Criminalizing Accidents
Captain George A. Quick, MM&P

Good afternoon, Ladies and Gentlemen

My name is George Quick and I am Vice President of the International Organization of Masters, Mates & Pilots. As the name implies, our organization represents the captains, officers and pilots on large commercial ships.

The area of concern that I would like to discuss today is the growing trend to bring criminal charges against mariners who are unfortunate enough to be involved in a maritime accident, particularly if the accident results in a breach of the ship's hull that causes unintentional pollution. These types of accidents can be high profile, generating political pressure to play the "blame game" and find someone to hold up in public and punish with criminal sanctions, including imprisonment. But, the fact remains most maritime accidents are just that, industrial accidents, without criminal intent and without the elements of gross negligence that would normally justify charges of criminal negligence.

In order to obtain convictions, overzealous prosecutors are turning to antiquated unrelated "strict liability" laws that were never intended to be applied to maritime accidents. If the accident results in unintentional pollution the mariner is charged under the Refuse Act of 1899 that was originally enacted to address the intentional dumping of trash, waste and refuse into navigable waters. If an accident results in killing a bird the mariner is additionally charged under the Migratory Bird Treaty Act passed in 1918 to protect birds from being killed by illegal market hunters or unauthorized hunting methods. Convictions and imprisonment under these statutes require only a showing that the act took place.

The mariner can be convicted and sentenced to a fine or imprisonment even when they took all reasonable precautions to avoid the accident. The improper application of such laws have turned every accident involving unintentional pollution into a potential crime scene without regard to fault or intent. As Oliver Wendell Holmes said in his classic book The Common Law: "Even a dog distinguishes between being stumbled over and being kicked." But, in maritime accidents U.S. Attorneys fail to make that distinction.

The third charge brought is a violation of the Clean Water Act which has a standard for conviction of simple negligence to impose fines or imprisonment. This is a very low standard to meet in order to sentence someone to prison. Normally simple negligence claims are settled in the civil courts with lawsuits for monetary damages, not criminal fines and imprisonment. With such a low standard for conviction, whether it is fair or
reasonable to bring criminal charges after an accident depends on the exercise of sound prosecutorial discretion on the part of the prosecutor whether justice is really being served.

Unfortunately, the appropriate exercise of discretion is often lacking in high profile accidents. In our view the decision to financially ruin and imprison a mariner by prosecuting him on the basis of strict liability laws and simple negligence for a navigational error is an improper application of laws intended for other purposes.

The motivation to prosecute often appears to be driven by a desire to be perceived by the public as taking positive steps to address the cause of the accident (regardless of the reality), and to have leverage over the defendants with respect to the ongoing civil liability negotiations related to clean up costs. These motives for prosecution are a misuse of the criminal justice system. Since the criminal charges include alleged violations of no-fault "strict liability" statutes, the defendants are in no position to resist what is a "slam dunk" case for the prosecution.

We believe the aggressive "blame game" and criminal prosecution of mariners after an accident on strict liability or simple negligence charges are counter productive to the goals of maritime safety. The goals of accident investigations should be determining the causes for "lessons learned" to avoid similar accidents in the future. The issue of possible criminal prosecution in an accident investigation has a chilling effect on the cooperation of witnesses. Ships' crews are well advised to remain silent during the investigation, until represented by attorneys. The policy of aggressively pursuing criminal charges is in conflict with the policy of conducting safety investigations to determine the root causes of accidents to prevent them in the future. There is no deterrent value or preventive goal in throwing the unfortunate mariner who had an accident in prison.

The issue of bringing criminal charges against mariners is not limited to the United States, although the United States is in the forefront in systematically pursuing criminal charges. The international maritime community is very concerned about the criminalizing of accidents, both as a question of fundamental human rights and because of its effect on the recruitment and retention of mariners needed to man the world's merchant ships that global trade is dependent upon.

It is difficult to retain experienced mariners in senior positions when they believe if they make an error they may be financially ruined by legal defense costs and criminal fines, and face imprisonment. The criminalizing of accidents is causing some of the most qualified people to leave the industry.

