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The Criminalisation of the Ship’s Master. A new approach for the new Millennium

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# Contents

Acknowledgements ................................................................................................................ 2
Abstract .................................................................................................................................. 4
Section One: Introduction ...................................................................................................... 5
1.1 Justice or Criminalisation? ....................................................................................... 5
The Primary and Secondary Research Questions ............................................................ 6
1.2 Action Research: Challenging the World View ....................................................... 7
(i) The Research Methodology ................................................................................ 7
(ii) Analysing the Mischief: Key Issues in the Literature Review ......................... 10
(iii) The Mischief .................................................................................................... 15
(iv) The Elephant in the Corner: Sovereignty ......................................................... 18
Section Two: On The Origin Of Species .............................................................................. 24
2.1 The Master and the Flag State .............................................................................. 24
(i) The Evolution of the Master Under God .......................................................... 24
(ii) Risk Management by Flag State ....................................................................... 43
(iii) The Clash of Authority: Compulsory Pilotage ................................................. 55
2.2 The Master and the Owner ..................................................................................... 66
(i) The Loss of the Master-Owner Relationship ....................................................... 66
(ii) The Influence of Corporate Accountability ...................................................... 84
(iii) The Loss of the Relationship: Risk and Responsibility on the Owner .......... 93
(iv) The Master and the Business of Commercial Risk ........................................... 98
Section Three: The Golden Thread laid Bare ..................................................................... 111
3.1 Criminalisation and Sovereignty .......................................................................... 111
(i) Risk Management by Port State – the Cradle of Criminalisation ................. 111
(ii) The Evolution of Injustice – Criminal Negligence ........................................ 129
3.2 The Unchecked Mischief of Sovereign Jurisdiction ............................................ 149
(i) The Character of Sovereignty ......................................................................... 149
(ii) Sovereignty: Causes and Cures ..................................................................... 152
Section Four: A New Approach ......................................................................................... 171
4.1 The Options for a New Approach ........................................................................ 174
Option 1: Rely on International Obligations between the States ............................ 179
Option 2: Alternative Dispute Resolution .................................................................. 183
Option 3: A new International Court? ......................................................................... 189
Option 4: Submission to the provisions of UNCLOS or the Clear Statement Rule, but with a Model Code for Sentencing ................................................................. 193
Option 5: A New Approach To The Master-Owner Relationship ............................ 202
4.2 The Options: Recommendation and Conclusion .............................................. 211
Plan A: The Preferred Approach .................................................................................... 212
Plan B: The Alternative of Management Control by Port State or an International Tribunal .............................................................................................................. 214
The Final Word of an Optimist ..................................................................................... 217
BIBLIOGRAPHY .............................................................................................................. 219
CASES CITED ................................................................................................................... 225
NATIONAL ARCHIVE CATALOGUING SYSTEM ...................................................... 228
Abstract

The criminalisation of seafarers has been observed as a growing phenomenon for more than thirty years, presenting a picture of increasing liability upon the Master even though their responsibilities remain essentially unchanged in generations of maritime law. Over the same period, the structure of the maritime environment in which they work has changed dramatically, as evidenced by the complex evolution of Fleet Ownership and Management and the resultant challenges in identifying the party liable in a potential action. Paradoxically, the person least able to influence such changes has been the Master, who has seen the key features of their traditional relationship with the ship operator blurring, as the structure of maritime operations has evolved with the demands of social and economic change. The effect of these changes has left the Master with diminishing management influence without losing responsibility. They remain Master Under God, but without God’s authority over the management of the ship’s affairs.

Faced with an increasing amount of criminal prosecutions globally in recent decades, the shipping industry has met the phenomenon with growing dismay, the downstream consequence of which has raised questions challenging the proportionality and, indeed, the fairness, of criminal accountability, in what is perceived by the maritime community to be a disharmonised system worldwide.

The purpose of this work is to examine the many facets of the mischief with which the phenomenon confronts the Master in their professional conduct, both in terms of Flag State and Port State obligations. But the purpose goes further than that, for upon this foundation we can then synthesise options for a solution.

Ultimately, this thesis is all about the perception of justice in a globalised maritime community in the twenty first century – but the real challenge is to rationalise a new approach to criminalisation, which would meet the interests of justice both for the Master and the State. In the harsh reality of intractable disputes in the twenty first century, that new approach might mean a compromise, which may not be ideal for the Master or for the State, but would be something which both can live with.
Section One: Introduction

1.1 Justice or Criminalisation?

Moral standards regulate right and wrong conduct, which underpin the concept of Justice. This must, itself, be defined, in order to present a persuasive argument for the ethics which flow from it. John Stuart Mill first published his seminal work ‘Utilitarianism’ in 1861; his definition of Justice has not subsequently been improved:

Justice is a name for certain moral classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life.¹

The Mischief, which broods at the very heart of the question, demands an understanding of just how the concept of criminal justice has evolved in the accountability of the Master. Such accountability logically should be defined by a single principle against which we judge all actions. Given the Master’s responsibility for the vessel and the safety of life under the laws of the Flag State, in balance with (sometimes in conflict with) the commercial responsibility to their employer, subject to the duty to observe the laws of the Port and Coastal States into whose jurisdiction the vessel sails, the possibility fades for a definition of a single principle of criminal justice, that can be applied consistently across the many jurisdictions into which the Master may get into trouble. It is the evolutionary process of criminal accountability across these jurisdictions, defined and applied by moral rules that differ according to the normative ethics of changing societies, which has forged the process which the global maritime community identifies as the phenomenon of criminalisation. Nowhere better was this characterized than in the case of the trial of Captain Chawla of the Hebei Spirit; upon his conviction, International Transport Workers Federation maritime coordinator Stephen Cotton articulated the industry’s outrage in a comment to Lloyd’s List:

>This is not justice. It’s not even something close. What we have seen today is scapegoating, criminalisation and a refusal to consider the wider body of evidence that calls into question the propriety of the court. This decision is incomprehensibly vindictive and will impact on all professional mariners...²

¹ Mill, JS,1863, Utilitarianism, Parker, Son & Bourn, London, p 87
The Primary and Secondary Research Questions

Professor Edgar Gold is Adjunct Professor at the T.C. Beirne School of Law, the University of Queensland, and a member of the Governing Board of the IMO-International Maritime Law Institute. In 2004 he delivered a paper to The Maritime Law Association of Australia and New Zealand’s 31st Annual Conference ‘Navigating the Sea of Change’ on the subject of ‘The Protection of Masters and Seafarers from Criminalization: Emerging Problems for the Shipping Industry.’ Professor Gold introduced the process of criminalisation as a problem which had been emerging for the shipping industry for some time. An absolute obligation necessarily must be capable of definition by a single principle – anything less and it would not be absolute - and, by any logical argument, if the phenomenon has emerged without the guidance of a single principle, then there must be a conflict between Justice and criminalisation. By any compelling argument founded on the principle stated by John Stuart Mill, this would amount to a failure of criminal justice. The primary research question therefore must examine the character of the Master’s criminalisation.

The focus on the core feature of the phenomenon, which defines our primary research question, reveals two assumptions, forming the secondary research questions, which must be tested in the context of the Master:

1. Has the Master undergone a process of criminalisation?
2. Has this been an emerging problem for some time?

These questions naturally define the issues which characterise the research methodology.

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1.2 Action Research: Challenging the World View

(i) The Research Methodology

The task of addressing the research questions demands an understanding of the evolution of the Master’s accountability in law. Michalowski’s generalised concept of criminalisation can be applied to offer a definition in context as the process by which the Master’s behaviour or conduct is transformed from what civil law would call something more than an error of judgment, into a criminal offence$^4$.

It therefore follows that Gold’s observation is dependent upon the Master’s rôle having been subjected to a process by which they are held criminally accountable for their acts or omissions, in circumstances in which they were not previously accountable. A cautious commentator might err towards under-statement and observe that Gold’s position is shared as the perception of the maritime industry; but the industry’s opinion has evolved far beyond perception, into conviction – the dangerous state in which a person does not need to question their belief, because they know they are right. The underpinning evidence for this state of affairs will be all too readily apparent in the global response to the Hebei Spirit case, discussed below.

The key to a successful methodology in this work addresses the issue from the position of authority which is derived from a historical perspective; therefore, the Master’s position in law will be charted from the period when external influences can historically be identified as first clearly having an impact on the Master. This can conveniently be placed in the sixteenth century, with the voyages that demanded accountability for the investment made in ships and cargoes – clearly, with origins in the law of contract.

This starting point delivers a benefit at an early stage in the project, at which the critical analysis of primary and secondary sources permits a re-evaluation of how the Master’s authority evolved to its contemporary status in law. This re-evaluation by itself leads to unexpected conclusions on the historical foundation for the current law, for the evidence indicates that they were not by any means the authoritarian figure envisaged by the phrase

$^4$ Michalowski, R, 1985, Order, Law and Crime: An Introduction to Criminology, Random House, New York, p6: the process by which behaviors [sic] and individuals are transformed into crime and criminals.
‘Master Under God’ and the ship’s company even expected to be consulted on appropriate
tion in moments of peril. Further investigation reveals the evolution of the Master’s
position from the sixteenth century to that which subsisted in the mid-nineteenth century,
which was achieved through research of contemporary archives as well as through case law
and, largely from the nineteenth century, statute law. This establishes the evidential
underpinning for a fundamental re-appraisal of the foundation of the Master’s exposure to
criminal liability, presenting findings which challenge commentaries in published literature
that the criminalisation of the Master has been a recently-emerging phenomenon.

While analysing the evolution of statutory regulation, closer examination of the sources
further establishes the foundation of the contractual relationship between the Master and the
shipowner, which underpinned the concepts of responsibility and shared liability in criminal
proceedings - two vital factors which have a dynamic effect on the changes in the Master-
Owner relationship which took place in the last thirty years. The position of the Ship’s
Master prior to the rapid evolution of ship management, is illustrated very well by case
studies drawn from primary source material in the form of interviews with reliably-
formed and highly experienced retired Masters and compares with studies of recent cases
in criminal law worldwide. Having established the facts of this change, the rationale for the
distance put by the owner between them becomes apparent – as the implementation of the
Corporate Manslaughter Act 2007 illustrates with some clarity. The effect, whether
intended or not, puts the fear of isolation and vulnerability in the heart of the Master. Within
their home jurisdiction this is bad enough but, the methodology places key focus on the
application of international law and, in particular, the relationship between Port State and
Flag State in their approach to resolving disputes arising out of the Master’s accountability.

Case studies perform an important function in the methodology, enabling a complete
understanding to be achieved of evolving case law and statutes, both on the part of Port
State and Flag State. Both reported and unreported cases, along with journal articles, papers
and reports delivered in recent years, from the United States and countries worldwide as
well as the UK contribute to the task of rationalising conclusions from case studies.

This material serves to underpin the analysis of the changes in the social and political
maritime environment, leading to conclusions drawn from elements of normative ethics and
jurisprudence, which are revealed to have a dynamic on the subject but only emerge, and
take substance and form, with the development of the work. The research methodology
exposes flaws in a theory, derived from commentaries reviewed, that the evolution in
criminalisation was partly caused by a growing rejection by many states of the provisions of
UNCLOS\(^5\); it was not a rejection but an interpretation of UNCLOS which resulted from this work, to identify just what effect the international community of sovereign states has had on the criminalisation of the Master.

\(^5\) See Art 97: Penal jurisdiction in matters of collision or any other incident of navigation
(ii) Analysing the Mischief: Key Issues in the Literature Review

The Social Idea of Fairness

Essential as they are to the work, the answers to the research questions are dependent upon the philosophy of the criminalisation process. Dennis Baker’s opinion\(^6\) must command respect that conduct should only be criminalised when it is fair to do so, but the persuasiveness of this is dependent upon the definition of what is fair. John Rawls\(^7\) argues that fairness demands equal liberty for all individuals, as a principle of justice which must be satisfied before other political interests are satisfied. Many commentators have wrestled with Rawls’s work but, in the context of this research, his theory presents a compelling argument that puts justice to the individual above political governance of society as a whole. This demands that priority be given to moral conduct which must be observed by individuals towards each other in society, and that violations of basic rights cannot be justified by arguing that such violations may produce economic or social advantages. If Masters are to be burdened with criminal accountability beyond that accorded to any other private citizen, then good objective reasons are necessary for this moral conduct. This is where the characteristics of a crime become so important, in order to justify objectively society’s characterisation of the crime in question as being a moral wrong.

In his paper on criminalisation, Professor Proshanto K. Mukherjee succinctly summarises the characteristics of a crime in the context of the Master\(^8\) with sharp focus on the mens rea, required in most serious crimes, which society views as being moral wrongs in which the key element of intention or recklessness must be proved, according to the criminal burden, beyond reasonable doubt. Failure to establish a guilty mind according to the crime defined in law will lead to an acquittal. Professor Mukherjee draws the distinction between such serious crimes and those which are less serious, which only require proof of the actus reus. These offences, known today as strict liability offences, were originally promulgated in the nineteenth century in order to provide health and safety regulations in the work place. Once challenged with such an offence, it is for the Defendant to prove on the balance of probabilities that he discharged his duties with due diligence; if the case is proved against

\(^8\) Mukherjee, P, 2006, Criminalisation and Unfair Treatment: The seafarer’s Perspective, Journal of International Maritime Law, Vol 12, 325-336
him, then this will give rise to liability to pay a penalty, without the trappings of a criminal
defence to which blame was attached, such as a case involving criminal negligence.

Applying this in context, it is the globalisation of society which has driven the evolution of
international law, bringing its normative ethics to conventions that make strict liability
offences of pollution. In this way, Article 211 of UNCLOS obliges Flag States to make
laws designed to prevent and control pollution from their ships, while Port and Coastal
States may make laws – specifically under their sovereign system – to prevent and control
pollution from any ships in their jurisdiction.

The international community agreed that environmental protection had to be a priority;
Treaty obligations must be applied under the legal system of a State and, thus, Port and
Coastal State laws would conveniently make strict liability offences of pollution laws. It
was always intended that liability be strict, not absolute and, so, Regulation 11(b) of Annex
1 of MARPOL gives the Accused a Due Diligence defence to such a prosecution. As an
additional safeguard, Article 230 of UNCLOS provides for monetary penalties only for a
pollution offence, except in the case of a wilful and serious act of pollution in the territorial
sea. In order that the seafarer’s human rights be respected, Article 230 (3) reminds the
Courts that, during any such prosecution, the Defendant’s rights to a fair trial must be
respected.

The justification is clear: global society understands the need to make Regulations which
protect the environment from pollution and, thus, a violation of those regulations cannot go
unpunished. But if the offence does not share the characteristics of a crime, that is, mens
rea, then the sanction must be appropriate to that.

It is the normative ethics of the society of the enforcing state which determines how (to
paraphrase WS Gilbert) the punishment should fit the crime. In so many of the case studies
in this work, though, the punishment visited upon the Master is disproportionate,
evidencing justification for alarm in the emerging criminalisation of the Master as the
individual responsible, even though they may not have the mens rea for blame.

In understanding the mischief, it is essential to analyse how the normative ethics of society
have influenced the current law, in which Masters find themselves subject to what the
maritime community perceives to be a growing phenomenon of criminalisation, notably in
relation to Port State jurisdiction but, in fact, the mischief is identified as spreading far
beyond, and discredits – shames, even – the most revered of judicial systems. This may be
illustrated starkly by a review of the cases of Captain Schröder\textsuperscript{9} and Adomako\textsuperscript{10}, when considered in the light of the wisdom of Mr Justice Holmes in the Northern Securities case\textsuperscript{11}.

To summarise, critical analysis of the literature empowers the work with an understanding first of how the position of the Master has evolved and, secondly, evaluates exactly whether the perception of a criminalisation phenomenon is justified, according to the normative ethics of a global maritime community which has articulated the perception. If the perception of a phenomenon can be justified in a critical literature review, then the mischief is revealed, and gives validity to the academic labour of finding a solution to cure the mischief. Whether a solution meets the demands of the normative ethics of the sovereign jurisdiction, may depend on just how compelling the sovereign jurisdiction finds the argument.

\textbf{The Normative Ethics of Justice}

If some moral wrong is condemned by society as criminal, it must threaten, in some way, the security or well-being of that society and, as Sir Carlton Allen has it, it is not safe to leave it redressable only by compensation of the party injured.\textsuperscript{12}

Society has entrusted to Parliament the function of defining and controlling just what society holds to be a moral wrong; that, itself, is enforced by a power which is maintained quite separately from Parliament and vested in the Courts, which Lord Simons described in Shaw v DPP\textsuperscript{13} as a residual power to conserve not only the safety and order but also the moral welfare of the state.

The normative ethics underpinning concepts of Justice bear a heavy burden in regulating two crucial constituent parts of the moral welfare of the state: liability and sentencing. The fairness of criminal justice systems naturally rely on checks and balances and on the good

\textsuperscript{9} United States of America v Wolfgang Schröder [2007] United States District Court, Alabama Southern District (currently unreported)
\textsuperscript{10} R v Adomako [1998] 1 AC 171
\textsuperscript{11} Northern Securities Co v United States 193 US 197 (1904). See below.
\textsuperscript{13} Shaw v DPP [1962] 2 All ER 446
conscience of legislators and interpreters\textsuperscript{14} to maintain society’s moral standards in liability and sentencing. In his paper ‘Social issues of Law and Order’ Bauman attaches a very high value to the effect which social and political trends have in moderating the humanity and reasonableness in punitive justice\textsuperscript{15}, so that a great deal depends upon proportionality, both in liability and sentencing, with the consequence of punishment telling on society as much as on the convicted person. When this is applied to the moderation of justice in a Port State, its relevance to the Master’s position is compelling.

The normative ethics of Justice as a set of moral rules, therefore, depend heavily on the moderation of society’s moral standards. Research conducted in this project indicates that, for generations over the last 150 years, the criminal accountability of the Ship’s Master was comfortably moderated by a society which embraced them as constituting a special case by reason of their overriding duty to maintain order and discipline, with an unassailable responsibility for the safety of life at sea and the ship herself, and the transnational nature of their profession.

These factors form the foundation of the Master’s position in law. How this evolved will be discussed more fully below.

The Risk Society

Society, naturally, evolves in response to internal change and external stimuli and, with it, the concept of a risk which might threaten the security of that society, has evolved. Indeed, Ericson and Carriere have defined this in terms of what they label a ‘risk society’, in which society has become more concerned with public safety than with economic inequality\textsuperscript{16}. It will be argued that this concept of risk management by domestic societies in sovereign states characterises the approach which the high contracting parties adopt in formulating transnational law, which is the source of maritime law that bonds flag states and port states to each other – rather, should bond them. How they respond to evolving concepts that shape the criminalisation of the Master will play a crucial part in the foundation of this work.

The approach taken to legislation by a risk society presents a clear tension which has a

\textsuperscript{14} Hudson, B, 2003, Justice in the Risk Society, Sage, London, Chapter 7
\textsuperscript{15} Bauman, Z, 2000, Social issues of Law and Order, British Journal of Criminology, Oxford Journals, Oxford University Press, Oxford, 40 205-221
dynamic on the definition of a moral wrong in the context of normative ethics. The underlying causes of this tension may be identified in terms of a concern, inter alia, for the safety of the individual, for the environment and for the state. Such conflicting issues in this tension compel the risk society to practise the Judgment of Solomon, and trade off the merits of ethical arguments which may place the individual and the state on a collision course. For the judgment to demonstrate that it has met the fundamental philosophical demands of Justice, the risk society has to make decisions which must strike a balance between the regulation of criminal activity by the restraint of punishment, and the respect and maintenance of limits on such punishment. Inevitably the clash comes when the judgment must confront the seemingly intractable problem of rationalising and justifying the argument for deciding what human rights should be suspended in the interests of the sovereign state in question. Put in context, this challenges society to convey a compelling decision to make the Master accountable for wrongs which the risk society perceives it to have suffered – simply because of the fact of the Master’s responsibility, rather than the presence of any characteristics of a crime. Such cases are commonly categorised as hard cases, and sometimes as great cases. In this context, the dictum of Mr Justice Holmes (dissenting) in the American case of Northern Securities v United States deserves a verbatim quotation:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.

While this explains the rationale of the risk society for the criminalisation of the Master, it does not render the rationale safe, because of the lack of evidence to support the logical conclusion of the inherent argument, central to the Judgment of Solomon, that the distribution and control of risks will restore a balance dictated by society’s conscience; without such evidence, one is left to draw the conclusion that the balance in favour of the Master’s human rights to justice and fairness would simply be eroded.

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18 Northern Securities Co v United States 193 US 197, 400-401 (1904)
(iii) The Mischief

It is important in this work to offer a solution which restores the ethical application of the criminal law to the Ship’s Master on a transnational basis. In this sense, the ethics underpinning the position of the Master must be applied broadly and, very often, must be applied subjectively to the Master, not objectively as society might more comfortably prefer, the evidence for which is only too apparent in the evolution of the crime of ‘criminal negligence’. When the society of a Port State reflects on the ethics which determine the Master’s accountability, it may not be limited to judging whether the Master’s acts are morally right or wrong. Nardin and Mapel distinguish some ethical judgments, as being moral in the restricted sense that they involve the application of principles of what society holds to be proper or improper conduct, surely to be determined by a subjective test upon the Master’s mens rea, by comparison with judgments which are concerned with acts which are permitted or condemned according to the features which characterise those acts, in other words, the circumstances alone which may not demand a guilty mind. Such judgments in the criminal law may vary dramatically according to the values and interests of the Port State and suffer intractable conflict with those of the Flag State which clothed the Master with their authority in the first place. In this context, the trend in recent years, of requiring mere strict liability for offences carrying increasingly severe penalties, touches a sensitive nerve for the criminalisation of the Master.

There is a prima facie persuasive argument in submitting that the solution would be to implement globally a common ethical system based on the rights theory, that is, the theory that the right of one person imposes a duty on another. Despite the UK’s late implementation of the 1950 European Convention on Human Rights, compelling arguments might be adduced to support the pre-eminence of the English Legal System as the torch-bearer of justice in human rights. The English system can be defined as being based on Common Law, having evolved from spontaneously observed rules and practices, shaped and formalised by decisions made by judges pronouncing the law in relation to the particular facts before them. Strong evidence underpinning this can be found in the Rules of Natural Justice, which were largely unwritten rules defining the assumptions of justice that can be relied on in the English system. These rules formed the foundation for Article 6 of the 1950 Convention, requiring that, whether the proceedings be civil, compensating the loser, or criminal, punishing the offender, everybody, whether the Accused or the Accuser,

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is entitled to a fair hearing in which they can defend themselves, in full view of the public
eye, within a reasonable time, before an independent and impartial tribunal which has been
established and managed by Statute, that is, by the Will of the People.

The English Legal System embraced and enforced the terms of the Convention by the
Human Rights Act 1998, which happily codified a number of ethical duties, including
Article 7 (No Punishment Without Law) – although this was not the first codification of the
right under English law (that belonged to Magna Carta), so that, taken as a whole, an
argument may be made for applying the English criminal process (as opposed to constituent
laws) worldwide in order to determine the criminal liability of the Master.

This, however, would defy a major ethical issue: In 1918 President Woodrow Wilson of the
United States addressed a joint session of Congress in which he declared the inalienable
right of people to choose freely the politics by which they are governed, and to follow the
social development as they choose. It necessarily follows they must be free to shape their
own culture, which means making their own laws and, if it so happens, be free to make their
own mistakes.\(^{20}\) That’s democracy for you.

In consequence, it would offend the most basic ethical values of the transnational forum to
tender a solution which conflicts with the rights of sovereign states to determine their own
judicial process; that is, the system which tries the Accused for liability under their chosen
system. Indeed, there are irreconcilable differences between the adversarial system, led by
English law, and the inquisitorial system of most European Continental states who would
support their system with the compelling authority of Cicero and, later, Imperial Rome\(^{21}\).
The task of determining which is the preferred system is hardly one which ethically can be
imposed upon a sovereign state against its will. This was undoubtedly the guiding principle
which led the International Maritime Organisation to tread carefully when drafting its
Guidelines on Fair Treatment of Seafarers:

\[
These \textit{guidelines do not seek to interfere with any state’s domestic, criminal or}
civil law processes nor the full enjoyment of the basic rights of seafarers,
including those provided by international human rights instruments, and the
seafarer’s rights to humane treatment at all times.\(^{22}\)
\]

\(^{20}\) http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points
\(^{22}\) Resolution LEG.3(91) adopted on 27 April 2006
By the same inalienable freedom of choice, there is nothing to stop a sovereign state from exercising the equal freedom of picking and choosing which legal principles and processes it admires in other jurisdictions. While English criminal law involves patterns and processes which are dependent upon the adversarial system, principles of English civil law have been embraced globally, perhaps the most notable example being the re-statement of liability in negligence held obiter in a case in which the villain of the piece was a dead snail lurking in a bottle of ginger beer\textsuperscript{23}. Paradoxically, the two galaxies of criminal and civil law clash where they meet this very case, which gave birth to the concept of criminal negligence, and fundamental to the golden thread running through this work that the emergent criminalisation phenomenon, at the centre of the primary research question, is fatally flawed by its reliance upon criminal negligence in finding a conviction against the Master that conveniently suits the normative ethics of Port and Coastal States.

This momentary introduction to the issue of criminal negligence in fact belies the importance of the concept to the criminalisation problem; while, at this early stage, it is a mere well-spring, it will gather pace and flow throughout the work as the golden thread which defines the mischief.

\textsuperscript{23} Donoghue (or McAlister) v Stevenson [1932] All ER Rep 1; [1932] AC 562
(iv) The Elephant in the Corner: Sovereignty

In a very competent summary of Korean Environmental Law, Hong Sik Cho clarified the historical background which explains the rationale of South Korea’s law on environmental protection and its enforcement. He observed that the enactment of the country’s first national environmental law, the Pollution Prevention Act, took place in 1963, the year in which Korea's initial five-year economic plan was initiated by then President Park Chung Hee. Korea’s phenomenal rate of economic growth was accelerating by more than 8 per cent every year, which was more than double that enjoyed by most others. Hong Sik Cho observed that Korean people thought everything had to be done ‘faster and faster’; but it was achieved at a terrible cost, for the downstream consequence of this massive industrialisation expansion resulted in a rapid and worrying deterioration of the country’s natural environment, which, in later years, was dubbed a ‘poison prosperity’ which led to a reassessment of the need for environmental protection in the national consciousness. Hong Sik Cho may have surprised even himself when he discovered that political activists who had devoted themselves to the democracy movement in the 1970s and 1980s became environmental activists themselves, when the state of their environment became so seriously apparent. As a result, a structured movement of Non-Governmental Organisations, or NGO’s, developed to champion environmental causes, in a trend which has won the support of the body of the Korean people, because they have awoken to the environmental catastrophe which they had nearly brought upon themselves with their industrial expansion. The effect which such concerns have upon the normative ethics of society provides a compelling rationale for criminalisation – if not justification.

Against this background, we should consider the case of the Hebei Spirit. At about 07.30 local time on the 7th December 2007, near South Korea’s Port of Daesan, a crane barge owned by Samsung Heavy Industries, that had been involved in a towage operation in which a tug had lost control after the line parted in heavy seas, collided with the Hebei Spirit, carrying 260,000 tonnes of crude oil.

Although no casualties were reported, the collision punctured three of the five tanks aboard the Hebei Spirit and resulted in the leaking of some 10,800 tonnes of crude.

The spill occurred near one of South Korea’s most beautiful and popular beaches.

24 Hong Sik Cho; Environmental Law, Vol. 29, 1999
contaminating one of Asia’s largest wetland areas. It was disastrous for wildlife because these areas were relied upon by migratory birds as well as resident wildfowl and marine life. As a national maritime park, with a host of fish farms, the region provided the living for hundreds of Korean families. Now these resources were annihilated, under the glare of the world’s media, which compounded the humiliation of the people and their government.

The South Korean government declared a state of disaster in the region, with a clean-up cost estimated at US$330 million, involving 30 aircraft and 327 vessels. News cameras carried highly emotive pictures of hundreds of thousands of volunteers and celebrities including popular Korean actress Park Jin Hee helping to clean up the beaches in the campaign. According to the South Chungcheong provincial government, 33 days after the casualty, the number of volunteers topped the one million mark. The government called an emergency meeting of ministers involved and Prime Minister Han Duck-Soo called for a major campaign to minimise damage, while, with just 10 days to go before the Presidential elections, the candidates in this comparatively young democracy hastened to the area in order to show sympathy for those who had lost their livelihoods. The political consequences of inaction would rapidly manifest themselves at the ballot box. Sympathy was not enough: the Will of the People demanded the accountability of an Accused, and the Master was that person.

South Korean criminal procedure shares features both of the adversarial and inquisitorial systems, having been founded on a merger of American and German criminal procedures. It was not until February 2008 that a limited system of jury trials was adopted for criminal cases and environmental cases, and all questions of law and fact are determined by judges.

On reflection, it was, perhaps, unsurprising that normative ethics of South Korean society demanded that the State should react with criminal prosecutions against those whom it believes to be accountable. Naturally, the evidence must first be examined in order to establish the facts of the case which, no doubt, would establish a solid foundation upon which to prosecute the Accused. But the trial of the Master of the Hebei Spirit, Captain Jasprit Chawla, an Indian national, pre-dated the casualty report dramatically. In a press statement released by the Prosecutor’s Office in January 2008 after the indictments had been signed, it was announced that the decision had been taken to prosecute Captain Chawla as well as his first officer of the Hebei Spirit and the skippers of the barge and two tug boats that towed it, all for failure to exercise due caution:

Captain Chawla (of Hebei Spirit) overlooked the possibility of collision and
carelessly assumed that the tug boat fleet would safely pass by a distance of about 280 metres (918 ft).

The South Korean criminal legal system distinguishes between serious offences and less serious offences, and crimes of a violent nature are distinguished from property-related crimes. There was no element of dishonesty in the case against Captain Chawla, mitigating the seriousness of the case against him even further. In the event, the Trial Judgment, in June 2008, cleared Captain Chawla and his chief mate of all charges, although the skippers of the tugs were jailed for marine pollution offences – one of whom was also convicted of a serious offence of dishonesty, for falsifying navigation records.

Then, within a week, the State Prosecutors lodged an appeal, which would require a re-hearing of the case against Captain Chawla and his chief mate. It was now abundantly clear that the State’s Central Maritime Safety Tribunal would have to deliver its final adjudication well in advance of the appeal hearing. As it happened, it took just under a year for that to happen. Responsible Examiner Jong Eui Kim concluded that the collision was caused when the crane barge ensemble lost its towing ability in bad weather, yet still continued to navigate without taking any safety measures, such as warning the other vessels nearby or performing emergency anchoring. Despite the fact that the Hebei Spirit was anchored in an area frequented by navigating vessels, it was found that her command management was negligent in performing its duty and was idle in handling the situation, whereby it failed to take early and active preventative measures. In addition, it was averred, the fact that the tanker’s main engine was not operable, amounted to negligence in engine readiness, in a situation where there was a risk of collision, resulting in the failure to take preventative measures. The examiner concluded that the cause of South Korea’s worst-ever pollution event was the crane’s jib puncturing the cargo tanks of the Hebei Spirit, resulting in the cargo spilling into the sea. The report followed with a conclusion that the pollution event had been exacerbated due to inappropriate emergency measures taken by Hebei Spirit after the collision occurred, which increased the speed at which the oil spilt.

However argued, flawlessly or otherwise, the Tribunal’s adjudication was finally signed on the 4th December 2008 – just six days short of the date set for the appeal hearing, on the 10th

25 Central Maritime Safety Tribunal, Decision Junghaeshim No. 2008-26, Marine pollution caused by the collision of “Samsung No. 1” (barge), towed by tugboats “Samsung T-5” and “Samho T-3,” and M/V “Hebei Spirit” (oil tanker), Notice of Decision on December 4, 2008
December, when the Court reversed the decision of the lower Court and convicted Captain
Chawla, who was sentenced to 18 months imprisonment, not for the physical spill, but on
two charges alleging property-related offences of criminal damage – damage to his own
ship, that is. As regards his actual misconduct, the Court held that Captain Chawla’s
criminal accountability rested on a number of key mistakes, although only limited fault
attached to his acts or omissions before the crane barge actually hit the vessel. Before the
collision, he should have gone full astern to drag anchor to prevent the collision with the
drifting crane barge. Then after the collision he should not have pumped inert gas into the
cargo holds, which had the effect of increasing the spillage when the explosive risk was
low. Additionally, he should have shifted ballast in order to create a sufficient list to take
the cargo away from the hole in the damaged hull, which would have prevented the oil spill.

Just as pertinently for the purposes of this work, Lloyd’s List reported the response of
International Transport Workers’ Federation maritime coordinator Stephen Cotton, who
rather articulated the vituperative opinion of the global maritime community that the
Court’s decision betrayed its rationale upon the criminalisation of the Master rather than
upon any notion of justice, with the effect that the impression of vindictiveness would have
a prejudicial effect on master mariners worldwide. They were harsh words indeed and,
while the emotive opinion of Mr Cotton may have lacked a compelling foundation in law, it
articulated the industry’s outrage that the decision had been unfair – iniquitous, that is,
according to the normative ethics of peoples who were not South Korean. Where the
strength of this outrage fails, is in the fact that the applicable law was that determined by the
ethics of South Korean society; it is very pertinent that Agence France-Presse reported that,
about a hundred residents of the area affected by the spill clapped outside court after the
judges issued their Judgment. One said laconically,

We are satisfied with the verdict26.

The Defendants promptly appealed but, in April 2009, the Supreme Court dismissed the
appeals in relation to the charges of pollution, although it accepted the appeal in relation to
the somewhat bizarre charge of the wilful destruction of the Hebei Spirit, for which they
had received prison sentences. This decision upholding the pollution convictions was
reached in the teeth of a storm of protest worldwide from supporters of the ‘Hebei Two’,
and continues to rumble through the skies of the maritime world. Its real value now,
however, is to illustrate the difficulty encountered in a globalised society, which perceives

26 See AFP newswire report, Court jails tanker officers over S Korea's worst oil spill, 10 December 2008;
http://WWW.afp/article/ALeqM5i762frrt2NK0zY7cuE7p6WxxRJiw
that a decision, however inviolate in the law of the relevant jurisdiction, nevertheless offends the normative ethics of that globalised society – and the most vulnerable individual in that society is the one who is most exposed to the hazards of the domestic jurisdiction of a Port State: the Master.

It may be argued that the decision of the Korean Supreme Court presented a miscarriage of Justice. In fact it may not be justice, but it is the law, and it is this tension between justice and fairness which has brought the topic of criminalisation to the top of the maritime agenda. The position in law underlines the tension between Port and Coastal States on one side and Flag States on the other, focusing on the interpretation by Coastal States of their sovereign authority to enforce their society’s approach to the characteristics of a moral wrong and how that must interface with their international obligations to Convention partners such as Flag States. The Court in any democracy, after all, is bound by the constitutional parameters of its powers, which have been accorded to it by the State, that is, by its own People in a democratic system. If the State loses confidence in the international process to serve the People in that democratic system, then, in their conviction, domestic law, rather than their international obligations, should prevail, rather than the other way around. It is as a result of this logical argument, that international consensus on pollution control in territorial waters has been eroded.

This was the key issue in a bitter argument in November 2009, hosted by Lloyd’s List between Robert Wallis and Jeff Park of London marine solicitors Hill Dickinson, on one side and Bob Bishop of V Ships Shipmanagement, who had championed Captain Chawla’s cause from the beginning, on the other. The position explained by the lawyers warned shipowners of the priorities of Port State jurisdictions, which served to support their own society, whose sovereign rights to the administration of justice may find them in conflict with Flag State interests and a resultant breakdown in international consensus – with the shipowner stuck in between27. The response from Bob Bishop, Chief Executive of V Ships Shipmanagement, published on the 9th November, re-stated the implacable view of the

27 Lloyd’s List, Informa plc, London, 02.11.09:
..... Owners should reflect on the often complex legal processes that can apply following a pollution incident and on the recent approach of the Korean courts, which is of great significance for trading tankers, whether under way or at anchor seeking shelter, awaiting orders, or simply before a call to berth. ... Even in a state where Marpol has been adopted, national laws can also apply, by, for example, Unclos Art.211 (4), such that coastal states can legislate to prevent pollution in their territorial seas. There is continuing debate on the interaction between national laws and Marpol provisions, raising controversial issues that were considered in the lead-up to the 2005 EU Ship Source Pollution Directive.... given progressively increasing worldwide environmental concerns and commensurate empowerment via conventions and domestic legislation, as shown by the Hebei Spirit and other cases, coastal states will prosecute tanker Owners, operators and crew if they cause or contribute to oil pollution.
shipowner, sadly serving to shoot the messenger rather than reflect on the point that they had been making. Such polemic serves to demonstrate the outrage which this case engendered in the world’s maritime community – but this view is a non-legal opinion. While V Ships’ letter demonstrates the fact that the industry simply has not grasped the point about the jurisdiction rights of sovereign states, it has great relevance in the wider context because of that core feature which characterises criminalisation – that is, the opinion of the society which the law seeks to regulate. And that opinion will evolve as society evolves; which brings us to the keystone in this research, the evolution of the Master’s accountability.

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28Lloyd’s List, Informa plc, London: Evidently the two lawyers neither followed the case for the 550 days it was a top news story, nor agreed with all the world’s major shipping organisations and institutions in condemning the judgments of the Korean Courts of Appeal and questioning the competence of the Korea Maritime Safety Tribunal stating that its findings were technically flawed and therefore drew unjust conclusion.
Section Two: On The Origin Of Species

2.1 The Master and the Flag State

(i) The Evolution of the Master Under God

Overview

In order to scrutinise the key issues underlying the research questions - Has the Master undergone a process of criminalisation? And has this been an emerging problem for some time? – we need to understand the modern-day position of the Master before making a judgment, which demands an understanding of how we have reached the position in current law. Historical research establishes the foundation of the Master’s rôle, and their authority within that rôle, in the context of their responsibility as an organ of the Flag State, and as the representative, servant or agent of the shipowner. The evolution of the rôle is studied to reveal the conclusion that, in fact, the law regulating the Master’s responsibilities to the Flag State and to the Owner has not shifted greatly today from the position in the nineteenth century, shedding light on the secondary research questions. From this position of knowledge we can now investigate two key factors: risk management by the Flag State and the loss of the Master-Owner relationship.

Antiquity

There was no doubt about it, Sir Francis Drake was Master Under God. In 1577, he famously sailed from England to circumnavigate the globe. Such adventures were in their infancy, defining a new era in maritime trade which was moving away from coastal trading to deep sea merchant ventures, requiring the Master to protect the investor’s interests in risks for rewards which, in the sixteenth century, were so uncertain that only the Crown really had the means to justify such risk on a cost-benefit analysis. With his diminutive Golden Hind as flagship, Drake’s small fleet successfully crossed the Atlantic but the venture then was plagued by vicissitudes from the time of his arrival in the River Plate estuary in South America, when he was forced to abandon two of the ships. The three
remaining ships continued southward until, in August 1578, they left the Atlantic Ocean and entered the Straits of Magellan at the southern tip of South America. After sixteen days the three ships sailed into the Pacific Ocean to be confronted with a series of violent storms which lasted for more than 50 days. With only his flagship left, which had been blown badly off course, a depleted crew to man her, and laughably inaccurate charts, Drake had nobody else with whom to consult; he could not share the burden of responsibility for the success or doom of the venture but had to decide, by his own judgment, how best to protect the voyage’s commercial prospects, in balance with the safety of what life remained on board the ship.

Incredibly, the same basic principle underlying ship management subsists today; it defines the nature of merchant shipping, and can be well-illustrated by the attention which is being devoted today, to the construction and development of the latest generation of ice-strengthened crude carriers and dry bulk ships capable of navigating in the High Arctic, to exploit the opportunities presented by global warming, which have combined to make the extraction and transport of crude oil and minerals not just possible but economically feasible. An analysis of the historical background is critical to the task of understanding the criminalisation phenomenon, by identifying the differences which have evolved in the Master’s rôle over the last four and a half centuries. This rôle has largely ebbed and flowed with the influences of communication between the Master and the investors, and the willingness to accept legal risk by those paid by the investors to manage their ships. The key factors emerging from this analysis will give clarity to the picture of the Master-Owner relationship today and, from this point, it will be possible to explore a possible solution in the contract which regulates that relationship.

Drake returned home to a hero’s welcome, accredited as the first Englishman to circumnavigate the world but, more relevantly for the maritime world, the voyage amply demonstrated the demands placed on a Master a long way from home; he was not only placed in the position of deciding the health and safety of the ship’s company but also had to make decisions which maximised the patron’s reward, without being able to seek advice or take instructions. Without it being articulated, he illustrated the idea of his principal’s agent. The venture was certainly worth it for Drake, whose financial reward for the voyage would equate approximately to £3 billion today.

29 Judson, B, 2010, Trends in Canadian Arctic Shipping Traffic, The International Society of Offshore and Polar Engineers, Cupertino Ca, p1292
30 Source: The Merchant Navy Association Francis Drake (c1540 - 1596) www.red-duster.co.uk
There was no Royal Navy of dedicated warships to protect the merchantmen, so they had to fend for themselves; unsurprisingly, therefore, the combined functions of commercial service and armed action meant that, during the Elizabethan era, most of the expeditions by individuals such as Drake sailed under instructions from the Crown and, as their agents, could do pretty much anything they pleased in order to achieve their objectives. They were, truly, Masters Under God, who pioneered deep-sea shipping. If things went well, the likes of Drake were rewarded beyond their wildest dreams. If the engagement were a failure, though, the Master was on his own, feeling the draught from all manner of ill winds, from enemy action to acts of God, with potentially severe consequences for his long-term personal future if he were lucky enough to make it home. Either way, he was hardly on so much as a nodding acquaintance with any rules of law regulating the relationship between the Master and the Flag State, save where it was in the interests of the Flag State to make a rule, such as privateering, with its associated letters of marque.

With the discovery of ocean routes by which Colonial possessions could be cost-effective, private investment became viable, encouraging merchant venturers to commission vessels which would enable them to embark on the key function which defines the initial step in the trade cycle of getting the goods to the market place, and they required the Crown merely to provide armed protection against ships of other nations and pirates – hence the growth of the Royal Navy.

As trading routes and colonies were established and the Royal Navy showed itself capable of protecting the vessels from pirates and enemy states, merchant venturers, ever keen to expand their commercial horizons, extended the boundaries of international trade – but, of course, the risks were greater. Small groups of merchants who, hitherto, had traded in single commodities around the coasts of the British Isles and Northern Europe did not have the resources to finance expeditions to the new found lands across the oceans. But, together they might be able to, so the small groups began to band themselves into larger associations, and the economics of business management were founded which still hold good today. The big difference is that, today, the world frowns on the word ‘Monopoly’ – in these late Middle Ages the merchant venturers worked towards the very creation of trade monopolies, to achieve market power in a particular part of the world, and they would resort to using force if necessary to protect that monopoly. In effect, they gave their Masters wide powers of defence in order to protect their investment. No better example can be shown in this dawn of the deep sea Master than that of the Honourable East India Company, which was incorporated by the royal charter of Queen Elizabeth I on the 31st December, 1600 with 215 shareholders and a share capital of £72,000, a staggering figure which today would
equate to £36 billion. Naturally, the Master would have to pay close attention to the profitability of the voyage for such an investment. The first voyages were undertaken by individual shareholders who took all the risk but also the profit. These ventures were referred to as separate voyages, but from 1612 all sailings were made on behalf of the company.

Masters in this era were usually appointed to their commands by the Owners of the vessels in question or, less frequently, by their charterers. Many Masters were, themselves, Owners or part-Owners of the ships in which they sailed, and some commanded one vessel and had shares in others. Others were hired for a single voyage, and some served in the same trade under different Owners or in different ships belonging to the same owner. A fair number were in long and regular employment with some particular owner, sometimes in the same vessel. 31

The Foundation of the Master’s Authority

In an age in which human life was not accorded top priority in the affairs of man, the Master’s powers and authority had to underpin his responsibility for the financial investment which the stakeholders had risked in the voyage; hence, with no perceived evidence of any prompting by the law of the day, business practice demanded that he take unfettered responsibility for the safety and well-being of his ship and her gear and, once he had signed the bill of lading, for her cargo as well 32. Any shortcoming could cost him dear. In 1541, Judgment was given against two Masters in a civil claim which would be identifiable today as negligence, for the consequences of stranding their vessels; they were ordered to pay damages in compensation, as a Defendant would today, but there was no element of criminal accountability for their ‘negligence’. Admittedly, the Court barred them from future command 33, which has parallels with current law, by which the Master’s Certificate can be suspended or revoked for serious negligence 34, but this is not to be regarded as a punishment but, rather, a device for abating the risk of a repetition of the individual’s incompetence when clothed with the authority of the Master.

While the commanders of the ships of the Royal Navy gazed enviously at the far superior

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31 Scammell G, 2003, Seafaring, Sailors and Trade, 1450-1750, Ashgate Publishing Ltd, Farnham (iv-2)
32 Earle, Sailors, p47; HCA 13/56, 30 May 1640; 13/88. 19 Sept 1728; 3 Feb 1728/9, fo 93, 7 Nov 1729
33 The Mariner’s Mirror, 56(1970) pp131-154 at 144
34 Today the authority will be that of the Secretary of State for Transport: Section 61 Merchant Shipping Act 1995
and more expensive ships built for the East India Company, the Company dealt harshly with those Masters who failed to protect its investment and case files subsist evidencing its wide disciplinary powers over Masters in the early seventeenth century for surrendering to, or fleeing from, enemies, indigenous or European, in Asian waters. It similarly disciplined slackness, poor seamanship or navigation, and cowardice in the face of danger. It held that its commanders could be dismissed at its pleasure, or at the instance of its agents, factors or even seamen\textsuperscript{35}. This does not convey an image of the Master as being accountable only to God. The powers were entirely contractual, however, in the understanding of a contract being an agreement whose terms regulate the relationship between the parties, and would be readily identifiable today with the rights and obligations in the relationship of employer-employee (without today’s statutory regulation).

At the outset of this Brave New World, the Master’s authority was far from clear, at least in the eyes of the ship’s company. Indeed, in moments of peril and in matters of importance crews expected that, like their medieval predecessors, they would be consulted as to what should be done, and were reluctant to see their standing and influence in the decision-making process eroded\textsuperscript{36}. Nevertheless, as longer voyages became more common and ships were out of contact with their home ports for greater periods of time than hitherto, the Master’s authority had to be strengthened in order to assure him the management control which would protect the venturers’ investment. As early as 1581, a seaman could claim as justification for his actions an order from the Master…

whose bidding the company were not to gainsay\textsuperscript{37}.

By 1635, the Masters of East Indiamen had been clothed with incredible disciplinary powers, with authority to imprison and impose capital punishment for mutiny or individual criminal acts, after courts martial\textsuperscript{38}. This, however, evidences a new source of authority, quite different to that of the shipowner, for such powers were conferred by the Flag State, who were anxious to ensure that the Master was given all the necessary authority to enable him to maintain order and discipline on board the ship; the ship was becoming, beyond all doubt, a little bit of sovereign territory of the Flag State, whose laws and rights must be upheld.

\textsuperscript{35} Foster, W. 1908, English Factories in India 1646-50, The Clarendon Press, Oxford p289; 1651-54, p165; 1661-64, pp2, 82 and n; HCA 13/88, 18 Dec 1732
\textsuperscript{36} ibid
\textsuperscript{37} ibid
\textsuperscript{38} PRO, CO 77/7, no 9(1635)
By the turn of the eighteenth century, a hundred years of solid growth in private investment in far-flung colonial adventures had laid the foundation for a complete maritime transport industry to service the demand of those ventures; but it was axiomatic that the investors be persuaded that their money was in safe hands – or at least, as safe as possible under the circumstances of risk. With no established communication, and few trustworthy businessmen in the far-flung loading ports where cargoes had to be negotiated, the venturers had to place their trust in somebody to protect their interests while the vessel was in distant parts, and the Master was the most reliable man on the spot. If his ship were arrested he had to secure her release. If supplies ran out or essential equipment lost or broken, he had to arrange for their replacement, and raise the necessary funds if need be39. Besides, the Master often had a financial stake in the adventure himself. Slowly, but with undeniable logic, the Master’s contractual relationship was developing into partner, employee, and agent.

It was, therefore, on a Master’s character, competence and judgment that the entire success of a venture might well depend. When put in the context of an age in which commercial risks were faced with virtually no supporting communication, the loss of a Master in whom the investors had confidence, would naturally have led to a maritime opportunity being turned down, with the downstream consequence, even, of ships being laid up or sold. With nobody else there to assist, such confidence depended heavily upon the ability of the Master to manage the risk in protecting the shareholders’ investment, and bring his ship safely to the port of discharge and the successful conclusion of her voyage.

In the twenty-first century the investor’s risk analysis depends considerably upon the technical specification of the vessel, to minimise the danger of loss or damage; but the design of a merchant ship in the eighteenth century was a study in trial and error, making it necessary to repose all their confidence in the Master in order to avoid a loss. Just one case study by way of illustration can be drawn from a contemporary ‘sales catalogue’ of ship designs produced by a Swedish naval architect, improbably named Fredrick Chapman, in 176840. Describing merely basic dimensions, there is hardly a word on technical design or engineering issues in construction. The Master had to conduct his business in great waters without any technical support whatever, save the naval architect’s very empirical eye for a design feature – it had succeeded before and, so, was presumably safe to follow. For all the envy cast at the eighteenth century East Indiamen, there was nothing but the rule of thumb standing between the ship’s company and Davy Jones’s locker.

39 HCA 13/78, 24 Oct 1676
40 Chapman, F.1768, Architectura Navalis Mercatoria
The builders had to give thought to the demands made upon a modern ship in this increasingly prosperous era of maritime commerce. Accordingly, while the technical issues of stability and safety were hardly addressed at all, factors such as the cargo type, route to be travelled, necessity of speed, and special characteristics or hazards of the expected ports of call, all had to be considered, with the emphasis on commercial demands, equipping the Master with the best possible vessel that would maximise the return on the voyage, both for the shipowner and the cargo owner\textsuperscript{41}. The downstream consequence, of course, was increasing pressure on the Master, upon whom investors relied at all levels of maritime commerce, for the logical reason that such reliance demanded that the Master discharge their Standard of Duty, requiring a subjective examination of the facts as to how the Master looked after their property. The evidence underpinning the Master’s professional judgment on seaworthiness, therefore, was entirely unequipped to support a notion of criminal liability – requiring an objective examination of the facts - except in the most blatant circumstances imaginable.

