

Lloyd's List

Reproduced from Lloyd's List, September 25, 2007

How a sketchy understanding of environmental crime can result in a brush with the law

An environmental litigation expert has warned shipping industry bosses that they must become familiar with recent cases to avoid ending up in the dock themselves, writes Helen Hill

THERE is currently very little trust in the maritime industry.

As concern among the public and regulators continues to rise, prosecutions, fines and prison terms in environmental cases are all likely to increase.

And it is not just those at the coal face of the industry that are at risk.

Addressing the Lloyd's List Management of Ships' Waste Conference in Rotterdam this week, Clifford P Case III, partner and co-director of Carter Ledyard & Milburn's environmental practice group, issued a stark warning: senior management are increasingly likely to find themselves directly in the firing line and facing sentences and large fines.

Reeling off a worryingly long list of recent successful prosecutions against shipping firms, he pointed out that many of these

'maritime environmental crimes' deal with the malfunctioning or disabling of oily water separators.

According to Mr Case, these cases illustrate a number of themes that are likely to be repeated in the months to come. Prudent shipowners, managers and operators should anticipate them, he stressed.

The co-ordination of investigations and prosecutions of shipping firms active at different ports in the US "is increasing and multidistrict prosecutions are becoming commonplace".

"Misfeasance involving one of a firm's ships is likely to trigger investigations of others," he said, pointing to the recent Evergreen International and Overseas Shipholding Group cases.

In addition, the "sophistication and thoroughness" of the investigations themselves is also increasing.

Recent US Coast Guard guidance provides carefully detailed recommendations to on-board inspection personnel, based on a finding that "recent MARPOL Annex I violation investigations have demonstrated that related shipowners and vessel crews conceal accidental or deliberate discharges of oily waste and sludge, usually caused by

malfunctioning equipment, poorly managed maintenance programs or as an effort to reduce operational costs."

The pace of environmental prosecutorial activity also appears to be rising, he added, partly driven by an increase in staff. Moreover, the recently appointed Environmental Protection Agency assistant administrator for enforcement has directed EPA's regional enforcement offices to evaluate all cases to determine whether they are best handled as civil or criminal matters. Consequently, all significant civil matters are considered for possible criminal investigation.

Fines and penalties are likely to increase if conduct does not improve, Mr Case pointed out.

"Fines to date, while not insignificant, are by no means the maximums authorised under existing statutes, and blatant, enterprise-wide violations of the law will encourage prosecutors and judges to move further toward the maximums allowed."

Prison terms for individuals responsible for controlling or directing illegal conduct will also increase, particularly where those individuals repeatedly seek to mislead government investigators, he stressed.

Senior management will be in increasing

danger of prosecution, with the possibility of substantial fines and prison terms. In the Rick Stickle case (see panel right), the chairman and chief executive of the company involved received a 33-month jail sentence. But senior MSC Management officials, who directed ship's officers to falsify records, were lucky that they were in Hong Kong, he stated. "The pain does not stop with the payment of a fine and the sentencing of a ship's officer or two.

"Comprehensive and costly company-wide environmental compliance programmes, paid for by the defendant and lasting throughout a lengthy post-sentencing probation period, are increasingly a feature of marine environmental prosecutions."

These programmes typically include a court-appointed monitor and an outside auditing firm, as well as multiple changes in training and equipment, he added.

There are also additional negative consequences. For a foreign-flag vessel, probation can mean that is not allowed to enter US waters or dock at US ports during the period of probation.

Firms seeking US government contracts can find themselves debarred from participating due to criminal convictions, as in the Overseas Shipholding Group case (see panel).

Mr Case points out that almost every case that has been brought to date has relied, "somewhat surprisingly", not on a discharge of contamination in US waters, but

"rather on falsifying records of what has occurred far outside of US waters, or destroying evidence of those occurrences".

"In effect, US prosecutions have become extraterritorial." The Rick Stickle case involved discharge of contaminated grain in the South China Sea, but the facts of that case, supporting as they did charges of obstruction of justice and submission of falsified records to US officials, justified guilty verdicts.

The outcomes of jury trials are also uncertain, Mr Case said. History suggests that the government usually wins, and the expenses of proceeding to trial, even if the trial results in a verdict for the defence, are considerable.

