COMMENTARY

BY

PAUL WILLEE QC

How U.S. Environmental Maritime Criminal Law Has Turned "Crime and Punishment" into "Mistake and Punishment" – Commentary.

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Introduction

It is a great pleasure to comment on Dr. Russo's most useful paper. If the hallmark of that utility is the ability of the work to re-emerge in a fresh environment with a minimum of modification, then this paper is worthy of the stamp. The legal concepts and advice relating to criminal responsibility are as germane to the Australian and (I suspect) New Zealand legal systems as they are to the American. The real difference between the two systems is manifested in the difference in the statutory regimen.

We don't have an Al Gore in this country, but the Premier of NSW gave a good imitation of similar imprecations to those described in the paper, against the owners master and crew of the ill-fated Italian oil tanker *'Laura D'Amato'* when, in August of this year, it left 300,000 litres of its cargo of light crude on the sparkling surface of the greatest Olympic harbour in the world. The spill occurred on August 3, but by 17 August , the reporters had renamed Sydney 'Slick City' and were still complaining that there was 'no one to blame for the spill' a fact which did not deter Mr. Carr from reportedly saying that the Government was confident of securing a prosecution[1].

Apart from the obvious logical inconsistencies, there was nothing in this to arouse the special or heightened sense of affront in Australian lawyers as seems to permeate Dr. Russo's description of liability after the *Exxon Valdez* experience. We have long been used to criminal prosecutions for oil spills both at sea[2] and ashore. Perhaps the difference is attributable to the fact that the provisions of the MARPOL 73/78 convention went into Australian municipal law in 1983[3] and similar protective legislation has existed since 1960[4], long before the *Exxon Valdez* disaster in 1989. The penalties were substantial (by Australian standards) from the outset. Like America, and building on the concepts of the 'common weal' or public welfare statutes, we have enacted a series of statutes both in the State and Federal arena designed to deal with the threat – not just of oil – but also of chemical and other pollutants.[5]

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[1] Telegraph 17 August 1999

[2] The *Arthur Philip* as to which see later.

[3] Protection of the Sea (Prevention of Pollution by Ships) Act 1983, and amendments to the Navigation Act 1912

[4] Pollution of the Sea by Oil Act 1960. The same has been true for New Zealand since at least 1974 – The Marine Pollution Act

[5] See for example in the Federal arena the various Protection of the Sea statutes; Protection of the Sea (Civil Liability) Act 1981, Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund - Customs) Act 1993, Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund - Excise) Act 1993, Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund - General) Act 1993, Protection of the Sea (Oil Pollution Compensation Fund) Act 1993, Protection of the Sea (Powers of Intervention) Act 1981, Protection of the Sea (Prevention of Pollution from Ships) Act 1983, Protection of the Sea (Shipping Levy) Act 1981, Protection of the Sea (Shipping Levy Collection) Act 1981. Complimentary State legislation

The Nature of Criminal Liability

Nonetheless, the basis of criminal liability under those provisions is almost on all fours with Dr. Russo's exposition of the American position. It is twofold, as he describes it on page 2 of his paper. That is to say general, in the sense of the universal concepts of criminal liability pursuant to the various Crimes Acts of the Commonwealth and the States involving loss of life, or damage by way of personal injury or to property, as well as, specific in the sense of violation of specific environmental enactments,

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So too, that liability can settle on those directly involved in navigating or crewing the vessel, or in its management, being the ship managers, shipowners be they corporations or natural persons. Our criminal law always dealt with problems of degrees of complicity by using the concepts of joint enterprise, by assigning a degree or level to the principals involved in a criminal enterprise, and by categorizing others who were not direct participants as accessories (before and after the act).