**The Development of a Framework of Law**

Parliament was acutely aware of the importance of maritime commerce to the country’s prosperity, at a time when the confidence of merchant venturers needed underpinning – and the law satisfied that need, not with any notion of criminal accountability but with a structure for marine insurance, which transferred the financial risk to underwriters. The Lord Chief Justice of the day, Lord Mansfield, laid this foundation in a series of test cases which defined the rights and obligations in the stressful venture in which the shipowner, the cargo-owner and their insurers all trusted in the utmost good faith to make a profitable living out of the carriage of goods by sea\textsuperscript{42}. His success can be measured by the fact that the London insurance market acquired a reputation upon which traders world-wide relied, and which is the cornerstone of London’s position in the maritime world today, forming the basis for the UK’s pre-eminence in maritime law and arbitration, which continues to keep pace with evolution, as we see with the Arbitration Act 1996 and the cases reported in the Lloyd's Law Reports. It is a remarkable fact that three quarters of maritime litigation conducted in London - in the High Court of Justice (notably in the Admiralty Court), by Arbitration and Alternative Dispute Resolution (Mediation) - originates outside the UK. In

\textsuperscript{41} Van Horn, K, 2004, Eighteenth Century Colonial American Merchant Ship Construction, Texas A & M University, College Station Tx, p12ff

\textsuperscript{42} Crowhurst, P,1977, The Defence of British trade, 1689-1815, Dawson & Sons, Folkestone, p81
about half of the cases commenced in the Commercial Court, there is no link to the UK at all save that the parties chose London as the jurisdiction for resolving their dispute\textsuperscript{43}.

Parliament was uneasy about the evolution of maritime law based solely on judicial precedents; hard cases can influence the body of law, but inevitably, judicial opinions can be revisited by judges in subsequent cases and put the law into different words according to their understanding. This demonstrated the need for Parliament to take control of the law by precise words in statutory form\textsuperscript{44} for the safety of maritime trade, with statutory regulation of the ships to which the State had allocated its flag. This was a crucial element in the picture of the Master’s position. His, in law, is the ultimate authority for that vessel and he is responsible to the Flag State for compliance with its maritime regulations. It is a question of control, so that the Flag State allocates its protection to the vessel, but regulates the Master who must be certified as having attained the standards which it demands. As this concept of Flag State control matured in the latter part of the eighteenth century, it is noticeable that the discharge of the Master’s duty was interpreted according to the word of statute – not a single instance of criminal culpability for ‘criminal negligence’ has been identified.

It was now that the State first asserted this control and the Master Under God found himself accountable for statutory standards of ship safety. The Registry Act 1786 provided for the regulation of construction and Ownership of every decked vessel of 15 tons and over. Such vessels were required to carry a certificate showing full details of measurement, tonnage, age, owner’s name, and other particulars. The name of the vessel, together with her port of registry, had to be painted on the stern. The other step was the setting up of a new Board of Trade, which was now by an Order in Council made into a permanent committee.\textsuperscript{45} Interestingly, today’s successor to the Board of Trade is the Maritime and Coastguard Agency (‘MCA’), whose functions are broadly the same – only the development of science and technology has raised the standards which the MCA must enforce.

The Registry Act was passed just a heartbeat before the Napoleonic Wars and, by the end of their hostilities, Britain's exports had increased by nearly 300 per cent, consisting largely of cotton and iron products, as well as wool. British merchant venturers in the nineteenth

\textsuperscript{43} Carranza, M, 2011, The City UK Research Centre, London, p1
\textsuperscript{44} See Posner, R, 1993, The Problems of Jurisprudence, Harvard University Press, Cambridge Ma, p248; note also Posner raises a pertinent point (p 262) about statute law, in that the Court’s function, to interpret the Will of Parliament, relies on letting the plain meaning of the words in a statute dictate the interpretation of the text.
century had learned the art of international trade, at a time when the wars had conveniently disabled foreign competition. With victory at Waterloo in 1815, though, that would change and Continental customers gradually developed their own industries, reducing the demand for British goods and putting a lot of British workers out of a job - a dangerous problem in a post-war climate in which there were large numbers of unemployed soldiers and sailors. By the early years of the 1820's, the country was in heavy debt, with high prices and a depreciated currency. What is more, high taxation - the promise that income tax would only be a temporary, war-time measure proved to be hollow - was fuelling political unrest, which the Government predicted would escalate with the current worry of overpopulation in large towns throughout the Kingdom. So, in 1824, the Government announced that it would give grants to aid emigration, which prompted thousands of people to make new lives for themselves in South Africa and the New World.

Growing Pains: Maritime Commerce in the Nineteenth Century

Such an incentive offered all sorts of opportunities for maritime commerce and the market leaders would have to exploit all the latest technology, which made their operation financially competitive and, thus, responding to an increasing investment demand that required more reliance still upon the professional skill and judgment of the Master to protect the higher risk. It was, therefore, the commercial risk management function that focused the investors’ reliance on the Master, who became the fulcrum for the risk management function, and a response plan if the Master let them down; in other words, the investment demand relied heavily on the concept of the Master’s duty of care which, if broken, would lead to compensation to those investors.

At this time Mr William Hall, a shipowner who had vessels trading between London and Hull, formed a partnership with Mr Thomas Brocklebank, a wealthy timber merchant trading from Greenwich, who had built his own wooden paddle steamer, the 56 ton Eagle, in 1820, wooing Londoners on Thames excursions to Margate and Ramsgate. She was a mere leisure tool – a toy – but a sound experimental platform for a much more serious concept in commercial transport. These two men were the founders and the driving force behind an association with nine others who agreed to form a company to develop steam navigation as a commercial enterprise, with plans to trade worldwide. In fact, their operations would centre on the short sea routes to Germany, Belgium, France and the Mediterranean – but they made such a success of this that their company earned itself the
distinction of one of the very cornerstones of London’s trading prosperity.  

There is a fact about business, that Risk and Reward are very subjective. Their perception – even definition – will vary from business to business – and from individual to individual. The reason for this is that the values gauged in Risk and Reward depend upon the individual or business, and each has different dynamics with their own opportunities and tensions.

For the businessperson, risk management is the absolute key to the justification of involvement in the firm, with the objective to reduce to an acceptable level the different risks related to the tasks which have to be managed within that firm. That was what the partners in the business now had to consider.

It was a fact of life, that each partner in the business had unlimited personal liability for all the debts of the business, so their personal assets were put at risk. Charles Dickens was an intimate witness to nineteenth century justice on debt, by which a debtor who was unable to settle his liabilities from his personal assets could be sentenced to the debtors’ prison – and there he would stay until his debts were paid off. How convenient, therefore, to be able to repose confidence in the Master to bring that risk within a tolerance that made it worthwhile; and to cement their confidence, the individual in whom they were placing their trust had been accredited by the Flag State. By the same token, the Master’s professional obligations had matured into two very clear strands: his Flag State responsibilities on the one hand, in which he was regulated and controlled on pain of criminal accountability, and, on the other, his contractual duties, which would stand heavily against him if he broke his duty of care to the Owners.

Nineteenth century London was an incredibly litigious place, and the mighty business founded by Hall and Brocklebank would participate in more, even, than most businesses; yet, critically, there is not a shred of evidence that contemporary society’s ethics had the slightest inclination to identify a coefficient within the two strands of criminal and civil liability that might form the basis of modern society’s concept of the Master’s ‘criminal negligence’.

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47 In 1824, His father was arrested for debt and imprisoned in the Marshalsea Gaol.
48 The Author has identified 36 cases appearing in law reports involving the General Steam Navigation Company, and another 32 case files survive in the custody of the National Archives. On the likely basis that not all case files will have been preserved, and mindful of the legendary statistic in the legal profession that ninety per cent of cases settle before getting to Court, the actual total of disputes must have been staggering.
Admitting a certain concern for the necessity of complying with the Registry Act it was, undoubtedly, the financial risk which was uppermost in the minds of Mr Hall and his partners. After all, the new steamship technology in which they were investing was in its very infancy but, in comparative terms, was discouragingly expensive to the cautious investor and, however glowingly they articulated their vision, the task of balancing risk against opportunity still resulted in a vision of daunting personal exposure.

What they needed, was a business medium which had its own independent legal personality, but which they could manage and control, so that they would achieve their objectives with the money of all who wanted to invest but they would not be exposed to any risk other than the financial sum which they had staked in it.

They were not alone. By the time that Hall and Brocklebank’s firm were showing that a success could be made of this business, the uplift in endeavour throughout the country was creating a demand for this business medium on an unprecedented scale. A charter granted by the monarch or by Act of Parliament could confer this personality on what became known as the body corporate, which was described by Stewart Kyd as having the character of a collection of individuals who had united to form a body with specific commercial purposes. Although it was an artificial, not a living thing, this body would be clothed with legal personality, so that it could enter into commercial arrangements just as a private individual could and, therefore, was capable of suing or being sued in those commercial arrangements.

In essence, the Company would operate in precisely the same way as a company does today, issuing shares to people who agree to pay for them as a means of investment; these people become Members of the Company, with various rights according to the shares they hold. All that Hall and his friends had to do, was to persuade those investors that the bottom line of the risk was acceptable, that is, that their business would, at the very least, trade - even survive - long enough to pay back its liabilities, that its income stream was secure and that the economy could support it as a going concern. Of course, the inducement, on the top line of a higher yield than they would get elsewhere, would be the deciding factor for them.

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49 Kyd, S, 1794, A Treatise on the Law of Corporations, J Butterworth, London, p13, reprinted 2006 by The Lawbook Exchange Ltd, defining the concept of a corporation as a collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.
This company, affectionately known as the Navvies, would become a household name after its incorporation on the 11th June 1824 as the General Steam Navigation Company. The corporate investment in such an operation demanded confidence in the individual in whose hands the investors placed their risk of £2 million, a staggering sum for commercial investment in 1824. Indeed, as the shareholders identified opportunities for higher returns, it became important to service the increased risks which accompanied those opportunities. The revolutionary but highly expensive leap by businesspeople into steamship technology had the (possibly unexpected) effect of changing forever the life of the seaman, for the standard of duty now demanded of seafarers as a result of the increased risk by the investors had made ancient history of the recent past. Before the advent of the industrial age, when it was almost understood that a ship's crew would come on board all hopelessly drunk, and would have to be kicked and drenched with cold water before they would stir themselves to work the vessel out of port, whole days would pass before anything like discipline could be established by the Master. After all, if desertions or death forced a Master to take on hands in a foreign port, all he could get were the lowest dregs of humanity. No wonder that the Master of the vessel in the case of Stilk v Myrick promised extra wages to those of his crew who had not deserted in Cronstadt, if they would work the ship back to London.

The development of the new steamship, though, with the increasing shareholding value and equivalent investment risk on the decision-makers, demanded a new type of crewman with which the Master could discharge his obligations: now the seafarer had to be sober and efficient when he came on board, able to perform the much higher standards of work required in a steamship. For officers, examinations became much more demanding, because the larger ships brought greater responsibilities and technical knowledge, just as they also meant better conditions. The profession of seafarer had come of age and it is axiomatic that the demands cut both ways, so that the ‘new’ seafarer must be clothed with rights, including fair treatment, which meet the level of their obligations.

The profitability of the venture necessarily presents the driving force behind maritime

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50 In their first prospectus to persuade investors, the directors stated:

> It having been considered by the most experienced individuals, many of whom are engaged in steam navigation; that the formation of a Company can alone bring it to the fullest state of perfection.... also profitable to those engaged in it by establishing between the United Kingdom of Great Britain and such places as may be deemed advisable a certain expeditious intercourse for the conveyance of passengers, merchandise, etc. These conditions having induced several respectable individuals to form the General Steam Navigation Company for the purpose of trading with vessels navigated by steam to those countries in the first instance which have been visited.... the Company have determined on raising a capital of £2,000,000 sterling to be divided in shares of £100 each.

51 Stilk v Myrick [1809] EWHC KB J58; (1809) 170 ER 1168
commerce; if there be no profit in it, then no cause would exist for the employment of a vessel or her Master in the first place. Over the centuries since Drake chanced upon success in a commercial venture, nothing had changed in the Master’s relationship with the Owners; they held that position as the Owner’s representative ensuring, not only the safety of life at sea and the prosecution of the voyage in accordance with their professional talents, but also the maximum return on the investors’ risk.

The illustration of General Steam as a case study can now be put in the context of the Flag State, which had to regulate its operation because, with the State’s investment in her burgeoning Empire, it was also necessary that Great Britain take some control over the shipping that made the Empire viable. The process by which English law controlled and regulated the safe construction and, later, the management of loading and navigation, had another facet, in that such control brought all manner of operations within the State’s power. Essentially, when Britain allocated her flag in accepting the registration of that ship, not only did the Master have to comply with the English maritime regulations but also had to ensure that English law prevailed within the ship. Indeed, English statutory regulation became so draconian that, according to William Schaw Lindsay, author of Navigation Laws, each of the 11 navigation regulations in place in 1852 had their own interpretation on any given question, giving rise to daunting and convoluted arguments in litigation – and this did not take into account arguments at Common Law.52

Thus, in the case of Dowell v The General Steam Navigation Company, which was heard in the Court of Queen’s Bench on the 1st June 185553, the Court felt compelled to express great compassion when we think of the fate of the Claimant’s vessel and her crew but the Court’s tortuous task was to unravel a Gordian knot of legislation which had grown into a fearful tangle in recent years, resulting in confusion and the decision necessarily had to be removed from concepts of compassion for those who had lost their lives. The Claimant, owner of a sailing collier, alleged that General Steam’s ship collided with theirs with great force and violence, ran foul of, and struck and came upon and against, the ship: whereby the ship was run down and wholly lost to Plaintiffs. But it was not as easy as that. An Admiralty Regulation of the day provided that all sailing vessels, on approaching, or being approached by any other vessel at night, had to show a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision. The jury heard evidence that the collier had exhibited a light, but had withdrawn it two or three

53 Dowell and Others v General Steam Navigation Co (1855) 5 El & Bl 195
minutes before the collision, and was not visible to the steamer, until she was within two or three of the collier's lengths off; but the Claimant contended that, if the steamer had been managed with ordinary care and skill, the accident would not have happened. The Claimant, discontent with a verdict for the Defendant appealed and, accordingly, Lord Campbell, the Chief Justice, considered the Judgment of the Court in the referral. It was not for the Judge to trespass upon the function of the jury, however, and he had to confine his attentions to a comparison of statutory provisions whose interpretation may have led to some inconsistency and a resulting miscarriage of justice.

The Judge concluded that the jury found that the Master of the collier did not properly observe the regulation of the Admiralty made under the authority of Statute, imposing a duty on sailing vessels approaching, or being approached by any other vessel, to show a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision. But then the Judge had to wrestle with inconsistencies in judicial approaches, in that, according to Admiralty Court rules, if both vessels were at fault the loss was equally divided: but in a Court of Common Law the Claimant had no remedy if his negligence in any degree contributed to the accident. The further complication arose as to whether the Defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the Claimant, as in the popularly quoted donkey case of Davies v Mann\(^4\). But then the judge concluded that all doubt could be removed by Statute law which provided that if, in any case of a collision between two vessels, the evidence established that fault lay because of the failure of a ship to show the lights required under the laws of the ‘Lords of the Admiralty’ as the Court respectfully had it, the owner of the offending vessel could not recover any damages whatsoever for any damages sustained, no matter the navigational enormities of the other vessel. Blame was not a matter to be apportioned; therefore the conclusion must necessarily follow that even gross negligence by the Master of the steamer in the case would have to be exonerated.

At a time when there was a growing tide of ill-feeling between the nascent steamship companies and the multitudes still dependent upon the sailing ship, who were fast losing their trade to the steamer and now apparently the law could not help them in this fatal casualty, such inconsistencies in the law were bewildering. But the feature which shouts so clearly in this case, is that the Court never for an instant dwelt upon a notion that the Master

\(^4\) Davies v. Mann (1842) 10 M&W 546, 152 Eng Rep 588. This case involved a claim in negligence in which a donkey belonging to the Claimant was sadly killed in an accident and gave rise to the last clear chance doctrine, which overrode (no pun intended) issues of liability arising out of contributory negligence. Parallels with Dowell are pertinent.
might be criminally negligent.

The Flag State had to impose some order upon the chaos which flowed from the conflicting laws of the day. Accordingly, the Merchant Shipping Act 1854 sought to address the ills visited upon maritime casualties by such confusion, firstly, by codifying and harmonising the myriad legislation then in force; secondly, by regulating ship operations through just one Government agency, the Board of Trade. In addition, the evolution of seafarers’ rights had culminated in the 1854 Act with a provision under Section 149 making it unlawful for the Master to proceed to sea, even on a short sea voyage, without first opening a written agreement with each of the seamen, whose terms concentrated heavily on defining the terms for their wages but, also, specifying the nature and duration of the voyage, the number of the crew and the capacity in which each would serve, the time when the agreement would commence, the provision of food and fresh water; and regulation of conduct and discipline. That being said, responsibility still had to be reposed in one individual for the observance of this and all Flag State laws on board the ship and that person was the Master.

**Twentieth Century Legacy**

It was this regulation of shipping by Victorian authority which established the firmest of grips on the safety of life at sea, culminating in the mighty codification of maritime laws in the Merchant Shipping Act 1894, with 45 sections alone on safety. The Master had become the handmaiden of the Flag State and, in any conflict between the interests of the Owners and those of the Flag State, the Flag State would prevail. They were, unquestionably, Master Under God and accountable for their professional judgment which, yet, remained unassailable. Save for the direst excesses of recklessness, a finding of culpability in negligence was still far removed from criminal accountability, as the case of the Molesey illustrates.

Captain George Huntley had been at sea since 1906, had held a Master's certificate since 1914, and had been in the service of the Owners since 1918. He was, by any standards, an experienced Master and the Britain Steamship Company, managed by Watts Watts & Co, had a strong reputation for reliability in maritime commerce. In July, 1929, he took over command of the Molesey at Norfolk, Virginia so was well used to the ship when, in

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55 The Molesey (SS), Board of Trade Inquiry, Report of Court No 7879 (1930)
November, he sailed from the Mersey for the Bristol Channel where she was to dry dock before being handed over to new Owners. During the evening of the 24th November, Captain Huntley received a weather warning from Seaforth:

Gale warning-Southerly gale extending to all coasts reaching force 9 locally-intense depression off south west Ireland moving north east⁵⁶.

He did not take any action, however, which turned out to be a dreadful mistake. On the following day, the increased force of the gale was so treacherous that the Master sought vainly to bring the vessel under control and keep her off the shore. But it was too late and, at 1.50 pm he sent to the Owners’ office at Cardiff the message:

A shore on Wolf Stack Point require immediate assistance vessel breaking up⁵⁷.

The vessel ran aground forty minutes later on the south-east corner of Mid Island, in Jack Sound, Pembrokeshire. Seven seamen lost their lives although the Inquiry found that

Nothing could have been done to save them, or any of them⁵⁸.

The Inquiry found that Captain Huntley contributed to the casualty and the loss of life by attempting to pass between The Smalls and the mainland through a channel where the tides run with great strength, in a vessel of low speed and light draught, with doubtful weather conditions prevailing – pertinent indications of serious negligence. Most pertinently, though, the Court speculated on issues that went to the core of the Master’s professional judgment:

This action may have been due to excess of zeal and a desire to make Cardiff on the following morning's tide, which hope the master had expressed by radio to the Owners; otherwise it is difficult to understand his reason for taking what was obviously a great risk. The Court considers that he was not in the circumstances justified in taking this risk and that he made an error of judgment in taking it and thereby jeopardising the safety of his ship⁵⁹.

The conclusions of the Board of Trade Inquiry left the Crown with no cause to attach any

⁵⁶ Ibid p2
⁵⁷ Ibid p2
⁵⁸ Ibid p4
⁵⁹ Ibid p4
criminal accountability to such negligent conduct, however; indeed, the Inquiry qualified its findings by highly commending the conduct of the Master after the ship struck and while awaiting rescue by the lifeboat. As the twentieth century was closing, social attitudes were influencing a process of change towards the perception of the Master’s accountability, which became suddenly visible in the wake of the Marchioness disaster in August 1989. The MAIB report\(^{60}\) made a number of findings, the principal one being that the collision occurred because neither vessel observed the other until it was too late. Further factors, inter alia, involved design defects which seriously restricted visibility from the wheelhouse of each vessel, both vessels were using the same, middle part of the fairway and the centre arches of the bridges across the river, and clear instructions were not given to the forward look-out of the Bowbelle. That being said, the report clearly concluded that there was no wilful misconduct in either vessel contributing to the collision, the foundering or the loss of life but, that some fault lay with those in direct charge of the two vessels at the time and with those responsible for both the perpetration and the acceptance of their faulty design.

Publication of the report had been delayed in order to accord a fair trial to the Master of the Bowbelle, Captain Henderson, for failing to ensure a proper lookout and thereby causing damage to another ship and death or personal injury contrary to section 27 Merchant Shipping Act 1970\(^{61}\); but the first jury failed to reach a verdict, as did the second, and a verdict of Not Guilty was duly entered on the charge when the Crown Prosecution Service abandoned the case.\(^{62}\) Subsequently, the MCA conducted a statutory inquiry into Captain Henderson’s fitness to continue to hold a Certificate of Competency, but this took place in 2001, long after the incident, and the MCA properly had to confine itself to considering his current fitness and that the agency had accepted that events which occurred in 1986 have no practical relevance on his current fitness. In his March 2001 report\(^{63}\), Lord Justice Clarke did not recommend any disciplinary action against Captain Henderson on the grounds of the length of time that had elapsed and on human rights grounds. In conclusion, the Master’s statutory accountability under the Merchant Shipping Act had been tried and tested, and he had been cleared; his accountability for the death of the victims on the grounds of criminal negligence had not been tested. But this time, it had come close, and the public response to the Prosecution’s failure was predictably unfavourable, choosing to ignore the legal issues and relying, instead, on the ethics which drove the opinion upon which the public response

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\(^{60}\) MAIB, 1989, Report into the collision between the passenger Launch Marchioness and MV Bowbelle
\(^{61}\) Now s58 Merchant Shipping Act 1995
\(^{62}\) Butcher L, 2010, House of Commons Standard Note SN/BT/769
was based. The risk of such a calamity has apparently always been outweighed by the enormous benefit of reposing confidence in one person for the safety of life at sea, and current law has confirmed their unassailable position. The Merchant Shipping (Safety of Navigation) Regulations 2002 (as amended) prohibits anybody, whether the Company or any other person (the Regulation’s own words) from trespassing on the Master’s ultimate power to use his own judgment when taking any action, or even making a decision, in the safe navigation of the ship. As if that needed reinforcement, International Law has addressed the Master’s authority through the International Safety Management Code 2002; in Part 5, the Code requires the Owners’ shore-based management system to support the Master’s responsibility and authority with clearly defined and documented Standing Orders implementing the safety and environmental-protection policy, motivating the crew in the observation of that policy, issuing appropriate orders and instructions in a clear and simple manner, verifying that specified requirements are observed, and reviewing the safety management system and reporting its deficiencies to the shore-based management.

In addition, the ISM Code obliges the Company to ensure that the safety management system operating on board the ship contains a clear statement that the Master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention; all they may ask of the Company is its assistance as may be necessary.

It is therefore apparent that the Master’s responsibility remains largely unchanged, for they must account for their acts or omissions arising by reason of their authority, and the old Common Law rules have been codified in the wake of international law giving consensus to the positions adopted by Flag States and Port and Coastal States. So what has changed? If not the Master’s rôle, then it must be the law that impacts upon the Master’s rôle, which defines the management risk inherent in the Master’s function. If the Port State develops a new concept in the law which defines that management risk, then the Master must be able to respond to that. The problem arises in that the risk can be the slave to what society in the Port State believes to be a moral wrong and, if society embraces a notion which betrays a

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64 Captain Henderson had also admitted forging certificates and testimonials relating to his period of service during 1985 and 1986. The MCA said it deplored these forgeries because Captain Henderson relied on these documents when he was issued with a certificate of competency to be a master mariner in 1988 but this did not lead to the conclusion that he was not fit to be a Master in 1989. Public response was less favourable, still.

65 SI 1473, as amended by the Merchant Shipping (Safety of Navigation) (Amendment) Regulations 2011 No 2978, which came into force in 2012. While the effect of the 2002 Regulations has not changed, these Regulations restructured the paragraph stating the existing requirement, that Owners must not restrict the Master’s decisions relating to safety or the environment, substituting for paragraph 3 of Regulation 34 the new separate Regulation 34-1.
fatal flaw in its philosophy, the Master finds themselves having to respond to a phenomenon which cannot be defended fairly but cannot be ignored either. Such a phenomenon has emerged in the shape of ‘criminal negligence’.
(ii) Risk Management by Flag State

Overview

The increasing sophistication of global maritime operations coincided with the development of international law regulating the relationship between States. The obligations owed between Convention States essentially hinge upon the nature of a ship as being a physical part of the sovereignty of the Flag State; thus, the ship is entitled to the protection which any part of a State has from intervention or injury by another State. By the same token, the Flag State must be accountable for harm inflicted by the ship upon another State. In all respects, the Flag State must be able to manage the risks, which it does by delegating responsibility – and accountability – to the individual in whom it has reposed its confidence by the accreditation of Master.

In addition, as a sovereign part of the Flag State, the rights and obligations conferred by the laws of the Flag State must be managed within the vessel, which naturally falls to the task of the Master. As a result, the Master must accept criminal accountability to the State which put him in that position of responsibility in the first place.

The Flag State and UNCLOS

The international response to the Israeli interception of the Turkish-flag Mavi Marmara, a vessel forming part of an aid convoy to Gaza in May 2010, underpins the importance which the world community attaches to the sovereignty of the Flag State. Turkey’s Foreign Minister, Ahmet Davutoğlu, spoke at an emergency meeting of the United Nations on the 31st May, reminding the delegates – and of course the entire world – that freedom of navigation was one of the oldest forms of international law; no vessel could be stopped or boarded without the consent of the Master or their Flag State. Delegates from around the world, many with no axe to grind against Israel, were vituperative in their censure for the reckless disregard of international law and its consequences in this case, while Richard Falk, the United Nations’ Special Rapporteur on the situation of human rights in the occupied Palestinian Territory, said

Israel is guilty of shocking behaviour by using deadly weapons against unarmed
civilians on ships that were situated in the high seas where freedom of navigation exists, according to the law of the seas\textsuperscript{66}.  

The high seas are open to all States, as expressly provided under Article 87 of the United Nations Convention on the Law of the Sea (‘UNCLOS’), which creates nothing new, but serves to perpetuate this ancient international law and, as Lord Bingham emphasises\textsuperscript{67}, the State must comply with its obligations under international law as a fundamental pillar of the rule of law by which it judges, and will be judged by others.

Even setting aside the underlying reasons for the scale of the condemnation which, undoubtedly, owed much to the loss of human life which followed the interception, this incident illustrates very graphically just how seriously the United Nations community takes the obligations which international law places on States to respect the sovereignty of the Flag State. As Article 91 of UNCLOS has it, ships have the nationality of the State whose flag they are entitled to fly. Therefore, an act against that ship is an act against her State\textsuperscript{68}.

The ship has emerged into modern international law as a sovereign piece of territory of the Flag State. It is this which offers the promise of protection to the Master and the Owners; after all, a ship on her own has little protection from a predator but, if protected by the power of a Navy and a strong state behind it, the predator might be discouraged from making rash decisions. It was ever so; this very practical interpretation of maritime rights gave force to the concept of freedom of navigation of the high seas, a convention which had matured centuries before the Israeli raid on the Gaza convoy, with the need to protect fleets from predatory assaults from other Flag States competing for possession of the valuable cargoes. The concept remains largely undiminished with the passage of time: once the vessel has progressed beyond territorial waters, she must be entitled to enjoy the freedom of the seas, a principle which had really established itself only in the seventeenth century, essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline, approximately the range of a cannon-shot, of three nautical miles. As all Flag States had vested interests in protecting their own shipping, any infringement of the doctrine tended to bring about universal condemnation and outrage by maritime states. Consequently, the high drama of this work, in terms of legal responsibility, falls upon the stage in which the Flag State is the prominent figure.


\textsuperscript{67}Bingham, T, 2007, The Rule of Law, CLJ 67

\textsuperscript{68}Israel might make the point that it has not ratified UNCLOS; this does not help them much, though, because the raid and subsequent detention certainly amounts to a breach of the customary international law of high seas freedom.
Thus, the convention of freedom of navigation was and remains critical to all maritime nations – indeed, it is important to non-maritime nations as well, for the interruption of a cargo’s journey from seller to buyer could bring confidence in international trade to an end. This was as true in 1861 as it had been in Elizabethan times and, however much statesmen carped that British merchants would happily see their ships’ sails scorched if they saw a profit in sailing to Hell, a Government which ignored the interests of such king-makers stood little chance of filling the Treasury, and less chance still of keeping their seats at the next Elections. So, when the War between the States broke out in the USA in 1861, the British Government made sure that their merchants’ interests were given top priority, while steering that strict neutrality which was pivotal to its diplomatic policy to tread a careful line in the Civil War – which introduces the case study of the Trent as, perhaps, the most dangerous incident to flare up between the United Kingdom and the United States in the last two hundred years\(^69\).

### The Case of the Trent

The steamer Trent was registered in the UK and owned by the Royal Mail Steam Packet Company; Southampton was her home port, as well as being home for most of the crew of British subjects. In accordance with customary international convention – as then, unwritten - her Master was accountable to the Flag State to ensure that the safety of life at sea was observed and that passengers and crew were protected by English law as surely as if they were on English soil. Additional to such obligations, the Master was entitled to the protection of the State which had allocated its flag to the ship. On board the ship were two commissioners of the Government of the Confederacy, who were bound for England. But, all the while, Captain Charles Wilkes of the Union Navy, commanding the sloop-of-war San Jacinto, carrying thirteen guns, was cruising nearby, lying in wait to capture the commissioners and win a famous victory. The interception was described by Commander

\(^69\) The Trent case was followed by numerous claims made by the United States against Great Britain arising out of the latter’s relationship with the Confederacy in the War for Southern Independence, resulting in the appalling injustice of the Geneva Conference in 1872. Source material references at the PRO: ADM 36 / 3038
FO 5 / 754-1311-1313-1314-1323-1408-1409-1422-1424-1425-1872
FO 97 / 439-440
FO 198 / 21 (perhaps the most important of all the primary sources)
FO 336 / 570
FO 881 /996-2084-22002
HO 45 / 7261
TS 25 / 1284
Williams, the Agent for Mails aboard the Trent, who reported subsequently to the Government, that the Trent left Havana at 8.00 am on the 7th November, bound for Southampton; when, shortly after noon on the 8th a vessel, which he described as a steamer with the appearance of a man-of-war, but not showing colours, thus failing to reveal her State’s identity as friend or foe, was observed ahead, hove-to. The Master of the Trent immediately hoisted the UK’s merchant flag, the red ensign, at the peak, but the other vessel did not respond with her flag; indeed, she did not respond at all, until, approaching the Trent, she fired a shot from her pivot-gun across the Trent’s bows and then ran up the United States (North) flag. There was now very little doubt about her intention. Upwards of sixty armed marines boarded this neutral vessel, their bayonets fixed, in such flagrant disregard of the laws applying to Sovereign States as to constitute an act of war. The Confederate passengers were forcibly taken out of the ship, and then a further demand was made that the Master of the Trent should proceed on board the San Jacinto, but as he expressed his determination not to go unless forcibly compelled, the commander of the boarding party backed down.

In Washington, the Union Government realised the possible consequences that the incident could lead to - and their fears were not misplaced. On the 30th November, the British Foreign Secretary Earl Russell sent an urgent instruction to the Admiralty, putting Vice-Admiral Milne on a war footing, while eleven thousand troops were immediately sent to reinforce the Canadian border and an embargo was slammed on all goods bound for the Northern States, including supplies of saltpetre, a vital ingredient of gunpowder. Washington was given seven days to liberate the commissioners and apologise. President Lincoln promptly realised that the act had been not only illegal but the possible trigger for Britain’s enmity, making them an unwelcome ally for the Confederacy. His Secretary of State, William Seward, for once had to concede defeat. On the 26th December 1861, Seward sent to Lord Lyons, the British Ambassador in Washington, a very long and elaborate dissertation on the questions of international law involved. But, in conclusion, he admitted that:

what has happened has been simply inadvertence... and for this error the British government has the right to expect the same reparation that we as an independent state should expect from Great Britain or from any other friendly nation on a similar case... The four persons in question are now held in military custody at Fort Warren in the state of Massachusetts. They will be cheerfully liberated. Your Lordship will please indicate ......a time and place for receiving them.
Most critically for the maritime interests of Britain, the Master’s protests had been upheld; he remained accountable to the Flag State for upholding its laws and, indeed, its sovereignty, and no other power could compromise his position of unfettered authority on the High Seas.

The really interesting bit about the Trent affair, is that the problems in terms of international maritime law have not gone away but persist in haunting us, as we can identify all too clearly in the recent case of the Odyssey. The facts were reported thus in Lloyd’s List on the 13th July 2007:

The Spanish Civil Guard has intercepted a boat operated by a US company amid a row over treasure from a shipwreck. The guard had been ordered by a Spanish judge to seize the vessel as soon as it left the British colony of Gibraltar. Gibraltar officials and Odyssey Marine Exploration, which owns the ship, said Spain had boarded the ship illegally as it was in international waters. A lawyer for Odyssey, Allen von Spiegelfeld, told Reuters news agency that Spain had not sought permission to board Ocean Alert from officials in Panama, where it is registered.

"The Owners of the vessel have contacted the Panamanian maritime authorities protesting the seizure on international waters," Mr von Spiegelfeld said.

These studies serve to anchor the theory to the foundation stone of the problem in context. The answer to the obvious question, as to why the State should need to make the Master culpable at all, is in its risk management of a potential situation involving a vessel to which it has allocated its sovereign right of protection. Such rights necessarily tow in their wake obligations, which demand an individual to carry them out; it is a factor in risk management for the Flag State and its relationship with the Port State.

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70 Lloyd’s List, Informa plc, London
Flag State Control – Foundation of the Master’s Accountability

The Master’s authority, indeed, their accountability, therefore, is derived primarily from the laws of the Flag State. The very fact that the Master assented to the process of certification by the authority of the Flag State makes out an unassailable argument that they have voluntarily subjected themselves to all the laws of the Flag State – they cannot pick and choose which ones they want to observe. This is an example of the social contract, by which the State maintains order, for the social contract implies that the Master gives up absolute freedom to the Flag State authority in order to receive or maintain social order through the rule of law, that is, a set of rules by which the Master is governed no matter where the ship may be.\(^{71}\)

The Flag State’s own responsibility for management of its legal rights and obligations is a prime factor in this. The State’s overall responsibility is defined, in the terms of UNCLOS, for the implementation and enforcement of those international maritime regulations to which it has committed itself, in respect of all ships to which it has allocated the right to fly its flag. The potential consequences on the Flag State for management failure has demanded some accountability; the question is, how the State renders that into blame. It may be that the Master must be held liable as a result of that; in which case the question to be raised is, how that is consistent with fairness, or equity.

By the same token of equity, Flag State responsibility also demands management of risk to the rights and obligations of the ship herself, to which the flag has been allocated. The very fact of that allocation brings the vessel within the protection of that State and, necessarily, all the State’s laws by which it controls its subjects. When addressing the human rights of individuals to go about their lawful business it would naturally be preferable to have such laws codified by statute but, in a Common Law system, common law rights and obligations have been defined in Judgments and, by their evolution, the Master has some guidance for divining their accountability.

This issue is so important to the subject because the Master has many responsibilities, for which they will remain accountable no matter what tasks they delegate in order to discharge those responsibilities. Their overriding duty, though, is to maintain order and discipline on board - the age old Rule of Law of the Flag State. In 1851, the Chief Clerk of the Thames

\(^{71}\) See Rousseau, J-J, 1762, Of the Social Contract, Or Principles of Political Right, Amsterdam (his books were banned from publication in his native Geneva)
Police Court wrote a useful digest of the key statutes which the Master had to observe\textsuperscript{72} in discharging his management duties under Flag State law, focusing on The Navigation Act 1849, The Mercantile Marine Act 1850, The General Merchant Seamen's Act 1844, The Seamen's Protection Act 1845 and, the 1851 Act passed to amend the Mercantile Marine Act 1850. The bewildering plethora of legislation, which would lead to its codification in the 1854 Merchant Shipping Act, cloaked the Master with authority over all mariners on board the ship, whose duty it was to obey his lawful commands for the safe navigation of the ship. In case of disobedience or disorderly conduct, the Master was empowered to correct them in a reasonable manner – but the author then cautioned that a hasty or intemperate blow given by the Master could not be justified:

There are doubtless many provoking acts and many causes of excitement which, in the heat of the moment, sometimes throw masters off their guard, and all such circumstances of provocation or extenuation are taken into consideration by the proper tribunals of the country, in the administration of the law and the distribution of punishment; but the law itself is too watchful over the safety of all to allow the slightest violence to be done to the person of any, except in self-defence, or for the maintenance of discipline to ensure the safety of the ship and the lives of the persons on board...\textsuperscript{73}

It will be readily perceived that English law was evolving to give a level of protection to seafarers which the normative ethics of contemporary society demanded. It was for the Master to observe and enforce the law on behalf of the Flag State; the Master, after all, had been found fit to be a Master under English law, and now was accountable to the same authority that had put them in that position, for the maintenance of its laws. The 1854 Act provided special protection for the rights of the seafarer and put the Master in control of them all. A full generation before compulsory education was first implemented\textsuperscript{74}, seafarers had the protection of a written contract, so that the Masters of those General Steam ships featured in case reports now had to observe Section 149, which obliged the Master to enter into an agreement with every seaman whom he carries to sea from any port in the United Kingdom as one of his crew.

It mattered not that the seafarer signing the agreement could not read it – his rights were

\textsuperscript{72} Symons, 1851, The Law relating to Merchant Seamen, arranged chiefly for the use of Masters and Officers in the British Merchant Service, Longman, Brown, Green and Longmans, Charles Wilson (late Norie and Wilson), London, Ch II passim

\textsuperscript{73} Ibid, p85

\textsuperscript{74} The Elementary Education Act 1880
protected and could be enforced by the Court. The Crew Agreement had to specify the nature and duration of the intended voyage; the number of crew and the tasks which each would be required to undertake; the time each would be on board; and heavy focus was made on the wages to be paid. The Act also protected the crew from Masters who ignored their most basic health and comfort, stating that not less than three of the crew might join to complain of the badness, unfitness or deficiency of the water or provisions, and thereupon an examination may be made thereof, and the Master must on notice provide proper provisions and water.

The Crew Agreement also contained regulations on the seafarer’s conduct, breach of which would be addressed by the Master’s management powers, to maintain order and discipline. Those powers, however, still had to be carried out in accordance with Flag State law and the same principle has not been compromised with the passage of time. As a clear illustration, a case reported in 1953 can surely have few equals in its field. Mr Hook had originally joined the Cunard Steam Ship Company in 1909 in the ‘hotel’ department, catering for the needs of the Company’s passengers on Transatlantic voyages, and during his career he had earned an unblemished character. Accordingly, when the express liner RMS Queen Elizabeth sailed from Southampton for New York on the 24th June 1950, Hook was employed aboard as a steward in the First Class passenger lounge. Among the passengers was Dr Greenberg, his wife and two children, including 10 year old Linda. On the evening after the ship sailed, the Master, Captain Cove, instructed the Staff Captain to investigate a complaint by Dr Greenberg concerning an allegation by Linda that an indecent assault had been committed against her in the lounge that evening. She identified Hook, and Dr Greenberg was about to strike him when the Staff Captain intervened and told the Chief Steward that Hook was to work in the pantry for the rest of the voyage, away from the passengers. That was not good enough for Dr Greenberg, though, who demanded that Hook be put under lock and key and that if he were not, he would inform the parents of other children among the passengers of the facts. He also threatened that, on arrival in New York, he would have Hook arrested and prosecuted, with all the publicity that could be mustered against the Company.

Mr Hook denied the accusation; indeed there was no evidence in corroboration of Linda’s story and a statement signed by Dr Greenberg purporting to be her account of the incident was inconsistent with the account which she gave in the presence of the Staff Captain. But the Master ordered the steward to be kept under restraint in the isolation hospital for the

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75 Hook v Cunard Steamship Co [1953] 1 AL ER 102I
remainder of the voyage and until the First Class passengers had disembarked at New York.

On the 6th July, after the Queen Elizabeth docked at Southampton, Mr Hook was discharged under the crew agreement and, on the 7th November, was dismissed under his permanent contract. Of his claims for compensation for false imprisonment, breach of contract and wrongful dismissal, the Company paid into Court the full sums in respect of the second and third claims, but defended the claim of false imprisonment, which thus was the defining issue in the case.

False imprisonment is a common law tort under English law, which involves the unlawful confinement of an individual against their will by another individual in such a manner as to violate the confined individual’s right to be free from restraint of movement – what today comes within the meaning of an individual’s human rights as well as defining a particular tort. The use of physical force presents compelling evidence, but force is not essential. With this in mind, Captain Cove argued manfully that he confined the Plaintiff in compliance with his duty to maintain order and discipline, ensuring no harm came to his ship or her passengers, preserving order among the ship’s company and, indeed, protecting the steward from the threatening attitude of Dr Greenberg. To this extent, therefore, Hook’s confinement was lawful, the Defence argued. Slade, J, cited Aldworth v Stewart, in which Baron Channell, summing up to the jury, had sought to clarify the defining features which characterize the Master’s authority. A hasty or intemperate blow, said Channell, could not be justified; in effect, the Master would be committing the criminal offence of an assault, for none of the State’s laws are suspended just because that bit of its sovereignty is floating and not fixed on dry land. It was, and remains, Necessity which clothes the Master with the authority of the Flag State, in order to carry out his overriding duty, to maintain order and discipline over the crew – even, in certain circumstances, over the passengers too. But this authority is limited to that necessity, and must remain confined to his overriding duty; even in carrying out that duty, the Master must respect and maintain all the laws of the Flag State, and a claim of false imprisonment is as enforceable on board a ship as it is on dry land, under English law.

The Judge further drew on the case of The Lima, in which the Court had held obiter how Parliament and the Courts which interpret Parliament’s Will have always valued highly that class of person categorized as the British mariner and, accordingly, have rushed to

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76 Most recently addressed in Austin v Commissioner of Police of the Metropolis [2009] UKHL 5 which concerned the police practice of ‘kettling’ in managing crowd control
77 Aldworth v Stewart (1866) 176 ER 865
78 The Lima (1837) 166 ER 434
encourage and protect them in their careers. That being said, the Judge cautioned, the Master must be able to repose confidence in his authority so that he can discharge his overriding duty to maintain order and discipline on the ship, which is essential to the safety of navigation and, in the immortal culture of Victorian society, the great commercial interests of the country.\textsuperscript{79, 80}

In finding Judgment for the Claimant, Slade J identified the key features in Mr Hook’s case with those clearly forming the foundations in Aldworth and The Lima, and held that he was satisfied that the Defendants did not order his detention because they believed that it was necessary for any purposes of maintaining order and discipline, but they did it to placate Dr Greenberg, and, by placating Dr Greenberg, to avoid what the Master had described as ‘unwelcome publicity’.

The very topical issue of defence against piracy puts the Master’s criminal accountability under Flag State law in strict focus. Article 101 of UNCLOS defines piracy as any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship and directed on the high seas against another ship or against persons or property on board such ship or aircraft. It necessarily follows from the definition that the piracy must take place outside the sovereign jurisdiction of a State. If within the jurisdiction of a State, then that State’s own laws will prevail (such as, for example, armed robbery).

How then is the Master to maintain the safety of his ship and crew in accordance with his Flag State obligations? The solution on the face of it is to defend her with such reasonable force as Flag State laws permit. If the Master uses excessive force under Flag State law and a pirate is killed on board his ship, then the defence of self-defence would fail if he were to be tried for murder. As Master of the vessel, with responsibility and, therefore, accountability under Flag State law, he would be exposed to criminal liability if defence measures were used which might not be protected under the law.

Whatever Flag State laws permit or restrict, has little bearing if the ship is in another State’s

\textsuperscript{79} Ibid
\textsuperscript{80} As a matter of principle, nothing much has changed – the Merchant Shipping (Safety of Navigation) Regulations 2002 (amended by SI 2011 No 2978; see footnote page 41) uphold the Master’s absolute discretion for the safe navigation of the ship, enabling him to hire and fire seafarers under the crew agreement. If the employer is not so satisfied that the seafarer’s dismissal under their permanent contract could be defended from a claim under the Employment Rights Act 1996, they will simply transfer the seafarer to another ship in the fleet – and another crew agreement.
territorial waters. If the vessel’s private army of armed guards infringed the laws of any Port State which they visited, then the local jurisdiction’s laws would certainly be enforced, bringing to account the shipowner as well as the Flag State, for both of whom, of course, the Master is representative – and the first target for criminal accountability.

In the long-running and bitter history of piracy attributable to the failure of Somalia’s jurisdictional control over its people, shipowners are losing patience with the constraints imposed upon them by the current law, and are turning increasingly to the use of privately-contracted armed guards on board their ships, thus taking the law into their own hands to defend themselves against a threat which they perceive to be incapable of control by the rule of law. The IMO has become so alarmed by this trend that, in May 2011 it published guidance to Member Governments on this practice, urging them to inform their shipowners of the risks involved\(^81\). The circular doubtless was written with a view to urge extreme caution upon shipowners in using privately contracted armed security personnel and if it were intended to discourage the practice, will probably succeed beyond its wildest dreams.

The guidance emphasises the importance of the Master’s position, as being central to the shipboard management rôle in maintaining Flag State law on board the vessel, the sovereign territory over which other States have no prima facie right in which to intervene – unless, of course, their laws have been broken and, very possibly, their nationals have been killed. In either case, the Master may optimistically take some comfort in their human rights of being able to defend themselves and, indeed, they may be acquitted at the eventual trial. But, they would have to go through that accountability process in the first place and, in the meantime, may be held in custody in some foreign jurisdiction whose accommodation for Defendants awaiting trial is inconsistent with what a Master may feel entitled to expect. And then, they may still be found Guilty at the trial. No criminal defence can ever be certain.

To summarise, the Master’s accountability to the Flag State is born of necessity, in order that the Flag State can maintain management control. The Master has consented to such accountability by virtue of their acceptance of the rôle, and by their seeking accreditation with that Flag State in the first place. By contrast, the position in which the Master has found themselves accountable under Port and Coastal State jurisdiction has proved a key factor in the analysis of criminalisation. Such analysis, though, can reveal confusion as well

as clarity - for which the case of Compulsory Pilotage provides an excellent study.
(iii) The Clash of Authority: Compulsory Pilotage

Overview

Compulsory pilotage was implemented by Port State laws as a result of commercial pressure on navigation in confined waters. The question to be addressed, however, is just what effect this has upon the Master, whose accountability rests upon their responsibility for the safety of the vessel’s operation. Confined, as it is, to Port State waters, an examination of the Master’s accountability in compulsory pilotage provides a strong case study to analyse just what has been the cause and effect of the clash of authority between the Master Under God, representative of the Flag State, and the Compulsory Pilot, clothed with the authority of the Port State. Its value to this work informs us on how the Master is confronted with criminal accountability in the context of Port State jurisdiction which has eroded the Master’s control of navigation but not their responsibility.

Rights and Responsibilities

International law has reinforced the Master’s position of supremacy in relation to the ship. The Merchant Shipping (Safety of Navigation) Regulations 2002 implement Chapter V of the International Convention for the Safety of Life at Sea (SOLAS) 2002, giving the Master the unassailable power to use their professional judgment in the navigation of their ship, and the protection of the marine environment. Whatever instructions, for example, the charterer might deliver for proceeding to an unsafe port, the Master has the right to refuse to enter. If, of course, they do proceed, then they must give a good account of their professional judgment, and they remain Master Under God throughout, even with a pilot on board in a compulsory pilotage area. In this context, the case of the Star B presents a cautionary tale, in which the Arbitrators found that there was evidence to support the Owners’ contention that at the (unsafe) port nominated, there were deficiencies in the entrance buoys, the range markers, the charts, the navigation guides and with the pilot sufficient to render the port unsafe at the time in question – But, there was also sufficient evidence to support the charterers’ argument that the grounding could have been averted by the exercise of good

\[82\text{Amended by SI 2011 No 2978; see footnote page 41}\]
\[83\text{Slebent Shipping Company Ltd v Associated Transport Line LLC, the Star B (2003) Award of the Society of Maritime Arbitrators of New York. The dissenting Arbitrator preferred the American approach of an apportioned award.}\]
seamanship and the negligence of the Master and or Pilot was so serious as to sever the causal connection between the charterer’s instruction and the damage to the vessel.

At first sight, this would tend to qualify the assertion of Professor Gold when he reviews today’s case law and draws the conclusion that shipmasters today seem to have many responsibilities but few, if any, rights. In order to analyse this observation in more depth, the question must first be addressed, as to where the line is drawn between rights and responsibilities. While Part 5 of the ISM Code and the sovereign law of the Flag State clarify the Master's responsibility for the safety of the vessel and the protection of the environment, the Flag State particularly gives them legal rights and authority in the management process of the ship which has been allocated their flag, which, as we have seen, are held unassailably. If, in the course of exercising those rights and authority, the Master breaks the law, they will be accountable to the State concerned. The phenomenon of criminalisation has been held to blame for such accountability - which is where the phenomenon of the growth of Human Rights would, in theory at least, come to their rescue.

Evidence may be adduced from recent authorities that the distinction between rights and responsibilities has been blurred in a particular area of law, which has evolved in response to the demands of compulsory pilotage. It will be seen, however, that this is by no means a recent phenomenon.

