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Memorandum

To: Commitee on Inland Waters & Towing, Maritime Law Association of the United States

From: Kent Roberts

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Marine Casualty Reporting, Selected Cases

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Most people involved in operating commercial vessels, and most legal practitioners advising those vessel operators, are generally familiar with the requirement at Title 46, Code of Federal Regulations, Part 4 for reporting marine casualties and accidents. Prompt reporting is essential for timely U.S. Coast Guard investigations and for the Coast Guard to respond to a casualty where assistance is needed. More importantly, lessons learned from prompt investigations can improve safety for maritime operators going forward.

The rules and circumstances around marine casualty reporting are, however, complex, and some in the industry feel there has been inconsistent enforcement by the Coast Guard. Recognizing this, the Coast Guard developed and, on July 21, 2015, issued a new Navigation and Vessel Inspection Circular (NVIC) on marine casualty reporting procedures. The circular, NVIC 01-15 (located at http://www.uscg.mil/hq/cg5/nvic/pdf/2015/navic-01-15_Marine_Casualty_Reporting20150721.pdf) does a great job of reviewing standard interpretations of the casualty reporting rules. The NVIC clarifies some uncertainty in interpretation particularly around "bump and go" groundings, and provides useful policy interpretations to assist parties in casualty reporting. All practitioners are encouraged to review this NVIC in detail, and to make sure their clients are aware of its contents and interpretations.

Failure to follow the Coast Guard rules on marine casualty reporting can result in Coast Guard fines against the vessel owner or operator and against licensed individuals involved in the incident. But there also have been a few cases in which a vessel operator's failure to follow

marine casualty reporting has been used as a sword against the vessel operator in an effort to enhance civil liability exposure. The marine casualty reporting requirement also triggers the marine employer's obligation to determine whether there is any evidence of alcohol or drug use by individuals directly involved in a reportable marine casualty. See 46 CFR §4.05-12 and 46 CFR Subpart 4.06. Failure to properly report a marine casualty, or failure to properly drug and alcohol test following a marine casualty, has been used in some civil cases in efforts to shift burdens of proof or to create negative inferences about conduct or causation, with mixed results.

In *Tisbury Towing & Transportation Co. v. Tug VENUS, et al.*[1], a barge owner claimed its barge suffered grounding damage, but the grounding had gone unreported. As a consequence, the plaintiff could not determine exactly when over several voyages the barge may have been grounded in order to meet plaintiff's burden of proof that the tug had caused the damage. The tug master admitted that a grounding incident had occurred on one voyage but claimed it was with a different barge in tow. The plaintiff argued that because this admitted grounding was not reported pursuant to 46 CFR §4.05-1, the plaintiff was denied direct evidence of exactly when the grounding occurred and whether the plaintiff's barge was involved. The plaintiff contended that this failure to report should shift to the tug owner the burden of producing evidence of causation and explaining how plaintiff's barge was damaged. The court held that where there was no direct evidence the tug had grounded plaintiff's barge, the failure to report an incident which may or may not have involved the plaintiff's barge was insufficient to shift the burden of proving causation.

NVIC 01-15 should prove useful for vessel operators setting their own internal policies for regulatory compliance in marine casualty reporting. *In re Crosby Tugs, L.L.C.*, [2]involved an oil spill and pipeline damage when the tug WEBB CROSBY grounded on a pipeline that had been maintained at an improperly shallow level. The WEBB CROSBY had been operating in a very shallow waterway and had grounded several times during the day before hitting the pipeline. In apportioning 50% fault to Crosby Tugs, the trial judge listed a number of violations of statutes and regulations, including the Inland Rules. One of them was violation of marine casualty reporting. While 46 CFR §4.05-1(a)(1) requires immediate reporting of a marine casualty involving an unintended grounding, the Crosby Tugs operations manual only required its personnel to report "groundings that exceed one hour or in which equipment is damaged". The court found that the company's procedure violated 46 CFR §4.05-1. This restrictive definition allowed groundings that occurred on the day of the accident to go unreported and the final grounding that resulted in the casualty to be reported late. Although this was not described by the trial court as a violation which led to the pipeline allision, it lengthened the list of regulatory violations and negligence findings which together raised Crosby Tugs' allocation of fault to 50%.

The court in *Crosby Tugs* seemed to suggest that in the context of the particular facts in the case, prompt reporting of the earlier unintended groundings in the waterway may have led Crosby

[1] 251 F.3d 298, 2001 A.M.C. 2703 (1st Cir. Mass. 2001)
[2] 2005 U.S. Dist. LEXIS 48397 (E.D. La 2005)

Tugs or the Coast Guard to become more aware of the shallow pipeline exposure, potentially preventing the casualty. In most situations, however, it is clear that a violation of casualty reporting rules does not contribute to the cause of the casualty and thus is not a statutory violation that can be used to allocate fault. The injured seaman in *Joseph v. Tidewater Marine, LLC*[3] claimed that the owner's failure to report his slip and fall as a marine casualty and to file a form CG-2692 should bar any consideration of the plaintiff's own comparative fault in the fall that he claims led to a hernia. The trial ruled that even if the vessel operator was required to file a CG-2692, about which there was some question, failure to do so was not a cause of the seaman's injury. Hence improper casualty reporting is not a legal basis for excluding evidence of a plaintiff's comparative fault.