Vicarious liability was an anathema to our criminal law because it violates the two essential elements for criminal liability namely – personal conduct and personal blameworthiness in the offender. As such it was a concept sought to be confined to the law of tort[6] but it has also escaped those bounds in this country, to become well established as a basis for liability. There are three main policy reasons justifying the imposition of vicarious liability. They are – a requirement to impose liability on the controllers of an enterprise, the inherent difficulties that can arise in the attempt to prove complicity or personal fault in an employer and the need to prevent relatively junior employees from being made scapegoats for occurrences with serious repercussions. Those concepts have been given expression in the environmental context.[7] What may have been swept away by that legislation, are those doctrines of the criminal law, which were developed by the common law to protect truly innocent actors who committed the actual act productive of the evil result (*actus reus*). These include necessity, duress, and innocency of agency. Similarly in Australia, this liability has been developed, by building concepts of criminal responsibility on interpretation of statutes designed for the 'common weal' or to protect public welfare.

In fact, there is very little need under the Australian statutes to impose vicarious liability in the context of marine accidents because the legislation is couched in terms which impose liability directly on the master and owner of the ship from which the prohibited substance emanates. For practical purposes, they are the offenders, whatever may have been the actions of those persons on board who may have directly caused that emanation.

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[6] Photo Production Ltd. v Securicor Transport Ltd [1980] 1 All ER 261 at 266.

[7] A good example of which, is the judgment of Chief Justice Gleeson in Tiger Nominees Pty. Ltd. v State Pollution Control Commission (1992) 25 NSWLR 715 particularly at 718.

So, for example, Section 9(1) of the Protection of the Sea (Prevention of Pollution from Ships) Act (Commonwealth) is expressed in terms –

"Subject to sub-sections (2) and (4), if any discharge of oil or of an oily mixture occurs from an Australian ship into the sea, the master and owner of the ship are each guilty of an offence punishable, upon conviction, by a fine -."

Such an imposition of liability is much more akin to the type of liability described by Dr. Russo later in his paper under the heading: *'Responsible Corporate Officer Doctrine'* but known in our parlance as a 'status offence'. That is to say one in which liability settles on the offender because of their status or position in the organization responsible for commission of the offence and not necessarily because of his or her action or inaction, in the commission of it. That may be an acceptable situation to the average Australian because it has long been part of our laypersons' folk law that "the Captain goes down with his ship" and the owners certainly could not expect a greater degree of sympathy from the man in the street than the Masters of their vessels.

So too, at the level of the legislation of the various States and Territories, so far as marine pollution from ships is concerned vicarious liability is of no real concern in the context of shipping on those waterways under the control of the States[8]. Under the State legislation, liability for breach of the statutes settles on the master and owner as well.[9]

However, under both Federal and State provisions, liability is extended to the charterer, manager or operator of the ship or an agent of the owner, charterer, manager or operator of the ship for failure to report a prescribed incident (that is a discharge of a oil or other noxious or harmful substance covered by the statute) where the Master is unable to report it or the ship is abandoned.[10]

These observations are not meant to convey the impression that the offences mentioned create unassailable liability. Statutory defences are encompassed in the legislation in circumstances of lack of knowledge of the incident for example, or if the ship is damaged (provided the damage was not caused recklessly).

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[8] The issue of the extent of Federal and State Jurisdiction over waterways to seaward of the high water mark is a fascinating study in its own right and can in certain situations raise the possibility at least of useful defences to criminal proceedings. However, an exploration of those issues is well outside the time available for this commentary, if not its justifiable scope. For those interested in the subject see the materials cited at footnote 11 particularly the article by Nicholas Brunton.

[9] See for example Sections 8(1) and 9(1) of the Pollution of Waters by Oil and Noxious Substances Act 1986 (Victoria).

[10] Section 22 Commonwealth Act and Sections 10, 19 and 23D of the Victorian Act.

Nevertheless, practitioners should be aware that there are a plethora of Statutes which impinge on the area of environmental pollution at the State and Territory level,[11] where pollution (particularly of inland waters) will invoke vicarious liability on the ordinary principles, which have been developed by the courts in respect of criminal liability. That is "whether or not the legislature has, expressly or by necessary implication, created a criminal offence for which one can be found vicariously responsible" depends on whether the offence is … "of such a nature that it is capable of commission vicariously" … and supports a condition where … "the effective fulfilment of the statutory purpose requires that employers be regarded as potentially vicariously responsible for acts of their employees"[12]

Mens Rea.

