

The Criminalization of MARPOL violations and maritime accidents in the United States by Michael G Chalos



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Mr. Chalos has represented a number of maritime industry clients involved in high profile civil and criminal environmental litigation, including the successful defense of the Master of the "Exxon Valdez".

As such, Mr. Chalos has developed a particular expertise in defending and resolving oil pollution, Marpol and the Act for the Prevention of Pollution from Ships (APPS) violations and other environmental claims. In this regard, he frequently interacts with governmental entities involved in the enforcement of environmental regulations, such as the Department of Justice, the Environmental Protection Agency, the United States Coast Guard, Federal and State Trustees, and the Oil Spill Liability Trust Fund, and various state departments of environment.

Mr. Chalos has authored a number of articles on the criminalization of maritime accidents in the United States and other maritime nations, as well as, articles relating to investigations and prosecutions by US authorities of Marpol violations, including the bypassing of oily water

separators and waste oil management systems.

The Criminalization of MARPOL violations and maritime accidents in the United States

On March 24, 1989, the EXXON VALDEZ ran aground on Bligh Reef and spilled over 11 million gallons of crude oil into the pristine waters of Prince William Sound in Alaska. This was the largest oil spill in American history. The EXXON VALDEZ was a watershed event which has forever changed the way the American people, government, environmentalists, media and industry view and deal with oil pollution resulting from maritime accidents.

Prior to the grounding of the EXXON VALDEZ, mariners, operators, managers, or other shore personnel never dreamed of criminal penalties resulting from maritime accidents caused by errors in navigation or management of a vessel. The criminal prosecution of Captain Hazelwood, Exxon Shipping Company and Exxon Corporation changed the rules dramatically. In addition to the typical civil liability exposure that ordinarily flows from any maritime accident, if such accident results in pollution there will likely be a criminal investigation. Additionally, depending on the facts, the media attention and the political climate, criminal charges may be leveled. Such charges, under the right circumstances, could be against individuals, such as crewmembers, or corporate officers of the company owning or operating the vessel, against the company itself, or, against the managers of the vessels.

In today's environmentally sensitive world, it is extremely important that everyone involved in the operation of a vessel, as well as their attorneys be aware of, and prepared for possible criminal investigation and prosecution flowing from maritime accidents and/or intentional violations of MARPOL and other environmental regulations. Indeed, the criminal prosecution and conviction of crewmembers, ship-owners, operators and managers will not only result in penalties possibly involving jail and substantial fines, but may also result in unlimited civil liability under the Oil Pollution Act of 1990 for the owner/operator.

The Nature of Criminal Liability

In the United States¹, there are two categories of statutes imposing criminal liability for pollution emanating from vessels. First, if there is pollution incidental to a maritime accident, criminal liability for violation of state and federal environmental statutes may be imposed. Second, regardless of whether there is

pollution, state and federal general criminal statutes imposing criminal liability for damage to property, personal injury and loss of life will also come into play.

With respect to intentional violations of environmental regulations such as MARPOL and the US enactment of MARPOL, the Act for the Prevention of Pollution from Ships (APPS, 33 USC Sec 1901 et. seq.), the United States government has become increasingly aggressive in pursuing violators of MARPOL and/or other violations of US environmental statutes, especially, as it relates to the by-passing of the vessel's Oily Water Separator (OWS)².

In this regard, since the tragic events of September 11th, pursuant to a directive of the Office of Homeland Security, the U.S. Coast Guard has undertaken a comprehensive program of boarding foreign flag-state vessels calling U.S. ports. As a result of the new heightened security measures, there has been a significant increase in the scrutiny in which vessels, and the vessel's records and logs, are being inspected. Such scrutiny, rightly or wrongly, has led to a rash of vessel/crew detentions, as well as criminal allegations and charges against vessel Owners, Operators, Managers, Officers and Crew.

Additionally, the U.S. Coast Guard has established an Oily Water Separation Systems Task Force (OWSSTF) to examine a wide range of issues related to oily water separation equipment, especially, as it concerns the operation of the OWS and its accompanying equipment, such as, the vessel's incinerator, oil content meter, piping, valves, etc, and their use on vessels in U.S. waters. Coast Guard personnel and other law enforcement personnel are scrutinizing the use and functionality of oily water separation systems more carefully than ever before, and U.S. authorities have made it clear that they will seek jail sentences for Masters and Chief Engineers of ships committing pollution offenses, whether they occur in US waters or not. Many times, even if no pollution incident has occurred, the Coast Guard in conjunction with U.S. prosecutors, upon the mere "discovery" of a flexible hose or other "suspicious looking" equipment in the engine room, will commence a Grand Jury investigation seeking to prosecute an alleged illegal by-passing of the oily water separation system and/or the presentation

of an Oil Record Book containing "false" entries. It is logical that in a criminal investigation of a maritime accident and/or intentional violation of MARPOL or other environmental statutes, the focus of criminal liability will first be on the crewmembers, then on the shipowning corporation, the operator and/or manager and, ultimately, on corporate officers of such organizations. Depending on the circumstances, the crewmembers could bear criminal liability for their actions under both environmental statutes and general criminal statutes. In addition, the ship owning corporation, operator and/or manager may be held vicariously liable for the acts of crewmembers acting within the scope of their employment if such acts constitute a violation of environmental statutes and, under certain circumstances, general criminal statutes. Additionally, corporate officers can be held criminally liable under environmental statutes merely because of their position of responsibility in the shipowning, operating or managing company, regardless of their actual knowledge or participation in any culpable conduct. This principle is commonly known as the "Responsible Corporate Officer Doctrine". Finally, corporate officers can be held criminally liable for violation of general criminal statutes depending on their actual knowledge of the facts surrounding the accident and whether they committed acts contributing to the accident.

