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Criminalizing seafarers: should shipowners and managers bear more responsibility?

On January 12 2010, Judge D'Almada Remedios handed down a verdict in a long-running trial arising from the collision of two vessels.⁽¹⁾

Facts

The facts - as found by the court - were as follows. Shortly before 9:14pm on March 22 2008 Neftegaz 67, a Ukrainian-flagged oil rig supply vessel of 81 metres, collided with the Yao Hai, a Chinese-flagged bulk carrier measuring 225 metres.

The collision took place in Hong Kong waters and within a deep-water buoyed channel, a few metres from buoys CP1 and CP2. Neftegaz 67 sank with the loss of 18 men. The Yao Hai's crew were uninjured, but the vessel's port bow was damaged.

The sea was calm and the weather fair. It was dark, but visibility was good at approximately three nautical miles. Traffic density was low. No other vessels impeded the passage of Neftegaz 67 or the Yao Hai and the buoyed channel was clear of other shipping.

Neftegaz 67 was eastbound and the Yao Hai westbound. They were end-on and following reasonably consistent but not reciprocal courses. Neftegaz 67 was on the Yao Hai's starboard side; the Yao Hai was on Neftegaz 67's port side.

Approximately five minutes before the collision Neftegaz 67 was proceeding within the buoyed channel and Yao Hai was approaching the channel, north of CP1 and CP2.

There was ample sea room for the two vessels to pass each other at a safe distance within the gates of the channel at CP1 and CP2, which were about 570 metres apart.

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Both vessels expected the other to give way, each applying different rules of navigation. The master of the Yao Hai believed that the vessels would pass port to port, whereas the master of Neftegaz 67 believed that they would pass starboard to starboard.

The vessels were heading for the same spot about 185 metres from CP1. When the two vessels were close to each other, both moved in the same direction to effect their intended passing, the Yao Hai moving to starboard and Neftegaz 67 to port.

The four defendants were the master of Neftegaz 67, the master of the Yao Hai and - on board the Yao Hai - a Hong Kong pilot with an assistant pilot. The helmsmen on board Neftegaz 67 and the Yao Hai were steering the vessels on the orders of their respective masters. The defendants were onboard the respective vessels at all material times.

The court heard that the Yao Hai turned to starboard in accordance with Rule 9 of the Narrow Channel Rules, which state that:

"a vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on [the] starboard side as is safe and practicable."

Those on board the Yao Hai considered the buoyed channel to be a narrow channel and therefore expected a port-to-port passage. Under Rule 9, the Yao Hai expected Neftegaz 67, having passed the restricted area near buoy CP3, to turn to starboard from its position in the middle of the channel in order to keep to the starboard outer edge, allowing the Yao Hai to enter on its starboard side.

The Yao Hai's master and pilots were surprised that Neftegaz 67 continued to navigate in the middle of the channel and then made a sudden turn to port, not starboard, in breach of Rule 9.

Neftegaz 67 turned to port because its master applied Rule 15 of the International Regulations for Preventing Collisions at Sea (COLREGS). Under the heading 'Crossing Situation', the rule states that:

"When two power-driven vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel."

The master initially expected that the Yao Hai - as the give-way vessel under the regulations - would turn to starboard and pass port to port. Rule 16 - headed 'Action by give-way vessel' - states that "every vessel which is directed to keep out of the way of

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another vessel shall, so far as possible, take early and substantial action to keep well clear".

This would have taken the vessel north of CP1 buoy and thus outside the buoyed channel, allowing for passage port to port. Therefore, Neftegaz 67 kept its course and speed as the stand-on vessel under Rule 17, which is headed 'Action by stand-on vessel':

"(a) Where one of two vessels is to keep out of the way, the other shall keep her course and speed.

(ii) The latter vessel may, however, take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.

(b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.

(c) A power-driven vessel which takes action in a crossing situation in accordance with subparagraph (a)(ii) of this Rule to avoid collision with another power-driven vessel shall, if the circumstances of the case admit, not alter course to port for a vessel on her own port side.

(d) This Rule does not relieve the give-way vessel of her obligation to keep out of the way."

The master later realized that the Yao Hai was intending to navigate not outside the buoyed channel, but between buoys CP1 and CP2. However, he still believed that, applying the crossing rule, the Yao Hai intended to cross Neftegaz 67's bow ahead and pass starboard to starboard. The master therefore maintained his course and speed.