Dr. Russo's statements about these concepts are as true for the Australian as the American system, including the process relating to the development of the abandonment of the concept of mens rea as the basis of criminal liability in areas of public welfare[13] However, a warning needs to be sounded concerning terminology. In Australia, we have three categories of criminal liability: (1) Those which require proof of mens rea in the sense explained by Dr. Russo, (2) offences of strict liability. That is to say, those in which the prosecution does not have to prove mens rea, but the defence may successfully defeat the charge by raising the likelihood of the *actus reus* having been committed while the accused laboured under an honest and reasonable mistake as to the circumstances which, if true, would have rendered such conduct innocent; and (3) Absolute liability which (once the commission of the actus reus and the identity of the accused are established), admits of no defence, or at least not one based upon a lack of fault on the part of the accused. This would appear to be the category of liability described by Dr. Russo as 'strict', but which in our terminology would be termed 'absolute'.

Indeed, I do not detect in his analysis, any reference to the concept of strict liability in the Australian sense. The importance of the distinction is immediately obvious. It is only in cases of strict liability that the sorts of concepts described by Dr. Russo at pages 6 and 7 of his paper under the heading: *'Knowing Conduct'*, will come into play in the Australian context. The battleground in our courts is very often characterized by a dispute over the exact nature of the criminal liability sanctioned by the relevant statutory provision – strict or absolute. For the competent criminal practitioner is most adept at fashioning legitimate defences, based on the circumstances, where the issue is one of the degree of

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[11] Much of this matrix has been the subject of careful examination and erudite analysis. See for example: Nicholas Brunton, *Water Pollution law in New South Wales and Victoria:Current Status and Future Trends* Environmental and Planning Law Journal February 1994 page 39, and by our own members: *Marine Pollution Laws of the Australian Region*, Michael WD White QC Federation Press 1994; *Shipping Law*, Martin Davies and Anthony Dickey 2nd. Ed. Chap. 18.

[12] Tiger Nominees Pty. Ltd. v State Pollution Control Commission (ibid) per Gleeson CJ

[13] The relevant principle is stated in Sherras v. De Rutzen (1895) 1 QB 918, at p 921, as follows: "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be onsidered."

care taken by an accused person, or the reality of his understanding of the circumstances in which the acts complained of, took place. A discussion of the issues by which a court may determine whether the statute imposes strict or absolute liability would be too lengthy for this commentary[14]. In general, this turns on the precise words of the statute. When these words fail to evince the clear intent of the legislature, consideration is given to such factors as: The seriousness of the offence as expressed in the penalty, (the more serious the greater the likelihood that mens rea is a requirement), the likelihood of the infliction of a penalty (regardless of fault on the part of the offender) influencing future compliance with the law breached by the commission of the offence, (if this is high, then it is more likely that the legislature intended liability to be absolute).

One classic example of this was a prosecution brought by the Commonwealth against the master, owners and operators of the oil tanker *Arthur Phillip;* in respect of a very large spill off the Victorian Coast on 21 May 1990. The Indictment alleged four counts of: discharging oil, and/or an oily mixture contrary to section 9(1) of the Protection of the Sea (Prevention of Pollution from Ships Act) 1983 (POPSA), and of failing to notify the authorities and log the occurrence of the incident contrary to sections 11(1) and 12(5) of the same Act, respectively.[15] Argument turned initially on whether or not the words of Section 9[16] of POPSA imposed strict or absolute liability. The court decided that they imposed absolute liability. Nevertheless, had the penalty imposed been more severe[17] the point was preserved for the Court of Appeal.