Mens Rea

Historically, the courts have recognized that in order to be guilty of a crime a person must have a criminal intent or mens rea. Thus, in order to be guilty of a crime, one needs to have acted with wrongful purpose, knowledge of a particular wrong, or in a reckless and/or willful manner³. The mental state necessary to trigger criminal liability will vary from statute to statute. Following the traditional rule, one would expect in maritime accidents resulting in pollution (as opposed to intentional violations of environmental regulations), that criminal liability would be predicated upon the individual's mental status for: willful or knowing conduct, negligence, criminal negligence, recklessness and willful ignorance.

The basic notion running through the traditional criminal law was not to criminalize conduct absent a showing of evil intent or motive or that which would be traditionally considered a civil wrong,

addressed by civil remedies. Most judicial interpretations of traditional general criminal statutes incorporated the concept of mens rea, even if not specifically provided for in the statute.

Unfortunately, this basic concept of law and fairness relating to minimal intent requirements was abandoned in the application of statutes dealing with the public welfare, including environmental statutes.

Basic Elements of Criminal Liability

1. Negligence.

In criminal law, there is a recognized distinction between criminal negligence and civil negligence. American courts dealing with common law criminal cases have held that the civil negligence standard of failure to use reasonable care is not enough to impose criminal liability. Rather, criminal negligence is required to impose criminal liability. However, the criminal negligence provisions of the Clean Water Act have been construed to require only proof of simple negligence rather than gross negligence to sustain a criminal conviction. Obviously, the proof required to establish simple negligence is much less than the proof required to sustain a charge of gross negligence, and a conviction under such statutes is almost a foregone conclusion.

2. Recklessness.

Reckless conduct demands a higher level of culpable conduct than negligence. In traditional criminal statutes, the seriousness of a crime will be greater when there is reckless conduct, as opposed to where there is only criminally negligent conduct. While negligence is the failure to perceive a risk, recklessness is to perceive the risk but to consciously disregard it. Proving recklessness, even under the environmental statutes, is a more daunting task for prosecutors. As a result, while recklessness is a criminal charge that prosecutors pursue, convictions under this theory are more difficult to obtain. Criminal charges based on recklessness oftentimes are used as bargaining chips to obtain guilty pleas of negligence which, in turn, lead to the imposition of fines, the shipowner's (and/or their underwriters') cooperation in cleaning up and restoring the affected area, as well as, unlimited liability under OPA.

3. Knowing Conduct.

While the public welfare approach to environmental crimes permits strict liability statutes, Congress has attempted to prevent the criminalization of innocent conduct by expressly including a knowledge element as part of the mens rea requirement in the majority of criminal environmental statutes. In order for criminal liability to attach in this class of offenses, the act must be committed knowingly. An act is done knowingly if it is done intentionally or voluntarily. It is not necessary that the person be aware that the act is illegal. Also, there is a line of cases which hold that willful ignorance can be considered the equivalent of knowledge. This concept comes into play when there is evidence that a defendant, usually a supervisor, deliberately chooses to ignore what would have otherwise been obvious to him, or consciously avoids learning of illegal conduct.

4. Corporate Liability.

It is a well established principle in US criminal law that a corporation can incur vicarious criminal liability for the actions of employees acting within the scope of their employment. This is also true in situations where the employee acts in a manner contrary to the desires and/or established procedures and practices of the corporation. Additionally, a corporation may have direct criminal liability for the acts of directors, officers or employees. Direct liability may be imposed if company policies or directions cause or contribute to the accident and/or intentional violation of environmental statutes. For example, in a maritime accident, direct liability could result from being aware of and condoning crew incompetence, or a failure to properly train the crews, or a failure to implement and monitor compliance programs. In intentional violations of environmental statutes, direct liability for the corporation results from the crewmembers intentionally bypassing the OWS or submitting a false record, such as the Oil Record Book, to the authorities to cover up an illegal act, or lying to authorities with the knowledge and consent of the corporation or someone acting on behalf of the corporation. Furthermore, corporate actions (depending upon privity, knowledge and/or control) can result in individual criminal liability for corporate officers as well as for the corporation.

In addition, a corporate officer may be held criminally liable for violation of

an environmental statute, even if the officer did not participate in the illegal activity. Under the "Responsible Corporate Officer Doctrine", which will be discussed more fully below, criminal liability can be imposed on corporate officers if they were in a position to know about or prevent the criminal act, even if they did not actually commit the alleged crime.⁴ This doctrine is very harsh in that it can result in criminal liability being imposed on a corporate officer merely because of that officer's position of responsibility, as opposed to any particular conduct on the officer's part.

