of others behind. As the crew members looked back from the lifeboat, they saw the HARMONY ablaze, with flames and smoke rising high from approximately the middle third of the ship.

"The captain and the others who remained aboard continued to fight the fire and operate the ship. They finally abandoned ship at 02:00, after yet another explosion, when the captain decided that it was no longer safe to remain on board. The vessel had been on fire for more than eighteen hours and portions of her deck and side shell plating had turned red or white hot.

"The captain collected the vessel’s log books and charts, then he and the remaining crew members evacuated."

While the explosion and fire on the DG HARMONY was the result of the manufacturers' negligence in preparing and packing the material, rather than its declaration as hazardous, these few paragraphs demonstrate the frightening rapidity with which a fire can spread throughout a ship and summarise the dangerous position in which seafarers can find themselves. Twenty seamen’s lives had been put at risk (a fairly typical size of crew for a modern container ship), and it took less than 24 hours to destroy millions of dollars worth of ship and cargo. Fortunately on this occasion the sea conditions were benign, other vessels were not too far away and all the crew were rescued, but that was largely a matter of chance. The next time, people might not be so lucky.

We hope you understand and share our concern. Please, for the sake of everybody in the transport chain, make sure that hazardous materials are packed, labelled and declared properly.

5. Spurious injury claims cost millions

The Club, like most other liability insurers is only too aware of the cost of claims for spurious, non-existent or pretended injuries. The claimants know that such claims are costly to investigate and therefore hope that the insurance company will pay relatively small claims rather than incur greater costs in investigating them..

This problem has once again been highlighted, this time by an insurer specialising in liability cover for local authorities, which in its recently-released report for 2005 states that spurious claims against local government authorities in the UK cost around UKP 250 million (about USD 443 million) each year. It reminds its readers (as if they needed reminding) that insurance fraud is not a "victimless" crime, as the costs involved inevitably work their way through into higher premiums.

The insurers report some successes in their fight against spurious claims, and some of them even provide a little amusement. Last year's crop includes one from a man who claimed to have injured his arm after slipping on steps owned by a housing association. Investigators established that he had indeed injured himself, but that the circumstances were not quite as he had represented them. They found out that his girlfriend had returned home unexpectedly and that he fell after jumping out of a window to avoid being caught with another woman. Perhaps he should have stuck to the traditional method of hiding in the wardrobe.

6. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

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