

**HOW U.S. ENVIRONMENTAL MARITIME CRIMINAL  
LAW HAS TURNED "CRIME AND PUNISHMENT"  
INTO "MISTAKE AND PUNISHMENT"**

**BY**

**THOMAS RUSSO  
LAW OFFICE OF  
FREEHILL, HOGAN & MAHLAR LLP**

HOW U.S. ENVIRONMENTAL MARITIME  
CRIMINAL LAW HAS TURNED  
"CRIME AND PUNISHMENT" INTO  
"MISTAKE AND PUNISHMENT".

By Thomas M. Russo  
LAW FIRM OF  
FREEHILL HOGAN & MAHAR LLP  
80 Pine Street  
New York, New York 10005

INTRODUCTION

Ship accidents have occurred as long as ships have sailed the seas. The oldest ship accident officially reported appears in the Bible when poor Jonah's ship almost went down in a celestially orchestrated storm. Of course, we also know that Noah's ship ultimately grounded as a result of bad weather. As far as we know, in all those ancient accidents, no criminal charges were ever leveled by the relevant authorities against the either Jonah or Noah. As, we in the United States approach the new millenium, we Americans have gotten much more sophisticated in our approach to ship accidents than the biblical ancients, and if Jonah or Noah had discharged any whale oil or killed any animals, as a result of their mishaps, the U.S. Justice Department would never have let them get away with it. How did we reach this point in the United States?

The grounding of the EXXON VALDEZ in 1989 on Bligh Reef in Prince William Sound Alaska was a watershed event in American environmental history.<sup>1</sup> The EXXON VALDEZ spilled 11 million gallons of oil into the pristine waters of Prince William Sound Alaska. The oil spill soiled beaches, killed fish, birds, otters and other wildlife. As a result of all the visible damage, the American news media went into a frenzy. The national television was saturated with reports of the spill and graphic pictures of oiled beaches, dead birds, and dead otters. The sensational coverage of the spill caused outrage among the public, the politicians, and environmental groups. Indeed the current Vice President of the United States, Al Gore, stated in his book Earth in the Balance that the grounding of the EXXON VALDEZ was an indictment of our civilization. (Fortunately, Mr. Gore was not in office in 1989, and therefore civilization as a whole escaped indictment, but the Master of the vessel and the owner of the ship, Exxon corporation did not.) As a direct result of the VALDEZ spill, from now on in the United States whenever there is a maritime accident resulting in an oil spill, there will be a criminal investigation and depending upon the significance of the environmental damage, the mood of public opinion, the ambitions of the presiding prosecutor, the interests of politicians, a criminal charge may be leveled against the, Master,

---

<sup>1</sup> *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil off Alaska, N.Y. Times, March 25, 1989, at 1.*

crewmembers, shipowner company, as well as corporate officers. Such prosecution could result in incarceration of individuals as well as substantial fines. Criminal conviction may also result in unlimited civil liability under the Oil Pollution Act of 1990<sup>2</sup> and the awarding of punitive damages in third party civil suits.

Accordingly, it has become very important for maritime lawyers who represent owners operating in U.S. waters to have a general insight into criminal investigations and prosecutions and how they affect the maritime industry. This paper is meant to be an introduction for the uninitiated into the uncharted waters of criminal liability stemming from maritime accidents in the United States.

## 1. THE NATURE OF CRIMINAL LIABILITY

In the United States, there are two categories of statutes imposing criminal liability arising from ship collisions and groundings. First, if there is pollution incidental to a maritime accident, criminal liability for violation of state and federal environmental statutes may be imposed. Second, regardless of whether there is pollution, state and federal general criminal statutes imposing criminal liability for damage to property, personal injury and loss of life can come into play.

It is logical that in a criminal investigation of a maritime accident the focus of criminal liability under either of these categories will first be on the crewmembers, then on the corporation, and ultimately on corporate officers.