Responsible Corporate officer Doctrine

This case also provides (in part) an example of the imposition of 'criminal liability for a failure to comply with environmental regulations when the violator did nothing consciously wrong or was unaware that his actions violated a law. Except as discussed below in relation to ship's masters owners and to a lesser extent in relation to prescribed incident reporting requirements, the charterer, manager or operator or an agent of the ship, I am unable to find any examples of Australian Statutes which impose liability based upon an individual corporate officer's position of responsibility in the corporation as opposed to his actual knowledge or participation in the actus reus, of the type mentioned by Dr. Russo under the heading 'Responsible Corporate officer Doctrine'. As

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[14] For those who need to refer to a most useful discussion of the factors involved, the seminal Australian authority is He Kaw The v The Queen [1984-5] 157 CLR 523. For examples of the diametrically opposed views taken by the Courts in New South Wales and Victoria on the application of the principles relating to the determination of strict and absolute liability in the context of similar State legislation relating to water pollution see Australian Iron and Steel v EPA (1992) 29 NSWLR 497 and Allen v United Carpet Mills [1989] VR 323. Both in logic and precedent, the New South Wales case is an infinitely superior authority.

[15] See copy indictment attached.

[16] The section was at that time in the following terms: "Subject to sub-sections (2) and (4), if an discharge of oil or an oily mixture occurs from an Australian ship in to the sea, the master and the owner of the ship are each guilty of an offence punishable, upon conviction, by a fine not exceeding (a) if the offender is a natural person - $50,000 or (b) if the offender is a body corporate - $100,000." The penalties have since been increased to $200,000 for both, and the section has otherwise undergone substantial amendment.

[17] The count of being the master of a ship which discharged the oil was dismissed by the Judge on grounds that the Captain was not in any way negligent or responsible for what was an accidental discharge. On the count of failing to report he was fined $4000

indicated earlier, in such cases our statutes provide their own inbuilt protections against the sort of arbitrary imposition of liability without blameworthiness, complained of in the principal paper.

Wilful Ignorance

Our description of this concept is 'Wilful Blindness' – the deliberate shutting of ones eyes to what is going on. Where knowledge of an offence is an essential ingredient of the commission of a crime it must be strictly proved. But that may be by inference. It is permissible to use the expression 'wilful blindness' as a convenient shorthand way of explaining circumstances from which such knowledge may be inferred but not as a basis for imputing knowledge where actual knowledge is not proved[18]

Criminal Negligence and Recklessness

As in the United States, so in Australia, it did not need the enactment of environmental statutes to impose liability by way of criminal negligence. The concept has long been known to Australian law but its development in application to crimes against the person, involving death, serious bodily injury or damage to property has never produced a satisfactory definition such as the one cited from the New York penal statute. Early attempts were quite circular, defining criminal negligence as negligence of such magnitude or quality as required condign punishment. Again, Australian authorities have always declared that simple negligence was insufficient to sustain conviction[19]. The criminal negligence required is often described in terms of being conduct involving a gross departure from the standard of care of the reasonable person[20].

Do the Australian statutes on criminal negligence only require simple negligence to create liability?

The extent of the Australian environmental statutory regime is now quite vast at both a National and State level. I do not profess to have spent the time required to look at all of the relevant legislation, but our approach does not seem to be one which works to produce liability based on the degree of negligence exhibited by the offender- at least not in the sense expressed in Dr. Russo's paper. Simple negligence may be the proximate cause of a particular mishap to which attracts liability but that liability is much more likely to be based on the nature, and extent of the incident or other surrounding circumstances than the actual degree of negligence which produced it. . That is to say that liability will be determined in accordance with the nature and incidents of the statutory elements by which it is imposed. In turn, this harks back to the classification of the offence – whether it is one requiring mens rea, or is an offence of strict or absolute liability. In that sense, the nature or quality of the negligence involved is only relevant to

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[18] Sir Daryl Dawson: Recent Common Law Developments in Criminal Law (1991) 15 Crim LJ 5 at 15..
[19] This is so even in the code States Callaghan v The Queen (1952) 87 CLR 115.
20 Andrews v DPP (UK) [1937] AC 576,; Callaghan v The Queen (1952) 87 CLR 115; Evgeniou v The Queen (1964) 37 ALJR 508; Nydam v The Queen [1977] VR 430, Full Court at 445.

