

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of the Arbitration :

Between :

TOKIO MARINE AND FIRE INSURANCE CO., :
LTD., NIPPON STEEL CORPORATION, et al. :

And :

SOUTHWIND SHIPPING CO., S.A., as :
owners of the M/V STOIC. :

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POST HEARING MAIN BRIEF
SUBMITTED ON BEHALF OF
CHARTERER-CARGO CLAIMANTS

Before:

DONALD E. ZUBROD, Chairman
JACK BERG
LLOYD C. NELSON

Arbitrators

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Claimants
14 Wall Street
New York, New York 10005

DOUGLAS A. JACOBSEN
STEPHEN V. RIBLE

Of Counsel

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SOUTHWIND SHIPPING CO., S.A., as
owners of the M/V STOIC.

POST HEARING MAIN BRIEF
ON BEHALF OF CHARTERER-CARGO
CLAIMANTS

STATEMENT

As a result of the stranding of the M/V STOIC on August 18, 1979 and consequent total loss of the vessel and her cargo, Southwind Shipping Co., S.A., petitioned for exoneration from or limitation of liability in the United States District Court for the Southern District of New York. After charterer-cargo claimants filed a claim and answer in this proceeding, shipowner made a motion in Court stating that all the cargo claims were subject to arbitration pursuant to a Contract of Affreightment dated November 28, 1968 and that the limitation action

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POST HEARING MAIN BRIEF
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CLAIMANTS

STATEMENT

As a result of the stranding of the S.T. STOIC on August 19, 1979 and consequent total loss of the vessel and her cargo, Southwind Shipping Co., S.A., petitioned for exoneration from or limitation of liability in the United States District Court for the Southern District of New York. After charterer-cargo claimants filed a claim and answer in this proceeding, shipowner made a motion in Court stating that all the cargo claims were subject to arbitration pursuant to a Contract of Affreightment dated November 28, 1968 and that the limitation action

should be stayed pending arbitration of the dispute concerning liability. Thereafter, the Court ordered that the dispute be sent to arbitration and further ordered that shipowner may reopen the limitation action after the arbitration process has been completed.

In this arbitration proceeding, charterer-cargo claimants (hereinafter referred to as Claimants), NIPPON STEEL CORPORATION, et al., and their insurer, TOKIO MARINE AND FIRE INSURANCE CO., LTD., make claim for a total loss of cargo which was carried on a voyage from Norfolk, Virginia, U.S.A. and Sepetiba, Brazil to multiple discharge ports in Japan. The cargo was coal and iron ore (Charterer's Exh. I) carried pursuant to the terms of a Contract of Affreightment dated November 28, 1968, with amendments, which included a Chamber of Shipping Voyage Charter Clause Paramount, 1958.

Both parties have stipulated and agreed for purposes of this dispute that the above Clause Paramount has the effect of providing that the carriage of all cargo on the STOIC is subject to the Carriage of Goods by Sea Act of the United States, 46 U.S.C.A. §§1300-1315.

Due to the total loss of its cargo, Claimants seek to recover from shipowner the full value of their cargo amounting to \$9,040,687.75 plus interest, costs and attorney's fees. (See Charterer's Exh. H-I, transcript at 217-18, and Appendix A attached hereto consisting of a table indicating the rate of interest from the date of the casualty to present).

FACTS

The S.T. STOIC was a Liberian flag oil/bulk/ore carrier, built in Japan in 1971. Length overall was 296 meters and beam was 45 meters plus. Deadweight tonnage was over 152,000 and at summer deadweight she would draw approximately 108,117 tons. She was steam turbine with 24,000 shaft horsepower. At full ahead, the STOIC would make about 15½ knots and consume 125 long tons of bunkers per day. At an economical speed of 12½ knots (65 r.p.m.) her daily consumption of bunkers was 90-95 tons (Perselis Transcript (Tr.) at 28-30).

The STOIC was equipped with a gyro compass with repeaters on the port and starboard bridgewings; an automatic pilot; two radars -- one 16 inch, the other 12 inch; two echo sounders; a radio direction finder; a

magnetic compass; course recorder; rudder angle indicator; and r.p.m. indicator (Perselis Tr. at 30-31).

The STOIC arrived at Norfolk on June 23, 1979 to load coal. While at Norfolk, a local representative for the Liberian authorities carried out a safety inspection of the STOIC on June 25, 1979 (Perselis Tr. at 46). Thereafter, a safety report was issued citing a violation of Liberian Maritime Regulation 10.292 because among other officers, the third mate, I. Karakostas, did not have a Liberian (or other National) license in the grade in which he was serving (Owner's Exh. 6).

On June 26, 1979, the STOIC completed loading approximately 108,117 tons of coal (92,137 long tons of "Pittston M.V. Blend" coal and 15,979 long tons of "Masco high volatile" coal) (Charterer's Exh. I-1, 2). She also took 5,100 long tons of bunkers on board so that she had about 6,000 long tons of fuel at departure (Perselis Tr. at 48).

The vessel departed Norfolk on June 26, 1979 bound for Sepetiba, Brazil. During this voyage, the main radar (16 inch) broke down and the sub-radar (12 inch) failed to operate satisfactorily. The ship's radio station was also experiencing problems. The master, therefore,

radioed ship's agents in Sepetiba to arrange for technicians to board the vessel at the next loading port (Perselis Tr. at 48-50).

The STOIC berthed at Sepetiba on July 11, 1979 at 2200 hours and loaded 29,614 long tons of iron ore. She sailed on July 12, 1979 at 2200 hours with drafts forward 53'08" and aft 54'00" (Charterer's Exh. I-3 and Owner's Exh. 4). During this short stay, the radar technicians were not able to repair the main radar (16"), and were only able to adjust the sub-radar (12") by tuning the set and replacing a magnetron (Perselis Tr. at 51-52 and Exh. Q). A radio technician also attended the vessel, but was unable to repair the malfunctioning radio because the replacement part (a new synthesizer) placed on board at Norfolk was defective. Therefore, the vessel sailed from Sepetiba with a malfunctioning radio, but the ship's radio officer allegedly repaired it on July 29, 1979 (Perselis Tr. at 53-55).

The STOIC departed Sepetiba at full speed, but soon reduced to economical speed because the Master feared that the ship had insufficient bunkers to reach the first discharge port -- Oita, Japan. During this period, the Master had in mind that he would request to load additional

bunkers at Singapore, if necessary. After repeatedly advising owners of the short supply of bunkers, the owners (instead of directing the vessel to Singapore) changed the rotation of discharge ports so that the first port would be Tobata, Japan (Yawata port). This deviation from the original port destination shortened the voyage by at least one day. Therefore, as the STOIC passed Singapore, the Master testified that he believed the vessel had a sufficient safety margin of bunkers to complete the voyage to Tobata (Perselis Tr. at 56-58 and Exh. 4 and 13).

The vessel made the voyage from Sepetiba, Brazil to Japan by crossing the Atlantic Ocean, passing the Cape of Good Hope, and transiting the Indian Ocean through the Malacca Strait and the Straits at Singapore (Perselis Statement (St.) to Owner (Exh.D-1 at 4)). As the vessel passed through the congested Singapore Strait, the Master was on the bridge more or less continuously for about two days (Perselis St. Exh. D-1 at 7 and Tr. at 123-24).

After transiting the Straits, the vessel proceeded a distance off the east coast of Taiwan on a course set towards Yonakuni Island (Perselis St. Exh. D-1 at 5).

The vessel passed Yonakuni Island at 0100 hours, ship's time (0200 local), on August 19th. The Master was on the bridge and took a radar position which indicated that the lighthouse on the island was abeam to port at a distance of 9 miles. The Master plotted the position on the chart, set a new course of 035°T and laid down a course line of 035°T on the chart. The new course line was set so that the track was 9 miles to the west of Sekibi Sho (Perselis Tr. at 60-61). When the Master left the bridge at about 0130 to 0200 hours, the vessel remained on automatic pilot (Perselis Tr. at 62-23).

At 0946, ship's time (1046 local), during the 0800 to 1200 watch of the unlicensed third officer (I. Karakostas), the S.T. STOIC stranded at a point bearing 243°T (approximately W.S.W.), 0.6 miles from the southwest end of Sekibi Sho, Senkaku Islands (Exh. B-2). As the vessel stranded, she pivoted until she came to rest on a heading of 328°T (Perselis St. Exh. D-1 at 10). Shortly before and at the time of the stranding, the weather conditions reported by the Master were: skies -- partly cloudy; wind force -- 3 to 4 from the southwest, sea -- rippled. Visibility was reported by the Master as: 0900 hours, ship's time -- improving to 8 or 9 miles;

0946, ship's time -- 6 to 8 miles (Perselis St. Exh. D-1 at 9-10).

At 2200 hours, ship's time, August 19th, the Japanese Maritime Safety Authority (M.S.A.) patrol boat WAKASA came alongside and stood by the vessel. The Master knew that typhoon "Judy" was approaching the position of the stranded vessel and, therefore, at 1030 hours, ship's time, August 20th, 17 men were transferred to the WAKASA. On the afternoon of August 20th, the remaining 21 people including the Master were transferred to the CHIKUGO (another M.S.A. vessel). At 1200 hours on August 21st, the STOIC's Chief Mate, Third Officer and Pumpman, along with the Salvage Master, boarded the STOIC to retrieve the ship's logs and to carry out an inspection. Sometime during August 21-23, typhoon "Judy" passed the stranded position of the STOIC. On August 28th, the sunken wreck of the STOIC was located by the M.S.A. about 6½ miles from Sekibi Sho (Perselis St. Exh. D-1 at 13-16).

"Purposes behind Harter Act, Hague Rules and Carriage of Goods by Sea Act were to achieve fair balance of interests of carrier, on one hand, and shipper, on other, and also to effectuate standard and uniform set of provisions for ocean bills of lading."

(422 F.2d at 11) (emphasis added)

APPLICABLE LAW

A. Introduction

The United States Carriage of Goods by Sea Act, 46 U.S.C.A. §§1300-1315 and its predecessor, the Harter Act, 46 U.S.C.A. §§190-196, were passed to work out a balance between the interests of carrier and shipper. As stated in Gilmore and Black, The Law of Admiralty (2nd Ed. 1975), §3-24 at 142-143:

"That act (Harter Act) was a compromise between the interests that sought (by the inclusion of exculpatory clauses in bills) full exoneration for the carrier from all claims based on his negligence, and those who (relying on the view of the federal courts) sought to hold carriers responsible for the consequences of every sort of negligence."