Depending on the circumstances, the crewmembers navigating and controlling the vessel could bear criminal liability for their actions under both environmental statutes and general criminal statutes. For example, in the EXXON VALDEZ grounding, the Master was charged under environmental statutes for the negligent discharge of oil, as well as under general criminal statutes for criminal mischief, reckless endangerment and operating a vessel while intoxicated.<sup>3</sup> In addition, the shipowner corporation may be held vicariously liable for the acts of crewmembers, acting within the scope of their employment if such acts constitute a violation of environmental statutes and, general criminal statutes, as well. Additionally, corporate officers can be held criminally liable under environmental statutes merely because of their position of responsibility in the company, regardless of their actual knowledge or participation in any culpable conduct. Finally, corporate officers can be held criminally liable for violation of general criminal and environmental statutes depending on

---

<sup>2</sup> Pub. L. No. 101-380, 104. Stat. 486 (1990) (codified at 33 U.S.C. §§2701-2719).

<sup>3</sup> *Alaska v. Hazelwood*, 3AN-S89-7217CR, 3AN-S89-7218CR (Alaska Sup. Ct. 1989) (unreported).

their actual knowledge of the facts surrounding the accident and whether they committed acts contributing to the accident.<sup>4</sup>

### A. *Mens Rea*

Historically, the U.S. courts have recognized that in order to be guilty of a crime a person must have a criminal intent or *mens rea*.<sup>5</sup> Thus, in order to warrant criminal sanction, a perpetrator has to have a wrongful purpose or guilty knowledge or willfulness which amounts to a criminal intent.

The basic idea running through the traditional American criminal law was not to criminalize conduct absent a showing of evil intent or motive or criminalize that which would be traditionally considered a civil wrong, or traditionally addressed by civil remedies. Most judicial interpretations of traditional general criminal statutes have incorporated the concept of *mens rea* as a basic element of a crime, even if not specifically spelled out in the statute.<sup>6</sup> Accordingly, it should be expected that in any prosecution of general criminal statutes, resulting from ship accidents such as manslaughter, criminally negligent homicide, reckless endangerment or criminal mischief, the prosecution will always have to prove a requisite criminal intent, either as defined in the statute or as incorporated by the common law.

Unfortunately, in the United States, this sound reasoning, requiring a criminal *mens rea* has been abandoned in a particular category of statutes dealing with the public welfare, which now are deemed by the courts to include environmental statutes. These "public welfare" statutes were initially concerned with the regulation and protection of the public from adulterated food and drugs.<sup>7</sup> Thus, the courts reasoned that the public safety outweighed the traditional requirement of criminal intent. Such statutes came into being to protect the public from the dangerous hazards resulting from the industrial revolution. In approving the criminal penalties imposed under these statutes, the U.S. Supreme Court in *United States v. Dotterweich* stated:

Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes

---

<sup>4</sup> See, e.g., N.Y. Penal Law §20.20, 2c (McKinney 1987); *United States v. Demauro*, 581 F.2d 50 (2d Cir. 1978).

<sup>5</sup> See, *United States v. Greenbaum*, 138 F.2d 437 (3<sup>rd</sup> Cir. 1943); *Dennis v. United States*, 341 U.S. 494, *reh'g denied*, 342 U.S. 842 (1951); *United States v. Damiano*, 579 F.2d 1001 (6<sup>th</sup> Cir. 1978).

<sup>6</sup> *People v. Burgess*, 107 A.D.2d 703, 494 N.Y. S.2d 58 (N.Y. App. Div. 1985); N.Y. Penal Law §15.15(2) (McKinney 1987).

<sup>7</sup> *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).

of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of Government and not merely as a collection of English words."