The Responsible Corporate Officer Doctrine should be of particular significance and concern to vessel operating and/or management personnel. Under this doctrine, if an officer or responsible individual at such companies actively engages in acts or omissions which result in a spill incident or an intentional violation of environmental regulations, that person and company can be charged with crimes under the various environmental statutes more fully set forth below. For instance, if an individual at the management company knowingly hires an incompetent master or crewmember that is responsible for the spill, that individual and his company is at risk for criminal prosecution. If an individual at the management company fails to comply with the ISM Code, or fails to implement systems to monitor the vessel personnel's compliance with the ISM requirements and/or environmental regulations, that individual and/or his company is at risk. If an individual at the vessel's operating company knows, or should have known, of a defect in the vessel's equipment which causes or exacerbates a spill incident or an intentional violation of the regulations, that individual and/or his company is at risk of criminal prosecution.⁵

Generally, there are three requirements which must be satisfied to impose liability under the doctrine. First, the individual must be in a position of responsibility which allows the person to influence corporate policies or activities. Second, the person, by reason of his corporation position, could have prevented or corrected actions which constituted the violation. Third, the individual's actions or omissions must have facilitated the violation.

The Responsible Corporate Officer Doctrine has been applied in the context of violation of environmental laws. There is certainly a potential for individual criminal exposure for violations by corporate officials for violations of which they have knowledge and the authority to prevent. Knowledge of the facts can be inferred in many cases, requiring only that the government establish that the person had the authority and capacity to prevent the violation, and failed to do so.

The fact that an owning, operating, or managing company and its personnel are located outside the United States should be of little comfort. United States prosecutors have displayed surprising ingenuity, doggedness and resilience in pursuing those responsible for spill incidents in the United States, even minor ones. Under the right circumstances, United States prosecutors can (and will) confiscate vessels to collect fines and penalties, charge and hold vessel personnel pending the investigation and trial, charge owning, operating and/or management companies and responsible corporate officers with violations of environmental regulations, even if such individuals are outside the United States. It should be borne in mind that the United States is a signatory to a number of extradition treaties with other countries and, if necessary, prosecutors can invoke such treaties to bring a responsible individual to the United States to stand trial for violations of environmental criminal statutes.

U.S. Government's Modus Operandi in Environmental Regulations Violations Investigations and Prosecutions

US Coast Guard investigators and prosecutors in the early days of OWS bypass investigations focused their efforts on alleged by-passes of shipboard oily-water separation equipment through the use of flexible hoses and flanges in order to effect illegal overboard discharges. However, the government has now become extremely sophisticated in its approach to investigating possible MARPOL violations. Investigators and prosecutors utilize a number of sophisticated tactics and forensic testing to determine whether an OWS by-pass has occurred. For instance, the Coast Guard has set up computer programs to compare the vessels' bilge sounding logs and Oil Record Book entries to the expected waste oil production of the vessel, its tank capacities, incinerator

use and capacity to determine if the entries are correct. In addition, they are very clued in to the "tricking of the Oil Content Meter" by the use of fresh water during the OWS operation. They are also very skilled in determining and locating the use of other by-pass methods and cross over connections. However, the government's most recent "secret weapon" in the war on prosecuting Marpol violators is the use of "whistleblowers", which are generally current or former crewmembers. In this regard, the government is authorized under the Act for the Prevention of Pollution from Ships (APPS), 33 USC Sec 1908(a), to pay up to one-half of the assessed fine.⁶

While the U.S. government has no jurisdiction over unauthorized discharges by foreign-flag vessels in international waters in violation of MARPOL, it does, indeed, aggressively investigate and prosecute false Oil Record Book entries, obstruction of justice and witness tampering.

The Legal Rationale of MARPOL Violations Investigations

The MARPOL Protocol ("MARPOL") is an international treaty implemented in the U.S. by the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. §§ 1901 et seq. APPS makes it a crime for any person to knowingly violate MARPOL, APPS, or the federal regulations promulgated under APPS. 33 U.S.C. § 1908(a). These regulations apply to all commercial vessels, including vessels operating under the authority of a country other than the United States, when these vessels are operating in United States waters or while at a port or terminal under the jurisdiction of the United States. 33 C.F.R. § 151.09.

MARPOL sets forth the international standards for the maximum amount of oil permitted to be discharged overboard from vessels. This standard is 15 parts per million ("ppm"). MARPOL Annex I, Reg.9. As mentioned above, the United States has no jurisdiction over a foreign flag vessel for any violation of MARPOL that occurs outside the US 12 miles jurisdictional limit. However, each transfer of oil in the engine room, including the overboard discharge of bilge waste, is required to be fully recorded without delay in the Oil Record Book. 33 C.F.R. § 151.25(h). The entries are to be signed by the person or persons in charge of the operation and each completed page must be signed by the Captain of the ship. 33 C.F.R. § 151.25(h). The United States Coast Guard regularly inspects the Oil Record Book during port

state inspections to determine compliance with United States law and the MARPOL Protocol and to assure that ships are not an environmental threat to United States ports and waters.