Similarly, Judge Anderson in Encyclopedia Britannica Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969), cert. denied, 397 U.S. 964 (1970) said:

"Purposes behind Harter Act, Hague Rules and Carriage of Goods by Sea Act were to achieve fair balance of interests of carrier, on one hand, and shipper, on other, and also to effectuate standard and uniform set of provisions for ocean bills of lading."

(422 F.2d at 11) (emphasis added)

Thus, COGSA was never intended to release carriers from the duties which they owe cargo entrusted to their care. Nor was it intended unilaterally to shelter carriers from liability where their vessels are unseaworthy and where carriers have failed to exercise due diligence to make their vessels seaworthy. As will appear from the cases cited below, the Courts have traditionally strictly construed a carrier's obligations to make the vessel seaworthy and to exercise due diligence in this regard.

There is a warranty of seaworthiness by any vessel owner to the cargo. As stated in The G.R. Crowe, 287 Fed. 426 (S.D.N.Y. 1922):

"All shipowners carrying goods by sea, whether common carriers or only bailees for transportation are under an absolute warranty, implied by law, to furnish a vessel seaworthy at the beginning of the voyage. The Caledonia, 157 U.S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644."

287 Fed. at 426.

Also:

"If there be defects known, or not known, he is not excused." Work v. Leathers, 97 U.S. 379, 380 (1878).

The carrier's warranty of seaworthiness to cargo may be lessened by contract or by statute. In this case, the warranty of seaworthiness by Southwind Shipping Co., S.A. to cargo is lessened by COGSA to the requirement that only due diligence be exercised to make the vessel seaworthy. However, the burden of due diligence is a heavy one; the carrier must prove said due diligence; and any doubt must be resolved against the carrier. As the U.S. Supreme Court stated in The Southwark, 191 U.S. 1 (1903):

"The burden was upon the owner to show by making proper and reasonable tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and if by the failure to adopt such tests and to furnish such proofs the question of the ship's efficiency is left in doubt, that doubt must be resolved against the shipowner and in favor of the shipper. In other words, the vessel owner has not sustained the burden cast upon him to establish the fact that he has used due diligence to furnish a seaworthy vessel, and, between him and the shipper, must bear the loss."

(pp. 15-16)

B. Burden of Proof

1. Vessel owner has burden of explaining the cause of the loss

The carrier has the burden of explaining the loss and proving that it resulted solely from a cause for which it is not liable. By contract, the provisions of the United States Carriage of Goods by Sea Act, 46 U.S.C.A. §§1300-1315, govern this dispute. Claimants have made out a prima facie case by proof of delivery of the cargo to the carrier and then failure by the carrier to redeliver the cargo at destination.

As was stated in Schnell v. The Vallescura, 293 U.S. 296 (1934):

"In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. The rule applies equally with respect to other exceptions for which the law permits him to stipulate. The reason for the rule is apparent. He is a bailee

entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty.

Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.

(293 U.S. at 303-304) (citations omitted and emphasis added).

In Lekas & Drivas, Inc. v. Goulandris, 306

F. 2d 426 (2d Cir. 1962), the Court said:

"... a shipper makes out a prima facie case by proving that his goods were delivered to the carrier in good condition and were outturned damaged or not at all; the burden then falls upon the carrier to bring itself within an excepted cause or to prove it exercised due diligence to avoid and prevent the harm."

(306 F.2d at 429) (emphasis added)

Since Claimants had already made out a prima facie case, the burden was on the carrier during the arbitration hearings to bring itself within a specific exception. General Foods Corp. v. The Troubador, (S.D.N.Y.) 98 F. Supp. 207, 209; Spencer Kellogg & Sons v. Great

2. Evidentiary factors favorable to claimants in respect of vessel
Lakes Transit Corp., 32 F. Supp. 520, 529, American Tobacco Co. v. The Katingo Hadjipatera, (S.D.N.Y.) 81 F. Supp. 438, 445, aff'd 194 F.2d 449, cert. den. 343 U.S. 978. The rule that the carrier must explain the loss and bring it within a specific exception is fair and logical because the carrier is the party who is in a position to know what happened during the voyage.

In order to bring itself within the exception under 46 U.S.C.A. §1304(2)(a) (COGSA), the shipowner attempted during the arbitration hearings to establish the existence of error in navigation committed solely by the ship's Master (as opposed to any involvement by the incompetent watch officer) and, further, that this error in navigation was the sole cause of the stranding. But the carrier failed to establish either an error in navigation by the Master or causation. On the contrary, Claimants established that the loss was caused by unseaworthiness resulting from owner's lack of due diligence under 46 U.S.C.A. §1303(1)(a) and (b).

2. Evidentiary factors favorable to claimants in respect of vessel owner's burden of explanation

For the following reasons, several evidentiary presumptions should be applied in reaching a decision concerning this dispute:

- a) Inference adverse to shipowner for failure to produce the watch officer

One of the crucial issues in this dispute centers about the actions and competency of the unlicensed Third Officer -- Mr. Karakostas.*

The law is clear that the shipowner has the burden to prove that Mr. Karakostas is competent (citations and full discussion in POINT I infra.). However, owner has failed to produce Mr. Karakostas to testify at the arbitration hearings. Owner has admitted that Mr. Karakostas was available to give testimony at the arbitration hearings if owner requested his presence:

"Mr. Kyne: As far as I know he [Mr. Karakostas] is equally available to both sides." (Tr. at 286)

*We note that Mr. Karakostas has been referred to in the Exhibits as either a Second or Third Officer. We therefore use these designations interchangeably throughout the brief. Of course, the evidence will prove that Mr. Karakostas was not competent in the capacity of an officer and merely possessed an able-bodied seaman's certificate.

We do note that Mr. Karakostas has given numerous statements, but even a quick review of these statements finds them to contain contradictory facts which calls their credibility into question. (See Appendix B.)

Under these circumstances the failure to produce such an important witness calls for the arbitrators to infer that his appearance and testimony at the hearings would have been injurious to the vessel owner's cause. Tropicana Shipping, S.A. v. Empresa Nacional "Elcano", 366 F.2d 729, 733-39 (5 Cir. 1966); O.F. Shearer & Sons v. Cincinnati Marine Service, Inc., 279 F.2d 68, 73-74 and footnotes 5 and 6 (6 Cir. 1960).

The failure of owners to produce Mr. Karakostas to testify at the hearings verifies the accuracy of Captain Davenport's interview of Mr. Karakostas (Exh. QQ) insofar as it further proves his incompetence as a Third Officer. By not producing Mr. Karakostas at the hearings, owner has effectively admitted that the Third Officer was incompetent. Owner's sole defense appears to be that the actions of, and the presence on board the STOIC of, this incompetent Third Officer in no way contributed to the casualty. The evidence is to the contrary as will be pointed out later in this brief.

b) Credibility of the crew's testimony

A careful analysis of the statements and testimony of the STOIC's officers and crew provides such a wide disparity of facts (sometimes almost diametrically opposed to each other) that all such evidence must be considered biased and untrustworthy.

Courts have often observed this predilection of seamen and have drawn up certain ground rules for analyzing these types of cases. See Silver Palm, 1937 AMC 1427, 94 F. 2d 754, 763 (9th Cir. 1937). In Oriental Hero-Castor, 1976 AMC 1287, 1288, Judge Knapp noted the Second Circuit's observations in S/V Luckenbach (1912) 197 Fed. 888, 890:

"The well known loyalty of seamen for their own ship is both natural and praiseworthy. It leads them unconsciously to espouse the cause of the vessel that carries them. Not only the crew, but passengers also are imbued with the same spirit and seldom see negligence in the navigation of the vessel on which they are temporarily embarked. In such cases it is necessary to have recourse to extrinsic evidence and to weigh the presumptions drawn from undisputed facts."

(Emphasis added)

Tr. at 136 Therefore, great weight should be placed on:

(1) extrinsic evidence, such as the observations of the disinterested fishermen, (2) documentary evidence, such as that illustrating the vessel owner's practice of employing unlicensed watch standing officers, and (3) the expert testimony of Captain Patterson based on undisputed circumstantial evidence prior to the stranding (e.g., the vessel stranded on a well charted reef off a clearly visible island on a clear day with calm seas during the watch of the unlicensed and incompetent Third Officer.)

c) Inferences adverse to shipowner for non-production of material evidence

The Master testified that a complete record of the ship's "turnover file" would be kept in the shipowner's offices. These records would include reports and invoices indicating the operating condition of the vessel's navigational equipment (Perselis Tr. at 159-162). In fact, shipowner's Circular 210, dated June 10, 1977, requires all Masters to attend repairs to all navigational equipment "and to report the extent of same, the quality of work and at a later stage, the effectiveness of same" (emphasis added). The Master testified that this was accomplished in the form of a report by the Radio Department (Perselis

Tr. at 156-58). Shipowner recently mandated that maintenance reports be submitted every month by the Master and the radio officer (See Exh. 00-1 & 2). But the owner failed to produce such reports for the most important period -- from May, 1978 to May, 1979 (excepting Radio Officer Costalos' letter dated April, 1979 which appears in Exh. NN-3). (See Exh. NN and RR with counsel's NOTE). These documents were repeatedly requested by Claimants' counsel.

The Master further testified that maintenance and repairs to the STOIC and her navigational equipment were predominantly carried out in Japan under the direction of owner's marine superintendent, Mr. Dertelis, from his office in Japan (Perselis Tr. at 36, 128, 137). Documents from Mr. Dertelis' office concerning the STOIC have been repeatedly requested by Claimants' counsel, but no documents have been identified by owners as those originating from Mr. Dertelis' office.

Owner's representatives routinely inspected the STOIC three times per year from 1976-1978, and wrote Summary Condition Reports for each inspection, but only one Summary Condition Report (dated March, 1979) was produced by owner for the year of 1979 (See Exh. CC with Index).

Finally, the Master stated that he knew a fierce typhoon was approaching the stranded STOIC (Perselis St. D-1 at 13) and instructed his Chief Officer and Third Officer to return to the vessel to retrieve important documents such as the deck log (Perselis St. Exh. D-1 at 15), but owners have failed to produce: (1) the vessel's course recorder tape, (2) the chart in use, and (3) the deck log in use, at the time of the stranding.