Because environmental laws are specifically designed to protect the public safety and welfare, they have been construed by the courts in accordance with *Dotterweich* in a manner which maximizes public protection.<sup>8</sup> Consistent with this approach, criminal environmental statutes can even be strict liability statutes, such as the Refuse Act, or the Migratory Bird Act, which imposes criminal liability for failure to comply with environmental regulations even when the violator did nothing consciously wrong or was unaware that his actions or violated a law or regulation. Environmental statutes can also impose criminal liability based upon an individual corporate officer's position of responsibility in the corporation as opposed to his actual knowledge or participation in the act causing the pollution. According to this public welfare theory, there is no wrongful mental state required to be guilty of a crime. This may result in criminal liability under environmental statutes for conduct which would not rise to the level of criminal conduct in traditional criminal statutes. In this regard, ordinary simple negligence is a crime under the Clean Water Act. The discharge of oil into the navigable waters is a crime even without any negligence under the Refuse Act.<sup>9</sup> The death of a Migratory Bird by oil is a crime even without negligence under the Migratory Bird Act.

### *B. Elements of Criminal Liability in Environmental Cases*

The most frequent mental state which will in practice trigger criminal liability will vary from statute to statute. The statutes impose strict liability, liability for simple negligence, criminal negligence, recklessness, or willful or knowing conduct.

1. Negligence. In criminal law there has traditionally been a distinction between criminal negligence and civil negligence. Since the 19<sup>th</sup> Century, American courts dealing with common law criminal cases have held that the civil negligence standard of failure to use reasonable care is not enough to impose criminal liability.<sup>10</sup> Rather, criminal negligence was required to impose criminal liability. Criminal negligence

---

<sup>8</sup> See, e.g., *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3<sup>rd</sup> Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

<sup>9</sup> 33 U.S.C. §411 (1994).

<sup>10</sup> See, *Commonwealth v. Pierce*, 138 Mass. 165, 52 Ann. Rep. 264 (1884); *People v. Lewis*, 53 A.D. 2d 963, 385 N.Y.S. 2d 828 (N.Y. App. Div. 1976).

goes beyond simple negligence and is deemed egregious enough to warrant criminal sanction. A typical definition of criminal negligence is contained in the New York penal law: "A person acts with criminal negligence with respect to a result or circumstance when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation".<sup>11</sup>

These "substantial risk" and "gross deviation" requirements would still apply in a ship collision or grounding where a general criminal statute containing negligence as an element is charged. For example, in order to prove criminally negligent homicide, the prosecution would be required to show that loss of life in a collision or grounding was caused by the gross negligence of the defendant."<sup>12</sup> On the other hand, where negligence is included as an element in an environmental statute, in accordance with the public welfare concept, proof of simple negligence alone would be enough for conviction. Negligence provisions of the Clean Water Act<sup>13</sup> have been construed to require only proof of simple negligence rather than gross negligence to sustain a criminal conviction.<sup>14</sup> In other words, in

---

<sup>11</sup> N.Y. Penal Law §15.05 (McKinney 1987).

<sup>12</sup> N.Y. Penal Law §125.10 (McKinney 1987).

<sup>13</sup> 18.33 U.S.C. §1319c (1994).

<sup>14</sup> *United States v. Paul Schwitters and Sea Glener Marine, Inc.*, (W.D. Wash. Oct. 10, 1989) (unreported). In *Hazelwood*, 3AN-S89-7217CR, 3AN-SS9-7218CR, the Alaska Superior Court, in its charge to the jury, construed the negligence standard under the Alaska Negligent Discharge of Oil Statute (Alaska Stat. §46.03.740 (1991 & Supp. 1994), to be a simple negligence standard:

[Jury Instruction No. 27.) A person acts negligently with respect to a result described by a provision of law defining an offense when the person fails to perceive an unjustifiable risk that the result will occur; the risk must be of such a nature and degree that the failure to perceive it constitutes a deviation from the standard of care that a reasonable person would observe in the situation. *Hazelwood*, 3AN-S89-7217CR, 3AN-S89-7218CR, Jury Instruction No. 27.

