

## AM I GOING TO JAIL?

**John D. Kimball  
Blank Rome LLP**

### I. Introduction

A. A fundamental principle of criminal law is that a crime consists of an Actus Reas (Latin for “guilty act”) accompanied by a Mens Rea (Latin “guilty mind”). The standard common law test of criminal liability is usually expressed as “the act will not make a person guilty unless the mind is also guilty.”

1. Most crimes are defined by statutes indicating the mens rea requirement as knowingly or purposely commonly referred to as “criminal negligence.” Requires intent.
2. Criminal liability is some times imposed for what is commonly referred to as “simple negligence.” These offenses are defined by statutes indicating the mens rea requirement as careless, inattentive, neglectful, willfully blind, or in the case of gross negligence what would have been reckless in any other defendant. Intent not required.

B. Strict Liability crimes create criminal liability for the commission or omission of a particular act (actus reas). Criminal liability is imposed regardless of mens rea.

C. In recent years criminal prosecutions have become more frequent in the maritime industry. This has been most pronounced in environmental cases, but also can be seen in cases involving passenger deaths and antitrust. Several of these statutes impose criminal liability upon mariners and their employers for merely committing the act (strict liability) and/or for negligent behavior.

D. Not just a United States Issue

1. Pollution caused by the sinking of the Prestige approximately 130 miles off the coast of northwest Spain.
2. Captain of the Prestige was detained by Spanish authorities for nearly 3 months. He was later released on 3 million euro bail but was unable to leave the country.

## II. Maritime Pollution and Federal Criminal Statutes

A. The case of United States v. Bouchard Transportation Co., 1:04CR10087-MBB (D. Mass.). Prosecutions under Federal Water Pollution Control Act/Clean Water Act (33 U.S.C. §§ 1251-1376) and the Migratory Bird Treaty Act (16 U.S.C. §§ 703-712).

1. On April 27, 2003, a barge owned by Bouchard Transportation Company (“BTC”) collided with an outcropping of rocks, spilling thousands of gallons of oil into the waters of Buzzards Bay off the coast of Massachusetts.
2. Under a **simple negligence** standard, the first mate of the tug towing the barge and BTC were charged with (1) negligent discharge of pollutant into and upon the navigable waters of the U.S. in violation of the Clean Water Act (33 U.S.C. §§ 1319(c)(1) and 1321 (b)(3)).
  - a. The Clean Water Act prohibits any person from negligently discharging “oil or hazardous substances into or upon the navigable waters of the United States” 33 U.S.C. §1321 (b)(3).
  - b. Criminal Penalties: “[F]ine of **not less than \$2,500 nor more than \$25,000 per day of violation**, or by **imprisonment for not more than 1 year**, or both.” 33 U.S.C. § 1319(c)(1).
  - c. There was evidence that the first mate was negligent by leaving the wheelhouse unattended while the barge was underway and failing to monitor radio traffic. There was also evidence that BTC was negligent in hiring the first mate or failing to remove him.
  - d. BTC plead guilty and was fined **\$2 million** for violating the Clean Water Act.
3. Under a **strict liability** standard, the first mate and BTC were charged with killing migratory non-game birds in violation of the Migratory Bird Treaty Act. 16 U.S.C. §§ 703-712.

- a. Migratory Bird Treaty Act provides “[I]t shall be unlawful at any time, **by any means or in any manner**, to . . . kill, . . . any migratory bird, . . .” 16 U.S.C. § 703.
- b. Criminal Penalties: Misdemeanor punishable by a fine of up to \$15,000 and/or six months in prison. “[A]ny person, association, partnership, or **corporation** who shall violate any provision of said convention . . . shall be deemed guilty of a **misdemeanor** and upon conviction thereof shall be **fined not more than \$15,000** or be **imprisoned not more than six months**, or both.” 16 U.S.C. § 707(a).
- c. Under the Migratory Bird Treaty Act the mere act of killing a bird imposes criminal liability. There was proof that hundreds of protected birds were killed when they came into contact with the oil discharged from BTC’s barge.
- d. BTC plead guilty and was fined **\$8 million** for violating the Migratory Bird Treaty Act.