the issue of a possible defence to an offence of strict liability. Even simple negligence may be sufficient to prevent what has become known as the Proudman v Dayman defence operating. That is of an honest and reasonable belief, in a state of facts which, if true, would exculpate the offender. This could happen if, for example, the offender claimed that he believed that a particular state of facts existed but had taken no careful steps to check the situation, when the statute placed a clear onus upon him to prevent the evil at which it was aimed. In this sense, it might be argued that the statute is aimed at punishing somebody for being 'no more than careless' in the conduct of the relevant activity [21]. The position is by no means clear however, for the other view is that the Proudman v Dayman defence owes nothing to the concept of negligence at all. Rather it stems from the common law requirement of proving a guilty mind (mens rea) [22], which can hardly exist if the offender is mistaken in the relevant sense, as to the surrounding circumstances in which he acts.

The degree of negligence is however, a matter to be considered in relation to penalty if not liability.

In Australian jurisprudence if there is a concept that "the seriousness of the crime will be greater when there is reckless conduct as opposed to when there is only criminally negligent conduct" it is not reflected in penalty. Probably because it is considered as no more than a facet of criminal negligence. Our definition of recklessness differs from that set out on page 6 of the paper although there are similar elements. Even if time permitted, this is not an area into which I wish to venture in this commentary, for its difficult and confusing concepts require great care in exposition. Moreover it is almost always confined to the case of murder or manslaughter, which might be concomitants of environmental law but in the normal run of events are not. Nonetheless is used in Australian Law in at least two senses. The one subjectively, to describe the accused's unreasonable or unjustifiable taking of a risk which is known to that accused. Objectively, recklessness refers to gross or `criminal' negligence, in which the accused's conduct deviates substantially – in this sense it is sometimes used to describe the actions of a person who fails to advert to a risk in circumstances where it would have been obvious if any thought had been given to the possibility of its existence.

A superb example of the difficulties into which one can fall in this area of the law, in a marine context is the Privy Council decision of Kong Cheuk Kwan v The Queen [23]. That case involved an appeal from conviction for manslaughter of passengers by gross negligence, by the Masters and Deck Officers of two Hydrofoils travelling on reciprocal courses out of Hong Kong and Macau respectively. On a day of flawless weather conditions and perfect visibility the accused managed a head on collision at a combined speed of over 50 knots. (64 mph). In discussing that decision the learned authors of the Bible on Criminal Law – Archbold Criminal Pleading Evidence and Practice, confused the concepts so badly that they attracted the following comment in the course of the judgment:

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[21] He Kaw The v The Queen (infra) at page 530 per Gibbs CJ.
[22] Ibid at pages 579-80 per Brennan J.; and 591-3 per Dawson J.
[23] (1985) 82 Cr App R 18

" Though Caldwell and Lawrence are referred to in the preface ... as "extraordinary decisions" (a view which the editor is of coure at liberty to express in his preface if he so wishes)... the view, whether correct or not cannot justify complete misrepresentation as to their effect in a text book of great authority widely used in England and Wales and elsewhere as in Hong Kong" ...[24]

For our purposes, statutory definitions are probably sufficient. For example that contained in the Pollution of Waters by Oil and Noxious Substances Act 1986 (Vic) Section 8 (3) (b). This defines the sort of damage to a ship which shall be taken to be intentional damage for the purpose of excluding a defence under Section 8 (2) (b), as damage arising in circumstances in which the master or owner "acted recklessly and with knowledge that damage would probably result". In this sense reckless probably means acting with foresight of the consequences but deliberately, regardless of whether or not those consequences flowed from the action.

[24] At page 23. That decision is also authority for caution in attempting to draw any relationship between "recklessness" in arson or other criminal damage cases, and the same expression in manslaughter.

Criminal Investigation and Prosecution and the Relationship Between Criminal and Civil Proceedings.

