The Human Factor in Accidents at Sea

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Legal Consequences

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Introduction

The purpose of this paper is to review and comment on the legal position of ship owners and crewmembers with regard to the consequences of accidents at sea and more in particular those accidents where the human factor plays a decisive role in the cause of such an accident.

I will first define the title of the paper, The Human Factor in Accidents at Sea, followed by a short historic overview of legal consequences, where after I will touch upon the developments in the legal arena and in particular the development on the European law front.

Definition

The Human Factor in Accidents at Sea can be defined as those accidents involving ships and their crew and cargo, which accidents are in some way linked to a human error as opposed to a purely technical failure.

One only has to browse Lloyd's List and turn to the Casualty Reports, and in particular the Marine Section, to see that Marine Accidents are nothing unusual. That also goes for the common cause of Marine Accidents, being the involvement of members of the crew or other persons involved in the day-to-day running of the ship. Of course this is nothing new. Human errors were made as long as there have been people walking on this earth and some of those errors are made in relation to ships and shipping. In that respect we commonly think of collision cases, where it is likely that mistakes have been made on board of one of the vessels involved or even on both vessels involved. Those mistakes are again commonly a misinterpretation of the situation the vessels find themselves in. The same cause,

misinterpretation of circumstances, also known as the "error in navigation", may result in groundings. We also think of fires on board of vessels, not necessarily caused by or as a result of a human error, but certainly being allowed to spread as a result of, for instance, lack of knowledge of dangerous goods if such a fire involves such dangerous goods or lack of knowledge on how to deal with a certain kind of fire on a certain kind of vessel.
Recent studies have resulted in focusing on fatigue in crewmembers as a cause of human error. Fatigue that could result from the busy schedules some vessels are engaged in, from reduction of the amount of crewmembers employed on a vessel and may even be caused by vibrations, lighting and other ergonomic circumstances found on modern vessels.

A few times I have mentioned "lack of knowledge". This could imply a lack of training. It is therefore not surprising that as a first prevention to counter errors being made on board of ships resulting in accidents, both ship owners and the authorities involved in shipping have first of all looked at the "knowledge"-side of ship's personnel, by making sure that all personnel are properly trained and certificated, this training and certification in an ideal world to be standardized. In that respect I refer to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, also commonly known as STCW and the 1995 amendment to this Convention, entered into force on 1 February 1997, however with a transitional period until 1 February 2002. By the last mentioned date every master and officer has to hold a valid Certificate and endorsement, which complies with the STCW 1995 Regulations and issued by the flag State of the particular vessel. The purpose of STCW is to bring the standards of competence to the highest possible level, which should reduce the risk of a human error being made. STCW 95 also focuses on establishing minimum resting periods for watchkeeping personnel and that all crewmembers receive vessel familiarity and a basic safety training.

It is of course not a secret that even with the highest standard of training plus additional and frequently repeated refresher courses a human error cannot be excluded. In that context I refer to a recent report on a Marine Accident, being a fire on board of a passenger ship, by the National Transportation Safety Board. The Safety Board identified that regular fire drills were held on board of this particular vessel in accordance with regulatory requirements. While the training may have prepared the shipboard personnel to attack the fire, the drills apparently did not adequately prepare some officers to appropriately assess and manage a

fire emergency. The Safety Board considered it essential to the safe operation of ships that masters and officers are able to fulfil their proper commands and control functions during shipboard fires and believes that shipboard training and drills for masters and other officers should be revised to include an emphasis on their management responsibilities during a fire emergency and the principles of command and control of on board fire fighting activities. So, even though the officers and crewmembers involved in this fire were highly trained and have been involved in frequent fire fighting courses, when it came to the point that the training had to be brought in practice, errors were made which contributed to the extent of the fire damage and spreading of smoke.

The Marine Accident I just touched upon took place in May 2000 and almost two years after the ISM Code came into force for passenger ships. This code is meant to establish safety-management objectives and requires a safety management system to be established by the company, whereby the company is defined as the ship owners or any person such as the manager or charterer who has assumed responsibility for operating the ship. The company is required to establish and implement a policy for achieving the set objectives.

The law and/or legal consequences.

Where does the law get involved in all of this.

