LEGAL CORNER

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Stowaways

> The practice of "stowing away," or hiding about a vessel, in order to procure, by this fraudulent means, a free passage across the Atlantic is stated to be very common to ships leaving for the United States. The "stowaways" are sometimes brought onboard concealed in trunks or chests, with air-holes to prevent suffocation. Sometimes they are brought in barrels, packed up to their chins in salt, or biscuits, or other provisions, to the imminent hazard of their lives. At other times they take the chance of hiding about the ship, under the bedding, amid the confused luggage of other passengers, and in all sorts of dark nooks and corners between decks. Hence, it becomes expedient to make a thorough search of the vessel before the steam-tug has left her, in order that, if any of these unhappy intruders are discovered, they may be taken back to port. As many as a dozen stowaways have sometimes been discovered in one ship; and cases have occurred, though not frequently, of men, women, and young boys, having been taken dead out of the barrels or chests in which they have concealed themselves. When the ship is fairly out, the search for stowaways is ordered. The Captain, Mate, or other Officer, and as many of the crew as may be necessary for the purpose, then proceed below. Although this search is invariably made with the utmost care, it is not always effectual, and instances have occurred in which no less than eight, ten, or even a larger number, including both men and women, have made their appearance after the vessel has been two or three days at sea.

The preceding slightly edited account appeared in the *Illustrated London News*, and could have been written yesterday. Actually, it was published on July 6, 1850, as part of an article entitled "The Tide of Emigration to the United States and to the British Colonies," and it is interesting to note that the methods of conducting shipboard stowaway searches have changed little in 150 years. What has changed since the mid-nineteenth century is the effect stowaways can have on the liabilities faced by ship owners and masters. This issue of Legal Corner shall discuss some of those liabilities.

From the outset, it is important to realize that while Title 18, United States Code, Section 2199 makes stowing away a federal crime in the United States, punishable by imprisonment for

not more than one year and a fine of not more than $1,000 or both, it is not considered a crime in many less developed nations. Since stowaways are seldom, if ever, prosecuted, and are merely deported if caught, there is no effective deterrent to such activity. On the other hand, the financial and legal liabilities faced by the innocent ship owner can be substantial. First, and most obvious, are the fines levied against a ship for illegally landing a stowaway. In Canada, this fine is $5,000. In the United States, it is $3,000. However, in the United States, the ship can be fined several times for landing the same stowaway. If, for instance, a stowaway jumps ship as she is docking and is later tracked down, caught, and returned to the vessel, the fine will be $3,000. If the same stowaway then manages to escape and make it ashore a second time, the ship will be fined another $3,000. If he is returned and escapes yet a third time, the ship will be fined another $3,000. There have been instances where ships have been fined three and four times for landing the same stowaway.

There is probably a limit to how many times one particular stowaway can escape and be returned to a vessel before she sails. Thus, even the most non-diligent vessel is likely not to incur more than a $10,000 or $12,000 fine for any given stowaway. The real problem arises when a ship lands twelve, fifteen, or more stowaways on each voyage. Liner service banana carriers have historically been placed in this predicament. On vessel runs from Turbo, Colombia to Tampa, Florida, for instance, we routinely saw a dozen to two dozen stowaways per Tampa port call. If the company had two ships in service, each making two runs per month, and each landing twelve stowaways per run, the fines alone would amount to $144,000 per month. That amounts to $1,728,000 per year. That type of liability, if realized, will put a carrier out of business very quickly, either because of the fines it pays or the increased calls it responds to for P&I coverage.

Of course, the immigration fines are only the tip of the liability iceberg. The cost of guarding and repatriating stowaways can add substantially to the overall bill. This was particularly so when ship owners were forced to bear the entire cost of maintaining stowaways ashore while the Immigration and Naturalization Service decided what to do with them. Fortunately, the ship owner is no longer responsible for such costs beyond the stowaway's first forty-eight hours ashore, but the expense can still be substantial.

Fines and repatriation costs are the least of the ship owner's stowaway concerns, however. In 1850, the primary purpose for stowing away was to secure passage one could otherwise not afford to a land of opportunity. It was still the primary purpose in 1927, when twenty-three-year-old Willem de Kooning, later recognized as one of the greatest abstract impressionist artists of the twentieth century, sailed from Rotterdam to Boston as a stowaway. It is still one of the main reasons for stowing away today, but it is not the *only* reason. Stowaways have consistently been utilized in recent times as "mules" for the importation of illicit drugs.