Whistleblowers are playing an increasingly large role in initiating prosecutions, driven by the bounty provisions in the Act to Prevent Pollution from Ships.

As more crew members and their representatives learn of these provisions, it is likely that giving orders to disable pollution systems and falsify entries in ship records will become more and more hazardous to shipowners and management.

As well as the many examples above, Mr Case looks to the 2004 award of \$2.1m out of a total fine of \$4.2m to the second mate of OMI's Guadalupe, who had reported to authorities that he was being ordered to engage in criminal dumping activity.

Co-operation with the government can bring lesser penalties. In the Pacific-Gulf Marine case, a shipping company paid just

\$1.5m for deliberate discharges involving four different ships because it undertook a voluntary investigation and disclosed the results (over 50 interviews with present and former employees) to the government.

Clearly, "the interest and concern of the public and regulators in the US continues to rise, fuelled by the reality of problems like those created by invasive species in ballast water, and the misdeeds of 'magic pipe' bad actors".

The complexities of the ballast water problem continue to multiply, just like introduced alien organisms, he said.

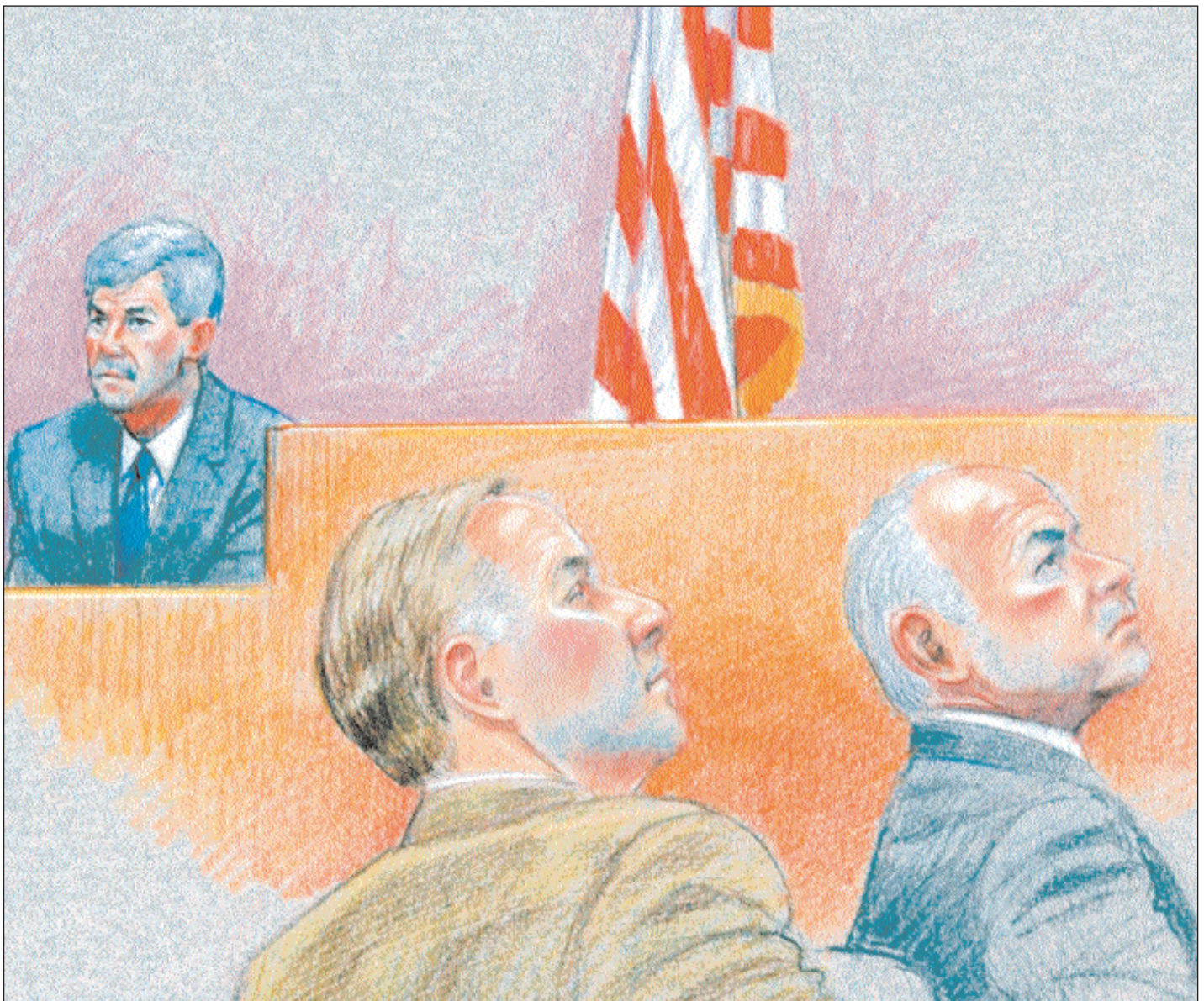
"The situation cries out for a rational negotiated solution, with shipping interests as a trusted participant in the process."

