Maritime Casualties: From Negligence to Strict Liability to Criminalization-- A U.S. Perspective

Executive Summary

An accompanying paper and presentation makes the observation that “the boundaries of the concepts of negligence and responsibility are shifting towards stricter liability regimes including criminal liability and custodial sentences for unintentional [ ] and accidental acts….”¹ The same can certainly be said about maritime casualties’ in the United States. For example, it is by now largely recognized that a polluter can be held criminally liable on the basis of strict liability or on a theory of negligence.² The concepts of strict criminal liability and criminal negligence have been used in many contexts including maritime casualties as a means of deterrence; that is, to heighten attention and reduce indifference towards conduct that might otherwise result in accidents.³ It is believed that the risk of

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³ See Staples v. United States, 511 U.S. 600, 629 (1994) (citing Morissette v. United States, 342 U.S. 246, 254 (1952) for the proposition that one characteristic of public welfare offenses – which use a standard of ordinary negligence – is that they “heighten the duties of those in control of particular industries, trades, properties, or activities that affect public health, safety or welfare”).
severe fines and even prison sentences will favorably influence how a particular task is evaluated, planned and executed.\(^4\)

Both “strict liability” and “negligence” are liability concepts first rooted in civil law, not criminal law.\(^5\) Traditional criminal jurisprudence required a demonstration of both *actus reus* and *mens rea*.\(^6\) The introduction of civil liability concepts such as strict liability and negligence into the criminal law relaxes if not altogether erodes traditional evidentiary burdens for the government to demonstrate criminal intent. This approach is perhaps most apparent in statutes relating to the needs of the general public welfare, including for example, unadulterated food and medicines, clean drinking water and environmental preservation.\(^7\) In borrowing these liability constructs from the civil law, well-meaning law makers have left the Courts with little choice but to fashion rulings that are ostensibly consistent with legislative language and intent while leaving behind well-established defenses and rights.\(^8\) For example, under the Clean Water

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\(^4\) See *United States v. Balint*, 258 U.S. 250, 252-53 (1922) (stating that punishment for negligent offenses in relation to the public can be necessary to stimulate proper care).


\(^6\) “Actus non facit reum nisi mens sit rea” the age-old axiom: “The act does not make a person guilty unless the mind be also guilty.”

\(^7\) U.S. Courts have reasoned that the interests of public safety simply outweigh the burdens traditionally imposed on the government to prove criminal intent. See *United States v. Dotterweich*, 320 U.S. 277 (1943) (interest in protecting the public from adulterated food); *United States v. Park*, 421 US 658 (1975) (same); *United States v. Lit Drug Co.*, 333 F. Supp 990 (D.N.J. 1971) (interest in protecting the public from drug adulteration); *Hanousek*, 176 F.3d at 1121 (interest in protecting the public from water pollution). But see *Hanousek v. United States*, 528 U.S. 1102, 1102-03 (2000) (Thomas, J. dissenting) (even though the government has an interest in protecting the public from water pollution, the Clean Water Act should not be considered a public welfare statute - a categorization that lowers the government’s burden of proving criminal intent - because it criminalizes ordinary use of commercial devices and normal industrial operations).

\(^8\) David E. Roth, Stephen R. Spivack, and Joseph G. Block, *The Criminalization of Negligence Under the Clean Water Act*, Criminal Justice, Volume 23, Number 4 (Winter 2009), ¶ 19 (noting that the standard for criminal negligence would be much more stringent on defendants if they were not permitted to advance traditional negligence defenses in criminal cases).
Act, the same “negligence” that defines civil liability can also be the basis of criminal liability. ⁹ Completely absent from the equation however, are other aspects of civil negligence such as comparative, intervening and superseding causes. Thus, a jury finding that a defendant is but one percent negligent actually results in a determination under the criminal law that he is hundred percent guilty. ¹⁰

Other aspects of civil law which have been borrowed by the criminal law present seemingly inconsistent or disjointed functions. For example, consider the doctrine of respondeat superior or corporate vicarious liability when imposing criminal sanctions on corporations for the acts or omissions of its employees when working within the course and scope of their employment. In the civil arena, it is widely accepted that the conduct of an employee working within the course and scope of his or her employment is imputed to the employer.¹¹ The same is true for certain criminal acts especially where the employees’ conduct is known or with privity, or at the direction or instruction of the employer.¹² Where ordinary civil negligence is the same standard for criminal negligence does it stands to reason that the employer should also be criminally liable as well? In the name of public safety, the answer is widely accepted as, yes; but to get to that point, one has to

