

## **CMI 2006 ABSTRACTS**

### **The Fair Treatment of Seafarers in the Event of a Maritime Accident A Panel Discussion**

**Monday, 13<sup>th</sup> February**

**11:00 – 12:30, 14:00 – 15:30, 16:00 – 17:30**

#### **Overview of the Session**

Précis by the Chairperson of the Session  
Professor Edgar Gold, AM, CM, QC  
Marine and Shipping Law Unit  
TC Beirne School of Law  
University of Queensland

In recent years all sectors of the maritime industry and many governments have become concerned about the criminal action taken against seafarers in the aftermath of maritime accidents, especially those that involve marine pollution. Examples such as those involving the masters of vessels such as *Nissos Amorgas*, *Erika*, *Tasman Spirit*, and *Prestige* immediately come to mind. However, there are many other cases, both reported and unreported, that illustrate this increasing trend where seafarers appear to have become the 'scapegoats' for maritime accidents, regardless of whether they are directly or indirectly involved or responsible. Furthermore, there are a number of other instances where seafarers are targeted criminally involving: immigration and narcotics offences by other crew members; problems relating to refugees and stowaways; ship security difficulties; problems of obtaining access to ports of refuge in times of distress; navigational accidents involving loss of life or injury; and, in some states, even problems relating to bills of lading and charter party information.

In some cases masters of vessels and other sea-going personnel, have been arrested, imprisoned or otherwise detained, under a variety of 'criminal law' and other proceedings for extensive periods. Often the most basic rights of such persons are not observed and access to legal advice is not provided nor even permitted. Furthermore, such persons are often neither charged nor provided with information why they are being held. In many instances, such seafarers appear to be held as 'material witnesses' or for other 'administrative and technical' reasons. In other instances seafarers may be 'charged' with causing the relevant marine accident and/or with marine pollution. This occurs despite the fact that there is rarely any directly attributable responsibility for such accidents that may result from circumstances quite beyond the operational responsibility or competence of those so charged.

As a result, a number of states, international organisations and professional groups have expressed their concern about this growing phenomenon to the IMO, as well as the ILO. In response a 'Joint IMO/ILO *Ad Hoc* Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident' was formed in 2004. This Working Group, drawn from China, Egypt, Greece, Nigeria, Panama, Philippines, Turkey and the USA, as well as four shipowner and four seafarer members, has been requested to provide recommendations to the IMO Legal Committee and the ILO Governing Body, including draft guidelines on the fair treatment of seafarers in the event of a maritime accident. The Comité Maritime International was specifically requested to assist in this work. In response the 'CMI International Working Group on the Fair Treatment of Seafarers' was formed in October 2004 to provide an initial response to this request.

The Chairman of the CMI International Working Group will provide an Introduction and Outline of the subject, including the work undertaken by the Working Group.

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## **The CMI Questionnaire on Fair Treatment of Seafarers: Summary of Findings**

Précis by the Presenter

David Hebden:

Independent Maritime Consultant

Specialist Marine Casualty Investigator

Mediator and Arbitrator

There has been an excellent response to the CMI questionnaire issued by the CMI International Working Group looking into Fair Treatment for Seafarers under the chairmanship of Professor Edgar Gold. At the time of writing some 24 Member Associations have responded and their replies to the questionnaire have been put into a summary document dealt with on a question by question basis. I have, throughout the document, transferred to the Summary the exact text of each Association's response to each question, without amendment or correction (except in the case of obvious typographical errors). In order to create a uniform document all transferred text was printed in Arial, font size 10.

When using the Summary it will be possible to compare the law and procedure of each jurisdiction with another, to identify trends, such as similarities and dissimilarities, and, of course, to compare the theoretical operation of the law, within a jurisdiction, with the actual reality of the treatment given to real Mariners who have the misfortune to have an accident and fall foul of the law.

The Summary and all attachments are produced in Microsoft Word and they may be downloaded onto a CD Rom or a Memory Stick. This will enable each Association's response to be included in full as it was forwarded to the CMI. The attachments include other documents and papers touching other relevant issues.

My presentation to this important CMI Colloquium will introduce the Summary, look into the similarities and dissimilarities, and touch on an example or two of where the theoretical is at odds with the actuality of seafarers' experiences.

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### **Fair Treatment of Seafarers: US Law and Practices**

Précis by the Presenter

Michael G Chalos

Senior Partner, Fowler, Rodriguez & Chalos

#### **A. Introduction**

A general discussion of the current climate in the United States in respect to the investigation and criminal prosecution by US authorities of environmental regulation violations for both for accidental and intentional acts. This will include a discussion of factors and elements involved in the detention, prosecutions and, at times, incarceration of seafarers.

#### **B. Unites States Authorities' Modus Operandi**

A discussion of applicable laws, including MARPOL, and the US Authorities' investigative techniques for both accidental and intentional acts. The current practices of interrogation and detention of crewmembers that may be either "targets", "subjects" or "material witnesses" in a pending investigation. This will include a discussion about the role of the "whistleblower" in the institution of such investigation.