When the Yao Hai was just ahead of Neftegaz 67's bow, the latter's master decided to give the Yao Hai more sea room. Neftegaz 67 turned away from the Yao Hai to port in order to put more distance between the two vessels when they passed starboard to starboard. The master believed that Rule 9 did not apply, as he did not consider the buoyed channel to be a narrow channel. He did not know that the Yao Hai had steered to starboard, as the alterations in its course were not big enough to be apparent to him.

The International Regulations for Preventing Collisions at Sea are recognized rules for the navigation of vessels at sea. In Hong Kong, these rules have statutory authority and obedience is mandatory for all vessels. The duty that they impose is intended to promote safety at sea. The rules set out the steps that vessels must take in order to prevent

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collisions at sea. A breach is an unlawful act and therefore an offence. The regulations applied to Neftegaz 67 and the Yao Hai.

Criminal charges, which were framed in the alternative against all four defendants, were brought under Section 72 of the Shipping and Port Control Ordinance (Cap 313), which states that:

"A person who, by an unlawful act or in any manner whatsoever without reasonable excuse, endangers or causes to be endangered the safety of any person conveyed in or being in or upon any vessel or in the sea, commits an offence and is liable:

(a) on conviction on indictment to a fine of HK\$200,000 and to imprisonment for four years; and

(b) on summary conviction to a fine of HK\$200,000 and to imprisonment for two years."

All of the defendants faced charges as a result of the collision and loss of life and the danger caused to the crew of Neftegaz 67 by unlawful acts or, in the alternative, by failing to keep a proper lookout and failing to take adequate positive and preventive action to avoid a collision.

The defence to the charge of an unlawful act is provided by Section 10 of the ordinance, which states that:

"Subject to any special provision in or under this ordinance, the collision regulations and the use of signals of distress regulations shall apply... to all vessels. It shall be a defence to a charge under Section (3) for the person charged to prove that [he or she] took all reasonable precautions to prevent the contravention to which the charge relates."

Decision

The decision - as reached by the court - was as follows. It found that the situation leading to the collision had been created by fundamental and serious faults by all four defendants, who had allowed the emergency to arise through grave and serious errors of judgment. None of the defendants knew what the others were intending to do. The master of the Yao Hai and his two pilots made poor decisions and did not communicate properly. All of the defendants delayed too long before taking evasive action.

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Those on board each vessel had seen the other vessel at a distance of approximately 2.5 nautical miles, at that point they had ample time to avoid manoeuvring at close quarters. Rule 8(c) states that:

"if there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation."

However, both vessels largely maintained their courses until one minute before the collision. This was indicative of the defendants' failure to maintain a proper lookout.

Section 72 can lead to an immediate custodial sentence being imposed. The general principles were considered in *Hong Kong v Chow Tin Shing*,⁽²⁾ an appeal to the Court of Appeal against a sentence under Section 72 for endangering the safety of others at sea. The facts were similar to those of the present case. In *Chow Tin Shing* the judge observed that:

"[a]s a matter of general principle, any sentence imposed pursuant to Section 72 will primarily depend upon the degree of danger created by the acts of the offender in the circumstances as they existed at the time of the offence. Those circumstances will vary enormously. The weather, degree of visibility, the sea state, speed of vessels, manoeuvres performed and other factors pertaining to those circumstances will often be relevant."

The court held that the applicant had performed no deliberately dangerous manoeuvres. He was at the helm of an empty oil barge and its bow was out of the water, impairing his vision. The barge was also proceeding on the wrong side of the fairway and in the vicinity of inshore traffic. The applicant was found not to have risked the lives and safety of others in a calculated way.

In *R v Cooksely* Lord Woolf compared sentencing for dangerous navigation to sentencing for dangerous driving.⁽³⁾ As in the offence of dangerous driving causing death, offenders under Section 72 do not necessarily intend to drive dangerously or to cause death or serious injury. However, the court held that the defendants had deliberately navigated dangerously and caused the lives of the crew of *Neftegaz 67* to be endangered.

The defendants' inaction had allowed a possible risk of collision to develop into a serious and real risk of collision. They took no evasive action until it was too late. This was construed as a deliberate omission to manoeuvre or take action, except at the last moment and in a state of panic. The court considered that observing the development of a dangerous situation and failing to act constituted dangerous and sub-standard navigation.