There is no more cogently relevant statement in this part of Dr. Russo's work than "It is first of all important to keep in mind that the law enforcement personnel are there to determine whether a crime has been committed and who bears criminal responsibility". Indeed, the statement may be too generous. Perhaps it would be more pragmatic, if somewhat cynical, to observe that from their perspective, such personnel are not present to determine if a crime has been committed but rather to gather the evidence of the commission of the incident which has drawn them to the scene. No less than in the U.S. the cast of those attending may be formidable and its combined power daunting. It will include representative at both the State and Federal level if the incident has manifest itself on shore or is likely so to do.

It is most important to remember when acting for putative defendants, that the 'first turn of the screw' will not 'cure all debts'. The Federal authority not only extends interstate from the Eastern to the Western Seaboard, but such authority will be likely to be lent to the State in an appropriate case. At the Federal level, the investigative power is exercised by the Australian Maritime Safety Authority (AMSA). It has potentially huge resources at its disposal, including the ability to involve civil and military ships and aircraft in the operation. Because of the relatively small concentration of shipping in the comparatively vast maritime jurisdiction surrounding Australia, either for itself, or on behalf for example of the State of New South Wales, AMSA can quickly narrow down the list of possible suspect ships to but a few. It does so by moving on several fronts at once. It will organizing the collection of a sample of an offshore spill, and then set in train the sophisticated processes of chemical analysis which will identify the offending ship with unerring accuracy. Starting with analysis of the sample, the time it has been in the water and using well established computer modelling of drift from actual data on wind and current, the recorded and observed shipping movements over the relevant period it can narrow down the list of possible suspects sufficiently to get ready to pounce. Usually, those suspects will still be in Australian waters, often about to dock in ports on the other side of the Continent or if not, likely to return to the jurisdiction in the near future. Even after steaming many sea miles, evidence of being involved in a spill will still cling to the sides of the ship, its boats and standing rigging, unless the most advanced and thorough cleaning methods have been used. In such cases, analysis of samples from internal compartments in the vessel may still produce the required result from the investigators point of view. Ultimately, AMSA alone can choose from a veritable army of over 170 appointed investigators throughout Australia, to visit and inspect the ship and interview all relevant personnel. The unimpedable powers of those investigators include: the ability to go on board the vessel with such assistants and equipment as the inspector considers necessary and to require the master to take such steps as the inspector directs to facilitate the boarding, to inspect and test any machinery or equipment on the ship and to require the master to take any directed steps to facilitate such testing, open or require the master to open virtually any compartment or receptacle on board, to require the master to produce a record book, or other document required by legislation to be carried on board, make copies of the same and require their certification by the master, examine and take

samples of any substances on board and to require persons to answer questions. These people know what they are doing and personnel from the various directorates of prosecutions have carefully instructed them on the requirements of successful prosecution.

This does not mean that nothing can be done to combat the prosecution machine. The scope of defence activity is so broad that it is well beyond the ambit of this paper. In general, I agree with the comments in the principal paper. My first reservation is that you ought not to be lulled into a false sense of security either by the investigators or a mistaken belief in your own ability – derived from years of civil practice, to deal with what is now an highly technical and specialized branch of the law – even at the level of ordinary civil criminal prosecution, let alone prosecutions with a maritime flavour. In the appropriate circumstance, tie up as soon as possible with an advisor with criminal experience and preferably one with marine experience as well. Most criminal practitioners will involve counsel at an early stage in ordinary criminal prosecutions. The need to do so with maritime prosecutions is just as acute – if not more so.

I do not subscribe to the theory that an attempt should be made to persuade investigators that a crime has not been committed. Doing so is likely to expose your plates in ways that might never have occurred to the investigation team.

There is no reported authority of which I am aware which deals with the power pursuant to Section 27 (1) (q) of the Act to require a person to answer questions put by an inspector. But I doubt that it could ever be construed so as to override the (still extant – but increasingly threatened) right to remain silent in circumstances of possible self - incrimination. In reality, this is rarely the problem. The basis of our liability means that those who can give the information and whose actions may have even been the proximate cause of the incident under investigation – are rarely under threat of personal prosecution. In my experience every ship contains at least one crew member, with a greater willingness to assist the investigators than concern about biting the hand that feeds him. In most cases it is not even necessary to give such a person a transactional indemnity of the type referred to by the author of the paper. Reducing the collateral damage such people can inflict, without attracting personal liability for obstruction of the course of justice, is a real art form.