Compulsory pilotage was implemented by Port State laws as a result of commercial pressure. Its origins in some jurisdictions can be traced back centuries, but that pressure forced its introduction into English Statute Law in the early years of the nineteenth century, as a means by which the Port State could manage the risk to life and property presented by the massive growth in Britain’s brave new maritime commerce, which had been helped so ably by the Napoleonic Wars. The developing laws of ship construction would be of little help to an expensive new merchant frigate whose back was broken on dangerous rocks and her cargo lost, simply because her Master did not possess knowledge of the local waters, and the power-mongers in the new era of post-war economic regeneration, the investors, the traders, the exporters and the insurers, persuaded Parliament to mitigate the losses of navigating in dangerous waters as the ships arrived or sailed from port. The solution was seen in the knowledge and skills of a pilot experienced in the particular waters of a locality;

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84 Gold, Op Cit P6
such expertise was identified as a crucial asset by the Port State in the risk management process and, as a result, the Pilotage Act 1812 introduced the concept by statute.

The question to be addressed, however, was just what effect this would have had on the Master, whose task management functions had been eroded by the Pilot taking the navigation away from him. As a result, if the Pilot were negligent and damage was suffered because of his fault, to what extent was the Master culpable and, most pertinently, how would the shipowner be held liable, even if he were blameless? After all, the essence of a contract is founded on the concept of a Bargain and, if the Master had no choice but to hand over navigation to the negligent pilot, then it could hardly have been a contractual relationship which gave rise to liability on the part of the shipowner. Parliament thought so too and, as a result, Section 30 of the 1812 Act duly provided for a defence on these grounds. With the burgeoning of the British merchant fleet in the ensuing decades, this defence was carefully preserved by Part 5 of the Merchant Shipping Act 1854, which applied Compulsory Pilotage to home-trade passenger ships between any place in the United Kingdom and the Channel Islands, and the Isle of Man, and within the limits of any district for which Pilots were licensed, unless the Master or Mate possessed a Pilotage Certificate within the district. It was this part of the 1854 Act which illustrates so graphically the law and procedure which applied to our next case study. Section 378 required all vessels coming up the Channel to London, to take a pilot on board at Dungeness, and to put him in charge of the ship.

**The Foundation of Common Sense: Two Nineteenth Century Case Studies**

From Dungeness to London Bridge was, by Section 370, constituted the Trinity House Pilotage district, and no single pilot could be licensed to conduct ships both above and below Gravesend. Although the requirement was compulsory, the consequence upon the Owner of compulsory pilotage was treated by Section 388, which emphatically provided that neither the Master nor the owner of any ship would be accountable for any loss or damage whatever claimed by any third party as a result of the fault or incapacity of any qualified pilot acting in charge of such ship within any compulsory pilotage area.

In the case of General Steam v British and Colonial86, the Defendants’ vessel, coming up the Channel to London, took a pilot on board at Dungeness. Before reaching Gravesend,

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86 General Steam Navigation Company Ltd v British and Colonial Steam Navigation Company Ltd (1869) LR 4 Exch 218
while the vessel was still under the control of the pilot, she came into collision with the Claimants' vessel, through the pilot's negligence.

The Claimants sued the Defendants for injury caused by a collision. The Defendants argued that their vessel was under the management of a pilot, in pursuance of the provisions of the Merchant Shipping Act, 1854, and that the accident was due to his negligence, for which they were not responsible.

The Court expressed sound reasoning in applying the statutory defence limiting liability of the Master or owner in a casualty event which took place in a compulsory pilotage area. Whether or not they were in such an area, the pilot was compulsorily on board, and the Defendants were not liable for his acts, for the relation of Master and Servant was never constituted between them and him. That relation exists only where the Master has a power of choosing his own servants, as is ordinarily the case with a crew; and this power of choice is the reason given for the liability of a Master for the acts of his crew. The Court applied the well-established doctrine to draw the conclusion that the pilot cannot be considered as the servant of the owner, for the Master can, at best, only choose him out of a selected class, and the best case scenario is rare for, as a rule, he cannot even do this, but must take the pilot who is offered by the pilotage authority — hardly the key features defining freedom of choice in the contractual bargain to which the Master and the owner will be held accountable.

It also held, that the Defendants having been compelled by Section 378 to put the pilot in charge of the ship and, being compelled to pay him the full rate for navigating the ship from Dungeness to Gravesend, the relation of master and servant was never constituted between them and thus the owner could not be held to be vicariously liable.

Fate revisited the law of pilotage upon General Steam with indecent haste in a case against London and Edinburgh Shipping, against whom General Steam were defending a claim for damages in which London and Edinburgh Shipping alleged that the collision involving their respective vessels had been caused by the negligence of General Steam’s ship. The Statement of Defence alleged, under the first head, that the Claimants’ vessel was at fault for neglecting to have the regulation light; secondly, that the collision was not caused by the negligence of those in charge of the Defendants’ vessel, but was, so far as they were

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87 Indeed, how the pilotage authority selects a pilot for a given task is up to them; whether or not it is by roster or otherwise is no business of the Master.

88 General Steam Navigation Company v London and Edinburgh Shipping Company [1877] 2 Ex D 467
concerned, an inevitable accident; thirdly, that if the collision was caused by the negligent navigation of the Defendants' vessel, it was solely the fault of the pilot who was acting in charge of the Defendants' vessel under circumstances and within a district such as to render the employment of a duly qualified pilot compulsory by law. At the trial before Kelly, CB, at Guildhall, the Defendants abandoned the first two grounds of defence, and relied on the third, upon which Judgment was made in their favour, on the ground that in the position in which the Defendants' ship was, the employment of a pilot was compulsory by law.

The Modern Law

The nineteenth century view taken of the liabilities between the parties was changed by the Pilotage Act 1913, expressly overriding any conflicting provision in primary or secondary legislation, and providing that the Owner and Master of a vessel navigating in a compulsory navigation area shall be answerable for any loss or damage caused by the navigation of the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory. This has been taken forward into current law by Section 16 of the Pilotage Act 1987, which provides that the fact that a ship is being navigated in a compulsory pilotage area shall not affect any liability of the Owner or Master of the ship for any loss or damage caused by the ship or by the manner in which it is navigated. It may be argued that this actually relaxes the Master’s and owner’s liability somewhat, as it rows back from the sterner wording of the 1913 Act providing that the Owner and Master ‘shall be answerable for any loss’. It starkly emphasises the departure from the principles of liability illustrated by the General Steam cases of the nineteenth century and puts the Master and his shipowner at risk.

Section 15(1) of the 1987 Act certainly perpetuates the requirement that a ship which is being navigated in a compulsory navigation area shall be under the pilotage of an authorised pilot unless the Master or Mate possesses a pilotage exemption certificate in respect of that area and ship. If any ship fails to comply with this provision, subject only to an offer having been made by an authorised pilot to take charge of the ship, the Master shall be guilty of an offence. There does not even appear the provision of a defence of otherwise having lawful authority or excuse.

However unsatisfactory this may appear at first sight, in terms of the rationale of the Master’s responsibility, this makes perfect sense. As the Master remains in command at all
times, so their personal accountability for safe navigation continues regardless of the pilot aboard. If they discharge their obligations, well and good; but if they do not justify their conduct in the case of a negligent Pilot, they will be held liable for the consequences. Parliament clearly intended to underpin the Master’s authority and in the debate in the House of Lords on Pilotage in June 1986, Lord Strathcona said:

> It seems odd to legislate in great detail as to who should command a ship at sea and then apparently abandon all control once the ship comes into a pilotage area\(^9\).

Within three years this argument would be tested. In the case of the Esso Bernicia\(^10\), Lord Jauncey underlined the importance of associating good law with common sense – a feature which is critically important to the business of maritime trade, whose governing law can be immensely complex but still has to be safely navigated daily by shipboard and shoreside managers alike\(^11\). Lord Jauncey drew the sensible conclusion of English law that the Master, like any individual who has a personal duty of care such as that envisaged in Donoghue v Stevenson, cannot walk away from their responsibility under that duty simply by delegating the performance of the task to somebody else, and it does not matter how the somebody else has been put there – whether an employee under a contract of service, or an independent contractor (such as a voluntary pilot), or whether the engagement has been imposed by a Statute (such as a compulsory pilot under the Pilotage Act 1987). Lord Jauncey thus drew the argument to its logical conclusion that this principle must also bind the shipowner, who is under a duty to operate his ship with reasonable care, and cannot walk away from that responsibility by delegating the handling of the ship to someone else, no matter whether it be their Master under a contract of service, or to a pilot who has not been put there by any voluntary bargain but has control of the navigation of the vessel. Thus, while the pilot has command and control of the navigation of the ship in compulsory waters, the Master will still have the responsibility for the safety of the ship and observe their contractual

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\(^9\) HL Deb 25 June 1986 vol 477 cc377-407
\(^10\) Esso Petroleum Company Ltd v Hall Russell & Company Ltd [1989] 1 All R. 8
\(^11\) Such common sense was recently famously re-stated in Owners of cargo lately laden on board the ship or vessel 'Starsin' and others v Owners and/or demise charterers of the ship or vessel 'Starsin'; Homburg Houtimport BV v Agrosin Private Ltd HL [2003] UKHL 12 [2003] 2 WLR 711, [2004] 1 AC 715, [2003] 1 CLC 921, [2003] AMC 913, [2003] 1 LIR 571, [2003] 1 All ER (Comm) 625, [2003] 2 All ER 785, [2003] 1 LIR 571: Commercial people would expect the identity of the carrier to be revealed in the material on the front of the Bill of Lading. The Attestation Clause in this case had been specifically written into the front of the Bill of Lading. It should clearly prevail over a standard printed term; after all, it is their Bargain. It is suggested that this casts an unfavourable shadow over the decision in the case of the Owners of the cargo lately laden on board the ship David Agmashenebeli v Owners of the David Agmashenebeli [2002] EWHC 104 (Admiralty): it surely does not matter how much the cargo is damaged and thus how the Bill of Lading is clamed, the Letter of Credit is still not going to be honoured, for the bank is not going to play fast and loose with its clients’ money, whether the cargo has been damaged 1 per cent, 10 per cent or 50 per cent.
obligations to their employer, the shipowner, with whom the duty ultimately rests.\textsuperscript{92}

\textbf{The Case of the Sea Empress}

One of the most serious pollution casualties in recent times serves to underpin the rationale for the relationship between the Master and the Pilot. The Liberian-registered tanker Sea Empress was less than three years old when she loaded her cargo of Forties light crude oil at Hound Point, in the Firth of Forth and sailed from there for Milford Haven on 13 February 1996. Two days later, under the navigation of the compulsory pilot, the bows had passed the Middle Channel Rocks Light on approach to Milford Haven when there was a shuddering vibration, followed by a sound from the deck below of liquid being forced under pressure, accompanied by a strong smell of oil. The Marine Accident Investigation Branch concluded in its report that the immediate cause of the grounding was pilot error, namely his failure to take appropriate and effective action to keep the vessel in the deepest part of the Channel. But the Pilot and the Master had not discussed and agreed a pilotage passage plan, as a consequence of which neither the Master nor the Chief Officer knew what the Pilot's intentions were. Moreover, the Master failed to follow the standing orders of his Managers with respect to pilotage matters and, when it became clear to the Master that the Pilot was hazarding the vessel, the Master wrongly kept quiet. Although the MAIB's reports are not prepared with a view to establish the liability of a party in litigation, the facts which it finds certainly are of value in such matters. For such reasons, the MAIB found fault with the Master, and critical conclusions in the MAIB’s report can lead to consequences in civil and criminal proceedings.\textsuperscript{93}

\textsuperscript{92} Paradoxically, this concurrently offers salvation to the shipowner under the nautical fault defence of the Hague-Visby Rules in the event of damaged cargo: the Master’s discretion in navigation must prevail supporting the Merchant Shipping (Safety of Navigation) Regulations 2002 (amended by SI 2011 No 297; see footnote page 41) and thus the employer in this instance cannot be responsible for its employee’s negligence over whom it has no control. See Tasman Orient Line CV v New Zealand China Clays Ltd and Others [2010] 2 Ll R 13. Worryingly for the shipowner, the Rotterdam Rules have abandoned this defence.

\textsuperscript{93} The report of the Chief Inspector of Marine Accidents into the grounding and subsequent salvage of the tanker SEA EMPRESS at Milford Haven between 15 and 21 February 1996, HMSO
Lessons to be Learned

The Sea Empress case illustrates the essential feature subsisting in maritime law that the Master’s authority remains unfettered. They retain the power to take the navigation out of the hands of the pilot if the pilot demonstrates manifest incompetence or hazards the vessel or other vessels persons or property for any reason. But if they do so, they cannot proceed an inch without the authority of the harbour authority, Section 15(3) expressly providing that, if the Master navigates his ship in a compulsory pilotage area without notifying the competent harbour authority, he will commit an offence. The downstream consequence, of course, goes beyond criminal liability, for the Master will have put himself potentially in a classic negligence situation. And that could result in a charge of criminal negligence.

If the pilot is incompetent and must be dismissed, or if he becomes incapacitated, then the Master must advise VTS of the facts and seek directions. They after all will be the ones who will have the knowledge of the appropriate place of safety and, in any event, must have in place contingency plans for dealing with ships that cannot respond due to Pilot incapacity or navigation defect on the ship. It must also be borne in mind that the Master’s decision of a place of safety may not take into account the hazards presented to third parties in the circumstances of the particular case and in any event could lead to all sorts of insurance problems.

That being said, the harbour authority has to balance the availability of resources, with commercial considerations of cost, often making it necessary to provide the pilotage service by a vessel traffic manager ashore. In a study which balances the arguments compellingly regarding shore-based pilotage, Karl Bruno and Margareta Lützhöft point out the dangers of ‘shore pilotage’. The pilot may have all manner of electronic instruments to assist him, but that is all he has, to give him speed, rate of turn, course and position. With this, he must give instructions to the crew on the bridge and, of course, the tugs. The bridge team may well not know the pilot – to them he is a remote voice which makes it difficult for all the parties involved, from the pilot to the bridge team and the tugs, to work to the model of safe navigation envisaged by the 1987 Act. The consequence is that, given any situation or emerging situation, the pilot is limited to the information that can be received on a computer.

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94 Unless a pilot is not offered; see s15(2) Pilotage Act 1987
95 While the Master’s discretion to act remains unfettered, he must still report to VTS any way in accordance with the Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements) Regulations 2004 on the reporting of incidents at sea and the incapacity of a Pilot would meet the definition of an incident in section 12(2)(b)
screen and from the radio communication with a bridge team, whose facial expressions and demeanour of incomprehension he is unable to detect.

Meanwhile, the Master remains accountable, which serves to demonstrate the Master’s need to respond to situations in which he is exposed to liability as a result of statutory provision that makes pilotage compulsory – except where no pilot is available, making it necessary to control vessel traffic movements remotely and, thus, offering the Master a service equivalent to that of the air traffic controller. While it is apparent that vessel traffic management has an important part to play in safety control, the Master’s responsibility to discharge their duty of care remains unassailable, even though the person upon whom they rely – the vessel traffic controller - is performing the pilotage function simply with the use of electronic aids. This problem is warmly acknowledged by the UK Pilotage service itself. John Clandillon-Baker FNI described the scenario compellingly when he asked the rhetorical question, as to how the demands of maritime safety can possibly be served in the situation in which the Master, now coming into their port of discharge, exhausted by hours on watch glued to radar and bridge management on the approach, while trying not to think about all the unfinished paperwork that has accumulated in the meantime and still has to be completed, finds that he has to carry out his own pilotage on the bridge, assisted only by a remote voice over the VHF, who has prefaced their communication with a clause politely declining any liability for advice given.97

While the Master’s management control of the safe navigation of the vessel has clearly been eroded by compulsory pilotage, he unquestionably remains accountable – he would have to be, of course, for in him reposes the Flag State’s confidence to protect their sovereign interests. That does not mean to say that he remains absolutely liable. If the pilot is negligent, the Master must account for himself but, if he could not have prevented the casualty in accordance with the normal principles of negligence, he will not be to blame. Had the Master of the Sea Empress followed the Company’s standing orders for pilotage procedures, had he drawn his concerns to the pilot’s attention and received satisfactory replies, then his culpability in consequent pollution offences, usually such a source of fear for the master in such circumstances, could not be established, according to the demands of international law for a fair trial98. How the Port State views that may be a different matter, particularly in the scenario in which some Port State’s environment has been damaged by a marine pollution event, while the vessel was in a compulsory pilotage area but, necessarily, remaining under the responsibility of the Master. Such was the case of the Tasman Spirit.

98 See European Convention on Human Rights 1950, Art 6
On the 27th July 2003, the Maltese-flag Tasman Spirit was bound for Pakistan’s national oil refinery at Karachi with a cargo of 67,800 tonnes of Iranian light crude, and 440 tons of heavy fuel oil in the aft bunkers, when she ran aground in compulsory pilotage waters as she approached the port. Her condition deteriorated as she was subjected to continuous stress from the heavy swell of the prevailing south-west monsoon and she subsequently broke in two, spilling an estimated 28,000 tonnes of her cargo. The vessel’s Master99 was arrested and charged with conspiring to ground the tanker with criminal intent to cause pollution and injury. They were detained for eight months facing criminal charges. After compensation agreements were negotiated, Pakistan dropped the criminal charges and the seafarers were released. Despite the fact that the ship was in compulsory pilotage waters, the pilot was not among those arrested, while the Master and his officers faced a harrowing period of detention without trial, on the grounds of criminal accountability that, finally, had to be abandoned100. 101

The Exception to the Master’s Authority

The issue of compulsory pilotage has evolved at a modest rate but the Master’s responsibility remains intact. It is therefore open to him to dismiss the pilot rather than carry out his directions. The only area where the Master seems to have no discretion at all, has been established by Statute for at least the last 150 years and has not changed appreciably since then. During the First World War the Britain Steamship Company was managing the Matiana which became the subject of litigation after an incident while she was in convoy under the command of a Royal Navy officer. The issue in contention involved the relationship between the Master and the Navy Commander and reached the House of Lords in 1921102.

Contemporary law was provided in the Naval Discipline Act 1866, sections 30 and 31 of which compelled the Master of a merchant ship in convoy to obey the Royal Navy commander in all matters relating to the navigation or security of the convoy, provided that he did not have to participate in combative action against an enemy ship. Lord Shaw

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99 Together with her chief officer, third officer, chief engineer, second engineer, third engineer and the quartermaster, as well as the salvage master
100 For further information, refer International Tanker Owners Pollution Federation Ltd, London www.itopf.com
101 The case pre-dated the IMO’s Guidelines For The Fair Treatment Of Seafarers In the Event Of A Maritime Accident by three years.
102 Britain Steamship Company Limited v The King and Others, The Matiana [1921] 1 AC99
summarised the situation thus:

So far as the direction of the course of the vessel was concerned, the merchant captain and officers were no longer in control. The naval officers were.

This situation subsists with the Current Law, section 131 Naval Discipline Act 1957, which covers ships under convoy and provides that it is the duty of a Master in command of a merchant ship that is sailing in convoy under the command of a Royal Navy officer, to obey the officer’s directions in all matters relating to the navigation or security of the convoy. If the Master fails to comply with any such direction, the Royal Navy officer may compel obedience by force of arms\(^\text{103}\), and neither he nor any person acting under his orders shall be liable for the consequent loss or damage to life and property.

\(^{103}\) Author’s italics
2.2 The Master and the Owner

(i) The Loss of the Master-Owner Relationship

Overview

This, the second head of the conclusions drawn from the analysis of the evolution of the Master Under God, rationalises key features which characterise the Master’s contractual obligation to maximise the commercial return for the shipowner, while mitigating risks to the owner inherent in merchant ship operations. In this context, the Master’s rôles as agent, servant and representative of the owner are examined as a foundation to establishing the risk to the owner by association with the Master’s accountability for acts or omissions, arising in the course of their employment, which have become criminalised. In consequence conclusions may be drawn which define the risks in law to which the Master exposes the owner, and offers an explanation, therefore, for the loss of the relationship in recent years.

The Relationship of Agency

As the era of deep sea maritime trade was truly blooming in the nineteenth century, it became commercially essential that the investors be persuaded that their money was in safe hands – or at least, as safe as possible under the circumstances of all the risks that stalked the opportunities for profit. With no established communication, and few trustworthy businessmen in the far-flung loading ports where cargoes had to be negotiated, the venturers had to place their trust in somebody to protect their interests, and the Master was the most reliable man on the spot. If his ship were arrested he had to secure her release. If supplies ran out or gear was lost or broken, he had to arrange for their replacement, and raise the necessary funds if need be104. Besides, the Master often had a financial stake in the adventure himself. Slowly, but with undeniable logic, the Master’s contractual relationship was developing into partner, employee, and agent.

This was a critical object-lesson in the evolution of the relationship between the Master and

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104 HCA 13/78, 24 Oct 1676
the Owners, which illustrates extremely well the principles which define the modern law of Agency. While there seem to be as many examples of an agent in maritime trades as there are tradespeople, the concept can be described simply as the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of third parties by the making of contracts or the disposition of property. The ancient case of Tweddle v Atkinson\textsuperscript{105} was not a marine action but, nevertheless, demonstrates extremely well the issue of Privity. The Claimant (known before 1999 as the Plaintiff) was the son of the late John Tweddle, who had arranged with the equally-late William Guy that a marriage portion would be given to the Claimant as part of the marriage arrangement. Although he was the individual who was to be the beneficiary under the contractual arrangement, he was neither the offeror nor the offeree. The Court delivered the clear general principle that parties who have not personally closed the contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it.

The birth of the law of Agency was essential in order to cure what would otherwise have been a fatal problem for contracts in maritime commerce; after all, it is one of the cornerstones of English Law that the only parties who can sue on a contract are those who have made valuable commitments to each other in the bargain\textsuperscript{106}. The commercial logic was articulated by Blackburn J in Ireland v Livingston\textsuperscript{107}, in describing the process by which cargo is to be delivered by the seller to the buyer (more properly described for the purpose of this exercise as the consignee, because the obligation for the carriage of the goods must be discharged by the carrier to the person entitled to receive them). Once the contract of sale is agreed, the seller raises an invoice to the consignee, containing the sale price, the premium for the cargo insurance and the freight, the contractual fee for the carriage by sea which must be paid upon delivery at the port of discharge. Although the seller is the party who has closed the contract with the carrier, the benefit of the contract, therefore, goes to the consignee. By the same token, when the ship duly discharges the cargo it is the consignee who will have to pay the freight, in accordance with the contract with the carrier; unless, of course, that cargo is not delivered, in which case the contractual obligation will not have been met to deliver the cargo and, so, the consideration under that contract, the freight, cannot prima facie be demanded against the consignee. If the non-delivery is in consequence of some breach of the contract for the carriage of goods for which the carrier is

\textsuperscript{105} Tweddle v Atkinson (1861) 1 B & S 393; 121 ER 762
\textsuperscript{106} While the Contracts (Rights of Third Parties) Act 1999 alleviated some of the unfairness in the general rule, maritime commerce had synthesised a solution generations earlier, with precedent leading up to the Carriage of Goods by Sea Act 1992
\textsuperscript{107} Ireland v Livingston (1872) LR 5 395
held liable, then the consignee will recover the value of the cargo from the carrier; if the carrier is not liable, then the consignee will call upon the cargo insurance policy which the seller had arranged on the consignee’s behalf, and who passed on the premium in his invoice. In substance, therefore, Justice Blackburn explained, the consignee enjoys the same rights and obligations as if he had been the original contracting party with the carrier (and, indeed, the cargo insurer). By the same token, unless the seller expressly assumed some personal liability to the carrier (who could then choose whom to sue), the seller would not enjoy any such rights and obligations.

The effect of the concept is that the agent is an individual in whom his principal could place his trust and so would not get him into trouble; or, indeed, would get him out of trouble as quickly as he had got into it. If this concept is taken to the context of the Master-Owner relationship, for the shipowner, this individual known as the ‘agent’ logically had to be the same one in whom he had placed his trust to bring the ship safely home: the Master. From the viewpoint of the Master, the critical feature is that, having closed a contract on behalf of the owner, he is not then personally liable to the third party on that contract. Only if the Master had not identified or named the owner as his principal could the third party bring a claim against him – and even that would be an up-hill struggle, for the third party could very easily make enquiries with the Flag State register as to the correct title of the principal108.

It must be said that the Master’s relationship with the Owner in the context of Agency is where the Author drifts from a consensus with Professor Gold109, who labours under the belief that the Master is personally liable under all contracts he concludes in relation to the ship. The Master may be held accountable to a third party in negligence if they break a duty of care to that third party who suffers damage as a reasonably foreseeable consequence, notwithstanding any contractual terms agreed between the Owner and the third party110, but a Master acting with the usual authority of their disclosed Principal, the Owner, will not be liable to the third party in a contract. As the humble Agent, they may have endorsed the contract but liability rests on the Principal for whom they acted – or, rather, on the Principal whom the third party believed they were getting bound into a contract with, so ably demonstrated in the case of the Starsin111. The Master’s contractual liability will be limited

108 See Knight Frank LLP v Aston Du Haney: CA (Civ Div): 12 April 2011 (currently unreported)
109 Gold, Op Cit p6
110 As so dramatically demonstrated in Adler v. Dickson [1954] 3 WLR 696, precipitating the Himalaya Clause in the contract for the carriage of goods by sea, the effect of which still holds well today subject to the provisions of the Unfair Contract terms Act 1977.
111 Owners of cargo lately laden on board the ship or vessel 'Starsin' and others v Owners and/or demise charterers of the ship or vessel 'Starsin'; Homburg Houtimport BV v Agrosin Private Ltd HL [2003]
to that owed to the Owner and defined according to the express or implied terms of their employment\(^ {112} \).

**The Special Relationship**

That being said, the Master has a special contractual relationship with the Owner at Common Law, arising out of their common interest in the success of the marine adventure, which could be relied upon to maintain the bond between them. But the changes in the pattern of ship management over the last thirty years have seen the outsourcing of skills, so that the business managing the operation of the ship is often entirely unrelated to the Owner. They may well have sub-contracted the crewing contract to another business, while they only won the management contract because of a tender which offered the lowest cost, and any additional financial cost would conflict with the manager’s bottom-line budget. Indeed, the manager may be operating with the very minimum of resources, far from able to provide the support which the Master might be entitled to expect from the Owners of the asset over which he has control. Thus, far from sharing a common interest with the Master, the management company may very well have a vested interest in avoiding legal accountability by dissociating itself from the Master’s acts or omissions, for it would derive no financial benefit from such association but could be exposed to risk if the Master’s tortious acts led it into vicarious liability. This is particularly relevant if the Master’s acts or omissions had given rise to criminal liability, in which a Prosecutor may seek to establish that both Master and manager shared common features in the mens rea and the actus reus. The management company doubtless would be horrified to face the risk that it might share criminal accountability – such had not been contemplated when it tendered for the work – but, after all, that was why the Merchant Shipping Act established criminal liability against them for a dangerously unsafe ship under Section 98 if they had assumed responsibility for safety in the contract with the registered owner (in that situation the owner would actually avoid criminal liability altogether).

Of great importance to the Master, this lack of support includes administrative management of the ship’s business. The Master today is expected to be a business manager, something which they had not envisaged in the heady days of their youth as they embarked on their

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\(^{112}\) See Lister v Romford Ice and Cold Storage Co Ltd [1956] AC 555
maritime career. Professor Gold touches upon this in his paper\textsuperscript{113} in terms of the management of the ship’s business; but this does an injustice to the Victorian Master who had to do much the same thing. It is just that, in the intervening period, global communications and shifts in the pattern of asset investment had fostered a closer, parental relationship between the Master and the Owner. By contrast, Gold illustrates the contemporary situation by articulating many of the complaints of today’s Master, with fatigue high on the list, having to navigate through heavy traffic, sometimes in bad weather, having to make judgments on the safety of the ship in balance with the commercial demands of the shareholders. The consequence of the Master’s failure under such conditions could lead to a charge of criminal negligence. How the Master defends such a charge may well depend on just what decisions the Master made as a result of balancing legal duties against commercial demands.

This issue of the battle between legal duty and commercial pressure is not an emerging problem; at the very most, it is a re-emerging problem, for the changes in ship management have forced the Master back to the position in which they found themselves in the environment of maritime commerce which characterised the Victorian era. Writing of that period, and the extreme clippers of the China tea trade, Basil Lubbock revealed the evidence underpinning the Master’s rôle in the business of shipping, with personal knowledge of his witnesses, conveying a graphic picture of the Master, who must be responsible for the ship’s business, and who tends to carry out that business in good faith. He observed that there were very few successful Masters in the trade, most being either too cautious or too reckless; it was just a few Masters

\begin{quote}
whose endurance equalled their energy, whose daring was tempered by good judgment, whose business capabilities were on a par with their seamanship, and whose nerves were of cast iron\textsuperscript{114}.
\end{quote}

Such qualities would be highly regarded by Owners today, provided that the Owners would not face criminal accountability if those qualities led to a catastrophe for which the Master was held to blame in some Port State jurisdiction.

The successful Master in this context was the one who conducted a risk-benefit analysis designed to maximise the commercial return, and mitigate the dangers if possible. But the Master had a comfort zone upon which he could rely: there is no evidence to suggest that

\textsuperscript{113} Gold, op cit, p10

criminal accountability would ensue in the context of nineteenth century law if, in making his decision, the Master took a decision which modern law would associate with negligence.

It is apparent that the evolution of maritime commerce was marked by the need for investors to repose their confidence in the Master, as a very sensible solution to the problem of an absence of communication and, therefore, management control over the entire voyage, once the vessel had sailed over the horizon. There is not a great deal of evidence about how the Master thought of this – save for the evidence of Captain Hilary Marquand (1825-1872), whose opinions, as revealed in his edited memoirs, were unrestrained – presumably thanks to the fact that they were not published for a century after his death. Writing of his appointment as Master, he glowed:

... let me appear to the world as really was a truly happy being at having attained to the summit of my ambition at so early an hour of my life. Proud of the preference shown to me over the many eager aspirants which were about. Proud with the feeling of competency, which until then I had thought buried in the recess of my own knowledge, but which was now publicly declared to the world by other tongues than mine, and stood as a halo of sunshine around me... It is no small charge, that of master of a ship trading round the world, with 'carte blanche' to act for the promotion of the owner's interest.115

Captain Marquand, however, held very firm views indeed about the commercial risks inherent in his appointment:

That man must be able to combine at once the essential qualities of merchant, and broker, to that of ship master, and I feel no reluctance to add that no man in whatever situation he may be, is surrounded with a greater set of disguised enemies in the mercantile world...116

The cause of such bitter commentary can be found, not in his memoirs but in the case of Marquand v Banner117. Captain Marquand had been Master of the Secret, for which a voyage charter had been fixed in 1854 to Buenos Aires. The vessel was loaded with general cargo, for which the Master duly signed bills of lading. Then on the 23rd January 1855 the charterers suspended payment and on the 19th February executed a general

116 Ibid p231
117 Marquand v Banner (1856) QB The Jurist Aug 2 1856 708
assignment of their property for the benefit of their creditors. Anxious to ensure that the freight payable by the consignees did not end up in the wrong hands, the Owners, via their agents, gave notice to the various shippers that the freight should not be paid to the charterers but to the ship-Owners. The charterers’ trustees gave the Owners notice that they wanted the freights paid to them, though. When the ship arrived in Buenos Aires on the 13th March, Captain Marquand managed to collect a modest amount of the freight due, but the Owners were still badly at a loss for the charterers’ default under the charterparty. The Owners were duly sued for the recovery of the freight which Captain Marquand had collected as their agent. In his Judgment, Wightman, J held that the wording of the charterparty made the charterers the parties entitled to the freight. Much to his disgust, Captain Marquand had believed himself acting as agent to the Owners, when he tried to mitigate the financial loss caused by ruthless, very likely dishonest, charterers, only to have to deliver to them in the end, what money he could recover. Given this, though, the close commercial association between the Master and the owner is clear and obvious.

The special relationship was acknowledged as indispensible to maritime operations, and has been embraced and encouraged by international law, acknowledging the Company’s rôle in supporting the Master’s authority, most recently through the International Safety Management Code 2002 (‘ISM’), which requires the Owners’ shore-based management system to support the Master’s Responsibility and Authority. In fairness, though, under English law this merely codified the Common Law position which had evolved with the paternal relationship that had grown up between the Master and the owner, largely following the era described by Captain Marquand, when global communications gave the Owners the ability to assist and get involved – albeit, of course, ultimately to protect their investment. As graphic illustration of this, the Owners’ own company orders, general risk management instructions to their ships, show just how little the former practice has changed with the ISM Code. The following are extracts from Standing Orders given by the Bowater Steamship Company Limited in 1957¹¹⁸ and mirror the relationship between the Master and the Owner:

The Master is at all times the personal representative of the Owners. His authority is supreme in every respect, at all times, both at sea and in port, over all departments and all employees on board ship.

¹¹⁸ See www.bowatersteamshipcompany.no-ip.com/page86.html
The British Statutes and Courts of Law having constantly proclaimed that the Master of a ship is the universally recognized representative of the Owners while the Master remains in command, he cannot divest of his identity and responsibility nor the authority pertaining thereto.

By comparison, the ISM Code offers little change in substance (although in form it makes big changes with the introduction of torrents of paperwork):

The Company should ensure that the SMS operating on board the ship contains a clear statement emphasizing the master's authority. The Company should establish in the SMS that the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the Company's assistance as may be necessary.

The difference between the approaches taken in 1957 and 2002 may appear inconsequential in this context – until the influence of criminal accountability is introduced as twenty first century society promulgates new statute law to enforce its ethics.

**Evolution by Statute Law**

The relationship between the Master and owner found its way into statute law, notably following ratification of the Hague Rules 1924, which evolved into the Hague-Visby Rules, adopted by the United Kingdom in the Carriage of Goods By Sea Act 1971. The Hague-Visby Rules provide inter alia that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and properly man, equip and supply her\(^\text{119}\). It is the Master's personal duty to ensure that the vessel is in all respects safe to proceed to sea, which includes the above requirements – thus, as the Master exercises their untrammeled discretion to decide to proceed to sea, they patently make an agency decision which will render the owner accountable to the cargo-owner for any damage. Such issues as seaworthiness are well-defined by Hague-Visby and, therefore, stand as compelling authority for defining a vessel’s condition, when interpreting the criminal implications of section 98 Merchant Shipping Act 1995, which renders the Master and the owner criminally liable if a ship in a UK port, or a UK-registered ship in any other port, is dangerously unsafe. Section 94 defines ‘dangerously unsafe’ in the context of being

\(^{119}\) Art III(1)
unfit to go to sea without serious danger to human life because of the condition, or the unsuitability of the ship, her machinery or equipment, or if she is undermanned, overloaded or unsafely loaded, or ‘any other matter relevant to the safety of the ship’.

Such a worry does not escape the independent ship manager, for Section 98 provides that, if the owner has passed management control over safety matters either directly, by a charterparty or management agreement, or indirectly, under a series of charterparties or management agreements, then the charterer or manager shall simply stand in the owner’s place for the purpose of criminal liability under the Act. In all such cases, the Master retains responsibility for ship safety and, indeed, guards still their unfettered discretion as to whether to proceed to sea; in addition to the provisions of the 1995 Act, the risk under current law raises its head if the Master’s act or omission amounts to criminal negligence. As a result, the Master-owner relationship potentially imperils the owner or manager, unless they can mitigate their position by distancing themselves from the Master.

The potential for criminal accountability can be identified most recently in the Bribery Act 2010, which finally came into force in July 2011. Section 1 creates an offence where a person offers, promises or gives a financial or other advantage to another person, in order to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity. Such a function or activity would include any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment, or any activity performed by or on behalf of the company. However the Master is described, therefore - as agent, representative or employee - they will be defined within the Act. For better or for worse, inducements to officials in many parts of the world have long been accepted as an occupational hazard of maritime operations, and the close relationship between the Master and the owner conveys a dangerous picture to the shore-based management operation.

That relationship would be a hard one to deny, given the practical reasons so graphically illustrated by the Master’s rôle, and the evolution of Statute Law has created undercurrents in strategic planning that have driven risk management decisions and, whether intentionally or not, are perceived to have eroded the Master-owner relationship.
The High Water Mark – and the Ebb Tide

It is very apparent that the evolution of the relationship between the Master and the Owner was a model of logic: the Master retains complete responsibility for anything that occurs on or involves their ship, but the liabilities arising out of such operation are covered under the owner’s liability insurance. The statutory provisions arising out of the Hague-Visby Rules assured some equity for the Owner, however, in the so-called nautical fault defence, relaxing liability upon them for the Master’s negligent acts or omissions over which they had no control and reached its pinnacle – and swansong – with the final appeal in the Tasman Pioneer case in 2010120. But overall, this apparently paternal, Owner-Master relationship, begged the perception that any suggestion of criminal accountability against the Master would see the vigorous intervention of the Company in their defence. It characterised the high water mark of the relationship, which had been achieved thanks to a sustained period, throughout much of the twentieth century, when efficient global communications between the Master, wherever the ship may be, and the Company’s shore office, with the senior managers, the lawyers and the experienced technical support staff, often presided over by the charismatic figure of the Chairman who had hands-on control of the day-to-day operation of the ship121.

With the benefit of such a reassuring, paternal hand at the corporate helm, the investor was able to speculate with confidence on financial risk in the context of a shipowning operation, making it worthwhile for them to purchase shares that gave them a yield which was better than that found in other industries, earning a divided paid out of income and a capital surplus upon final disposal of the shares. For UK flag companies, all went according to plan in the early post-war years, with little incentive to spend development cost on competitiveness as long as the profits came tumbling in - until the collapse of the British Empire brought an end to all the protected trades which had helped the British merchant fleet to prosper, and imperial disintegration led to a massive struggle by those emergent nations to win maritime emancipation, for they understood that the protection and development of their own merchant fleets was the key to their prosperity. Moreover, many countries, great and small, realised that by subsidising their shipping industries they would help them to develop and, at the same time, obtain foreign currency which would be so important to their balance of payments. As those developing countries learned to process their own resources, they no longer needed the know-how and the supply of bulk raw materials from Britain; while the

120 Tasman Orient Line CV v New Zealand China Clays Ltd and Others [2010] 1 Ll R 41
121 Gold, Op Cit, p8
development of instantaneous global communications had become so sophisticated as to render business passenger travel by sea suddenly prehistoric. Moreover, social reform at home brought a massive escalation in British crewing costs, rendering British companies even less able to compete with the new rivals from emergent maritime nations.

By the 1960’s, the financial storms which had been started by the sweeping changes post-war were gathering pace on every trade route in the world, and the reshaping of the British shipping industry became glaringly obvious following the crippling seamen’s strike of 1966. The British Government set up a Committee of Inquiry into Shipping, chaired by Lord Rochdale in 1968, to review the organisation and structure of the UK shipping industry, its methods of operation and any other factors which affect its efficiency and competitiveness. The Committee sought the opinions of all the major players in the British Fleet - and got a rude awakening from some of the country's key decision-makers, such as Lord Vestey, Chairman of the Blue Star Line, who wrote in February 1968:

The trend of our shipping profits over the past ten years has been downwards and unsatisfactory. For the future we hope that the changing pattern of British liner shipping, particularly in the development of unitisation and containerisation of cargo will improve the present very depressing financial situation, but it will take several years before anything approaching an adequate return on the capital invested and risks involved is shown.\(^{122}\)

It was not just investment risk that was brought into sharp focus, in the same year Mr Justice Bridge held against the Company on the issue of employer’s liability\(^{123}\), observing:

…it is not only the reasonable behaviour of employees which it is an employer’s duty to anticipate; it may include unreasonable behaviour.

Such findings would have struck home to shipowners when considering the application of increasingly expensive litigation to the concept of vicarious liability in the shipboard management scenario, in which the Master has responsibility – and unassailable authority – over shipboard operations and, thus, for anything potentially litigious occurring on or involving their ship, but the liabilities arising out of that must be covered under the owner’s insurance, whether hull and machinery or protection and indemnity.

Nevertheless, the industry today perceives this to have been the age defining the zenith of

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\(^{122}\) PRO: AB 38/557; BT 137; MT73/486

\(^{123}\) Chalmers v Blue Star Line Ltd [1968] 1 Ll R 643
the relationship between the Master and the Owner. In order to establish whether the Master shared the same opinion of the relationship, it is appropriate to hear the evidence of a former officer of another organisation, the China Navigation Company, who served during the high-point of that period in the evolution of the Master. The China Navigation Company is the wholly owned deep-sea shipping arm of John Swire & Sons Limited. Incorporated under English law with its registered office in London, but operated from its base in Hong Kong, the ships were registered under the UK flag and, subsequently, transferred to the Hong Kong register.

This witness embarked on his sea career in October 1956. He was awarded his Master’s Certificate ten years later, but was not given command as Master until 1970, which he held for the next 24 years. When appointed Master, he was very aware of the power and authority which the Company reposed in him for the safe operation of the vessel and could rely on what he saw as a common understanding of the needs of shipboard management as the Company provided them, in the form of Fleet Instructions, today understood as Company Standing Orders. In addition, though, he was responsible for his own Standing Orders, which underpinned his special responsibility as Master – his unassailable discretion also meant unassailable accountability for anything which might go wrong, so, on joining the ship he covered any possible gaps between the Company’s Standing Orders and his personal risk, with Master’s Standing Orders, as well as writing Night Orders each evening at sea at about 2000 hours124. To make sure that all the officers had read and understood the orders, they had to sign them on joining the ship.

He understood very clearly his responsibility as Master for the safety of the ship within the meaning of the Merchant Shipping Act (1894, as it then was) and nobody in the Company could compromise that. As an example, on one occasion he was sailing as Master of a ship which was carrying a cargo of iron ore from India to Japan when she was caught in typhoon conditions and had to lie hove to about 200 miles off Hong Kong for a lengthy period, during which time damage was caused to the engine. When better conditions prevailed, he advised the Company’s office in Hong Kong of the situation and of his intention to divert to Hong Kong for engine repairs. The Company’s manager instructed him to carry out the repairs at sea or in Taiwan, but he advised management that, notwithstanding their instructions, he was, in the interests of the safety of the ship, proceeding to Hong Kong for repairs, and did so. He was aware that the Company could do many things contractually, but they could not override his judgment in such matters.

124 See Appendix for Master’s Standing Orders drafted in 1990
The hypothetical question arises, as to whether he would have felt compelled to carry out the instructions not to enter Hong Kong had they come from the port authority. On reflection, and mindful of his personal liability, particularly in relation to Port State Control, he felt that he would have been obliged to comply, particularly when confronted with the dilemma of the safety of his own ship or the safety of a port which he would have been entering with a 45,000 ton bulk carrier without permission, particularly on the basis that they would have special knowledge of potential risks of which he was unaware.

In terms of the paternal relationship between Master and Owner, this witness emphasised that, while as Master he appreciated his heavy responsibility in managing the safe and efficient operation of the ship, at the same time, he would have expected – and was utterly confident that he would have received – the protection of the Company if he ever needed it. There was, he said, a tremendously respectful relationship in China Navigation Company between management and the Master. Always aware of his wider responsibility, being answerable for claims against the Company, not only in terms of liability but also profitability, he was very conscious of the pressure to keep going and manage the ship through any problems that were encountered, but would always have expected the Company to support him and, if necessary, get him out of trouble as soon as he got into it.

What has changed since this witness retired in 1994? His impression of the shipping industry today is that the relationship between management and the Master has been eroded by a number of factors, and that the Master may well no longer have confidence that he can rely on his company to support him in a crisis. In so far as the reasons for this decline must be analysed, he believes that the root causes can be summarised very largely as economic. Pressures on shipping forced changes in management and in fleet operation. Without prompting by the Rochdale consultation with Lord Vestey, this witness attached importance to the expertise and experience of relatively expensive British and Commonwealth officers, who had qualified from well-organised navigation schools, giving high priority to safety, efficiency and economics; but the Company gradually moved away from employing British and Commonwealth officers because their salaries and pension requirements had left them as less economically viable, so fewer were employed and were replaced by cheaper officers, who did not give such a high priority to the issues of safety of navigation which concern Port State judicial systems so keenly today. But the logic of the transition had been made safer for the Company – and their insurers - by the process of satellite navigation systems and electronic, almost instant, communications, in contrast to former practices of celestial navigation and radio communication, which enabled, really, anybody, to run a ship and to
be acceptable to good Owners and insurers.

As the Rochdale Report reflected, so this witness shared the understanding that the economic recession of the 1970’s and 1980’s forced companies to reconsider how they could operate profitably, and was aware that the organisation and management structure of the Company had changed. That being said, though, his personal experience, right up until the time he left, left him sure that he had access to the management team as and when he wanted it. Moreover the Company’s Fleet Commodore had access not only to management but also had the right of access to the board of directors if he felt the matter was serious enough.

Such access would have been a matter of envy in other companies – and by the same token would reinforce the position of the Master in a senior management rôle pursuant to the Corporate Manslaughter Act 2007. His opinion ends on a starkly realistic note:

I accept, however, that we were very fortunate in CNCO and things may well have been very different in other companies. While I am appalled at the recent case studies of the Zim Mexico III and the Hebei Spirit, I am not necessarily surprised in the light of how the industry has developed and would say that the Master is treated as the fall-guy for Management 125.

A second witness, Captain Graeme Drewery, joined China Navigation Company in 1964; he obtained his Master’s Certificate in 1968 and, in that position, he served the company until his retirement in 1997. Reinforcing the opinions of the first witness, he was very much aware of the Company’s reliance upon him to maintain order and discipline on board as well as ensuring the safe arrival of the cargo at the port of discharge. This included the safe navigation of the vessel, sometimes in demanding circumstances. For example, there were occasions when he would have to take the ship through waters that were hazardous due to rocks and shoals, not to mention countless small craft. The compelling factors driving him were the commercial priorities of the Owners, but his skills of professional competence and leadership were what the Owners relied on. In return, he was confident that he could rely upon everybody in the Company he needed to.

Captain Drewery believes that changes in shoreside management have played a significant rôle in the changing relationship between the Master and the Company. For purely

125 See Appendix for full text
commercial reasons, shore offices dispensed with marine superintendents, and employed engineering superintendents instead. As a management response to changing times in the industry, this may have been adequate in meeting the demands of legal obligations to ensure that the fleet was seaworthy, but a vital link in the family relationship between the Owners and the Masters was lost, because that link depended upon an understanding that comes from experience, and engineering personnel have different rôles and responsibilities from deck personnel.

With the evolution of shoreside management within the industry, the Master is strongly aware that the loss of the parental relationship exposes himself to greater risks because he realises that his responsibility has not diminished at all. This becomes a significant problem when adding the factor of management control over the ship’s affairs. This is starkly illustrated by the issue of communication. Language barriers can present major problems for shipboard management, which is the responsibility of the Master as part of his duties. But the Master does not get any choice over the nationality of his crew – he gets what he is given by the shore office (which might be a ship management agency which has no corporate relationship with the Owners). It was, of course, a communication problem which was held partly accountable for the loss of the Estonia. In the personal experience of this witness, when Master of the Foochow, he was handing over on her transfer in 1980 to a South Korean subsidiary, when it became very clear indeed that the Korean deck crew could not understand a word of their instructions or advice. As a result, he feared for the efficient management of the subsequent voyage.

**The Case of the Tasman Pioneer**

With this broad view of the situation from the senior management on board the ship, it is possible to make a value-judgment on the relationship between the Master and the Owner, as a real advantage to both parties, preserving the Master’s responsibility but transferring liability to the Owner, who, in turn, will transfer the risk to his Insurer. To this extent, therefore, the Owner must beware of the lawfulness of the Master’s conduct. The Master retains absolute discretion in the navigation of the ship, for which the Merchant Shipping (Safety of Navigation) Regulations 2002\(^{126}\) reflects the body of international law that upholds this globally, but that potentially carries with it accountability for the Master’s actions and, if such actions are outside the Owner’s control, then the relationship between

\(^{126}\) Amended by SI 2011 No 2978; see footnote page 41
them may become strained. In real terms, the Owner’s vicarious liability would prima facie make them liable for the Master’s negligence in this situation, against which shipowners have held the nautical fault defence in the Hague-Visby Rules in very high esteem indeed. The part which it plays in the context of maritime commerce can be difficult to reconcile, though, for while the Master and the Owner are both engaged in the maritime adventure to make a profit, their interests may diverge, with consequences on liability. This can be illustrated very well in a study of the recent case of the Tasman Pioneer, a vessel in the fleet of Tasman Orient Line, a wholly-owned subsidiary of China Navigation Company.

On the evening of the 1st May 2001, the Tasman Pioneer, a multi-purpose break bulk cargo carrier built in 1979, left Yokohama, bound for Pusan in South Korea, with a passage plan that allowed for a safe voyage but, by the following day, the Master was concerned that she was running late and, therefore, took the commercial decision to shorten the voyage time by some 40 minutes by taking the channel between the island of Biro Shima and the promontory of Kashiwa Shima. The purpose was very clear: it was in the interests of his employer to restore the time schedule to that envisaged at the time when they had calculated the profitability of the voyage. Having altered course he entered the channel at 02.50 on the 3rd May – but then, disastrously, the ship lost all images on her starboard radar. He apparently realised that he was now in a precarious position and made a command response to abort the passage through the channel. This manoeuvre was not successful, though and the ship struck bottom off Biro Shima with such force that her speed was immediately slowed from 15 knots to some 6 or 7 knots.

Shortly afterwards the ship took a list to port with water discovered in the forward ballast tanks and cargo holds. The Master ordered the pumps activated but he did not alert the Japanese Coastguard, as he should have done, or seek other assistance. The ship then sailed at close to full speed for a further two hours, some 22 nautical miles, before anchoring in a sheltered bay. It was only then that the Master contacted the ship managers in Greece, without, however, specifying the cause of damage or its full extent.

The Court’s evaluation of the evidence about the Master’s good faith was not comforting. His initial explanation of the casualty had been that the ship had hit an unidentified floating object and the Court heard that he then schooled the crew to adopt this explanation in the inquiry conducted by the Japanese Coastguard, in the course of which the truth eventually emerged. Mr Justice Williams took the view that his initial decision to use the passage east

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127 Tasman Orient Line CV v New Zealand China Clays Ltd and Others [2010] 2 LI R 13
of Biro Shima and his subsequent attempt to abort the transit, were navigational decisions which he had, indeed, taken in good faith - he was endeavouring to save time and keep to schedule, in accordance with his contractual obligations to meet the ship managers’ legitimate demands. Where he abandoned his good intentions lay in his actions after the grounding, held the Judge; in particular his failure to notify promptly the Coastguard and his managers of the casualty and the ship’s position and condition; more seriously still, for its implications of dishonesty, in his fabrication of the story that the ship had hit an unidentified submerged object, which could not have been motivated by his paramount duty to the safety of the ship, crew and cargo. The whole sum of his conduct, the Judge held,

was intended to allow him to misrepresent and lie about the true circumstances of the casualty so as to absolve himself from blame and in particular to hide his reckless decision to transit the inside channel of Biro Shima Island in order to take a short cut route\(^\text{128}\)...

