



The Nautical Institute Southampton
“POLLUTION FROM SHIPS”
RESPONDER IMMUNITY

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The ISU explored the main issues having a direct and substantial impact on the ability to prevent potentially catastrophic marine spills. The four main issues relevant are resourcing, responder immunity, criminalisation and the provision of places of refuge each issue is connected and has an important, direct bearing on the salvor's ability to use his best endeavours to prevent pollution.

It was concluded that Preventive Strategies fall into two simple but distinct groups: Pre-Casualty and Post-Casualty. By nature most International Maritime Organization [IMO] conventions, codes and other measures focus on the prevention of casualty events and in contrast the salvor provides the response when a casualty occurs despite the best efforts of Shipowner, crew, regulators and enforcement agencies. However it must of course be appreciated that no amount of regulation and enforcement can totally eradicate marine casualties and the threat of major spills.

Reviewing the four main issues in question;

Resources

Human fallibility and the natural perils of the sea will always ensure that zero tolerance will not be matched by zero spills. Yet considerable progress has been made towards that zero goal.

During the 1970s there were over 20 significant oil spills every year (a significant spill being defined as 5,000 barrels plus). In 2002 there were only three - unfortunately one of the three just happened to be the Prestige catastrophe with costs exceeding €1 billion.

Political pressures drive forward new regulatory initiatives whenever events such as Erika and Prestige occur albeit relatively rarely nowadays but the progress made goes unrecognised and especially by those responsible for zero tolerance policies have no interest in what happened during the 1970s.

Resourcing for prevention of major spills is a complex matter. Difficult questions must be faced. Firstly, how close are we to the law of diminishing returns when introducing new regulations? Each major spill triggers a fresh wave of regulation and the measures may cost billions to implement. Is this the best way to spend the industry's money? Especially as the incidence of major spills is now so low that it could be concluded that more regulation amounts to tackling the problem "from the wrong end" – meaning the truth maybe that the incidence of major spills is unlikely to be further reduced by more regulation.

One alternative to more regulation would be to channel additional resources towards the clean-up industry but once again this would produce limited returns. Huge resources have been invested in clean-up over many years yet the results of clean-up invariably disappoint and there has been no decisive technological or scientific breakthrough in this field for the past four decades.

With prevention of the next *PRESTIGE* the main objective governments would do better to direct more resources to spill prevention through Salvage.

This option has key advantages firstly; decision-makers selecting this option are recognising the reality of the situation in that they acknowledge that casualties and spill threats will continue to arise despite the best efforts of regulators and enforcement agencies.

Secondly; they are recognising that this option is infinitely preferable to that of clean-up, after a spill. Indeed, salvors often achieve 100 per cent success in preventing environmental damage and even when pollution does occur following grounding or collision salvors are often able to intervene and limit the extent of the damage.

Thirdly; salvage is far more cost-efficient than clean-up - the *PRESTIGE* case proves the point as the cost of salvage and limited clean-up at a place of refuge, would have been no more than €50 million – as opposed to Clean-up and compensation costs following loss of the entire cargo will exceed €1 billion.

The International Salvage Union [ISU] is a firm supporter of the IMO and its lead role in the areas of safety at sea and protection of the marine environment. The ISU hopes that the IMO will examine all resourcing issues and spill prevention measures in terms of cost-efficiency. A more appropriate balance needs to be struck between resourcing for casualty prevention (through spending on regulatory compliance) investment in clean-up and support for spill prevention through salvage.

An IMO strategy review in this area would almost certainly lead to the clear conclusion that support for the salvage industry is the best way of coming as close as humanly possible to the zero spills goal.



Responder Immunity

Salvors have every reason to be concerned about responder immunity as they are in a vulnerable position and are most often the very last line of defence against catastrophic pollution. The professional salvor has a duty of care and if he is negligent during the salvage he is liable for damages arising from that negligence notwithstanding these, ISU salvors accept this long-standing principle of law but they also seek protection from the imposition of strict civil and criminal liability in relation to pollution damage and in addition want protection from civil action by third parties who may attempt to “channel” liabilities.

If the ship's liability fund is likely to be exhausted and the next line of attack is against anyone else involved! The salvor may be regarded as an obvious target, as the Salvage Master has command of the operation and his decisions, even though taken in association with the authorities ashore will shape the outcome. It should be bourn in mind that unfortunately strict liability takes no account of the fact that even the Salvage Master has no influence over the weather!

Lack of responder immunity has a negative influence on the salvor's ability to intervene and prevent pollution. It should be remembered that salvage is performed in extreme circumstances where frequently there is no time to carry out a detailed risk assessment so as to gain a complete understanding of the vessel's condition and the extent of the damage.

Calculated risks have to be taken which would not be acceptable in more conventional circumstances ashore. For example, a Salvage Master might find himself explaining to the authorities ashore that the only way to prevent the loss of the entire cargo requires the acceptance of some degree of pollution - This is not the time to begin to negotiate immunity from strict liability!

The Prestige serves as an object lesson – she was leaking oil and the total loss of ship and cargo was inevitable without a place of refuge. The Spanish Authorities however could not bring themselves to accept limited pollution in order to avoid an environmental and economic catastrophe.

