

# Can you be ordered off your vessel?

*An admiralty lawyer examines a recent decision in a lawsuit against the Coast Guard*

By John P. Love

On the morning of Nov. 2, 1997, Northern Voyager, a 144-foot factory trawler, was proceeding a few miles off Gloucester, Mass., in 6- to 8-foot swells when she started to flood through her starboard rudder tube, after the rudder had fallen off. The master radioed the Coast Guard and requested pumps.

The Coast Guard responded immediately with three vessels, and as soon as the first vessel arrived evacuated eight crewmembers who had requested rescue, leaving on board the master, engineer and first mate. Two petty officers boarded Northern Voyager with pumps to render assistance.

could have been saved.

Indeed, after Northern Voyager was evacuated she remained upright for 55 minutes and afloat for some time thereafter. The District Court granted summary judgment dismissing these claims, and the plaintiffs appealed to the U.S. Court of Appeals for the First Circuit.

To put this incident into perspective, there are no questions about bravery in the face of perils of the sea. The Coast Guard put to sea when requested, boarded with equipment to render assistance, and in the end rescued all on board the trawler. The general legal principal governing rescue missions is that the decision to undertake a rescue is discretionary, but once the Coast Guard ac-

The dissenting judge pointed out, "The Coast Guard, or its predecessors, has been with us since the inception of the Republic. Yet, in all of its various forms there is not a single reported case, not a shred of documented evidence, not an iota of coherent legislative history, sanctioning the exercise of the extraordinary executive powers claimed by the Coast Guard in this case."

The dissent also states, "The new, misguided doctrine promoted by the government in this appeal will have far-reaching implications for the maritime and marine insurance industries. At a minimum, it will result in a shift in the decision-making responsibility for the safety and salvage of a ship from the

son ... to afford such aid to distressed navigators as their circumstance and necessities may require; and such public vessels shall go to sea prepared fully to render such assistance."

The dissenting judge in this case said that the authority granted by this statute and later statutes was only to "aid" navigators as "their" necessities required, and nothing in these statutes granted the Coast Guard authority to force a master to evacuate his vessel, at least not under the circumstances of the loss of Northern Voyager.

The saga of the loss of Northern Voyager isn't yet completely written. According to the U.S. Court of Appeals, when the Coast Guard sailed to the aid



As the 144-foot factory trawler, Northern Voyager, foundered off Gloucester, Mass., a Coast Guard crew removed the fishermen, then watched the vessel head for the bottom.

The pumps stemmed the flooding but didn't stop it, and Northern Voyager developed a list to port. The Coast Guard on-scene coordinator was concerned that possible progressive flooding and sudden capsize might trap those aboard below. He ordered his men off Northern Voyager, a decision that no mariner would second guess, but what happened next was a departure from maritime law and custom.

The master, mate and engineer of Northern Voyager elected, in the traditions of the sea, to stay aboard to salvage their vessel, but they were ordered to evacuate under the threat of being "forcibly" removed should they refuse.

While the master was being removed, commercial salvage assistance with a diver and pumps was on its way to the scene. But that effort was frustrated by a radio operator at Coast Guard Station Gloucester whose communication directives effectively excluded the salvor from participating in the rescue operation.

The owner of Northern Voyager, its underwriters, and the Thames Shipyard and Repair Co. sued the Coast Guard in the U.S. District Court for the District of Massachusetts, alleging that the sinking was due to the agency exceeding its authority by compelling the master to leave his vessel against his will, and by interfering with the efforts of the commercial salvor.

Plaintiffs claimed that, had the master not been coercively evacuated from his command, and had the salvor been included in the communications with those on scene, Northern Voyager

cepts a mission it should do so with acceptable seamanship. For example, the Coast Guard has been held responsible for grounding damages to a vessel it was towing, occasioned by human error.

In the Northern Voyager incident the United States Court of Appeals ruled last November that the decision to order the master and his officers off the vessel was made because the trawler was under such perilous conditions that it amounted to a true policy choice involving incommensurable values, such as human safety and the allocation of resources. The Coast Guard is immune from the consequences of policy choices, as opposed to technical errors for which it is accountable.

The court said, "A forcible evacuation from a private vessel constitutes a seizure of the person" and can only be ordered by the Coast Guard in life-threatening emergencies. If Northern Voyager had been in a gale on the high seas and taking on water through a fractured hull, the factual finding that there was a life-threatening emergency would be clear.

However, the 144-foot fish-processing trawler, engine room apparently operational, was a few miles off Gloucester and taking on water through the rudder tube in daylight, and in what I feel was good weather. The testimony was that the progressive flooding could have been contained and that the salvor's divers could have plugged the rudder tube in a few minutes. But the factual finding isn't what makes this case so important; it's the strong dissent.

person best qualified and most knowledgeable regarding his vessel, the master, to a governmental agency that, as well intentioned as it may be in its actions, is not even required by law to engage in any rescue attempt. In effect, the Coast Guard is now empowered to arrive at the scene of the marine casualty without any duty of engaging in any attempt to save the vessel."

The law of salvage can be traced to the sea laws of Byzantium and the Mediterranean seaport cities, and was little changed until oil pollution became a matter of public concern. Northern Voyager went to the bottom with her bunkers (diesel fuel). An unintended consequence of the failure to salvage Northern Voyager is the cost of removing bunkers to avoid pollution as the vessel succumbs to the sea. In the circumstances, who should be held responsible for the pollution?

The Coast Guard compelled the owners of Northern Voyager to remove the bunkers from the sunken wreck at a reported cost of more than \$300,000. Some old salts might remember that the Royal Air Force waited until salvage efforts failed before bombing and sinking S/T Torrey Canyon stranded on Seven Stones off Southwest England and one of the biggest oil spills ever.

The law that has governed the Coast Guard from the earliest days of the Republic has served the Coast Guard and its constituency well. In 1837 Congress authorized the president "to cause ... public vessels ... to cruise upon the coast, in the severe portion of the sea-

of Northern Voyager its actions were governed by the "Good Samaritan" doctrine. A good Samaritan who is negligent in the prevailing circumstances can be liable in damages for harm caused over what would have occurred anyway had the pleas of the stricken been ignored. The Coast Guard, as good Samaritan, assumed exclusive control over rescue-related communications; the vessel interests claim that the negligent handling of those communications effectively prevented a commercial salvor, under way from Gloucester with diver aboard, from assisting Northern Voyager, thus proximately causing the sinking. These good Samaritan issues were sent back to the district court for trial.

There are few indeed who earn their livelihood at sea or who sail for pleasure who do not respect the Coast Guard, which has a well-deserved reputation for valor and integrity. Fewer still do not bemoan the increasing plague of untutored and bad-mannered boaters with whom the Coast Guard has to deal. It is well to note, however, that the Coast Guard also is not immune from having less-than-qualified personnel and, in my opinion, commercial and recreational mariners can be the most experienced and skillful on scene with respect to their own vessels, with which they have an intimate familiarity. ■

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