

## The Master's Burden

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(The failure of the regulatory system and influence of the insurance market on the criminalisation of the Master)

Nautilus International has a long and distinguished history in representing Masters' interests. Originating in the United Kingdom in 1857 as the Mercantile Marine Service Association (MMSA), the nature of its work has changed over the years - as has the economic, legal, political, and social environment. An international industry has become global, with all the complexity that is involved in a world of instant communication. However, the basic tenant of protecting the interests of marine professionals remains

Masters of merchant ships have always been subject to the rulers of hostile and remote realms where justice was swift and brutal. Today, condemnation is swift and brutal, with justice questionable. It is also closer to home, either in your own country or that of coastal or port state.

In the last year we have witnessed such sentences as: Master, COSTA CONCORDIA – 16 years; Master, SEWOL - 36 years; Master, LAMMA IV 8 years. Foolish individuals, possibly, but criminals that are dangerous to society, definitely NOT. No ship owner representative group or owner has condemned these sentences, other than to utter the feeble words, “we do not comment on sentences.” These sentences satisfy the blood lust of a public, brainwashed by 24-hour media, but they mask the failings of a bankrupt regulatory system neglected by politicians.

While it is possible to cite inquiries and law cases, some going back to the 17th and 18th Century in both the Netherlands and the UK, to demonstrate the actions of the authorities against Masters, it is increasingly evident that actions by the parties involved in an incident potentially influence who is prosecuted.

The authorities have the ultimate decision on who to prosecute. In cases where there is a wilful act or a case of gross or serious negligence (terms depending on jurisdiction), this is understandable and has to be accepted. This is not to say there is justifiable mitigation in such cases. However, where a Master is simply doing his or her best, often with limited or inadequate resources, determined by the owner and compliant with current regulations, why should there be a prosecution? Why so often, is the Master the only person to be prosecuted or the principal person to be prosecuted in an industry where management control from ashore is greater than ever?

One would never seek to defend the lack of professionalism by a Master, officer or any other seafarer. They may shoulder considerable responsibility for the cause, but the consequence and its magnitude lies elsewhere. This may be the government, regulatory authority, ship designer, class, yard, hull and machinery insurer, cargo insurer, P&I and - by no means least - the ‘owner’. Where the stakes are high those with the most to lose may engage in an orchestrated campaign utilising the existing processes so readily available to protect all but the seafarer. Who is there to protect the seafarer, especially the Master? Ideally, their national representative organisations. However, the degree of protection offered and received can vary dramatically, dependent upon their resources and purpose.

Over 10 years ago, against a background of increasing criminalisation, Nautilus advocated at the International Maritime Forum the need for replacement of criminalisation by professional sanction. Arguably, this had been an effective measure over the years of European dominance of world trade, with few flag states issuing certificates. Masters and officers were well aware of the consequences of an error of judgement; you lost your 'ticket', you lost your livelihood at sea, but not your freedom. A counter argument has emerged, namely, that this approach is ineffective in a global industry where certificates of questionable quality are issued by flag states of equally questionable quality and where professional sanctions are rarely if ever applied.

Criminal sanction has gained traction in response to political demand, driven by public pressure that has been stimulated by media hysteria; more so in countries where there is an absence of independent accident investigation. Many accidents are never investigated and even in many that are investigated, the findings are not released. The media are ignorant of how this industry fails to address preventable incidents.

Criminal sanction is a convenient tool to divert attention away from regulatory failure or inadequacy. The MMSA spent the best part of the last century in defending the reputation of Captain Stanley Lord of the CALIFORNIAN, who was criticised by an Inquiry for failing to go to the aid of the TITANIC. After all, Captain Smith, Master of the TITANIC went down with his ship; there was little mileage in targeting a dead man in an era that sought selfless examples of sacrifice. The targeting of Captain Lord was a deliberate action by the UK authorities to deflect criticism from the United States levelled at the then British Board of Trade and UK Government.

The fractured nature of the labour market in shipping today, either created intentionally or by necessity, means that the likelihood of Masters receiving an adequately funded defence by a body representing their interests is rare. Similarly, the cause of death of seafarers - even when a body is recovered - is rarely subject to adequate scrutiny. Human rights are denied to seafarers even in death as they are in life. The term, 'Human Rights' is rarely uttered in the shipping industry. Their rights are defended where the seafarer is a member of an association, professional body or union who is not only willing to speak out after an incident, but also constantly alerting managers, the public and politicians to dangers within the industry. The adequacy and effectiveness of such warnings are somewhat limited when so few are willing to speak out.

It may be said that "no man is an island" – therefore, there is a need to go beyond the direct representation of one's own members and speak out where the causal factors influencing an incident affect them and so lay the ground for a defence should other members be subject to the same unjust treatment in the future. To remain silent is no longer an option in a media-driven world. Nautilus is often a lone voice amongst national organisations, which are willing to speak out when invited to comment on incidents where there is no direct involvement.