After the grounding of the EXXON VALDEZ, the Alaska legislature amended the Negligent Discharge of Oil statute to make the negligent discharge of oil a much more serious crime. At the time of the EXXON VALDEZ grounding, the offense was only a class B misdemeanor. After the amendment, the discharge of more than 10,000 barrels was made a class C felony. However, consistent with the traditional criminal law approach to negligence, the Alaska legislature specifically provided that the standard for the commission of the crime would now be criminal negligence rather than simple negligence. Alaska Stat. §§46.03.740 (1991 & Supp. 1994) & 46.03.790 (d)(1)(1994).

the United States, if you negligently kill somebody but are not grossly negligent you have no criminal liability, but if you spill oil, simple negligence is enough to incur criminal liability. The inherent illogic of this situation should be apparent.

**2. Recklessness.** Reckless conduct demands a higher level of culpable conduct than negligence. In traditional criminal statutes, the seriousness of a crime will be greater when there is reckless conduct as opposed to when there is only criminally negligent conduct. For instance, reckless manslaughter is a more serious offense than criminally negligent homicide.<sup>15</sup>

A typical definition of reckless conduct is that:

[A] person acts recklessly with respect to a result or circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. While negligence is the failure to perceive a risk, recklessness is to perceive the risk but to consciously disregard it.<sup>16</sup>

**3. Knowing Conduct.** While the public welfare approach to environmental crimes permits strict liability statutes,<sup>17</sup> and criminal statutes based upon simple negligence, Congress has attempted to prevent the criminalization of truly innocent conduct by expressly including a knowledge element as part of the *mens rea*<sup>18</sup> requirement in many criminal felony environmental statutes. In order for criminal liability to attach in this class of offenses, the act must be committed knowingly. An

---

<sup>15</sup> In the New York State Penal Law, criminally negligent homicide is a felony punishable by up to four years in prison, while manslaughter in the second degree (reckless manslaughter) is a class C felony punishable by up to fifteen years in prison. N.Y. Penal Law §§125.10, 125.15, 70.00 (McKinney 1987). Also, the *Hazelwood* indictment charged criminal mischief in the second degree, a class C felony which had as an element that a "person recklessly creates a risk of damage in an amount exceeding one hundred thousand dollars to property of another by the use of widely dangerous means." Alaska Stat. §11.46.482 (1989 & Supp. 1994).

<sup>16</sup> N.Y. Penal Law §15.05 (McKinney 1987).

<sup>17</sup> The Navigation Act mandates strict criminal liability for discharge of a foreign substance into United States navigable waters. 33 U.S.C. §§407, 411 (1994). See, *United States v. Hamel*, 551 F.2d 107, 113 (6<sup>th</sup> Cir. 1977).

<sup>18</sup> 33 U.S.C. §1319c(2); 33 U.S.C. §1415(b) (1994).

act is done knowingly if it is done intentionally or voluntarily.<sup>19</sup> It is not necessary, however, that the perpetrator be aware that the act is illegal.<sup>20</sup>

Also, there is a line of cases which hold that willful ignorance can be considered the equivalent of knowledge.<sup>21</sup> This concept comes into play when the evidence demonstrates that a defendant, usually a supervisor, deliberately closed his eyes to what would have otherwise been obvious to him, or consciously avoided learning of illegal conduct.

In addition to knowing conduct, some environmental statutes place a higher degree of criminal liability on conduct which amounts to knowing endangerment.<sup>22</sup> Knowing endangerment occurs when a person, through the knowing violation of the statute, puts another person in danger of death or serious bodily injury. A finding of knowing endangerment will significantly increase a criminal penalty. For instance, a knowing violation of the Clean Water Act can result in a fine of up to \$50,000 per day and/or imprisonment of up to three years. A conviction for knowing endangerment under the Clean Water Act can result in a fine of up to \$250,000 and/or fifteen years imprisonment for individuals and a fine of up to one million dollars for corporations.<sup>23</sup>

**4. Corporate Liability.** It is an established principle in criminal law that a corporation can incur vicarious criminal liability for the actions of employees acting within the scope of their employment.<sup>24</sup> Additionally, a corporation may have direct criminal liability for the acts of directors, officers or employees. Direct liability may also be imposed if company policies or directions contribute to the accident. For example, in a maritime accident, direct liability could result from being aware of and condoning crew incompetence.<sup>25</sup> Furthermore, corporate actions (depending upon corporate privity or knowledge and control) can result in

---

<sup>19</sup> *United States v. Jewell*, 532 F.2d 697 (9<sup>th</sup> Cir.), cert. denied, 426 U.S. 951 (1976).

