A Just Culture for the Seafarer

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Abstract

The Master is the Leader in the Marine Adventure, with the Flag State's responsibility for the safety of life at sea and the protection of the marine environment. But they are also the Company's Representative whose purpose is to make the voyage a commercial success.

They have always been accountable for their risks; the difference now is that they are being criminalised for what previously had been activity that, at worst, merited nothing more than a civil claim in negligence.

As a result, a maritime casualty that results in collision, death and personal injury has become the basis for establishing crime and punishment without having to rely on the burden of proving the criminal element in a maritime context – and the target of that blame is the seafarer, who has to do their job in conditions far removed from the landward contexts for which the criminal law was originally intended.

In this paper, we shall discuss some of the essential features which define the phenomenon of criminalisation from the global perspective, so that we have a common understanding of what criminalisation means. Then we can apply it in the context of the seafarer's accountability for the risks which accompany their professional judgement.

Upon that foundation we must then build a clear understanding of where the seafarer stands in the prosecution of the criminal law. By comparing cases such as the *Kota Nebula* and *Dongfang zhi Xing* with the *Pride of Bilbao* and the *Zim Mexico III*, we can develop a strategy for a future maritime policy in criminal accountability that balances Justice for the seafarer with the demands which meet the cultural priorities of Chinese society – which, ultimately, must drive maritime policy.

We are entering a new generation in which the jurisdiction of Chinese maritime criminal law must reach out to other peoples in the initiative of 'One Belt, One Road'; in this paper we are opening a debate that will shape maritime policy for fairer accountability of the seafarer.

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What is a Crime?

The whole essence of the criminal law is that it is not set in stone, because Society is not set in stone. In other words, it is what the People want, and the People change their attitudes on the things that matter to them; but this is nothing new. Cicero well understood the need to communicate with a varied, and sometimes outspoken, popular crowd when pleading a case; and the judges had to take into account the popular view when deciding their verdict[2]. As a result, the criminal process is managed by the Courts to protect the moral standards which Society has set for itself at any one time. And nothing has changed in over twenty-one hundred years. In *Shaw v DPP*[3] Viscount Simonds famously stated:

There remains in the Courts of Law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for… The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society[4]

The Master has undergone a process by which their responsibility to manage a maritime risk has been opened up to ever-growing accountability to the criminal law as Society sees new threats to its welfare, caused by the very hazards that the beleaguered Master is trying to avoid.

The Master and Accountability

He used to be called Master Under God. He still is. The International Convention for the Safety of Life at Sea provides[5]:

The owner, the charterer, the company operating the ship…. or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safety of life at sea and protection of the marine environment.

We call this the Master's Absolute Discretion. The Flag State has made the Master their Representative, and his ship is a bit of sovereign territory of the Flag State – Nobody can mess with that.

A great example of this in action is the case of the *Arctic Sunrise*. In August 2015 the Permanent Court of Arbitration in The Hague ordered Russia to pay damages to the Netherlands for seizing the *Arctic Sunrise* in 2013, registered under the Dutch Flag.

[2] Powell, J and J Paterson (eds), 2004, Cicero The Advocate, Oxford University Press
[3] Shaw v Director of Public Prosecutions [1962] AC 220, [1961] UKHL 1, [1961] 2 All ER 446, (1961) 45 Cr App R 113
[4] Viscount Simonds of Sparsholt in the County of Southampton was called to the Bar in 1906 and progressed through the law for nearly sixty years, ending his judicial career in 1962 having served as a Lord of Appeal for some fifteen years. He knew what he was talking about.
[5] SOLAS Ch V Reg 34 – 1

But the Master will still be accountable for how they meet their responsibility for the safety of life at sea and the protection of the marine environment.

Once you strip away the Master's Absolute Discretion, they will be just as accountable as any other seafarer for meeting the standards which society has set out in its criminal law.

Of course, it is the safety of life at sea which is the most critical of Society's priorities in this respect. And Society is quick to blame.

It is understandable. In his paper *The Homicide Ladder* in the Modern Law Review[6], Victor Tadros states:

When death is caused it is a natural reaction to look around for someone to blame... The fact that our intuitions in attributing blame for death tend not to track the wrongfulness of the killing very accurately provides a powerful reason for the law to differentiate between degrees of wrongdoing more precisely. In distinguishing between different levels of wrongdoing, the law provides public guidance about how we should perceive the killer where it is needed most, where our intuitions, particularly if we are bound up with the deceased, often fail us.

The wrongdoing of Manslaughter has historically proved especially troublesome to establish with clarity, as described famously by Lord Atkin in *Andrews v DPP*[7]:

Of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions... the law ... recognises murder on the one hand based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, but not exclusively, on the absence of intent to kill, but with the presence of an element of 'unlawfulness' which is the elusive factor.

For us in the West, the task of establishing a Just Culture for gross negligence manslaughter took decades to establish. Because of a clash between what society demanded and what met the demands of a fair trial that tested the Defendant's state of mind – the critical element which establishes their criminal accountability in a state of affairs that led to the death of the victim. It was not until 1995 that the case of *R v Adomako*[8] set a benchmark for criminal accountability when it established that the Defendant can be convicted of gross negligence manslaughter in the absence of evidence to his state of mind. Following *Adomako*, the jury needs to consider whether:

- the defendant owed a duty of care to the deceased; and
- he was in breach of that duty; and
- the breach of duty was 'a substantial' cause of death[9]; and
- the breach was so grossly negligent that the accused can be deemed to have had such disregard for the life of the deceased that it should be seen as criminal and deserving of punishment by the state.