But it is hard to see much trust in evidence, he stressed. "Indeed, it is hard to avoid the conclusion that far from trusting the bona fides of shipping interests, there is almost an assumption of the reverse on the part of some regulatory officials, legislators and interest group representatives."

This lack of trust — a source of great frustration to responsible segments of the shipping industry — can make it extremely difficult to reach solutions that allow the industry to function effectively, he said.

"For progress to be made, the credibility of shipping interests must be enhanced."

"Other industries have faced and overcome similar problems of compliance and public perception in the past. The shipping industry can and must do so now," Mr Case told delegates.



Cases in point

US v Evergreen International

THIS case set a record for the largest fine to that date imposed in a case involving deliberate vessel pollution: \$25m.

Evergreen agreed to plead guilty, in April 2005, to 24 felony counts and one misdemeanor in five different judicial districts on the West and East Coasts of the US, involving the ports of Los Angeles, Portland, Oregon, Seattle, Newark and Charleston.

Following up on a spill of 500 gallons of oil in the Columbia River, the USCG discovered that at least seven Evergreen ships regularly used bypass equipment to discharge oily waste and sludge oil, concealing the discharges in fictitious log books.

In addition to the unprecedented fine, four Evergreen companies will be covered by a detailed environmental compliance plan intended to prevent future violations, as a condition of probation.

Hardware changes will be required to make bypassing more difficult, and Evergreen ships visiting the US must be audited by an outside firm reporting to a special court-appointed monitor.

US v MSC Management (Hong Kong) Ltd

IN THIS case, MSC Management pleaded guilty in February last year to charges of conspiracy, obstruction of justice, destruction of evidence, false statements and violating the Act to Prevent Pollution from Ships, and agreed to pay a \$10.5m fine.

According to Department of Justice representatives, this was the largest fine involving a single vessel charged with deliberate pollution and the largest fine paid by a defendant in an environmental case in Massachusetts history.

A specially-fitted 'magic pipe' had been installed on the MSC Elena to bypass required pollution prevention equipment and discharge oil sludge and waste directly overboard.

Following discovery of the 'magic pipe' during a USCG inspection in Boston Harbour in May 2005, senior management in Hong Kong directed crew members to lie to the USCG, and senior ship engineers ordered that documents be destroyed or concealed.

The ship's chief engineer, Mani Singh, an Indian citizen, also pleaded guilty to making false statements, obstructing justice, concealing evidence and concealing the discharges in a falsified oil record book that was presented to USCG inspectors. He was sentenced to two months in jail and fines totalling \$3,500. The ship's second engineer, Aman Mahana, also pleaded guilty.

As a condition to MSC Management's probation, it was required to enter into a detailed, 42-page environmental compliance programme covering all of its ships, paid for by MSC Management (with funding guaranteed by MSC's parent).

US v Overseas Shipholding Group

FOLLOWING a multi-district investigation involving ports in Boston, Portland, Maine, Los Angeles, San Francisco, Wilmington, North Carolina and Beaumont, Texas, Overseas Shipholding Group pleaded guilty in December last

year to 37 felony counts related to deliberate vessel pollution from nine ships and false pollution log entries on three additional ships.

OSG agreed to pay \$37m, the largest criminal penalty to date involving deliberate vessel pollution, and accepted a three-year period of probation, during which it must implement an environmental compliance programme with a court-appointed monitor and an independent outside auditor of its ships worldwide.

According to an agreed statement of facts: "Numerous OSG crew members, including chief engineers, engaged in conspiracies to commit illegal pollution and falsify ship records while certain lower level crew members knowingly participated because they were explicitly or implicitly threatened by superiors with loss of employment if they refused."