For all its blatancy in terms of gross negligence, the uncomfortable theme clearly establishes the priority given by the Master to his obligation towards the commercial success of the voyage. Where there is a risk to his own exposure to prosecution, the Master must rapidly make a risk-benefit analysis – will the risk to his personal position outweigh the commercial pressure, or vice versa?

Intriguingly, the Hague-Visby Rules have been challenged in the form of the new Rotterdam Rules. Currently only two of the 24 signatories have ratified this Treaty\(^\text{129}\) and so another 18 States must ratify, but it has been the subject of much discussion, nevertheless. The principle of fault-based liability for loss of or damage to goods has been maintained but elimination of the nautical fault defence exposes the Owner to the full force of the principle of vicarious liability. The challenge confronting the global maritime community in the ratification of yet another body of statutory limitation rules is a recurrent theme which divides opinion on the new Rules\(^\text{130}\).

The issue penetrates deeper still into the Owner’s consciousness with the issue of corporate manslaughter. With the evolution of the crime of criminal negligence, the Master may well be arraigned on an indictment with the downstream consequence of incriminating the Owner in a very serious crime indeed. It is hardly surprising, therefore, that modern

\(^{128}\) Ibid, p19
\(^{129}\) Spain and Togo (as of July 2012)
\(^{130}\) See Lloyd’s List, 11 October 2011, Legal Experts urge Brussels to redraft Rotterdam Rules, Lloyd’s List, Informa plc
maritime management practice identifies a priority in putting clear water between them and the Master when it comes to corporate accountability, which will be discussed in the next section.

The Tasman Pioneer case leaves a great many questions of unfinished business in the Master’s rôle in commercial risk.
(ii) The influence of Corporate Accountability

Overview

Corporate accountability does not lend itself to precise definition, but has been well summarised by Swift as addressing the requirement or duty to provide an account or justification for one’s actions to whomever one is answerable\textsuperscript{131}. The ‘whomever’ has come to be known as the stakeholder; just who satisfies that definition naturally has been the subject of litigation in negligence for generations, but the Neighbour Principle in Donoghue v Stevenson must offer the best guidance in the context of this work: a stakeholder will be somebody so closely and directly affected by the Company’s act that it should reasonably foresee that they would be so-affected\textsuperscript{132}. With the implementation of the Corporate Manslaughter and Corporate Homicide Act 2007, corporate accountability for the crime of manslaughter has taken on statutory form, which satisfies the normative ethics of a society that demands redress for catastrophic events such as the Herald of Free Enterprise and the Marchioness, but at the cost of the nerves of ship operators. This chapter charts the decline and fall of the relationship, culminating in a study of the issues for combating piracy – the current event which might just make or break the relationship.

The Exxon Valdez Experience

In the Exxon Valdez case, the corporate accountability for the Master’s conduct – or what was perceived to be his conduct – was illustrated very clearly indeed. At about 9 minutes past midnight on the 24\textsuperscript{th} March 1989, the vessel, loaded with about 1,263,000 barrels of crude oil, ran aground on Bligh Reef in Prince William Sound, on the coast of Alaska. There were no personal injuries, but about 258,000 barrels of oil spilled into the sea when eight cargo tanks ruptured. Damage to the vessel was estimated at $25 million and the lost cargo cost about $3.4 million – while the clean-up cost during 1989 was $1.85 billion. It was the worst pollution event in American history at that date, contaminating more than 1,300 miles of coastline, destroying the livelihoods of people dependent upon fishing and subsistence hunting in the region and killing hundreds of thousands of birds and marine

\textsuperscript{132} Donoghue (or McAlister) v Stevenson [1932] All ER Rep 1; [1932] AC 562
mammals; as recently as April 2010 scientists had discovered that residual spill was still being ingested by wildlife and would persist in threatening vulnerable species for decades.\textsuperscript{133}

The National Transportation Safety Board’s investigation concluded that there were five probable causes of the grounding, only one of which incriminated the Owner in that it had failed to supervise the Master and provide a rested and sufficient crew for the vessel.\textsuperscript{134} But the determination of Exxon’s culpability was reflected in the original order of the Federal Court that it pay $5 billion in punitive damages. A Federal Appeal in 2006 halved it to $2.5 billion and, it must be said, the US Supreme Court further reduced the punitive award to just over $500 million in 2008. More than $2 billion had been spent on clean-up and recovery, while Exxon paid at least $1 billion in damages overall.

There is no doubt that the Company, therefore, faced harsh corporate accountability for the spill, while Captain Hazelwood had to accept responsibility as Master, when the Coast Guard suspended his certificate for a period of nine months. He was charged with being drunk at the time of the grounding, although he was acquitted at his Trial, but was convicted of a misdemeanour of negligent discharge of oil, for which he was fined $50,000 and sentenced to 1,000 hours of community service. His employer dismissed him.

Unsurprisingly, the Owner of a crude tanker would view the Exxon Valdez case as a study in the need for caution – and the accountability for the consequence of a risk management failure. In the case of accountability for their Master’s negligence, though, they had a sound argument to excuse themselves from liability. Mindful of the Master’s unassailable authority in the safe navigation of the vessel, the Owner could argue persuasively that it could not overrule the Master in their duty of care and, therefore, the Owner should be protected from liability in the event of the Master’s negligence. This persists as the core feature of the nautical fault defence in the Hague-Visby Rules; what horrifies the shipowning community is the current evolutionary creep of international statutory limitation provisions, by which the Rotterdam Rules sweep away the long-established nautical fault defence, with the result that the carrier will be liable for all or part of the loss, damage or delay if the Claimant proves that the event set forth is subsequent to a fault of the carrier or

\textsuperscript{133} Esler D et al, 2010, Cytochrome P4501A biomarker indication of oil exposure in harlequin ducks up to 20 years after the Exxon Valdez oil spill. Environmental Toxicology and Chemistry, Rice University, Houston

\textsuperscript{134} Kolstad, J, 1990, Report Ref M-90-26 through 31, National Transportation Safety Board, Washington DC
their Master. If the bill of lading in the Tasman Pioneer case\textsuperscript{135} had fallen under the Rotterdam Rules instead of Hague-Visby, the Owners would have been hard-pressed to persevere with the argument that their vicarious liability should not apply to the Master’s gross misconduct, even though the damage to the deck cargo had occurred as a consequence of the Master’s efforts to protect his own interests, rather than theirs.

The shipowner identifies a greater mischief still with the evolution of the law of criminal negligence against the Master, should the Master incriminate them in a crime under the new Corporate Manslaughter Act\textsuperscript{136}, whose origins stemmed from public and political unhappiness with the corporate positions presented in the Herald of Free Enterprise and Marchioness disasters, among others. The offence is committed if the way in which the Company’s activities are managed or organised causes a person’s death, and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. Liability for the death no longer must be attributed to the conviction of manslaughter against a member of the controlling mind of the Company, but by a ‘management failure’ involving a person who plays a significant rôle in the making of decisions about how the activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities. The Master fits perfectly this definition. If a person is killed, and particularly if the Master is confronted with allegations of criminal negligence, that may be used in evidence against their employer, the shipowner, in order to establish that there was a management failure giving rise to the crime of corporate manslaughter. The UK Government’s Sentencing Council\textsuperscript{137} published guidelines in 2010 which stated that the fine which would likely be imposed upon the convicted company would seldom be less than £500,000 and could be measured in millions of pounds.

Such threats encourage the owner to distance themselves from the Master as far as they possibly can, for, if the owner is to be held vicariously liable for such negligence then the consequences in terms of damages may result in punishment which the maritime world had seen first imposed in the Exxon Valdez case, involving fines, punishing compensation claims, and plunging share values with which to contend.

\textsuperscript{135} Tasman Orient Line CV New Zealand China Clays Ltd and Others [2010] 1 LL R 41
\textsuperscript{136} S1 Corporate Manslaughter and Corporate Homicide Act 2007: An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised causes a person’s death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
\textsuperscript{137} Anon, 2010, Corporate Manslaughter & Health and Safety Offences Causing Death – Definitive Guideline, Sentencing Guidelines Council, London. At the present time (December 2011) the only conviction under this Statute resulted in a fine substantially less than this, when Cotswold Geotechnical Holdings Ltd were convicted and fined £385,000 in 2011, the rationale being that it was a very small company which was described in mitigation as being in a parlous financial state. The Judge ordered the fine to be paid in instalments over ten years (currently unreported)
The frightful fiend now treading close behind the Master has taken form and substance in the dilemma revealing itself in a very real drama currently confronting the maritime community, arising out of the need for some self-protection against piracy. In a situation in which the Master is responsible for the safety of life and the property of the vessel herself, they are keenly aware of the risks in meeting that responsibility when attacked by pirates – and the shipowner may be held equally accountable by virtue of their relationship with the Master.

The Stress-test of Piracy

When our friends China Navigation Company acquired the Bank Line from Andrew Weir Shipping in 2006, the assets which passed to the new Owners included the Teignbank, a multi-purpose cargo ship that had been converted for round-the-world service from an Arctic freighter built for the Soviet Union in 1984. China Navigation renamed her Boularibank but, with the global economic downturn, her last round-the-world service was scheduled for the spring of 2009. She was on this last run, under the command of her UK-certificated Master, Captain Peter Stapleton, with a mainly-Russian crew of 31 including four British cadets, and carrying eleven passengers and the Master’s wife, when, on the 28th April, 120 miles northeast of Socotra Island at the entrance to the Gulf of Aden, Captain Stapleton saw, on the radar, a green blip travelling in the wrong direction. It might have been innocent fishermen – but turned out to be Somali pirates, and two skiffs were launched from the mother vessel, closing rapidly on the Boularibank at a speed of some 26 knots. Captain Stapleton realised that they could not out-run the pirates, so he carried out evasive manoeuvres, while under fire from the assailants' assault rifles and rocket-grenades, one of which exploded above the bridge138.

Captain Stapleton was, of course, acutely aware of the risk to the lives of the ship’s company and the passengers – the safety of life being the overwhelming issue in his responsibility as Master. He was also aware that current law left him naked to do more than prepare to repel the pirates with the sort of force to which merchant ships are limited both by convention and by domestic laws. Risk management procedures were put in place in accordance with these limitations, which involved turning the fire hoses on the attackers,

138 A host of sources exists for this event, some of which tend to dramatise it more than others. Recommended reference is made to:
Andrew Weir Shipping Ltd.[http://www.oceanlinermuseum.co.uk/Bank%20Line%20History.html]
International Transport Workers Federation.[http://www.itfseafarers.org/boularibank.cfm]
and bundles of heavy timber baulks were hung on ropes over the ship’s side behind the forecastle, while container twistlocks were made ready to throw; then the outside staircases were blocked by ropes, all outside watertight doors were closed, and the passengers were ordered to hide in the corridors behind the wheelhouse. Captain Stapleton then steered his 22-year old ship on a zig-zag course, creating a wash to keep the pirates' boats away.

The attack failed and the pirates broke off. Captain Stapleton was later awarded the UK Merchant Navy Medal for exceptional bravery during the attack. A Russian destroyer captured 29 suspected pirates shortly afterwards; but there was little more that the naval protection force could do. The pirates were disarmed, and then had to be released. That is the current law and, for the Master, it is a minefield which could lead to their accountability for the most serious crimes if they get it wrong.

Piracy in this context is defined by UNCLOS Article 101 as consisting of any illegal acts of violence or detention committed for private ends by persons on a private ship, whether they call themselves crew or passengers, and directed against another ship either on the high seas, or at least in a place outside the jurisdiction of any State. This definition has been incorporated into English law by virtue of s26 Merchant Shipping and Maritime Security Act 1997 and, accordingly, applied to the venerable statutory provisions which will be enforced against a person who commits an act of piracy, and it matters not which is the Flag State of the pirate ship or the innocent vessel. According to the legal theory of English criminal law, the offender may be arrested, tried and punished, in this case, in the Crown Court, even though the alleged offence took place in international waters. If the offending activity took place within the jurisdiction of UK territorial waters, then the Defendant will be arraigned on the charge in domestic law of robbery, under the Theft Act 1968 and tried in the Crown Court, irrespective of which State had allocated its flag to the innocent vessel. In terms of Sovereign State jurisdiction, this is an obvious example of the

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139 S 2 Piracy Act 1837: Whosoever, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall be liable to imprisonment for life. The sentence was amended from death by the Crime and Disorder Act 1998, bringing consistency with the Human Rights Act 1988 (the right to life).

140 See s6 Courts Act 1971

141 S8(1) Theft Act 1968: person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

142 S2 Territorial Waters Jurisdiction Act 1878: An offence committed by a person, whether or not he is a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty’s dominions, is an offence…. Although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.
common-sense application of the clear statement rule\textsuperscript{143}.

By the same token, any act taken by the innocent party resulting in death or personal injury to the assailant may be subject to accountability in the same jurisdiction. As a result, the Master of the innocent vessel will remain accountable to the laws of the Flag State, or the Port State under the clear statement rule for the death of the individual, and if a defence such as self-defence failed, then the Master would be exposed to a sentence for murder, if malice aforethought is established, or manslaughter if it is not. Even if the defence is successful and the Master is acquitted, they may have spent years on remand in custody in circumstances or conditions which would be unrecognisable to the reader of the IMO’s Guidelines on the fair treatment of seafarers. To the shipowner, the contract of employment may well incriminate them on the basis of the Master’s defence that they were protecting the property and employees of the owner as their employee, representative and agent and the resultant death occurred because of a management failure to preserve the assailant from death during the offending activity\textsuperscript{144}.

It may not be justice, but it is the law; as such, the issue of protection is fraught with difficulty. Notwithstanding that the Master may possess a firearms certificate granted by the Flag State, by Section 13, Firearms Act 1968, the Master may, without holding a certificate, have in their possession a firearm or ammunition on board a ship, but only as part of the equipment of the ship. As such this has traditionally been defined to mean distress flares and, in any event, is dependent upon how the MCA would view the provision of firearms for approval in the ship’s security plan, as required by the International Port Facility Security Code (ISPS). The prevailing Marine Guidance Note\textsuperscript{145} containing guidance on this issue explained the hazards somewhat dramatically in its strong discouragement of carrying and using firearms on board at all\textsuperscript{146}.

\textsuperscript{143} A less common-sense example may be argued in the case of Specter v Norwegian Cruise Line Ltd 545 US 119 (2005)

\textsuperscript{144} S1 Corporate Manslaughter and Corporate Homicide Act 2007: see below. The owner is guilty of an offence if the way in which its activities are managed or organised causes a person’s death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

\textsuperscript{145} Measures to Counter Piracy, Armed Robbery and other Acts of Violence against Merchant Shipping. MGN 298(M), published October 2005: The carrying and use of firearms for personal protection or protection of a ship is strongly discouraged and will not be authorised by the British Government. Carriage of arms on board ship may escalate an already dangerous situation, and any firearms on board may themselves become an attractive target for an attacker. The use of firearms requires special training and aptitudes and the risk of accidents with firearms carried on board ship is great. In some jurisdictions killing a national may have unforeseen consequences even for a person who believes that they have acted in self-defence. MGN 440 post-dates this (2010) but confines itself to links to relevant websites.

\textsuperscript{146} The small matter of insurance will also be a relevant issue to the shipowner. While an insurance product for corporate manslaughter claims arising out of the use of armed guards was launched in July 2011, it necessarily can only cover the legal costs which the shipowner might incur in defending a claim. The insurer would certainly not cover the risk of payment of a fine in a criminal conviction. While Protection and Indemnity cover can extend to the lawful payment of ransom demands, its
Even if the Master were held lawfully to be in possession of such weapons while on board the vessel, when she comes alongside in the port of another State, the question begs itself as to what will be the consequence in law. While a Flag State has the power to make laws granting powers permitting their merchant ships to carry firearms, the acknowledgement of such by a Port State may be open to question. As one example, the Master of a merchant ship arriving at a South African port, which has firearms on board, must apply for a permit from the South African Police 21 days prior to their arrival in South Africa. How the procedure is to work in practice remains somewhat unclear, for example, in the situation in which the charterer had not even nominated her port of discharge at the time when she had left her port of loading.

In fact the issue of carrying firearms on board a vessel at all is fraught with difficult questions, not the least being how secure are the firearms in the right hands, and how hazardous would it be if the firearms somehow got into the wrong hands on a voyage? If, in a pirate attack, a member of the crew fired a weapon and some personal injury was inflicted, whether intended or not, and whether or not due to the crew’s inexperience with a firearm, the Master would still be held accountable, very possibly for criminal negligence. Worse still for the shipowner, they would be incriminated as the Master’s employer, for whom they were playing a significant rôle in the making of decisions about how the shipowner’s activities were managed or organised, and such management failure could result in the dread consequence of a conviction for corporate manslaughter, with all that entails in the form of fines, subsequent compensation claims, and the publicity ultimately affecting the share price.

For all of these reasons, shipowners have recently developed a cunning plan to employ privately contracted armed security personnel on board ships, to minimise the risk of a hijacking and deliver a higher level of self-defence. Encouragingly, such attention to the problem lends support for the Master’s position; the trouble is that the risks of criminal accountability have not gone away for the shipowner or operator. For this reason, in May 2011 the International Maritime Organisation (‘IMO’) hurriedly published interim

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147 Firearms Control Act 2000
guidance\textsuperscript{148}, in which it emphasised the importance that Flag State jurisdiction and thus any laws and regulations imposed by the Flag State concerning the use of such private security forces will apply to their vessels. It further emphasised that the laws of Port and Coastal States may apply, obviously when their sovereign jurisdictions are involved, either if the vessel is in those waters or if their nationals are shot. And the UK Government had ‘strongly discouraged’ the provision of such measures on board ships\textsuperscript{149} – in Government jargon, this meant that the UK Government would not assist in the event of some consequence arising out of their use.

But we live in interesting times. Financial pressures have stretched the Government’s defence capability beyond the point at which the Royal Navy can cost-effectively protect UK flag vessels, even in high risk regions. Such considerations added weight to the urgency pleaded by shipowners in the UK fleet for protection against piracy attacks, many of whom had already resolved to provide armed protection on their ships with the use of the private security forces against which the IMO had cautioned. As a result, at the Commonwealth Heads of Government meeting in October 2011, the British Prime Minister announced a radical change in policy, to permit UK flag ships to be licensed, if they (that is, the shipowner) wish, in order to have armed security guards on board their ships.

For the Master, this barely provides a fig leaf for protection in law. The importance of maintaining the unassailability of the position of the Master Under God is a key feature of any guidance, for, naturally, the Master will remain responsible for all consequences, from the very possession of a firearm to the death of an individual, hence the IMO cautioned the shipowner to ensure that the command and control structure linking the ship operator, the Master, the ship's officers and the contract security team leader has been clearly defined and documented – for the purpose of establishing the critical evidence should a Trial follow some event.

For all the complexities of the Master’s position in the efficient shipboard management of such security protection, exposure to Flag State law remains if the vessel is attacked in international waters, and the Government’s licence will carry little weight with the authorities in other Port States. In response to the UK Government’s announcement, the Egyptian Government promptly announced that it would not permit armed merchant vessels

\textsuperscript{148} MSC.1/Circ.1405 23 May 2011: Interim guidance to shipOwners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area

\textsuperscript{149} See MGN 420(M): para 5: The UK Government strongly discourages the carriage and use of firearms onboard UK registered ships for the protection of personnel or for the protection of the ship and/or its cargo.
to proceed through the Suez Canal, whether or not they possessed a licence issued by the Flag State. This starkly highlights the point that tensions between Flag State and Port State have not gone away – and the Master’s criminal accountability may just be underlined further, if the defence of a vessel results in the breach of Port State laws, exposing the Master to risk of prosecution and, quite possibly, imprisonment – let alone breaches of Flag State obligations, for the Master will still be held to account for the deaths of individuals according to Flag State laws.
(iii) The Loss of the Relationship: Risk and Responsibility on the Owner

We have seen how the General Steam Navigation Company was formed on the basis of corporate ownership, by which individuals’ liabilities are limited to the share which they have invested by virtue of the cash payment committed. With this in mind, the Company must consider how to convey to investors the best argument for putting their money with them. Continuing with the story of General Steam illustrates this business in context: with the end of the First World War a rebuilding programme was essential, and ten, fine new ships were ordered for the fleet for Continental trading from London and Southampton, but the cost was a crippling burden to the Company, coming at a time when there was bitter rivalry for the work that was coming out of a European Continent that was struggling to rebuild itself. It was at that stage, that the Peninsular and Oriental Steam Navigation Company entered the scene. P & O could command a great deal of funding, but needed European business to fill their ships; General Steam had the strongest agency business in Europe to fill their ships, but needed funding. So it was, that, in late 1920, P & O bought the controlling interest in General Steam: the investment aspirations both for General Steam and for P & O were satisfied.

But the owners of the ships were still General Steam; P & O merely owned shares in that Company in the same way as any legal individual; they were part shareholders in the body which owned the assets and were not, themselves, at risk for criminal accountability for the Company’s acts or omissions. When P & O bought the remaining shareholding in 1976, there was no such gulf in liability, for they were now the asset-holders and, thus, were the controlling mind; in consequence, P & O Ferries were the controlling mind which was accountable for the loss of the Herald of Free Enterprise, even though they had only acquired the Owners, Townsend Car Ferries, a month previously.

And thereby hangs a tale. The Herald case and, in particular, Justice Sheen’s comments in the Inquiry, sent shock-waves through the industry, but the corporate liability issue should...
not have come as any surprise; after all, the idea of the single ship company had developed in the nineteenth century to protect assets from legal risk.

It was the Exxon Valdez casualty which awoke the maritime world to the measure of damages associated with a crude spill, with the shipowner embroiled in litigation for the next 20 years. On reflection, the response of any shipowner must logically ask the question, How could the risk be managed both as to liability and quantum? The management board, of course, ultimately has to protect the assets, in the terms of shareholder value, and so would have adopted the customary management procedures of considering the treatment options:

1. Should they do nothing? This option would invariably have to be discarded in such circumstances.
2. Should they terminate the risk? Realistically, this would mean abandoning shipping operations, which would have to be discarded – they have to move their cargoes about the world, and chartering other people’s ships would simply not be cost-effective.
3. They could transfer the risk, in terms of insurance – there is already compulsory insurance in place to a minimum level for crude spills, and additional cover is frequently adopted in the industry, provided by the shipowner’s protection and indemnity association, although they might not want to consider total cover, which might incur unacceptably high premiums.
4. How might they then treat the risk, that is, do something about it? A management adviser might counsel ways to treat the risk of liability in two ways:
   i. They might distance themselves from the person with management control on the vessel, the Master, who, of course, has absolute discretion in their navigational judgment and, so, the Owner might say, We cannot be blamed because we cannot tell the Master how to do their job;
   ii. They might minimise the risk by avoiding liability without losing the value of the asset’s profitability. This would necessitate some creative thinking on just how to go about asset management – and the Post-War world offered the solution in a new generation of solutions with independent registers, where a ‘brass plate’ company in an offshore State complied with the laws of the Flag State jurisdiction which regulated the ships, as well as their tax liabilities, and the net profits would then be repatriated to the shareholders who still held the investment in the principal company, the original Owner, which now exercised simple control by managing the brass plate business.

In fact, in this context the principal company did not even have to conduct the ship
management function itself – such could be outsourced, to any of a growing number of companies ready, willing and able to operate vessels, who would tender highly competitive bids for the work, and as the competition for that work grew stronger with more joining the field, so the competitive tendering grew more cut-throat still. In truth, a number of the traditional shipowners had decided that they could no longer generate a satisfactory profit in shipowning operations and would serve their shareholders better by selling the hardware – the ships themselves – thus creating a windfall, and concentrating on independent ship management. Each company which followed suit, increased the competition for the job of managing an Owner’s ships.

So what would be the benefit of owning and operating the ships, in the traditional way? If the operator / manager assumed responsibility for operational risk, they may well have to defend proceedings arising out of negligence – possibly criminal negligence - but the Owner, an entirely separate entity, could not be held liable to a Judgment creditor or a Court and thus risk the asset value of the vessel.

The operator saw the situation as delivering an income using the skills resources in their business, while they did not have the value of the asset on their Balance Sheet, while the Owner could not derive a profit from the ship’s trading activities but still received a valuable return in the form of profits associated with a lease of the ship – a lump sum premium and a regular fee.

It was the ship operator managing her, who really had the relationship with the Master now, establishing the contractual relationship and giving the management instructions. And the world was taking note; hence, in the Merchant Shipping Act 1995, the UK makes the manager liable for operational violations.\(^\text{153}\)

The business of maritime economics keeps the profitability of the maritime adventure under constant review, to maximise profit for the minimum risk. The complexities that result from creative management strategies, though, can be bewildering. We may take the example of the Tricolor,\(^\text{154}\), a single screw Pure Car Truck Carrier grossing 46,792 tons, which was built at Tsuneishi in 1987. She was registered in Tønsberg, under the Norwegian

\(^{153}\) See, eg, s100 making the Owner liable for the unsafe operation of a ship but if the ship is bareboat chartered, or is managed, either wholly or in part, by a person other than the Owner under the terms of a management agreement, then the bareboat charterer or the manager will be liable.

\(^{154}\) Naturally the ultimate purpose of establishing ownership and responsibility lay in the dispute resolution process; in this case reference is made to the remarkable United States decision in Otal Investments Ltd v mv Tricolor 08-3031 (an appeal in March 2012 held that the Court found no error in the District Court’s allocation of liability).
independent flag. She was owned by Capital Bank, Scotland, who had nothing to do with her management or operation, though, for she was on bareboat-charter to Wilhelm Wilhelmsen, which, far from being a reckless operator, ranks today as one of Norway’s leading centres of maritime expertise and a leading international supplier of maritime transport. Commercial operation was conducted by Wallenius Wilhelmsen Lines AS, a company established in 1999 and owned jointly by Wilhelm Wilhelmsen and Walleniusrederierna AB, Stockholm but manning and technical management was contracted to Barber Ship Management AS, Oslo. Her Master was a Norwegian national, who commanded 22 Philippino crew. But this is all part of the management function in maritime economics with which Governments have not interfered.

So the Owner now has come a long way from the traditional image of nineteenth century operations, with the effect of divesting itself of the risk associated with the vessel’s navigation, but the Master’s professional negligence remains untouched. The result is that the operator, not the Owner, has little vested interest in protecting the Master – it is not any asset on their Balance Sheet which the Master is controlling – but the assumption of liability for the consequence of the Master’s violations would still damage their profit stream, in terms of Court Orders on liability and quantum of damages.

Why, then, should the manager take such a risk? It is a rhetorical question, of course, for this entire process has had the effect of distancing the Master from the Owner who may avoid or mitigate corporate accountability in criminal prosecutions and vicarious liability in civil claims, and the operator / manager has scant incentive to assume such a burden of liability, instead responding to the risk management function in a way which leaves the Master exposed.

The evidence confirms the Master’s exposure to the risk. Seafarers’ Rights International, an independent organisation with a focus on the law concerning seafarers, conducted a survey of 3,480 seafarers, which was undertaken in the 12 months to the end of February 2012. Almost 24 per cent of Masters who responded to the questionnaire stated that they had faced criminal charges during this period, while 87 per cent of seafarers who faced charges relating to the discharge of their professional duties said that they did not have legal representation. In truth, after copious research there is scant evidence that the Owner has provided for the Master’s legal defence in recent years, although there is a crumb of comfort in the last of the traditional treatment options, by transferring the risk to insurers; in

155 http://www.seafarersrights.org/tag/criminalisation/
the case of Captain Mangouras, remanded in custody in Spain pending the criminal investigation into the Prestige disaster, the bail was secured by a bank guarantee, arranged not by the Owner but by its P & I Club. But that still does not diminish the risk of criminal accountability.
(iv) The Master and the Business of Commercial Risk

Overview

Developing the themes which originate in previous chapters, the Master’s potential for criminal accountability, as a consequence of commercial risk, is examined in the context of contemporary maritime operations, taking as a study the emerging maritime environment in the High Arctic. This section puts in context the Master’s rôle in the business of maritime commerce in the twenty first century, presenting a stark introduction to the following chapter, which is crucial to the work.

The Rationale

The business of maritime commerce has always been in motion; sometimes fast, or slow, depending on the maritime economic cycle, it is constantly driven by tensions of competition, with rival Owners anxious to return a profit on their assets, by whatever means possible. That necessarily involves exploiting all the advantages that might be available either in reducing costs or increasing liquid assets and, in their unique rôle in the business of marine operations, the Master has the enormous advantage of being able to contribute by relating their skills and their expertise to the Owners’ objectives. Where an opportunity for profitability arises, therefore, the Master needs to meet those objectives, and, necessarily, needs to adapt to change in order to meet them. In the twentieth century this was surely identified most keenly in the development of crude oil transport; the continuing, and continually insatiable, demand globally for crude as an indispensible part of industrial activity, has galloped into the twenty first century spurred on by the gathering realisation that crude oil supplies are dwindling, and becoming more expensive, thus providing the impetus for the development of resources in the High Arctic, and for transport through the Northwest Passage that can shorten voyage times dramatically, bringing down costs. While the Master’s skills and expertise are presented with new challenges in exploiting these new opportunities, they must meet the attendant commercial risks, which have been rendered enormous on the Master personally, thanks to the ethics which society has attached to the protection of the environment, and the attendant penalties that accompany such protection,

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156 Tallack, R, 1996, Commercial Management for Shipmasters, Nautical Institute, London, Chapter 1 passim
in the form of criminal accountability.

The Risk of Crude Oil Pollution

The tanker is perhaps the most influential mode of cargo transport, due to the dependence of the world on its precious cargo - oil fuel has become blood to an industrialised society. Post-war, the earth's nations consuming vast quantities of oil naturally grew uneasy about their dependence on the whims of the crude-producing countries and so they wanted to establish refineries on their own territories as well as saving the cost of having the crude refined before reaching them. Thus the import of crude was stimulated around the world. At the same time, oil had to be transported fast, regularly and at the lowest possible cost.

The demand for oil that was generated by this brave new world encouraged naval architects to develop the ideas of economies of scale that had been born with ships such as the Narragansett, a dedicated tanker built as early as 1903, with a deadweight tonnage of 12,500. The era of the supertanker only emerged after the Second World War, with BP's British Adventure, built in 1951 and capable of lifting 28,000 tonnes of crude, making her the largest tanker in the world but, by 1957, Esso had developed the concept with orders for the 'City' class of twelve tankers, commencing with the Esso Guildford, handed-over in 1957, capable of lifting 36,040 tons of crude.

In the following years the mighty names in crude transport constantly out-paced each other in building ever-greater ships to satisfy the West's demand for petroleum. The remarkable thing is that, within ten years, crude carriers were being commissioned around the world that put those giants in the shade. When laid down in the United States in 1959, the Torrey Canyon had a deadweight capacity of 60,000 tonnes but she was later enlarged in Japan to 120,000 tons capacity. In 1967, Esso ordered two ships of 193,000 deadweight tonnes, but they rapidly were overtaken by another order which Esso placed, for a tanker of 250,000 deadweight tonnes. In that same year, the industry - the whole country - was sent into shock when, on the 18th March 1967, the Torrey Canyon ran aground on the Seven Rocks, off the Scilly Isles. Nine days later, the files of the British Government's statutory expert adviser, the Nature Conservancy, were reflecting on the desperate struggle to protect wildlife from the effects of the disaster. Ten months later, they were able to take stock of the long-term effects and reported that a total of 200 miles of coastline in Cornwall and Brittany had been
contaminated by at least 40,000 tons of Torrey Canyon oil in spring 1967\textsuperscript{157}. Oil ending up on the shore had reached up to over 30 feet on exposed cliffs. The experts were horrified to discover, also, that the chemicals used to disperse the crude were just as toxic as the matter they was meant to destroy, and even extended damage to previously unpolluted areas. By the 13\textsuperscript{th} May, 1968, the Government’s Hazardous Cargoes Committee was making out the special case of oil. The Cabinet Office wanted a list of references relating to the effects of oil pollution on the environment and wanted to ensure that those on wildlife were covered. The effects of methods of treatment should not be included but they realised the difficulties of separating the references to the effects of oil and oil emulsifier on the environment and considered that although their remit did not go beyond oil pollution, they could point out in a covering note that measures employed to reduce oil pollution might present further hazards to wildlife.

The damage to wildlife was horrendous. Taking an indicator species, the Atlantic Puffin, it was found that crude oil and chemicals actually combined to poison, drown and suffocate them. Then the poisons kill their food supplies in the delicate balance of nature, and those which had not been killed already, then starve. As the fish stocks become lower, the puffin population must decrease proportionately - until it reaches the critical level below which the species could not be sustained. These findings were not restricted to studies following the Torrey Canyon disaster but have followed nearly every major crude pollution event, including the Exxon Valdez, the Sea Empress and the Prestige. The consistency in using the same indicator species adds compelling authority to the scientific findings\textsuperscript{158}.

The risks of crude pollution were craving the world’s attention, and the wheels of international law were grinding away slowly. In 1973 the International Convention for the Prevention of Pollution from Ships was adopted, to become the MARPOL Convention. It was modified in 1978 and, today, is the most important global treaty for the prevention of pollution from the operation of ships, the backbone of international maritime environmental law, covering all the technical aspects of pollution from ships and governing the design and


\textsuperscript{158} See, inter alia: Balseiro, A, & Others, 2005, Pathological Features in Marine Birds affected by the Prestige’s Oil Spill in the North of Spain, Journal of Wildlife Diseases, Wildlife Disease Association, URL \url{http://www.jwildlifedis.org}


Wells, P & Others, 1995, Exxon Valdez Oil Spill: Fate and Effects in Alaskan Waters, American Society for Testing and Materials, Philadelphia
equipment of ships, establishing a system of certificates and inspections and, crucially, obliging states to provide reception facilities for the disposal of oily waste and chemicals ashore. Its benefit is to regulate the discharge of toxic waste into the environment by routine operations. In fairness, when the problem takes the shape of a tanker breaking up on the rocks of a sensitive coastline (inevitably in the glare of the world’s television cameras) provisions for routine waste management do not help a great deal.\textsuperscript{159}

MARPOL had a difficult gestation and birth, partly involving the complexities in negotiations arising out of inconsistent priorities between States Parties, and within the decade the world’s maritime economies had other worries to contend with. By 1986, the Director-General of the General Council of British Shipping was saying that, in view of the barrage of blows that the UK fleet had suffered, it was remarkable that any British shipping companies had survived at all. But the crude carriers had carried on growing. Vessels such as the Seawise Giant were built to lift 560,000 tonnes of crude, with a service speed of 16 knots, faster than many dry cargo ships a fraction of their size. Well-manned and maintained, supertankers are remote risks, and indeed have been proved to transport oil more safely than much smaller tankers; but when economics force operators to make savings, the risks rise alarmingly.

The High Arctic

Given the environmental risks inherent in crude oil pollution, the scale of the disaster presented by the unit size of these huge vessels feeds the human need to find somebody to blame, and when the damage is exacerbated by the very remoteness and pristine natural beauty of the environment, the phenomenon of human psychology demands criminal accountability. Professor E Scott Geller\textsuperscript{160} has drawn conclusions from the standpoint of psychology that there is hardly ever a single person to blame for such a disaster, but the human reaction is to demand that the alleged offender be punished by the criminal law, and a single person is already accountable in the person of the Master. How they discharge their

\textsuperscript{159} For the sake of completeness, mention should be made of the International Convention on Civil Liability for Oil Pollution Damage, which was adopted in 1969 and amended by a protocol coming into force in 1996. This convention essentially requires tankers to maintain insurance or other financial security to compensate claimants who suffer oil pollution damage resulting from maritime casualties, and places strict liability for such damage on the owner of the vessel from which the polluting oil escaped or was discharged. In terms of criminalisation, its relevance is limited.

\textsuperscript{160} Geller, E, 2011, Psychological Science and Safety: Large-Scale Success at Preventing Occupational Injuries and Fatalities, Current Directions in Psychological Science, Washington DC 20: 109-114
accountability is a matter for them. In March 1989 the Exxon Valdez ran aground in Prince William Sound on the Alaskan coast. Roger Howard\textsuperscript{161} estimated that, within five hours, at least 11 million gallons of crude oil had spilled into the sea, covering some 11,000 square miles of ocean that contaminated 1,200 miles of coastline. 80 per cent of the cargo stayed on board the vessel, though; ironically, thanks largely to the vessel’s Master, Captain Hazelwood, whom the US Coast Guard praised for exemplary handling of the stricken ship, which helped to prevent more cargo spilling into the sea and possibly saving human life as well\textsuperscript{162}. Nevertheless, he was prosecuted by the State of Alaska on an indictment which included felonies of criminal mischief, operating the Exxon Valdez while intoxicated, and reckless endangerment, as well as a misdemeanour, or less serious charge, of negligently discharging oil. The Jury Trial lasted two months, resulting in his acquittal on all the charges except the misdemeanour, when he was sentenced to 1,000 hours of community service, which consisted of picking up rubbish along Alaskan roadside verges, and a compensation order of $50,000\textsuperscript{163}. No other individual faced criminal charges, certainly nobody from Exxon, who promptly blamed their Master\textsuperscript{164}.

In fairness to the conscience of twenty first century society, the perceived risk to the environment in the Arctic is immense\textsuperscript{165}, with difficulties in emergency response arising out of the very remoteness of the region, as was discovered to the horror of the response teams in the Exxon Valdez case\textsuperscript{166}. In reality, though, the demands of twenty first century civilisation present opportunities that are irresistible to the tanker sector of the world’s fleet. Tanker Owners can identify such huge commercial opportunities that an environmental disaster may be viewed as an eminently manageable risk, that can be contained within tolerable levels of such financial cost which the ethics of society feel a suitable punishment to pay. The risk of civil claims can be transferred admirably to the shipowner’s insurers. By contrast, the accountability of the Master remains a risk for their own personal assessment, and as the convenient individual available for blame, as Captain Hazelwood discovered at the hands of his former employer, and the Coastal State.

\textsuperscript{161} Howard, R, 2009, The Arctic Gold Rush, Continuum, NY, p130. He observes that some pressure groups put the estimate much higher.
\textsuperscript{162} Behar, R, 1989, Joe Hazelwood’s Bad Trip on the Exxon Valdez, Time Magazine, NY
\textsuperscript{163} Mauer, M, 2010, Criminal Charges were levied after Exxon Valdez Spill, Anchorage Daily News, a subsidiary of the McClatchy Company, Sacramento, CA
\textsuperscript{164} Exxon subsequently embarked on a spirited defence to criminal litigation in which it was originally fined $150 million, the largest fine ever imposed for an environmental crime; but the Court later reduced this to $25 million in recognition of Exxon’s cooperation in cleaning up the spill and paying certain private claims.
\textsuperscript{165} As a result of the Exxon Valdez spill, it was estimated that wildlife fatalities ran to 250,000 seabirds, 12,800 otters, 300 harbour seals, 247 bald eagles and 22 orcas (Graham, S, 2003, Environmental effects of Exxon Valdes Spill still being felt, Scientific American, Nature Publishing Group, London
\textsuperscript{166} Howard, R, 2009, The Arctic Gold Rush, Continuum, NY, p131
The environmental issues and the commercial issues in this region are immensely complex, and conflict between the two can be predicted with the inevitability of Greek tragedy. In 2005, a joint project undertaken by the Arctic Council and the International Arctic Science Committee published a 1,042-page report\textsuperscript{167} which warned that the reduction in sea ice in the region would have devastating consequences on the wildlife of the region; this would have a downstream consequence on the indigenous peoples who relied upon it as a food resource. But it also emphasised that the same reduction in sea ice would likely increase maritime commerce, both as to ships and access to resources which those ships would be lifting. The obvious consequence presents new employment opportunities for Masters, for whom their criminal accountability may be viewed as an occupational hazard. As the commercial opportunities for shipowners gather pace, the Flag State will be anxious to ensure that its obligations under international law are met.

These obligations are clearly defined in UNCLOS, Part II Section 1 of which provides for the sovereign limits of a Coastal State to extend up to 12 nautical miles beyond its land territory and any archipelagic waters; in this area, known as the territorial sea, merchant vessels of all States have the rights of innocent passage, that is, so long as the voyage is not prejudicial to the peace, good order or security of the Coastal State. That being said, Article 21 authorises the Coastal State to exercise its jurisdiction over such vessels, essentially by statutory regulations managed by the Court process, in order to ensure the State’s sovereign rights over matters including, amongst other things, the safety of navigation and the regulation of maritime traffic, the conservation of the living resources of the sea, the prevention of infringement of the fisheries laws and regulations of the coastal State, the preservation of the environment of the coastal State and the prevention, reduction and control of pollution, and the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the Coastal State. Most importantly for the Master, Article 21.4 requires that ships of other Flag States exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea. The key issue to bear in mind, is the focus on the obligation on ships, not their Master – that is, the thing over which the Flag State has sovereign management control by reason of the allocation of its flag, in whom they have reposed their confidence in the Master who has been clothed with their certificate of competency. The importance in this distinction will become apparent in Section Four.

The powers of the Coastal State are addressed further by Article 27 which is cunningly drafted to limit the zeal of its Courts by stating that its criminal jurisdiction should not be exercised on board the vessel of another Flag State passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only if the consequences of the crime extend to the Coastal State; or if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or if such measures are necessary for the suppression of illicit traffic in proscribed drugs. The State may also ‘assist’ (an interesting, perhaps euphemistic, word employed in the Convention) if asked to do so by the Master or by a diplomatic agent or consular officer of the Flag State.

Beyond the territorial sea, the Coastal State does not have any such powers, save those reserved for the exclusive economic zone defined in Part V of the Convention, confirming the Coastal States’ sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, including those in the waters superjacent to the seabed and of the seabed and its subsoil, but limiting the State’s jurisdiction, that is, its judicial enforcement, to protect installations and structures (such as drill rigs), the conduct of marine scientific research and a sweeping provision for ‘other rights and duties’ defined in the Convention.

Of course, the Coastal State’s jurisdiction can be well-established when the calculations of rights from the baseline are agreed by other States. Where there is no such Treaty, as in the High Arctic, the Master is sailing into potentially disputed waters. And we have not even touched upon the potential flashpoint of disputed boundary rights in international straits: in this case, the emerging North West Passage, which Part III of the Convention protects by requiring bordering States to respect by refraining from interrupting the rights of transit passage by a ship of another Flag State, save for the protection of safe navigation or the marine environment or resources, or the protection of health and immigration, customs and revenues. The relevance to the North West Passage lay in the issues between the United States and Canada; the former demands the transit rights through the Passage according to the provisions in UNCLOS for international straits; the latter asserts sovereignty over the Passage which lies, it argues, solidly within the definition of its archipelagic territory.

The Master navigating through the High Arctic, therefore, will be very conscious of four

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168 This has helpfully been addressed further in the concept of the Clear Statement Rule, which will be discussed below.
obligations:

1. Their obligation to the Flag State as Master
2. Their obligation to observe the Port or Coastal State’s rights in the region, however uncertain the geographical boundaries may be
3. Their obligation to the shipowner as Agent as well as Employee
4. Their obligation to protect their own interests, given the industry’s conceptualisation of their criminalisation.

The shipowner will be keenly aware of their obligations to the Flag State and to the various Port or Coastal States whose laws they will have to observe. It must come as no surprise, therefore, to follow the developments in design and propulsion of the ships that the shipowner is embracing, at huge cost but, of course, such expenditure is relative to the potential return; an eminently acceptable risk treatment option on any cost-benefit analysis and a hard-earned lesson from Grimshaw v Ford. It is believed that Fednav’s prospective Polar Capesize dry bulk carriers would be designed to operate in multi-year floes and cut through 1.8 metres of ice, but would cost as much as twice the price of a standard Capesize not built for the challenges of the High Arctic. When this concept turns to crude tankers, the stakes, of course, are much higher.

For all that, Russia is well ahead in the development of tanker tonnage in the environmentally-sensitive High Arctic, where the fortunes to be made are astronomical, but so are the costs of making those fortunes. In the dawn of the twenty first century, the Russian crude giant Sovkomflot forged a joint venture with Swedish company Stena Bulk for the purpose of sharing in the development costs and profits of a new generation of tankers to carry Russian crude from the Gulf of Finland and Russia’s High North to the European Continent. When the resultant flagship, Stena Arctica, was completed in 2005, she was the world’s largest tanker in her ice class. Capable of lifting 117,100 tonnes of crude, though, the Owners were taking no chances, with a heavily reinforced hull that is wide-bodied and shallow, so that she can minimise risk when navigating through hazardous waters, and a propulsion system massively over-specified than that for normal tankers, helping her to get out of trouble as fast as she got into it. The vast achievements of

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technology have certainly transformed the business of navigation but if vigilance and care are relaxed, if the most advanced scientific aids to navigation fail the officer of the watch, the old sea demons of storm, rock, shoal, ice and fire lie in wait.\textsuperscript{170}

The opportunities presented by global warming encouraged Russian initiative to develop exponentially in this environment. In December 2009, the Russian Government released a press story to the newswires that Prime Minister Vladimir Putin had launched an oil tanker which was capable of slicing through over a metre of ice, bringing Russia a step toward its decade-long ambition to launch its first offshore oilfield in the Arctic. The Kirill Lavrov had been designed for Sovkomflot in a masterly sweep of lateral thinking; the naval architects have developed a theory – in fact, evolutionary rather than revolutionary as the original idea is nearly a century old - using a specially designed ice-breaking stern in heavy ice and a bow for open water. As a shuttle tanker, especially designed to transport oil by sea from Russia's offshore oil fields in the Arctic, she is capable of lifting 70,000 tonnes of crude. Dually classed with Lloyd's Register and the Russian Maritime Register of Shipping, she and her sister, Mikhail Ulyanov can reach a speed of 16 knots moving ahead in open waters, but can break through ice 1.2 metres thick when moving astern at a speed of three knots, shuttling the crude drilled to the buyers' orders, all year round, irrespective of winter ice.

The regulatory demands are high, as the international community demands in the modern era of environmental awareness. The revised structural requirements for the Polar Ship Rules of the International Association of Classification Societies reflect those demands, forcing upward trends in shipbuilding costs that must be balanced somewhere if the Owners' shareholders are going to make the dividends that make their investment risks worthwhile. It must, after all, come as no surprise that the two Sovkomflot newbuildings represent the highest order, in terms of cost, in the history of Russian merchant shipbuilding. But the potential rewards presented by the opportunities make the risk worthwhile; the world’s media was in no doubt that this newbuilding project was developed on the back of confidence in Russia’s claim to the Arctic region's potentially huge mineral riches.

\textsuperscript{170} The Late Captain Arthur Raymer, one of the founding fathers of London’s Honourable Company of Master Mariners, stated in a private paper (c 1935 but undated) in the author’s collection: “The loss of many well found ships gives the lie to the theory that science has taken danger out of the modern sailor's life.”
High Arctic Casualty Risks: The Master’s Accountability in Context

While the regulatory demands seek to offer comfort in the construction of ships in this environment, the real accountability rests on the shoulders of the Master in command of such a vessel. As representative of the Flag State and agent of the Owner (although not necessarily in that order), the Master of such a ship is more comfortably placed when confronted with Port and Coastal State environmental demands but, for all the engineering progress made today, the geography remains as hazardous as ever, as evidenced in The United States Coast Pilot\textsuperscript{171}:

Each season has its own weather problems, each waterway its own peculiarities.... \textit{The ice threat is compounded by fierce winter storms which} bring a variety of wind, wave, and weather problems on an average of every 4 days. A combination of strong winds, rough seas, and cold temperatures can result in superstructure icing, in which sea spray and sometimes precipitation can freeze to a ship’s superstructure. This adds tremendous weight and creates dangerous instability..... \textit{Fog can form in any season, but is it most likely in spring and early summer, particularly over open waters. Along the shore, fog is also common in autumn. Occasionally, steam fog will develop during the winter}....

The Master’s professional judgment is the key feature upon which command decisions are taken on the management of risk. As a direct consequence, it is upon the Master’s professional judgment that their accountability will stand or fall. By no means is the Master doomed to absolute liability – but it will be tested under the stress of cross-examination at Trial. In Grace v General Steam\textsuperscript{172}, a case involving the Master’s accountability for their professional judgment on whether a port was safe due to ice conditions, it was wisely held (obiter) that when a claim for damages is being considered, the event has happened and need no longer be forecast. In this context, the Master should not be deprived of his remedy merely because, in ignorance of the danger, he entered a port which well-informed men might erroneously have pronounced to be safe; nor is he to be given damages if he sustains

\textsuperscript{171} United States Coast Pilot 6, 38th Edition, 2008, The Office of Coast Survey (OCS), an Office of the National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA) Narragansett, RI

\textsuperscript{172} G W Grace & Co Ltd v General Steam Navigation Co Ltd [1950] 2 KB 383, [1950] 1 All ER 201, 83 LJR 297
injury in conditions which fall short of the danger-point merely because well-informed men might have erroneously pronounced his entry to be foolhardy.\textsuperscript{173}

It is a valuable exercise to compare the wisdom of this decision with those which prevail in more recent case studies, such as that of the Hebei Spirit. The difference, of course, lay in the shifting sands of the normative ethics of Port State societies, which have done so much to advance the current law of criminal accountability. This has chilling significance when applied to the High Arctic. The introduction of constant maritime traffic to the region must be an essential consequence of the exploitation of mineral resources in the region; while the retreating sea ice will enable deep sea trade to use the Northwest Passage and thus reduce voyage routes from Europe to the Far East by some 5,000 miles.