After the stranding, Perselis remained on the STOIC for more than a day and a half until he boarded the CHIKUGO on the afternoon of August 20th. On the afternoon of the 21st, the Chief Mate and Third Officer returned to the vessel (Perselis St. to Owners, pp. 13-14). While on the STOIC and while on the CHIKUGO, the Master testified that he was communicating with owner's representative in Greece and owner's Marine Superintendent in Japan. Surely, the representative of Nereus Shipping (a company which manages a considerable fleet of vessels and which is very experienced in the requirements concerning pertinent documents for post-casualty investigations) would have advised the Master to obtain the course recorder tape; the chart in use; and the current deck log, engine log, and bell book.

S.S. Cap The Master testified that he communicated with the owner's office in Greece and Japan (via wireless) after the stranding (Perselis Tr. at 193-195), but owner has failed to produce any of these post-stranding cables. Not even one ship cable announcing the position of the stranded site. Similarly, the Master testified that due to radio difficulty during the first portion of the casualty voyage, he was relaying messages via other vessels in the LEMOS fleet (Perselis Tr. at 176), but owner has failed to produce even one cable so relayed from the vessels in the LEMOS fleet.

The fact that vessel owner failed to produce material documents should not be treated lightly. As observed by Mr. Justice Storey, such non-production is:

"a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court." The Pizarro, 2 Wheat. (15 U.S.) 227, 241, 4 L. Ed. 226 (1817).

The non-production of material evidence which is in control of a party raises an inference that the evidence is unfavorable to that party. Hellenic Lines Ltd. v. Life Insurance Corp. of India, (Hellenic Sailor), 526 F. 2d 830, 832 (2d Cir. 1975); Tupman Thurlow Co. v.

S.S. Cap Castillo, et al., 490 F. 2d 302 (2d Cir. 1974); Trans-Amazonica Iquitos, S.A. v. Georgia Steamship Co., 335 F. Supp. 935, 938-39 (S.D. Ga. 1971). This rule is particularly applicable to suits in admiralty, where records are often crucial and records and witnesses often are in control of one party. O.F. Shearer & Sons v. Cincinnati Marine Service, Inc., 279 F. 2d 68, 73 (6th Cir. 1960).

C. Seaworthiness

1. In General

Section 1303 of the Carriage of Goods by Sea Act provides in part:

"1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

- (a) Make the vessel seaworthy;
- (b) Properly man, equip and supply the ship;"

A carrier's obligation to make the vessel seaworthy is strictly construed. In the case of Compania General de Tabacos de Filipinas v. United States, 49 F. 2d 700 (2 Cir. 1931), the Court said:

"When the owner accepts cargo in an unseaworthy ship, though the defect be such as may be neutralized by care, he imposes on the shipper an added risk; not merely that his servants may fail, insofar as she is sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risks except those inevitable upon the seas." (49 F.2d at 701)

Any doubts as to a vessel's unseaworthiness must be resolved against the carrier. In The Vizcaya, 63 F.Supp. 898, (E.D. Pa. 1945), aff'd 182 F.2d 942 (3 Cir. 1950), cert. den. 340 U.S. 877 (1950), the Court stated:

"...if there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against the shipowner. The Southwark, 1903, 191 U.S. 1, 14, 24 S. Ct. 1, 48 L. Ed. 65; Bank Line v. Porter, 4 Cir., 1928, 25 F.2d 843, 845; The Bill, D.C. 47 F.Supp. 969." (p. 904) (emphasis added)

2. Unseaworthiness due to incompetent watch officer.

Seaworthiness is a relative term depending upon its application to the type of vessel and the nature of the voyage. The general rule is that the vessel must be staunch, strong, well equipped for the intended voyage and manned with competent officers and crew.

The Niagara v. Cordes, 62 U.S. 7 (1858); Framlington Court, 1934 AMC 272, 69 F.2d 300, 304 (5 Cir.), cert. denied, 292 U.S. 651, 1934 AMC 829 (1934); Northern Commercial Co. v. Lindblom, 162 Fed. 250 (9 Cir. 1908); Petition of United States (The F.S. 231), 178 F.2d 243 (2d Cir. 1949). In Chamberlain v. Ward, 21 How. (62 U.S.) 548, 564-65 (1853), the Court stated:

"Owners of vessels. . . must see to it that the master and other officers entrusted with their control and management are skillful and competent to the discharge of their duties, as, in case of a disaster like the present, both the owners and the vessel are responsible for their acts, and must answer for the consequences of their want of skill and negligence; and this remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all

the time they have charge of the deck. (emphasis added)

If then the STOIC was manned by an incompetent navigator, Southwind Shipping Co.'s duty as shipowner was breached on either the theory of personal negligence or that of unseaworthiness. Incompetence of the navigator makes the vessel unseaworthy. Tug Ocean Prince, Inc. v. U.S., 1978 AMC 1786, 1792 (2d Cir. 1978). Empire Seafoods, Inc. v. Anderson, 1968 AMC 2664, 398 F.2d 204 (5 Cir.), cert. denied, 393 U.S. 983 (1968).

The fact that the incompetent navigator's acts may be referred to as "negligent navigation" does not protect the vessel owner because the proximate cause of the casualty is unseaworthiness due to incompetency of the crew:

"The actual conduct of such an incompetent crew which is the cause of the damage may involve the navigation or management of the vessel; nonetheless if incompetence results in a navigational error which causes the collision, it is crew incompetence, and therefore the unseaworthiness of the vessel, which has caused the *** damage. The fact that the unseaworthiness can be labeled as an error in navigation does not magically protect the shipowner from liability. At some point along a spectrum of performance competency, an error in navigation is attributable to in-

competence on the part of the crew." Matter of Ta Chi Navigation (Panama) Corp., S.A. (EURYBATES), 1981 AMC 2350, 2356-2357, 513 F.Supp. 148, 158 (E.D. La. 1981), aff'd. 728 F.2d 699 (5th Cir. 1984); In Re Hercules Carriers, Inc. v. Claimant State of Florida (SUMMIT VENTURE) 768 F.2d 1558, 1577 (5th Cir. 1985).

3. Unseaworthiness due to continuing violations of the manning regulations and ensuing unsafe navigational practices.

Seaworthiness involves the adequacy of licensed ship's officers and men. The United States, as well as other maritime nations, including Liberia, have regulations governing the manning of ships. In the DENALI, 105 F.2d 413, 1939 AMC 930 (9th Cir. 1939); on rehearing, 112 F.2d 952 (9th Cir. 1940), the court considered the U.S. statutory equivalent to the Liberian regulations which require that a vessel (such as the STOIC) be manned by three licensed mates who shall stand in three watches while the vessel is being navigated. Because the vessel was manned in violation of this statute, the court held that the vessel was unseaworthy.

Unseaworthiness also results when a vessel sails with an insufficient number of licensed officers. Hercules

Carriers, Inc., supra, 768 F.2d at 1566; Tug Ocean Prince, Inc., supra, 584 F.2d at 1155; Benedict on Admiralty, §68.

A vessel may be further rendered unseaworthy by an improper navigational practice. In re Thebes Shipping, Inc. (S.T. ARGO MERCHANT) 1980 AMC 1686 (S.D.N.Y. 1980); American Mail Line Ltd. v. U.S., 1974 AMC 1536 (W.D. Wash. 1974); In re Delphinus Maritima (MARI BOEING) 1981 AMC 2362, 2376-77 at footnote 1(3). Southwind Shipping Co.'s continuing bad practice of utilizing unlicensed personnel to stand as watch officers so disrupted safe watch standing procedures that it rendered the vessel unseaworthy.

D. Concurring Cause

Section 1304 of COGSA provides in part:

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the management or in the navigation of the ship."

Under the facts of this case the carrier has not established an error in navigation by the Master,

and it is, therefore, liable to cargo. However, even if there were an error in navigation by the Master and the error was only a concurring cause of the loss, the carrier is still liable. In Ionion Steamship Co. of Athens v. United Distillers of America, 236 F.2d 78 (5th Cir. 1956), Judge Brown stated:

"It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted 'loss or damage arising or resulting from' (1) navigational error, (2) stranding or (4) latent defect, (6) any other cause without actual fault or privity, The Folmina, 212 U.S. 354, 29 S. Ct. 363, 53 L. Ed. 546; and certainly not if these were merely concurring causes. Compania de Navigacion La Flecha v. Brauer, 168 U.S. 104, 118, 18 S. Ct. 12, 42 L. Ed. 398; The Olga, S., 5 Cir., 25 F.2d 229, 1928 A.M.C. 831." (p. 80) (emphasis added)

This means that the carrier is liable if negligent navigation is only a concurring rather than the sole cause of the loss. Thus, cargo claimants recover from the carrier if unseaworthiness due to the carrier's lack of due diligence is only a concurring cause of the loss. As the Court said in The Temple Bar, 45 F.Supp.

Court stated:

608 (D.C. Md. 1942), aff'd 137 F.2d 293 (4 Cir. 1943):

"(16) It is true that the Carriage of Goods by Sea Act does not reduce the standards, imposed previous to that legislation, by which the seaworthiness of a vessel is to be tested, nor the requirements which constitute the exercise of due diligence. It must also be conceded that if the facts in any case disclose unseaworthiness resulting from the vessel owner's failure to exercise due diligence to make the vessel seaworthy, which concur with negligent navigation in causing the loss, the owner will be liable.

That is to say, unseaworthiness cannot be transformed into bad seamanship for the purpose of avoiding responsibility for loss of vessel or cargo. If more than one means is required to effect seaworthiness, the lack of any one of them cannot be excused. The *Maria*, 4 Cir., 91 F.2d 819; *Leathem Smith-Putnam Navigation Co. v. National Union Fire Insurance Co.*, 7 Cir., 96 F.2d 923." (p. 617) (emphasis added)

In the case of Union Carbide and Carbon Corp. v. The Walter Raleigh, et al., 109 F.Supp. 781 (S.D.N.Y. 1951), aff'd 200 F.2d 908 (2d Cir. 1953), the District

Court stated: 1) of the Act provides that:

"The carrier has the burden of showing that the loss was due to one of the excepted causes. Further, the carrier has the burden to show that it used due diligence to make the vessel seaworthy for the voyage. American Tobacco Co. v. The Katingo Hadjipatera, D.C., 81 F. Supp. 438. If it appears that there may have been several concurring causes of the damage, the burden is on the carrier to show that it was due to one of the causes excepted under the Carriage of Goods by Sea Act. And if it is shown that more than one cause was an effective and proximate cause of the damage and that one of the causes was the unseaworthiness of the vessel, the fact that the other cause was an expected (sic) cause under the Act does not relieve the carrier from liability. If unseaworthiness resulting from the carrier's failure to exercise due diligence to make the vessel seaworthy concurs with negligent management of the vessel by the officers, the carrier is liable. The Temple Bar, D.C., 45 F.Supp. 608." (p. 793)(emphasis added)

E. Due Diligence

The burden is on the carrier to prove that it used due diligence to make the vessel seaworthy. This burden is clear-cut and never shifts from the carrier.