OSG also acknowledged that shore-side management failed to provide sufficient supervision and control. Each of 12 current and former crew-members has been awarded \$437,500 under the Act to Prevent Pollution from Ships.

Given the magnitude of the criminal penalty agreed to, the significance of the OSG case is clear, Mr Case stated.

US v Pacific-Gulf Marine Inc

PACIFIC-Gulf Marine was sentenced in January to pay a \$1m fine and \$500,000 for community service, as well as serve three years of probation under an environmental compliance programme.

In June, 2006, Pacific-Gulf Marine had pleaded guilty to deliberate acts of pollution involving four different ships, and acknowledged that ship records misrepresented that hundreds of thousands of gallons of oil-contaminated bilge water were properly discharged through required pollution prevention equipment, when in fact the ships involved used a 'magic pipe' to circumvent the equipment. Stephen Karas and Mark Humphries, former chief engineers of the M/V Tanabata, and Frank Coe and Deniz Sharpe, former chief engineers of the M/V Fidelio, were indicted for various crimes, including conspiracy, witness tampering and obstruction of justice; Mr Humphries allegedly threw the 'magic pipe' for his ship overboard after the USCG inspected the vessel.

All of the chief engineers except Mr Humphries have now pleaded guilty. The government's criminal investigation of this matter began in 2003.

Pacific-Gulf Marine came forward after learning of the investigation and disclosed to the government the results of an internal investigation, including over 50 interviews with present or former employees containing incriminating information.

It received credit for having done so (compare its fine to that imposed in another multi-vessel case from 2005, Evergreen International) but the prosecution was not averted because a governmental investigation had already begun.

US v Chian Spirit Maritime Enterprises Inc and Venetico Marine

THESE two Greece-based shipping companies were sentenced in January, 2007 to pay a criminal penalty of \$1.25m and

to implement a court-monitored environmental compliance plan after pleading guilty to a felony relating to the operation of the M/V Irene E.M.

USCG investigators were presented with a falsified oil record book and discovered that the vessel's oily water separator had been inoperable for several months. A crew-member testified that the ship had illegally discharged waste oil into the ocean approximately four times per week.

The ship's engineers also installed a 'magic pipe' bypass that was hidden from the USCG. The master of the Irene, Grigore Manolache, pleaded guilty to presenting false information to the USCG, and the ship's chief engineer, Adrien Dragomir, pleaded guilty to falsifying the oil record book, and was sentenced to a one-year term of unsupervised probation.

US v Artemios Maniatis

THE June, 2007 result in this case contrasts sharply with every other recent reported instance of prosecution for maritime pollution, including the Petraia Maritime case one month earlier: after a jury trial, the defendants were acquitted.

Prosecutors based their case on the testimony of six Filipino crewmembers of the M/T Captain X. Kyriakou, who testified that the ship and its chief engineer, Mr Maniatis, violated pollution laws and maintained false records.

The jury apparently found for Mr Maniatis and the ship's manager, Athenian Sea Carriers, because they felt the crewmembers were motivated by the rewards available under the Act to Prevent Pollution from Ships and gave inconsistent testimony.

The case is a useful reminder that the government does not always win, but it remains an isolated example of a defense verdict. And although vindicated, Athenian was still reportedly left with substantial costs: a \$1m bond and an estimated \$2m in out-of-pocket expenses.

US v Rick Stickle et al

STICKLE the chairman and chief executive officer of Sabine Transportation, Inc., was convicted after a jury trial for his role in the dumping of 442 tonnes of oil-contaminated wheat from the SS Juneau into the South China Sea, along with, among other things, obstructing justice and falsifying documents.

The wheat, originally destined for humanitarian relief, had been contaminated by a diesel oil leak. Other senior Sabine employees and ship's officers were also convicted, and the corporation pleaded guilty and agreed to a \$2m fine.

Stickle was sentenced in February, 2005 to 33 months in jail and a \$60,000 fine; he appealed, largely on the grounds of improper venue, but his conviction was affirmed in August 2006. Commenting on the conviction, Thomas V. Skinner, acting assistant administrator for Enforcement and Compliance Assurance, US Environmental Protection Agency, stated, "this prosecution sends a clear message that those who violate the law and pollute our waters, including senior corporate officials, will be vigorously prosecuted"