The United States Coast Guard is charged with enforcing the laws of the United States and is empowered under 14 U.S.C. § 89(a) to board vessels and conduct inspections and investigations of potential violations. The Coast Guard is authorized to examine the vessel's Oil Record Book to determine, among other things, whether the vessel has operable pollution prevention equipment and appropriate procedures, and whether the vessel has discharged any oil or oily mixtures in violation of MARPOL, APPS, or any other applicable federal regulation. 33 C.F.R. §§ 151.23(a)(3), 151.23(c). If the Coast Guard finds evidence that a vessel is not in substantial compliance with MARPOL or APPS, the Coast Guard is empowered to deny a vessel's entry to a United States Port or detain a vessel 33 C.F.R. §§ 151.07(b). The Coast Guard is also required to report to the United States Attorney's office for the District in which the vessel is inspected all suspected violations of any US laws.

Criminal Sanctions

There is a broad array of criminal sanctions available to the U.S. government agencies in the investigation and prosecution of cases involving a suspected criminal offense. Recently, there have been an extraordinary number of investigations regarding alleged MARPOL and other environmental offenses. The United States treats such violations seriously, and has demonstrated that it will spare no expense in the investigation of such matters.

For your guidance, we provide below a broad outline of a number of laws and statutes which U.S. Federal prosecutors generally look to in charging a vessel Owner, Operator, Manager, Officers or, in many circumstances, individual crewmembers.

A. The Act to Prevent Pollution from Ships (APPS)

The Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1911, adopts as U.S. law the provisions of the International Convention for the Prevention of Pollution from Ships ("MARPOL"). Various administrative regulations have been promulgated by the Coast Guard to enforce the provisions of MARPOL and the APPS. See 33 C.F.R. parts. 151 and 155.

Under 33 U.S.C. § 1908(a), it is a class D felony to knowingly violate the provisions of MARPOL. A class D felony is punishable by up to 10 years imprisonment and a fine of up to \$250,000 for an individual and \$500,000 for a corporation, for each violation. 33 U.S.C. § 1809(a); 18 U.S.C. § 3559(a)(4); 18 U.S.C. § 3571 (b)(4); 18 U.S.C. § 3571(c)(3). A vessel violating a provision of MARPOL may be arrested and sold to satisfy any fine or penalty under the Act 33 U.S.C. § 1908(d).

The security being requested by Coast Guard officials and U.S. prosecutors for alleged MARPOL violations lately has been in the range of \$1 million to \$2 million corporate surety bond, or cash, rather than the customary Letter of Undertaking.⁷ Under 33 U.S.C. § 1908(e), the United States may revoke the U.S. Customs clearance of a vessel and detain it where reasonable cause exists to believe that the ship, its owner, operator or person in charge may be subject to a fine or civil penalty for a MARPOL violation under the APPS.

B. The Clean Water Act

The Clean Water Act (CWA) 33 U.S.C. § 1251, et seq. prohibits the discharge of any pollutant by any person into navigable waters of the United States, 33 U.S.C. § 1311(a). A "knowing" violation of the Act is a felony. A "negligent" violation is a misdemeanor. The Act also prohibits the discharge of oil or hazardous substances into the navigable waters of the United States, or into the waters of the contiguous zone . . . in such quantities as may be harmful. 33 U.S.C. § 1321(b)(3). Failure to report a discharge is punishable by imprisonment of up to five years. 33 U.S.C. § 1321 (b)(5). The Clean Water Act also provides that the term "person" includes a "responsible corporate officer." 33 U.S.C. § 1319 (c)(6), (see, discussion of Responsible Corporate Officer, below at paragraph "I").

C. The Rivers and Harbors Act

Under section 407 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, et seq., any discharge of refuse of any kind from a vessel into navigable waters of the United States is prohibited. A violation of the Act is a misdemeanor. 33 U.S.C. § 411. The courts have taken a broad view of what constitutes "refuse" under the Act, and the Act has been extended to a discharge of oil or petroleum. Violation of the Act

is a strict liability offense which does not require proof of either intent or negligence. Accordingly, a person can be convicted of a misdemeanor violation under the Act based solely upon proof that the person placed a banned substance into navigable waters of the United States.

D. The False Statements Act

Under 18 U.S.C. § 1001, providing a false statement to the U.S. Government is illegal. To sustain a conviction for a violation of the Act, the Government must show:

- (1) that a statement or concealment was made;
- (2) the information was false;
- (3) the information was material;
- (4) the statement of concealment was made "knowingly and willfully;" and
- (5) the statement or concealment falls within the executive, legislative or judicial branch jurisdiction.

Falsity through concealment is found to exist where disclosure of the concealed information is required by a statute, government regulation, or form. Also, a false statement about, or concealment of any prohibited discharge satisfies both the Act to Prevent Pollution from Ships or the Clean Water Act, since both impose the duty to report. Likewise, a false entry in a vessel's oil record book has been the grounds for numerous felony indictments under this statute.