Recognizing that fair treatment begins with the procedures used during the accident investigation the International Maritime Organization (IMO), the United Nations organization responsible for the regulation of international shipping, has taken the lead in trying to establish international standards for the fair treatment of mariners in the aftermath of a maritime accident. The IMO Legal Committee adopted Guidelines on the Fair Treatment of Seafarers in The Event Of A Maritime Accident in 2006. Those guidelines formed the basis for a Code on "International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident" that is on track to become a mandatory international standard on how mariners are to be treated during investigations.
The Code would mandate that mariners be informed of the nature and basis of the investigation. Many mariners believe that accident investigations are focused on safety issues and are unaware that their answers to questions during an investigation can lead to criminal prosecution, particularly foreign mariners who are unfamiliar with current U.S. practices. The Code would place an affirmative duty on the investigators to inform the mariner. The Code would also mandate that a mariner be informed and allowed access to legal advice regarding self-incrimination and the right to remain silent, and any protections against the evidence provided being used against them.

The Code does not change the substantive law as to what constitutes a crime under various national laws, but it does provide some procedural protection to the mariner who may be uninformed as to nature of the investigation and his rights under various national laws. Surprisingly, the United States, under pressure from the Environmental Crimes Section of the Department of Justice, has taken a position in opposition to the Casualty Code and has stated they will prevent it from entering into force in the United States. Apparently they not only want the ability to prosecute on the basis of statutes that have minimal standards for conviction, but they want the additional advantage of keeping the mariner in the dark as to his procedural rights during an investigation. It is like to shooting ducks - migratory birds - in a barrel.

The disturbing frequency with which mariners are being unfairly treated after maritime accidents, particularly where there is unintentional pollution, has led the International Chamber of Shipping, the International Shipping Federation and the International Transport Workers' Federation — a coalition of management and labor on a worldwide level — to begin a campaign to educate mariners as to the provisions of the international Guidelines on the Fair Treatment of Seafarers in The Event Of A Maritime Accident. The advice being given in posters now being circulated to most of the ships in international trade is that a mariner should ask for a lawyer before answering any questions or making any statements to investigators after an accident since these could be used against the mariner in future criminal or legal proceedings. It is unfortunate that such adversarial advice is necessary, as it does not set the stage for a cooperative effort between the ship's crew and authorities to uncover the causes of the accidents or to mitigate the consequences of accidents. The threat of criminal prosecution continues to undermine cooperative and effective oil spill prevention and response efforts.

There is a need for Congress to address the public policy issue of whether criminal prosecution of mariners after a maritime accident, absent the normal standards for criminal negligence, really serves the public interest. Is it sound public policy and an effective means of deterring accidents? The answer is clearly No!

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Employers and unions unite to back fair treatment for seafarers following maritime accidents

The International Transport Workers’ Federation (ITF), the International Shipping Federation (ISF) and the International Chamber of Shipping (ICS) have joined forces in a new initiative to help protect seafarers involved in maritime accidents. The three organisations, which represent maritime employers and trade unions worldwide, announced today in London that they have united to support and promote the IMO and ILO Guidelines on the Fair Treatment of Seafarers In The Event Of A Maritime Accident.

As part of the campaign the three organisations are distributing posters (supported by websites and leaflets) worldwide to show seafarers how the Guidelines can help protect them. They are also encouraging their members - national shipowners’ associations belonging to the ISF and ICS, and seafarers’ unions affiliated to the ITF - to approach their governments in order to promote the Guidelines and to monitor how effectively they are being implemented.

ISF/ICS Secretary General, Tony Mason explained: “As responsible employers, we believe its is very important that the IMO/ILO Guidelines, which represent the internationally accepted minimum standard for the fair treatment of seafarers by investigating authorities, are indeed implemented in practice by governments. Seafarers must be treated with dignity and respect, and given access to independent legal representation in situations where they may be interviewed or held following an accident at sea.”