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Sentencing

The master of Neftegaz 67 and the main pilot were qualified mariners of large vessels. Within three minutes of the collision, neither vessel should have been in doubt as to the other's intention.

The master of the Yao Hai and the assistant pilot were less experienced and should have been able to rely on the main pilot's skill. However, they should also have been able to recognize the dangers of the main pilot's navigation and should have alerted him to the risk of collision when they saw that he was doing nothing to avert disaster.

The maximum sentence for the offence of endangering the safety of others at sea by unlawful acts contrary to Section 72 is four years' imprisonment.

The judge stated that the tragic loss of 18 lives could not be ignored; however, if no lives had been lost, this would not necessarily have mitigated the endangerment. He considered that the defendants had committed the most serious errors in navigation. Careful and prudent navigation is expected in Hong Kong's busy and restricted waters, and errors of navigation that result in collision or capsizing are life threatening. The judge stressed the utmost importance of the safety of persons at sea.

The court considered the incident to be close to a worst-case scenario. The defendants' failure to act and the serious nature of the errors called for a deterrent sentence.

The court took into account several factors in mitigation, including the defendants' good characters, good records and - particularly in the case of the master of Neftegaz 67 - their genuine remorse and shock at the loss of life. The court also took account of the main pilot's exemplary 39-year record in the industry and the fact that he had provided voluntary unpaid assistance and training through the Pilots Association and other organizations. The master of Neftegaz 67 was sentenced to three years and two months' imprisonment and the main pilot was sentenced to three years' imprisonment. The two other defendants received sentences of two years and four months.

Comment

Motivations for criminalizing seafarers

The criminal law is increasingly invoked when serious shipping casualties occur. The reasons for this trend are uncertain, but it is likely to be influenced by greater news coverage, especially with the spread of electronic media. The low limits of compensation and indemnities for the bereaved are a growing issue of public concern. Together with the

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scant information to which the bereaved have access and misconceptions of the coroner's role, these factors feed a sense of frustration that is reflected in the trend to invoke criminal liability. Meting out criminal penalties to seafarers arguably has as much to do with a combination of deterrence and retribution as with compensating those who have suffered loss. In addition to this desire to punish or avenge, the tendency to criminalize seafarers is a reflection of the courts' eagerness to convict in general.⁽⁴⁾

Criminalizing corporations

Except in cases, such as *Neftegas 67*, of isolated negligence of seafarers beyond their control, it might be more appropriate to focus on punishing shipowners and managers for poor management practice and lax safety procedures. Managers and directors in all industries, particularly transport, must take great care to ensure that their operations are as safe as possible. It is increasingly common for owners to be indicted for criminal offences. A change in the attitudes of prosecuting authorities has prompted a trend towards holding corporate management criminally responsible for safety. The stigma and censure that follow conviction and the symbolic weight of criminal law are perceived to send a message to society and industry that safety standards must be stringent.⁽⁵⁾

The decision to prosecute an individual depends on an assessment through the evidence of a guilty mind and evil intent, or a knowledge of the wrongfulness of an act. Generally, a decision to prosecute a corporation in addition to an individual employee - for whose actions the corporation is vicariously liable in civil law - requires evidence of systemic failure by the corporation. Although continuous training in safe navigation at sea and collision avoidance is a matter of international concern among shipowners, operators and pilotage organizations, maritime law has historically upheld rules that protect shipowners and operators against the consequences of isolated acts of their servants or agents, over which the shipowners and operators can have no reasonable control. In civil law, inroads have been made into this previously protected ground.⁽⁶⁾ Commentators can point to a controversial decision in the case of a claim for cargo damage brought under a bill of lading subject to the Hague-Visby Rules, in which a carrier by sea was not entitled to the defence of "neglect or default of the master... or the servants of the carrier in the navigation or in the management of the ship" under Article 4, Rule 2(a) where the master's actions were not motivated in good faith by a paramount duty to the safety of the ship, crew and cargo, but furthered a plan to absolve himself from responsibility for the casualty.⁽⁷⁾

There remains a significant gap to bridge between the civil standard of the balance of probabilities and the criminal standard of reasonable doubt. However, the boundaries are becoming more blurred, leaving shipowners, operators and liability underwriters on uncertain ground.