E. Obstruction/Perjury/Providing False Information to Government Representatives

A number of criminal statutes of the United States provide for severe penalties for obstructing justice, providing false information to a government representative, and similarly, providing false testimony under oath to a Grand Jury (18 U.S.C. § 1503-the "Omnibus Obstruction Statute", 18 U.S.C. § 1505-extends obstruction to agency proceedings such as Coast Guard investigations. Similarly, influencing or attempting to influence the testimony of another, or destruction or alteration of evidence (18 U.S.C. § 1512 and 18 U.S.C. § 1515) are viewed under United States law as extremely serious, and will result in extremely serious criminal consequences to any individual crewman or others involved in such activities.

F. Witness Tampering

U.S. authorities vigorously investigate

and prosecute individuals and corporations suspected of tampering with witnesses in connection with an on-going investigation of pollution and/or illegal discharge incidents. Under 18 U.S.C. § 1512, anyone who knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person with the intent to hinder, delay or prevent the communications to a law enforcement officer or a judge of the United States of information relating to the commission, or the possible commission, of a federal offense, shall be fined or imprisoned up to ten (10) years, or both.⁸

G. Conspiracy

Under 18 U.S.C. § 371 if two or more persons conspire either to commit an offense against the United States, or the defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy each shall be fined or imprisoned up to five (5) years or both. This is a very handy "add on" charge for prosecutors if they determine that several crewmembers or crew-members and company officials conspired to obstruct justice, destroy evidence or tamper with witnesses. This add on charge can cost up to another \$500,000 in fines.

H. Sarbanes-Oxley Act of 2002

(Obstruction of Justice)

Prosecutors in the United States have recently commenced utilizing the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"). This is a powerful new law enforcement tool that exposes a wrongdoer to a prison term of up to 20 years. The threat of charging an engineering officer under this section, rather than 18 U.S.C. § 1001 (the False Records Act) which has a lower potential jail time provision, is generally for the purpose of frightening such individual into confessing that the alleged OWS by-passing was in fact done, and, preferably, with the knowledge and consent of the vessel owner and/or operator.

I. Responsible Corporate Officer Doctrine

Under the "Responsible Corporate Officer Doctrine," mentioned above,

criminal liability for violations of environmental laws can be imposed on corporate managers or officers who were in a position to know about and prevent a violation, even if they did not actually commit the alleged crime. A person can be held liable as a responsible corporate officer based upon the persons' ability or authority to influence the corporate conduct which constituted the violation. In the past, the United States has used this doctrine to convict high level officers of corporations, including presidents of corporations, for violations of environmental laws committed by lower-level employees.

Conclusion

For better or worse, the criminalization of maritime accidents and intentional MARPOL violations has become a fact of life for shipowners, operators, managers and crewmembers, not only in the United States, but in a number of countries around the world. The trend for such prosecutions appears to be on the rise. As the world's population becomes more environmentally aware and sensitive, tolerance for maritime accidents resulting in pollution of the seas and environs or intentional pollution through MARPOL violations becomes less and less. As a result, and because of enormous popular demand and support, prosecution of pollution incidents and polluters, even innocent ones, does not appear to offend anyone's sensibilities, other than those in the maritime industry. Under the circumstances, the industry needs to carefully implement and monitor procedures, practices and regulations to minimize the risk of maritime accidents and pollution. At the same time, the industry through its various trade organizations, must actively petition the governments and regulatory bodies around the world to de-criminalize maritime accidents in the absence of criminal behavior.

Ladies and gentlemen, I thank you for your time and attention.

Notes

¹While this paper deals mainly with the criminal statutes of the United States and prosecutions thereunder, the philosophy of criminal investigation, detention and prosecution of those responsible for oil spills, especially Masters of vessels, has been applied in recent years on a worldwide basis (i.e. KATINA P at Mozambique, HAVEN, Italy, ERIKA, France, NISSOS

AMORGOS, Venezuela, FREJA JUTLANDIC, United States, PRESTIGE, Spain, TASMAN SPIRIT, Pakistan, etc).

² It is not the author's intention to place criminalization of maritime accidents and intentional violations of MARPOL and other environmental regulations on the same plane. Clearly, one who intentionally pollutes should be punished in accordance with the country's laws that it violates. However, this premise has, in a number of instances been applied harshly and unfairly in the United States where the authorities for a number of reasons commence full blown investigations on mere suspicion or at times because of the over zealousness of Coast Guard investigators, which result in innocent crewmembers being arrested as "material witnesses", taken off the vessel in shackles and thrown into jail until they are released by a judge. In addition, such practices not only delay the vessel and disrupt the commercial relationships between vessel owner and charterers and/or receivers, but cost innocent shipowners substantial sums to hire attorneys to represent the crewmembers, to change out the crew which is subpoenaed by the government for Grand Jury appearances, to house such crewmembers once they are released from material witness custody, to post substantial cash security, only to then be told that the government has decided that they did not find any wrongdoing after all. Obviously, such news is welcomed but, it comes at a steep price, both financial and emotional, which in many instances is completely unnecessary.