Casualties in the High Arctic are already manifesting themselves. In July 2010, two Russian-flag tankers owned by the Murmansk Shipping Company, Indiga and Varzuga, loaded with 13,300 tons of diesel-fuel, were sailing through the partly ice-covered Northern Sea Route, saving both time and cost as the distance from Europe to Asia via the north is much shorter than traditional routes through Suez, Panama, or around Africa to Asia. Then, at an exact position not given, they collided in difficult ice conditions, exacerbated by poor visibility. The hull of Indiga was damaged, but the vessel did not lose seaworthiness. No spill was reported but the risk was clear and apparent. Each was capable of lifting 16,000 tonnes of crude, and both were ageing sisters – the Indiga was built in 1976, the Varzuga in 1977, designed before ship construction specifications and Port State laws changed in the wake of the Exxon Valdez and successive casualties.\textsuperscript{174}

On the 1\textsuperscript{st} September 2010, the Nanny was 11 nautical miles from Pointe au Pic, Canada, bound for Montreal with a cargo of 2.4 million gallons of diesel fuel when she ran aground on a sandbar about 50 kilometres southwest of Gjoa Haven, Nunavut, Canada in Simpson Strait within the Arctic passage. Plans were made to transship some of the cargo to another ship, to lighten the vessel so she could float off the sandbar. The operation to ease her off the sandbank took two weeks. Given her ability to lift 9,177 tonnes of environmentally deadly oil or chemical-based cargoes, the potential hazard raised alarm bells in the media – and in the local communities, whose inhabitants, of course, would have such things in mind when they voted in the next elections.

\textsuperscript{173} Ibid, p394
\textsuperscript{174} Bizarrely little information has been revealed about this casualty, but see Barents Observer 19 July 2010, Barents Observer, Kirkenes
Then the short-sea tanker Mokami, incredibly belonging to the same company in the Woodward Group, ran aground on the 4th October 2010 in the harbour of a small coastal Labrador community, although the company that owns it said she was empty. Although she was more diminutive with a cargo-carrying capacity of 3,015 tonnes, it transpired that, in a four month period Mokami ran aground three times, and there was one grounding in previous years.

The Woodward Group casualties naturally invite conclusions to be drawn on whether the causes were on the part of the Owner, or the Master, or technical error for which neither were responsible\textsuperscript{175}.

A prosecution of the Master on the basis of criminal negligence raises the issue, again, as to whether the evolution of the law of criminal negligence leads to the criminalisation of the Master, falling beyond the protection of UNCLOS and MARPOL.

As J B Ismay, Chairman of the White Star Line, discovered in 1912, the adjective ‘unsinkable’ appears only in the vocabulary of the foolhardy; while the special hazards in the Arctic, presented by icebergs floating freely through the shipping lanes for much of the year, and poor visibility for even more of the time, with extreme cold and high winds, conspire to increase the likelihood of a casualty and reduce the likelihood of an effective response.

The prospect of an early settlement of the conflicting jurisdictional claims by Canada, Russia, the United States and Denmark (not to mention Norway and Sweden) in the High Arctic may be euphemistically described as unlikely. Without such a treaty, there can hardly be established a consensus on rights of sovereign legal jurisdiction and, in consequence, the Master who meets with an environmental accident which devastates the innocent wildlife of this region, is unlikely to be gifted with mercy by the Coastal State which has suffered. To this extent, the High Arctic scenario predicts a deepening gulf between the theory of jurisprudence and the reality of normative ethics in contemporary society. Bauman’s understanding of the fairness of criminal justice demands that humanity and reasonableness in punitive justice are dependent on the choice which a society makes in evaluating and applying moderation in the punitive process\textsuperscript{176} but a moderate approach is an unrealistic

\textsuperscript{175} See Dawson, J, 26 September 2010, The Star, Toronto Star Newspapers Ltd, Toronto
\textsuperscript{176} Bauman, Z, 2000, Social issues of Law and Order, British Journal of Criminology, Oxford Journals, Oxford University Press, Oxford, 40 205-221, developing the basic concept described in Bauman’s 1987 work Legislators and Interpreters: On Modernity, Post-Modernity and Intellectuals, Polity Press, Cambridge, Ma
possibility when confronted with a pristine environment that the Coastal State’s society sees to have been raped by an event whose origins lay in the lust for a trading profit.

The solution, however, visits Bauman’s concept of moderation upon the international regulation of relationships already in place between Port State and Flag State. The Master has been appointed by the laws of the Flag State, the Flag State owes Convention obligations to the Port or Coastal State, thus the Master has already volunteered himself as accountable to the normative ethics of the sovereign laws of the Flag State, which must meet its Convention obligations. In the contemporary model of jurisdictional uncertainty in the High Arctic, the Coastal State which has suffered loss will likely achieve much more in terms of a fair deal in justice and in compensation if it addresses the Flag State on such matters.

From the Master’s point of view, only if the Flag State’s criminal justice system fails to embrace the concept of moderation, does this cunning plan break down.
Section Three: The Golden Thread laid Bare

3.1 Criminalisation and Sovereignty

(i) Risk Management by Port State – the Cradle of Criminalisation

Overview

This chapter turns the focus of the work on the key mischief identified in the introduction, by analysing case studies to illustrate the tensions between jurisprudence and the normative ethics of Port State jurisdictions leading to the concept of Criminalisation. In this way, the work develops the key themes which are necessary to address in the reasoning of the core issue in the concept.

Captain Laptalo and Port State Justice

Article 2 of UNCLOS defines maritime sovereignty of a Coastal State beyond any doubt, to extend beyond its land territory to the territorial sea, which Article 3 identifies broadly as the 12-mile limit. The purpose of the territorial sea naturally is to ensure that the State can implement and enforce its laws, in the protection of its people, by addressing key priorities, including health and safety, immigration, defence and terrorism, marine and agricultural environmental protection, revenue and resource protection. It is axiomatic that the way in which the state legislates for this must reflect the moral standards of its society, regulating its concept of right and wrong which underpins the concept of Justice. This must, itself, be defined, in order to present a persuasive argument for the ethics which flow from it. John Stuart Mill’s conclusions on the nature of Justice focus on the classification of moral rules of behaviour, which go beyond any other rules for guidance in life by identifying an absolute obligation, in the maintenance of well-being for that particular society\textsuperscript{177}.

UNCLOS provides a strong check on unlimited management control by Port State on ships

\textsuperscript{177} Mill, JS,1863, Utilitarianism, Parker, Son & Bourn, London, p61
engaged in innocent passage through territorial seas. Article 27 states that the criminal jurisdiction of the Coastal State should not be exercised on board the ship of another Flag State passing through its territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only if the consequences of the crime extend to the Coastal State; or if the crime may disturb the peace of the country or the good order of the territorial sea; or if it is necessary to do so in order to control illegal drug trafficking; or, if the Master (or a diplomatic officer or agent of the Flag State) specifically asks the Coastal State to assist. In any such circumstances in which the Coastal State seeks to exercise its criminal jurisdiction on the vessel, if the Master so requests the Coastal State must notify Flag State.

The problem arises when the Port State’s society’s concept conflicts with the understanding of Justice held by societies in other States, particularly where laws are promulgated in a State, which are inconsistent with its Treaty obligations with other States.

The recent case of the Coral Sea illustrates the position of the Master under God, when the normative ethics of society clash with the rights of a ship registered under another flag in its sovereign jurisdiction. Captain Kristo Laptalo was Master of the Coral Sea; with the fine lines of a reefer built in 1976, she was registered in Nassau under the Bahamas flag. A Croatian national, Captain Laptalo was 58 when, in June 2007, his ship loaded a cargo of 200,000 pallets of bananas at the Ecuadorian port of Guayaquil. A routine search by Ecuadorian police failed to reveal any evidence of illegal drugs having been stowed with the cargo.

The charterers initially nominated the port of discharge as Civitavecchia, Italy and the ship sailed on the 6th July. Then, 13 days later, orders were received from the charterers instructing them to steam to the port of Aegion in Greece. More specific orders, to discharge 27,377 pallets at Aegion, came 17 days into the voyage. So they did.

The cargo was resting shore-side at Aegion when a quality check carried out by the ship’s agent revealed that 51.6 kilos of cocaine had been hidden in the cargo. The ship had been cleared to sail and was awaiting the pilot, when Captain Laptalo was informed of the discovery, and he promptly disembarked to inspect the pallets himself.

He was then arrested by the Greek authorities, together with Lithuanian first mate Konstantin Metelev and Filipino bosun Narciso Carcia. Captain Laptalo was remanded in custody at Korydallos prison, a high security jail on the outskirts of Athens, while his
lawyer, Stamatis Tzelepis of the Ioannis Iriotis law office, expressed some remarkable personal opinions to Lloyd’s List\textsuperscript{178}, saying that the fight to have the men freed on bail would be difficult; that jailing of crew in drug cases was almost routine in Greece; and making a number of comments to Lloyd’s List which shed some light on his professional opinion of the approach taken by the Courts in this situation. As a litigation lawyer, his opinion may carry some authority when he criticised the judges’ decision in what was, in his experience, a unique case in which they had convicted his client without any evidence of guilt whatsoever, neither as to the circumstances of the case nor of any guilty mind on the Master’s part – in Mr Tzelepis’s submission rendered obvious by the fact that Captain Laptalo did not even know which port of discharge the charterers would nominate when they left Ecuador.\textsuperscript{179}

The case duly went to Trial, about a year later, when, among the Prosecution witnesses, the harbour master from Aegion, far from incriminating Captain Laptalo, expressed his opinion that the Defendants could not hide drugs on the ship and that the Master was not culpable.

The Prosecution submitted, however, and the Court accepted the argument, that Captain Laptalo as Master had to know everything that was going on board the ship, including the content of the cargo she was carrying. The Prosecution also submitted that it was illogical that someone would send cocaine without any control over it. They said that the claim by the Ecuadorian police that they had inspected the cargo before the ship sailed proved that the drugs were loaded onto the ship somewhere in the open sea.

Some of the evidence was the subject of comment by the vice president of the Seafarer’s Union of Croatia, Predrag Brazzoduro, who told Lloyd’s List that the Court’s decision was based on the Prosecution’s wishes, whose witnesses denied the charges\textsuperscript{180}. Brazzoduro echoed the shock with which the maritime community received the news of Captain Laptalo’s conviction, particularly focusing on their incomprehension of the Prosecutor’s assertion that he must be guilty simply because he was the Master\textsuperscript{181}.

On the 17\textsuperscript{th} July 2008, Captain Laptalo was sentenced to 14 years in prison and a fine of 200,000 euros. The first officer Konstantin Metelev and bosun Narciso Garcia were released.

\textsuperscript{178} See various editions of Lloyd’s List, Informa plc, London  
\textsuperscript{179} ibid  
\textsuperscript{180} sic - whether or not this was the literal translation of his comment is unclear from Lloyd’s List  
\textsuperscript{181} ibid
Captain Laptalo appealed against conviction and sentence. At the appeal hearing, the Judicial Council apparently found sympathy with the Defence argument that it would have been physically impossible to access the cargo once it had been loaded. Moreover, it was reported that prosecutors eventually admitted that there was no evidence that Captain Laptalo was responsible for the smuggling. Interestingly, Lloyd’s List reported that the Court heard submissions from international experts in maritime law that it is not the Master, but the company that trades bananas that was responsible for the cargo's content, as well as the location to which the ship was headed.

The Judicial Council concluded that neither Captain Laptalo nor any other Master could be prosecuted according to command responsibility – according to Lloyd’s List, setting a precedent which may be used in the future in similar cases - and the Judicial Council reversed the decision against Captain Laptalo\textsuperscript{182}.

Concurrently, and possibly without even considering it, the Court brought the decision into line with Article 6(2) of the European Convention on Human Rights, that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

What antagonised the normative ethics of the global maritime community was that Captain Laptalo’s misfortune was becoming an occupational hazard. Stephen Cotton, spokesman for the International Transport Workers Federation, articulated the industry’s opinion that this was another example of the phenomenon which was making a criminal scapegoat of Masters in order to appease the normative ethics of Port State societies, no matter the injustice perceived by the global maritime community. While expressing satisfaction with a happy outcome for Captain Laptalo, the industry’s concerns had only been reinforced by this case, that the phenomenon had exposed the Master to the risk of unfair prosecution, simply as the most convenient target in order to satisfy the normative ethics of Port State societies to find somebody to punish for an event, whether or not that somebody was blameworthy\textsuperscript{183}.

The Emerging Problem

\textsuperscript{182} Unfortunately for Captain Laptalo, the bureaucracy of Greek law had another blow to cast, when, after being acquitted on Appeal, he then was detained for having broken Greek law, according to which non-citizens of the EU can stay in an EU member state no longer than three months.

\textsuperscript{183} See International Transport Workers Federation, London, www.itfseafarers.org. Happy though we are for him we must not forget that every seafarer is potentially in the firing line. Authorities have to learn to stop reaching for the easy option and condemning the – usually foreign – ships’ officers as a gift to public opinion when things go wrong.
On the face of it, Captain Laptalo’s conviction would appear compelling evidence of the
criminalisation of the Master, as part of an evolving process of risk management by the Port
State – the prosecution of Masters is the risk treatment option in the modern global battle
against illegal drugs. The contribution of this case to the argument is considerable because it
illustrates that the Port State relied on an assumption of facts, simply arising out of the
ancient principle of the Master’s responsibility for the affairs of the ship; what it did then,
was to apply that to the normative ethics of the society of the Port State which in recent
years has legislated criminal liability for drug smuggling and concluded that the Master’s
position in law rendered his liability strict in this case; that is, obviating the necessity of
establishing beyond reasonable doubt that the Accused had possessed the necessary mens
rea for the offence in question. In the process the Master’s Human Rights had been ignored.

It is submitted that this is the critical evidence to support the contention that the
criminalisation of the Master (not merely a seafarer), according to Michalowski’s definition,
is identified as an emerging problem, insofar as it has been precipitated by the normative
ethics of society which has led to an evolving pantheon of crimes that have emerged in
recent years, as exemplified by laws for the control of environmental damage and illegal
drugs in the above case studies.

Recalling the protection to the Master enshrined in Article 230 of UNCLOS, which
provides for monetary penalties only for a pollution offence, except in the case of a wilful
and serious act of pollution in the territorial sea and the demands of Article 230(3) to
respect the Master’s Human Rights to a fair trial, it would be a miscarriage of justice for
any State’s Court to prosecute or punish a Master in some way which is inconsistent with
that – yet a chronology of convictions for pollution offences stands as evidence that States
are ignoring this.

Professor Gold asserts\(^\text{184}\) that the practice of arraigning Masters after a maritime accident
appears to have originated with the prosecution in 1989 of Captain Hazelwood of the Exxon
Valdez. Herry Lawford supports this\(^\text{185}\), lending weight to the view that the Exxon Valdez
case had an important effect on the normative ethics of American society - from the
Government to the People and those who influence its opinions in such matters, notably the
environmental experts and the media – as to how it should respond to an oil pollution event.

\(^\text{184}\) Gold, op cit p3
\(^\text{185}\) Herry Lawford, UK P&I Club in a paper to the MLAANZ Conference, Melbourne 3\(^\text{rd}\) October 2002
entitled Criminal Responsibility in Shipping
Hitherto, a Master had no cause to suspect that they would risk serious criminal punishment for an error in navigation or shipboard management. For his part in the Exxon Valdez event, Captain Hazelwood was arraigned on a range of felony charges, on which he was subsequently acquitted, but was convicted of a misdemeanor charge of negligent discharge of oil, fined $50,000, and sentenced to 1,000 hours of community service (a sentencing alternative to imprisonment).

The Company faced a claim for record punitive damages on the allegation that it had to bear responsibility because it had put a drunk in charge of its tanker. There is some truth in this: Captain Hazelwood was an alcoholic before his appointment to command the vessel – but no finding of fact was made that he was drunk at the time of the grounding. According to some compelling journalistic research, it is also true that, in 1985, he was Master of Exxon Chester with a cargo of asphalt when she ran into a storm, in which her mast was damaged, carrying away her radar and radio communication. While the crew prepared to abandon ship, he apparently rallied them and guided them to safety.186 After he was appointed Master of Exxon Valdez in 1987, she subsequently received safety awards in 1987 and 1988. The criminal punishment of the Company paid scant regard to Captain Hazelwood’s merit, and led to a generation of litigation in the case of the punitive damages awarded against it. While Exxon made a concerted struggle to mitigate its corporate position, there is no evidence of any paternal relationship between the Master and the Owner in this case.187

The problem was emerging of a Port State ethic to criminalise the Master, accompanied by a distancing by the employer from their employee, the ship’s Master, in order to avoid or mitigate the risk of accountability.

Herry Lawford very properly points out that criminal accountability evolved as a management control tool by the UK in the nineteenth century, though. This development of statutory regulation culminated in the Merchant Shipping Act 1894, which reflected Society’s demand for the control of ship safety by criminal penalties for disobedience. So, for instance, by section 442, if a Master allowed the ship to be loaded so that the key part of the load-line was submerged, he (with the Owner) would be guilty of a criminal offence. Another example can be found in section 457(2) which provided that the Master would be guilty of a criminal offence if he knowingly took a ship to sea in such an unseaworthy state as to endanger life.

This rationale has been developed with current law which confirms the Master’s position as

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186 Behar, R, 1989, Joe Hazelwood’s Bad Trip on the Exxon Valdez, Time Magazine, NY
187 Ibid
the individual with ultimate responsibility – and, hence, accountability. Section 98 Merchant Shipping Act 1995 holds the Owner and Master criminally liable if their ship is dangerously unsafe, as defined by Section 94(2), whether as to the condition, or the unsuitability of the ship or any part of her or her equipment, or any other matter relevant to her safety. This provides a convenient springboard to launch into one of the most pertinent case studies on criminalisation, for it addresses the very statutory provisions which would confront Captain David Lewry in 1987, underlining Professor Gold’s assertion\textsuperscript{188} that the major policy influencers – the shipowners, the exporters, the traders and the insurers – had never even acknowledged that there was much of a problem, and nobody listened to the Master.

\textbf{The Case of the Herald Of Free Enterprise}

By the summer of 1986, the board room of P & O Ferries was thinking hard about its long-term strategy, in order to keep its position in the market-place and satisfy the shareholders. Paradoxically, it was this decision which led to the Company taking over the Ownership and operation of the ill-fated Herald of Free Enterprise, just a month before her foundering. The Herald was one of three sisters, a modern roll-on/roll-off passenger/vehicle ferry grossing 7,950 tons, and one of the largest vessels of her type when she left her German builders in 1980. She had been designed at a time when her Owners, Townsend Thoresen, knew that every second and every penny counted in the cut-throat competition on the English Channel. Indeed, so thorough had her design concept been, that the linkspans at either end of her planned service, between Dover and Calais, were especially built to match the levels of the ship’s car decks, in order to enable simultaneous loading of both decks and thus minimise the time required for turn-around in port.

The competition just carried on growing on the English Channel, one of the most crowded seaways in the world – and the Dover-Calais run was the most competitive crossing, because it was the shortest – just 22 miles long. While the UK’s growing trade with the European Community undoubtedly contributed to the rising demand, competition was heating up thanks to a number of factors. In July 1984 The UK Government announced the privatisation of the former State-owned ferry operator Sealink, which would lead to more pressure still on the competitiveness of the rival ferry operators on the route. Then, in 1986, after generations of aborted attempts to initiate a tunnel project, and in the teeth of bitter

\textsuperscript{188} Gold, op cit p2
opposition from the ferry operators, the French and British governments finally gave the go-ahead to build the Channel Tunnel.

In the face of these factors, the board rooms of ferry operators had to consider how best to conduct their prime function: to maximise a yield for their investors. It was against this background, that P & O Ferries had to make some bold business decisions. As a short sea shipping company, it had a hugely successful tradition, making the most of its once-mighty foundation in the shape of the General Steam Navigation Company, whose controlling interest had been acquired by P & O in late 1920, and then bought outright in 1972 when P & O remodeled it as P & O Ferries (General European) Limited

It was the management of the financial risks and opportunities which were uppermost among the concerns in the board room of P & O Ferries; safety management did not feature in their job descriptions. Out of that management of risk, they found a solution, when they resolved to buy out their very formidable rival, Townsend Thoresen, reducing the competition and spreading the overheads. In February of 1987, the deal was completed and the directors of P & O Ferries implemented their plans for maximising the financial yield.

Their own ferries on the Dover-Calais route were doing their job very satisfactorily; they did not need Townsend’s tonnage there, so it was decided to switch the Herald of Free Enterprise to the Zeebrugge route. The only problem was that the linkspan at Zeebrugge had not been designed with the Herald in mind, so that, for the vessel’s upper vehicle deck to be accessed by the ramp, it was necessary to trim the ship by the head and flood her ballast tanks, to lower the level of the vehicle deck to the linkspan.

When the Herald left Zeebrugge on the 6th March 1987, not all the water had been pumped out of the bow ballast tanks, causing her to be some 3 feet down at the bow. Mr Stanley, the assistant bosun, was responsible for closing the bow doors but he had been released from duties by the bosun before the sailing time. He duly went to his cabin and fell asleep; tragically, he slept through the ‘Harbour Stations’ call which ordered the crew to their assigned sailing positions. It was not part of any body else’s duties to ensure that the bow doors were closed before sailing, save the overriding duty of the Master to ensure that the vessel was in all respects safe to proceed to sea. Her design of clamshell bow doors made it impossible for Captain David Lewry to see from the bridge if the doors were opened or

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closed, though.

The Herald sailed at 7.05 pm local time, with a crew of 80 and some 459 passengers, 81 cars, 3 buses, and 47 trucks. Passing the outer mole 19 minutes later, she increased speed, when a bow wave began to build up under her prow. At 15 knots, with the bow down 3 feet lower than normal, water began to break over the main car deck through the open doors at the rate of 200 tons per minute.

In common with other roll on – roll off vessels, the Herald’s main vehicle deck lacked transverse bulkheads and, so, the sudden flood of water through the bow doors quickly caused the vessel to become unstable. The Herald listed 30 degrees to port almost instantaneously, as water continued to pour in and fill the port wing of the vehicle deck, causing her to capsize 40 seconds later. The Herald settled on the sea bed at slightly more than ninety degrees with the starboard half of her hull above water. There had been no chance to launch any of the ship’s lifeboats.

At least 150 passengers and 38 members of the crew lost their lives when the vessel capsized, the worst disaster for a British vessel in peacetime since the sinking of the Titanic in 1912.

The prevailing legislation at that time for the conduct of an inquiry was the Merchant Shipping Act 1970, defining the statutory provision for a judicial investigation into the loss or presumed loss of a UK-registered ship anywhere in the world, as is the responsibility of the Flag State, or such loss of any ship that foundered in UK territorial waters, as is the responsibility of the Port State. This Formal Investigation was conducted by Mr Justice Sheen190, whose findings sent the industry into nervous shock.

The Court heard the evidence of a director of the Company, Mr Develin, who, when asked who was responsible for considering matters relating to safety in the navigation of the Company’s ships, answered, Ashore, the system would be to take a consensus of the senior masters. The Judge took the view that, without a properly qualified marine superintendent, it sounded sensible to rely on such a consensus; the problem revealed by the evidence, though, was that the shore management took very little notice of what they were told by their Masters. In any event, the Masters only met infrequently – indeed, for some two and a half years there had been no meeting at all between Management and Senior Masters,

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although, latterly, there had been some improvement in this. What really became very clear to the Judge, though, was the frustration felt by the Masters that the Marine department simply did not listen to the complaints or suggestions or wishes of their Masters. And the Judge agreed.

But that was no defence to the charge against Captain Lewry that, as Master of the vessel, he knowingly took a ship to sea in such an unseaworthy state as to endanger life. The Judge was compelled to address this strictly according to the statutory provision (as summarised above). He explained his findings in full on this:

Captain Lewry was Master of the Herald on the 6th March 1987. In that capacity he was responsible for the safety of his ship and every person on board. Captain Lewry took the Herald to sea with the bow doors fully open, with the consequences which have been related. It follows that Captain Lewry must accept personal responsibility for the loss of his ship.

In judging his conduct it is right to look at it in perspective. Captain Lewry has served at sea for over 30 years. He has held a Master’s Certificate of Competency (Foreign Going) for over 20 years, and he has been in command of a ship for 10 years. Captain Lewry joined the Herald on 13th March 1980 as one of five masters. The Company has issued a set of standing orders which included instructions for Readiness for Sea, which required heads of department to report to the Master immediately they were aware of any deficiency which was likely to cause their departments to be unready for sea in any respect at the due sailing time. In the absence of any such report the Master was advised to assume, at the due sailing time, that the vessel was ready for sea in all respects. As a result, Masters came to rely upon the absence of any report at the time of sailing as satisfying them that their ship was ready for sea in all respects. On the 6th March, Captain Lewry saw the Chief Officer come to the Bridge. Captain Lewry did not ask him if the ship was all secure and the Chief Officer did not make a report. Captain Lewry was entitled to assume that the assistant bosun and the Chief Officer were qualified to perform their respective duties, but, in the words of the Judge, he should not have assumed that they had done so. He should have insisted upon receiving a report to that effect. It was apparent to the Judge, however, that the shadow of blame on Captain Lewry should be mitigated by three particular points:

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191 Ibid, para 12.1
1. Captain Lewry merely followed a system which was operated by all the Masters of the Herald and approved by the Senior Master, Captain Kirby.

2. The ‘Ship’s standing orders’ issued by the Company made no reference, as they should have done, to opening and closing the bow and stern doors.

3. Company ships had proceeded to sea with bow or stern doors open on five known occasions before the Herald casualty.

Some of the incidents in point 3 were known to the management, who had not drawn them to the attention of the other Masters. Captain Lewry had, himself, said in evidence that, if he had been made aware of any of those incidents, he would have instituted a new system on board his ship which would introduce positive reporting to ensure that the doors were closed. The Judge viewed his evidence with a certain caution, however, commenting, rather, that

It is possible that he would have done so. But those Masters who were aware of the occasions when ships proceeded to sea with bow or stern doors open did not change their orders.... The fact that other Masters operated the same defective system does not relieve Captain Lewry of his personal responsibility for taking his ship to sea in an unsafe condition. In so doing he was seriously negligent in the discharge of his duties. That negligence was one of the causes contributing to the casualty.\(^{192}\)

While the function of the proceedings was to investigate the cause of the casualty, it did not have the power to punish – save, under section 56 (4), which provides that, if, as a result of the investigation, an inquiry is satisfied that a UK-qualified officer has been seriously negligent in the discharge of his duties, and if the inquiry is satisfied that it caused or contributed to the casualty, he may cancel or suspend the officer’s certificate. In Captain Lewry’s case, the Court took into account the mental and emotional strain which had burdened him as a result of the disaster but, on balance, felt that it would be failing in its duty if it did not suspend his Certificate of Competency. Accordingly, the court suspended Captain Lewry’s Master’s certificate for one year.

It was not Captain Lewry whom the Judge identified as the villain of the piece, though. While the apparent fault lay with the shipboard management function, that is, the individuals with hands-on control of the crisis - the Master, the Chief Officer and, to a

\(^{192}\) Ibid, para 12.5
lesser extent, the assistant bosun – the inquiry could not avoid drawing the conclusion, after analysing the exhaustive evidence, that the underlying fault lay within the management control structure, and those responsible for safety as a strategic function of the company. Some safety system had to be rolled out on a company-wide basis, which was down to the responsibility of the company’s directors. It was, after all, their ultimate responsibility to ensure that the safety of their passengers was maintained, which, to the Judge’s mind, should have led them to ask themselves, what orders should be given for the safety of their ships? The Board, however, did not appear to have appreciated their responsibility for the safe management of their ships. As a result, not a single director had been charged with the duty of organising safety on the Herald. In terms of Board responsibility, this was understandable, if inexcusable – As with most companies, the Board’s management function was designed primarily to ensure a profitable yield for the shareholders. And that was what led to the Judge’s comments in the Report, which have subsequently rumbled thunderously through the boardrooms of every shipowner in the country:

All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.\(^{193}\)

While Mr Justice Sheen had exercised his power to deal with Captain Lewry by way of reviewing his certificate of competency, though, the Judge had no power to order any redress against the Company; recourse would have to follow in a more appropriate Court. And while His Lordship criticised the directors in the Herald Inquiry in the most scathing terms possible, the same words, paradoxically, became the directors’ salvation. The fact that the evidence led to the conclusion that the directors had not appreciated their responsibility for the safe management of their ships, that they had not applied their minds to the question of safety and their lack of comprehension of what their duties were, showed that no director had assumed any personal responsibility which underpinned a duty of care and, in the absence of that, there could not be any realistic prospect of a conviction for manslaughter against a director and, thus, under the identification doctrine, no prospect of a successful prosecution against the Company for corporate manslaughter.

Mr Justice Taylor had to wrestle with the concept of the controlling mind in the ensuing

\(^{193}\) Ibid, para 14.1
prosecution of P & O Ferries in the Herald case, when he re-stated the law that a corporation may be culpable of the crime of corporate manslaughter where an individual, who is part of the corporation’s controlling mind, does an act which fulfils the pre-requisites for the crime of manslaughter. However serious the disease of sloppiness had taken hold, the mere failure of the management system to prevent a death, in the absence of an individual guilty of manslaughter, could not, itself, sustain a conviction. In the trial against P & O, therefore, the prosecution was doomed to fail. After a half-time submission, the judge ruled that the prosecution was not in a position to satisfy the doctrine of identification.

**Criminalisation of the Master’s Professional Judgment**

Although the Corporate Manslaughter and Corporate Homicide Act 2007 has sought to redress such a problem in future, the iniquity of the situation, which saw the Company escape liability but punished the Master, compels some sympathy with Professor Gold’s observation that contemporary case law offers the view that the Master today seems to have many responsibilities but few, if any, rights, asserting that the Master’s command function is derived from a number of customary rules, very few of which are defined in terms of legislation – he remains Master Under God with all the express and implied responsibilities that led to Captain Laptalo’s prosecution in Greece.

In his Judgment in Grace v General Steam Navigation Company, a civil case involving an allegation of negligence on the part of the Master, Mr Justice Devlin famously expressed his sympathies with the Master, whose professional judgment on all the factors determining safety must be exercised at the time when the Master makes his decision to proceed. While they have to anticipate situations as part of their risk management function, the Master is not expected to be clairvoyant. As a result, their professional judgment will be based on factors such as the estimated position which would be reached at the planned time by any

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194 R v P & O European Ferries (Dover) Ltd [1991] 93 Cr App R 72
195 In February 2011 the first corporate prosecution under the much-heralded Corporate Manslaughter and Corporate Homicide Act 2007 ended with a conviction and fine of £385,000 against Cotswold Geotechnical Holdings. With the Herald case very much to the fore in the Law Commission’s proposals, the new Act was designed to remove the troublesome need to identify a culpable individual in the controlling mind in order to convict a company of manslaughter. In truth, the Cotsworld Geotech case gives the Crown little cause for optimism – the prosecution of a much larger company must first be achieved.
196 Op cit, p6
197 G W Grace & Company Ltd v General Steam Navigation Company Limited [1950] 2 KB 383
well-informed and experienced Master; if a decision is based upon such an estimate the Master’s culpability will not be affected by the fact that, in the light of subsequent events, it is proved to be erroneous. At most that would be a mere error of judgment, which does not itself give rise to liability in negligence, which is dependent upon a wrong done and an injury actually sustained, giving rise to a right to damages; that right does not, by itself, follow someone’s estimate of whether a wrong is likely to be done or an injury likely to be sustained. As Justice Devlin concluded,

A Master is not to be deprived of his remedy because, in ignorance of the danger, he entered a port which well-informed men might have erroneously pronounced his entry into the port to be foolhardy\textsuperscript{198}.

The question in this case depended upon the Master's own judgment, a very subjective issue for a mere error of judgment will not itself give rise to a claim in negligence – it must be established that the standard of care reasonably owed by the Master as a professional person has been broken. Historic authority for distancing the idea of a mere error of judgment from liability for negligence is found in the British Wreck Commissioner’s Inquiry into the Titanic disaster, in which Sir Robert Finlay, representing the White Star Line, invited the Court to find that there was no error of judgment on the part of the navigating officers whatever, to which the Wreck Commissioner, Lord Mersey, said:

That means also no negligence.

Sir Robert Finlay replied, Certainly\textsuperscript{199}.

The picture in current law has evolved more clearly, still, to shed much light on the standards by which an allegation of negligence must be tested. This is conveyed articulately in the recent case of Passarello v Grumbine\textsuperscript{200} in the Superior Court of Pennsylvania, which establishes key principles for us, and clarifies the issue well that, in cases in which the judgment of a professional person is concerned, negligence cannot be established merely because of an unfortunate result which might have occurred despite the exercise of reasonable care. This case involved a claim in negligence against a physician but the rule applies equally to Masters that such professional persons are permitted a broad range of judgment when carrying out their professional duties and so are not liable for errors of

\textsuperscript{198} Ibid, p394
\textsuperscript{199} British Wreck Commissioner’s Inquiry, Report on the Loss of the “Titanic” (ss) (30 July 1912), Day 28
\textsuperscript{200} Steven P Passarello and Others v Rowena T Grumbine and Others, No 1399 WDA 2010; 2011 PA Super 199
judgment unless it has been proved that an error of judgment was the result of negligence. Crucially for the case of the Master, it was held that the standard of care to be established in professional negligence cases is objective in nature, because it focuses on the knowledge, skill, and care normally possessed and exercised by the professional in question. Consideration of a mere ‘error of judgment’ improperly refocuses attention on the professional’s state of mind at the time; it is improper because the civil tort of negligence is concerned with consequences, a test which must be objective, rather than the Defendant’s state of mind, which must be established by a subjective test.

This underscores one of the critical problem areas which define the ills of criminalisation, for the evolution of modern criminal liability owes a great deal to the civil tort of negligence. The downstream consequence is that the characteristics of certain crimes, to which the Master has been exposed in recent times, have had to evolve in reliance upon the civil tort of negligence in order to meet social demands for the criminalisation of the Master’s professional activity; Passarello v Grumbine homes in on the key point, that the respective objective and subjective tests for establishing liability are irreconcilable and render the idea of criminal negligence fatally flawed.

But the normative ethics of society will not be denied. While observing those ethics, the task of risk management by the Port State clearly demands the strict observation of the Master’s human rights during the litigation process – the right to a fair trial has long-preceded written international Conventions\(^\text{201}\). That being said, an uncomfortably large percentage of cases confirms the delicate balance to be struck between the administration of justice and the Will of the People, which may not always be harmonious. A glaring example of this is found in the case of Captain Mangouras, Master of the Prestige which, in November 2002, was involved in a catastrophic event which led to a spill of 70,000 tonnes of fuel oil into the sea, endangering marine life and, consequently, leading to a criminal investigation by the Spanish authorities. In the meantime, the Spanish Court remanded Captain Mangouras, a Greek national, in custody and set his bail at an incredible 3 million euros. The case was appealed to the European Court of Human Rights on the grounds of an infringement of the European Convention on Human Rights\(^\text{202}\).

The Court confirmed\(^\text{203}\) that a remand in custody with such a high bail could only be

\(^{201}\) Magna Carta 1215 (final amendment 1225) ‘No free man shall be seized or imprisoned, or stripped of his rights or possessions except by the lawful judgement of his peers’ and ‘To no one will we sell, to no one deny or delay right or justice.’

\(^{202}\) Articles 3 and 5 (security and liberty)

\(^{203}\) Mangouras v Spain (12050/04)
required as long as reasons justifying that detention prevailed, and that the authorities had to take as much care in fixing appropriate bail as in deciding whether or not the Defendant’s continued detention was indispensable. But the Court went on to uphold the normative ethics of the Port State over the human rights of the Master and expressed the opinion that new realities had to be taken into consideration in interpreting the requirements of the Human Rights Convention, namely what it referred to as the growing and legitimate concern both in Europe and internationally in relation to environmental offences and the tendency to use criminal law as a means of enforcing the environmental obligations imposed by European and international law\textsuperscript{204}. The Court held the view that the increasingly high standard which was demanded by individual human rights required greater firmness in assessing breaches of the fundamental values of democratic societies. In consequence, the Court could not rule out the professional environment which made demands upon a Master in Captain Mangouras’s position. The Court went further and approved the relevance of the environmental damage in considering the question, and expressed no surprise that the Spanish Court should have adjusted the amount required by way of bail in line with the level of liability incurred. The Master was in custody for 83 days before a bank guarantee for the sum was arranged, not by Captain Mangouras’s Owners, but by the Protection and Indemnity insurers.

Many would argue that this decision champions the approach of the risk society and, whether by accident or otherwise, puts the Master’s human rights down in the Port State’s list of priorities. More seriously still, by attaching a remand in custody and bail conditions, issues which are pertinent in criminal proceedings, to the seriousness of the pollution event rather than any allegation of criminal intent, the element of criminalisation has ostensibly been approved by the European Court.

The late Lord Bingham\textsuperscript{205} understood the point, which has been revealed repeatedly in this work, that governments ultimately must be accountable for the administration of justice, but governments are anxious to win the support of the voters who will return them to office at the next election, so they will concentrate on measures which will earn them the support of the majority. If the will of the majority conflicts with the rights of the minority, then the process of a prosecution risks the condemnation of those who support the minority – such as the maritime community in the case of the Hebei Spirit.

But at least the government ministers will retain their seats at the next election.

\textsuperscript{204}The author’s reading of the text of the Judgment, which is in French
The Trial process itself is dependent upon the Judge’s competent management powers, and turns heavily on a fair conclusion based on the evidence. Sometimes this may involve a judicial decision which is unlikely to satisfy the emotive opinions of local society, but the right to a fair trial demands neatrality from such emotions. In this context, the case history of the Hebei Spirit may be contrasted with another case involving General Steam\(^{206}\), in which the Claimant Owners of a lighter were seeking damages for loss sustained when the barge sank after colliding with General Steam’s Tern in the River Thames in January 1929. The River was regarded by the Watermen and Lightermen as their domain, and the loss incensed the River community, whose normative ethics demanded justice and, perhaps, a certain amount of retribution, in the form of a Judgment in their favour. It was as a result of this, that the Judge, in fact the President of the Court, declared in his Judgment that he understood their feelings, but would not be swayed from his duty:

>This case has developed a good deal of human interest as well as matters of some importance in respect of the navigation of the reaches of the River Thames which need to be investigated with absolute care and with absolute regard to the regulations\(^{207}\).

The Judge, then, is neither more nor less than the voice of the legal system to which they, through their legal training, are able to gain access\(^{208}\). In the bulk of the cases, they can gain access to the system, but cannot influence it, because they must simply follow the existing rules and principles which the system has established. Hard cases, however, demand a consideration of the legal principles involved in order to ensure the best possible result, even if this means ignoring previously-established rules. In hard cases, therefore, judges can influence the system. Professor H L A Hart\(^{209}\) conveyed the argument forcefully in terms that judges have a fairly strong discretion in determining hard cases, in which they will be influenced by the moral and political values of contemporary society. It was Hart’s view, however, that they never have complete discretion, for those influencing factors create checks and balances on the system, checks and balances demanded by society, a view which was forcefully underpinned by Lord Simons in Shaw v DPP\(^{210}\) in which he articulated the power which the Courts still hold today, of upholding the supreme and


\(^{207}\) Ibid, p292


\(^{210}\) Shaw v DPP [1962] 2 All ER 446
fundamental purpose of the law, with the purpose to conserve not only the safety and order but also the moral welfare of the state.

It is in the category of hard cases that the criminalisation of Masters falls.
(ii) **The Evolution of Injustice – Criminal Negligence**

**Overview**

Many of the case analyses shed light upon the golden thread running through this work, which challenges the very foundation of criminal proceedings in Negligence. The conclusion can be drawn that the perception of Criminalisation of the Master emerged concurrently with the development of the modern legal concept of ‘criminal negligence’. In this context, the irreconcilable differences between a crime and a tort expose the flawed basis of this hybrid concept, upon which a rational philosophy of law cannot be built for criminal negligence. The inherent weakness in the rationale of criminal negligence is at the core of the shipping industry’s dismay over the unfairness of criminal accountability of the Master in twenty first century society.

**The Case of Captain Schröder**

While I certainly do not discount the terrible consequences that have resulted from this negligence, what he has been convicted of is really a civil offense [sic]

211

Thus said Judge Callie Granade, District Judge for the United States District Court for the Southern District of Alabama, in sentencing Captain Wolfgang Schröder, Master of the Zim Mexico III who was convicted of homicide. In March 2006 Captain Schröder had been in command of the vessel, in a compulsory pilotage area, when she collided with a dock-side crane at Mobile, Alabama. The consequence led to the death of a dock-worker, in what mariners world-wide believed to be a mere error of judgment. Captain Schröder was indicted under the Seaman’s Manslaughter Statute, as Master of the ship, for misconduct, negligence, or inattention to his duties on the vessel, resulting in the death of the dock worker. The jury convicted him and he faced a sentence of imprisonment of up to 16 months. At his sentencing, Judge Granade noted that the law required jurors to find that Schröder was guilty of simple negligence, a lower standard of unlawfulness more commonly associated with civil disputes.

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211 United States of America v Wolfgang Schröder [2007] United States District Court, Alabama Southern District (currently unreported)
The problem arises in that the characteristics which define guilt in criminal law are very
different from those for establishing liability in civil law. That being said, however, the laws
of the twentieth century evolved in a process of criminalisation to make a Defendant Guilty
of a crime based upon the principles upon which liability in negligence is founded. It is
axiomatic, therefore, that the modern tort of negligence came first.

The Modern Law of Negligence

Street on Torts presents a good starting point for a definition for the law of torts as comprising:

... the obligations imposed on one member of society to his or her fellows and
provides a range of remedies for harms caused by breach of those obligations.\(^{212}\)

The main question which underlies the theory of tortious liability, is how the law must
reconcile the competing interests. An act, even though it is malicious, will not incur such
liability unless the interest violated is protected in tort. In the matter of torts, we are
addressing the consequence of the unlawful act or omission: has the interest of an innocent
third party been violated or not? The mental element is irrelevant: the civil law confines
itself to the question as to whether the Defendant was to blame for that consequence.

This is precisely identifiable in the evolution of liability for negligence, in which the
Claimant must persuade the Court that it has suffered an actionable and careless infliction
of damage as a result of the breach of a duty of care by the Defendant. The principles of the
tort of negligence were founded upon establishing a duty that arose as a result of the
relationship between the parties, and that the duty was broken. In Grant v Australian
Knitting Mills\(^{213}\), Lord Wright emphasised the priority under English law first to establish
duty before liability can be addressed; the mere fact that a person suffers loss, even by the
act or omission of another, does not by itself give a cause of action against another. The oft-
quoted maxim of Brett MR (then Lord Esher) in Le Lievre v Gould\(^{214}\) remains compelling:

\(^{212}\) Murphy, J, 2012, Street on Torts, 13\(^{\text{th}}\) ed, Oxford University Press, Oxford, p4
\(^{213}\) Grant v Australian Knitting Mills [1931] AC 85 at p103
\(^{214}\) Le Lievre and Another v Gould [1893] 1 QB 491. This case underlined the demand for hard evidence of
an acknowledged relationship, repeatedly sought in the form of a contract, which underlined the approach
of nineteenth century Courts; see also Winterbottom v Wright (1842) 10 M& W 109; 152 All ER 402;
Heaven v Pender [1883] 11 QBD 503
A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

The key to establishing liability, therefore, hinges upon the underpinning evidence which established that relationship in law - evidence which, in civil proceedings, must persuade the Court of the Claimant’s case on the balance of probabilities. Lord Denning famously described the Claimant’s burden as having to persuade the Court on the balance of probabilities that the facts underpinned its case. If, on the underpinning evidence, the Court thinks it more probable than not, the burden is discharged; if the probabilities are merely equal, then it has not\textsuperscript{215}.

The case of Donoghue v Stevenson\textsuperscript{216} defines the principles in the current law. In this case the appellant sought to recover damages from the respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. The ginger beer had been purchased for the appellant by a friend in a café and arrived at the table in its customary bottle of dark opaque glass, when the appellant had no reason to suspect that it contained anything but pure ginger beer; having had some of the contents poured into a tumbler, which she drank quite uneventfully, her friend was then proceeding to pour the remainder of the ginger beer into the tumbler when a decomposed snail accompanied the rest of the contents out of the bottle. The appellant claimed damages for alleged shock and severe gastro-enteritis. The appellant further averred that the ginger beer was manufactured by the respondent to be sold as a drink to the public (including the appellant); that it was bottled by the respondent and labelled by him with a label bearing his name; and that the bottles were thereafter sealed with a metal cap by the respondent. She further averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger beer was filled into them, and that he had failed in both these duties and had so caused the event.

It was Lord Atkin’s speech which defined the modern principle, introducing the concept of the neighbour as the party to whom the Defendant owed a duty of care:

\textsuperscript{215} Miller v Minister of Pensions [1947] 2 All ER 372
\textsuperscript{216} Donoghue (or McAlister) v Stevenson, [1932] All ER Rep 1; [1932] AC 562
You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.\(^{217}\)

Lord Atkin's colleagues illuminated his observation with their own analysis of this redefined principle of duty. It is apparent that Donoghue v Stevenson brought evolution, not revolution, to the law of negligence; nevertheless, it was this humble bottle of ginger beer which provided the hard case that led to the illumination of the principles underpinning the tort of negligence, although the principles themselves had not changed. This is well-evidenced by the nineteenth century collision cases in the River Thames, when the underpinning evidence was not contractual but statutory, in the form of the London River By-laws, Admiralty Regulations and Common Law rules on liability – as Dowell v General Steam revealed (albeit demonstrating the inconsistency between the bodies of law).\(^{218}\) That being said, Donoghue v Stevenson clarified the principle so that the Claimant must establish on the balance of probabilities:

a) that the Defendant, the party alleged to be negligent had a duty to the injured party to avoid acts or omissions which might cause him loss or damage – for example, the Master, who is responsible for safety on board their ship, clearly owes a duty of care as a result as regards lawful visitors to the ship, whether or not they are contracting parties.\(^{219}\)

b) that the Defendant was in breach of that duty of care, generally by showing that his conduct fell below the reasonably expected standard to be owed by such persons in those circumstances.

c) the Claimant must have suffered damage as a reasonably foreseeable consequence of the Defendant's breach of duty.

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\(^{217}\) Donoghue (or McAlistser) v Stevenson [1932] All ER Rep 1; [1932] AC 562, p580

\(^{218}\) Dowell v. General Steam Navigation Co (1855) 5 El & Bl 195

\(^{219}\) Mention must be made of Caparo Industries plc v Dickman [1990] 2 AC 605, where the House of Lords held that in novel factual situations, for a duty of care to exist, there must be (a) proximity between the parties, (b) foreseeability of harm / loss and (c) it must be fair, just and reasonable for the law to impose the duty; subsequently applied in Marc Rich & Co AG and Others -v- Bishop Rock Marine Co Ltd and Others [1995] 3 All ER 307; [1995] UKHL 4; [1996] 1 AC 211; [1995] CLC 934; [1995] 2 LLR 299; [1996] ECC 120; [1995] 3 WLR 227; [1995] 2 Lloyd's Rep 299, in which Lord Steyn said that the common law of negligence develops incrementally on the basis of a consideration of analogous cases where a duty has been recognised or desired.
Damages are awarded in compensation with the purpose of putting the Claimant in the position he would have been in, had the negligence not taken place – so long as that is all that the measure of damages does; they certainly cannot put the Claimant in a better position than he would have been\(^2\)\(^2\)\(^0\).

This gallop through the general principles of negligence starkly demonstrates the foundation principle characterising the tort that the Defendant’s state of mind – their mens rea, essentially – is not the determining factor in their culpability. For all the motives of the Master of the Tasman Pioneer in exacerbating an already serious casualty, the subjective motivation of the Master could not change the quality of their acts or omissions in the navigation of the vessel so as to alter the laws of civil liability\(^2\)\(^1\).

**Characteristics of a Crime**

By contrast with the civil law, crimes are wrongs which threaten the well-being of Society and, to that extent, they go beyond the mere interference with some individual’s private right; in short, Society must be protected. Sir Carlton Allen had it thus\(^2\)\(^2\)\(^2\):

> Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.

Smith and Hogan convey a compelling image in what defines the characteristics of a crime, which can be very subjective\(^2\)\(^3\):

> When a citizen is heard urging that, “There ought to be a law against it…”, he is expressing his personal conviction that some variety of act is so harmful to society that it ought to be discouraged by being made the subject of criminal proceedings.

The next sentence has stark significance for this work:

\(^2\)\(^0\) The Argonautis [1989] 2 Ll R 487

\(^2\)\(^1\) Tasman Orient Line CV v New Zealand China Clays Ltd and Others [2010] 1 LlR 41

\(^2\)\(^2\) Allen, Op Cit, pp233-234

\(^2\)\(^3\) Ormerod, D, 2008, Smith & Hogan Criminal Law, Oxford University Press, Oxford, p 7
There will almost invariably be a body of opinion which disagrees\textsuperscript{224}.

The conflicting bodies of opinion need not be confined to a particular jurisdiction however; there is nothing to prevent the observation applying to a body of opinion in a Port State with that in a Flag State, if the law in question is to be applied against both.

Smith and Hogan proceed with some critical analysis of the development of criminal law in England with the view that there has been a disproportionate use of the criminal law to deal with regulatory offences\textsuperscript{225}. In view of the purpose of the regulatory offences for pollution envisaged in UNCLOS and MARPOL, this demonstrates a key clash between the theory of criminal accountability and the Master’s criminalisation for pollution offences. The theory has been expanded by the Law Commission in a consultation paper published in 2010\textsuperscript{226}, in which it states that a crime should only be defined with a view to punishing an individuals whose seriously reprehensible conduct deserve the stigma associated with a criminal conviction. Most pertinently, it states:

It should not be used as the primary means of promoting regulatory objectives.

In the context of this theory, we can establish a simple definition of the characteristics of a crime, which needs just two elements:

1 The actus reus contains all the elements in the definition of the crime except the Defendant's mental element. It is generally, but not invariably, made up of the Defendant's conduct and sometimes the consequences of that conduct, as well as the circumstances in which the conduct took place.

2 The Prosecution must also establish the Defendant's Guilty Mind, or mens rea. The primary function of the Prosecution case therefore must be to establish the Defendant's intention to commit the crime\textsuperscript{227}. A result is intended when it is established beyond reasonable doubt as the Defendant's purpose - that is, that it was the intended result.

This was qualified by section 8 Criminal Justice Act 1967, which provides that, when assessing whether the Defendant had the necessary mens rea, the Jury shall not be bound to

\textsuperscript{224} Ibid, p7  
\textsuperscript{225} Ibid, p7  
\textsuperscript{226} The Law Commission, 2010, Criminal Liability in Regulatory Contexts, Consultation Paper No 195, HMG, London, para 1.28  
\textsuperscript{227} See R v Moloney [1985] 1 All ER 1025; R v Nedrick [1986] 3 All ER 1
infer that the Defendant intended or foresaw the result of his actions merely because it is the natural and probable result of those actions, but by the subjective test of whether he actually did intend or foresee that such result would ensue, but the Jury must apply the test objectively by drawing such inferences from the evidence as appears proper in the circumstances (the Statute’s own words).

