NEGLIGENCE OR INCOMPETENCE: GROUNDING OF THE CMA CGM LIBRA

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1 Facts

On 8 March 2019, Justice Nigel Teare of the Admiralty Court in England, handed down his decision in *Alize 1955 & Anor v Allianz Elementar Versicherungs AG & Ors.*[1] It concerned the grounding of the laden container vessel *CMA CGM Libra* outside the buoyed channel during its outward passage from the port of Xiamen, China, shortly before 0235 hrs on 18 May 2011. Justice Teare found the vessel's master to be negligent. Although the majority of cargo interests paid their General Average contributions, a small minority refused to contribute based upon, inter alia, unseaworthiness, lack of due diligence and negligent navigation. If the master had been found to be incompetent, the vessel would have been unseaworthy at the start of the voyage and the minority of cargo interests would have been successful. The purpose of this casenote is to consider the master's actions leading to the grounding; the finding that the master was negligent and to offer a reasoned argument as to why the master should have been found incompetent.

The buoyed channel which the vessel had navigated, incorporated a fairway marked on the chart by pecked magenta lines on both sides.[2] The vessel had sufficient "UKC in the channel".[3] (Under Keel Clearance is the depth of water below a vessel's keel and it ensures that a vessel has sufficient water for safe navigation). The master had deliberately navigated the vessel out of the buoyed channel resulting in the vessel grounding outside the channel. (The judge and the two experts used the terms *buoyed channel* and *buoyed fairway* interchangeably; fortunately, nothing turns on these terms; this casenote uses the term *buoyed channel*). The passage plan had been prepared by the second officer[4] and it recorded the master's approval on 17 May 2011.[5] The courses to be made good had been laid within the buoyed channel.[6]

2 The Judgment

The master gave oral evidence at the trial in January and February 2019.[7] The passage plan required the vessel to pass buoy 14-1 to starboard; however, the master's decision to pass buoy 14-1 to port was explained in the judgement as:[8]

> The master is reported as having explained his decision on the very day of the grounding in these terms:
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> Approaching the buoy no. 14-1, I decided to leave it in Port side (because upon arrival in Xiamen the day before, north-west bound, the VTS warned me that there is shallow water ahead on the East of the channel). When I tried to re-enter the channel today, nearby Buoy 14-1, the vessel was steering with difficulty due to the deep draught and with trim zero. I noticed that the vessel is not responding fast enough to come back to port and in order to avoid the awash rocks ahead I tried to go ahead and remain west of the Jiujia rocks, to follow a route outside the channel as the chart was showing depths of 40-35 metres ahead, with the intention to rejoin the channel after that.

The master's decision to deliberately navigate outside the buoyed channel is difficult to accept because he had to know that, neither the chart, nor the port authority responsible for the chart, guaranteed the depths of water outside the buoyed channel.

While the judgment referred to notice NM 6274(P)/10 regarding minimum depths in the buoyed channel,[9] the content of the notice was not relevant to the grounding. Its inclusion is to illustrate the opinions of the two experts:

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1 [2019] EWHC 481 (Admlty).
2 Ibid [14] (Teare J).
3 Ibid [35] (Teare J).
4 Ibid [25] (Teare J).
5 Ibid [28] (Teare J).
6 Ibid [30] (Teare J).
7 Ibid [4] (Teare J).
8 Ibid [45] (Teare J).
9 Ibid [51] (Teare J).

Captain Whyte for the owners and Captain Hart for the cargo interests, and the judge's comments on their opinions:[10]

> Captain Hart also understood the notice to warn mariners that depths less than those charted existed. In his opinion the prudent mariner would conclude that it was unsafe to navigate outside the fairway. The master accepted when cross-examined that NM 6274(P)/10 contained "a clear warning … that if you leave the dredged fairway you may encounter uncharted shoal areas." Captain Whyte's opinion was not so clear cut. In his opinion a prudent mariner would give "due weight" to the "warning" in the notice to mariners but would consider that warning in conjunction with the information on the chart that the survey on which it was based was carried out in 2003, which meant that "they shouldn't be that unreliable".
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> With regard to this conflict of expert opinion I prefer and accept the opinion of Captain Hart. Paragraphs 2 and 11 of the Notice to Mariners contain both a warning to mariners that it is unsafe to rely upon charted depths and advice as to the least depth in the fairway. When read together by an ordinarily prudent mariner they advise that it is safe to navigate within the fairway having regard to there being a least depth of 14 metres but not outside the fairway where no information is given as to the least depth and where there are "numerous" depths less than those charted. Captain Whyte's approach (and counsel's submission) appears to me to be one which invites the ordinary mariner to discount the warning in NM 6274(P)/10. Captain Whyte accepted that NM 6274)P)/10 was "a crucial" and a "paramount" document. If so it is very difficult to understand why he had such difficulty in accepting that the prudent mariner would understand it as a warning not to rely upon the charted depths in the Admiralty chart.

The above extracts show that, according to Captain Hart, a prudent mariner would not navigate outside the buoyed channel; the judge accepted the opinion.