Other, much broader issues impinge on the course of conduct of the master and owners in these circumstances. Ostensibly, there is much to be gained by facilitating the prosecution and pleading guilty at an early stage of proceedings. All our criminal jurisdictions contain provisions granting a substantial discount in penalty if a defendant makes a guilty plea. The earlier it is made the greater the discount. In some jurisdictions that principle is actually enshrined in the sentencing statutes. Very often these matters produce such conflicts of interest that the same counsel cannot represent the master and owners or operators. Such considerations must always be balanced against the effect on liability civil liability of a guilty plea. Or even on collateral liability where the prosecution seeks to recover criminal damages for clean up costs of installations,

seascapes, flora and fauna. Penguins and seals are in my experience particularly expensive pollution vehicles.

In many Australian jurisdictions, the old common law rule derived from the decision in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 that a criminal conviction might not be led in evidence in a civil proceeding has suffered serious inroads by judicial decision or statutory intervention [25]. The question of whether or not such evidence would compel a tribunal of fact to come to a similar conclusion in civil proceedings may be somewhat academic, if in fact the major players have made admissions or given evidence in earlier criminal proceedings that can be used against them in the civil proceedings.

I wish you all well in your next foray into the criminal arena. And for those of you who new me of old and can not believe that I delivered all this with a straight face I leave you with this thought. [Hidden text not for publication prior to the meeting follows Cindy]

[25] For example in Western Australia by Mickelberg v Director of Perth Mint [1986] WAR 365. For a full discussion of this matter see *Cross on Evidence* Byrne and Heydon, Butterworths Current Service 1999 Ed. Chapter 3 Section F paragraph [5180].

[Annexed Indictment]

IN THE COUNTY COURT AT MELBOURNE

IN ITS CRIMINAL JURISDICTION

THE QUEEN

against

PHILLIP JAMES HICKEY

INDICTMENT

First Count — The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf of Her Majesty the Queen, INFORMS THE COURT AND CHARGES that on the 21st day of May 1990, Phillip James Hickey was the master of the ship the "M.T. ARTHUR PHILLIP", which discharged oil into the sea off the coastline of the State of Victoria, contrary to sub-section 9(1) of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

Second Count — And the said DIRECTOR OF PUBLIC PROSECUTIONS FURTHER INFORMS THE COURT AND CHARGES that on or about the 21st day of May 1990, Phillip James Hickey was the master of the ship the "M.T. ARTHUR PHILLIP", which discharged an oily mixture into the sea off the coastline of the State of Victoria, contrary to sub-section 9(1) of the Protection of the Sea (Prevention of Pollution from Ships Act) 1983.

Third Count — And the said DIRECTOR OF PUBLIC PROSECUTIONS FURTHER INFORMS THE COURT AND CHARGES that on or about the 21st day of May 1990, off the coastline of the State of Victoria, PHILLIP JAMES HICKEY, the master of the ship the "M.T. ARTHUR PHILLIP", did not, without delay, notify a prescribed officer in the prescribed manner of a prescribed incident in relation to the said ship, contrary to sub-section 11(1) of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

Fourth Count

And the said DIRECTOR OF PUBLIC PROSECUTIONS FURTHER INFORMS THE COURT AND CHARGES that on or about the 21st day of May 1990, off the coastline of the State of Victoria, PHILLIP JAMES HICKEY, the master of an oil tanker, the Australian ship the "M.T. ARTHUR PHILLIP", did not, without delay, make appropriate entries in, or cause appropriate entries to be made in, the ship's oil record book, of a prescribed occurrence in relation to the said ship, contrary to sub-section 12(5) of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

PETER CHARLES WOOD
For and on behalf of the
Director of Public Prosecutions