This reference to the 1967 Act illustrates the point that it is up to Parliament as to how it qualifies the requirement of mens rea in general; how particular issues are refined, may be established by decided cases. A notable example of this in context is recklessness, qualifying the requirement of intent, which will incriminate a person in a particular offence depending on his awareness of a risk given the circumstances or the result that may be apprehended from the circumstances228.

In criminal accountability, the Prosecution must establish that the Defendant’s mens rea coincides with the actus reus required for the crime. If ever there is an illustrative authority which blends instruction with entertainment, it is the non-marine case of Deller229. The Defendant persuaded a third party to purchase his car by representing that it was free from encumbrances. Deller, however, had previously borrowed money from a finance company which had taken a mortgage over the car as security and, so, he believed that he was telling a lie – satisfying the mental element of dishonesty. When it transpired that the car was mortgaged and, therefore, very unfree from encumbrances, he was charged with obtaining property by false pretences by intentionally misrepresenting a past or existing fact, contrary to section 32 of the Larceny Act 1916. But it then transpired that the bill of sale for the transaction had not been registered in accordance with legal requirements and, therefore, the mortgage was void. The car, therefore, had been free from encumbrances all along, so the actus reus for the crime was not present, and Mr Deller’s conviction was quashed on appeal230.

The requirement of mens rea remains the key issue in determining criminal accountability; this most ancient of bastions in criminal law was upheld by Lord Reid in Sweet v Parsley231.

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229 R v Deller [1952] 36 Cr App Rep 184
230 It did not do Mr Deller a lot of good in the end, for the Court held that he could now be convicted of an attempt to obtain property by deception, which did not require the final element of the actus reus. See Ormerod, D, 2008, Smith & Hogan Criminal Law, Oxford University Press, Oxford
231 Actus non facit reum nisi mens sit rea
in the presumption that Parliament does not intend to make criminals of people who are not blameworthy for what they did\textsuperscript{232}, quoting the venerable Brett J in R v Prince\textsuperscript{233}:

Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea.

The demands made by the requirement of mens rea on criminal liability require some qualification of the general principle, if a person, who does not intend to cause a harmful result, takes an unjustifiable risk of causing it. Such is the foundation of recklessness, in which either the Defendant was aware of its existence or, in the case of an obvious risk, the Defendant failed to give any thought to the possibility of its existence\textsuperscript{234}. This will be examined in more detail below, for its importance to the argument concerning negligence cannot be understated.

No such demands of legal principles are required in a civil claim, however: merely, that the Claimant has suffered loss as a consequence of the Defendant’s behaviour. The gulf between civil liability and criminal liability rests, ultimately, therefore, on how the law determines blameworthiness. If the differences between the two are irreconcilable, then the gulf must be unbridgeable.

**The Gulf: Criminal Accountability for Negligence**

Lord Hailsham famously re-stated Brett J’s maxim when he held obiter in Haughton v Smith\textsuperscript{235},

The deed does not make a man guilty unless his mind be also guilty.

The crucial issue is that this clarifies the common law and applies also to crimes under statute law, because English statute law falls short in giving guidance on crimes involving negligent behaviour\textsuperscript{236}. The excellent reason for this, is that, historically, English law did not identify a concept of criminal negligence. In order to dissect and analyse this, therefore, we must seek some guidance elsewhere on just what the State intended.

\textsuperscript{232} Sweet v Parsley [1970] AC 132, at p 148
\textsuperscript{233} R v Prince (1875) LR 2 CCR 154
\textsuperscript{234} See R v Caldwell [1981] 1 All ER 961; R v Lawrence [1981] 1 All ER 974
\textsuperscript{235} Haughton v Smith (1975) AC 467
\textsuperscript{236} This statement must be qualified with the advent of the Corporate Manslaughter and Corporate Homicide Act 2007; more of which, below
For all the faults of the American system as demonstrated in Captain Schröder’s case, Article 33 of the Criminal Code can be paraphrased to provide a sound starting point with the guidance that an act committed with express intent to bring the desired consequence upon the victim – or with the acknowledgment of the inevitability of such a consequence by the Defendant’s action - shall be considered as a crime. This establishes the first of three limbs falling within the definition of mens rea as originally developed in Roman Law, with the concept of dolus directus (direct intent), where the consequences of an action were both foreseen and desired by the Defendant.

Naturally it is essential that this eventuality can be rejected in a case of negligence, which conveniently leaves two alternatives to be addressed. In this respect, the range of opinion differs, not only as to analysis but even as to definition. The American Criminal Code offers the distinction, and can be paraphrased in that:

1 A crime will be committed negligently if the Defendant foresaw the consequence of their action as reckless, that is, if the Defendant saw the risk or inevitability of the consequence in the action, and went ahead with the action nevertheless, thus allowing the consequence to follow or treating the risk with indifference;

2 by comparison, a crime will be committed by negligence if the Defendant either had foreseen the possibility of the risk to the victim and expected without valid reasons that the consequence would be prevented, or had not foreseen the possibility of the consequence but should have done.

By creatively associating common factors from a range of academic opinion in Roman Law, some parallels can be drawn:

1 Dolus indirectus, where some collateral consequence of an act falls upon the victim and, although foreseeable as a certainty, the consequence was not specifically desired by the Defendant; nevertheless, he carried on regardless, with full knowledge of the risk.

2 Dolus eventualis is defined where the Defendant foresees as a possibility – not necessarily a certainty - the consequence which befell the victim, and still proceeds with the act in question.

237 Criminal Negligence, Article 33.1
A great deal of disagreement, not to say confusion, bedevils the analysis of the two as discrete levels of negligence, both in academic arguments and in case law, giving rise to the inevitability of confusion. In reality, both fall within the category of a crime committed negligently under the American Code, without addressing the crime committed by negligence. On that basis, the American system touches parts that the Roman system cannot reach, namely the Defendant’s assumption of the risk – in other words, the consciousness and acceptance of the risk. In analysing the Canadian model, Lareau supports the phrase coigned by Fletcher to characterise the distinction by reference to the ‘inner posture’ of the Defendant, describing the state of mind which embraces consciousness and acceptance of the risk, even if it were not the primary consequence desired by the Defendant.

If the logic of the argument is developed, therefore, had the risk not formed part of the Defendant’s mental element, then there would not be the mens rea for a crime. It is this state of mind which offers the key to the solution, for the determination of the Defendant’s state of mind must necessarily be established by a subjective test, analysing guilt by the individual’s intent, rather than by the test which places the jury’s focus on the consequences of the individual’s acts.

The application of the principle in the context of negligence must, therefore, rest upon the definition of the appropriate test. Having discredited thoroughly the objective nature of the test in R v Adomako and condemned it in Williams v Natural Life Health Foods, a subjective test must offer the only alternative. The only outstanding issue that can remotely fall to be determined is whether the Defendant’s ‘inner posture’ had been ‘reasonable’. The question of reasonableness was defined in R v K, when the ever-redoubtable Lord Bingham put the position that the Defendant’s belief must be established as honest and genuine; if so, it need not necessarily be reasonable by any objective standard, although, the more unreasonable the belief, the less likely it is to be accepted as genuine.

In essence, therefore, criminal liability will depend upon the question as to whether the Defendant’s state of mind amounted to recklessness. If the Master of a vessel genuinely does not apprehend the risk that a crime could occur as a result of their action, then, at most,

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239 See also Fortin, J and L Viau, 1982, Traité de droit pénal général, Les Éditions Thémis, Montreal
240 R v Adomako [1995] 1 AC 171
241 Williams and Another v Natural Life Health Foods Ltd [1998] 1 WLR 830
242 R v K [2001] UKHL 41
243 see R v Williams (Gladstone) [1987] 3 All ER 411, 415
they have made an error of judgment, which leaves them blamelessly inadvertent; while such may still leave them accountable in the tort of negligence, it does not incriminate them in a crime. The test has been established under English law, in a succession of cases in criminal damage, culminating in the House of Lords decision in R v G\textsuperscript{244}. While striving to interpret the Will of Parliament – which is the Court’s prime function in the determination of criminal law - the House of Lords held a subjective standard to apply so that, a person who, without lawful excuse, destroys or damages any property belonging to another, either with intent or by recklessness, will be guilty if he is aware of the risk that a circumstance exists or will exist; or a result when he is aware of a risk that the result will inevitably follow; and it is, in the circumstances known to him, unreasonable to take the risk.

Such basic principles have evolved through a succession of judicial decisions, particularly as to recklessness. In fairness, these characterise the very essence of a hard case, which demands a consideration of the legal principles involved in order to ensure the best possible result, even if this means ignoring previously-established rules. Naturally, the judge will manage the process by drawing upon the arguments presented by the advocates – Cicero’s sage observation is as relevant today as ever, that if cases could speak for themselves, no one would employ an advocate\textsuperscript{245} – but, in hard cases, the judge can influence the system.

The constant factor running through all of them, clearly, touches upon the Defendant’s state of mind. In R v G\textsuperscript{246} Lord Bingham articulated the point beyond any doubt that conviction of a serious crime should depend on proof not simply that the Defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. Taking an obvious and significant risk by intention or recklessness would satisfy Lord Bingham of a guilty mind but not if the Defendant did not perceive the risk; whatever that made him, it did not make him a criminal.\textsuperscript{247}

**Neither one thing nor the other**

The evolution of the criminalisation of the Master has run parallel with the hard-fought campaigns in which the Courts have struggled to define criminal liability for negligence, that is, guilt in the absence of intention or recklessness. Perhaps it was a solution that was

\textsuperscript{244} R v G and another [2003] UKHL 50
\textsuperscript{245} Nam si causae ipsae pro se loqui possent, nemo adhiberet oratorem – M T Cicero, Pro A Cluentio. 139
\textsuperscript{246} R v G [2004] 1 AC 1034
\textsuperscript{247} Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.
all too easy, to take the principles of the tort of Negligence and seek to apply them to a crime, notwithstanding the irreconcilable differences between their characteristics.

It is an uncomfortable paradox, that the modern tort of negligence has had a critical, and potentially critically-damaging, effect on the Master’s criminal accountability, in the matter of manslaughter. Not that such a thing can be explained easily; in his paper The Homicide Ladder in the Modern Law Review, Victor Tadros made psychology the interrogator of the question of human behaviour when it comes to putting manslaughter into the context of normative ethics. The conclusion finds that, when a sudden death takes place, it is human nature for people to find somebody to blame, and the reasoning behind the conclusions drawn may not bear any similarity with principles of law. As a result, the blame process may not be mapped onto any legal argument defining the characteristics of the crime of manslaughter, which means that the normative ethics of society present the hazard to the process of a fair trial by demanding criteria that cannot be justified according to demands of jurisprudence. If society demands redress, therefore, the law which is put in place to serve that demand must stand up to scrutiny according to basic concepts of fairness in criminal accountability. Manslaughter has proved particularly vulnerable to such scrutiny; indeed, the very starting point has proved troublesome, for a definition has been notoriously difficult to establish. In Andrews v DPP, Lord Atkin went further and held out manslaughter as being the most difficult of all crimes to define. While the guilty mind in murder requires an intention to kill (malice aforethought), even if that intention is benign, manslaughter essentially turns on an absence of an intention to kill. The really difficult part about manslaughter, however, is establishing the factor which must still be proved, that of unlawfulness.

A succession of cases over decades exposed the need to define just how evidence of the Defendant’s state of mind should underpin gross negligence, until, in 1995, the case of R v Adomako established that the Defendant can be convicted of gross negligence manslaughter in the absence of evidence to his state of mind. In this case the Defendant was the anaesthetist during an eye operation on a patient. In the course of the operation the tube from the ventilator supplying oxygen to the patient became disconnected. The Defendant failed to notice the disconnection for some six minutes before the patient suffered a cardiac arrest, from which he subsequently died. The Defendant was charged with manslaughter. At his trial it was conceded on behalf of the Defendant that he had been negligent in the

249 Andrews v DPP [1937] 2 All ER 552 (at p554-555)
250 R v Adomako [1995] 1 AC 171
tortious understanding of the word and medical evidence was called by the Crown that the Defendant had shown a gross dereliction of care. The judge directed the jury that the test to be applied was whether the Defendant had been guilty of gross negligence. The Defendant was convicted.

Hearing the Appeal, the Lord Chancellor, Lord MacKay, referred to the opinion of Lord Hewart CJ in R v Bateman in underpinning his conclusion that the criminal law requires a fair and reasonable standard of care and competence in individuals in the position of Mr Adomako, according to the evidence required to establish liability in the civil tort of negligence. This, alone, creates a serious problem in the judicial process, for, as has been noted, in civil cases, the Claimant must persuade the Court that it has proved on the Balance of Probabilities the requisites for establishing liability, whereas in criminal cases, the Prosecution must persuade the Court that the case against the Defendant is proved Beyond Reasonable Doubt, by applying the evidence to the body of criminal law with all those characteristics special to it, that is, including the mens rea.

As if the mischief in the Court’s decision were not clear enough, however, the Judge summed up the Prosecution’s task as taking the requirements for establishing the tort and applying an objective test in order to establish the crime. In words which were astonishingly unambiguous, the Judge directed the Jury that, in order to establish criminal liability on the charges in the Indictment, the Prosecution had to satisfy them that the matters simply necessary to establish liability in the civil tort of negligence had been proved. The only factor which went beyond this level was that the facts had to persuade the jury that the negligence (or incompetence – the Judge’s word) of the Accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

The Judge’s observations on the application of civil liability massively outweigh that devoted to criminal liability; but, to summarise the principle in this case, the jury needs to consider whether:

- the Defendant owed a duty of care to the deceased; and
- he was in breach of that duty; and

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251 R v Bateman (1925) 19 Cr App R 8 (at p12-13)
252 R v Adomako [1995] 1 AC 171
• the breach was so grossly negligent that it should be seen as criminal\textsuperscript{253}.

This third factor introduces into the civil test the criminal issues contained in the passage italicized above. Lord MacKay defined gross negligence as depending:

\textit{\ldots on the seriousness of the breach of the duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury’s judgment\textsuperscript{254} to a criminal act or omission\textsuperscript{255}.}

The whole issue of the Defendant’s state of mind, his mens rea for the crime, has therefore been put into the form of an objective test determined by the circumstances and grafted on to the evidential test required for liability in civil proceedings. However the opponents of Immanuel Kant might urge him to fall back into his former dogmatic slumber\textsuperscript{256}, the logical truth of this great thinker’s philosophy exposes the fatal flaw in the objective test, with the direct consequence that the crime of criminal negligence cannot be sustained.

\textbf{The Catastrophic Failure of Criminal Negligence}

Kant identified the key characteristic of Truth as being something subjective. It may be beneficial to illustrate his, admittedly highly tortuously-argued, philosophy with a favourite anecdote which has been so oft-repeated as to arouse the suspicion of appearing apocryphal; nevertheless it serves the task well. Kant was attending a lecture by a materialistic astronomer on the topic of man’s place in the Universe. The astronomer concluded his lecture with:

\textit{So you see that astronomically speaking, Man is utterly insignificant.}

Kant replied, \textsuperscript{253}In addition, the breach of duty was ‘a substantial’ cause of death; as refined by R v O’Connor [1997] Crim LR 16 (CA) \textsuperscript{254}In this case, meaning the Jury’s conclusion \textsuperscript{255}R v Adomako [1995] 1 AC 171 \textsuperscript{256}See Kant, I, 1783, Prolegomena to Any Future Metaphysics That Will Be Able to Present Itself as a Science, reprinted 2008 by forgottenbooks.org
Professor, you forgot the most important thing, Man is the astronomer.  

Applying this in context, the underpinning issues of jurisprudence in the criminal law, so closely affecting the Defendant’s human rights, demands that the jury wrestles with the objective test dictated by Adomako in finding the Truth, which opposes intractably the reasoning of Kant. Rather, the test of the timeless criminal element of mens rea must logically demand a subjective test, which readily engages with Kant’s philosophy. The yawning gap between civil and criminal liability was, and remains, the burden of proving the essential elements. If the principle for establishing liability in Donoghue v Stevenson were to be applied in criminal proceedings, it would readily be identified that the core feature of the test is objective, while the determination of the mental element in a crime is subjective. This is the very reason why Judge Bender so forcefully ruled a consideration of a mere error of judgment out of the test for negligence in Passarello v Grumbine: the objective test is the only thing that will do in negligence. To seek to translate this test from the civil to the criminal context renders its character unsuitable to the task and, thus, the conviction in Adomako should be rejected as being unsafe. The criminal practitioner would doubtless argue that the Adomako test is the only basis upon which criminal negligence can be established – in which case criminal negligence must be fatally flawed.

This can be illustrated graphically in the contrast between the cases of Hubble and Schröder. In R v Hubble, in which the Defendant, Second Officer on the P & O Ferry Pride of Bilbao pleaded Not Guilty to three counts of Manslaughter alleged to have taken place between the 20th and 24th August 2006. The Prosecution had to prove beyond reasonable doubt that, by his gross negligence, Mr Hubble, when officer of the watch, did not take sufficient steps to avoid the looming situation warned by the look-out, that he failed to proceed on the basis that there might have been a collision, and that he took no steps to stop or inform rescue services. As the evidence unfolded, it is possible that some carelessness may have been established on the level of the civil burden, the balance of probabilities, but what they heard was insufficient to persuade the jury that the Prosecution had discharged their burden in criminal law of proving the case beyond reasonable doubt. Unable to reach even a majority decision, a verdict of Not Guilty was returned.

In the case of Mr Hubble, the verdict gave the Defendant cause to breathe a sigh of relief.

\[257\] Kreeft, P, 2004, The Pillars of Unbelief, OrthodoxyToday.org. Paradoxically, Kreeft was opposed to Kant’s philosophy by reason of his Roman Catholic beliefs

\[258\] Steven P Passarello and Others v Rowena T Grumbine and Others, No 1399 WDA 2010; 2011 PA Super 199

\[259\] R v Hubble [2007] The Crown Court Winchester (currently unreported)
The element of the yawning gap between civil and criminal liability in negligence, however, which gives growing cause for concern, was highlighted very starkly in the case of Captain Wolfgang Schröder. Judge Granade accurately identified the weakness in determining guilt in a criminal trial according to the standards demanded of a law whose modern origins are founded on a claim for compensation arising out of a snail in a bottle of ginger beer. This appraisal surely underlines the wisdom of Sir Carleton Allen’s view of the characteristics of a crime, which consists in some wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.260 In the context of this work, though, this may be insufficient on its own, for it is necessary to identify the society concerned: is it the security or well-being of the society of the Port State or the society of the maritime society in which the Master enjoys their own security or well-being, in other words their human rights?

In mimicry of a scene from The Emperor’s New Clothes, precious little word of caution has followed the application of the civil principles of negligence through Adomako and O’Connor to the criminal arena; but Judge Granade may have articulated a new argument in this context.

She has not been alone in this. Speaking in the London Shipping Law Centre’s 8th Cadwallader Memorial Lecture in 2005, Epaminondas Embiricos took the part of advocate for the industry, making a valid point in a critical analysis of the EU Directive on Criminal Sanctions for Ship Source Pollution, when he criticised the term ‘serious negligence’ as being vague, subjective and ill defined. When confronted with the task of criminal law to define clearly and specifically the rights and obligations of individuals towards Society, the term therefore fails to serve the purpose of the law even in its own name, and for such lack of clarity a Defendant could be convicted in circumstances which might be very damaging to the Defendant’s human rights, while the conviction had been secured by an interpretation which, rather, suited the normative ethics of society within that jurisdiction. In the circumstances of a Master’s prosecution for their behaviour in a pollution event, the vague notion of criminal negligence therefore would suit the local jurisdiction even though it was inconsistent with the global maritime community’s understanding of fairness.

If behaviour is to be the subject of control by criminal law, it is essential that the law in question is, at the very least, precise. The Courts must apply the definition of the crime according to the intention of the body that legislated it (in the case of the UK, of course, that

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260 Allen, Op Cit, p234
would be Parliament) and, so, they are presented with an exceptional problem when the Intention of Parliament is impossible to fathom in a given circumstance, such as with a term that is vague and whose defining principles were founded on decisions in civil proceedings whose process is different from that in question – as we find in the situation in which the modern law of negligence, stemming from a claim for damages arising out of a bottle of contaminated ginger beer that must be determined on the balance of probabilities according to civil evidence procedures, has driven the criminal law in which criminal evidence procedures must deliver a verdict beyond reasonable doubt. This scenario takes us firmly into the realm of jurisprudence, which is the foundation stone of good governance. Kelsen expressed the Pure Theory of Law in very simple terms as having the exclusive objective of accurate definition of its subject-matter. With such a reliable foundation, the judicial process can apply the defined law safely to any given problem scenario and draw a compelling conclusion, in the form of a verdict.

Whoever makes the Master accountable in their jurisdiction in this emerging phenomenon, therefore, must respond to the challenge, posed by the global seafaring community, that criminal negligence fails to meet the basic demands of jurisprudence. As we have seen, the purpose of the criminal process is to punish the offender, whereas the purpose of the civil law of negligence is to compensate the innocent party, without any notion of punishment. Drane and Neal argue persuasively that the concept of ‘punishment’ necessarily involves the infliction of some sort of pain, which prima facie violates the fundamental right of freedom from pain. As a result, an assumption of the law of criminal negligence carries with it the obligation to establish the moral justification for making a crime out of negligence; in other words, the legal process must identify the criminal elements of the conduct which justify inflicting the pain of punishment rather than simply requiring the offender to pay damages. Drane and Neal argue that such moral justification can be established, upon proving three elements which are intimately intertwined: a moral theory, interests to be protected, and a convincing argument that those interests may be protected by criminalisation within the constraints of the moral theory. If it cannot be justified, then the process cannot be defended. From this standpoint, they develop their argument which establishes the indispensable need for a moral justification to determine just where the boundary lies between a crime and a tort. Much of this justification is founded on the

262 This, necessarily, excludes the provision for punitive damages which is a measure permitted in, eg, the United States, but even this head of damages has been eroded in cases in recent years, as we have seen with those authorities held since Grimshaw v Ford; and, of course, the subsequent appeal hearings in the Exxon Valdez case. See footnote 168 supra
264 Ibid, p415-416
But we may take the Socratic approach a little further here and challenge just how society responds – not to the consequences of the behaviour but to the criminalisation of that behaviour. The evidence indicates that the normative ethics of the risk society in Port States have driven the phenomenon, demanding criminal regulation of environmental protection; but just what determines the risk society’s collective mind to make a crime out of what, at most, would be a tort? Richard Epstein wrote a paper on the Tort / Crime Distinction as early as 1977; he revisited the issue in 1996 in the light of the avalanche of American regulatory law that had taken place in the intervening years. It was his clear observation that the expansion of criminalisation by the creation of regulatory offences on an industrial scale really did little to shape the opinions of ordinary people – the very society for whom the moral justification of criminal negligence is made out – as to what conduct should be legal or not. He pointed out the irony that it was only lawyers who saw legal opinions as formative influences shaping the underpinning moral judgments for criminalising some behaviour. In the wider scheme of the society whose normative ethics drive society’s moral judgments, Epstein challenges the validity of the criminalisation phenomenon as serving society – rather, he says, the phenomenon is more likely to undermine the views of ordinary people in society as to what should or should not be a crime. His conclusion sums up the grounds for suspicion which Drane and Neal had shared:

We need to worry about the line between the tort and the crime. But we also need to shrink both domains simultaneously.

Drane and Neal concluded that their examination of the moral justification for the tort / crime distinction merely served to expose the deficiencies in the theories underpinning that justification, and the exercise demonstrated that the boundaries between a crime and a tort have not been established. Certainly that supports the opinion of the global seafaring

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267 Ibid p20

268 Ibid p20

269 Ibid p21

270 While the questions which follow go somewhat beyond the scope of this work, we cannot resist asking - Just who drives the normative ethics of society: the people themselves or the law-makers who tell them how the law must protect them with such criminal regulation? And in that case, what if such law-makers are unelected?

271 Epstein, Op Cit p21
community which responds to each case of criminal negligence which it confronts; criminal negligence, indeed, is neither one thing nor the other and it would be wholly wrong to inflict the pain of punishment rather than to compensate the innocent party; and this undermines the entire rationale for making a crime of the negligent behaviour. As a result, the case against Captain Schröder can hardly be justified, and Judge Granade’s observations articulate a valid condemnation of criminal negligence.

It should not be presumed that such a problem as Captain Schröder’s case could not happen in an English Court. The test to be put to the jury for determining guilt in gross negligence manslaughter in Adomako was refined by the decision in O’Connor two years later; of course it still relies for its foundation on the civil case of Donoghue v Stevenson. Hard cases demand minute critical analysis of the legal principles involved, but the expression of judicial authority behind that analysis may trade infallibility for the refuge of a safe option – an option, in this case, of seizing upon a principle founded in civil law as the cornerstone for a principle in criminal law. The underlying weakness in such unsafe law is analogous with a theory known to mathematicians for generations as the propagation and compounding of errors: Whenever calculations are done using imprecise numbers, then the numbers resulting from the calculations are also imprecise. This weakness is at the core of the shipping industry’s dismay over the unfairness of criminal accountability of the Master in twenty-first century society. What compounds the problem even more, is the exacerbation of the mischief at the hands of sovereign jurisdictions globally.

Conclusions on Criminal Negligence

The Master’s accountability necessarily hinges upon their judgment, in which they have the discretion allowed in current law, as it has allowed for generations, to make decisions about what to do and when to do it. How they discharge the burden of their accountability will be determined by their awareness, or conscious assumption, of the risk that will follow. If they hold their belief in the consequences genuinely, then they will have discharged their burden in criminal law – with the aside of Lord Bingham’s wisdom that, the more unreasonable the belief, the less likely it is to be accepted as genuine.

272 Drane R and David Neal, 1980, On Moral Justifications for the Tort / Crime Distinction, Vol 68, No 2 California Law Review. Their concluding observation underlines the importance of finding a solution to criminalisation – in our case, of the Master:

In light of the very serious consequences of classifying conduct as criminal, our strongest hope is that moral justification will not remain the subject of academic debate, but will inform the actual categorization of conduct as criminal or tortious. (p421)
Had the Master of the Hebei Spirit been accountable by this standard, the reasonable likelihood is that his acquittal would have been secure. Had the Master of the Tasman Pioneer been tried by this standard (at least for the criminal damage of the deck cargo), the reasonable likelihood is that a conviction would have followed.

The emerging conclusion, however, on the validity of the assumptions underlying the perception of the Master’s criminalisation, gives form and substance to the theory of a flawed system of justice to which the Master has become exposed. Criminal accountability for statutory standards of ship safety, and the maintenance of order and discipline on board the ship, evolving for some two hundred years, have been held blameless. The golden thread running through the analysis identifies the far more recent evolution of criminal negligence, as that which has underpinned the current perception of the Master’s criminalisation. Whoever makes the Master accountable in their jurisdiction, therefore, must satisfy the test for moral justification for criminal negligence, or abandon it. No persuasive argument for a moral justification has been conveyed to the author yet.
3.2 The Unchecked Mischief of Sovereign Jurisdiction

Overview

Running through the whole problem of Criminalisation is a constant theme:

- The lack of consistency within those Courts in the way in which the philosophies of different criminal jurisdictions address the accountability of the Master.

- But these are the jurisdictions of sovereign states, and the basic right of a state must be preserved - the right to protect their laws from external influence.

Whichever way the mischief is analysed, this remains the elephant in the corner, and not a scrap of progress can be achieved without resolving its presence, for it is this constant theme which has led to the tensions between Port and Flag States. This section therefore examines the nature of sovereignty and the relationship between sovereign states. Paradoxically, the analysis of the problem areas in sovereignty has revealed a possible solution to the Criminalisation phenomenon by reference to the Master’s position as an organ of the Flag State.

(i) The Character of Sovereignty

If one is permitted to paraphrase Max Weber, it makes it a little easier to define a State in context as a community of people – its Society - which is controlled by its management power having a monopoly of legitimate force over them. In a democracy the force of law is defined and limited according to the normative ethics of that Society, upon which no external power should trespass. Thus it can be established that the criminalisation of certain behaviour which characterises Society’s normative ethics is a matter for that Society’s conscience – that is, a case which falls to be determined according to those laws will be tried according to that State’s rules of judicial procedure. Crucially, that is a matter entirely for their self-determination, which is the freedom cry that defines Sovereignty.

Naturally, State Sovereignty has been guarded jealously with the evolution of the body of...
law which regulates the relationship between States; this extends not just to the acts of States themselves but also the subjects of those States, with or without their State’s authority. The ageless work by Oppenheim on international law introduces an issue which, to parody countless epitaphs, has been forgotten but has never actually gone, that the notion of international law imposes the obligation on every State to take such steps through legislative management and control of its own subjects, and others residing in its own territory, so as to minimise the risks that they might commit acts which may cause physical injury to, or prejudice the rights of, other States, insofar as that injury or those rights have been defined and agreed between the States in question. This transposes well to the case of the Master, who is to all intents and purposes a representative, an official, of the Flag State. To take Oppenheim’s proposition further in this context, though, the best which a State can do is to use due diligence in meeting its obligations to its fellow High Contracting Parties, by regulating and controlling its Flag State Masters with laws and standards, in practice the Flag State cannot prevent all injurious acts which a private person might commit against another State, such as a Port State. That, of course, is where the criminal process may have to regulate the process with a fair sentencing system.

The crux of the sovereignty issue in this context demands absolute clarity about whether the person is to be regarded as a private person, that is, a person who is not cloaked with the authority of the State, or a person who does have such authority. The distinction arises because the State must take responsibility for official acts of administrative officials, or at least for acts conducted in their official capacity, even if unauthorised, and that responsibility is owed to the other State in question, whereas the State will not generally be responsible for the acts of private citizens acting in a private capacity. The concept is essentially simple because a State has no mind of its own but does have a legal personality. As such, it will act through the administrative organs of the State, on the authority of the democratic power. Therefore, the State can invest, for example, an individual with power, when they become an organ of the State, and their acts or omissions when acting officially in the capacity which the State has conferred upon them, amount to acts of that State, for which the State must be accountable and bear responsibility if, as a result of the conduct of that person, the interests of another State, or the citizen of another State, are damaged or compromised.

It was precisely this which led to the United States assuming the burden of responsibility.

275 Ibid, at p544
276 Ibid, at p540
for the crimes of Commander Wilkes when he stopped and boarded RMS Trent on the high seas in November 1861. A State, therefore, bears responsibility for internationally injurious acts committed by such persons in the ostensible exercise of their official functions even if committed without that State's command or authorisation, or in excess of their competence according to the internal law of the State, or in mistaken, ill-judged or reckless execution of their official duties. A State's administrative officials are under its disciplinary control and all acts of such persons in the apparent exercise of their official functions or invoking powers appropriate to their official character are prima facie attributable to the state. This is well-illustrated by the Zafira case in 1925\textsuperscript{277} when the American-British Claims Arbitration Tribunal based the liability by the US for looting by the Chinese crew of a British supply ship attached to the American fleet upon the culpable lack of control by the officers.

\textsuperscript{277} AJ, 20(1926) pp385-390
(ii) Sovereignty: Causes and Cures

The International Boundaries Research Unit at Durham University celebrated its 20th anniversary in 2009 with a Conference on the State of Sovereignty. Noora Arajarvi tackled the notion of sovereignty in international law as delivering legal impermeability – that is, no foreign power has authority over the people. Summarising the wisdom of the German thinker Carl Schmidt, sovereignty allows a State to develop its own norms and values over which external forces have no prevailing voice. This introduces us to the dynamic tensions which international law places on a State in discharging its sovereign powers within its own jurisdiction. Oppenheim makes an assertion which has sometimes been lost amid twenty first century thinking, that international law fundamentally comprises a body of rules which States Parties have voluntarily endorsed as the basis upon which they interact with each other; if one employs a simplistic analogy by reducing it in context to the private person, it is the same notion of self-regulation by a contractual agreement between individuals. In addition to binding States themselves, though, States can agree to make individuals within their sovereign jurisdiction subject to rights and obligations conferred by international law.

If we apply this to the provisions of UNCLOS, therefore, we can draw conclusions on the obligations of the Flag State to others. Article 217 defines the obligations on Flag States to enforce the provisions of the Convention, stating inter alia that States must ensure that vessels flying their flag must comply with the Convention standards which the State has ratified. In reality, of course, this means that Flag State vessels must comply with Flag State regulations that must at least equal the Convention standards, for the prevention, reduction and control of pollution of the marine environment from those vessels, and the Flag State must pass enforcement measures to prevent or punish a violation of the regulations, irrespective of where that violation occurs. Crucially, Article 217 further compels the Flag State to carry out an immediate investigation of a violation of the minimum Convention laws, and where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred. If the Flag State fails to promulgate the necessary domestic legislation to ensure that its subjects, including the Master, comply, then the Port State concerned will take its grievance to the International Court of Justice or the International Tribunal, where the defending party will be the Flag State, not the Master.

278 Jennings, Sir R and Sir A Watts, ed, 1993, Oppenheim’s International Law, 9th ed 2nd impression, Longman, Harlow, 4; see also pp 16-17, 846-84
In terms of law, this is entirely rational. A State which has allocated its flag to a vessel, extends its sovereignty to her, and the discharge of the duties arising out of that State’s agreement with other States must necessarily be reposed in the person with the authority to manage the command of the ship. In this way the Flag State must logically have made the Master its representative, in whom it has vested its confidence by virtue of the Master’s Certificate of Competency. The Master thus becomes an organ of the State as understood by Oppenheim and, so the State must then bear the responsibility for the consequences of the Master’s dereliction of duty to the Coastal State while exercising the official function of commanding that ship, even though they did not have the Flag State’s specific instruction or authorisation to carry out the act or omission in question. It is the very theory of liability without blame which defines the master’s vicarious liability for its servant’s negligence.

For very good reasons, therefore, the Flag State defines in clear terms the standards which the command of a vessel must meet. In the UK, for instance, Section 47 Merchant Shipping Act 1995 empowers the Secretary of State for Transport to specify standards of competence to be attained and other conditions to be satisfied in order that a person shall be qualified to assume the position of Master of a UK-flag ship. With that power, the Secretary of State duly drafted the Merchant Shipping (Training and Certification) Regulations 1997 which requires a person’s suitability to be evidenced by the award of a certificate of competency (or certificate of equivalent competency if their original certificate was awarded by a non-UK authority). The final arbiter of such an award is the Secretary of State’s own expert in the field, in the shape of the MCA.

By the same token, the Flag State which awarded the Master their certificate can also take it away, or refuse to renew it. By no means need it be a Court. Section 61 of the 1995 Act provides that, if, after an inquiry, it appears to the Secretary of State (in fact, the MCA) that the Master is unfit to discharge their duties, whether by an event involving their serious negligence, or whether by reason of incompetence or misconduct or for any other reason, the persons holding the Statutory inquiry have the power to cancel or suspend any certificate issued to them under section 47, or just to censure them; theirs is a very wide discretionary power.
The Cause and the Cure

In this way the State can manage and control the risk to which it is exposed when allocating its flag to a ship and, thus, it can satisfy itself that it can repose its confidence in the Master to protect its interests. Nathalie Horbach and Pieter Bekker illustrated the emerging legal risks to which the State is exposed in this context, in a paper published in 2003, in which they emphasised the rapid evolution of international law in recent decades, particularly with regard to environmental protection, in order to mobilise all the forces of law, whether international or domestic, for the purpose of halting activities undertaken by one State which inflict environmentally injurious transboundary consequences on other States or territories beyond the jurisdiction of that State. This naturally casts focus on the Master who has been accredited to command the offending vessel to which the State has allocated its flag.

The challenge, however, is to rationalise a link between the liability of the Flag State and the individual – the Master – arising out of the same law. Noora Arajarvi articulated the contemporary view among lawyers that international law cannot impose duties on individuals – which, after all, is why conventions are codified in domestic law. In fact, this theory is flawed, to such an extent that it would be unsafe even to state it as a general principle without the qualification that there is nothing to stop a State from conferring directly on its citizens whatever rights it wants, including international rights and duties and make them, to that extent, accountable under the relevant body of international law, provided that the State has been clothed with such powers under its Constitution. In effect, the domestic courts within the State must give effect to the body of law contained in the treaty.

This can be articulated most clearly by analysing the difference between the contrasting theories of monism and dualism. The monist approach sees the ratification by the State as bringing the treaty directly into force in the State's sovereign jurisdiction, so that it will come within the jurisdiction of its domestic Courts. By contrast, the dualist approach requires a treaty, even after ratification by the State, to be implemented into the State's body of law by domestic legislation before it can be enforced by the Courts. If a State embracing the dualist theory, therefore, ratifies a Convention but does not enforce it by domestic law, then the dualist assumes that its citizens cannot be clothed with rights or obligations under it and, of course, without the force of the domestic law the Courts cannot rule on it. This would not prevent another State which has ratified that Convention from pursuing the

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defaulting State under the dispute resolution process stated in the treaty concerned; if the defaulting State's Courts rule that the citizen in question had not been accorded the relevant rights or obligations, that would not be an issue with which the complainant State would bother itself.

An extreme example of a body of international law taking direct effect would even see the citizen prosecuted by a Court established by the treaty; and a recent example exists, in the Rome Statute, establishing the International Criminal Court. Under Article 25 the Court shall have jurisdiction over natural persons who are the subjects of those States which are parties to the Statute, and such a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute.

The critical issue in context is that, by extending the theory, provided that the Constitution so-permits, the Flag State in question has the power to make its Master accountable to laws which the State has agreed in obligations at an international level; as such, the aggrieved Port State has inherent rights against the Flag State with whom it had closed that agreement, and can refer its grievance to the United Nations if it is not satisfied that the Flag State has met those obligations. It is then for the Flag State to hold the Master accountable within its inherent jurisdiction by its very nature as sovereign controller of the vessel to which it has allocated its flag.

Oppenheim supported this contention with the Advisory Opinion of the Permanent Court of International Justice concerning the Jurisdiction of the Courts of Danzig\textsuperscript{280}, which stated that a State may expressly grant to individuals direct rights by a Treaty which it has ratified; the Opinion even went so far as to assert that such rights may validly exist and be enforceable without having been previously incorporated into domestic law\textsuperscript{281}. From the point of view of the individual’s accountability to the State in a democracy, this latter point is open to argument, but the theory can be observed in the Rome Statute.

In fact the evidence becomes ever more compelling with further analysis of current law. What has inconveniently been lost from sight in recent years, is the fact that a ubiquitous example of this is commonplace throughout the European Union. Crucial to the

\textsuperscript{280} (1928) PCIJ, Series B, No 15, p 17
\textsuperscript{281} While admitting that in principle a treaty cannot, as such, create direct rights and obligations for private individuals, the Court said: It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations enforceable by national courts.
achievement of the aims of the Treaty of Rome was Article 169 (Article 226 Treaty of Amsterdam), providing a mechanism for infringement proceedings to be initiated by the Commission against a defaulting Member State to ensure that the State concerned complies with its treaty obligations. In the course of addressing this, the necessity became clear to enforce Treaty provisions regarding human rights and fundamental freedoms owed to private individuals, who may in certain circumstances institute proceedings in order to secure their observation\textsuperscript{282}. In the process of affording an individual their rights under the Treaty, the question naturally fell that such a private individual must also meet obligations in order for the Treaty’s aims to be achieved, notwithstanding the failure of a Member State to implement enabling legislation. Thus was born the principle of direct effect, which was developed in the European Court of Justice decision in the case of Van Gend en Loos\textsuperscript{283}.

Having decided that Treaty provisions could confer directly effective rights on individuals, the Court took the academic reasoning further and theorised that, whether or not the relevant Member State had passed legislation, European Community Law has the authority by virtue of that State’s accession to the Treaty of Rome (or, more recently, Amsterdam) to impose obligations upon individuals residing in that State; as such it must also have the power to confer rights on them. The only overarching requirement logically must be that such rights must have been conferred expressly on them by the Treaty, as well as obligations defined and expressed in the same way, so that the Treaty can bind individuals as well as Member States. In essence, the Member State has signed up its subjects by its very act of ratifying the Treaty.

A relevant precedent in maritime law would be ideal; and such exists. The Claimant, the Bowater Steamship Company Limited, a subsidiary of the mighty Bowater Corporation, was a UK-registered company which owned the Gladys Bowater, a fine British registered ship grossing 4,750 tons, designed to lift 5,475 tons of the Bowater Corporation’s woodpulp from their loading ports in Canada to their newsprint mills. In July, 1959, the virtually new Gladys Bowater sailed from Newfoundland with a full cargo of forest products for discharge in Buffalo. The officers and crew of the Gladys Bowater were British nationals, employed under British articles and serving under a British Master. On her arrival in Buffalo on the 3\textsuperscript{rd} August, a strike picket appeared at the dock with a sign reading SS Gladys Bowater Unfair to Organized Labor, International Woodworkers of America. The longshoremen who had been engaged to unload her cargo promptly refused to do so.

\textsuperscript{283} Van Gend en Loos v Nederlandse Administratief der Belastingen (Case 26/62)
International Woodworkers of America (‘IWA’), whose secretary and certain of whose members were named as Defendants, was a trade union with members in the United States and Canada which had recently sought to organise employees of contractors in Newfoundland who were cutting timber for companies in the Bowater Group (not the shipowning company) and other companies in Newfoundland, but Bowater and their associates had not reached an agreement that accorded with the IWA’s view and, in the absence of such agreement, the IWA had called a strike in December, 1958.

In proceedings in the United States Court of Appeal284, Bowater sought an injunction to restrain unlawful picketing of their vessels. In addition, and most relevantly to the issue in this work, they advanced a claim under an obscure, 145-year old commercial treaty to regulate maritime commerce between the United States and Great Britain, which had been signed and ratified by both States Parties in 1815285. Article 1 provided inter alia that:

> The Inhabitants of the two Countries respectively shall have liberty freely and securely to come with their ships and cargoes to all such places, Ports and Rivers in the Territories aforesaid to which other Foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said Territories respectively, ..... and generally the Merchants and Traders of each Nation respectively shall enjoy the most complete protection and security for their Commerce but subject always to the Laws and Statutes of the two countries respectively.

The Court observed that, under the American Constitution, and in accordance with Federal law, when the wording of a treaty is sufficiently explicit to permit its application without additional implementing statutes, and the States Parties intended it to be self-executing, all of which the Court found in this treaty, it can be enforced without domestic legislation. The treaty explicitly conferred the defined rights and obligations not only upon the two States Parties but also upon the inhabitants of the two countries. In this case the Court held that the United States had to fulfil its treaty obligation of protecting the guaranteed freedoms in two ways: firstly, by not violating its treaty obligations and, secondly, by empowering the Courts to take whatever steps would be necessary to protect and maintain the rights and obligations of individuals, in this case to grant injunctive relief to prevent the Defendants...

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284 Bowater Steamship Co Ltd v Patterson and Others, The Gladys Bowater [1962] 303 F.2d 369 USCA
285 A Convention To regulate the Commerce between the Territories of the United States And of his Britannick Majesty, signed and ratified in 1815, 8 Stat. 228, and extended indefinitely on August 6, 1827, 8 Stat. 361. See Bevans, C, 1974, Treaties and Other International Agreements of the United States of America 1776-1949, Vol 12, Department of State Publication 8761, Washington DC
from acting contrary to the treaty.

This clearly confirms the validity of the general position argued by Oppenheim, underpinning the issue relevant to this specific matter, so that it can be established that, while international law can bind a private individual, it most certainly will regulate the conduct of human beings and their institutions where that must be necessary for the State to observe its treaty obligations and to prevent individuals under its control from violating the State’s treaty obligations. Hypothesising a little further, when an individual in question is acting as an organ of the State – the Master of the Flag State’s vessel must be so-doing in order to meet the Flag State’s Treaty obligations to other signatories, for which of course the Flag State has confirmed the Master’s competence in accordance with its training regulations - the obligation of accountability demands control by the management process, namely the Courts. The underpinning logic is unassailable, because a State ultimately is a mere political association of people who have sovereign control within a geographical area; it has no organic existence of its own and, so, when it undertakes rights and obligations with other States, those rights and obligations ultimately must be accounted for by the men and women in whom the State has conferred specific responsibility.286

The argument is complete with the voluntary assumption by the Master of their rôle, as Master Under God of the ship registered in that Flag State. To paraphrase W B Yeats, no law, nor duty forced them into the job, they chose to be regulated by the maritime law of that Flag State and the criminal law on board that ship – and the ship to which the flag has been allocated, is as much a part of the sovereign state as its soil, and deserves that protection. The Master cannot then pick and choose which rights and obligations they would like enforced. Most relevantly of all, for the Master, geography presents no obstacle to the principle. Oppenheim must be justified by logic in his opinion that, irrespective of a State’s obligations to other high contracting parties to a treaty, international law has no wish or power to prevent a State from exercising its sovereign rights to govern, by laws, the conduct of its own citizens, whether they be at home or abroad, since they remain under that State’s personal authority. For this reason, the citizen of a State may be accountable to it for any misconduct carried out abroad and proscribed by that State’s law, just as much as they must account for taxes in respect of their assets or earnings abroad, if that is what the State’s legislature enacts.287

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286 Westlake, J, Collected Papers on public international law (1914), Cambridge University Press, Cambridge, p78
Putting this in context, as the vessel is an extension of the sovereign territory of the Flag State, the Master remains under its personal control.

In reality, there is the small matter of enforcement to address, when the ship is in some far territorial sea and the State’s power to enforce its laws depends upon the Master being in, or returning to, their home territory or having some assets in the home territory over which the State can enforce its Judgment. That aside, all that is required, is the Will of the State, evidenced through the legislative process, to assert jurisdiction over its citizens abroad; in practice this varies particularly as regards the application of criminal law to their conduct and consequently the jurisdiction of their courts to try such nationals for their conduct abroad. Taking the United Kingdom as an illustration, very few acts committed by nationals abroad constitute criminal offences under its laws. Oppenheim suggests that the reason for this is because the procedure of criminal trials in the adversarial system involves the cross-examination of witnesses as an essential feature of contested evidence, which would impose severe practical difficulties in relation to offences committed abroad. By contrast, other States, twelvey described by Oppenheim as having different traditions and procedures, assert almost complete jurisdiction over the criminal conduct of their nationals abroad. The practical difficulty for a State which seeks to assert criminal jurisdiction over one of its subjects who is beyond its geographical jurisdiction, is that it has two options:

1. Either it explores the opportunities for extradition, if Treaty rights with the other State prevail; or
2. It must patiently await the return of the citizen in question, before it can take effective steps to exercise its jurisdiction over them (as illustrated by the UK case of Ronald Biggs).

Perhaps serendipitously, English law has evolved since Oppenheim's observation. Section 108 Anti-Terrorism, Crime and Security Act 2001 addresses bribery and corruption of foreign officers, and extends the jurisdiction of English criminal law defining offences of bribery and corruption by public officials to cover offences committed wholly or partly in the UK and offences committed by UK nationals abroad. Parliament’s intention was made very clear that it matters not, whether or not the person being offered the bribe has any connection with the United Kingdom; neither does it matter whether the offending acts of offer or receipt of the bribe take place within the sovereign jurisdiction of the United Kingdom; thus the application of the offence is global – the only requirement is that the offender must come within the control of United Kingdom laws.

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288 see the Law of the Netherlands, X v Public Prosecutor, ILR, 19(1952) No 48
The effect of this provision opens wide the jurisdictional limits beneath which English law had hitherto slumbered, so that now the territorial boundaries are removed which confined the acts undertaken to the jurisdiction of English courts. Section 109 takes the issue beyond any doubt to individuals or legal bodies whether or not they are Government officers, providing for the offence being satisfied by UK nationals or bodies incorporated under English law who carry out the offending act anywhere outside the United Kingdom, if the act would, itself, have constituted a corruption offence had it been committed with the territory of the United Kingdom.

The authority upon which this statute stands must have originated with the UK Government’s approval of the OECD’s Convention on Combating Bribery of Foreign Officials in International Business Transactions 1997, Article 1 of which compels each State to pass laws, making it a criminal offence for any person within the jurisdiction of that State’s legal control, intentionally to offer or give in any way any financial reward or more obscure financial advantage to a foreign public official, with the intention that the official either acts or refrains from acting as they should in accordance with their official duties with the objective that the offender achieves some advantage either in obtaining or retaining business, or with the objective of obtaining some other improper advantage in the conduct of international business.

Article 4 crucially requires the State to take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory. It goes a step further, to address those States which have passed laws to prosecute its citizens for offences committed abroad, requiring them to take measures to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

This convention not just defines, but explores, the extent to which an international Treaty can dictate the substance of a State’s duty towards its citizens whether they are at home or abroad and, clearly, the basic principle of jurisdictional control could be translated to the case of a Master under the Flag State, whatever their nationality, for they remain an organ of that State. The globalisation of maritime business has witnessed a phenomenon in recent years in which a ship may be registered in State A, managed in State B with the Master a national of State C. The fact that the Master has a Certificate of Competency in State A does not mean that they must be a national of that country; but the logic of Oppenheim’s

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289 Subsequently broadened and now implemented in the UK by the Bribery Act 2010
analysis leads to the conclusion that, once an alien enters into a sovereign state, they must necessarily be equal under the law to all others in the sense that everybody within that State must be regulated and controlled by that State, which, after all, is the key feature which characterises sovereign jurisdiction, the power to control individuals for whose behaviour the State must assume responsibility for the protection of its own people and its relationship with other states – without such obligation, there would be little point in having a legal system and a judicial process to manage it. But with that equality of rights comes simultaneously equality of obligations, so that the alien must be accountable for their behaviour in relation to the laws of the land, even though the alien’s stay may be temporary: as long as they are in the State’s jurisdiction, they owe allegiance to the State laws in so far as they are binding on them.

The discussion, having turned to the alien, conveniently proceeds to the rights and obligations of the Port State. And there’s the rub; for much of the global maritime industry’s concern stems from what they see as the incipient creep of criminalisation by the Port State. Oppenheim’s commentary on an alien’s duties to observe the laws of the sovereign state in which they find themselves, underlays the rationale for the prosecution of so many of the Masters whose cases have been studied in this work. When Society’s normative ethics demand the criminalisation of conduct which has led to wrongs such as pollution, then the Port State will enforce the laws which its Society has demanded.