<sup>20</sup> *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971).

<sup>21</sup> See, *United States v. Ciampaglia*, 628 F.2d 632, 642-43 (1<sup>st</sup> Cir.), cert. denied, 449 U.S. 956 (1980).

<sup>22</sup> 33 U.S.C. §1319c(3).

<sup>23</sup> 33 U.S.C. §1319c(3).

<sup>24</sup> *United States v. Gold*, 743 F.2d 800 (11<sup>th</sup> Cir. 1984), cert. denied, *Gold v. United States*, 469 U.S. 1217 (1985); *Apex Oil Co. v. United States*, 1976 AMC 2118, 530 F.2d 1291 (8<sup>th</sup> Cir.), cert. denied, *Apex Oil Co. v. United States*, 429 U.S. 827 (1976); N.Y. Penal Law §20.20 (McKinney 1987).

<sup>25</sup> As a result of the EXXON VALDEZ grounding, Exxon was criminally charged for crew incompetence under the Ports and Waterways Safety Act, 33 U.S.C. §1232(b)(1)(1994), and the Dangerous Cargo Act, 46 U.S.C. §3718(b)(1994).

individual criminal liability for corporate officers in addition to corporate criminal liability for the corporation.

### RESPONSIBLE CORPORATE OFFICER DOCTRINE

A particularly disturbing aspect of U.S. law provides that a corporate officer may be held criminally liable for violation of an environmental statute, even if the officer did not in any way participate in the illegal activity or, even know about it. Under the Responsible Corporate Officer Doctrine, criminal liability can be imposed on corporate officers if they were in a position to know about or prevent the criminal act even if they did not actually commit the alleged crime.<sup>26</sup> This doctrine is very harsh in that it can result in criminal liability being imposed on a corporate officer merely because of that officer's position of responsibility as opposed to any particular conduct on the officer's part. In recent years some circuit courts have been chipping away at the Responsible Corporate Officer Doctrine and rightfully holding that in environmental statutes where there is a requirement of "knowing" violation as an express statutory element of the crime, there must be evidence of at least knowledge of the criminal act, even if there was no participation before the corporate officer can be held liable.<sup>27</sup>

### CRIMINAL INVESTIGATION AND PROSECUTION

What is the practical nature of a criminal investigation after a maritime accident in the United States. What can the maritime lawyer expect to encounter when he or she is called out in the middle of the night to respond to a ship collision or grounding resulting in an oil spill? It is first of all important to keep in mind that the law enforcement personnel one can expect to encounter in such a circumstance are there to determine whether a crime has been committed and who bears criminal responsibility for its commission. The law enforcement officers are there solely to gather evidence; they are not there to engage in a friendly fact-finding mission. The cast of characters may include the Coast Guard, Environmental Protection Agency ("EPA"), Federal Bureau of Investigation ("FBI"), state police, United States Attorney, local District Attorney and the Attorney General. Each of these are separate and distinct organizations, with their own hierarchies, policies, and agenda. With the exception of the Coast Guard and the civil division of the EPA, the only purpose of the law enforcement personnel is to investigate and prosecute crimes. The criminal divisions of the EPA, FBI, and state police have investigators who gather facts and evidence and bring it to the prosecutors for evaluation.

---

<sup>26</sup> See, *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Pach*, 421 U.S. 658 (1975).

<sup>27</sup> See, *United States v. MacDonald and Watson Waste Oil Co.*, 933 F.2d 35 (1<sup>st</sup> Cir. 1991); *United States v. Hayes International Corp.*, 786 F.2d 1499 (11<sup>th</sup> Cir. 1986).