Ever since 1988 when the United States announced its zero-tolerance policy for the importation of illicit drugs, ship owners have been forced into the drug interdiction business. This is because the law requires ship owners to "exercise the highest degree of diligence and care" in preventing the importation of illegal drugs in order to avoid the substantial fines levied by U.S. Customs. This organization, the MSC, in fact, was formed as a direct response to the initial fines levied in 1988 and 1989 against the major carriers in the industry, and from the subsequent cooperation between the MSC and U.S. Customs grew what has become to be known as the Carrier Initiative and Super Carrier Initiative Agreements. These are simply contracts between the carriers and Customs that, in essence, define what "highest degree of diligence and

care" means. The ship owner must still meet whatever that standard is in order to avoid being fined.

Since a connection between stowaways and drug smuggling has been clearly established, the ship owner is now faced with attempting to avoid both the INS fines for landing stowaways, as well as Customs' fines for the importation of illicit drugs. While the INS fines are an absolute (you land the stowaway, you pay the $3,000), the Customs fines are not, and it therefore behooves the master to conduct stowaway searches as part of his due diligence to prevent the importation of illicit drugs. A single stowaway carrying a kilo (2.2 pounds) of cocaine or heroine can cause a ship to be fined $35,273.60 ($1000/ounce). If he is carrying two kilos, less than five pounds, the fine can be over $70,000.

Many ship owners therefore require their masters to conduct stowaway searches in an attempt to meet the due diligence requirement under U.S. law and/or the Carrier Initiative Agreements. These may include searches made at the conclusion of each day's loading operations, once loading is complete and the hatches are sealed, shortly after sailing, and before entering U.S. territorial waters. The problem is, however, that unless the ship owner has given considerable thought as to how such searches should be conducted, by whom, and under what circumstances, they can significantly increase his liability exposure rather than decrease it. A large number of stowaways are armed and desperate, and, at least under U.S. law, an injured or murdered crewmember's Jones Act claim is likely to be far greater than the combined fines for the stowaway importation of illicit drugs and landing of stowaways. The ship owner must therefore ensure that the crewmembers conducting the searches are properly trained, equipped, and supervised.

Another aspect of stowaway liability involves damage to the ship's cargo through contamination of one form or another, including dead bodies or diseased individuals. Exposing crewmembers to the same contamination can also be a serious cause for liability, and may even render the vessel legally unseaworthy. And, as we noted in the last newsletter, sending a vessel to sea in an unseaworthy condition that is likely to endanger the life of an individual, which presumably includes a stowaway, can give rise to criminal liability pursuant to 46 U.S.C. §10908.

While there is no international legal requirement for cargo vessels to prepare and implement a comprehensive ship's security plan, the drafting of a security plan, or at least a stowaway procedures plan, will go a long way in protecting the ship owner from various forms of liability. By drafting such a plan, he will be forced to address many of the matters herein discussed. The International Maritime Organization has already done so, in a limited and general way, in its *Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases* [Resolution A.871(20)].

The guidelines state that the resolution of stowaway cases is difficult because of different national legislation in the various countries involved. Nevertheless, some basic principles can be applied. First, stowaways entering a country without the required documents are, in general, illegal immigrants, and decisions as to how to deal with them are the prerogative of the countries concerned. However, stowaway asylum seekers should be treated in compliance with international protection principles set out in the relevant treaties. Second, the guidelines advocate close cooperation between ship owners and port authorities. Where national legislation permits, national authorities should consider prosecuting stowaways for any damage they caused. (Notice the difference between prosecuting a stowaway for having committed a crime,

something the IMO has not recommended, and merely prosecuting him for the damage he causes, if any.) Countries should permit the return of stowaways who are identified as being their citizens, and countries where the stowaways originally embarked should accept them pending final dispositions of their cases. Third, every effort should be made to avoid situations where a stowaway must be detained on board indefinitely. Finally, the guidelines suggest some of the responsibilities of the master, ship owner, country of debarkation, country of embarkation, country of the stowaway's apparent or claimed nationality, flag state of the vessel, and any countries of transit during repatriation.

An international convention relating to stowaways was adopted in Brussels in 1957, but was never put into effect. In fact, some of the original signatories later withdrew their support. That was almost fifty years ago, and the world has entered a new millennium since. On September 15, 1999, the Secretary-General of the IMO, Mr. William A. O'Neil, delivered a speech in Berlin at the annual conference of the International Union of Marine Insurance, in which he said:

> What can we expect from the new Millennium?…There is no doubt that we live in an increasingly litigious age. People are much more likely to take legal action now than they were thirty years ago and the amounts of money involved have grown to astronomical proportions….The new Millennium provides an ideal opportunity for us to stand back and take a fresh look at the way we do things in shipping, an industry that all too often has been governed by precedent, tradition—and complacency.

If the observations made by a London reporter 150 years ago regarding stowaways are as relevant today as they were then, it is time to change both our outlook and our response. The stowaway problem can be solved, lives can be saved, cargo can be secured, and crewmembers can be protected. It is simply a matter of having the willingness to do so.