Section 1304(1) of the Act provides that:

"Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section." (emphasis added)

Any question as to the exercise of due diligence is strictly construed against the carrier. Compagnie Maritime Francaise v. Meyer, 248 Fed. 881, 885 (9th Cir. 1918); In Metropolitan Coal Co. v. Howard, 155 F.2d 780 (2d Cir. 1946), Judge Learned Hand said:

"...the warranty of seaworthiness is a favorite of the admiralty and exceptions to it or limitations upon it, are narrowly scrutinized." (155 F.2d at 783)

In The Otho, 49 F.Supp. 945 (S.D.N.Y. 1943), aff'd 139 F.2d 748 (2d Cir. 1944), the Court quoted an English case, stating that:

"If the ship is allowed to go to sea in an unfit state, grave consequences follow. The lives of many men are at stake, and very valuable property. The utmost care must be taken. The duty must be fulfilled most thoroughly." (49 F.Supp. at 950)

The carrier's obligation to use due diligence to make the vessel seaworthy, i.e., to have proper navigational equipment on board, properly maintained and in good condition, to provide up-to-date charts and nautical publications, and to properly man its vessel with competent personnel, is non-delegable. Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978); The Esso Providence, 112 F.Supp. 630, 637 (S.D.N.Y. 1953); Ore S.S. Corp. v. D/S A/S Hassel, 137 F.2d 326, 330 (2d Cir. 1943). The diligence required by the law to make a vessel seaworthy is that of all of the carrier's employees, regardless of their position. In International Nav. Co. v. Farr & Bailey Manufacturing Co., 181 U.S. 218, the Supreme Court said:

"The obligation was to use due diligence to make her seaworthy before she started on her voyage, and the law recognizes no distinction founded on the character of the servants employed to accomplish that result." (p.226)
(emphasis added)

The vessel owner cannot delegate the duty to the Master or crew of the vessel. The Bill, 47 F.Supp. 969, 976 (D. Md. 1942), aff'd 145 F.2d 470 (4th Cir. 1944).

Inspection by experts is not sufficient to satisfy the duty of exercising due diligence to make the vessel seaworthy, nor does the phrase mean "due diligence to obtain certificates of seaworthiness." See Ionian Steamship Co. of Athens v. United Distillers of America, 236 F.2d 78 (5th Cir. 1956); The Agwimoon, 24 F.2d 864, aff'd 31 F.2d 1006, cert. den., 279 U.S. 874 (1929); The Abbazia, 127 Fed. 495 (S.D.N.Y. 1904); Bank Line, Ltd. v. Porter (The Poleric), 25 F.2d 843, cert. den., 278 U.S. 623 (1928).

POINT I

THE STOIC WAS UNSEAWORTHY BECAUSE THE ACTS OF THE UNLICENSED AND INCOMPETENT THIRD OFFICER WERE A CAUSE OF THE STRANDING. THE VESSEL OWNER HAS FAILED TO SUSTAIN ITS BURDEN OF PROVING THAT IT EXERCISED DUE DILIGENCE TO PROVIDE COMPETENT, PROPERLY LICENSED WATCH OFFICERS.

A. Owner's Explanation of the Cause of the Stranding Refuted

Vessel owner alleges, through the testimony of the STOIC's master, that the stranding occurred because (1) the master's navigation was hindered by fishing boats, (2) a monstrous current forced the STOIC onto the reef, and (3) the master was unaware of this reef because it was unknown and uncharted and because British Admiralty Chart 3236 indicated that the shoal extended

only 2 cables from the island. Disinterested third-party testimony and documentary evidence proves that these events did not occur:

1. No fishing boats prevented the STOIC navigator from making evasive maneuvers

The master testified that at 0920 hours, six miles distant from the island, he wanted to change course from 035 degrees to 008 degrees, but there were ten fishing boats on the vessel's port and starboard sides (Perselis Tr. at 70), and the boats to port impeded his intended course. Therefore, he only altered course to 027 degrees. At 0930 hours, the boats impeding his vessel on the port side had passed and he then changed course to 008 degrees (Perselis Tr. at 68-72). The Master further stated that at 0930 hours, ship's time (1030 local time), the STOIC was "about 3.5 miles from the west end of Sekibi Sho" (Exh. B-7 at 56-57). Therefore, the fishing vessels allegedly obstructing the STOIC's maneuvers were positioned at a range from 4-6 miles away from the island.

A disinterested witness, however, contradicts the master's excuse. Ken Heiansan, the chief engineer and relief captain on the SHOEI MARU #3, explained that on that particular day all the fishing vessels save one (the vessel from Yaeyama) fished within 1000 meters from Sekibi Sho (Heiansan Tr. at 237). The reason was simple -- this was where all the fish were located, i.e., on the shallow water area of the reef (Heiansan Tr. at 237). Even the boat from Yaeyama (Owner's Ex. 20, Boat No. 5, Heiansan Tr. at 245) (whose Captain was apparently ignorant of the location of the good fishing grounds) was only 2000 meters distant from the island and well forward of the STOIC's stranded position. (Heiansan Tr. at 236-237 and 250). Certainly no fishing boats were located as far away as five or six miles from the island (Heiansan Tr. at 237), as contended by the Master.

Mr. Heiansan further testified that all the fishing vessels, except one, were on the starboard side of the STOIC when she stranded (Heiansan Tr. at 250).

The vessel depicted as No. 5 in Mr. Heiansan's drawing (Exh. 21), although shown as being on the port side of the stranded STOIC, was actually far forward of the STOIC's position (Heiansan Tr. at 250). This testimony was confirmed by the STOIC's Chief Engineer, Iliopoulos, who testified that the fishing boats he observed by binoculars while on the bridge wing were forward and to the starboard of the STOIC (Iliop. Tr. at 230 and 258). It is evident that the master's testimony is not correct in respect of the location of the fishing boats.

2. No monstrous current swept the STOIC uncontrollably towards the island.

The master testified that the current was stronger than he anticipated and had unexpectedly cast his vessel upon the reef (Perselis Tr. at 97-98). He bases his opinion on the fact that the sounding line used by the Chief Mate after the stranding extended to an angle of 90 degrees indicating a strong current (Perselis Tr. at 78-79). The current experienced at the stranding site, however, occurred upon a shallow ledge of less depth than the draft of the vessel. The master admitted the fact that the rate of current necessarily

increases when deep water suddenly flows over a shallow reef (Perselis Tr. at 138). Obviously, the current affecting the vessel prior to the stranding was the current as it existed in deep water, and not that which flowed over the shallow reef.

Rear Admiral Patterson observed that in order for the STOIC to have been swept onto the island in the maneuver described by Perselis, the current in the deep water would have had to set in a direction of 115 degrees (East Southeast), at a rate from 5.8 knots to 9.8 knots (depending upon the divergent accounts of the ship's position, heading and course changes shortly before the stranding). Captain Patterson's opinion was that both the direction of the set and drift (rate) of this alleged current were "absurd." (Patterson Tr. at 272).

All objective evidence proves that the current in the vicinity of the Sento-Shosho Islands (including Sekibi Sho) sets to the Northeast at a rate of 2.5 knots (Exh. S-1, Japan Pilot, second page "Sento-Shosho - Caution" and third page "Outlying Inlet") (Exh. S-2,

third page "Sekibi Sho"). Mr. Ken Heiansan, a fisherman thoroughly familiar with the local ocean currents, confirmed that the current in the deep water surrounding Sekibi Sho is two to three knots setting towards the east northeast (Heiansan Tr. at 229). The Japan Maritime Safety Agency's 1974 investigation also determined that the speed of the current in the vicinity of Sekibi Sho was 2-3 knots setting towards the north northeast (Exh. B-1, third page). Hence, the master's testimony is not correct.

3. No "unchartered" reef caused the stranding of the STOIC.

The master of the STOIC also claimed he navigated the vessel too close to the island because the chart he was using did not depict a reef at the position where the vessel stranded. The master stated:

"The instant accident was caused partly because. . . of my mistaken estimate, that is to say; on the chart" [B.A. 3236] (Exh. B-2 at 30)

"I judged that the underwater shoal in the vicinity of Sekibi Sho extended only 2 cables from the edge of Sekibi Sho according to the entry shown on the chart." (Exh. B-7 at 55-57) (See also Exh. D-1 at 9 and 17).

by B.A. Chart 3236 is not credible.

However, by juxtaposing one minute of latitude (one minute of latitude being equivalent to one nautical mile) alongside the reef as depicted on B.A. chart 3236, a navigator (who would use dividers to make the same determination) would readily recognize that the reef is charted as extending about one half of a mile at the southwest point from Sekibi Sho. This was the exact location of the stranding site, i.e., right on the chart's "limiting danger line" in the southwest vicinity of the island. (See Appendix C).

Admittedly, a competent navigator would not rely on such a small scale chart to navigate in close proximity to this island. In navigating by Sekibi Sho, with 50 miles of open ocean to the West, and 100 miles of open ocean to the East, a competent navigator would pass at least 3 miles distant from the island (Patterson Tr. at 273). In fact, the master admitted that on a normal passage during daylight hours with adequate visibility, he would navigate his vessel so that it passed three miles off from Sekibi Sho (Perselis Tr. at 208-09).

Therefore, the master's claim that he was deceived by B.A. Chart 3236 is not credible.

and incompetent As a result, the only credible evidence remaining is that provided by the testimony of the unbiased Japanese fisherman and the undisputable fact that the stranding occurred during the watch of the unlicensed and incompetent "third officer" - Karakostas.

under both Mr. Heiansan stated that, from the time he first sighted the STOIC until the vessel stranded, the STOIC was always headed in a direction almost straight at Sekibi Sho (Exh. D at 4-5 and Heiansan Tr. at 237-39). Heiansan's opinion is confirmed by the master of another fishing boat, Captain Nakamura, who stated that STOIC maintained the same course from a point about five miles from the vicinity of the island until the vessel stranded (Exh. B-6 at 50, paragraphs 4 and 5).

island to Analysis of the testimony and exhibits shows that the events preceding the stranding were simple: on a clear day with calm seas and slight wind, the S/T STOIC proceeded directly (or due to slight, unnoticeable course changes shortly before impact, almost directly) towards a charted reef located close by a known and readily observable island during the watch of an unlicensed

(that while the vessel was on a course of 35 degrees

they visually observed Sekibi Sho about 8 to 9 miles

and incompetent third officer. It is self-evident that this was not the navigation of an experienced and licensed master.