International law goes further still: Article 218 of UNCLOS states, inter alia, that when a vessel is voluntarily within the jurisdiction of a Port State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the territorial sea or exclusive economic zone of that State in violation of international law. There is a qualifying – even, rather, a clarifying - proviso, though, in that no proceedings pursuant to such a violation shall be commenced in the territorial sea or exclusive economic zone of another State unless requested by that State, the Flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the territorial sea or exclusive economic zone of the State instituting the proceedings.

But while the Port State will enjoy all the privileges which are the gift of sovereignty, it must also comply with its obligations under international law. Professor Mukherjee’s assertion\textsuperscript{290} that prima facie a state enjoys its sovereign prerogative to enact a law that

\textsuperscript{290} Mukherjee, op cit p3
criminalises the act of an accidental oil spill, and criminalises the seafarer who allegedly caused the oil spill must logically lead to the conclusion that an alien – the ship’s Master, in this case – must be held accountable in accordance with the logic of Oppenheim’s argument. That being said, Mukherjee theorises that if that state is a party to the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) or MARPOL, any national law that is in conflict with those conventions is invalid, and national courts should so hold.

Not only is this theory sound but it is supported by the authority of the Vienna Conference, which came into force in 1980. Article 27 prohibits a State Party from invoking the provisions of its own domestic laws as justification for its failure to perform a Treaty. The logical deduction is that, where a State’s domestic law is inconsistent with that contained in a Treaty which it has ratified, the Treaty law must prevail. In its ruling in the case of Internationale Handelgesellschaft

But what if the law at European Community level is inconsistent with bodies of international law which have been ratified by Member States? In the well-known INTERTANKO case, the Claimants applied to the High Court of Justice in London for a judicial review in relation to the implementation of European Council Directive 2005/35, a measure on ship-source pollution; perhaps the most essential feature was in Article 4 of the Directive, which states:

Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive.

291 Internationale Handelgesellschaft, Case 11/70 (17 December 1970)
292 R (on the application of International Association of Independent Tanker Owners (Intertanko) and others) v Secretary of State for Transport (Case C-308/06)
The penalties for infringements imposed liability much stricter than that in UNCLOS and MARPOL, clearly criminalising the Master in a way not provided in the Conventions.

The High Court referred the case to the European Court for a preliminary ruling. Central to the issue was the point that, while the European Community was a valid party to UNCLOS, only States Parties could ratify MARPOL, which does not permit endorsement by international bodies; in these circumstances, which should prevail, Community law or international law?

Article 300(7) of the European Treaty binds Community institutions to those international agreements which the EC has signed, as a result of which the relevant international convention must have primacy over secondary Community legislation; as always, in the event of some inconsistency, the provisions of the international convention must prevail. In the case of the referral on UNCLOS, however, the Court held on terms which are very relevant to the position of the Master:

...individuals are in principle not granted independent rights and freedoms by virtue of UNCLOS. In particular, they can enjoy the freedom of navigation only if they establish a close connection between their ship and a State which grants its nationality to the ship and becomes the ship's flag State. This connection must be formed under that State's domestic law.

In effect, therefore, even though the European Community is a signatory to UNCLOS, it is the relationship between the Master and their Flag State which is pivotal; the Master is the representative of the Flag State, and must observe its laws.

With regard to MARPOL, the Court observed that the Community is not a Party and neither has it apparently assumed powers under the European Treaty to exercise the powers previously exercised by Members States which have signed up to it. As a result, even though all the members of the Community had signed up to MARPOL, the Community is not bound by it and the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention into Community law does not give the European Court the power to review the Directive's legality in the light of the Convention.

293 Article 300 of the Treaty establishing the European Community provided for the procedure leading to the conclusion of international agreements between the Community and third countries or international organisations.
294 Ibid, para 59
295 Ibid, para 48
296 Ibid, para 49
It would be pertinent at this stage to remind ourselves of the purpose of international environmental law for Port States. The world’s oceans consist of one enormous, interconnected body of seawater, separated by continents into several ocean basins and marginal seas. The influence of man over the oceans has had appalling consequences, however. Pollution kills marine life both directly, in poisoning, suffocating and drowning marine life, and indirectly, by starvation as it interrupts the food chains. With the emerging realisation of the threat to marine species, Port and Coastal States particularly had a vested interest in moving forward with an agenda for some international legal framework that could respond to perceived risks. While MARPOL was being implemented and enforced with an ever-greater list of amendments, E J Molenaar’s analysis\(^{297}\) identifies a key cause of the problem, namely increasing numbers of substandard ships and estimates of amounts of pollutants entering the oceans through operational and accidental discharges, which forced the wider community to confront the uncomfortable conclusion that Flag States were simply failing to achieve the objective for which international law had made them responsible under Convention provisions. The frequency and ever-growing effects of marine pollution left Port and Coastal States increasingly dubious of the will or the power of Flag States to meet the objectives with which their obligations under international law had charged them\(^{298}\). As a result, Port State jurisdictions strengthened their attitude towards those responsible for the offending pollution events, and the focus of the prosecution process fell on the Master, in order to address the normative ethics of the judicial process which was intended to protect their environment. Putting the Master on Trial was their solution: all they had to do now was find some lawful authority for that solution.

While Article 194(1) UNCLOS categorically clothes the Port State, as any other, with the authority to take all measures (which, at least, are consistent with the Convention) to prevent, reduce and control pollution of the marine environment, Professor Mukherjee points out that the Port State is not permitted to imprison a Master for polluting the marine environment except where wilful and serious negligence has been proved. Article 230(2) of UNCLOS, the relevant provision, specifically qualifies the Port State’s enforcement rights against foreign vessels\(^{299}\) by permitting only fines to be imposed by its Courts against foreign-Flag vessels where there have been breaches of its domestic laws or applicable

\(^{298}\) UNCLOS Article 217(4) emphatically requires the Flag State to investigate and, if appropriate, institute proceedings, if its vessel commits a violation of the Convention rules for the protection of the marine environment.
\(^{299}\) The Convention’s word in italics; it is noteworthy that the employment of the words ‘vessel’ and ‘accused’ in this provision may lead to broad interpretations by the Port State’s prosecutor as to whom they may regard as the Offender.
international rules and standards, and, further, the Port State is obliged to observe the Accused’s rights under subsection 3. That being said, the decision of the European Court of Human Rights in Mangouras v Spain has a chilling note on the approach to the criminalisation of the Master, even in the context of their own human rights:

The Court could not disregard the growing and legitimate concern both in Europe and internationally about offences against the environment. It noted in that connection the States’ powers and obligations regarding the prevention of marine pollution and the unanimous determination among States and European and international organisations to identify those responsible, to ensure that they appeared to stand trial and to punish them.\(^{300}\)

Many would say that the effect of the decision in INTERTANKO leaves Port States with the comfortable illusion that they could justify criminal regulation of the Master under European law even if it is inconsistent with the body of international law, which should, in fact, prevail. The decision in the Mangouras case only serves to perpetuate the illusion and, as an inevitable consequence, sets Port States on a collision course with Flag States. The conclusion must be drawn that the administration of justice in the context of European law exposes it to a clash of irreconcilable differences with key elements of legal theory, concisely summed up by the Law Commission in its 2010 consultation paper:

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\text{The criminal law... should not be used as the primary means of promoting regulatory objectives}^{301}\text{.}
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Just how a reconciliation can be made between the two remains a challenge.

Naturally, the structure of the legal system must give transparency to the judicial process, so that Justice is manifestly seen to be done. The response of the international maritime community to the prosecution of the Hebei Two highlighted some obfuscation on the part of the South Korean system in revealing this. But it is difficult to justify the convictions on these grounds in the cases of Captain Schröder and Captain Laptalo. These prosecutions were not founded on matters which were the subject of environmental law, but criminal law within the Port State. In the case of the former, criminal liability was held by the application of civil criteria in the tort of negligence. In the case of the latter, criminal

\(^{300}\) Mangouras v Spain (12050/04); Para 3 Summary of Judgment

\(^{301}\) Law Commission, 2010, Criminal Liability in Regulatory Contexts, Consultation Paper No 195, HMG, London, para 1.28
liability was held by the application of the Common Law rule of the Master’s responsibility for his vessel, without any evidence against the Master whatever.

Such prosecutions pose a critical question which inevitably must be resolved, as to how we distinguish between offences for which the Flag State is accountable to the Port State and those which raise the question as to whether the Master must be accountable without incriminating the Flag State. An essential factor must be to identify the key element in the distinction. By reviewing the case studies in this work, contrasting those of the Zim Mexico III and the Coral Sea with the Hebei Spirit and the Sea Empress, the distinction can be formulated by reference to the Master’s acts or omissions in the course of acting as Master under the Flag State authority. It would be logical to draw the analogy with the law of vicarious liability – in which case the Flag State would be responsible even for the personal negligence of the Master. In respect of those criminal offences which are personal to the Master as a result of their intent and which are not associated with any body of international law to which the Port State and Flag State are parties, though, the current law must necessarily expose the Master to liability within the Port State jurisdiction without any Flag State protection. In this respect the Master of the Coral Sea would, for example, still have to face the full rigour of the Greek criminal process. In synthesising a solution to protect the Master against criminalisation, we can identify the key issue as to just how the Port State’s jurisdiction must be respected against possible compromise, if there is to be some protection for the Master by their Flag State - and that can be very subjective indeed to the Port State.

UNCLOS Article 3 clearly defines the right of every State to establish its sovereign jurisdiction up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the Convention. The question arises, then, of just how Port State jurisdiction can apply concurrently with, or take precedence over, Flag State jurisdiction of ships in territorial waters. In the 2005 United States case of Spector v Norwegian Cruise Line, the United States Supreme Court considered whether domestic American legislation, in this case the Americans with Disabilities Act 1990, applied to foreign-flag cruise ships in American territorial waters.

The Act itself did not contain a specific provision making its application mandatory to foreign-flag vessels in US waters. The issue arose over the meaning and effect of the Clear Statement Rule, which was defined as a rule of international law that the law of the Flag State ordinarily governs the internal affairs of a ship. As a result, it was argued that, under

302 Spector v Norwegian Cruise Line Ltd 545 US 119 2005
the Clear Statement Rule, without a clear indication of congressional intent, the Americans with Disabilities Act could not apply to foreign-flag vessels in United States territory.

The Lower Court, the Court of Appeals for the Fifth Circuit, had ruled that the Act did not apply to foreign-flag ships because it did not contain a specific provision mandating its application to foreign-flag vessels in US territorial seas. Of the eight Justices, five disagreed with that and held that cruise ships of whatever flag were prima facie bound by a statutory definition of what was readily achievable for public accommodation and specified public transportation.303

But then the difficulties started. The majority concluded that the standard required by the Act would be inconsistent with international law, particularly the provisions of SOLAS which address construction and the safety of life at sea, which would place foreign-flag ships in violation of the domestic law as soon as they entered US territorial waters, obviously causing chaos to merchant ship operations, as a result of which the requirements would not be readily achievable, which was a key feature of the Act. But three of those five Justices fell out with the others on the application of the Clear Statement Rule, which, they believed, required that neither the Act in question, nor, indeed, any other Act which did not have a specific maritime application, could apply to the internal order and discipline of a foreign-flag ship without a clear expression of intent that Congress meant that to be the case when it passed the Act in question. In the resultant row four Justices concluded that the Clear Statement Rule merely raises the assumption that Congress does not intend that its statutes should have effect beyond its territorial boundaries.

In the sub-plot of the discord between the five judges in the majority, the other two Justices felt that the Clear Statement Rule should only be invoked where a statute is inconsistent with the United States’ Convention obligations under international law and, thus, the Rule has no application when there is no such inconsistency.

In a magnificently complicated decision, it was, at least, possible to identify the key point of the Appeal that the Clear Statement Rule did not invalidate a domestic law which regulated the internal order of a foreign-Flag ship in United States territorial waters; but that the standard which the Act provided must be readily achievable, and what was readily achievable had to be defined so as to avoid conflict with SOLAS.

303 The Act’s own words in italics
The Court did assist with a further ruling that, with respect to any provision within the Act which may affect the internal affairs of a ship, a clear congressional statement that such a provision applies to foreign-flag ships is required, and instructed the lower court to examine whether the Petitioners’ claims under the Act might have an impact on the internal affairs of the Respondents’ ships.

This, at least, may shed a little light on the dynamic tensions in which the laws of Flag State and Port State overlap and, in that event, which should prevail.

In fairness, the United States legislature is aware, only too keenly, of the limitations of its jurisdiction. In June 2009, a Bill was introduced with the express purpose of assisting in the defense of United States-flag vessels against piracy and to ensure the traditional right of self-defense of those vessels against piracy.

This, the United States Mariner and Vessel Protection Bill, was designed to sanction the use of maritime safety teams and security teams to defend US-flag ships in international waters. It specifically provided that the owner, operator, time-charterer or Master of a vessel would not be liable for damages brought in any American Court in a claim arising out of the use of reasonable force unless the Defendant was grossly negligent or engaged in wilful misconduct. It is noteworthy that the Bill restricts itself to establishing defences to proceedings in the jurisdiction of United States courts and assiduously avoids falling into any trap laid by jurisdictional conflicts. A cynical commentator might question the value of such a Bill, and point mutely to the fact that it has never actually managed to make it to the Statute Books.

While the core of the problem lies in the undoubted target of the Master by Port State management control, any solution to the problem must first overcome the crisis of confidence which the Port State so frequently harbours against the Flag State if the international system of law is to prevail and deal with the Master as the Master had originally undertaken when assuming command of the vessel.

The evidence for such feeling is no novelty and can be discovered between the lines of the OECD’s Convention on Combating Bribery, in which Article 3 requires that States punish offenders who bribe a foreign public official with effective, proportionate and proportionate and

304 Govtrack/US/congress last accessed 4 July 2011
305 Now implemented in the UK by the Bribery Act 2010, Section 6 (1) providing that a person who bribes a foreign public official is guilty of an offence if the person’s intention is to influence the official in their capacity as a foreign public official (see above).
dissuasive criminal penalties. The Convention rationalises the sentencing with guidelines in place for punishing offenders who are convicted of bribing public officials within the State’s domestic jurisdiction. If the offender is a person, then, whatever punishment those guidelines recommend, they should be held in custody, wherever they are, in order to enable effective mutual legal assistance and extradition may be necessary between States in order to allow the concept behind the Convention to be achieved and effective prosecution to be conducted according to the terms agreed. The underlying concern, clearly, is one of trust in the prosecuting State to observe its Convention obligations and deal with convicted persons as the Convention intended.

This crisis of confidence consists not only of doubts in the prosecution of offenders but also of doubts in the process of investigation. In 2008 Nicholas Purnell wrote an article in Lloyd's Maritime and Commercial Law Quarterly which concentrated on criminal investigations and trials concerning UK and European corporations taking place in foreign jurisdictions, principally the United States. Purnell's particular concern focused on the emerging solution taken by the American administration when confronted with cross-border investigations.

The evidence researched by Purnell underpins the conclusion that the United States Department of Justice has become increasingly frustrated that foreign nationals resident outside their jurisdiction have broken American laws which were put in place to protect their own people. Even when confronted with the evidence, the investigating authorities abroad have failed to meet consistency with American demands for justice, which has resulted in a crisis of confidence in the international process. As a result, Purnell finds that the US Department of Justice has taken an increasingly aggressive position in demanding the extradition of such foreign nationals to face prosecution in the United States under American criminal law. The statistics appear alarming: in the period between 1999 and 2006, while the US Department of Justice prosecuted 84 American nationals for cartel crimes, 27 foreign nationals from nine different countries were extradited from European countries (including the United Kingdom) and were tried in the United States under their criminal process.

Applying that to the Criminalisation project, we need to have a statutory definition of crimes, which are consistent with a common understanding of fairness both in their

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307 Ibid p14
308 Ibid p16
character and in their application in the process of justice, within the concept of jurisprudence. This demands some consensus on the pattern and process for resolving criminal disputes, involving the admissibility of evidence and the system of prosecution. However diverse the world’s criminal justice systems may be, the one core, inalienable feature essential to all of them was described in Woolmington v DPP in 1935\(^{309}\), in terms which have never been improved, that, no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the Defendant is an indispensable part of the process and no attempt to whittle it down can be entertained. Wherever the prosecution is to be conducted, there must be confidence in the heart of both Port and Flag State that the process of law will be carried out. The discomfort in an analysis of jurisprudence in the contemporary system, however, undermines confidence in the system which international law has developed for the creation of strict liability offences of violations of environmental law. Professor Mukherjee underlines the theory\(^{310}\) that such offences, which do not have a mental element, are not criminal in any real sense\(^{311}\), but they most certainly have been embraced as such within the sovereign jurisdictions of States around the world. Viscount Sankey in Woolmington v DPP describes the danger with clarity:

> If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law\(^{312}\).

The miracle cure would be to introduce this as a foundation principle of justice throughout the sovereign jurisdictions of the maritime world.

\(^{309}\) Woolmington v Director of Public Prosecutions [1935] AC 462  
\(^{312}\) [1935] AC 462 p469
Section Four: A New Approach

The research questions in this work challenged the global view of justice for the Ship’s Master, examining the character of their accountability in the context of John Stuart Mill’s understanding of justice, as a single principle, founded upon the moral rules of society, against which we judge all actions. Within that very wide understanding, society – mainly Port State society - has evolved the notion of criminal accountability which has taken form in this work as the Mischief – clothed with all the negative characteristics which that noun implies, and which lies at the very root of the global maritime community’s perception of the Master’s criminalisation.

From where we stand in this new Millennium, we can emphatically answer the secondary research questions, for it is apparent that the maritime community’s perception of a negative phenomenon of criminalisation is justified, in so far as it offends our understanding of criminal justice.

It is also apparent that this has been an emerging problem for some time; not long past, but, rather, the recent past. We have seen that the Master has been criminally accountable for generations, within the parameters of justice which the maritime community had accepted to be fair; but the phenomenon before us today has been formed and moulded by the normative ethics of contemporary societies globally – some of them having conflicting approaches, and conflicting interests, resulting in convictions and sentences which trespass upon every concept of justice which is upheld by those peoples making up the maritime community who send their Masters down to the sea in ships, and do business in great waters. The very diverse case studies of Captain Schröder, Captain Laptalo and Captain Chawla underpin such a conviction with compelling persuasiveness.

The secondary research questions have given validity and justification to the primary question, examining the character of this mischief called criminalisation. But the answers to these questions do not go far enough. This work has as its fulcrum the analysis of solutions: options for the effective patterns and processes of dispute resolution in which the Port State can expect some redress for an alleged act or omission on the part of the Master of a foreign-flagged vessel. International law imposes the duty upon every state to exercise due diligence to prevent its own subjects and such foreign subjects as live within its territory (which includes its ships), from committing injurious acts against other states. This duty –
to procure satisfaction and reparation for the wronged state as far as possible – may be met by trying the accused and then, after due process of law, punishing offenders and compelling them to pay damages where required. In a number of cases international tribunals have held that the non-execution or remission of a sentence on the culprit constitutes a denial of justice to the injured person\textsuperscript{313}.

This argument develops logically from the conclusions, drawn, so far, from the research analysing contemporary concepts of fairness and proportionality in addressing the criminal accountability of the Master, exposing the mischief of criminal negligence as a monster of injustice that, in hardly a generation, has been bred, nurtured and now firmly protected by the concept of sovereign jurisdiction. Despite the wisdom of Lord Bingham\textsuperscript{314}, the monster created by Lord Hewitt\textsuperscript{315} and laboured on by Lord MacKay\textsuperscript{316} lives yet.

While the concept of the regulation of obligations between States has been analysed in contemporary literature, no solution has been found, or even attempted, to resolve the discord between the Flag State and the Port State, which has led to conclusions being drawn within the maritime community that the problem is intractable. But from this mischief, not even the Flag States, theoretical protectors of the Ship’s Master, can distance themselves, for they are, themselves, the prosecuting bodies within their own jurisdictions. Captains Schröder, Laptalo and Chawla were all convicted in states that have significant maritime profiles; in essence it is all down to priorities in the normative ethics of the convicting state.

A solution necessarily compels the synthesis of a new approach.

The simple solution on a transnational basis would engage all states in a common process for dispute resolution by adoption of a standard under new international law, thus taking further the philosophy identified in the IMO’s Guidelines for the Fair Treatment of Seafarers. The problems which taxed the IMO would present difficulties with this solution in promulgating new international law for the criminal prosecution of the Master, for such would trespass on the sovereign rights of states to define the processes within their own legal systems, which they have the right to protect against external influence.

\textsuperscript{313} See the decisions of the US-Mexican General Claims Commission, constituted by agreement between the parties under the General Claims Convention 1923, in order to settle claims against one government by nationals of the other for losses or damages suffered by such nationals or their properties and for losses or damages originating from acts of officials or others acting for either government and resulting in injustice. On-line archive materials at http://www.lib.utexas.edu/taro/utlac/00024/lac-00024.html#a23
\textsuperscript{314} R v G [2004] 1 AC 1034
\textsuperscript{315} R v Bateman (1925) 19 Cr App R 8
\textsuperscript{316} R v Adomako [1995] 1 AC 171
The promulgation of new international law would, in any event, be extremely expensive, time-consuming and uncertain. By comparison, research has shown that international obligations are already in place to deliver a cost-effective solution which compels Flag States to meet the obligations to which they are already committed, and Port States to cooperate in that process, in order to resolve a solution. That process will result in submissions on the process for determining liability. Having established that, a rational argument then should be made for a uniform legal order, regulating criminal penalties for the fair accountability of Masters for crimes which the process had determined their guilt.

A new approach also involves the evaluation of evidence of trends in the contractual relationship between the Employer and the Master, in order to explore an approach which draws on the combined strengths of the Master’s relationship with the Flag State which accredited them and with their employer, the shipowner, who put them there. This will rely significantly on the conclusions drawn in this thesis on the historical evolution of the contractual relationship, the commercial risk managed by the Master and the rôle of the Master in the study of compulsory pilotage. The purpose of this approach justifies the faith in the Master-Owner relationship, restoring that paternal protection which has been perceived to have eroded in recent years. But the re-confirmed relationship with the Flag State will then serve as the medium for the resolution of disputes with Port States, relying, of course, on the relationship between states in the international context.
4.1 The Options for a New Approach

Overview

Building on the relationship between Flag State and Port State which has been explored in this work, the arguments in developing management control by Flag State are analysed as the starting point of a solution, for which models are offered in five options for dispute resolution. The key issues of regulation by the UN Charter, giving rise to actions commenced in the ICJ or ITLOS, are analysed and compared with Arbitration, which is put in a light somewhat more accurately than that in which it is frequently conveyed, by the example of the Alabama arbitration. Both of these methods of dispute resolution are regulated by principles of law, which simply may not serve the priorities of the parties involved, thus an option is discussed in Mediation as a tried-and-tested method for resolving intractable disputes. The Chapter on Sovereignty identifies a realistic solution which needs no new body of international law, for the Master must be accountable to the Flag State which accredited them to that position in the first place. In terms of the legal process, though, focus is placed on a solution in a model guide on sentencing. Ultimately, the solution of traditional litigation is highlighted, with its key feature depending on the Master-Owner relationship, conveniently developing the argument in the final option for a new contractual regime, based on a Convention format that can be implemented through Flag State jurisdictions.

Passage-Planning a Solution

Essentially, the solution can be planned with suspiciously simple logic, by the extension of existing laws and minimum effort on the part of the international community. The key Convention requirements are established by UNCLOS\textsuperscript{317}, with the fundamental principle of co-operation between States enshrined in Article 197, to develop international rules, standards, practice and procedure, not with the intention to criminalise the seafarer but to protect and preserve the marine environment.

Part XII Section 6 of UNCLOS specifically addresses Enforcement, Article 217 compelling Flag States to ensure compliance by their vessels with international rules and standards, and with their domestic laws put in place to meet their Convention obligations. Crucially for this work, Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

While this provision alone would plead a compelling argument to redress the ill of Port State intervention in the business of management control by the Flag State, the criminalisation process is complicated by other passages in the Convention. Article 97 addresses penal jurisdiction in matters of collision or any other incident of navigation, surely the broadest regulation of the Master’s authority when it comes to the offended interests of a Port or Coastal State. Encouragingly, Article 97.1 establishes that no penal or disciplinary proceedings may be instituted against the Master except before a Court or Statutory Authority either of the Flag State or of the State of which the Master is a National\(^{318}\). The ship cannot even be seized by another State without the order of the Flag State\(^{319}\). Disappointingly, however, the Article emphatically requires the vessel to be on the high seas at the material time, that is, in international waters beyond the jurisdiction of the Port or Coastal State.

Under Article 220, where there is compelling evidence that a vessel navigating in a Coastal State’s sovereign jurisdiction (the territorial sea) violated whatever laws that State put into place in accordance with this Convention or applicable international maritime environmental laws, then that State may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws\(^{320}\). This emphatically supports the application of the clear statement rule, which was doubtless intended in meeting Member States’ priorities in the investigation process as a prelude to the prosecution of offenders, as part of the solution to the problem of responding to real and perceived risk. The difficulty naturally arises where the normative ethics driving the jurisprudence in that sovereign jurisdiction embrace the solution of criminal negligence in order to meet more easily the threats of increasing numbers of substandard ships and pollutants entering the oceans through operational and accidental discharges.

While genuflecting, however cautiously, to the principle of the need to observe the

\(^{318}\) The State which had issued a master's certificate or equivalent certificate of competence shall alone have the power to suspend or revoke it (see for example, s61 Merchant Shipping Act 1995)

\(^{319}\) UNCLOS 97.3

\(^{320}\) Article 226 strictly limits the Port State’s powers of detention of the vessel. In theory.
sovereign rights of the Port State as the foundation for Article 97, the academic argument for upholding management control by the Flag State enjoys compelling logic. Ratification of a Convention by a Flag State certainly regulates the conduct of a Master who has voluntarily submitted to that State’s laws and obligations by reason of their Certificate of Competency; they must be accountable as an organ of the Flag State – the key question is how the pattern and process of the law is to be applied.

The solution to this question follows two stages:

1. In addressing the claims or grievances of a Port State, the Flag State must assume responsibility for Masters conducting activities in the course of their duty as representative of the Flag State; thus meeting the objective for which the Convention had been intended in regulating the relationship between the parties.

2. The Flag State will then investigate the Master’s accountability by reason of their position; that is, whether the Master would be liable under the State’s domestic regulation, or, indeed, whether they had compromised the Flag State’s Convention obligations to the Port State and such obligation had been extended directly to the Master by the Flag State.

The general concept of Flag State responsibility for conflict resolution of a Port State’s grievance, when analysed in these two clear stages, presents four areas of hazard which have to be addressed:

1. Where the Flag State’s process of dispute resolution is inconsistent with the Master’s right to Justice; this is most manifest in the situation in which the Master must confront the iniquity of ‘criminal negligence’;

2. Where the Port State lacks confidence that reliance upon the Flag State will deliver a resolution which it finds acceptable; most clearly perceived in the Flag State’s inability or reluctance to conduct criminal proceedings against the Master;

3. Where some inconsistency prevails between the States’ understanding of the application of UNCLOS or the application of the clear statement rule in a particular case;

4. Whether conducted by the Flag State or the Port State, how inconsistencies in sentencing may follow a conviction after a fair trial.
The starting point for the quest for a solution demands an analysis and understanding of the priorities of the States Parties. The Port State clearly identifies priorities in

- Managing the risk arising out of the casualty;
- Securing financial compensation;
- Obtaining the justice demanded by the normative ethics of its People;
- Deterring or preventing repeat offences.

By comparison, the Flag State has priorities which are likely to coincide with those of the Port State only by mere chance:

- To protect its sovereign possession in the asset which the shipowner has confidently placed under its jurisdiction; and which other shipowners having invested in its flag will be watching closely;
- To minimise the financial consequences of any Convention claims which the Port State may demand;
- To protect the human rights of its representative, the Master;
- To obtain the justice demanded by the normative ethics of its People.

The solution inevitably demands some compromise by both sides in the achievement of their respective priorities, but whichever way the passage of this solution is planned, it must overcome the four hazard areas if the criminalisation of the Master is to be contained within tolerable limits.

By relying on existing international law, the logic of a solution by settlement between States Parties becomes unassailable. Under the existing regime, the Port State is entitled to rely upon the Flag State to meet its commitment under Article 139 to ensure that vessels to which it has allocated its flag are effectively controlled in order to meet the obligation to protect the marine environment of the high seas. In theory the idea of extending this to the Port State’s territorial waters is simple and compelling; after all, the Port State could pursue the Flag State in litigation under the United Nations charter if they could not find a solution by negotiation.

The first hazard arises where the Port State lacks confidence in the Flag State’s will or ability to deliver a resolution which meets its normative ethics. The second arises out of the abandonment of the clear statement rule with the result of ousting the sovereign jurisdiction
of the Port State.

What we need is a method of dispute resolution that can rise above both of these hazards.
Option 1: Rely on International Obligations between the States

This option necessarily arises in the circumstance, either that the Port State has broken its obligation to the Flag State, for example, by criminalising the Master in a strict liability case in breach of UNCLOS and MARPOL; or that the Port State complains that the Flag State must stand liable as the Master was acting as its representative, or instrument, by which the Port State’s rights had been infringed according to the Flag State’s obligations under the relevant Treaty.

Article 33 of the United Nations Charter gives pre-eminence to the principle that disputes must be settled peacefully, leaving the choice of means to the parties. (If the parties cannot agree on a forum, arbitration is obligatory.)

As the principal judicial organ of the United Nations, the International Court of Justice (‘ICJ’) is regulated by Chapter XIV of the UN Charter. Although the charter does not employ the specific words, it sees itself as a ‘world court’. The ICJ has a dual jurisdiction, the relevant one to this work being to decide, in accordance with international law, disputes of a legal nature that are submitted to it by States – which the ICJ defines as a disagreement on a question of law or fact, a conflict, a clash of legal views or of interests.

As a general rule the ICJ does not have jurisdiction to hear disputes unless both parties have agreed to submit to its jurisdiction on the matter. UNCLOS, however, provides an exception. While Article 280 of UNCLOS emphasises the parties’ right to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any method of negotiation or alternative dispute resolution, if this is unsuccessful and no settlement has been reached, then Article 286 provides that a claim may be submitted to the ICJ by a party unilaterally. All that is necessary, is that both parties are signatories of UNCLOS.

The ICJ does not bask in the warmth of universal acclaim. In its dispute resolution function it does not permit access by bodies other than States who have signed up to the UN Charter. This may be inconsistent with the human rights of the Master who should naturally be entitled to join as a party, and therefore be heard, in proceedings in which they will be accountable for their conduct. A compromise solution theoretically enables the UN General Assembly and the Security Council to seek advisory opinions from the ICJ on any question.

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321 The modest terminology in the text of its website, however, mirroring the UN Charter, reveals refreshingly how it sees its powers and function: see [http://www.icj-cij.org](http://www.icj-cij.org) last accessed August 2011)
of international law, while other non-State parties, such as the IMO, may do so in respect of
matters falling within their specific competence\(^{322}\). For the representation of the Master,
though, this solution is unavailable; in any event, the likelihood that the awesome majesty
of the Security Council would be troubled to gaze upon some trifling maritime dispute is
not a realistic contingency.

That being said, a case submitted to the ICJ inevitably suffers from two major ills, of time
and cost. From the 22\(^{nd}\) May 1947 to the 9\(^{th}\) August 2011\(^{323}\), just 151 cases were entered in
the General List, which conveys something of the huge complexity in being a party to
proceedings in the ICJ. The most recent example is that involving an extremely serious
dispute between Costa Rica and Nicaragua\(^{324}\), potentially leading to armed conflict.
Proceedings were commenced in the ICJ on the 18\(^{th}\) November 2010; an Order for
Directions made by the Court on the 5\(^{th}\) April 2011 fixed the 5\(^{th}\) December 2011 and the 6\(^{th}\)
August 2012, respectively, as the time-limits for the filing of a Memorial by the Republic of
Costa Rica and a Counter-Memorial by the Republic of Nicaragua. As for the remainder of
the case management, the Court directed that:

The subsequent procedure has been reserved for further decision.

In other words, the likely date for a final decision in the case is anybody’s guess, and the
written Judgment may not be published for a considerable time after that. In a particular
case in which the Master’s accountability must be thrashed out between the States Parties,
such a time-scale would be utterly unthinkable.

There is a real alternative: The International Tribunal for the Law of the Sea (‘ITLOS’).

ITLOS widens the choice of forum, not only for UNCLOS disputes, but for any dispute
concerning the law of the sea, the protection of the marine environment or the conservation
of marine living resources.

It is now open to States, should they desire to do so, to take marine disputes to ITLOS,
rather than to the ICJ. A recent case study can be found in the matter of the Louisa\(^{325}\).

According to the Application instituting the proceedings in ITLOS, Saint Vincent and the

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\(^{322}\) An advisory opinion from the ICJ carries just as much authority as a judgment in inter-State proceedings,
and represents a very real means of clarifying and developing the law.

\(^{323}\) Date of last information access


\(^{325}\) The MV Louisa (Saint Vincent and the Grenadines v Kingdom of Spain) ITLOS List of Cases No 18
Grenadines, as Flag State of the Louisa, has claimed that, in February 2006, Spain seized the Louisa and her tender, the Gemini III, on a patently false allegation that she had violated Spain’s historical patrimony or marine environmental laws. Moreover, Spain, as the offending State, had failed to advise Flag State of the seizure of the vessels and, according to the claim, rejected all efforts to rectify the lawless seizures. Spain then imprisoned the crew for various periods of time and, although they had subsequently been freed, continued to hold the vessels without bond, the effect of which is that their value has now diminished, even to nothing.

The proceedings were filed on the 26th November 2010, and followed by a directions hearing with (for international tribunals) lightning speed on the 12th January 2011 when time limits were given for filing pleadings. Sadly the system stumbled at the hand of the Claimants themselves when, on the 28th April 2011, they had to ask for an extension of time for filing their Memorial, which had a knock-on effect for the management of the case, with the consequence that Spain would not have to submit its Counter-Memorial until the 10th November 2011, which, effectively would put back the time-limit for a final rejoinder, closing the pleadings, to March 2012. Even so, the time advantage remains clear over that of the ICJ.

Unlike cases brought in the ICJ, the proceedings before ITLOS will enjoy the expertise of 21 judges with recognised competence in maritime law. In the wider sphere, where a case is brought by consensus, the range of potential parties may include non-member States, international organizations, NGO’s, and private parties. This may present real opportunities for justice in marine environmental cases, because it offers the possibility of creating a judicial process capable of accommodating the broader conceptions of participation already apparent in international law-making.326

Whether the tribunal be the ICJ or ITLOS, the source of law upon which the decision is based, will be founded on the international treaties and conventions in force, international custom, the general principles of law and, as subsidiary means, judicial decisions and the opinion of academics acting as expert witnesses. As a cautionary tale, the classic North Sea Continental Shelf case between the Federal Republic of Germany and Denmark demonstrates the role to be a very narrow one, involving the applicability of conventions and customary international law.

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327 North Sea Continental Shelf, Judgment, ICJ Reports 1969, p 3
This option relies on, and develops, the concept of the regulation of relationships by international law. The Port State complains that a pollution event has been caused by a vessel to which the Flag State has allocated its flag and, therefore, the convention provisions binding them will form the basis upon which their priorities can be met. The determination is made on that liability and, in the event of a finding for the Port State, the Flag State must pay compensation. It is then for the Flag State to deal with the conduct of the Master according to its own law, following the procedures of its sovereign laws.

The advantage is that no new laws are necessary; international law permits this to be implemented immediately. At the most, it requires only a memorandum of understanding for Port and Flag States to confirm their intentions to pursue this.

By the same token, of course, this memorandum of understanding limits the Port State’s options by relinquishing its powers to prosecute the Master in criminal proceedings. In essence, the Port State must put its faith in the Flag State to ensure that justice is seen to be done against the Master in its own criminal process. Given the Port State’s apprehension that the Flag State in question may not have the financial means, or the structure in place to obtain such means (whether by insurance, or recovery from the shipowner concerned), or even the will, to comply with the Order of the tribunal awarding compensation within a reasonable time-frame, this option faces the hazard that it will fail through lack of confidence between the parties.

It might, however, form the basis for a new approach, by development with a second option.

While the key issues will be of extreme interest for the States Parties, the Master’s accountability, as the organ of the Flag State, may not be addressed at all until after the international process has concluded, hanging over them like the Sword of Damocles.
Option 2: Alternative Dispute Resolution

The whole structure of international regulation relies on consensus: not just in ratifying terms, but also in resolving problems. For this reason, the UN sets a lot of store by arbitration as an alternative to the Court process. Indeed, if the parties cannot agree on a forum, arbitration is obligatory; for example, the 1991 Antarctic Protocol refers all disputes to arbitration, unless the parties agree otherwise, and some Arctic equivalent may well follow suit.

It is unwise to enthuse too highly about arbitration in the context of this work. States are justifiably reluctant to resort to adjudication where the rules of customary law are themselves unsettled, and an underlying consensus on what they should be is not yet fully established. In these circumstances a judicial or arbitral award might establish precedents with unwelcome implications for the parties – and the international maritime community.

This may best be illustrated by the horror story of the arbitration of the Alabama case. In May 1871 the Geneva Conference was established to arbitrate an international dispute involving a claim by the United States against Great Britain for compensation for the consequences of Britain's naval contribution to the Confederate war effort in the War for Southern Independence. The demands made involved incredibly inflated figures, exceeding the British national debt, and despite rejecting much of the Union’s claim, the Arbitration panel even managed to offend the Rules of Natural Justice before, embarrassingly, it made a final award against Britain of $15,500,000; a staggering amount which even exceeded Washington’s claims in respect of those damages which had not been thrown out, and the Senate had to pass a Bill to create a commission to adjust the compensation due to claimants that would be discharged out of the indemnity fund awarded by the Conference; even then a residual balance was used for purposes never contemplated by the arbitration.

328 See National Archives resources ref: CO37/202/13; CO37/202/23; CO37/202/90; FO881/2062; FO881/2085; FO881/2087; PRO30/22/17A; PRO/30/29/22A/9
329 The iniquity of this decision can hardly be understated. It must be remembered that the Conference was obliged to make its award solely on findings of law based on the evidence before it, nothing else. It was entirely immaterial whether or not Great Britain was committed to the belligerent whom she believed to be in the right. Moral concerns were irrelevant - or, rather, should have been, because the facts demonstrate that, notwithstanding its consensual foundation in the 1871 treaty, the Arbitration offended the rules of natural justice: that the Tribunal should be impartial. Of the Arbitrators, one was a Brazilian; of whom it was alleged that he thought more of the goodwill of the United States than of Britain. The second was a Swiss, who had no knowledge of the subject matter of the case: Switzerland possesses no seaboard and he sought no grounding in the maritime matters that were being argued. Despite these assertions, the Author has not found any evidence that would condemn the Tribunal’s impartiality as regards determining liability. The real problem lay with the Italian Arbitrator. After the award was made, Lord Selborne protested on behalf of the British Government at the size of this gross award of damages, to which the Italian replied: You are rich, very rich.
There can be no certainty that such an outcome would not happen today, in a world in which the normative ethics of society in matters involving the marine environment have developed and evolved the Master’s accountability for ‘criminal negligence’ in such a case.

While arbitration is often viewed as a form of alternative dispute resolution, because of the consensual nature of its implementation (it is, effectively, implemented by contractual agreement), its outcome is entirely out of the control of the parties. And it has teeth, in the form of an Award which can be enforced: something which will appeal to the winner, and dismay the loser.

Pure forms of alternative dispute resolution require that consensus to apply even to the outcome of the process – that is, the whole experience is controlled by the parties themselves, from the scope of the dispute to be addressed, to the final settlement. While alternative dispute resolution takes a number of forms, the flagship is Mediation.

Mediation remains fairly new to the litigation process in many parts of the world. Its birth was a matter of necessity rather than choice, as the cost of litigation in terms of money, time and uncertainty escalates out of acceptable terms to the parties, leading them to consider a new approach. Its application in the twenty first century world has evolved from experience in the United States in the last quarter of the preceding century, where the legal process had led the world in the arena of expensive litigation. In fact, while the English legal system has been grinding away for centuries, the idea of modern mediation was conceived by Britain in dramatic circumstances in 1862, during the War between the States. It was never put into place, though, for politics got in the way, and the Civil War dragged on for another two and a half years, with the loss of 620,000 lives. It is a tragic example of how a positive and flexible approach to resolving a dispute could have been explored but for the will to grasp the nettle, and the consequences that flow as a result of a failure to mediate a solution.

**Mediation - American Success**

It was entirely improper to take into consideration a party’s means when considering the arbitration of a civil claim, and such an outrageous comment renders the Award unsafe, leading fairly to the conclusion that Britain was, indeed, denied that basic right of natural justice, to be tried by an impartial tribunal.
Litigation costs have an endless capacity to escalate out of control. Nowhere has this been more keenly felt, than in the United States in recent years, where they tackled the problem head-on, and found the solution: let the parties keep control of the situation and explore a settlement - not with a judge who will rule between them, but with a trained neutral person who will guide them. Mediation has been a feature of litigation in the United States for some forty years now - a feature which has been found time and time again to be a cost-effective alternative to litigation. Even in those apparently intractable cases which have gone to judgment and subsequently been appealed, current statistics show that 54 per cent of those are then successfully mediated before the appeal hearing\(^{330}\).

Mediation’s success story in the United States has been so compelling that it has been embraced by the British government as a vital tool in modernising the Courts system in this country, and procedural rules have been in place since April 1999 actively encouraging the use of Mediation and ADR in every civil case. It is a fact that in the year to May 2000 the number of cases in England which were mediated as an alternative to going to Trial increased by 140 per cent.

**The Key to the Success of Mediation**

The application of Mediation in the international context, readily embraces the idea of dispute resolution without boundaries: the parties need not be states which have signed up to any key treaties, and there are no rules of procedure limiting just how flexible a solution may be reached, in order to meet the parties’ priorities, resolving not just the event which has taken place, but also establishing some future relationship which gives the parties confidence in each other. The key is in the parties’ own power, to reach some guided settlement by negotiation.

It works in this way. When people are unable to reach a solution to a problem themselves it makes sense to seek the assistance of a neutral person - the Mediator - who is especially trained and skilled in the process. By working with the parties, the Mediator helps them to clarify the issues that divide them and identify the matters on which they agree, which makes it easier to explore a solution, which will not be ideal for one party or another, but will be something with which all of them can live. In this way, the parties remain in control.

\(^{330}\) United States Court of Appeals for the Federal Circuit, Circuit Mediation Office Statistics 2011 Calendar Year – First Quarter (January 1, 2011 through March 31, 2011)
of the negotiation.

The Mediator, understandably, must guide the process by relying on their own expertise in the issues, and by exercising to the full their energy, patience and persistence. That really is all they have, for there are no rules in Mediation – what the parties want, they get. The Mediator’s function is to facilitate the negotiation, by establishing the foundation of confidence. Without any issues of reliance upon precedence or legal regulation, confidence is essential for the Mediation to work, because the parties must have confidence in the process, and confidence in the Mediator to steer the process - and the parties - to a solution to their dispute.

At the core of the parties’ confidence, is their respect for the Mediator’s neutrality: the Mediator has no axe to grind one way or the other, and so the parties can rely on the vital commodity of confidentiality when they are discussing their position with the Mediator behind closed doors. This aspect of confidentiality is crucial to the process, because the Mediator must know what the parties’ priorities are - what is important to them - if there is to be any hope of finding a solution. Very often they have kept very quiet about these priorities, which would otherwise betray some weakness in their case or their bargaining position, and they would not be at all thrilled if these were disclosed to the other side; but the Mediator will know what their needs are, and will skilfully keep this in mind without disclosing any confidences unless the party in question authorises him to do so.

The pressures that build up in a dispute frequently force cases out of the hands of the parties, even if they did not want it to escalate; this can be particularly dangerous to their priorities when they have, want, or may need to have ongoing relationships of some sort, such as that between Port State and Flag State. Time is invariably an important issue, for they have a mutual interest in a relatively swift resolution, while litigation appears long, expensive, and risky for both, and the outcome is out of their control: experienced lawyers are aware that no case is really more than 80 per cent certain, so much can go wrong in the end. But both parties feel that they are being pushed into litigation by a whirlwind of accusations and arguments. Driving it all, of course, is the clash of the normative ethics of their respective societies, generating strong emotions, venting negative feelings which prevent them from looking objectively at ways to meet underlying interests and jointly solve problems.

The resultant effect of these pressures forces a breakdown in communication between the parties, and lost communication is the mid-wife of Litigation. By comparison, the mediator
will help them to communicate, and guide them to recognise their own and each other’s legitimate priorities; from this foundation, they can clarify those areas of mutual agreement, and isolate the dangerous areas of disagreement, leading them to design options which reconcile and meet those needs, creating a solution which would be beyond the power of the court to impose, but which can be closed in the form of a binding agreement in which the parties can have confidence in the future.

A Utopian Ideal?

Experience in recent years of high level political mediation in the Middle East and Northern Ireland, and the growth of international trade – and the damage caused when it is interrupted – have opened opportunities for mediation, even in what have been viewed as intractable conflicts. Jacob Bercovitch\textsuperscript{331} characterises intractable conflicts as being driven by protagonists who have a strong sense of identity; by application in context, this associates the phrase with the classic Port State – Flag State issue in which sovereign states harbour a grievance against each other, be it economic, political or, indeed, otherwise sensitive, such as the damage to one party’s environment or the human rights of the other party’s representative (the Master). The successful mediation of intractable conflicts in the international arena, in which the antagonists reach a jointly acceptable outcome without assuring their political suicide with their electorate, raises the real option that a dispute arising out of an alleged claim by the Port State against the Flag State for the spill from one of its vessels, can be mediated without the cost of litigation and without the necessity for any new international law whatever.

The question remains, however, as to how realistic the notion presents itself, in the context of this work. Realistic minds have expressed the opinion that the conflicts between Port State and Flag State arising out of a pollution event are unlikely even to allow them to agree on a mediation process, let alone to pursue it, when the prospect of a final solution is entirely dependent upon the parties’ will to find one, and to keep to its promises – for mediation has no teeth.

But that puts mediation in the context of being an alternative to an international tribunal. Mediation may be observed to offer an additional option, as a stage in the process following the breakdown of negotiations but before arbitration or litigation before a tribunal. After all,
it is a consensual, non-legal remedy, so if the parties cannot reach agreement, they can proceed to Trial. The UK Government has embraced this as a key part of the management of civil cases, and itself has published a commitment, on its own behalf, underlining a key objective to…

actively consider and attempt the use of alternative dispute resolution techniques whilst making going to court to resolve the dispute a last resort wherever possible.332

In the light of this, mediation could be built into the option for a solution, as a means of facilitating some negotiated process, which, if unresolved, would enable the parties to proceed to the next step, of testing their case in Court.

For the Master, however, this option only presents the opportunity of expediting a possible resolution of the dispute between the offended Port State and the Master’s Flag State regarding their international commitments to each other. If the States cannot reach a resolution under the existing regime, most likely because the Port State does not have the confidence that the Flag State has the means or the will to administer justice according to its obligations, then these options remain unresolved as solutions for the Master, whose criminalisation will continue.

But then we have an option to consider, for a new court altogether.

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Option 3: A new International Court?

Options 1 and 2 address the opportunities for embracing and developing current international law, putting the dispute firmly in the arena for resolution between the Port State and the Flag State, rather than the prosecution of the Master in the jurisdiction of the Port State, to which they did not submit when contemplating their certificate of competency from the Flag State. It would then be for the Flag State to try the Master’s accountability under its own system. Our analysis of Option 1, however, reveals serious issues with the acceptability of this by the Port State which apprehends that its key priorities will not be met. As a downstream consequence of such failure, Port State might argue, none of its priorities could be achieved, either in managing the risk already created by the casualty or by a repeat offence, or securing damages in compensation, or securing the justice demanded by its electorate, presenting two of the particular hazards identified above to successful resolution:

- Where the Port State lacks confidence that reliance upon the Flag State will deliver a resolution which it finds acceptable;
- Where the Port State asserts its right to sovereign jurisdiction, which likely will be articulated by its application of the clear statement rule in a particular case.

The Flag State’s response must, equally, of course, ensure that their priorities are met, protecting its shipowners and the Masters under its sovereign flag, guaranteeing the justice which the maritime community demands and minimising the risk of damages owed to the Port State.

If the conflict remains intractable, then a third option must be offered.

A possible solution under this head has already been tried and tested in international law. The International Criminal Court (‘ICC’) was established by the Rome Statute 2002 as a permanent tribunal for the prosecution of perpetrators of the gravest crimes of genocide, crimes against humanity, war crimes and the crime of ‘aggression’. The ICC is emphatically independent of any body, be it a sovereign jurisdiction or the United Nations, which, at the very least, clothes it with impartiality.

The ICC is not intended to supplant a State’s sovereign jurisdiction, but to assume the

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333 broadly defined as an act of war lacking the justification of self-defence
prosecution of a case if that State does not deliver the judicial process demanded by the crime. While the ICC will not have jurisdiction in a case which has been or is being investigated or prosecuted by a State with jurisdiction, it can have jurisdiction if the investigating or prosecuting State is unwilling or unable genuinely to carry out the investigation or prosecution.

The attraction of this option can be identified with the compelling issue, already argued, that the Master owes direct accountability for the obligations of (for example) safe navigation and environmental protection agreed by Flag State in its treaty obligations. As such, it is incumbent upon the Flag State to enforce such accountability through its Court process. In default, a maritime equivalent of the International Criminal Court, on the precedent of the Rome Statute, will do so, assuring the Accused, wherever they may be, of consistency in prosecution and sentencing.

The uncertainties in creating a model on this option are challenging:

1. Any such treaty would have to adopt a process of prosecution which is acceptable to parties which practise the adversarial and the inquisitorial systems in any combination. This is heavily mined by hazards, not the least of which involve the conflict between the two systems in how evidence is managed and presented.

2. The extortionate cost and time expended in getting a draft instrument to the stage of a ratified Convention might be seen as an incentive for revisiting other options.