The Coast Guard has a mixed purpose. It has the responsibility to oversee and insure that a proper cleanup takes place, as well as to determine the cause of the accident in order to insure safe operation of vessels and to take corrective administrative action if necessary. It is also important to remember, however, that the Coast Guard has an obligation to turn over any evidence of criminal conduct it discovers in the course of its casualty investigation to the U.S. Attorney and has been increasingly involved in criminal investigations.<sup>28</sup> The maritime lawyer, who is most accustomed to dealing with the Coast Guard in its civil capacity, must be aware of this criminal investigatory role, and should be as careful in his dealings with the Coast Guard casualty investigator as he would be in dealing with the FBI or State Police. The U.S. Attorney, District Attorney, and Attorney General are prosecutors who play an advisory and supervisory role in a criminal investigation. They are very important in that they will make the ultimate decision of whether to prosecute and if so, try the case in Court.

What can be done on the defense side to counteract the law enforcement investigation team? The most obvious task for the maritime lawyer responding to the scene would be to persuade the law enforcement personnel present that a crime has not been committed and that the event is just an accident which should be dealt with through civil or administrative proceedings. Unfortunately, if there is significant oil in the water and/or loss of life or serious physical injury, this will be an impossible task. Once it becomes apparent that the investigators will not rule out that a crime has been committed, it then becomes the job of the defense lawyer present to protect his clients' rights and certainly not to actively assist investigators to gather incriminating evidence.

In this respect, it is important to remember that no one on board a ship can or should be forced to speak to a law enforcement officer, including the Coast Guard investigating the cause of the mishap if there is a possibility that the person may incriminate himself by doing so. It should be noted that even if the investigator does not give Miranda warnings, any statements made may still be used in a criminal prosecution.<sup>29</sup> As a matter of policy, companies should see to it that crews are not coerced by company officials to give statements to law enforcement officials on the scene.

Each crewmember is entitled to consult with counsel and to have counsel present when being questioned by law enforcement. The prudent

---

<sup>28</sup> "If, as a result of any investigation or other proceeding conducted hereunder, evidence of criminal liability on the part of any licensed officer or certified person or any other person is found, such evidence shall be referred to the U.S. Attorney General." 46 C.F.R. §4.23-1 (1993).

<sup>29</sup> See, *People v. Bertolo*, 102 A.D. 2d 193, 478 N.Y.S. 2d 19 (N.Y. App. Div. 1984), *aff'd*, 65 N.Y.S. 2d 475 (1985).

and ideal procedure when there is likely criminal liability would be for an attorney engaged specifically to represent the crewmember to interview the crewmember involved in the accident as soon as possible after the accident. That attorney would initially make a determination as to whether the crewmember bears any personal criminal responsibility for the accident. If the crewmember does not have any personal criminal liability then he is just a witness and can probably be made available for a law enforcement interview with his attorney present. On the other hand, if the crewmember has real or even potential exposure to liability, such as if the crewmember was involved in the navigation and control of the vessel or in any way contributed to the accident, then the attorney should advise the crewmember to invoke his constitutional rights under the Fifth Amendment to the U.S. Constitution to not talk at this time. Experienced law enforcement officers should not be shocked if an attorney says he has advised his client not to speak. This is normal practice in a criminal investigation and is the normal advice given by a criminal defense attorney.<sup>30</sup>

Theoretically, all the important witnesses, such as the bridge team, may have potential criminal liability and have legitimate grounds to refuse to be interviewed regarding their culpability in the accident until they engage counsel. Such witnesses may insist on grand jury subpoenas. This situation may be a viable and advantageous strategy in certain situations. In some states, a witness called before a grand jury gets complete immunity, known as transactional immunity, as soon as he responds to the first question posed to him in the grand jury.<sup>31</sup> In the federal system, a witness has to invoke his Fifth Amendment rights in the grand jury and be granted immunity by a court before he can be compelled to testify.<sup>32</sup> The immunity in a Federal proceeding is not transactional immunity but use and derivative use immunity. Such immunity would protect an individual from being prosecuted based on what he says in the presence of the grand jury or based on evidence derived from what he says in the presence of the grand jury. He can still, however, be prosecuted on evidence derived independently of his testimony.<sup>33</sup>

---

<sup>30</sup> There is a distinction to be made between invoking one's Fifth Amendment right against self-incrimination and one's refusal to cooperate in clean-up efforts. Under the Oil Pollution Act of 1990, Pub. L. 101-380, §1004c(2), 104 Stat. 491 (codified as amended at 33 U.S.C. §2704), liability will be unlimited, if the responsible party fails to cooperate with officials in the clean-up process.