#### **C. The Foreign Seafarer's Rights Under US law**

A discussion of the seafarer's rights in a criminal investigation, including the right to remain silent, the invocation of the 5<sup>th</sup> Amendment privilege against self-incrimination, and the right to counsel and interpreters prior to speaking to government investigators.

## **D. The Legal Process**

A discussion of the US government's legal right and authority to conduct shipboard investigations, seize documents, interrogate witnesses, detain such witnesses and indict and prosecute those individuals who allegedly committed crimes. This discussion will include a brief overview of the roles of the prosecutor, the Grand Jury, the crewmembers' defense lawyers and the lawyers representing the interests of the owner and operator of the vessel. The discussion will also include a review of the current practice by the US government of demanding the maintenance and keep of seafarers in the jurisdiction for a period of up to 120 days or more, and the dubious legal basis for such demand.

## **E. The Human Element**

The human toll of these investigations, detentions and prosecutions on the seafarer and their families. A discussion of the seafarer's day to day existence while under detention which include boredom, anxiety, fear, isolation and many times deep depression.

## **F. The Future**

A discussion of what the future holds for the continuation of these types of environmental regulation violation investigations, detentions and prosecutions. The respective future roles of the US government, the shipowner and operators and the seafarers in eliminating, or, at least, minimizing the conditions that have led to the current situation.

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## **Detention and Prosecution of Seafarers after Oil Spills**

Précis by the Presenter  
Colin de la Rue  
Partner, Ince & Co

This presentation deals with the main issues of international law and practice concerning criminal liability for oil pollution, and the treatment of seafarers charged with pollution offences.

It provides a reminder of the main relevant provisions in UNCLOS and MARPOL, highlighting differences between operational discharges and accidental spills. It reviews cases where seafarers have been detained at length after oil pollution casualties, summarising from a legal perspective the concerns which these highlighted.

Finally an account is given of the recent EU Directive imposing Criminal Sanctions for Ship-source Pollution, outlining concerns that the Directive is in conflict with international law, that it imposes criminal liability which is uncertain in scope, and that its effect will be counter-productive.

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## **Fair Treatment of Seafarers: A Marine Insurance Perspective**

Précis by the Presenter  
Kim Jefferies  
Senior Claims Executive, Legal Adviser  
Gard AS

The Fair Treatment of Seafarers or, as stated negatively, the "criminalisation of seafarers" is a topic of high priority, but what do we really mean? We are talking about two related but separate phenomena. The principal focus is the increasing trend to treat maritime accidents as crimes, particularly in cases involving significant pollution. The second trend is the unfair

treatment of seafarers in cases that may involve intentional discharges of oily waste in contravention of MARPOL.

Although the maritime industry, including P & I Clubs, oppose the criminalisation of accidental pollution, the industry supports the use of measured criminal sanctions for those who deliberately dump waste oil in contravention of the MARPOL convention.

The distinction between accidental and intentional pollution is reflected in the rules of cover related to pollution fines for all members of the International Group of P & I Clubs. There is no express exclusion for "criminal penalties" in P & I Rules. Generally, fines arising from an "accidental discharge" are covered even if the fine is considered to be criminal under the law of the authority imposing it. On the other hand, intentional dumping is not considered to be an accidental discharge and is not covered. The International Group is unified in its condemnation of intentional dumping.

Despite the support of measured criminal sanctions for deliberate pollution, the maritime industry ought to be concerned with the treatment of seafarers caught up in such cases. The problem is not that the criminal law is applied to seafarers who deliberately pollute; the problem is the unfair way in which the law is applied. That many crewmen have been caught bypassing or disabling the oily water separator in clear violation of the MARPOL requirements is an embarrassment to the industry. Yet, the treatment of crewmen, both the innocent and the guilty, has to be of concern not just to the industry but to all who hold dear the civil rights of the individual when faced with the crushing power of a government investigation.

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### **Unfair Treatment of Seafarers: The Seafarers' Perspective**

Précis by the Presenter  
Professor Proshanto K Mukherjee  
ITF Professor of Maritime Safety and Environmental Protection  
Director of Doctoral programmes  
World Maritime University

Seafaring, arguably the second oldest profession, has been around since the dawn of human civilisation. The seafarer is an artisan of ancient vintage but his lot has not been a happy one. Despite the fact that his services are indispensable to seaborne trade and the global economy he is largely a non-entity as far as the rest of humankind is concerned.

The purpose of this paper is to examine how seafarers are treated by society at large, in the context of maritime accidents as well as outside that context in light of growing apprehension in certain quarters regarding seafarers being potential criminals. The focus of this discussion is essentially the perspective of the seafarer in terms of his unique interests as a major contributor to the welfare of land-based society.

The paper, at first, addresses the legal notion of criminality and criminalisation within the domains of national and international law with particular reference to marine pollution offences. The discussion then progresses on how in the current maritime milieu seafarers are treated as scapegoats for dubious owners with deficient ships. The issues of gross violations of seafarers' fundamental rights, through undue harassment, lack of respect and basic human dignity and deprivation of shore leave based on the pretext of seafarers being potential security threats are discussed. Current initiatives and their inadequacies in dealing with these issues are referred to and proposals for a more meaningful and effective way forward are submitted in conclusion.

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