Likewise, in *Martin v. SMAC Fisheries, LLC*,[4] the injured seaman sought summary judgment prohibiting the vessel owner from arguing comparative fault because the fishing vessel owner did not have the crew drug tested following the plaintiff's injury. The court denied the plaintiff's motion because it was not clear that failure to drug test the crew under 46 CFR §4.06-3 had any causal connection to the plaintiff's injury. There were also material issues of fact as to whether or not the plaintiff's injury constituted the type of marine casualty that would trigger the drug testing requirement. The plaintiff also had the temerity to argue he could not be charged with comparative fault because a crewmember possessed marijuana on the fish boat in violation of regulation. The crewmember with the marijuana was the plaintiff himself! Not surprisingly, the plaintiff's motion to apply the Pennsylvania rule of statutory fault for this reason was also denied.

Clark v. Icicle Seafoods, Inc.[5] is another example of a plaintiff seeking to use the employer's failure to file a CG-2692 form to establish liability or shift to the defendant the burden of proving causation. The plaintiff, working as a fish processor, claimed he was injured pulling a fish cart from a freezer using a chain handle. There were no witnesses and the parties disputed how the accident occurred. There had been a prior similar injury involving the freezer cart which the company had reported to the Alaska OSHA office, but not to the Coast Guard. The company contended it filed OSHA reports for production worker and processer injuries, and filed Coast Guard reports only for injuries involving crew members with navigation duties. The plaintiff convinced the court that the company's policy was wrong and that it should have filed a CG-2692. But the court also found that the failure to file a Coast Guard reports, including one for the plaintiff's injury, was not a contributing cause of the plaintiff's injuries. The court did not invoke the Pennsylvania rule to shift the burden of proving causation to the defendant.

While the failure to report a marine casualty would not ordinarily be a contributing cause of a marine casualty, it is still a statutory violation that can trigger serious consequences in the context of commercial contracting. *Fitch Marine Transport, LLC, et al v. American Commercial Lines, LLC, et al*.[6] involved claims for wrongful termination of bareboat charters for four

[3] 2002 U.S. Dist. LEXIS 15711
[4] 2012 U.S. Dist. LEXIS 57553 (D. Alaska 2012)
[5] 2007 U.S. Dist. LEXIS 85723 (W.D. Wash. 2007)
[6] 2010 U.S. Dist. LEXIS 127834 (E.D. La 2010)

towboats under charters containing a minimum performance standards clause. The clause referenced marine casualties as defined in 46 CFR §4.05-1 and stated that "the minimum standard is that zero marine casualties occur". The charter further required the charterer to comply with all applicable laws. During the charter term, one of the tugs experienced a vibration and divers found a cable and line wrapped around one of the propellers. When the tug was drydocked to address this issue, the owner conducted an inspection and found that both propellers had also suffered damage from a previous unintended grounding. The charterer had not reported this grounding to the owner or the Coast Guard. The vessel owner then terminated the charters for failing to comply with applicable operational laws and regulations, specifically the failure to report the grounding as a marine casualty as required by 46 CFR §4.05-1. The court reviewed the evidence from the drydocking and determined that in fact the damage was due to a grounding of a type that was required to be reported to the Coast Guard. Thus the termination of the bareboat charters for violation of 46 CFR §4.05-1 was found to be justified.

No discussion of cases interpreting marine casualty reporting requirements would be complete without mention of *Hazelwood v. State of Alaska*[7]. Following the EXXON VALDEZ oil spill, Capt. Joe Hazelwood was convicted of negligent discharge of oil, a misdemeanor under Alaska law. When the EXXON VALDEZ struck Bligh Reef, Capt. Hazelwood immediately reported the marine casualty to the Coast Guard as required by 46 CFR Part 4. Because the casualty involved pollution, Hazelwood argued he was entitled to the immunity protection stated at 33 USC §1321(b)(5) requiring immediate notification of any oil spill and including the clause "[N]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." Hazelwood contended the State's prosecution arose from information obtained by the exploitation of his notification about the grounding and spill, and after a lengthy analysis, the Alaska Court of Appeals agreed, albeit reluctantly.

Lastly, there is the recently decided case of *Greger Pacific Marine, Inc. v. Oregon Offshore Towing, Inc.*[8] Practitioners working with towing industry clients will find the facts in the case a bit hard to believe. It is a case in which the vessel operator's failure to report two marine casualties or to conduct drug and alcohol testing following either, was used to create and support inferences of gross negligence. Greger Pacific purchased an inland derrick barge, the DB-560, and an inland crane barge, the WEEKS 243, in Hawaii. It then contracted with Oregon Offshore to tow them to San Francisco. The towing contract contained a mutual "name and waive" insurance clause, requiring Greger Pacific to insure the barges and waive subrogation against the tower. This arrangement effectively insulated Oregon Offshore from liability for negligent towing. Greger Pacific did not purchase insurance, and so under the contract was required to absorb all claims that would otherwise have been covered by insurance.