³ Of course, in the situation involving willful or intentional violations of MARPOL or other environmental regulations the mens rea element is satisfied by the conduct of the individuals involved.

⁴ In a recent case involving the 2004 Staten Island Ferry disaster which resulted in eleven deaths, the Director of Port Operations for the City of New York has plead guilty to one count of manslaughter under the "Ship's Act", 18 USC Sec.1115, for his failure to oversee and enforce City regulations and procedures requiring the training and shipboard operations which called for two captains to be on the ferry bridge during docking and undocking.

⁵ In the NORTH CAPE spill incident off the coast of Rhode Island, the owning company, its President and Operations Manager were charged, and pled guilty, to criminal violations of various environmental statutes on the grounds that they knew, or should have known, that the anchoring system on the

oil carrying barge that ultimately ran aground was not working properly. In that case, while the President and Operations Manager avoided jail time, they were required to pay huge fines and to bear the stigma of a criminal conviction. The tug master was also charged and convicted, but he paid a substantially smaller fine. A similar corporate officer prosecution occurred as a result of the MORRIS J. BERMAN spill in Puerto Rico. In several OWS prosecutions, foreign corporate officers who participated in obstructing justice by advising the crewmembers to lie to the authorities during the course of the investigation were charged with crimes by the US Department of Justice.

⁶ The OMI case mentioned in the caption of this speech is significant for the fact that the "whistleblowers" involved received \$2.1 million of an assessed fine of \$4.2 million. A substantial sum for an oiler who normally earns about \$1000 a month.

⁷ In addition, the US Coast Guard has been demanding a \$500,000 LOU from the owner's P&I Club for any potential civil fines that may be assessed. In many cases, we have been successful in negotiating the demand for both criminal and civil security to lower amounts, as it is not clear from the applicable regulations that the Coast Guard has the right to demand security above \$500,000 for any potential criminal charges, and there is some argument that their authority may not be as high as that amount. However, neither the Coast Guard nor the vessel owners involved have chosen to litigate this issue; hence, the Coast Guard's willingness to negotiate for lesser amounts in security.

⁸ It can be said generally that a "presentment of a false record (i.e. a false Oil Record Book)" case, while serious, is a relatively uncomplicated matter to deal with and settle on reasonable terms. However, once the element of obstruction, destruction of evidence or witness tampering is introduced, the case takes on a different dimension. In this regard, if evidence of obstruction, destruction of evidence or witness tampering is uncovered, prosecutors and judges are very unsympathetic to the defendant(s). In such cases, the fines and charges sought generally increase substantially.

Appendix to Michael Chalos' speech on criminal prosecutions of maritime accidents and MARPOL violations

I. A primer on criminal investigations and prosecutions in the United States

What happens from a practical point of view after a maritime accident resulting in a spill or as a result of an alleged intentional violation of environmental regulations? What can the mariner, shipowner, operator or manager expect to encounter in the United States when he or she is called out in the middle of the night to respond to a ship collision or grounding resulting in an oil spill, or an allegation that the crew has been by-passing the oily water separator? It is important to remember that the law enforcement personnel deployed to investigate potential violations of environmental regulations, intentional or otherwise, come on the scene to determine whether a crime has been committed and who might bear criminal responsibility for its commission. The law enforcement officer's responsibility is to gather evidence; not to engage in a friendly fact-finding mission.

The cast of characters at a spill scene may include the Coast Guard, EPA, FBI, state police, United States Attorney, local District Attorney and the Attorney General. Each of these are separate and distinct organizations, with their own hierarchies, policies, and agenda. With the exception of the Coast Guard and the civil division of the EPA, the only purpose of the law enforcement personnel is to investigate and prosecute crimes. The criminal divisions of the EPA, FBI, and state police gather facts and evidence and bring it to the prosecutors for evaluation. The Coast Guard has a mixed purpose. It has the responsibility in spill situations to oversee and insure that a proper cleanup takes place, as well as to determine the cause of the accident in order to ensure safe operation of vessels and to take corrective administrative action if necessary. In addition, in carrying out its traditional port state control inspection duties, it is at the same time vigilantly observing the vessel's equipment to determine if there is any evidence of intentional violations of environmental regulations. In this regard, the Coast Guard has an obligation to turn over any evidence of criminal conduct it discovers in the course of its casualty investigation or PSC

inspections to the U.S. Attorney. Crew members, shipowners, operators, managers and their attorneys must be aware of this criminal investigatory role, and should be as careful in dealing with the Coast Guard casualty investigators and criminal investigations division personnel, as they would be in dealing with the FBI or State Police. The U.S. Attorney, District Attorney, and Attorney General are prosecutors who may play an advisory or supervisory role in a criminal investigation. They will make the ultimate decision of whether to prosecute.

What can be done to counteract the law enforcement investigation team? The most obvious task for the attorney responding to the scene would be to persuade the law enforcement personnel present that a crime has not been committed. Unfortunately, if there is significant oil in the water and/or loss of life or serious physical injury, or evidence of an intentional by-passing of the OWS equipment, this may be a very difficult task. Once it becomes apparent that the investigators will not rule out that a crime has been committed, it then becomes the job of the attorney to protect his clients' rights and certainly not to actively assist investigators to gather incriminating evidence.