<sup>31</sup> See, e.g., *N.Y. Crim. Proc. Law* §190.40 (McKinney 1993).

<sup>32</sup> 18 U.S.C. §§6002, 6003 (b) (1994).

<sup>33</sup> See, *Kastigar v. United States*, 406 U.S. 441 (1972), *reh'g denied*, 408 U.S. 931 (1972).

In addition to legal representation for the crewmembers when there is criminal liability, separate criminal legal representation should be provided for the corporation to evaluate and protect against corporate criminal liability. Tactically, this could be advantageous for the corporation because it also makes it clear that the corporation is not in charge of how the crewmembers are represented and does not make the corporation look obstructionist if some crewmembers choose to invoke their Fifth Amendment right not to give statements. In most situations the targeted crewmember and corporation will be able to cooperate and share information under a joint defense theory and still maintain the attorney client and work product privileges.

After the criminal investigation is completed, the U.S. Attorney, District Attorney, or Attorney General will have to make a decision as to whether or not to charge a crime. They will also need to decide who to charge. These decisions are very much within the discretion of the prosecutor. For this reason, it is always a good strategy for the lawyer representing the crewmembers and corporation to open lines of communication with the prosecutor before the decision of whether to charge is made. Not only will a lawyer be able to get an idea where the case is going, he may also be able to convince the prosecutor not to prosecute by bringing exculpatory facts favorable to the client to the prosecutor's attention. This is particularly beneficial in maritime cases where the prosecutor is often ignorant of basic maritime principles and procedures and may be operating under misconceptions.

### III. THE RELATIONSHIP BETWEEN CRIMINAL LIABILITY AND CIVIL LIABILITY

It is also important to consider the relationship between criminal liability and civil liability in a maritime accident situation. Initially, we can assume that in every major maritime accident where there is an oil spill and an environmental impact there will also be a deluge of civil cases against the shipowner and crewmembers for damages based on negligence, and punitive damages based on willful or reckless conduct.

Nearly all of the issues which could later be the basis for huge civil recoveries will be the same issues involved in most criminal prosecutions arising out of the same accident. Thus, since a criminal case will invariably be tried before the corresponding civil case, it is very important to preserve the viability of a civil defense by defending vigorously any criminal prosecution of the crew, corporation or corporate officers arising out of a maritime accident.<sup>34</sup>

---

<sup>34</sup> Most jurisdictions mandate that a criminal defendant must be brought to trial speedily after being charged unless he consents to adjournments. N.Y. Crim. Proc. Law §30.30 (McKinney 1994). Even with foot dragging, criminal cases will usually be brought to trial within a year of the indictment.

In practical terms, this means that long before the civil case even gets into serious discovery, the issues relating to negligence, recklessness and the specific facts regarding what happened will have already been determined by a court and jury. For instance, a finding of guilt based on recklessness or negligence, because it is a finding beyond a reasonable doubt, could be introduced as a final determination of that issue in a subsequent civil trial. In other words, a party's civil liability, including liability for punitive damages, can for all intents and purposes be decided by a criminal conviction arising out of the same incident dealing with the same issues and parties.

### CONCLUSION

It seems safe to say that in the United States criminal charges arising out of serious maritime accidents are common since the grounding of the EXXON VALDEZ. Such charges have far reaching repercussions for individuals and corporations. Accordingly, maritime lawyers should be aware of the possibility of criminal charges flowing from maritime accidents in the United States and should take measures to protect their client's interests from both the civil defense and criminal defense point of view.