

# **Litigation Mitigation**

- **What is Litigation Mitigation?**

- The ability to reduce your companies liability due to litigation following personal injury or accidents including collisions.

- I believe that through my work testifying as an expert witness I have been able to help protect my company against frivolous lawsuits through adapting and refining policies, procedures, and guidelines.

- **What's an expert witness?**

- Someone with an extensive background in the Maritime business with an emphasis on sea going experience, vessel management, safety in the workplace, knowledge of bridge resource management, and rules of the road.

- **Not really any different that most of you here.**

- **Why am I telling you about it?**
  - **SOME LESSONS TO BE LEARNED!**

- **In Jones Act cases the deck is stacked against the employer.**

- **Historically because their work exposes them to the “Perils of the Sea” Jones Act was designed to be “Solicitous to Seaman”.**

**• Jones Act Negligence is described as “Failure to use reasonable care which contributes in any way, NO MATTER HOW SLIGHT, to injury.”**

- **Allegations that are most common to a Jones Act Negligence and Unseaworthiness case are:**

1. Adequate training was not provided
2. The injured party was not provided a safe place to work
3. Inadequate safety program
4. Failure to implement or follow company safety program
5. The Tug was undermanned

**I adopt the ISM Mantra:**

- **Say what you do**
- **Do what you say**
- **Prove it.**

- **How do you “Say what you do?”**

- **Can you make your procedures too difficult to achieve?**

- **There can be a big difference between Employee Standards and Legal Standards**
- **Remember your legal duty is to exercise reasonable care. Most responsible companies exceed this requirement.**

- **Companies are often penalized for setting very high standards and not complying with them.**

**How do you “Do what you say”**

- **First thing is train your employees**
  - Do they meet with the elements CFR title 29 Parts 1910,1915, 1918,
  - Does your safety management system meet the requirements of
    - ISM
    - RCP
    - OSHA training

- **Second is Safety Meetings and Drills**

- Back safety and lifting techniques
- Slips trips and falls
- Situational awareness
- Fall overboard prevention
- Heavy weather precautions
- Hypothermia
- Vessel access
- Life raft use and care
- Line handling
- Ladder safety
- Winch use

- **Vessel Orientation**

**•How do you “Prove it?”**

## •Documentation is critical in litigation context

- In any significant lawsuit filed by a competent counsel they'll request all of your records.
  - If you don't have these documents, the jury will likely conclude your safety program is inadequate. It's no defense to say: "We do safety meetings, but we don't record all of them" the jury doesn't believe it!

# **Favorite Legal Lessons learned**

# **Moored Crewboat**

# Shadow Program

**12 hour rule.**

- With regard to the 12 hour rule 46 CFR 15.710 states: “it is the responsibility of the Master or person in charge to insure that these limitations are met.” Do your captains know this?

- Make sure you have a policy and Captain recognizes his authority to use certain “Best Management Practices” to adhere to policy. Including allowing the master the discretion of delaying sailing or ceasing operations in order to comply with the 12 hours rule if no other means of assistance is available.

- **Use of exercise equipment**
  - If you have equipment on board make sure you have procedures for safe use.

- **Establish Physical Standards for all crew members**

- Have a licensed medical job analyst look at all the crew positions
  - Plaintiff lawyer can't claim weights or wires are too heavy.
- Physical aptitude test pre hire

**What next down the road?**

- **Watch Standing and Lookout Procedures – The industry practice of one person wheelhouse could be threatened.**

- This practice was recognized and approved by Congress when it adopted Inland Rule 5:
- On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and *towing vessels*, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. It is not the intent of these Rules to require additional personnel forward, if none is required to advance safety.
- Senate Report, No. 879, 96<sup>th</sup> Congress, 2<sup>nd</sup> session 7-8 (1980) (emphasis added).