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CRIMINAL LIABILITY IN THE UNITED STATES

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On March 24, 1989, the EXXON VALDEZ ran aground on Bligh Reef and spilled over 11 million gallons of crude oil into 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, owners, operators, managers, or other shore personnel never, generally speaking, 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 are now common-place and regularly target individuals, (such as

crewmembers, or corporate officers of the company owning or operating the vessel), as well as vessel owners, operators and/or managers.

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 criminal investigations and exposures. Indeed, the criminal prosecution and conviction of crewmembers, shipowners, 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, as well as the awarding of punitive damages in civil suits.

I. THE NATURE OF CRIMINAL LIABILITY

A. *Mens Rea*

Historically, U.S. courts have recognized that in order to be guilty of a crime a person must have a criminal intent or *mens rea*. As such, in order to be guilty of a crime, one ordinarily needs to have acted with wrongful purpose, knowledge of a particular wrong, or in a reckless and/or willful manner. 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 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. These "public welfare" statutes were initially concerned with the regulation and protection of the public from adulterated food and drugs. Thus, the courts reasoned that the public safety outweighed the traditional requirement of criminal intent. Such statutes originally came into being to protect the public from the dangerous hazards resulting from the industrial revolution.

Because environmental laws are specifically designed to protect the public safety and welfare, they have been construed by the courts in a manner which maximizes public protection. Consistent with this approach, some criminal environmental statutes, such as the Refuse Act, are based on the notion of strict liability, or impose criminal liability for failure to comply with environmental regulations even when the violator was unaware that his or her conduct violated a law or regulation. In addition, some statutes impose criminal liability upon an individual corporate officer based on his or her position of responsibility in the corporation. According to this public welfare theory, the only mental state required, if any, is that which is explicitly stated in the statute, as opposed to being incorporated through traditional criminal common law. The application of such statutes may result in criminal liability for conduct that would not rise to the level of criminal conduct in traditional criminal statutes. The result being the criminalization of maritime accidents in a draconian and, for the most part, unfair manner.

B. 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. A typical definition of criminal negligence is contained in the New York penal law:

A person acts with criminal negligence with respect to a result or circumstance when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Common sense dictates that these "substantial risk" and "gross deviation" requirements should apply in maritime matters where a general criminal statute containing negligence as an element is charged. However, U.S. courts have held that where negligence is included as an element in an environmental statute, proof of simple negligence alone is enough for conviction. As an example, 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. It is precisely because it is so easy for

the prosecutors to obtain a conviction under these statutes, that the prosecution of crewmembers and company officials has become so prevalent.

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. The definition of reckless conduct is that:

[A] person acts recklessly with respect to a result or circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

While negligence is the failure to perceive a risk, recklessness is to perceive the risk but to consciously disregard it. Proving recklessness, even under public welfare 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 an established principle in criminal law that a corporation can incur vicarious criminal liability for the actions of employees acting within the scope of their employment. 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. 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. 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", 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. 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 an incident, that person and company can be charged with a crime. For instance, if an individual at the management company knowingly hires an incompetent master or crewmember who is responsible for a pollution incident, that individual and his company are 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, 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, that individual and/or his company is at risk of criminal prosecution.

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 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.

Under the circumstances, the best advice we can offer an owner, operator, or manager of a vessel calling the United States is to ensure that your procedures, directives, international and governmental regulations and requirements are properly implemented, monitored, carried out and complied with at all times. Establish a clear and comprehensive compliance program for your company and the vessels in its charge. Ensure that crews and employees are well trained, and that proper reporting procedures are developed. Avoid shortcuts and, most importantly, avoid burying your head in the sand if you know, or should know, something that requires attention is not being attended to. Keep accurate records, but avoid the proverbial "CYA" memos, unless absolutely necessary. As a matter of policy, if you are in a position to implement a "no alcohol" policy while the vessel is in the United States waters, I would advise that you do it forthwith. Nothing creates a bigger stir or potential for criminal prosecution, fines, penalties and loss of limitation of liability, than a spill incident resulting from the use of alcohol by a crew member.

II. A PRIMER ON CRIMINAL INVESTIGATION AND PROSECUTION IN THE UNITED STATES

What happens from a practical point of view after a maritime accident resulting in a spill? 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? It is important to remember that the law enforcement personnel deployed after a spill incident 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 and/or local 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 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. However, the Coast Guard also has an obligation to turn over any evidence of criminal conduct it discovers in the course of its casualty investigation 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 investigator 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, 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 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 as soon as possible after the accident. That attorney will make an initial determination as to whether the crewmember bears any personal criminal responsibility for the accident. If the crewmember does not have any personal liability, he can be made available 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, 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 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, a well-defined response plan, and preparation to deal with government investigations will invariably lessen the risk to the owner, operator, manager and crewmembers of criminal prosecution, fines and/or administrative actions.

III. 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, there can, and often are, be a number of civil cases against the shipowner, operator, possibly the management company and crewmembers 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.

CONCLUSION

For better or worse, the criminalization of maritime accidents 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 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.

While we trust the foregoing is self-explanatory, we stand ready to respond to any and all inquiries you, your colleagues and/or your clients may have. Of course, any specific substantive legal opinion and/or liability analysis will necessarily depend on the facts and circumstances of the underlying incident. We are available to assist in any and all ways possible, and for your convenience, confirm that the undersigned can be contacted on a 24/7 basis either at the above details; on his mobile telephone (+1 516-721-4076); or via Email at gmc@codus-law.com.

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