In the context of vessels navigating within the buoyed channel, the judge observed:[11]

> Further, the AIS evidence for large vessels using the fairway in 2010-2012 which was collated by Captain Whyte showed many vessels outside the magenta lines but within the buoyed channel …

In noting that the course on the chart required the vessel to pass buoy 14-1 to starboard, the judge stated:[12]

> There is a dispute as to whether the master's decision to pass buoy 14-1 to port, and so leave the buoyed channel, was negligent. Captain Whyte expressed the opinion in his first report that it was prudent for the master to seek to avoid the shallows near buoy 14-1. …. In the joint memorandum he said that the master was "entitled to leave the Fairway for any navigational reason within the available safe water." In his supplementary report he said that "if there was sufficient water, which there was, then the master was perfectly entitled to increase the passing distance of the charted shallows around buoy 14-1." By contrast Captain Hart expressed the opinion that the master was not aware of the "increased depth in the Fairway and the newly advised shoal soundings outside the Fairway." In the joint memorandum he expressed the view that "the actions of the master with regard to planning and execution of the Vessel's outward passage were not those of a competent master" and that it was "a gross error of navigation" to deviate from the planned track. In his supplementary report he maintained his opinion that "the Vessel should have remained in the charted Fairway, as departing from the Fairway introduced significant and unnecessary navigational risk."

Captain Hart described the master's actions as not being those of a *competent master*. Captain Whyte opined that the master could have left the buoyed channel, despite the data showing that none of the vessels that had navigated the buoyed channel between 2010-2012, had left the channel.

The judge held that the master's decision to navigate outside of the buoyed channel was negligence:[13]

> I therefore consider that the master's decision to depart from the passage plan and to navigate outside of the *buoyed* fairway was negligent, being a decision which a prudent mariner would not have taken.

The judge declined to find the master incompetent:[14]

> The Cargo Interests invited the court to infer from the master's negligence (in failing to ensure a proper passage plan, in failing to navigate by reference to the paper chart, in deciding to navigate outside the buoyed

[10] Ibid. [52 & 53] (Teare J).
[11] Ibid [67] (Teare J).
[12] Ibid [44] (Teare J).
[13] Ibid [54] (Teare J).
[14] Ibid [122] (Teare J).

> fairway and in failing to advise the second officer why he was doing so) that he was incompetent. I am not satisfied that this would be a proper inference to draw. Indeed there is much evidence that he was a competent master. He had 30 years' experience at sea, including 16 years with the Owners and 8 years in command of containerships. He had been selected by the Owners to take command of a newly built containership. It is improbable that he was incompetent. The manner in which he responded to questions in the witness box did not suggest that he was incompetent.

It would have benefitted Admiralty and maritime law if the finding of negligence, rather than incompetence, had been justified with relevant case law.

3 Actions by a Master That Could Be Considered Negligence

It is recognised that a competent master could be negligent. Some acts of a master that, in the writer's opinion, fall under the rubric of negligence, could be a sudden increase in vessel speed causing the vessel to squat deeper and perhaps touch bottom in a channel; a manoeuvre commenced too early or too late, causing the vessel to ground; and misjudging the speed of the current, causing the vessel to ground.

4 Could The Master's Deliberate Action Be Considered Incompetence

The issue as to whether the master's action of deliberately navigating the vessel outside the buoyed channel could constitute incompetence, should be considered in the context of what the master should have known about such navigation. A competent master had to know that courses *approved* in a buoyed channel, must be followed to ensure the safety of the vessel. Consequently, the master's action of deliberately navigating the vessel outside of the buoyed channel demonstrated his lack of knowledge regarding the consequences of such navigation viz the certainty of the vessel grounding outside of that buoyed channel.

5 Case Law on Incompetence of Masters

The extracts from case law below indicate the circumstances in which masters have been found to be incompetent. In *Standard Oil Company of New York v The Clan Line Steamers Ltd (The Clan Gordon),*[15] the master of a turret constructed vessel incorrectly transferred ballast with a homogenous cargo on board, causing the vessel to capsize. That the owners, aware of the dangers of such a transfer yet failing to communicate same to the master, was not relevant. Lord Atkinson said:

> It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does that principle not apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarity of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage? There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each renders the master unfit and unqualified to command and therefore makes the ship he commands unseaworthy.

Lord Atkinson's comments about the master being *unfit and unqualified to command* ignored the master's qualifications; the comments were quoted by Hewson J in *The Makedonia:*[16]

> In considering efficiency the matters to be considered, in my view, are not limited to a disabling want of skill and a disabling want of knowledge. A man may be well qualified and hold the highest grade in certificates of competency and yet have a disabling lack of will and inclination to use his skill and knowledge so that they are well nigh useless to him.

The reefer vessel *Star Sea,*[17] became a CTL when a fire in its engine room burned out of control because the master did not have proper knowledge in the use of the CO_2 extinguishing system. Tuckey J had this to say about the master:[18]

> The CO_2 system was the most potent weapon to use in a fire-fighters' armoury. Knowledge of when and how it should be used was essential. The master's conduct demonstrates to my mind a massive ignorance of these essentials which can only be characterized as incompetence. Mr George Kollakis accepted that the master's

15 [1924] AC 100 at 121

16 [1962] 1 LR 316 at 335.