3. Once the treaty is in place, the management of the Court would have to be paid for, and parties would have to contribute judges with the expertise in which both the Flag States and the Port States had confidence. A comparison with the ICC characterises a few of the cost features which might prove difficult to resolve.\textsuperscript{334} For example, as an independent body, most of the ICC funding comes from Member States, whose contributions are determined by the same method used by the United Nations, which roughly corresponds with that State’s income. The timeless difference of view between the exporting (or Port or Coastal) States and that of the maritime (or Shipowning) States, with which the limitation rules under Hague-Visby, Hamburg and Rotterdam are so closely associated, could lead to pessimism over the likelihood of a consensus which would be necessary for ratification to succeed.

Ultimately, the complexity behind this option is dogged by the very simple, and damning.

\textsuperscript{334} Calzonetti C, 2005, Untitled, Council on Foreign Relations, New York, NY
question which both parties could raise, and which the Author articulates: Why, ask the States, should we pursue this at all? Existing law is in place. Ultimately the rights of the Master against criminalisation come fairly low down in our list of priorities. Both parties have existing Convention obligations; we could apply to the ICJ or ITLOS.

Ultimately, States will be persuaded to adopt such a solution on the basis that it resolves either a cost benefit issue, or a political issue. (To resolve both issues would be a bonus). Maybe, some encouragement can be derived from the Hebei Spirit case. In response to the South Korean Courts exercising their sovereign jurisdiction over Captain Chawla, the International Transport Workers Federation made a very public appeal to South Korea to allow the two Hebei Spirit officers found innocent of causing the oil spillage (the ITF’s own words) to return home.

Subsequently, the ITF joined BIMCO, the International Chamber of Shipping (ICS), International Shipping Federation (ISF), INTERCARGO and INTERTANKO, the International Group of P&I Clubs (IG), and the Hong Kong Shipowners’ Association, to deliver a joint protest to the South Korean Government expressing their deep dismay over the continued detention of Captain Chawla and his First Officer, condemning the Court’s decision as unjust and in breach of their human rights. The one thing that they could not do, was to say that it had been contrary to South Korea’s sovereign law, which, no doubt, increased the frustration of the maritime community.

In November 2008 the ITF made a statement at the Maritime Safety Committee of the International Maritime Organisation, supporting interventions which had by now been made to the South Korean Government by the Governments of India, Hong Kong and China. This statement deserves quoting in some depth because of the strength of the issues within it, with which it informs this work:

“We sympathise with those in South Korea affected by the oil spill but are conscious that Capt Chawla and Chief Officer Chetan have been found innocent of causing last December’s spill. We accept that the Korean Government cannot interfere with the judicial system but call on them to do everything possible to enable the seafarers to be repatriated as soon as possible. Seafarers throughout the world and their representatives are deeply concerned at the unjust treatment of these men and condemn this as another blatant case of criminalisation of a

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336 Ibid para 8
profession that is relied on for our trade.”

This statement embraces the key problem which the global community had to confront, in that the State’s sovereign jurisdiction cannot be challenged from outside, and must reflect the normative ethics of that State’s society; but such a demonstration of criminalisation was, nevertheless, presented as a threat to the character of the sovereign State by the global community which might have consequences in terms of trade and international relations that might be persuasive factors in influencing a change in the process of their sovereign law.

However much of a threat the global maritime community sought to make of itself, it did not do much good, for the Master and Mate were imprisoned a month later – only to be released on appeal, subsequently. Maybe, in this way, the South Korean people saw that justice was done and, conveniently, the maritime world saw the seafarers subsequently released – a result, perhaps, achieved by compromise.

The value of this study offers the option of an independent international court to resolve the issue by examining the facts and, if necessary, by the prosecution of the Master. But the issue will always be that of Jurisdiction. Current international law has expressed a great deal about jurisdiction, in the form of UNCLOS, and the respect for the sovereign State must be upheld. It is for this reason that this option falls into some doubt. Its synthesis, however, has proved beneficial, because it leads to another option, which builds on the current foundation of international law which respects sovereign jurisdiction. What is needed, is a consistent approach towards justice, which, to parrot the words of Hewart, LCJ, should not only be done, but should manifestly and undoubtedly be seen to be done. Such consistency may be achieved in a code for sentencing; if that be the case, it need not necessarily matter where the Defendant is tried, and under which process of law.

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337 Ibid, para 12
338 R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, [1923] All ER 233
Option 4: Submission to the provisions of UNCLOS or the Clear Statement Rule, but with a Model Code for Sentencing

Existing international law offers accountability by the Flag State to the Port State, and the accountability of the Master to their Flag State goes far to embracing the validity of a structure of law enforcement against a Master by their Flag State of its domestic laws as well as its international obligations, wherever the act or omission has taken place. In this context, however, we are left with the supreme difficulty in current law of the defective evolution of criminal negligence in the Flag State’s process of criminal accountability, one of the key hazards identified in this work.

To this extent, it may be argued that it matters not whether the hazard is confronted in a Flag State or a Port State Court. Moreover, the mischief of inconsistency in the way in which evidence is managed and presented in the conflicting adversarial and inquisitorial systems, so long a barrier to the effective administration of criminal justice internationally, pales into insignificance when compared with the risk that it will be used to underpin an objective, rather than a subjective, test of the Defendant’s mens rea.

In this context the application of provisions under UNCLOS such as those in Articles 21 and 27, or, much more to the liking, no doubt, of the Port State, the clear statement rule, so beloved in the priorities of the Port State, would have little practical advantage or disadvantage to the Master, while its preservation would, at least, meet the rights which inherently belong to state sovereignty in the judicial process, while conveniently disarming the Port State’s potentially inflammatory lack of confidence in the judicial process of the Flag State concerned. In this respect, UNCLOS need not be revised at all. With the abolition of the objective test in criminal negligence accepted globally, then the sovereign rights of Port States and Flag States could remain intact and their respective judicial systems respected. The essential leveller required in this case remaining to be determined is how the punishment will fit the crime.

Some invaluable guidance has been given by the European Union in this context, which was severely tested by a case which was heard by the European Court of Justice in October 2007 and affirms good precedent for the concept. The decision in the case of the Commission of the European Communities v Council of the European Union 339 focused heavily on a constitutional conflict within the Union addressing the safety of maritime transport, but

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339 Case C-440/05 Commission v Council
clarified principles which, applied more widely, are crucial to this project.

The philosophy in the Treaty of Amsterdam for judicial co-operation in criminal matters\textsuperscript{340} specifies, perhaps somewhat narrowly for the tastes of some, that the Union’s objective is to provide its citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters, while defining the objective more closely to prevent and combat crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.

Nothing there about maritime safety, and nothing on the Union’s power to make new criminal law.

Central to the argument in this case was the Court’s observation in the Judgment that the common transport policy is one of the foundations of the European Union, with its primary objective to improve maritime safety and protect the marine environment. The decision supported the finding in the previous case of the Commission v The Council\textsuperscript{341} that although the general principle subsists that it is not for the European Community to legislate new criminal law or make rules of criminal procedure, which fall solidly within the jurisdiction of each Member State, nevertheless in the situation in which measures have to be put in place to deter the commission of serious environmental offences, those measures must have the common purpose of implementing effective, proportionate and dissuasive criminal penalties within individual jurisdictions, and to this extent the law-making process within the European Community legislature has the right under the Treaty of Amsterdam to require Member States to implement such penalties in order to ensure that the rules which it lays down in the field of environmental protection are fully effective. It is submitted that the logic of the argument goes beyond this, for the philosophy of the European Union demands a harmonised process which establishes a level playing field across Europe; thus criminal punishment in one State must be consistent with that in another.

The Court’s decision exposed the supreme difficulty, however, in that the Community has the power to compel Member States to provide those criminal penalties, but has no power to tell the Member States how to do it. In other words, the power to determine the type and level of penalties to be applied remains within the sovereign jurisdiction of the Member

\textsuperscript{340} See Title VI of the Treaty
\textsuperscript{341} Case C-176/03
State concerned, and on this occasion the European Community has no right to trespass on those rights which are so jealously guarded within the understanding of the word ‘sovereignty’.

This concept of international law can be transposed to the issue in context, to reveal the consequence that, while UNCLOS compels Port States and Flag States to implement regimes of criminal law for the protection of the marine environment, it leaves the determination and technicality of the punishment to the individual systems of the States concerned.

In the case of the criminalisation of the Master, this presents an ultimate hurdle to a solution, for such sovereign rights must be respected. The solution, however, is revealed by logical extension of the argument in the ECJ decision: whoever shall have jurisdiction matters not, it is the determination of the type and level of penalty which is relevant to the Master; namely, the process of sentencing. And that can be harmonised very simply by the ratification of sentencing guidelines across the community of Port and Flag States.

In this context a solution can be explored which has some precedent in the English legal system which, after all, enjoys the confidence of the maritime world; indeed, London remains supreme as the centre for dispute resolution thanks to the faith which is placed in English Admiralty Law. The precedent can be identified in the work of the Sentencing Advisory Panel and the Sentencing Guidelines Council, which have established rôles in the UK to encourage and develop consistency in sentencing in UK courts. The key feature of their work has involved the promulgation of guidelines in order to aid Courts in the complex decision-making process involved in sentencing. In the sphere of this project, sentencing should be uniform just as the accountability under international law is uniform.

**The Foundation of Sentencing: Culpability and Harm**

The academic theory in sentencing inevitably is a slave to the normative ethics in Society. While the strict liability offences provided in UNCLOS and MARPOL clearly are intended to deliver redress, it is axiomatic that the redress in question is a matter for resolution between the States Parties to the Convention concerned. How the normative ethics of the Society in whose jurisdiction the issue will be tried, will demand retribution is an entirely separate matter, which has already been acutely observed, not least in the case of the Hebei Spirit.
Seeking to punish the Master as the most convenient person to blame is, therefore, the prime function for the guidelines to avoid. Upon this foundation, the principles of appropriate sentencing can be built.

As representative of the Flag State, the errant Master has behaved in such a way that the Flag State’s convention obligations to the Port State have been broken. If the Port State is to have jurisdiction in the prosecution of the Master, therefore, it must establish the culpability of the Master in the breach of the Port State’s sovereign laws which have been implemented, in theory at least, by virtue of its Convention rights and obligations with the Flag State.

The Sentencing Guidelines Council published a helpful paper in 2004\textsuperscript{342} addressing overarching and general principles relating to the sentencing of offenders. The Council placed great faith in the wisdom of the Criminal Justice Act 2003, which broadly compels the Court to take into account five purposes of sentencing when dealing with convicted offenders: the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offence\textsuperscript{343}. The application of those purposes in the context of the Master in fact underpins the relevance of all save the reform of offenders, which is not a matter with which the Port State is likely to concern itself.

The overarching obligation on the Court is to pass a sentence that is fair and proportionate when considered with the seriousness of the offence. The seriousness of an offence is determined by two main parameters: the culpability of the offender and the harm caused or risked being caused by the offence.

Culpability, or blameworthiness on the part of the offender, will be determined by such factors as motivation, whether the offence was planned or spontaneous or whether the offender was in a position of trust – or responsibility. Such features manifestly lend themselves to considering the position of the Master in a casualty event and, thus, the relevance to the task in context is compelling. Culpability has been analysed by the Council to have four levels, which determine the seriousness attached to the mens rea of the

\textsuperscript{342} Anon, 2004, Overarching Principle: Seriousness, Sentencing Guidelines Secretariat, London
\textsuperscript{343} 142(1) Criminal Justice Act 2003
offender and can be paraphrased to apply specifically in this case as follows:

1. The Master had the intention to cause harm, with the highest culpability when the offence itself was planned. The worse the harm intended, the greater the seriousness.

2. The Master was reckless as to whether harm would be caused, that is, where the Master appreciated that at least some harm would be caused but proceeded any way, giving no thought to the consequences even though the extent of the risk would be obvious to most Masters in that position.

3. The Master had knowledge of the specific risks entailed by their actions even though they did not intend to cause the harm that resulted.

4. The Master was guilty of negligence. (Sadly, the word ‘negligence’ is not defined by the Council.)

On the face of it, the last level arouses suspicions that the Council’s advice is unsafe, in that it perpetuates the mischief of criminal negligence. The Council proceeds to argue a relevant point, though, in that strict liability offences, in which culpability need not be proved for the purpose of obtaining a conviction, will still require the consideration of culpability in deciding sentence. When transposed to the wider concept of blameworthiness generally, this raises the fascinating argument that the objective test which is central to the defective concept of criminal negligence could yet play a rôle in sentencing. In R v F Howe & Son, a case involving breach of health and safety law, the Court of Appeal gave a non-exhaustive list of particular aggravating and mitigating factors which might be relevant when deciding sentence. A deliberate failure by the offender to heed warnings would amount to an aggravating factor; as would a deliberate breach with a view to profit or a risk run specifically in order to save money. By contrast, steps taken to remedy the deficiencies after they were drawn to the offender’s attention would amount to a mitigating factor. In fairness, however, such matters have probative value in determining the offender’s ‘inner posture’, that state of mind which embraces consciousness and acceptance of the risk, even if it were not the primary consequence desired by the offender. The test for the ‘inner posture’ must necessarily be subjective, though, which renders an evaluation by the standard of negligence unsafe, yet again. This conclusion is underpinned by the guidance of the Health and Safety Executive, which identifies a factor to be considered in sentencing which may indicate a higher element of culpability, if the offender deliberately or recklessly violated

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344 Overarching Principle: Seriousness, Sentencing Guidelines Secretariat, p 4
345 R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249
the law, as opposed to breaching it as a result of carelessness, thus confirming the validity of the approach of determining the offender’s state of mind. In conclusion, it is apparent that the same issues of the mental element apply in establishing liability as in sentencing and so level 4 in the Council’s Advice must be discredited.

Harm must always be judged in the light of, and, therefore, must follow the determination of, culpability. The Council has analysed the parameter of harm to cover three types:

1 Harm to the individual, who may suffer death, personal injury, psychological stress or financial loss; in other words, issues which are personal to the victim in question, and cause a particular impact which the Court should reasonably take into account when determining the seriousness of the offence.
2 Harm to the community, which widens the impact from the individual considered above to the well-being or otherwise of the local society, or society at large.
3 Other types of harm, which the Council had difficulty in characterising but, in the context of a pollution casualty, may describe the effect on wildlife and the marine environment but there may be human victims as well who suffer financially or psychologically as a result of the environmental damage or the suffering inflicted upon animals as a result of the casualty which gave rise to the offence.

The Council embraced the notion that some conduct is criminalised purely by the normative ethics of society, in particular when public feeling is inflamed by the consequences of the behaviour, which can influence public perception of the harm caused. The Council promptly dismissed this highly pertinent factor in 49 words, but the issue is emphasised, nevertheless, leading to the conclusion that sentencing has a natural affinity with the normative ethics of society, which may not be justified within the concept of jurisprudence, as this work has identified exhaustively. Mr Adomako may or may not have been negligent in the concept of civil law, but the concept was translated to the criminal scenario in order to meet the public demand for a criminal consequence for the harm caused. In these terms, the Master and Mate of the Hebei Spirit endured the same fate when the State Prosecutor secured a conviction on the criminal damage charge which entitled the Court to impose prison sentences.

The art of compromise in this clash between jurisprudence and normative ethics does not lend itself lightly to finding a solution to the problem of sentencing the offender, which

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347 Overarching Principle: Seriousness, Sentencing Guidelines Secretariat, p 5
suggests the need to reconsider the approach. Serendipitously, the Sentencing Advisory Panel’s first advice to the Court of Appeal addressed the issue of formulating guidelines for environmental offences\(^{348}\), with the overall aim to promote fairness and consistency in sentencing. The panel addressed its guidance in relation to five specific environmental statutes, one of which involved a maritime context in the Water Resources Act 1991, controlling, inter alia, pollution in coastal and territorial waters. In this work, aggravating factors were more particularised in determining the culpability of the offender, and the results can enhance and develop the work of the Sentencing Guidelines Council for a more reliable approach to sentencing, as a model for the punishment of the convicted Master. Building on the foundation of the combined work published to date, the factors determining culpability may be described thus:

1. The offence is shown to have been a deliberate or reckless breach by the Master of their obligations in law by reason of their responsibility, both as to Flag State law and such Port State laws which have been promulged as a result of the authority and powers under UNCLOS and MARPOL;
2. With reference to the conduct which led to the casualty event, the Master acted from a financial or commercial motive, whether of profit or of cost-saving on behalf of the Owner or Charterer;
3. The Master failed to respond to advice, caution or warning from the relevant regulatory authority. The example begging to be cited in this instance is that of the Hebei Spirit; but this must always be tempered with the Master’s unique discretionary powers under the Merchant Shipping (Safety of Navigation) Regulations 2002\(^{349}\), which do not render him unassailable but by his subjective decision he can give a good account of himself;
4. The Master ignored Company Standing Orders (as in the case of the Sea Empress regarding the Master-Pilot exchange), or ignored the concerns expressed by others, not just those on the bridge or Port State Control but, for example, a voluntary pilot on board;
5. The Master is shown to have had knowledge of the specific risks involved, apprehending the risk that a crime could occur as a result of their action and, nevertheless, proceeded to take that risk\(^{350}\).

The harm to be considered in the light of culpability can equally be addressed with a model which relates to the actual or potential extent of the damage caused:

\(^{348}\) Wasik, M, 2000, Environmental Offences: The Panel’s Advice to the Court of Appeal, The Sentencing Advisory Panel, London
\(^{349}\) Amended by SI 2011 No 2978; see footnote page 41
\(^{350}\) Ibid, Para 6
1. The pollutant spilled was noxious, widespread or pervasive, and/or liable to spread widely or have long-lasting effects, affecting the water column, the sea bed and or the coastline;
2. Human health, animal health, or flora were adversely affected, especially where a protected species was affected, where a site designated for nature conservation was affected, or where the event took place in a pristine environment, such as the High Arctic, demanding increased awareness of the risk of damage;
3. Extensive clean-up, site restoration or animal rehabilitation operations were required, again demanding increasing awareness of the hazards to effective clean-up such as the geography and weather hampering operations in the High Arctic;
4. Other lawful activities were prevented or significantly interfered with, such as fishing, leisure and tourism.\textsuperscript{351}

Crime and Punishment

The nature of the punishment can be addressed more clearly, by reference to the provisions in UNCLOS and MARPOL on the penalty for strict liability offences. The panel restates the general principle that individuals and companies should not profit from their offences, and it is important that the sentence takes full account of any economic gain achieved by the offender by failure to take the appropriate precautions; it should not be cheaper to offend than to prevent the commission of an offence. Conversely, the expense of any remedial action already taken by the offender might lead the court to reduce the level of the fine it would otherwise have imposed. In this respect, naturally, the focus travels from the Master to the shipowner or operator, raising the spectre of identifying the culpable party within the context of fleet Ownership – necessarily associating the culprit with the ability to pay the fine and damages involved, for it would avail little benefit to the state prosecutor if they convicted the defendant operator but then discovered that they had no funds or assets with which to pay. In the circumstance in which much of the applicable law holds both the Master and the owner-operator accountable, it is not difficult to understand the prosecutor’s decision on a cost-benefit analysis to abandon the hunt for the owner and concentrate, instead, on the individual currently residing in custody in one of their cells.

The level of the fine should reflect how far below the relevant statutory environmental

\textsuperscript{351} Ibid, para 7
standard the offender’s behaviour actually fell. The assessment of seriousness requires that the Court should consider the culpability of the offender in bringing about, or risking, the relevant environmental harm. This needs to be balanced against the extent of the damage which has actually occurred or has been risked. The level of the fine should be high where the offender’s culpability was high, even if a smaller amount of harm, such as environmental damage, has resulted from the offender’s actions than might reasonably have been expected. This might arise where damage (or more extensive damage) has been avoided through prompt action by the Port State authorities, or through some fortuitous element, such as helpful weather conditions, a frequent intervener in pollution cases and, in any case, over which the Master had no influence. Conversely, in a case where much more damage has occurred than could reasonably have been expected, the sentence, while giving weight to the environmental impact, should primarily reflect the contribution of the offender to the mitigation of the environmental damage. This of course was an issue highlighted in the Hebei Spirit case once again, in which the Master took steps to avoid further spillage, although he was held more culpable still for what he failed to do in mitigating the spill.

Such a model effectively serves the sentencing of the Master who has been convicted of offences whose origins may be identified in the relationship between Port State and Flag State, and managed by international laws which are designed to govern the safety of life at sea and the protection of the marine environment. There remains the issue of the Master whose accountability arises out of a breach of Port State laws which are not the subject of that relationship, such as the predicaments in which Captains Schröder and Laptalo found themselves. In the case of the former, the miscarriage of justice arose out of the Port State’s employment of criminal negligence to convict him; while the latter was held accountable without any evidence of accountability whatsoever, other than that he was the Master of the vessel. In both cases, the convictions were secured by misuse of the application of the characteristics of a crime; how each sovereign state observes the application of those characteristics lays at the very source of this problem. No amount of sentencing guidelines could assist the Master who suffers such miscarriages of justice in establishing his guilt. If, however, the Master is so blatantly mistreated as in the case of Captain Laptalo, the Flag State and the Government of the State of which the Master is a citizen, would have the power to take up his cause with the Government of the Port State concerned. Such an issue would likely feature strongly in the list of priorities of the Flag State, as described above. How vigorously the Flag State would pursue a swift resolution may involve other complexities in the relationships between States, however.

352 Ibid, paras 15 - 17
Option 5: A New Approach To The Master-Owner Relationship

The American case of Bowater v Patterson\textsuperscript{353} demonstrates the value of that option which has its foundation in the relationship between the Master and their employer. In this scenario the old paternal relationship is restored, and serves the Master and the shipowner alike, by giving them the power to determine their own rights and obligations, and, ultimately, their rights and obligations towards third parties, and the States which manage them. But they are not States Parties; they have no voice which will be heard by an international court. It is the age-old form of dispute resolution by litigation – civil or criminal - which must guide them in this option, in the forum of the most appropriate jurisdiction.

The starting point must be to examine the process by which litigation is resolved. In the adversarial system, each party will present their case and protect their own interests in challenging the submissions and the evidence of their opponents. The issues of law involved will be argued and supported by the body of relevant evidence, that is, the evidence of non-expert witnesses on what actually took place as they saw or heard it, and the evidence of expert witnesses which assists the Court with informed opinion that enables it to reach a safe conclusion on the weight of evidence.

The Judge manages the process on the foundation of the Rules of Natural Justice\textsuperscript{354} - the right to a fair hearing, free from bias - according to the law which is submitted and argued between the lawyers and, indeed, with the Judge as well, upon which he then draws his conclusion, by applying the law to the weight of evidence.

That conveniently sums up the concept under the adversarial system, which differs from the inquisitorial system practised in jurisdictions which have followed the traditions of Roman law. In practice, litigation suffers from a number of characteristics that discourage its employment:

1. The outcome is entirely out of the control of the parties - it must be, for the Rules of Natural Justice to prevail;
2. Associated with (1), is the risk that no case can be considered 100 per cent watertight by any party;

\textsuperscript{353} Bowater Steamship Co Ltd v Patterson and Others, The Gladys Bowater [1962] 303 F.2d 369 USCA
\textsuperscript{354} Now enshrined in the Human Rights Act 1998
3 The process is expensive, demanding the use of Counsel and, very often, expert witnesses;
4 The process takes a long time to reach Judgment.

Nevertheless, if the Port State has detained the vessel and arraigned the Master on criminal charges in excess of its authority and powers under UNCLOS\textsuperscript{355}, then the option presents itself that the domestic Court of that jurisdiction should address the specific complaint, much as the Court did in Bowater v Patterson.

Naturally the Master has the right to exercise that option but, given the discouraging features which tend to characterise Port State justice, the Master should be supported by their employer, the shipowner (or the charterer if she is bareboat chartered). This is the stage at which the Master-Owner relationship becomes so important in the process of exploring a solution to the Master’s predicament, and conveniently introduces the argument for a solution which focuses on the Master-Owner relationship.

The point will not have been lost on the reader that the litigation in this option will challenge the authority and the powers of the Port State in its determination of the Master’s accountability. The issue of the Master’s defence to the proceedings in which they are arraigned must necessarily follow the patterns and processes required in the sovereign jurisdiction concerned. On the face of it, it would seem that all that could be offered by the owner to the Master in such a case would be the funding of the defence case. But the potential implications for the shipowner, should the Master be convicted, might, themselves, be severe, and it may be wise for the shipowner to support the Master in their defence, even if it were only to minimise the risk of some further action against themselves.

As a result, with the incrimination of the owner both in criminal and in civil litigation arising out of the Master’s conduct, there is a strong case to be argued for the restoration of the paternalistic Master-Owner relationship; the legal solution will be found in the express and implied terms which regulate their relationship, and how those terms must protect and assist the parties in this bargain. Such a solution can only be explored having first analysed the issues of risk and responsibility in the twenty first century maritime world.

\textsuperscript{355} Article 230 limits punishment of environmental offences to monetary penalties and compels the recognition of the Accused’s rights, eg, to a fair trial
The Owner’s Obligation: A double-edged sword?

The erosion of the Master-Owner relationship in recent years owes much to the risk which the shipowner assumes by associating itself with the Master in the situation giving rise to their criminal liability. With the pressing issue of corporate accountability, the Owner’s concern to prioritise the shareholders’ interests over the Master’s presents a serious challenge to any option as being a viable alternative for the protection of the Master which would be acceptable to the shipowner.

In the terms of the immediate present, such accountability has already been established as a threat in English law, with the development of the modern law on corporate manslaughter, inevitably precipitated by the failure of a successful prosecution against P & O Ferries following the Herald of Free Enterprise casualty. In the light of the Law Commission’s report in 2000 the Select Committee on Home Affairs and Work and Pensions set its face to drafting a Bill that reflected the Government’s determination to enable more prosecutions to proceed by tackling the difficulties created by the identification principle. The new proposals were intended to change the basis of liability from the requirement of identifying the causal link from an individual Guilty of manslaughter to the controlling mind of the company, to liability founded on accountability for the way in which an organisation's activities are managed or organised by its senior managers. In this way it was the intention of Parliament to close down the possibility that a shipowner could avoid criminal liability for corporate manslaughter, in the way encountered in the case of the Herald.

The Corporate Manslaughter and Corporate Homicide Act 2007 was the result. The crime of corporate manslaughter is, broadly, committed when an organisation owes a duty to take reasonable care for a person’s safety and the way in which activities of the organisation have been managed or organised amounts to a gross breach of that duty and causes the person’s death. How the activities were managed or organised by senior management must be a substantial element of the gross breach. The mischief of criminal negligence stalks through the statute, stating, as it does, that the Defendant organisation owes a relevant duty of care to the victim according to the common law of negligence – clearly giving its support to the old ill as the common law of negligence, which is simply and conveniently nipped and tucked to fit a criminal process that must respond to the baying crowds for some

356 Reforming the Law on Involuntary Manslaughter: The Government's Proposals (Home Office, May, 2000, CC NO77828)
358 Home Office, Corporate Manslaughter: The Government's Draft Bill for Reform, Cm 6497, March 2005
criminal accountability that meets their normative ethics, notwithstanding any irritating
issues of jurisprudence that may get in the way.\textsuperscript{359}

For the shipowner, the serious issue is that there need no longer be a causal link between the
fatality and the controlling mind of the company; now the Master’s behaviour may
incriminate them because the death must have been caused merely by a management
failure; it need not even have been the sole cause of death, but if the Master, who, after all,
plays significant strategic or regulatory compliance rôles in the management of the whole or
a substantial part of the organisation’s activities, behaves in such a way that their conduct
falls far below what could reasonably have been expected, then the shipowner will be guilty
of the offence\textsuperscript{360}.

As if to remove any lingering doubt or loophole in the application of the 2007 Act, Section
28 specifically applies the offence to the UK’s territorial sea as well as to any UK-registered
ship anywhere in the world, whether or not any mishap occurred which led to the
foundering of the ship. Overall, the drafting experts made a thorough job of ensuring that
the Act would be applied vigorously to the maritime scenario; and there is no doubt that
companies are understandably shy of exposing themselves any more than is absolutely
essential to such a risk. The Master’s conduct is not necessarily fatal to the company’s
position – but the potential for criminal litigation is obvious. For example, there is no doubt
that Tasman Orient Line had excellent company standing orders in place in the case of the
Tasman Pioneer\textsuperscript{361}, demonstrating a management system which would successfully pass
any test of reasonableness; what would be open to issue, was how the Master’s conduct in
that case may have incriminated the company.

That being said, no current prosecution against a company in such circumstances has been
concluded, giving rise to all sorts of interesting speculation, not the least being, for all the
theoretical obligations arising out of the company’s vicarious liability for the Master, the
Master’s discretion should properly prevail – given the company standing orders,
ultimately, the final judgment must be at the discretion of the Master\textsuperscript{362}.

For all that, the Master-Owner relationship presents a strong contractual bargain, which

\textsuperscript{359} Anon, 2007, Corporate Manslaughter and Corporate Homicide Act 2007 – Explanatory Notes, HMSO,
London

\textsuperscript{360} See Anon, 2010, Corporate Manslaughter & Health and Safety Offences Causing Death – Definitive

\textsuperscript{361} Tasman Orient Line CV v New Zealand China Clays Ltd and Others [2010] 2 Ll R 13

\textsuperscript{362} See Merchant Shipping (Safety of Navigation) Regulations 2002 (amended by SI 2011 No 2978; see
footnote page 41)
contains rights and obligations which benefit both parties across the entire range of the activities which the company would wish to protect. The resultant picture shows a pattern of advantages to the relationship which far outweigh the risk to the company. And, after all, the spectre of vicarious liability has evolved as a sword which can be wielded against and by the employer. The historic case of Lister v Romford Ice\(^{363}\) underlines the general rule that the mere fact of employment will give rise to vicarious liability but, under the terms of their contract, the employee must be diligent and use reasonable skills while at work. This amounts to a general duty to take reasonable care while at work, which is owed to the employer, as opposed to any tortious liability to a third party who suffers loss as a result of the employee’s negligence. As a consequence, the Master may be sued by the shipowner for breach of the employment contract if the former’s negligence leads to loss by the latter, whether in terms of civil damages or of a fine. While the shipowner would be insured against the quantum of damages, it could not insure itself against the criminal penalty of a fine; but as a claim in civil compensation against the Master, it may certainly be recoverable, and, thus, all the company need do is to ensure that, as part of the contract of employment, the Master has in place a policy of professional insurance. Even if they do not require it, the Master in today’s marine environment would be well advised to consider it.

By identifying the areas where their interests coincide and clarifying where they clash, a foundation can be established upon which a solution can be explored for re-defining the critical terms of their contractual bargain and, in this way, restore some confidence in the idea of a paternalistic Master-Owner relationship, not to replace the options analysed previously, but to support the Master when confronted with the phenomenon of twenty first century criminalisation.

**Restoring the Bargain**

We cannot turn the clock back to the old Master-Owner relationship but we can cunningly redress the legal position by redefining the Owner and the bareboat charterer, with a solution which addresses their position with the operator, in the sense of the manager, and the resultant responsibility in their relationship with the Master. This is a matter of necessity if we are to resolve a solution involving the party whose ownership of the asset is at stake, for the process of identifying the true owner remains a very painful sore running through

\(^{363}\) Lister v Romford Ice and Cold Storage Co Ltd [1956] AC 555
marine litigation globally but, if we are to devise a solution which embraces a new approach to the Master-Owner relationship, this is an obstacle which must be overcome.

In reality, the situation remains that the independent operator / manager will not accept such responsibility, and Regulation cannot impose such a thing lightly without offering the manager some justification in law, or else it will not be commercially feasible in a risk-benefit analysis.

As a result, we must conclude that the Owner must take ownership both of the asset herself and in the employment of the Master who is managing that asset. How they do that is a matter for them – such a thing is feasible and desirable. But that needs strong legal regulation which is why a solution is dependent on a commercial contract of employment – as has been seen, there is no other basis upon which shipboard order and discipline can be maintained, and that must extend to the Master, whose absolute discretion cannot be overruled, whether nor not the owner remains vicariously liable.

The solution, therefore, must flow from the definition of just who must be the employing authority in this bargain. The purpose of the International Safety Management Code is to provide an international standard for the safe management and operation of ships and for pollution prevention. It defines the Company as:

the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code.

Such becomes the Document of Compliance Company, and offers a new definition of the Owner in context; but the independent ship operator / manager will remain unhappy with this arrangement, and the Judgment creditor or the enforcing Port State court will be frustrated that there is no asset to be seized from such a party. As a result, the definition of the Document Compliance Company ill-serves the task in hand of defining the Owner for the purpose of a new approach.

Just as the Owner must have its asset on the Balance Sheet, and insure her accordingly, or as the bareboat charterer takes out and maintains insurance cover, so the Owner – the asset-

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364 ISM Code and Guidelines on Implementation of the ISM Code 2010, Preamble, Para 1
holder whose investment is at stake - must ensure that the Master, in whose hands that asset has been placed, is protected, by a contract of employment; and insurance covering legal defence and damages for the Master will be a condition in that contract, even if the policy is to be taken out and maintained by the bareboat charterer. It is a simple expedient, but it is pivotal to the new approach.

A contract is nothing more than an agreement made by the exchange of commercial promises, which is managed by terms that the parties have agreed, or have been imposed by the current law of that jurisdiction, and, as a whole, the agreement is recognised by both parties as a legal obligation. The essence of the contract is that it is a Bargain - the parties are free to make their own bargain and the terms of the contract must be decided by the parties to the contract.

Whether or not the parties have endorsed a written contract, they will be bound by the terms from the moment when the offer is accepted. From that point, it is all down to how the parties meet the standard of duty which those terms have imposed upon them. If a party fails to perform an obligation agreed in the contract, that must necessarily amount to a breach – the key factor, however is whether the party failed to perform because they had failed to meet the standard of duty promised: that is, the question to be satisfied is, was it their fault? In the non-marine case of Target Holdings v Redfers, Lord Browne-Wilkinson held that liability must be based on fault – and it was this which established whether the Defendant should be liable for the consequences of that legal wrong in failing to perform the promise that had been made.

The objective of this in the context of the Master-Owner relationship is to give the parties to a contract of employment the confidence that they can rely on the terms to regulate the way in which it is performed – both by the employer and employee. In practice, the objective will be put to the test by the stresses placed on that relationship which has eroded in recent years, whether coincidentally or not, during the same period in which the criminalisation phenomenon has been seen by the industry to have been emerging.

In consequence, the concept of restoring the relationship with a contract will be received with caution by both parties, unless six key factors can be assured:

1. Certainty of rights and obligations – the terms must be capable of clear and

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365 Target Holdings Ltd v Redfers [1996] AC 421
unambiguous definition.

2 The Master will have the confidence that the contract is consistent with – and the Owner will support - their rights and obligations under Flag State and Port State laws.

3 The Owner’s apprehension of corporate accountability for the Master’s conduct will not be exacerbated by such a contract.

4 Both parties acknowledge that the terms preserve the contract as a fair bargain.

5 A dispute over the contract can be referred to a cost-effective process of dispute resolution which ensures that the parties are on an equal footing, and is dealt with expeditiously, fairly, and in a way which is proportionate to the problem which has arisen.

6 The Owner will transfer the risk on an indemnity basis, by way of a contractual condition that it will insure the Master against liability for financial penalties, including the costs of legal defence and expenses necessarily and reasonably incurred in avoiding or mitigating same, for the violation of Port State laws, unless the Master has been held liable of intent or recklessness in the casualty event.

It is axiomatic that the element of mutual trust must exist between the parties. On occasions this can be put sorely to the test by uncertain terms, or by a lack of confidence in the employment laws of the jurisdiction in which the contract is agreed; and, to grasp the nettle a little more strongly, the relationship can be tested by evidence of bad faith which creeps in as a result of the parties’ behaviour, under whatever pressures may prevail, whether commercial or regulatory. Such issues have historically challenged the International Labour Organisation; so we may turn to them for some guidance.

A Maritime Labour Agreement for the Master?

Taken overall, the rational conclusion to be drawn from the loss of the Master-Owner relationship foresees that, far from supporting the Master who has fallen victim to the criminalisation process, the Master-Owner relationship can only get worse – yet, the general principles of their contractual relationship have not changed in modern times.

This itself raises the possibility of a solution, in re-defining certain of the contractual rights

366 This is by no means beyond the pale of modern practice, and a legal defence insurance product has been formulated by the International Federation of Shipmasters’ Associations, although fines for breaches of the criminal law will not likely be covered as a matter of public policy; but see insurance cover advised by the Maritime Law Association of the United States: http://www.mlaus.org/article.ihtml?id=559&committee=160
and obligations of the parties in order to restore the confidence that each had previously reposed in the other, before the recent criminalisation phenomenon became manifest.

The International Labour Organisation embraced enthusiastically the task of drafting an international format for the employment of seafarers, which forms a core part of the Maritime Labour Convention\textsuperscript{367}. In the light of such a precedent, international rules unifying certain rules of law governing the employment contract for the Master must offer a solution by which the Master’s accountability is addressed by reference to protection by their employer. This does not infer that the employer must accept vicarious liability for the Master’s criminal offences in all cases, but, rather, it must protect the interests of the Master who is confronted with three specific threats:

1. The threat of a breach of the IMO’s Guidelines on the Fair Treatment of Seafarers in the Event of a Maritime Accident 2006;
2. The threat of criminal punishment under domestic law which violate those rights and powers under UNCLOS;
3. The threat of a denial of the Master’s human rights to liberty and security of person, and to a fair and public hearing within a reasonable time by an independent and impartial tribunal, at which they shall be presumed innocent until proved guilty according to a fair legal process.

The general principles of employment law will be retained, as in that of any contract, in so far as it must be a voluntary arrangement, a bargain freely entered into by the parties. For flexibility, the effect of the rules could follow one of two options:

1. A written contract of employment would meet the requirements in the same way as that for seafarers under the Maritime Labour Convention; or
2. A body of rules would apply in much the same way as the Hague-Visby or Rotterdam Rules apply, adjusting the concept from the application of the jurisdiction of the Port of Loading to the jurisdiction of the Flag State, in which the critical terms will be specified in a written contract.

\textsuperscript{367} This convention received full ratification in August 2012
4.2 The Options: Recommendation and Conclusion

We might learn something from Eastern philosophy. Sufi wisdom holds that deep intuition is the only real guide to knowledge. In the quest for knowledge and understanding, the Sufi scholar is challenged with the most engaging mental exercises which lay in the work of Idries Shah, author – or, perhaps, collector – of the delicious parables of an ancient Mulla, contained in The Exploits of the Incomparable Mulla Nasrudin; just one example shines a light on the path to a conclusion for this project.

"What is Fate?" Nasrudin was asked by a scholar.
"An endless succession of intertwined events, each influencing the other."
"That is hardly a satisfactory answer. I believe in cause and effect."
"Very well," said the Mulla, "look at that." He pointed to a procession passing in the street.
"That man is being taken to be hanged. Is that because someone gave him a silver piece and enabled him to buy the knife with which he committed the murder; or because someone saw him do it; or because nobody stopped him?"

Let us put this in context.

What is the character of the Master’s Criminalisation?

- The current stage of an endlessly evolving process arising out of the constantly evolving normative ethics of societies intertwined with the global maritime community from which the Master comes, each influencing the other, but emerging in recent times as a mischief – but a mischief perceived in different ways, depending on which side of the fence you are on.

Put into terms of cause and effect, we are challenged with this:

- The Ship’s Master is on Trial for polluting Port State waters. Is that because the Flag State made them their representative; or because the Port State saw the Master’s negligence and attributed criminal guilt to the Master by reason of the effect, rather than the intent; or because the shipowner had not done enough to stop the spill, whether the Master was guilty or not?

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This effectively adopts a Socratic approach to challenge the world view, upon which we can
draw conclusions on the options which have been synthesised as possible solutions to the
criminalisation of the Master.

Those options have been scrutinised and, individually, have their respective advantages, and
disadvantages. The Master would identify their priority in a solution which removes the
scourge of criminal negligence and restores the Master-Owner relationship to give them the
protection which vicarious liability affords any employee. In reality, none of these options,
by themselves, would achieve that. But a new approach will offer a solution that can
achieve a compromise to which all parties may agree – an approach which adopts some of
the options in combination.

**Plan A: The Preferred Approach**

The most forceful argument calls for a combination which brings the priorities of the Port
State and Flag State together, as the keystone to a compromise solution, without any fresh
treaty to contemplate. The Master remains the organ of the Flag State, and the Convention
obligations under UNCLOS underline the Flag State’s obligations. As such, no new body of
international law is necessary if the Port and Flag State are to resolve the issues arising out
of a casualty. So much of the responsibility lays at the feet of the Flag State, which must be
held accountable for the breach of treaty obligations to the Port State occasioned by its ships
(the emphasis on the noun ships rather than Masters in UNCLOS is noteworthy), that
dispute resolution between States Parties has a compelling attraction, and it would be for the
Flag State to prosecute the Master for the breach of the international obligations for which
the State has made its Master directly accountable. What the Flag State does in terms of its
own regulation process can be achieved by its own domestic criminal justice process. The
approach which underlines the obligation of the Flag State to the Port State for the acts or
omissions of its vessels will also encourage the Flag State to regulate its shipowners to the
standards acceptable to the global community of Port States. Those Flag States which fail to
do so, may find themselves black-flagged and, thus, may lose their attraction for
registration, if shipowners find their risk profiles compromised too far to make them
financially viable for modern trading. This is nothing new, indeed, it is a key figure in the
new EU Port State Directive.

In addition to the issue of criminal accountability, the Port State will also demand
compensation, for the wrong done by the Flag State’s vessel. This can be effectively
resolved by a process of civil compensation to be made by the Flag State, in order to put the aggrieved Port State back into the position it would have been, had the wrong not taken place. But with awesome inevitability, the hazard confronting a solution is that of the Port State’s confidence in the Flag State to settle a Judgment on compensation and, indeed, delivering within a satisfactory time-scale. The solution in Option 1 presents itself as it enjoys a well-tried mechanism for dispute resolution – save for the cost and the time. As the UN Charter espouses, arbitration may well assist in delivering a cost-effective decision on a dispute, but then the question of enforcement raises concerns of viability. Alternative Dispute Resolution offers a cost-effective non-legal remedy which aims to resolve the dispute by compromise; again, it lacks teeth for enforcement, but its failure would not be any bar to proceeding to trial on the Port State’s claim (and the Flag State’s counterclaim, if the Master has been held in custody and the ship detained).

But the Flag State needs redress against its own wrong-doers, as well, for it must hold to account those within its responsibility and therefore management control who have actually been responsible for the wrong giving rise to the Port State’s complaint. Again, our range of options offers a solution, for such redress finds its characterisation in the Master-Owner relationship. However much we rail against the injustice of the concept of criminal negligence, it is possible that what we view as a mischief against the Master can be turned to advantage, for the answer may lie in the way in which the UK has embraced criminal negligence in the context of corporate accountability, and the liability attaching to the Master’s employers, the shipowner, which keeps the Master personally removed from criminal liability for the corporate offence. The general principles of liability involve a gross breach of duty of care and senior management failings as a substantial element of breach, generally (but not necessarily) involving systemic failures. By taking the guidance for the current law of corporate manslaughter, we can suggest a solution which makes the shipowner accountable to the Flag State.

The shipowner owes a relevant duty of care to a potential victim, be it in the jurisdiction of the Port State or Flag State; such duty must have been broken as a result of the way in which the activities of the organisation were managed or organised. This management failure, therefore, must amount to a gross breach of the duty of care by such persons who play a significant rôle in the whole or a substantial part of the shipowner’s activities, which includes those activities necessary for compliance with statutory regulation, and clearly covers the position of the Master.

In this respect, the shipowner finds itself vicariously liable under the criminal law for their
Master’s negligence. The issue has not been tested under the Corporate Manslaughter Act 2007 but, if the company were to challenge its criminal liability under this Act on the basis of the failure of the Master as a senior manager, it possibly might seek to rationalise such an argument on the statutory provision of the Master’s discretion under the 2002 Regulations, and underpinned further by the logic of the nautical fault defence in Article IV (i) of the Hague-Visby Rules\(^{369}\); after all, it was the Master’s discretion which had got them into such trouble.

Once the shipowner’s criminal liability has been established, the way ahead now lay against them by Claimants for determination of civil liability for compensation. The options reveal a solution both for the Claimant and Defendant at this stage, in that, as a crucial step in the civil procedure system, the process of alternative dispute resolution can offer very real advantages, as a compromise which, if successful, binds the parties in an agreement which preserves priorities in a non-legal remedy which looks towards a successful future relationship. If, however, no compromise can be reached, then the parties have lost nothing at the negotiating table and the litigation process can proceed to Trial and Judgment in the traditional way.

The final head of this approach naturally involves some fair regulation of the Master-Owner relationship. Restoring the bargain in which they have confidence is essential – whether it is self-regulated, in the form of a voluntary bargain unfettered by statutory terms, or whether it is regulated by terms imposed by a new maritime labour agreement may depend on just how both parties feel their confidence in the other to be justified.

**Plan B: The Alternative of Management Control by Port State or an International Tribunal**

In the scenario in Plan A the Port and Flag State have confronted the problem that one of the Flag State’s ships has infringed Port State interests; this requires that justice is seen to be done, which the Port State can expect the Flag State to carry out, if it is to observe its obligations and resolve the problem. That much is simple; the complexity arises when the Port State loses confidence in the Flag State’s will or ability to meet those obligations. This is where the existing process, highlighted in Option 1, demands an international tribunal in

\(^{369}\) In this context, it should be noted that the Rotterdam Rules have deliberately closed that defence down, although at the time of writing (January 2012) the UK has not ratified the Rotterdam Rules.
order to resolve the dispute between the States Parties, whose burdens of time and cost might prove unacceptable.

Notwithstanding the confidence - or lack of it - in the Flag State’s judicial process, it must be expected that the Port State’s priority to preserve sovereign jurisdiction over criminal activity which damages their interests – undeniably enshrined in UNCLOS – will inevitably prove a major difficulty to the shifting of the Master’s Trial process to another jurisdiction, particularly when compounded by skepticism over the Flag State’s will or ability to try the Master’s criminal accountability and see justice done. A new international court would offer a solution to this problem which is independent of the States Parties; and while there are advantages with impartiality and an assured consistency in prosecuting and sentencing, the key protagonists, the States involved, may see this option merely as moving the management process out of their control, and moving it very expensively, for such tribunals must be paid for. Meanwhile, unless the international court were to embrace the issues involving the abolition of criminal negligence as the chief ill of criminalisation, the Master might see it as not necessarily making it any fairer, but certainly making it much longer. If such issues present themselves, there has to be an alternative option which the Parties can adopt.

If there is to be a cost-effective solution which preserves sovereign jurisdiction, and the Flag State concerned does not enjoy the confidence of the Port State to administer justice, then submission to the Port State’s jurisdiction under the Clear Statement Rule offers a compromise solution provided that the process of Criminal Justice is protected by a model code of sentencing which is adopted and observed by both Port and Flag States. In effect, therefore, it would matter not to the Master in whose jurisdiction they were to be held accountable.

The risk to the Master is that the Port State’s criminal process submits to the disagreeable normative ethics of its society and ignores the model code of sentencing. In this case, the mischief of the Master’s criminalisation will not have been resolved at all.

**But The Golden Thread Remains**

The key factor underlying these solutions, is one of compromise, in the approach to protecting the Master from criminalisation. In all the scenarios, however, the golden thread
remains, that the emerging phenomenon of criminal negligence against the Master is at the very core of the mischief, and in this the approach must be inflexible and unyielding. The general principles of criminal accountability envisaged in the modern law of criminal damage demonstrate the wisdom of preserving the subjective test for the mental element. By contrast, unless the strange civil-criminal hybrid of criminal negligence, with its iniquitous evidential baggage of the objective test developed in civil proceedings, is removed against the Master, any option, any new approach, will simply shift the way in which the mischief is applied. They might as well shift the deck-chairs on the Titanic.
The Final Word of an Optimist

We started this thesis with a challenge, to make out a compelling argument for a new approach to criminalisation, which would meet the interests of justice both for the Master and the State. So the golden thread of criminal negligence, running throughout this entire work, is the mischief which characterises the phenomenon of criminalisation which has been emerging for some time. It is not an ill which is alien to the Flag State or monopolised by the Port State, but, the reality in searching for a new approach demands compromise, in a consensus which meets, at least in part, the priorities of the key players in global shipping.

But such a consensus is dwarfed by a more pressing issue, still; it is a monster of Biblical character which rises up and then consumes everything else, and has been the subject of some analysis in this work: for it must address a solution for the Master in a situation in which the sovereign jurisdiction is actually in dispute. It is the monster lurking in the High Arctic, currently lacking any treaty, indeed lacking any consensus upon which a treaty could be based. To the Master, who is found in the maelstrom of outrage following a spill which is far out of reach of a prompt and efficient response and exposed to the violence of Arctic storms, the Master who is the prime and chosen target of Port and Coastal States Parties all claiming sovereign jurisdiction over the Master’s blood, the support and protection of their employer - the shipowner - will be a paramount issue for them; hence, the approach which restores confidence in their relationship. Paradoxically, the bargain which lay at the very root of the Master’s employment, from the antiquity which we examined in the Origin of the Species, remains the bottom line for a new approach in this new Millennium.

The dread fear stalking any brave plans for a new approach is that of rejection: what if we cannot achieve consensus between Flag State and Port State on such an approach? It must be recalled, that UNCLOS delivers rights to the Port State upholding their sovereign jurisdiction – in which case Plan B will remain the only approach which the Port State is likely to accept. Compromise necessitates some transnational consensus, which will uphold the clear statement rule but, ultimately, whatever system of law is applied by the State in its administration of justice, it is the sentencing of the offender which must enjoy consistency world-wide – and that is where the model code for sentencing must be applied, whatever the character of the State which is prosecuting the Master.
In the final analysis, a new approach will require seismic shifts in the perception of the sovereign jurisdiction of justice. Nevertheless, a new approach is critical, in order to abate this emerging phenomenon of criminalisation of the Master, which, if unchecked, presents an ever-darker prospect of Hell for the Master whose safe navigation of the vessel is, ultimately, dependent upon the Grace of God. For that reason, the Master must be an optimist, and trust in a new approach being adopted. And perhaps, of all his necessary qualities, the quality of optimism must be paramount. As Mark Twain had it:

That optimist of yours is always ready to turn hell's backyard into a playground370.

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370 Paine, A, Mark Twain, A Biography: The Personal and Literary Life of Samuel Langhorne Clemens; original publication pre-1925 but see http://www.bibliolife.com/
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