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Appeals

This decision leaves many in the maritime and transport industries in a worryingly ambiguous situation, and it is understood that all of the defendants are preparing to appeal. There are several indications that the area in which the collision took place was not a 'narrow channel or fairway' in law. Vessels do not treat the area as a narrow channel, nor is the channel narrow in the natural meaning of the word. It has a navigable width of approximately 1 mile - big enough to accommodate even large vessels. Charts and other Marine Department publications do not demarcate the area as restricted or narrow, nor does the Marine Department website make reference to the area as a fairway. In *AM Vella* it was established through the marine courts and by pilotage enquiries that the general area is not a narrow channel. The magistrate, sitting with two nautical assessors, found that large ocean-going vessels frequently pass to the north of the buoys in the area when heading east. The nautical assessors were a senior officer of the Marine Department and the Chairman of the Hong Kong Pilots Association Ltd, and the magistrate mentioned that their findings in the matter were unanimous.

However, the case involving *Neftegaz 67* and the *Yao Hai* was a criminal case, heard in the District Court - as such, the judge was not permitted to have nautical assessors to assist her. The expert witnesses held widely different and conflicting views and the judge was forced to choose between them without the benefit of expert advice on technical matters. As a result, the finding that the area in question was a narrow channel, notwithstanding the opinion of the Marine Department, has made the situation confusing and worrying for all seafarers operating in Hong Kong. The Director of Marine is the pilotage authority for Hong Kong waters, but mariners may now find themselves in a position of considerable uncertainty: the government department that examines them for their certificates and regulates Hong Kong waters will expect them to conduct themselves as if in open water when in the area, whereas the courts will expect them to treat the area as a narrow channel. It will be impossible for mariners to do right in the eyes of authority.

This unsatisfactory decision has created considerable uncertainty for the Hong Kong maritime industry. The severity of the sentences - taken together with the fact that the judgment flies in the face of Marine Department findings, reports and publications - has created a dilemma for mariners in Hong Kong waters.

If the appeal court overturns the first instance finding on the designation of the area as wrong in law, and if the correct rule is found to be the Crossing Rules, this would mean that *Neftegaz 67* should have been regarded as the vessel crossing from starboard to port, making it the stand-on vessel and placing it under a duty to keep her course and speed, subject to action as the stand-on vessel. In all likelihood, that would considerably alter the position on culpability under criminal law - and might negate it entirely. Furthermore, the division of blame in civil liability proceedings would be significantly altered in favour of

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Neftegas 67, as the Yao Hai would be found to have been required to take early and substantial action to keep well clear.

Endnotes

- (1) Criminal Case 669/2008.
- (2) [2007] 4 HKLRD 99.
- (3) [2003] 3 ALL ER 40. "Although the offence is one which does not require an intention to drive dangerously or an intention to injure because, before an offender can be convicted of dangerous driving, his driving has to fall far below the standard of driving that would be expected of a competent and careful driver and the driving must be such that it would be obvious to the same competent and careful driver that driving in that way would be dangerous, it will usually be obvious to the offender that the driving was dangerous and he therefore deserves to be punished accordingly."
- (4) In his preface to *Archbold Hong Kong 2010*, Clive Grossman - former senior prosecutor at the Hong Kong Department of Justice - compares Hong Kong's conviction rate to that of North Korea, placing it at around 90%. Grossman states that, given such a high conviction rate, an arrested person is statistically almost certain to face imprisonment.
- (5) Persuasive authority that a corporation may be convicted of manslaughter can found in *R v P&O European Ferries (Dover) Ltd* (93 Cr App R72, CCC). This was also assumed to be the law in *R v HM Coroner (Dover) Ltd* (93 Cr App R 72, CCC) and *R v HM Coroner for East Kent* (88 Cr App R 10).
- (6) In particular, this can be seen in a line of carriage of goods by sea cases, such as *The Makedonia* [1962] 1LL Rep 316, which found the shipowner to be liable for an engineer's incompetence, despite the exclusion of liability for errors of navigation in the Hague Rules.
- (7) *China Clays Limited v Tasman Orient Lines*, New Zealand Court of Appeal.
- (8) International Regulations for Preventing Collisions at Sea, Regulations 15 and 17
- (9) Id. Regulation 16.

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