B. The Officer on Watch was Incompetent

The master of the STOIC was duly licensed under both Greek and Liberian law. He first went to sea in 1948 and first began to sail as a master in 1962. All of his education and experience enabled him to navigate vessels as master for at least 17 years, reportedly without any incident, save touching bottom in one harbor.

Just as the master had repeatedly done in the past, he laid down and plotted a safe 35 true degree course line on chart B.A. 3236 at 0100 on the 19th of August, 1979 extending from a point about 9 miles off Yonakuni Island to a point about nine miles off Sekibi Sho (Perselis Tr. at 60-61). Captain Patterson testified that this planned course line was quite satisfactory (Patterson Tr. at 269-270).

However, the navigational errors made immediately preceding the stranding constituted extremely gross fault. Evaluating the testimony of the STOIC officers (that while the vessel was on a course of 35 degrees they visually observed Sekibi Sho about 8 to 9 miles

ahead and a few degrees on the starboard bow and then later at 0920 by radar fixed Sekibi Sho at just under six miles away and 5 to 6 degrees on the starboard bow), Captain Patterson stated that a competent bridge watch standing officer would have had only one choice:

"There is only one thing to do. Get out of there fast. Alter course immediately to pass at least three miles off of Sekibi Sho, either side does not make any difference, three miles off either side and nothing to close them in.

They have 50 miles to the west, 100 miles to the east. No other Island or anything showing around there. The thing is to get away from that place as fast as they can and as far as they can." (Patterson Tr. at 273)

The actions of the STOIC's navigating officer under these conditions were unreal. While visually observing this obvious (over 200 foot high) rock formation, Sekibi Sho, the navigating officer (Mr. Karakostas) allowed his vessel to proceed towards a well-charted shoal surrounding the island "without taking early and substantial action to avoid it." (Patterson Tr. at 278).

When course changes were finally made, as alleged by Mr. Obregon, states that the final course change was made by the STOIC's officers, they were very small changes,

(Exh. E, para. 4 and 13.)

"just dribbles", and were made too late (Patterson Tr. at 278).*

Captain Patterson emphasized that these actions were not taken by a competent and experienced master (Patterson Tr. at 278), but were made by an inexperienced and incompetent person.

Captain Patterson's conclusion, based on his practical experience at sea, is supported by a legal presumption. This presumption is fully described in In re Ta Chi Navigation (Panama) Corp., S.A., (EURYBATES), supra, 1981 AMC 2350 including specific examples of gross navigational errors, but the rule can be summarized as follows: A single series of events which display errors in navigation of a sufficiently aggravated nature raise a legal presumption that the navigating officer is incompetent. Faced with this proof of unseaworthiness, the vessel owner must show that it exercised due diligence to determine that this presumed incompetent person

*Even the course changes immediately preceding the stranding are controverted. The Master states his final course change at 0930 was to 008 degrees North, but the helmsman, Mr. Obregon, states that the final course change was 015 degrees North. He explains that the Master coerced him to testify less truthfully at the Japanese investigations (Exh. E, para. 4 and 13.)

was properly trained, licensed and possessed the requisite amount of experience. EURYBATES, 1981 AMC at 2357-2359; see SUMMIT VENTURE, 1983 AMC 2409, 2433,

In this case, there can be no doubt that the navigating watch officer, Karakostas, was incompetent due to the extreme nature of the navigational errors preceding the stranding and the additional specific evidence of his lack of ability.

Although Mr. Karakostas had the full duties of a watch officer, he did not possess either a Greek or Liberian license (Perselis Tr. at 41). Mr. Karakostas signed on board the STOIC, about 3 1/2 months before the stranding, in April of 1979 (Perselis Tr. 40-41). Although he had never sailed with Captain Perselis before, the master merely assumed he was competent due to his past sea experience (Perselis Tr. at 42). His only "training", if it can be referred to as such, was standing an 8-12 watch with the master which allegedly allowed the master to check his competency (Perselis Tr. at 42.) But Perselis claimed he never trusted the third mate enough to per-

mit him to make landfalls or navigate in sight of other vessels. (See: Analysis in POINT II infra.). Karakostas' lack of training may be summed up by his own admission during the Japan Casualty Hearings:

"I have been aboard the Vessel for only 3 1/2 months and I don't know the ship's particulars." (Exh. B-3 at 33).

An interview conducted by Capt. C.R. Davenport (retained by claimants), on August 19, 1979, provides an in depth picture of Mr. Karakostas' actual qualifications (Exh. QQ). Mr. Karakostas had experience at sea, but never attended a marine navigation school in Greece. The usual practice for a Greek officer is to attend such a school for two years (Exh. QQ, second page). He possessed only an able bodied seaman's certificate. He did attempt to obtain a Liberian second mate's license, but:

"Mr. Karakostas advised that he took the test in Pireaus in 1971 for a Second Mate Liberian License but did not pass. Cost was \$200.00 and test was taken in the office of the American Bureau of Shipping - Piraeus (who are authorized to give the test.) He was advised that he

had failed on two items; but does not remember which subjects were involved. He recalled that he didn't get his license and also did not get his \$200.00 returned." (Exh. QQ, third page)

There can be no stronger evidence of incompetence than a so-called second mate and watch officer admitting that he was unable to pass the examination qualifying him as a Liberian Second Mate.

C. The incompetent watch officer's acts were a cause of the stranding.

In order to bring itself within the COGSA exemption of "negligent navigation", vessel owner must prove that all of the navigational errors which caused or contributed to the stranding of the STOIC were attributable solely to the independent acts of the master, Perselis.

1. Alleged navigation procedures prior to stranding.

The master's unconvincing testimony is that he arrived on the bridge at 0800 hours (ship's time). Karakostas and the helmsman were already on the bridge (Perselis Tr. at 84). Weather was good; visibility was five miles. Speed of the vessel was 12 knots per hour (65 rpms) (Perselis Tr. at 65-66). The automatic

pilot was disengaged at 0805-0810 (Perselis Tr. at 66-67).

The Master states he first sighted Sekibi Sho at 0900 by binoculars at a distance of 8-9 miles bearing 5-6 degrees to the starboard (Perselis Tr. at 67-68). He immediately turned on the starboard radar and then took a radar fix at 0920. The radar indicated the island was 6 miles distant and 6-7 degrees to starboard (Perselis Tr. at 69). He wanted to alter course from 035 degrees to 008 degrees but several fishing vessels impeded his planned track, so he altered course to 027 degrees (Perselis Tr. at 70). At 0930, he altered course to 008 degrees and continued to make radar observations (Perselis Tr. at 72). Also at 0930, he visually estimated that if the vessel continued on its 008 degree course, it would pass about 1 1/2 miles from the island (Perselis Tr. at 72). At 0946, still on the 0800 course, the vessel grounded (Perselis Tr. at 73).

By plotting these positions (Exh. GG-1 and 2) and analyzing the Master's testimony, Captain Patterson emphasized that the courses steered were "so perfect and so correct" that they had to be fabricated. He stated, "ships just don't navigate that way" (Patterson Tr. at 280).

It is self-evident that if all these navigational precautions had actually been taken, it's inconceivable that a qualified master would have allowed his vessel to be intentionally navigated within 1/2 mile of Sekibi Sho. It strains one's credulity to accept a story that it was the master himself who made these observations, took the evasive action described and then stranded, in broad daylight, by unnecessarily navigating too close to a clearly visible island with a charted reef. (See original photographs of stranded STOIC and Sekibi Sho - Exh. 2).

2. Alleged use of radar.

According to the master's account of the event, he was relying on the starboard radar (RAYMARC 12) to navigate around Sekibi Sho. By using the "heading line" on the radar, he was able to determine that the island was 6-7 degrees to the starboard distant 6 miles. Charterer's Exh. NN-3, however, proves that the starboard radar's heading line "continually shifts left or right on the picture by as much as 3 degrees. . . This was due to "unduly worn gears between the motor and scanner." (Charterer's Ex. NN-3). Although the radio officer stated that the

*Exh. NN and Exh. NN (depicting recurring malfunctions of the gyrocompass and the auto-pilots) illustrate the sub-standard maintenance practices of the vessel owner concerning the STOIC's electronic navigation equipment.

gears should be replaced at the earliest opportunity, there is no evidence that this was ever carried out (Exh. NN 1-3 and index note). Such a condition of disrepair constitutes unseaworthiness which, if the master was relying on the radar, would constitute a contributing cause of the stranding.

It is far more reasonable, however, to accept the testimony of the Chief Mate, Skulikidis (Exh. C-3, third page) and the Helmsman, Obregon Leonel (Exh. E, paragraph 7), that the only operable radar (the starboard RAYMARC 12) was not turned on prior to the stranding. It is most difficult to believe that the master would have navigated so close to Sekibi Sho if he had observed the radar as stated.

Charterer's Exhibit NN, depicting chronic failures of both the main radar (RAYMARC 16) and the sub-radar (RAYMARC 12), provides the explanation for why the sub-radar was not turned on prior to the stranding.* It is undisputed that the main radar was inoperable due to a condition existing prior to the last load port. Therefore, the reliability of the sub-radar became critical because

*Exh. NN and Exh. RR (depicting recurring malfunctions of the gyrocompass and the auto-pilots) illustrate the sub-standard maintenance practices of the vessel owner concerning the STOIC's electronic navigation equipment.

it was the only one which remained, to some extent, operational. The master knew that if the sub-radar failed, as it had repeatedly done in the past, the vessel might not be allowed to enter the Japanese Ports (Perselis Tr. at 205). However, it is obvious from Charterer's Exh. NN that the sub-radar was unreliable and should have been replaced. An unreliable radar constitutes an unseaworthy condition. A radar is recognized as the best means of determining the actual distance from a landfall, even on a clear day, due to the inaccuracy of guessing distances visually at sea (Patterson Tr. at 273-274). From this history of recurring breakdowns, it is easy to understand why the master would be reluctant to allow the radar to be turned on. Therefore, the fact that the radar was turned off is causally related to its unseaworthy condition.