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⁹ See Hanousek, 176 F.3d at 1120.
¹⁰ While one hundred percent guilt is the finding, apportionment of fault is saved for the sentencing phase of trial, where calculations of fines or other punishment will be imposed. For example, when the government pursues criminal charges, it may seek fines under the Alternative Fines Act (“AFA”) in lieu of other statutory bases for fines. These fines may be based on “the greater of twice the gross gain or twice the gross loss….“ 18 U.S.C. § 3571(d).
¹¹ However, to establish the pecuniary gain or loss for purposes of the AFA, the government must (1) allege in the Indictment the amount of gain or loss attributable to the defendant, and (2) prove that particular amount of loss to a jury (3) beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. 446, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt”); S. Union Co. v. United States, 132 S. Ct. 2344, 2357 (2012) (finding that the rule of Apprendi applies to the imposition of criminal fines).
¹² See Faragher v. City of Boca Raton, 524 U.S. 775, 796-97 (1998) (”The liability of a master to a third person for the torts of a servant has been widely extended by aid of the elastic phrase ‘scope of the employment’ which may be used to include all which the court wishes to put into it”) (quoting Seavey, Speculations as to “Respondeat Superior,” in Studies in Agency 129, 155 (1949)).
admit that the “intent” element of the crime has been abandoned altogether. Moreover, intent is entirely eliminated in a case involving a strict liability statute where culpability or the conduct of the employee is not even an issue for consideration resulting in what some have described as “strict vicarious criminal liability” for corporations.\(^\text{13}\)

The erosion or elimination of criminal intent coupled with expanding broad prosecutorial discretion has upended the traditional approach to responding to a marine casualty. By accepting instructions to respond to a maritime casualty, the maritime practitioner is ethically obligated to give qualified legal advice and representation amidst an overlapping and often confounding web of international treaties, domestic national laws and even regional or local environmental and public health and safety laws and regulations. While knowledge of the applicable maritime law has always been a necessity (and indeed the very basis for which an appointment is made in the first instance), it is no longer enough. From the time of the initial call, the modern day maritime lawyer should fully anticipate and plan for criminal enforcement activities when responding to marine casualties involving death or serious bodily harm, health and safety of the public, and risk to the environment. As the shipping industry is increasingly exposed to risk of criminal liability for marine accidents, the successful maritime lawyer must also expand his or her practice to include at a minimum a working knowledge of key aspects of criminal law and procedure.

\(^{13}\) See Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. Legal Stud. 833, 840 (1994) (recognizing the existing law for corporate criminal liability to be “pure strict vicarious criminal liability”). See also Craig H. Allen, Proving Corporate Criminal Liability for Negligence in Vessel Management and Operations: An Allision-Oil Spill Case Study, 10 Loy. Mar. L.J. 269, 273 n. 18 (2012) (pointing out that the IMC Shipping Company, as operator of the M/V Selendang Ayu, was held strictly liable under the Refuse Act for actions of its agents in connection with the vessel’s running aground the Aleutian Islands and spilling fuel oil).
This presentation will identify certain aspects of a response and investigation into a maritime casualty for which special care and attention should be given particularly in light of the potential for criminal sanctions. In addition to common international treaties and protocols, primary reference and examples will be drawn from primarily from pollution incidents and the laws of the United States – as that jurisdiction has been recognized to have lead a major shift in the criminalization of the maritime incident.14

The presentation will also then offer practical suggestions that the casualty lawyer should consider and prepare for in advance of his or her next response, including:

(1) **Understanding and Accepting the Engagement.** Who does the lawyer represent, considerations of multi-party representations in a potential criminal case; and the significance of an Upjohn warning/disclosure.

(2) **Avoiding the Risk of Disqualification.** Lawyer versus witness, and the use of surveyors, consultants and experts.

(3) **Considerations for the Timely Appointment of and Dealing with Individual and Pool Counsel.** Maintaining privilege and use of joint defense agreements.

(4) **Interacting With Investigative Authorities.** Understanding the full reach of 14 USC § 89a and the seemingly endless Port State Control exam, being mindful of possible whistle-blowers, Real Party in Interest status, and the threat of obstruction-- Really?

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