17 [1995] 1 Lloyd's Rep 651.

18 Ibid [608] Tuckey J.

> decision to discharge only half the CO_2 bottles was an incomprehensible mistake which suggested that he did not have the required level of competence…. Due to this incompetence I think the vessel was unseaworthy.

In the appeal from Tuckey Js decision, Leggatt LJ confirmed that a single act by a master could constitute incompetence: *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)*:[19]

> What is submitted in the skeleton argument on behalf of the plaintiffs is that "a finding of unseaworthiness through the incompetence of a crew member requires a series of acts below the standard to be expected from that person" reliance being placed on a passage in the judgment of Mr Justice Hewson in *The Makedonia.* It is true that in *The Makedonia* (sup) Mr Justice Hewson found at p 336, … *a shocking history of sheer inefficiency, a succession of negligent acts … amounting to a state of inefficiency far beyond casual negligence* … but we can find nothing to support the proposition that a series of acts must always be necessary to establish incompetence or inefficiency.
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> Indeed at an earlier stage of the judgment, Mr Justice Hewson quoted the well known passage from Lord Atkinson's speech in *Standard Oil Company of New York v The Clan Line Steamers Ltd (The Clan Gordon)* (1923) Ll L Rep 120; [1924] AC 100, referring to Lord Atkinson's view that "disabling want of skill and disabling lack of knowledge" each equally renders the master unfit and unqualified to command. It seems to us that it must be possible, in certain circumstances, to draw the inference from one incident that someone had a "disabling lack of knowledge".

In the appeal to the House of Lords, *Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited & Ors* (*The "Star Sea"*), Lord Hobhouse said:[20]

> The judge found that the failure to use the CO_2 earlier and the failure to use all 4 banks of bottles at once was attributable to the incompetence of the master in that he was ignorant of what was required for the successful use of the CO_2 system. He held that this disabling lack of knowledge on the part of the master amounted to unseaworthiness. (*Standard Oil Co. of New York v Clan Line Steamers* [1924] AC 100).

The car carrier *Eurasian Dream* (*Papera Traders Co Ltd & Ors v Hyundai Merchant Marine Co Ltd & Anor* [2002] 1 LR 719) became a total loss, when a car on the vessel caught fire and burned out of control. The master claimed not to have instructions or knowledge on how to fight such a fire. The judgement noted in the paragraphs extracted below, the master's incompetence due to his ignorance of the hazards and risks of fire on a car carrier, and his failure to ensure the crew were instructed and drilled in fighting fires:

> [150] The *Eurasian Dream* was not in a suitable condition and suitably manned and equipped. Although it is convenient to categorise the findings of unseaworthiness under three headings (The Vessel's Equipment; Competence/Efficiency of the Master and the Crew; and Adequacy of the Documentation Supplied to the Vessel), I emphasise that these findings overlap and should be seen as one cumulative set of deficiencies.
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> *Competence/Efficiency of the Master and the Crew*
> (7)The Master and crew were ignorant as to the peculiar hazards of car carriage and car carriers and the characteristics and equipment of the *Eurasian Dream.* In particular, there was:
> (a) general ignorance of the fire hazards involved in the carriage of vehicles on a car carrier. For example, the Master did not appreciate that there were special fire risks when the vessel was in port during cargo operations.
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> (8) The crew were improperly or inadequately trained in fire fighting:
> (e) The failure to conduct such drills or to provide such instruction compounded the incompetence of the Master and crew in relation to such fundamental safety matters.

6 Qualifications and Experience Not Relevant to Incompetence

The judges in the cases extracted above, ignored the qualifications and experience of the masters in question. This is appropriate because, if qualifications and experience governed a finding of incompetence, it would result in an untenable situation where judges would establish varying levels of qualifications and experience to support their findings of incompetence.

[19] [1997] 1 Lloyd's Rep 360, 373–4.
[20] [2001] 1 Lloyd's Rep 389.

7 Master's Action Should Have Been Considered Incompetence

The earlier mentioned case law found the masters to be incompetent based upon attributes such as *ignorance*, *lack of skill* and *lack of knowledge*. The action of the master of the *CMA CGM Libra* demonstrated one or more of those debilitating attributes when he deliberately navigated the vessel outside the buoyed channel. Such navigation was certain to result in the vessel grounding – which it did. It is therefore difficult to comprehend how his action could not be considered incompetence.

It bears reiterating that the factors that Justice Teare relied upon, to decide that the master was *not incompetent* were: the master's 30 years sea experience with 8 years in command; his selection to take over a new building; and his responses in the witness box. These factors could not act as a bar to incompetence because they did not affect the master's lack of knowledge that, deliberately navigating the vessel outside the buoyed channel, would result in its grounding. The judge should have justified his finding that the master was *not incompetent* with relevant case law that would have enhanced the tapestry of Admiralty and maritime law.