3. Alleged presence of the Master on the bridge during the critical maneuvering period.

It is also easy to understand why the master would not allow the untrained third officer, Karakostas, to operate the sub-radar. Captain Perselis commented the bridge watch at the critical "maneuvering period" prior to the stranding (Patterson at 278-279).

as follows:

"Q What was your practice at sea on the STOIC with respect to the use of radars. I am going to divide the question into several parts: first with respect to its use in general; second with respect to the use by the watch officers; and third with respect to use by you alone.

A When I was on the bridge I would turn it on. If I were not, then the chief mate would set it. And so could the second mate.

Q But not Mr. Karakostas?

A As far as Karakostas is concerned, I was always on the bridge, and if the radar was necessary, required." (Perselis Tr. at 204)

His response states a different set of rules to be applied to Mr. Karakostas. Understandably so, Karakostas was untrained and the radar was unreliable. Because the starboard radar was turned off prior to the stranding and because gross navigational faults caused the STOIC to strand, it was Captain Patterson's opinion that the third officer, Karakostas, and not the master, was on the bridge watch at the critical "maneuvering period" prior to the stranding (Patterson at 278-279).

Captain Patterson also points out that at the time of the stranding, the unlicensed third engineer called up to the bridge to find out what happened and that it was the third officer who answered. Karakostas' only instruction was "wait a minute". Then, within an incredibly short one minute, the Chief Engineer was able to descend seven decks and fifty feet from the bridge to the engine room and stop the engines (Patterson Tr. at 280, referring to Exh. B-5 at 46-47). Therefore, Captain Patterson stated:

"I don't believe the master was on the bridge until maybe she struck or shortly before. Somebody must have been up there. Maybe the master got up there in the last minute, but he certainly wasn't up there when all the maneuvering was going on." (Patterson at 281)

Reinforcing Captain Patterson's opinion are these salient facts: The stranding occurred at 0946, Sunday, August 19, 1979. Chief Engineer, Iliopoulos, testified that every day, he and the master would have coffee in the coffee room around 1000 hours (Iliopoulos Tr. at 260). Rather than drink coffee up on the bridge, he stated, they could enjoy the coffee better in the

smoking room (Iliopoulos at 260). He further stated:

"And the other reason was, it was Sunday and we would be altogether and we could kid around." (Iliopoulos Tr. at 260)

These facts completely contradict the master's assertion that he stood the entire watch with the unlicensed third officer. More importantly, if both the master and the Chief Engineer were down below in the coffee room at the time of the stranding, one could more readily understand how the stranding occurred and how the Chief Engineer arrived in the engine room so quickly.

4. Alleged non-participation of Karakostas in the navigation of the STOIC.

Setting aside the issue of whether the master was on the bridge for the entire watch and working within the parameters of the testimony, as given, it is still clear that acts of the incompetent and unlicensed third mate were a concurring cause of the stranding:

a) Karakostas was the relieving officer of the watch:

"On the morning of the 19th August 1979 I went to the bridge a few minutes before 0800 hours

ship's time which was 0900 hours Japanese local time. I took over from the Chief Officer who told me that we were steering a course of 035 degrees T. He showed me on the chart that we were using and working from a fix off a lighthouse on Yonakuni Shima timed 0100 hours ship's time. He showed me along the 035 degrees course line his 0800 dead reckoning position, which he had marked on the chart. I knew that we were making about 12 knots through the water and understood the Chief Officer's calculations." (Karak. St. to Owners, Exh. D-2 at 2 and Perselis Tr. at 64.)

b) Karakostas participated in the navigation of the vessel:

"The Master was using the binoculars to scan the horizon and shortly after 0900 hours he said that he had the island in sight on the starboard bow. At first I could not see it with my own eyes, but soon afterwards I used the glasses and also picked up the island. The Master switched on the starboard radar and shortly after he told me that the island was 6 miles away at the six miles range of the radar. A few minutes later, that is to say about 0920 hours, I took a bearing using the giro (sic) repeater on the starboard wing. It gave a bearing on the island of 038 degrees T which with a course of 035 degrees T put the island on our starboard bow." (Karak. St. to Owners, Exh. D-2 at 2)

The duties of an officer of the watch are substantially different from those of a lookout. A lookout need merely be present at the critical moment. Either he sees the impending doom or he does not. A watch officer's ability to perform, on the other hand, requires continuity of information. He requires knowledge, not only of where the vessel is going, but where it has been. This knowledge is passed on by receiving vital information from the officer of the watch being relieved. The International Chamber of Shipping (ICS) Guide enumerates his duties as follows:

"2.4 Changing over the Watch

2.4.1 The relieving Officer of the Watch should ensure that members of his

The Officer of the Watch should make regular checks to ensure that:

- (a) the helmsman or the automatic pilot is steering the correct course;
- (b) the standard compass error is established at least once a watch and, when possible, after any major alteration of course;

watch are fully capable of performing their duties....He should not take over the watch until...he has personally satisfied himself regarding:

- (a) standing orders and other special instructions relating to the navigation of the vessel;
- (b) the position, course, speed and draught of the vessel;
- (c) prevailing and predicted tides, currents, weather visibility and the effect of these factors upon course and speed;
- (d) the navigational situation including:
 - (i) the operational condition of all navigational and safety equipment;
 - (ii) errors of gyro and magnetic compasses;
 - (iii) the movement of vessels in the vicinity;
 - (iv) conditions and hazards likely to be encountered during the watch;
 - (v) the possible effects of heel, trim, water density and squat on underkeel clearance.

2.5 Periodic Checks of Navigational Equipment

2.5.1 The Officer of the Watch should make regular checks to ensure that:

- (a) the helmsman or the automatic pilot is steering the correct course;
- (b) the standard compass error is established at least once a watch and, when possible, after any major alteration of course;

- (c) the standard and gyro compasses are compared frequently and repeaters synchronised;
- (d) the automatic pilot is tested in the manual position at least once a watch;
- (e) the navigation and signal lights and other navigational equipment are functioning properly."

This essential element of continuity is the reason for the ICS rule (purportedly adopted by the vessel owner in its Instructions to the Master) that:

"The Officer of the Watch continues to be responsible for the safe navigation of the vessel despite the presence of the Master on the bridge until the Master informs him specifically that he has assumed responsibility."

Even the testimony as given proves that the master had not completely assumed responsibility for the navigation of the vessel. The third officer was on the bridge and he participated in the navigation of the vessel during the 8-12 watch on which the vessel stranded.

Karakostas does not suddenly become a non-person just because a casualty occurred. At a minimum, he

was a participating watch officer and as such, his acts

are a concurring cause of the stranding.

D. Vessel owner failed to exercise due diligence to properly man the STOIC

The vessel owner has a non-delegable duty to provide the vessel with properly qualified and duly licensed watch officers. However, the vessel owner knew at the time it signed on Karakostas as a second officer for the STOIC, that he held no license for this position (Perselis Tr. at 41-42 and Exh. B-10 at 13).

We have previously described Mr. Karakostas' lack of qualification for the position of second officer. In spite of his deficiencies, the testimony and exhibits submitted in this proceeding are devoid of any proof that vessel owner attempted to train or educate Mr. Karakostas. Yet, it is a basic obligation that the vessel owner must personally ensure that the officers and crew are competent and properly trained. The owner may not delegate its duty in this regard to the master. Tug Ocean Prince, Inc. v. U.S., 1978 AMC 1786 (2d Cir. 1978); Hercules Carriers, Inc., supra, 768 F.2d 1558, 1573-74 (5th Cir. 1985); The Bill, supra.

In fact, it is apparent from the contents of Exhibits BB and CC, that for more than 5 years prior

to the stranding, the vessel owner had consistently manned the STOIC with unlicensed, unqualified watch officers. Therefore, Southwind Shipping Co., S.A., failed to exercise due diligence to man the STOIC with a competent watch officer.

POINT II

THE STOIC WAS UNSEAWORTHY BECAUSE OF VESSEL OWNER'S POLICY OF CONSISTENTLY VIOLATING THE LIBERIAN LICENSING AND MANNING REQUIREMENTS WHICH CAUSED THE STOIC'S WATCH STANDING OFFICERS TO BE UNABLE TO COMPLY WITH IMCO'S BASIC PRINCIPLES FOR NAVIGATIONAL WATCHKEEPING, ICS'S BRIDGE PROCEDURE GUIDE AND SHIPOWNER'S INSTRUCTION MANUAL. THESE UNSEAWORTHY CONDITIONS WERE A CAUSE OF THE STRANDING. THE CARRIER FAILED TO SUSTAIN ITS BURDEN OF PROVING THAT IT EXERCISED DUE DILIGENCE TO COMPLY WITH THE AFORESAID REQUIREMENTS AND BASIC PRINCIPLES.

Charterer's Exhibits BB and CC illustrate the reckless practice, engaged in by the vessel owner, of employing unlicensed personnel as mates on board the STOIC with the full duties and responsibilities of navigation watch officers. This practice continued for at least five years prior to the casualty.

The Liberian Authorities obviously did not condone this unsafe practice. Each time a safety inspector discovered the lack of duly licensed personnel, an automatic \$100 fine per unlicensed officer was exacted against the vessel, pursuant to Section 17 of the Liberian Maritime Law (For example, see Exh. BB-4, 11th page).

While the vessel was at the load port in Norfolk, Virginia, a Liberian safety inspector conducted an inspection on June 25, 1979 and reported that the third mate, Karakostas, did not hold a Liberian or Greek license (Perselis Tr. at 46-47 and Exh. G). Perselis testified that he guaranteed to the inspector that he would be responsible for and would stand the same watch with Karakostas (Perselis Tr. at 47). Perselis claimed that the inspector agreed with his proposal; otherwise, the vessel would not have been granted permission to sail (Perselis Tr. at 47).

The master's statement (attempting to show some sort of an approval by the Liberian authorities for this unsafe practice of allowing unlicensed personnel to navigate seagoing vessels) flies in the face of unbiased documentary evidence contained in Charterer's Exh. BB. These safety inspections, deficiency notices, and fine

(1) Required Minimum Number of Deck Officers.

impositions never prevented the STOIC from sailing due to improper manning. The only recourse the Liberian authorities had at their disposal was to impose a \$100 fine per deficiency on the vessel. Although these fines were small in light of the hazard created, the imposition of such fines denotes a condemnation by the Liberian authorities of this unsafe practice (Exh. BB and Exh. G, tenth page - deficiency notice for unlicensed Karakostas on June 25, 1979).