Historically there are Rules and Regulations in the shipping laws of the world's major maritime countries through which national legislators have tried to achieve a certain standard of safety on board of vessels flying their flag. These Rules and Regulations not only involve inspections and consequently certification of vessels, thus the standard of the vessel itself, but also the standard of training of watchkeeping officers or, using a broader definition, those officers that have certain responsibilities towards the vessel and her owners, crew and cargo. In connection with those Rules and Regulations most national legislators have drawn up rules concerning the investigation into Marine Accidents. There are certain countries that use the outcome of such investigations without appointing blame to the persons involved and only to learn lessons from the outcome of such an investigation and to make recommendations if necessary. There are countries that have linked the results of an investigation to their national Criminal code and there are countries, such as the

Netherlands, that have in place a specific disciplinary law on the basis whereof certified officers may receive a simple reprimand or may not be permitted to sail in their particular rank for a certain period of time.

The above Rules and Regulations have indeed been evolved in close connection and as a reaction to the developments in the business over the years. Such as accidents and incidents, technical development in the size, design and purpose of vessels and as guided by International Conventions that came about through the involvement of institutions such as ILO and IMO.

The other side of the coin, and a development that is closely linked to major casualties over the last two decades, is the strife of national legislators as well as international legislators to look at the owner and or operator of the vessel if it comes to responsibility and/or liability in connection to marine accidents. There are examples. Accidents that involved huge losses of life such as the Herald of Free Enterprise and the Estonia and accidents that caused serious damage to the environment with even greater financial consequences, such as the Exxon Valdez and the Erika.

It was after disasters such as those mentioned above, which were predominantly caused by human errors, with management failures also identified as contributing factors, that it was decided nationally and internationally to set higher standards, in particular in respect of the management of ships, resulting in the adoption by the IMO in 1989 of the Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention. This eventually led in 1993 to adopting the ISM Code.

These developments went hand in hand with other, more general developments in national and international thinking in respect of the "culpability" of companies. This line of thinking was also brought about as a result of the major casualties of the last decades, both marine and non-marine and fuelled by the political importance of those accidents. Corporate culpability involves the link between an act committed by a company or indeed negligence attributed to that company in their management and the Criminal law, and more in particular the possibility of convicting a company and its directors in respect of proven failure in their management such as the management failures that were seen as contributing factors in

respect of the loss of the Herald of Free Enterprise, described by Lord Justice Sheen as "the disease of sloppiness". Within the context of this paper it would go too far to dig deeper into the subject of this Corporate Culpability, which is an item in full development and constantly changing.

It is however this way of thinking that should at least push ship owners and other companies involved in the management of ships, also charterers and companies not necessarily involved in the day-to-day running of a vessel but having a certain influence on the quality of shipping, to comply with the Rules and Recommendations set by national and supra-national authorities.

Immediately after the Erika disaster it was ascertained by the European Commission that public opinion was no longer prepared to tolerate accidents such as the Erika and the accidents that preceded her, such as the Torrey Canyon, the Olympic Bravery, the Amoco Cadiz, the Aegean Sea and the Braer. Those casualties resulted in a strong political will to tackle their causes. It has taken those high profile casualties, where the environment was the major victim, to spearhead this political change in climate and not those disasters where many lives were lost. It has to be said that disasters such as the Herald of Free Enterprise and the Estonia had a certain impact on the regulatory field however less conspicuous. The European Commission in her proposal to the European Parliament following the Erika disaster, considers that the normal framework for international action on maritime safety under the auspices of the IMO appeared to fall short of what is needed to tackle the causes of such disasters effectively. The Commission in that respect points out the changes in maritime transport over the last decade and the emergence and development of flags of convenience, which complicate the due application of the regulations issued by IMO throughout the world. On the basis of its Report the Commission came to a proposal for a few short-term regulatory measures, amongst which:

- To ban from EU ports vessels older than 15 years that have been detained more than twice by Port State Control in 2 preceding years;
- Stricter monitoring of Classification societies;
- The ban on single hull vessels according to a timetable to be set.