It is of considerable concern that few are ready to speak out, using the excuse 'we must wait for the accident investigation before comment'. There was merit in this position prior to the increasing use by the authorities of the courts and subsequent criminalisation of Masters in preference to professional sanction. Could there be a more basic reason for not speaking out - the fear of loss of conference revenue, advertising revenue, or loss of employment opportunities for members? There is no evidence to confirm this, but fear is enough. In response, the words of F.D. Roosevelt come to mind, namely: "The only thing you have to fear is fear itself".

Press releases issued after the COSTA CONCORDIA and SEWOL incidents by Nautilus were rapidly seized upon by world media and newspapers. This was because they were issued immediately while the incidents were NEWS. A great deal of harmful press speculation, fuelling calls for prosecution, can be prevented by providing timely informed comment. However, the effect is somewhat limited when it is made a considerable distance from the geographical area of the incident. Furthermore, such comments may not always be repeated locally due to interference by the authorities or commercial interests. Not knowing the causal factors of an accident when information is scarce, it can be difficult to speak out expressing an opinion in the defence of a Master and to be critical of an operator. However, it is possible to criticise the regulator for the consequence and - to a lesser extent - their responsibility for the cause. Such an approach affords the opportunity to influence media discussion and so protect the Master from prosecution without putting oneself in a position of being wrong.

Beside the authorities, the party with the greatest interest to protect is usually the owner - although builders and class are increasingly in the frame given the withdrawal of flag state authorities from effective oversight of newbuildings, coupled with 'light touch' regulation. The owner is by necessity, inextricably linked to the P&I Club. Together with Hull and Machinery (H&M) insurance, and cargo insurance, the scene is set for a tragedy to be played out in private and for high profile cases, in full view of the media. The stakes can be high - not only the immediate financial cost of the incident and the clear-up, but company reputation and future cost from loss of income and possible additional imposed safety measures.

Insurance is a contract of indemnity, i.e. to indemnify the loss of the insured. It can only be paid once; therefore the issue of who amongst the insurers pays is significant. Proximate cause is so often the basis of a claim in English Law, in contrast to Chinese Law on marine insurance. Hence in collision and grounding incidents - who was at fault or where blame can lay is crucial to the financial outcome. In passenger ship incidents General Average is generally not applicable, therefore in collision and grounding incidents the focus is on the owner (charterer) as operator of the vessel. The battle lines are set between H&M and P&I, with negligence of the crew being the issue; so easy to prove yet difficult to deny.

Negligence of the crew could not be demonstrated better than accompanied by a criminal conviction. If it is the Master rather than an officer or other crew member, so much the better. There are occasions when the interests of the owner and Master coincide. Often the way to the company is via the Master, so it is in the interests of the company to shield the Master. Where this is so, it is in the interests of the owner to ensure the Master receives a proper defence. Where this is not the case, the owner is only too ready to abandon the Master to the courts and the mob in order to protect their own financial interests, as instructed by P&I Club lawyers.

This is understandable, but what is not acceptable is the deliberate abandoning of the Master to criminal sanction. This is not limited to the Master: officers and other crew members may be similarly treated. What is worse is the intentional adverse briefing against their own employees, particularly the Master, so as to achieve a more favourable financial outcome.

In company disciplinary cases that Nautilus deals with, where there is no involvement of the authorities involving insurance claims, there is evidence to suggest an increasing willingness to focus on the failings of the individuals rather than the failure of the ship management system, i.e. the proximate cause, involving the Master and/or an officer, so as to facilitate a convenient route to a trouble-free claim.

Company disciplinary action and criminal sanction by the way of a fine or suspended sentence, while uncomfortable and potentially a career stopper, is very different from a period of 'incarceration' in some inhospitable jail. This is not only unacceptable but is cruel and vindictive, given there was no wilful intent or gross/serious negligence. Seafarers are human – this was established beyond doubt in the EU-funded Project Horizon research, which confirmed that seafarers suffered tiredness like us all. Consequently, they make mistakes and errors of judgement, especially when affected by fatigue.

Criminal sentences divert attention away from the root causes, including poorly trained crews, inadequate construction, detached ship management and 'light touch' regulatory authorities. Consequently, passengers and seafarers pay with their lives, seafarers with their freedom and owners on the balance sheet, possibly? Masters are in the vanguard having not only the daily burden of command, but also the commercial pressures brought about by a failed regulatory system.

Today companies, other than the untraceable ones hidden behind a corporate veil, have a planned response to incidents. This includes the engagement of specialists to deal with the authorities and media - including teams of lawyers in different jurisdictions to protect corporate and financial interests. They are able to respond rapidly and set the desired course to minimise financial loss. In contrast, organisations representing seafarers are generally poorly equipped to respond - often in the misguided belief that justice will prevail following a full and complete investigation. Alternatively, fearing that speaking out may endanger the industry and commercial relationships and employment. The absence of independent accident investigation does not necessarily prevent justice but facilitates injustice.

Masters shoulder the burden not only of daily command but of a failed regulatory system in a highly competitive industry with a fractured workforce. The solution to unwarranted criminalisation is not easy. It is doubtful it will come from well-meaning initiatives such as 'seafarers' rights' and 'fair treatment' alone. It requires a robust response to each and every incident, however difficult, from the very start and remorseless action on the failings of regulation. It is the law-makers that determine the actions of owners and set the levels of safety. It should not be Masters that suffer for their failure.