The Liberian Requirements for Merchant Marine Personnel Certification clearly state:

"B-1 Officer License Required,
Definitions

(a) No person shall perform the duties of...navigating officer in charge of a watch...of any vessel registered under the processions of the Liberian Maritime Law, unless duly issued a license by the DCO."(Ex. PP, third page).

The shipowner's practice of employing unlicensed personnel as watch officers also violated the manning requirements in the Liberian Regulations applicable to the STOIC:

"10.292 Manning Requirements.

(1) Required Minimum Number of Deck Officers.

... (d) Every Liberian vessel other than a passenger vessel, of 1600 gross tons and over, shall have on board and in her service, in addition to her master, at least three mates, licensed in appropriate grades, who shall stand in three watches while such vessel is in navigation; but if such vessel is engaged upon a voyage in which the time of passage from port of initial departure to port of final destination is less than 24 hours, then she shall have on board and in her service at least two mates, licensed in appropriate grades, in addition to her master." (emphasis added) (Exh. HH)

These repeated violations of licensing and manning requirements caused the navigation team of the STOIC to be unable to comply with proper watch standing procedures. These procedures are set forth in a similar manner in: IMCO's Basic Principles for Navigational Watchkeeping (Exh. II), Shipowner's Instruction Manual to the Master (Exh. JJ-1), and the ICS Bridge Procedure Guide adopted by the shipowner (Exh. JJ-2,3).

These procedures were recommended by IMCO and ICS and purportedly required by the shipowner because they set forth the accepted methods for safe navigation

at sea. It is universally recognized that by failing to follow these procedures, the risk of hazardous consequences (such as collision or stranding) is unacceptably high.

Yet, when a vessel owner repeatedly violates the Licensing and Manning Requirements by providing the vessel with unlicensed watch officers, the owner is forcing the watch standing officers, including the master, to violate these basic principles of good watch standing practice.

Irrespective of whether or not the master and/or watch standing officer may be competent, the continual violation of proper watch standing procedures must occur solely due to the fact that the watch officer is unlicensed.

The events which occurred during the last voyage of the STOIC are a perfect illustration of how these procedures are forcibly broken down:

Firstly, as the STOIC was continually crewed with unlicensed officers, Liberian Safety Inspectors repeatedly reported these deficiencies and Liberian Authorities repeatedly fined the vessel for the deficiencies (Exh. BB).

Thus, by temporarily supplying a licensed officer at the next known reinspection port, the owner avoids the fine and can place the unlicensed man back into position as soon as the inspection is completed.

Thirdly, when the vessel owner is caught "red-handed" employing an unlicensed watch officer, the owner claims he will stand an entire navigation watch with the unlicensed man. This very incident allegedly occurred at the last port, when the Liberian Safety Inspection covered that Mr. Karakostas was sailing as the 8-12 watch standing officer but had no license whatsoever. Personally I claimed that he gave his guaranty to the Liberian Safety Inspection that he would continuously stand the entire 8-12 watch with Karakostas (Piraeus Tr. at 47 and 180-181).

Secondly, in an attempt to avoid these fines, evasive maneuvers were carried out by the vessel owner's shoreside representatives in concert with the masters of the STOIC. For example, in Charterer's Exh. L (a telex from the master of the STOIC to NEREUSHIP PIRAEUS dated January 1, 1979), the Master requests permission to bunker in Singapore, but reminds the owner that Liberian licenses will be required if the vessel calls at Singapore. The only reason for this concern is the obvious -- the vessel was improperly manned with unlicensed officers and, as usual, needed to avoid a Liberian Safety Inspection. Charterer's Exh. CC-8 illustrates another evasive technique utilized by the shipowner:

"During vessel's last Liberian Safety inspection in U.S.A. the Second Engineer found without any Greek or Liberian 1st assistant Enginner (sic) certificate. Vessel reinspected again for this matter in Japan and found OK. (2nd Engineer substituted (sic) temporarily at Wakayama by Ch. Engineer Gouvousis.)"

Thus, by temporarily supplying a licensed officer at requirements. On large seagoing vessels, such as the STOIC, the regulations specifically require that three duly licensed mates stand the three 8-hour watches. Thus, by temporarily supplying a licensed officer at the next known reinspection port, the owner avoids the fine and can place the unlicensed man back into position as soon as the inspection is completed.

Thirdly, when the vessel owner is caught "red-handed" employing an unlicensed watch officer, the master claims he will stand an entire navigation watch with the unlicensed man. This very incident allegedly occurred at the load port, when the Liberian Safety Inspector discovered that Mr. Karakostas was sailing as the 8-12 watch standing officer but had no license whatsoever. Perselis claimed that he gave his guaranty to the Liberian Safety Inspector that he would continuously stand the entire 8-12 watch with Karakostas (Perselis Tr. at 47 and 180-181).

Therefore, because the vessel owner supplied the STOIC with an unlicensed third officer in violation of Liberian regulations, the master has been forced to commit himself to stand the full 8-12 watch in place of the unlicensed man. Captain Perselis stated that the vessel owner knew this unsafe navigation practice was occurring on the STOIC. (Exh. B-10 at 13). This practice of allowing two qualified mates and the master to stand the three watches violates the Liberian manning requirements. On large seagoing vessels, such as the STOIC, the regulations specifically require that three duly licensed mates stand the three 8 hour watches.

This Liberian regulation is substantially similar to our United States Statute (46 USC 223) which also requires such vessels to be manned with three licensed watch officers in addition to the master. The purpose of the Liberian regulation and the United States Statute is to set a minimum standard for safety at sea (See Patterson Tr. at 276). In Pacific Coast Coal v. Alaska Steamship Co. (DENALI), the Court of Appeals for the Ninth Circuit found that the statute, requiring three licensed mates to stand three 8 hour watches, was a positive command of a safety statute designed to prevent fatigue in the navigating officer controlling the navigation of the vessel. DENALI, 1940 A.M.C. 877:

"It is matter of common knowledge that safety in anything which requires human efforts depends - in the last analysis - on the human being. A weary man is infinitely more dangerous than a defective pipe or an obscured light, because he is unfit to discover the unfitness of the inanimate object."

In the DENALI, it was the vessel owner's custom to have the navigating officers stand a 12 hour watch in two 6 hour watches per day during the entire voyage

on which the stranding occurred. DENALI at 878. The court held "that the owner consciously sent the vessel to sea in an unseaworthy condition with respect to the safe carriage of sailors, passengers and cargo because of the violation of this statute for safety against fatigue in navigation."

Under the same rationale, a Master who must stand the full 8-12 watch of an unlicensed third mate is forced into a hazardous condition of fatigue. In fact, the Master testified that only a couple of days prior to the stranding he had been on the bridge in control of navigation for a solid two day period while the vessel was passing through the Malacca-Singapore Straits (Perselis Tr. at 123-124.)

Fatigue of the Master, however, is not the most important unsafe consequence of attempting to operate a vessel with improperly licensed officers. Eventually, due to the varied and numerous responsibilities of a Master, a breakdown of proper watch standing procedures must take place.

Captain Patterson detailed the many duties of the Master which precluded him from being able to stand a full watch (Patterson at 276). His conclusion was:

"When the Master has to stand a watch on a large vessel, he is not going to be - not going to have the time to do his own duties properly. A Master has to be available 24 hours a day, 365 days a year. Any time he is called, he can't be on a watch with a specific limited time." (Patterson at 276).

It was Captain Patterson's opinion, therefore, that by attempting to carry out the duties of both a full time Master and watch-stander, the Master was unable to properly carry out his duties as a watch standing bridge officer (Patterson at 277). Patterson's opinion is confirmed by IMCO:

"10. Whoever is in charge of a navigation watch shall not be assigned or undertake any duties which would interfere with the safe navigation of the ship."
(Exh. II, at 6)

As a necessary consequence of being overburdened, the Master had to share some of the watch standing duties with the unlicensed third officer. Although Perselis may have initially promised to stand the full watch with Karakostas, we know that as the voyage proceeded he was unable to fulfill his

commitment: stated to the Japanese Authorities:

"In Newport News Virginia we were visited by the Liberian inspectorate authorities...I said that in view of the fact that he was uncertificated I would take special care and would cover his watches. In fact I was on the bridge for most of the time during his watches which were from 8.00 until 12.00 meaning from 08.00 hours until noon and then from 20.00 hours until midnight. In practice when we were in the open sea away from land and with no other vessels in sight I was happy to leave the Officer to keep the bridge on the basis that he would call me whenever he thought it was necessary due to the approach of another vessel or anything of that sort." (Perselis St. to Owner, Exh. D-1 at 6)

Also the helmsman, Leonel Obregon, stated:

"It was the practice of the Master of the 'STOIC' not to remain for a complete watch on the bridge, going to it only for the time necessary to perform any functions and he would then return to his office." (Exh. D, para. 16)

The Chief Engineer confirmed this practice when he admitted that every day at 1000 hours, it was customary for he and the Master to have coffee and "kid-around" down in the coffee room (Iliopoulos Tr. at 260). Finally,

Karakostas stated to the Japanese Authorities:

"During the course of navigation we take duty on the bridge, fix the ship's position confirming that the vessel is navigating on the course set by the Master. My duty on the bridge is twice a day from 8:00 to 12:00 both in the morning and the afternoon."
(Exh. B-4, p.34, para. 5)

Therefore, Perselis eventually relinquished control back to the very unlicensed officer which the vessel owner had personally nominated for standing the 8-12 watch. Indeed, it was the custom of the vessel owner for the past five years to require that masters of the STOIC allow the vessel to be navigated by at least one unlicensed watch officer. (Exhs. BB and CC.)

Towards the end of a long voyage, the interplay between the mental impressions of the Master and that of the unlicensed third officer becomes critical. The Master may still be attempting to exert control over the unlicensed watch officer, but his presence on the bridge during the 8-12 watch is, by necessity, lessening in duration. On this particular voyage, Perselis must have been doubly pre-occupied because the vessel was

heading for drydock after offloading cargo and all cleaning operations, paperwork, etc., would have to be completed before the voyage ended (See Exh. T).

By the time this long voyage was coming to an end, the Master and the third mate were more or less sharing the duties of the watch standing officer, but the Master was constantly on and off the bridge. Consequently, no one individual could specifically assume control. Also, no one individual had all the knowledge necessary to competently stand the watch because no one individual had complied with safe watch standing procedures for:

- 1) Properly changing over the watch (Exh. JJ-3-ICS, para. 2.4; Exh. NN - IMCO; Exh. JJ-1, 2 - Shipowner's Instructions).
- 2) Conducting Periodic Checks of Navigational Equipment (Exh. JJ-3 - ICS, para. 2.5; Exh. NN-IMCO; Exh. JJ-1, 2 - Shipowner's Instructions).
- 3) Keeping a Good Lookout (Exh. JJ-3 - ICS, para. 2.2; Exh. NN-IMCO; Exh. JJ-1, 2 - Shipowner's Instructions).