In this respect, it is important to remember that no one on board a ship can or should be forced to speak to a law enforcement officer investigating the cause of the accident or the possibility of an intentional violation of an environmental regulation if there is a possibility that the person may incriminate himself by doing so. As a matter of policy, shipowning companies, operators and/or managers should ensure that crews are not coerced by company officials to give statements to law enforcement officials on the scene.

Each crewmember (and, indeed, any corporate personnel that is a target of a criminal investigation) is entitled to consult with counsel and to have counsel present when being interviewed by law enforcement officials. The prudent and ideal procedure when there is likely criminal liability would be for an attorney engaged specifically to represent the crewmember to get on board and interview the crewmember involved in the accident or any allegation of intentional criminal

activity as soon as possible after the incident occurs or the investigation is commenced. That attorney will make an initial determination as to whether the crewmember bears any personal criminal responsibility for the accident or the alleged violation of a regulation. If the crewmember does not have any personal liability, he can be made available to the prosecutors for an interview with his attorney present. On the other hand, if the crewmember has real or even potential exposure to liability, such as if the crewmember was involved in the navigation and control of the vessel or in any way contributed to the accident, or, is a traditional "target" for regulation violation allegations (i.e. the Chief Engineer and/or Master), then the attorney should advise the crewmember to invoke his constitutional rights under the Fifth Amendment to the U.S. Constitution. Law enforcement officials will not be shocked if an attorney says he has advised his client not to speak. This is normal practice in a criminal investigation and is the expected advice to be given by a criminal defense attorney.

In addition to legal representation for the crewmembers when there is a potential for criminal liability, separate criminal legal representation should be provided for the shipowning, operating or managing corporations to evaluate and protect against corporate liability. Tactically, this could be advantageous for the corporation because it also makes it clear that these corporations are not in charge of how the crewmembers are represented. It also avoids the appearance that the corporation is obstructing the investigation if some crewmembers choose to invoke their Fifth Amendment rights.

In summary, the most important thing for vessel owners, operators and managers to remember in the context of maritime accidents, is to be prepared for the possibility that they may become the subjects or targets of a criminal investigation. In this regard, the companies and their personnel must be prepared, in advance, to deal with government investigations. Failing to do so will only make matters worse and increase the likelihood for civil and criminal liability. Advance training in ISM and ISPS compliance, as well as, in knowing and adhering to applicable environmental regulations and procedures together with a well-defined compliance program and a

separate response plan, and advance preparation to deal with potential government investigations will invariably lessen the risk to the owner, operator, manager and crewmembers of criminal prosecution, fines and/or administrative actions.

II. The relationship between criminal liability and civil liability

It is also important to consider the relationship between criminal liability and civil liability in a maritime accident situation. One can assume that in every major maritime accident where there is an oil spill and environmental impact, there will also be a number of civil cases against the shipowner, operator, possibly the management company and crew-members for damages based on negligence, willful or reckless conduct.

Nearly all of the issues which could later be the basis for civil actions will be the same issues involved in most criminal prosecutions arising out of the maritime accident. Thus, since a criminal case will invariably be tried before the corresponding civil case, it is very important to preserve the viability of available civil defenses by defending vigorously any criminal prosecution of the crew, corporation or corporate officers arising out of the accident.

In practical terms, this means that long before the civil case even gets into serious discovery, the issues relating to negligence, recklessness and the specific facts regarding what happened will have already been determined by a court and jury. For instance, criminal conviction based on recklessness or negligence, because it is a finding beyond a reasonable doubt, could be introduced as a final determination of that issue in a subsequent civil trial. In other words, a party's civil liability, including liability for punitive damages, can be for all intents and purposes, decided by a criminal conviction arising out of the same incident dealing with the same issues and parties.



- **THE CRIMINALIZATION OF
MARITIME ACCIDENTS AND MARPOL
VIOLATIONS IN THE UNITED STATES**

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**BASIC ELEMENTS OF CRIMINAL LIABILITY--
MENS REA**

- Generally to be guilty of a crime, a person must act with *criminal intent* or *mens rea* (*i.e. prosecutions for MARPOL Regulations*)
 - For health and public welfare violations strict liability applies (*i.e. accidental spills after a casualty*)
 - Strict liability means that an individual can be found criminally liable without having had any criminal intent, in the traditional sense.

US Strict Liability Criminal Statutes

- The Migratory Bird Act
- The Refuse Act
- The Refuge Act

Violations of these statutes are misdemeanors
punishable by up to one year of jail time and a
\$200,000 fine per count)

Every spill and/or casualty involving loss of life
will result in a criminal investigation in US
and, potentially, prosecution.