ITF General Secretary, David Cockroft, remarked: “The knee-jerk scapegoating of seafarers following accidents at sea is a growing concern to us all. In recent years the response of too many national authorities has been to reach for the handcuffs first and find out what actually happened last.
“Incidents like these prove how vital the Guidelines are. I’m proud to say that the ITF and ISF in their capacity as ILO ‘social partners’, with support from ICS and other industry organisations, helped to develop these Guidelines, which were the product of tripartite negotiations with governments prior to their agreement by IMO and ILO.”

Speaking at a press conference to launch the joint effort the two men displayed the Maritime Accidents. Seafarers – Be Aware! posters that the organisations are distributing for use on ships, in seafarers’ missions and in other locations around the world. These can also be downloaded from either www.marisec.org/fairtreatment or www.itfglobal.org/fairtreatment, where the IMO/ILO Guidelines also appear in full.

Meanwhile the three organisations are sending the following letter to the Secretary-General of the IMO and the Director-General of the ILO:

To Mr E E Mitropoulos, IMO Secretary-General, and Mr Juan Somavia, ILO Director-General

1 February 2008

Dear Mr Mitropoulos and Mr Somavia,

FAIR TREATMENT OF SEAFARERS FOLLOWING MARITIME ACCIDENTS

We are writing with regard to a joint campaign being launched today by the International Shipping Federation (ISF), the International Chamber of Shipping (ICS) and the International Transport Workers Federation (ITF) to promote the Guidelines on the Fair Treatment of Seafarers in the Event of a Maritime Accident, adopted by IMO and ILO in 2006.

As you are both well aware, the treatment by national authorities of seafarers unfortunate enough to be involved in maritime casualties or pollution incidents is an extremely important issue for the shipping industry, especially in the light of recent high profile cases around the world, where masters and crews have been detained by investigating authorities, apparently without adherence to proper due legal process. It was, of course, such incidents that led to the adoption by governments of the IMO/ILO Fair Treatment Guidelines, in order to address the key responsibilities of detaining States as well as those of the vessel’s flag State and the seafarers’ country of residence.

It is therefore very important that the IMO/ILO Guidelines, which represent the internationally accepted minimum standard for the treatment of seafarers by investigating authorities, are implemented by governments, and we are now actively promoting the IMO/ILO Guidelines throughout the industry. As part of our global campaign we are distributing posters worldwide to show seafarers how the Guidelines can help protect them, and we are encouraging our members, who of course are national maritime employers’ associations and national seafarers’ unions, to approach governments to promote the Guidelines and monitor how effectively they are being implemented. For information, a copy of the poster drawing attention to the Guidelines is enclosed.
We are sure that IMO and ILO will welcome this campaign by the industry’s social partners and our objective of ensuring that these important IMO/ILO Guidelines are indeed implemented in practice.

Yours faithfully

Tony Mason       David Cockcroft
Secretary General, ICS/ISF       General Secretary, ITF

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If your vessel is involved in a maritime accident, then be aware that there are international guidelines in place to ensure that you are treated fairly if an investigation is carried out and/or if you are detained by a State following the accident.

These guidelines are the IMO/ILO Guidelines on the Fair Treatment of Seafarers in the event of a Maritime Accident.

The Guidelines require that seafarers should be treated fairly by the port or coastal state, the flag state, the seafarer state and shipowners.

It is important that you understand your rights under these Guidelines so that if you are questioned or detained following a maritime accident, you know what to do and how to protect your interests.

If you are questioned about a maritime accident involving your vessel:

- If you think it is necessary, ask for a lawyer before answering any questions or making any statements to port, coastal or flag State investigators since these could be used against you in future criminal or other legal proceedings
- Contact your company and/or union for advice and assistance
- Make sure you fully understand everything that you are asked

If there is anything you do not understand:
- ask the authorities to stop the questioning
- request the assistance of an interpreter, if necessary

It is important to ensure that you protect your interests first. Therefore, follow the advice you receive from your company, union or lawyer, and importantly, when advised to provide information, be truthful with investigators.

More information on the Fair Treatment Guidelines can be found at: www.itfglobal.org/fairtreatment or www.marisec.org/fairtreatment