Legal Corner

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Maritime Security and Legal Liability

A MARINE GENERAL once said, "The road to Hell is paved with the bones of Lieutenants who forgot about security." That adage, though meant to apply to the art of war, may just as easily be applied to the marine industry of today where lawsuits are routine and criminal prosecutions are becoming commonplace. Legal liabilities lurk around every rocky promontory like Corsican men-of-war.

This column is intended to assist MSC members to navigate some of the legal rocks and shoals associated with the various issues of maritime and seaport security. For instance, many ship owners have now developed extensive shipboard stowaway search and handling procedures. How many, however, in preparing and enacting those procedures, considered the legal liability exposure they create? The seaworthiness of any given vessel is important for a myriad reasons, and the usual definition of an "unseaworthy" vessel is "one not fit for its intended use," or "not properly outfitted or safe for a voyage at sea." Thus, a vessel not properly outfitted or equipped to repel pirates, for instance, may well be "unseaworthy" if the vessel's sailing route takes her through known pirate waters. If she is therefore determined to have been unseaworthy at the inception of the voyage in question, issues of insurance coverage, liability for personal injuries to seamen, and criminal liability arise.

This column is not designed to simply give me the opportunity to expound upon legal issues I find interesting. Rather, it is intended to answer questions, or discuss specific security/legal scenarios, raised by the MSC membership. It is hoped it will develop into a "legal Ann Landers" of sorts. I toyed with the title, "Double Eagle Legal Beagle," but decided against

it. The idea, however, is hopefully clear, and we encourage members to mail, fax, or e-mail their requests for comments to the editor.

Since this is the debut of the column and I have no questions to answer from any of you, I have selected a recent court case to discuss that has some serious implications for the maritime industry. That case is, *United States of American v. Pedro Rivera*, 131 F.3d 222, 1998 AMC 609 (1st Cir. 1997). It was decided on December 2, 1997, by the United States First Circuit Court of Appeals sitting *en banc*, and reported in March, 1998, and involved the radical criminal prosecution of a tugboat managing company's manager by the federal government under 46 USC §10908.

Section 10908 provides as follows:

> A person that knowingly sends or attempts to send, or that is a party to sending or attempting to send, a vessel of the United States to sea, in an unseaworthy state that is likely to endanger the life of an individual, shall be fined not more than $1,000, imprisoned for not more than 5 years, or both.

The case arose out of an oil spill that occurred off the coast of San Juan, Puerto Rico in 1994, which was caused after the tow wire connecting the tugboat *Emily S.* to the barge *Morris J. Berman* parted. The barge subsequently ran aground and spilled her oily cargo. Rivera was the general manager of the company that managed the tugboat. It is interesting to note from the outset that the case did not involve injuries or loss of life. It was an oil spill case. The government, however, evidently not being able to make a case under any of the environmental protection statutes, chose to prosecute under the statute in question—a prime example of government prosecutors running amok. In any event, Rivera was found guilty of failing to replace a deteriorated towing wire, and convicted. The Court of Appeals was then called upon to decide (1) whether such a conviction was legally allowed under 46 USC §10908, and (2) whether the evidence supported the conviction.

After examining the statute at length, including its legislative history as well as its statutory predecessor, the court held that the statute did in fact allow a basis for criminal liability. It determined that, pursuant to the statute, a person may be found culpable if he: (1) knowingly sends a vessel to sea, (2) knowing the vessel is in an unseaworthy condition, and (3) knowing that the unseaworthiness is such that it will likely endanger life. Criminal prosecution, the court argued, "requires knowledge not only that the vessel is unseaworthy but also that it is afflicted with a defect that is 'likely to endanger' life." It stated, "run-of-the-mill unseaworthiness cases will not fall within this embrace." But then, the court said a very disturbing thing. It stated, "On the other hand, if growing numbers of individuals are prosecuted and convicted under the required standard, we see nothing inconsistent with the apparent safety objective of Congress."

Having determined that the statute does in fact allow prosecution under the conditions set forth above, the court next turned to the evidentiary standard needed for conviction. It focussed on the statutory language, "likely to endanger life," and held the government may not simply demonstrate the *possibility* that life may be endangered, it must prove the actions will "probably" or "in all probability" endanger life. "A slippery deck, a malfunctioning winch, or poor stowage all can lend themselves to fatal scenarios. There is very little that can go wrong at sea without some risk to human life." The test, the court said, "is not 'possibility' or 'some risk.' It is a significantly higher order." The court reversed the conviction, holding that, "The government's evidence, in sum, showed only that the parting of a tow wire *could* pose a serious risk to human life. This is inadequate to prove that Rivera violated §10908 by sending a vessel to sea knowing that its unseaworhty condition was *likely* to endanger life."

This case has serious implications for the maritime industry. Although this was the first time someone has been prosecuted under 46 USC §10908, I suspect it will not be the last. Failure to provide adequate security may well render a vessel unseaworthy, and sending it to sea

in that condition, when it is likely to endanger human life, may well expose the operators to criminal prosecution. The government used 46 USC §10908 as an excuse to prosecute for an oil spill for which it could not otherwise obtain a conviction. It may well attempt the same thing again for some other violation an overzealous prosecutor may believe should not go unpunished.