As a result, no one was in control, which caused confusion, gross navigational errors, and serious deviations from safe navigation practices such as the failure to post a bow lookout.

The duty of a lookout is of the highest importance, The ARIADNE, 80 U.S. 475, 478-79 (1861), and, consequently, a proper lookout should have no other duties. Northern Petroleum Tank Steamship Co., Ltd. v. City of New York (DONGAN HILLS - TYNEFIELD), 1961 AMC 414 (S.D.N.Y. 1960), Griffin on Collision §108 (1949).

Due to the breakdown of proper watch standing procedures, a proper lookout was not posted. Rather, Perselis, Karakostas and the Helmsman stated that, although they were attending to other duties, they were all attempting to "keep lookout together." Ex. B-3, p. 35, para. 6 (Karakostas); Ex. B-4, p. 41, para. 7 (Helmsman); Ex. B-2, p. 24, para. 17 (Perselis).

There is the consideration that if a proper lookout had been specifically posted (with no other duties but to be a lookout), as soon as the island was observed, he would have noticed (at a time early enough to maneuver evasively):

- 1) The tide races which occur 6 cables west-south-westward of the inlet. These races are described in the Japan Pilot (Ex. S-1, third page) and the U.S. Sailing Directions (Ex. S-3), third page (Akao Sho-tide rips form about 1200 yards WSW of the inlet.) A report by the lookout to a competent navigator would cause him

because the owners supplied the STOIC with unlicensed watch officers. Hercules Carriers, supra, 768 F.2d 1113, 1164-71

to believe that a reef of some sort was breaking the flow of the water. In fact, this is the very location of the stranding.

- 2) The hand signals given by a seaman on the fishing vessel, SHOEI MARU #3, to warn the STOIC to avoid the reef area. (Heiansan at 239-242)

We must reiterate that the circumstances leading up to this casualty strongly indicate that the Master was not on the bridge of the STOIC at the critical maneuvering period prior to the stranding (Patterson at 280). No doubt what happened was that Karakostas was supposed to be used as little more than a lookout, because of his limitations. But Captain Perselis was only occasionally on the bridge in charge of the watch. There were bound to be gaps in his coverage of the 8-12 watch and Sekibi Sho was such a gap. But even assuming the Master was "present" on the bridge, he was not in control of the bridge. With the prevailing practice, there was such a breakdown of safe navigational watch standing procedures, that errors by the "navigation team" were inevitable. All of these errors - improper use and maintenance of radars, improper posting of lookouts, improper bridge relief and turnover procedures, grossly inadequate navigational maneuvers preceding the stranding - resulted from the personal negligence of the vessel owner (or unseaworthiness) because the owners supplied the STOIC with unlicensed watch officers. Hercules Carriers, supra, 768 F.2d 1558, 1566-74

and 1577; see also Ta Chi Navigation, supra, 513 F.Supp. at 158.

In Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978), the Court of Appeals for the Second Circuit was faced with an analogous, unsafe navigation system. The Tug OCEAN PRINCE was sent on a voyage up the Hudson River manned by two "potential" captains. One Captain (Reimer) was licensed but inexperienced and incompetent insofar as Hudson River piloting was concerned. The other Captain (Kiernan), however, was licensed, experienced, and competent. The vessel's management never instructed either of these individuals as to who was to be the Captain and who was to be the Mate. As a result, Kiernan and Reimer each assumed that he was the Mate and the other was the Captain. Although the inexperienced Captain had the helm at the time of the stranding, counsel for vessel interests attempted to exonerate the vessel owner by stating that the experienced Captain could have taken over the wheel if a request had been made. The court refused to accept this excuse and held that the vessel's management clearly failed in its duties to exercise due diligence and sent out the ship in an unseaworthy condition because it was not properly manned. The court found that the vessel's management had a non-delegable duty to provide a Captain and crew and it seriously failed in that duty by sending the OCEAN PRINCE on a voyage

without appointing someone (Kiernan or Reimer) as captain in command. This failure resulted in "an unfortunate set of circumstances", which created confusion. While the tug was proceeding up the river pushing the oil-laden Barge NEW LONDON, the barge struck a charted rock outside the channel because Captain Reimer failed to see a channel buoy and a range light on an island ahead. The court held that the grounding did not occur because of a single separate incident. It was the result of an accumulation of acts, all of which originated with Red Star's [vessel owner's] management, resulting in an easily foreseeable casualty. Therefore, the owner's actions were considered as causative when establishing fault in the grounding of the barge." Tug OCEAN PRINCE at 1158.

Similarly, in the STOIC case, the vessel owner's practice of consistently manning the STOIC with unlicensed watch officers forced the master of the STOIC into a position of attempting to share the duties of watch officer with the unlicensed Karakostas. As in the Tug OCEAN PRINCE case, no one can point out a single navigational error which caused the STOIC to strand. Rather the grounding of the STOIC occurred as a result of an accumulation of acts, all of which originated with the vessel owner's policy of

violating the Liberian licensing and manning requirements by consistently providing the vessel with unlicensed watch officers. Therefore, the vessel owner's actions must be considered as causative when establishing fault for the grounding. The vessel interests failed in their duty to exercise due diligence by sending out the STOIC in an unseaworthy condition, improperly manned for her long voyage.

CONCLUSION

Southwind Shipping Co., S.A. is liable to charterer-cargo claimants. The vessel owner failed to establish that negligent navigation caused the stranding. The sole, or at least concurring, cause of the stranding was unseaworthiness of the STOIC. The vessel owner failed to exercise due diligence to make the vessel seaworthy at the inception of the voyage.

The issue of whether vessel owner is entitled to Limitation of Liability according to U.S. Statutes may be decided by the United States District Court for the Southern District of New York.

Therefore, Claimants are entitled to a recovery in full of their claims in the amount of \$9,040,687.75.

APPENDIX A

In addition, Claimants are entitled to interest from August 19, 1979 at the prevailing rate (See Appendix A) plus reasonable costs and attorneys' fees.

Respectfully submitted,

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Charterer-Cargo
Claimants
14 Wall Street
New York, New York 10005
(212) 732-4646

DOUGLAS A. JACOBSEN
STEPHEN V. RIBLE

Of Counsel

$30,919.59 \div 13.812684$ Average Daily
2,238 Interest Rate

$2,238 \div 365 \times 13.812684 = 84.710961\%$

INTEREST DUE CLAIMANTS - 84.71% as of Sep. 30, 1985

*Source - Bankers Trust Company, Citibank Corp.

APPENDIX A

Interest Prime Rate Calculation August 16, 1979-September 30, 1985

Year	*Average Annual Rate	Number of Days	Cumulative Interest Rate
1979 (8/16-12/31)	14.25%	138	1,966.5%
1980	15.212432%	366	5,567.75%
1981	18.863014%	365	6,885%
1982	14.821918%	365	5,410%
1983	10.793151%	365	3,939.5%
1984	12.028005%	366	4,402.25%
1985	10.067766%	273	2,748.5%
		<u>2,238</u>	<u>30,919.5%</u>

$$\frac{30,919.5\%}{2,238} = 13.815684 \text{ Average Daily Interest Rate}$$

$$2,238 \div 365 \times 13.815684 = 84.710961\%$$

INTEREST DUE CLAIMANTS - 84.7% (as of Sep.30,1985)

*Source - Bankers Trust Company, Citibank Corp.

APPENDIX B
KARAKOSTAS' STATEMENTS CONTRADICTED

Karakostas' Statement

1. When the vessel was 5-6 miles from Sekibisho, "I thought the vessel was proceeding considerably close to the island. When I thought I should mention this to the Master, the Master fixed the ship's position . . ."

(Exh. B-3, page 35)
 (emphasis added)

2. "When the distance was about 1 mile [from the STOIC to Sekibisho] the 'A' Engineer [Iliopoulos] came on the bridge and said to the Master 'Captain, are we passing too close to the island?'"

(Exh. C-4)

3. "The Captain pointed out a group of fishing vessels which were near the Island and heading from starboard to port of the vessel. All boats clearly indicated by proper signals that they were fishing."

(Exh. QQ) (emphasis added)

Contradictory Statement

1. KARAKOSTAS:

"On our new course (008°T) it seemed to me that we would pass clear over 1.5 miles to the west of the island and at no time did I have the slightest apprehension."

(Exh. D-1, page 3)

(emphasis added)

2. ILIOPOULOS:

As the vessel was approaching Sekibisho, Iliopoulos said, "I had absolutely no sense of danger and in fact was feeling relaxed and looking forward to having coffee with the Captain."

(Exh. D-4, page 2)

(see Iliopoulos Tr. at 259)

3. PERSELIS:

"Q. Were they [the fishing boats] showing any signals?"

A. No, they had no signals."

(Perselis Tr. at 132)

(emphasis added)

4. "Before we reached the Sekibisho Island, the Master saw it in the Radar at a distance of 24 miles."
(Exh. C-4) (emphasis added)

5. "At about 0930, we went further to port on to 008°T [before impact]."
(Exh. D-2, page 3)

6. At 0920-0930 when the STOIC was 4-6 miles from Sekibisho, Karakostas stated that "4-5 small fishing boats obstructed" the STOIC evasive maneuvers.
(Exh. B-3, page 35)
(emphasis added)

7. "Question: Were on board the vessel's charts of the area and if all the navigation instruments operated normally during the time of the casualty?

Answer: Yes, there were charts and all the instruments were operating normally." (emphasis added)
(Exh. C-4) (See also B-3, page 38, para. 11).

4. PERSELIS:
"The Master stated that he first turned the star-board radar on when the vessel was only 8-9 miles away from the island!"
(Perselis Tr. 67-68) (emph.ad)

5. OBREGON:
"The helmsman stated that the final course change was 015°, before impact."
(Exh. E) (emphasis added)

6. JAPANESE FISHERMEN:
No fishing boats obstructed the STOIC evasive maneuvers.
(See analysis in Brief at 34-36).

7. PERSELIS:
The Port (or Main) Radar was "completely out of order."
(Perselis Tr. at 49)
(emphasis added)

APPENDIX C

Sekibi Sho danger limiting line photocopied (from BA Chart 3236) against one minute of latitude.