[7] 836 P.2d 943, 1992 A.M.C. 2423 (Alaska Ct. App. 1992)
[8] 214 U.S. Dist. LEXIS 93786, 2014 A.M.C. 2284 (Dist. Or. 2014)

The two barges were not loadlined, they required USCG trip permits for the tow to San Francisco. Greger Pacific did not get trip permits for either barge. It was later fined by the Coast Guard for this violation. The captain of the towing tug OCEAN EAGLE, Capt. Cooley, raised the lack of trip permits with the Oregon Offshore president and was told to "just tow" the barges. He later testified that he believed the reason there were no trip permits is that the Coast Guard would not have passed the barges or let the tow proceed. There was conflicting evidence, however, whether the barges were nevertheless seaworthy for the tow.

Just 39 miles off the coast Hawaii, the WEEKS 243, which was the second barge in the tandem tow, began to sink. The tug was unable to disconnect the WEEKS 243 from the tug so had to cut the tow wire, leaving portions of the tow rigging from both barges hanging from the now remaining barge, the DB-560. The barge sinking was classified as a "Serious Marine Incident," requiring immediate Coast Guard notification. Neither Capt. Cooley nor Oregon Offshore reported the sinking. Oregon Offshore was later assessed a substantial Coast Guard fine for failing to report. Capt. Cooley and his crew were also required to take drug and alcohol tests under 46 CFR §4.05-12. They did not do so. Capt. Cooley later told the Coast Guard that the drug testing kits were no longer on board the tug at the time of the barge sinking. Alcohol testing kits were on board but the captain explained he did not administer those tests because he had not seen anybody drinking. The Coast Guard fined both Oregon Offshore and Capt. Cooley for these violations.

Rather than returning to Hawaii, the president of Oregon Offshore instructed Capt. Cooley to continue towing the DB-560 to California, which he did on a jury-rigged soft line at a speed (5 knots) much too fast for the prevailing conditions. Six days later, the DB-560 sank as well. Again, Oregon Offshore failed to report the second sinking to the Coast Guard and again failed to administer drug and alcohol tests to the crew members. Oregon Offshore and Capt. Cooley both conceded that had the OCEAN EAGLE returned to Hawaii after the sinking of the WEEKS 243, the DB-560 would have arrived safely and not been lost. Capt. Cooley also had just come off a one year suspension of his captain's license for testing positive for cocaine, and he had recently been fired by another tug company for drug violations.

On these facts, Oregon Offshore moved for summary judgment because Greger Pacific failed to obtain insurance, arguably relieving Oregon Offshore of liability under the mutual name and waive clause. Greger Pacific responded that its claim was for liability based on gross negligence and under prevailing 9th Circuit law, towers cannot validly contract out of their own liability for gross negligence. So the court had to decide whether there were disputed issues of fact regarding whether Oregon Offshore was grossly negligent. Not surprisingly, the court found a number of disputed facts concerning whether Oregon Offshore was grossly negligent in towing the two barges. The company's violations of 46 CFR Subpart 4 played heavily in the court's decision:

> "First, there is the reasonable inference of possible drug or alcohol use by the crew of the *Ocean Eagle*. Despite the well-established and well-understood reporting requirements that are triggered after a Serious Marine Incident, Capt. Cooley did not report to the Coast Guard the sinking of either the WEEKS 243 or the DB-560. Moreover, the captain

> did not administer the required drug or alcohol tests, claiming that the drug kits were not onboard the *Ocean Eagle* (but unable to explain why the drug kits were found onboard by the Coast Guard only a month before). Further, Capt. Cooley's own history of work-related drug incidents may be evidence of a motive for not reporting the Serious Marine Incidents because, if there had been drug use involved, Capt. Cooley could have feared a repeat, or worse, of the suspension or firing that he previously experienced."

After denying summary judgment, the court went on to rule on several evidentiary motions. Oregon Offshore sought to exclude evidence of Capt. Cooley's prior drug and alcohol use. Had Oregon Offshore and Capt. Cooley complied with the marine casualty reporting requirements, this evidence likely would have been excluded. Instead, the court ruled:

> "[f]urther, the references to Capt. Cooley's drug and alcohol use may be admissible as evidence of motive under Fed. R. Evid. 404(b)(2). Capt. Cooley's past work related problems regarding drug or alcohol use, coupled with his awareness that a positive test could again result in suspension or loss of his job, may provide a motive for not reporting the two relevant Serious Marine Incidents to the Coast Guard."

Conclusion

While these cases show that problems in marine casualty reporting may not be determinative in subsequent tort litigation, defending maritime claims becomes a whole lot simpler if vessel operators get marine casualty reporting right. Moreover, vessel owners who adequately report accidental groundings and other marine casualties can avoid substantial contractual problems and evidentiary headaches.

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