B. Act to Prevent Pollution from Ships (“APPS”). (33 U.S.C. §§ 1901-1915)

1. Requires compliance with the MARPOL Protocol and applies to all ships of U.S. registry or nationality or operated under U.S. authority, wherever located.
  - a. MARPOL generally refers to two treaties: (1) the 1973 International Convention for the Prevention of Pollution from Ships, referred to as the MARPOL protocol; and (2) the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships.
  - b. More than 95% of the world’s shipping tonnage is transported under the flags of signatories to these treaties.
2. MARPOL sets standards for the maximum amount of oil permitted to be discharged from ships and requires ships to maintain an oil record book.
3. Criminal Penalties
  - a. A person who **knowingly** violates the MARPOL Protocol . . . or the regulations issued thereunder commits a **class D felony**. 33 U.S.C. § 1908 (a).

4. Whistleblower provision
  - a. In the discretion of the Court, an amount equal to not more than  $\frac{1}{2}$  of such fine may be paid to the person giving information leading to conviction. 33 U.S.C. § 1908 (a).
5. Oily Water separators will be discussed by Mr. Kyne.
6. Although APPS applies to U.S. Ships, wherever located, APPS only applies to foreign vessels (1) while the ship is within navigable waters; (2) while in the exclusive economic zone of the U.S.; and (3) when at port or terminal in the U.S. 33 U.S.C. §§ 1902(3) and (4). Therefore, most convictions for foreign ships are under the provisions to maintain an accurate oil record book while in the navigable waters of the United States and under 18 U.S.C. § 1001 for making and using materially false statements and representations in a matter within the jurisdiction of the United States. See U.S. v. Abrogar, 2006 U.S. App. LEXIS (3<sup>rd</sup> Cir. 2006); United States v. Evergreen International, S.A.
  - a. Paradox of APPS: If a foreign vessel maintains an accurate oil record book with respect to its discharge of oil in violation of MARPOL outside of the jurisdiction of APPS the foreign vessel cannot be prosecuted by the U.S.
  - b. However, 33 U.S.C. § 1908(f) provides if the violation is by a ship registered as the nationality of a country party to the MARPOL protocol, the matter can be referred to the government of that country for appropriate action.

#### C. Exxon Valdez Oil Spill (March 24, 1989)

1. Exxon was charged and plead guilty to violations of the Clean Water Act, the Refuse Act and the Migratory Bird Treaty Act.
  - a. Exxon settled all criminal charges for a fine of \$250 million.
2. Captain Hazelwood charged with operating a tanker under the influence and of illegally discharging oil.
  - a. Hazelwood acquitted of operating a tanker under the influence but was convicted of illegally discharging oil.

### III. Seaman's or Maritime Manslaughter Statute (18 U.S.C. § 1115)

#### A. History

1. The roots of the law go back to 1838, which was promulgated in response to the frequent fatalities caused by numerous steamboat disasters in the nineteenth century. See In re Charge to Grand Jury, 30 F. Cas 990, 991 (E.D. La. 1846).
2. The *General Slocum* incident of 1904, Corporate liability and punishment. United States v. Van Shaick, 134 F. 592 (S.D.N.Y. 1904), *aff'd*, Van Shaick v. United States, 159 F. 847 (2d Cir. 1908).

#### B. 18 U.S.C. § 1115 provides:

Every **captain, engineer, pilot or other person employed on any steamboat or vessel**, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be **fin**ed under this title or **imprisoned not more than ten years**, or both.

When the **owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation**, for the time being actually charged with control and management of the operation, equipment, or navigation of such steamboat or vessel who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be **fin**ed under this title or **imprisoned not more than ten years**, or both.

- #### C. Simple negligence can trigger criminal liability. “Any degree of negligence is sufficient to meet the culpability threshold, however slight.” United States v. OKeefe, 2004 U.S. Dist. LEXIS 1494, \*11 (E.D. La. 2004), *aff'd*, United States v. O’Keefe, 426 F.3d 274 (5<sup>th</sup> Cir. 2005).