The ISU has voiced concerns about lack of immunity for some years and the example in UK the Sea Empress spill during 1996 resulted in the prosecution of Milford Haven Port Authority under an obscure strict liability law previously thought to apply only to river pollution! The fine of over USD 7 million was a convincing demonstration of regulatory



aggression. Alarm bells rang throughout the international salvage community and the UK government promised a review of this legislation but subsequently failed to act.

Salvors have a measure of protection under the IMO CLC and HNS conventions, but IMO governments rejected immunity for salvors when adopting the Bunker Spills Convention in 2001 and ignored calls for immunity from leading shipping and insurance organisations, including the International Chamber of Shipping, INTERTANKO and the International Group of P&I Clubs.

This was a grave setback for salvors and the ISU warned that any prosecution of those attempting to perform salvage and prevent pollution would have a significant impact on the salvors' willingness to intervene and deal with casualties in certain jurisdictions. Significantly, many salvage operations now commence with the removal of bunkers and to further compound the matter during an IMO Diplomatic Conference several delegations openly declared that they wished to retain the freedom to prosecute salvors. Hence Salvors responding to an active pollution threat in these jurisdictions would be wise to take a prudent view.

It is disturbing to report that very little progress has been made on the issue of responder immunity over the past decade. Nevertheless the ISU will continue to lobby for immunity and it will continue to warn that any prosecution of a salvor using his "best endeavours" to salve property and prevent pollution would have a severe impact on service provision in the jurisdiction involved.

Criminalisation

Similarly there are two aspects to criminalisation: the lack of immunity for responders and secondly the growing tendency of governments to detain and imprison those unfortunate enough to be caught up in major accident situations.

As for the wider issue of criminalisation, the arrest and imprisonment of the Master of the *PRESTIGE* in late 2002 has done much to highlight this problem. In mid 2003, the detention of members of the crew of *TASMAN SPIRIT* together with Salvage Master Nicolas Pappas gave a clear signal to the salvage industry. The point was made by the ISU whilst campaigning for their release that aggressive jurisdictions could find themselves bereft of salvage and spill prevention cover!

In September of last year at the ISU 50th General Meeting member salvors adopted a Resolution on criminalisation which states that the ISU will oppose the provision of salvage services in a jurisdiction unjustly detaining salvage personnel.

Further the ISU view that governments should take account of three facts:

- Salvors deal with problems which are not of their making.
- Salvors are the primary source of the equipment and expertise required to prevent spills when ships get into trouble.
- Hostile attitudes towards responders work against the prevention of spills which can cost billions.

In the final analysis criminalisation fosters a blame culture and only serves those who are more interested in scapegoats than prevention of the next major spill. Criminalisation is a blunt instrument and some governments are prepared to use it against the very people best placed to prevent pollution when a casualty occurs.

The risks of arrest and seizure of vessels and equipment by hostile jurisdictions may well result in those countries losing the benefits of prompt emergency response.

These points have been acknowledged by IMO Secretary General Mitropoulos when he said: "Criminalisation of individuals caught up in major spills might jeopardise effective response to an accident, as it might lead to fear and indecision at crucial times. If action is taken against salvors, indecision or inactivity may be further extended as third parties and other agencies may be unwilling, or at least hesitant, to respond to an incident because of the uncertainty over their position. Criminalisation may end up depriving us of the services of those individuals or agencies who may play an instrumental role in preventing accidents and, once they do happen, in mitigating their impact on human life and the environment."

The shipping industry has lobbied hard for moderation of the EU's proposals on criminal sanctions. The European shipowners have added their voice to a campaign to persuade the European Commission to avoid conflict with MARPOL and turn away from the imposition of penal sanctions for accidental (that is *unintentional*) ship-source pollution.

The ISU has joined other industry organisations and leading flag states in urging the IMO to develop guidelines on the fair treatment of seafarers. The IMO is now pursuing this proposal. It is to be hoped that these guidelines will set new standards and promote more civilised behaviour.

Places of Refuge

In some cases a place of refuge is essential for successful salvage where a sheltered location may be required to complete temporary repairs in relative safety or to perform a ship-to-ship transfer of cargo. Understandably many coastal authorities worry about the additional risks involved in providing places of refuge and the consequent financial exposure of coastal communities which this situation certainly deserves more attention.

The view of the ISU governments should go much further than mere compensation for any disruption and damage to the local and regional environment and economy but should *actively reward* communities which accept this heavy burden on behalf of both the national and international interests.

This policy would boost the confidence of coastal communities and reduce political tensions between central and regional/local government. It would make it easier for the salvor to gain access to places of refuge.

This concept of reward should be supported by the IMO and could perhaps be presented as best practice in the Casualty Management Guidelines?

Conclusion and Recommendations for Future Policy!

Spill prevention through salvage is the most effective Post-Casualty Strategy therefore preserving and enhancing Salvage services through a more secure financial footing in addition to introducing measures allowing the salvor the necessary freedom to perform at maximum efficiency.

All envisaged measures should embrace Responder Immunity, the introduction of Best Practice Guidelines on Casualty Management, a sharper focus on the Best Environmental Option and substantial financial support for coastal communities providing Places of Refuge.

In response to the EU Green Paper on "Future Maritime Policy" the ISU proposed a 10-Point Plan "Action Plan for the Spill Risk Reduction in EU Waters" which incorporates the sentiments and requirements outlined in this paper but goes much further in providing the industry with a model for the development of an effective environmental marine spill defence plan.