As a second step the proposal is to improve the systematic exchange of information between all parties in the maritime community and further development of the Equasis system, improved surveillance of navigation and last but not least, a further development of the liability of the various players participating in the oil trade. With the term 'various players" the European Commission does not look at the ship owner alone, but also at the charterer, sub-charterers and cargo owners involved in a marine accident.

There are of course already certain remedies in place to prevent (un) limited liability following such a disaster. Strict compliance to the ISM code could be such a remedy. If the ship owner proves that it fully complied with the Regulations and Recommendations it is bound by pursuant to the code, this should ensure in limiting the liability that would attach, strictly or otherwise. The position of the ship owner may be different when observing the aftermath, meaning the financial consequences, of an accident, resulting in some way to damage to the environment. In those cases there is the concept of strict liability, the owner of the polluting vessel is liable whether or not blame or negligence attaches to the owner. In principle this liability may be capped by limitation and becomes therefore insurable, the limitation being based on the rules of the relevant Conventions. In general liability in respect of oil pollution is subject to the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution (CLC) and the International Convention that sets up the Oil Pollution Fund (the Fund Convention). This provides for a two-tier liability. The United States of America have adopted the Oil Pollution Act 1990 (OPA90) as they thought that the CLC and Fund Convention did not go far enough. The general rule is that the ship owner is liable, with relatively higher limits and whereby limitation is excepted in cases of gross negligence or wilful misconduct of the responsible party or the violation of an applicable federal safety, construction, or operation regulation by the responsible party, an agent or employee of the responsible party or a person acting pursuant to a contractual relationship with the responsible party. This provides for a rather wide group of people and companies related to an accident. Non-compliance to the rules such as the ISM code by the ship owner and/or manager could have an impact on limitation of liability. Non-compliance could under circumstances result in gross negligence or wilful misconduct mentioned in OPA90, or could result in breaking the limits of liability according to the more generally used term, when it is proven that the accident was a result of a personal act or omission by the party seeking to

limit its liability, committed with the intention to cause the loss, or recklessly and with knowledge that such a loss would probably result.

In the matter of the Herald of Free Enterprise the right of the ship owner to limit its civil liability was challenged in Court, however it was unsuccesfull. To my knowledge the right to limit liability pursuant to the 1976 Convention has been denied on two or three occasions by French lower Courts. In one matter the Supreme Court reversed the judgments of the lower Courts. The Paris Supreme Court is presently dealing with at least one other matter.

Conclusion

To conclude it is to be expected that the position of the ship owner, the manager, the charterer and sub-charterer of a vessel, as well as owners of a cargo, will be of a considerably higher profile than it was some years ago. Due to the changes in legal thinking, political priorities under pressure of public opinion and the sometimes enormous financial consequences of a maritime accident, insurable or uninsurable, cargo owners, charterers and sub-charterers are less likely to be able to hide behind the ship owner, obscure or not. A legal framework is in the process of being put in place to reach "through" legal set ups as single ship companies. It is becoming more and more acceptable in certain legal systems to break through or lift the sacred so-called "corporate veil", in place to limit the liabilities and responsibilities of a company or group of companies, its managements and shareholders.

The changes in legal thinking are not only in the field of civil law and through national and supra-national legislators, but also and as importantly in the field of criminal law. Corporate culpability could result in hitting the financial structure of corporations due to economic sanctions imposed upon them and even with the imprisonment of those managers that are held responsible for the negligence of a company. In that respect I would only like to refer to the way the shipping administration and the criminal prosecutors in Greece in close cooperation with each other have dealt with and are still dealing with the aftermath of the Samina Express-disaster.

What can be done?

Perhaps the secret is to keep the corporate structure of a company or group of companies as transparent as reasonably possible. The aim will be full compliance by ship owners and managers and all other participants in the shipping industry with the Rules and Regulations in place and to be put in place in the near future such as the ISM Code and other quality enhancing schemes (ISO), STCW95 and the Quality Shipping initiatives as proposed by the European Commission.

No doubt there will an impact on the industry where costs are concerned in order to achieve the objectives that are more or less imposed by national and supra-national authorities. The legislators should also deal with this aspect in order to find a balance between costs and measures. An initiative as developed by the US Coast Guard, being certain cost effecting incentives for those ship owners that are in full compliance with the rules, should also be looked at within the framework of the coming changes.

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