PROFESSIONAL SKIPPER

Issues relating to the owner's responsibility for vessel safety

All participants and stakeholders in the maritime industry have an inherent interest in enhancing vessel safety and the safety of those present on the vessels, whether as crew or passengers. In spite of this common interest there remain tensions and on-going debates between the various groups as to how safety is best achieved, at what cost, and who bears the ultimate responsibility for safe operation of vessels. The main statute concerned with vessel safety (the Maritime Transport Act 1994) casts the net widely when imposing responsibilities relating to safety. Under various sections of the Act and, in particular, section 6, employers are required to take all practical steps to ensure the safety of seafarers by maintaining safe vessels and equipment. Statutory responsibilities are imposed on the masters of vessels (under s19) relating to operation of the vessel. There are also separate provisions specifying responsibilities of vessel owners. In summary, while the master is responsible for the vessel while at sea, it is also clear that a person in the position of an employer or owner is required to provide appropriate equipment for the safe operation of the vessel.

A recent decision of the District Court in Hamilton discussed issues relating to the interface between the responsibilities of owners/employers and masters. The writer appeared as Counsel for the Defendant in the matter. The decision is that of Cooper DCJ in the Queen v Mathers T000525, Hamilton District Court, Judgment dated 21/3/2002. The case ultimately came down to who was legally responsible for shackling an anchor to the anchor chain.

Mr Mathers had previously been convicted of failing to hold a Safe Ship Management Certificate and of causing or permitting a vessel to be operated in an unsafe manner, in breach of s65(2)(a) of the Maritime Transport Act. However his conviction on the charge relating to the allegedly unsafe operation of the vessel was quashed on appeal and a re-trial ordered.

The background facts can be briefly outlined as follows. Mr Mathers, a builder by profession, owned a 10 metre gill net fishing vessel (*Sea Hunter II*) and employed a master and crew to

operate that vessel. Mr Mathers had no relevant sea-going or fishing experience. The vessel's dedicated anchor (a plough type) was lost at sea and a replacement ordered. It was Mr Mathers' expectation that if the master decided to operate the vessel before the replacement anchor arrived he would use one of the other anchors on board and, in particular, would use one of the "Kewene" anchors provided. Before the replacement anchor arrived the vessel was lost at sea on the 18th September 1998 off the West Coast of the North Island near Waikawau, with the loss of three lives. When the vessel sailed from Raglan on the 17th September 1998 no anchor had been connected to the anchor chain. At the time the vessel was lost Mr Mathers did not hold a Safe Ship Management Certificate for the vessel, as the Safe Ship Management company had identified some equipment issues it wanted resolved before issuing a Certificate. The salient issues related to an EPIRB and a second fire extinguisher.

Mr Mathers was charged with an offence under s65(2)(a), which provides every person commits an offence who:

> *"(a) Causes or permits any ship or maritime product to be operated, maintained or serviced;…*
> *In a manner which causes unnecessary danger or risk to any other person or to any property irrespective of whether or not in fact any injury or damage occurs"*

The prosecution had to prove firstly that the vessel had been operated in a manner which caused unnecessary risk or danger and, secondly, that the accused caused or permitted the vessel to be operated in that manner. The Crown alleged the vessel was operated unsafely because it did not have any appropriate vessel anchors on board, or in the alternative, was unsafe because the appropriate anchor had not been connected to the anchor chain. It also alleged that the vessel was unsafe because the EPIRB was not fixed to a bracket and the vessel did not carry a second fire extinguisher.

Judge Cooper was careful to emphasise, both during the trial and in his written judgment that the case was not about the actual loss of the *Hunter II*, nor was it an enquiry into what caused the death of the master and two crew members. His Honour noted that there may have been many factors which contributed to the loss of the vessel. These included the use of an unsuitable

anchor, insufficient anchor warp, smoking of cannabis by crew members, anchoring too close to shore, failure to utilise warning and safety devices, failure to maintain a proper watch and remaining anchored in an exposed area in the face of a forecast change in weather conditions. All of these were operational factors which were the responsibility of the master.

Instead, the issues in dispute were the responsibility of Mr Mathers for the condition of the vessel and its equipment at the time it left Raglan on the 17th September 1998, which was quite independent from the factors which caused the loss of the vessel itself.

Cooper DC J firstly had to deal with the legal issue of what was meant by "causing" or "permitting" a vessel to be operated in an unsafe manner. The Crown urged the Court to adopt a wide meaning, which went beyond actual knowledge of the unsafe operation. The Crown submitted that, in this context, it would be appropriate to adopt the reasoning from decisions relating to other health and safety type legislation[1]. This could impose a positive duty on owners/employers to take reasonable steps to detect and prevent breaches. Ultimately the Judge rejected this approach and preferred an interpretation which required knowledge of the facts which made the operation unsafe. However, while proof of actual knowledge was necessary, such knowledge could be inferred from evidence of wilful blindness to suspicious circumstances.

On the factual issues, His Honour went on to consider the evidential dispute over the safety of the Kewene anchors. He preferred the evidence of the defence witness (your editor, Mr Ingram), and decided it had not been proved that the Kewene anchors carried on board were inadequate or unsuitable. Whilst it was accepted that it was unsafe for the vessel to sail without one of the Kewene's attached to the anchor chain as a dedicated vessel anchor, His Honour accepted on the facts that Mr Mathers had no knowledge that this had occurred. It was found that the issues relating to the EPIRB and anchor did not mean that the vessel was being operated unsafely.

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1. [1] McKnight v NZ Biogass Industries Limited [1994] 2 NZLR 664). Vehicle Inspectorate v Nuttal [1999] 3 All England 833.

The Judge went on to note that even if a wider interpretation of the words “cause” or “permit” was adopted so that proof of actual knowledge of the dangerous operation was not required, the result would be the same. In this he accepted the writer’s submission that it was reasonable for Mr Mathers in all the circumstances to assume that the appropriately qualified and experienced master would take the obvious and simple operational step of attaching one of the anchors provided before the vessel departed. This was a step so basic that to require an employer or owner to check that it had been done was akin to requiring him to check with the master that the vessel had been appropriately bunkered before it sailed.

Accordingly Mr Mathers was found not guilty of the charge.

So what can be learned from this case? It would be dangerous to draw too many general conclusions, as this is an area where each case will depend on its own facts. The owner/employer must take all reasonable steps to ensure that the vessel and equipment provided is safe. While broadly speaking the master bears ultimate responsibility for operational issues, if the owner is aware of any unsafe practices, then the owner can also be held accountable. Also if the owner is aware of any circumstances which should have led to further enquiry, then the owner may be held accountable on the basis of “wilful blindness”. However, in the maritime industry at least there are still some circumstances where an employer/owner is entitled to assume that the master (and presumably the crew) will take reasonable steps to operate the equipment provided in a reasonable and safe manner.

The allegations relating to the EPIRB and fire extinguisher are also of interest and should provide a clear warning to vessel owners that if they do not comply with the safety requirements identified by their Safe Ship Management company this may be used by the MSA as a basis of a serious charge under s65(2)(a).

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