#### D. Recent Prosecutions

1. U.S. v. Peng Fei, 225 F.3d 167 (2d Cir. 2000) (“Golden Venture”)
  - a. Defendant arranged to smuggle approximately 300 Chinese immigrants into the United States through the cargo ship “Golden Venture.” When the ship got to New York harbor defendant, who was not on the ship, instructed that the ship be grounded at Rockaway Point and for all passengers who could swim to jump overboard and swim ashore. As a result, ten passengers drowned or died of hypothermia.
  - b. Defendant convicted under the statute and sentenced to ten years imprisonment.
2. U.S. v. Shore, 1:02cr10413 (D. Mass.)
  - a. The captain/owner and first mate of a party boat pled guilty to manslaughter charges stemming from the drowning death of an under-aged passenger who was served alcohol on board. The passenger fell overboard through a broken railing which occurred when the vessel collided with a moored sailboat.
3. U.S. v. Mitlof, 165 F.Supp.2d 558 (S.D.N.Y. 2001), *aff’d*, U.S. v. Sheehan, 2004 U.S. App. LEXIS 4695 (2d Cir. 2004)
  - a. On August 23, 1998, a ferry capsized on the Hudson River killing one passenger. The owner and captain of the vessel were charged under the statute for negligent operation of the vessel because the vessel did not have the proper Coast Guard certificate of Inspection and the vessel was in unfit condition to carry passengers on the Hudson River.
  - b. Owner was convicted under the statute.
4. U.S. v. O’Keefe, 2004 U.S. Dist. LEXIS 1494, \*11 (E.D. La. 2004), *aff’d*, U.S. v. O’Keefe, 426 F.3d 274 (5<sup>th</sup> Cir. 2005).
  - a. On March 13, 2001, a tugboat operating on the Mississippi River capsized. As a result, the captain’s ex-wife drowned. The Captain’s ex-wife was not authorized to be aboard and the captain was under the influence of cocaine at the time of the accident.
  - b. Captain convicted under the Maritime Manslaughter Statute and sentenced to 12 months imprisonment.

- c. NB: even if does not result in death, still criminal liability under 46 U.S.C. § 2302 and 33 CFR §§ 95015 and 95.020 for operating a vessel under the influence of alcohol or drugs. See United States v. Petridis, 1:06cr00183 (W.D. Wa.).
5. Staten Island Ferry cases. On October 15, 2003, the Staten Island Ferry ANDREW J. BARBERI, while on one of its regular runs between Manhattan and Staten Island allided with a concrete pier killing 11 passengers onboard and seriously injuring several others. The Seaman’s Manslaughter Statute was used to place criminal responsibility on individuals responsible for the casualty, both on board and ashore.
  - a. U.S. v. Smith, 1:04cr0070 (E.D.N.Y.). **Captain** of the ferry pled guilty to manslaughter under the statute and making false statements and was sentenced to 18 months imprisonment.
  - b. U.S. v. Ryan, 1:04cr00673 (E.D.N.Y.) **Director of Ferry Operations** pled guilty to manslaughter under the statute and making false statements and was sentenced to 18 months imprisonment.

#### IV. White Collar Crimes

##### A. Anti-trust violations

1. Norwegian shipping company Odfjell Seachem AS, and two of its executives plead guilty participating in an international cartel to allocate customers, bid rigging and price fixing.
2. Stolt-Nielsen S.A. indicted for anti-trust crimes of price fixing, customer allocation, and bid rigging. Two executives and subsidiaries of Stolt-Nielsen S.A. were indicted.

##### B. Securities law violations

##### C. Criminal Fraud

1. United States v. Ventura, 724 F.2d 305 (2d Cir. 1983). Principal of an ocean freight forwarder convicted of wire fraud and conspiring to defraud agencies for materially concealing the favorable freight rate from the shipper and forcing the shipper to pay the higher rate while keeping the difference for himself.

2. Sentenced to 18 months imprisonment and \$10,000 fine.

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\* This paper has been prepared with the assistance of Michael P. Smith, Esq.