MARPOL Violation Prosecutions in US Government's Position

- Enforcement of US laws
- Punishment of Wrongdoer by Fines and/or Jail Time
- Deterrence of Wrongdoer
- Deterrence of Other Potential Wrongdoers
- Protecting the Environment for all
- Flag States Not Enforcing Marpol

The Real Impetus For These Prosecutions

- Shipping industry is an easy target
- Shipping companies are perceived as having lots of money and will pay large fines rather than fight
- No political constituency
- No organized political muscle
- Good publicity for US government on Environmental enforcement
- Good statistics for Dept. of Justice on bringing “environmental criminals” to justice

Current Status of MARPOL Violation Prosecutions in US

- US DOJ and Coast Guard are well organized with task forces to investigate and prosecute shipowners, operators, managers and seafarers for Marpol violations
- Prosecutions are on the rise
- Security demands (monetary and maintaining crew during investigation) for release of vessel increasing and becoming more onerous
- Fines are getting larger
- Court ordered and enforced compliance programs

How and Why?

- OWS equipment do not always operate as advertised or as intended
- Poor culture for protection of environment and adherence to regulations
- Lack of maintenance of OWS equipment and poor training of crew in its use and in record keeping
- Aggressive US government investigations and prosecutions
- “Whistleblowers”- can get up to 50% of fine

Basis for Marpol Violations Investigations

- The Act to Prevent Pollution from Ships (“APPS”), 33 U.S.C. §§ 1901 *et seq.* is US MARPOL
- APPS makes it a crime for any person to knowingly violate MARPOL, APPS, or the federal regulations promulgated under APPS. 33 U.S.C. § 1908(a).
- However, the United States has no jurisdiction over a foreign flag vessel for any violation of MARPOL that occurs outside the US 12 miles jurisdictional limit.

- Each transfer of oil in the engine room, including the overboard discharge of bilge waste, is required to be fully recorded in the Oil Record Book.
- The US Coast Guard regularly inspects the Oil Record Book during port state inspections to determine compliance with US law and MARPOL
- If the Coast Guard finds evidence that a vessel is not in substantial compliance with MARPOL or APPS, it is empowered to deny a vessel’s entry to a US port or detain the vessel and, at the same time, instigate a criminal investigation through the US Attorney’s Office.

CRIMINAL STATUTES & SANCTIONS

- There are a broad array of criminal sanctions available to prosecutors against crewmembers, owning and managing corporations, and individuals in such corporations.
- Prosecutors can and will:
 - arrest, detain and/or confiscate vessels to obtain security and/or collect fines/penalties;
 - hold vessel personnel in US pending a criminal investigation and criminally charge such crewmembers;
 - criminally charge owning/operating and/or management companies; and
 - criminally charge responsible corporate officers, as well as, managing company personnel.

CORPORATE LIABILITY

- A corporation can incur vicarious liability for the actions of its employees undertaken in the course of their employment.
- A corporation may have direct criminal liability for the acts of its directors, and officers.
- A corporate officer/director may be found criminally liable just because of his/her position of responsibility. (“Responsible Corporate Officer Doctrine”).
- The fact that the company and its employees, officers and/or directors are outside the US not a bar to the dogged efforts of US prosecutors.

Applicable Criminal Statutes

- **False Statement Act**
- **Act for the Prevention of Pollution from Ships (APPS)**
- **Conspiracy**
- **Obstruction of Justice**
- **Tampering with Witnesses**
- **The Clean Water Act (CWA)**
- **Sarbanes-Oxley Act of 2002**

**All are felonies punishable by up to five(5) years
in jail and a \$500,000 corporate fine per count**

WHAT TO DO TO AVOID CRIMINAL INVESTIGATIONS AND PROSECUTIONS

At all times:

- *obey all international and US regulations and ensure that company procedures and directives are properly implemented and adhered to;**
- *ensure that all ISM and SMS requirements are in place and adhered to by the crews;**
- *ensure that crews and employees are well trained and proper reporting procedures are developed;**

- * all entries in the Oil Record Book and logs be truthful and in compliance with MARPOL and all other applicable regulations;**

- * all personnel must be truthful and forthcoming during all port state control inspections;**

- * ensure that the OWS equipment, including the oil content meter and incinerator are in good working order and are being properly utilized by the crew;**

- * ensure that the OWS equipment, including piping is in conformance with all applicable class and port state control requirements;**

- * remove all flanges from flexible hoses, and blank-off all flanges at or near the OWS;**

- * consider instituting a voluntary environmental management system compliance program.**

WHAT TO DO TO RESPOND TO CRIMINAL INVESTIGATIONS

**ENGAGE LEGAL COUNSEL AS SOON AS POSSIBLE
IN ORDER TO:**

- 1. ASSESS THE SITUATION;**
- 2. PROVIDE ADVICE TO THE OWNERS,
OPERATORS, MANAGERS, OFFICERS & CREW;**
- 3. ENGAGE INDIVIDUAL COUNSEL FOR
OFFICERS & CREW, AS NECESSARY AND
APPROPRIATE**

Conclusion

- Prosecutions will continue
- Owners/Operators must do all they can to ensure full compliance with environmental regulations by their crews and personnel
- The industry must organize itself to have an open and frank dialogue with the Coast Guard and the Dept. of Justice, and, if necessary, challenge them by lobbying Congress and policymakers for fair treatment
- Ways and means exist for agreements between industry and government that will encourage cooperation in the common endeavor and provide a “safe harbor” from prosecution