[6] Tadros, V, (2006) 69(4) MLR 601-618, at 601
[7] Andrews v DPP [1937] 2 All ER 552 (at p554-555)
[8] R v Adomako [1995] 1 AC 171
[9] As refined by R v O'Connor [1997] Crim LR p16 CA

In the same year, the Merchant Shipping Act addressed the risk in a maritime context, in section 58, which addresses conduct endangering the safety of life at sea. While the section covers loss and damage of the ship, let us focus on the loss of life. In section 58, it is the conduct which is important, and does not actually require proof of manslaughter, or even death.

If the Master, or, indeed, any seafarer, does any act which causes or is likely to cause the death of or serious injury to any person, or omits to do anything required to preserve any person on board their ship from death or serious injury, and that the act or omission was deliberate or amounted to a breach or neglect of that special duty of care expected of a seafarer in discharging his duties on a ship, causing the likelihood that death or injury would follow, they will be guilty of a criminal offence and, if convicted by a Jury in the Crown Court, can face a sentence of imprisonment of up to two years, or a fine, or both.

Let us look at this in practice.

Regina v Hubble[10]

The large, UK-flag ferry *Pride of Bilbao* left Portsmouth terminal at 23.25 on 20 August 2006. At about 00.30 the Master handed over the watch to Second Officer Michael Hubble, 62 years old, with 42 years' experience at sea.

At 01.07 the lookout suddenly noticed a dim white light on the starboard bow. He picked up the binoculars and, as he looked at the light, he noticed a brighter red light. The lights appeared to be close. He called to the second officer saying, "He's showing a red that one".

The second officer heard the lookout say something regarding a light and, with no concerns that the light was anything other than from a distant vessel, did not immediately come out to investigate. After a few seconds, the lookout realised the red light was from a small vessel close ahead, and he walked quickly towards the port side entrance to the chartroom saying more urgently that the light was "pretty close". Mr Hubble saw what he thought was a cluster of bright white lights close and about two points on the starboard bow, and placed the autopilot joystick to port in order to turn the bow of the vessel away from the lights. From this position he was now unable to see the lights as they were below his line of sight. He asked the lookout if the yacht was clearing, but received no reply. He looked out aft and believed that he saw a single red light off the starboard quarter. He took no further action, he did not call the Master, and the ship continued on her voyage.

Two days later the bodies of the three yachtsmen from the yacht *Ouzo* were recovered from the water. The vessel herself was never found, presumed lost.

The Flag State report of the Marine Accident Investigation Branch (MAIB) concluded that the *Ouzo* probably passed within 20 metres from the bow of *Pride of Bilbao*, and then passed close down the windward side of the vessel and out into her wake. While it is not the purpose of a casualty report to address blame, it noted that Mr Hubble did not positively seek confirmation that the yacht and her crew were safe after the near collision, and, whatever views he held, failed to implement any emergency

[10] R v Hubble [2007] The Crown Court Winchester (unreported)

search and rescue procedure to investigate, and indeed failed to call the Master as would have been demanded in such a situation.

Mr Hubble pleaded Not Guilty to an indictment containing three counts of Manslaughter, for the deaths of the occupants of the yacht.

At the Trial, the Jury had to consider:

- did Hubble owe a duty of care to the three yachtsmen;
- was he in breach
- was that breach a substantial cause of death; and
- was the breach so grossly negligent that his disregard for their life should be seen as criminal and deserving punishment.

We do not know what the Jury thought – the secrecy of their deliberations is always guarded jealously as the safeguard of a fair Trial - but after a week, they could not even reach a majority verdict on the manslaughter charges. And so the Judge ordered them to return a verdict of Not Guilty.

Before the Trial had commenced, the Defendant was further charged with breaches of section 58, but, the Judge concluded that it was simply not in the interests of justice to allow the Jury more time to consider this, and so he ordered a Not Guilty verdict to be returned on this count as well.

This case met the criteria for a maxim long held under English law, that justice must not only be done, but must be seen to be done.[11]

But it does not always work out that way.

Wolfgang Schröder and the *Zim Mexico III*

On the 2 March 2006, Captain Wolfgang Schröder was Master of the *Zim Mexico III* as she manoeuvred to leave her berth at Mobile, Alabama, when the bow thruster failed, and the bulbous bow, suddenly uncontrolled, struck a lower wood dock structure and the upper bow struck the leg of a gantry crane, killing a contractor who was working on the crane at the time.

Captain Schröder was indicted for Seaman's Manslaughter, which provides that

Every captain…. By whose misconduct, negligence, or inattention to his duties on any vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed…. Shall be fined under this title or imprisoned not more than ten years, or both.

[11] R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256 [1923] All ER 233

Captain Schröder pleaded Not Guilty on the basis that he could not be liable in the terms of the indictment alleging criminal negligence, in which the cause of the negligence was the vessel's bow thruster had failed during manoeuvring which was improperly powered by the shaft's generator instead of the diesel generator as required by the ship's ISM shipboard manual.

At the Trial the Prosecution relied on evidence in the casualty investigation, which, as with all casualty investigations, was not gathered with a view to being given in criminal proceedings and, as a result, Captain Schröder was not cautioned at the time he was interviewed. Indeed, Counsel for the vessel's owner testified at the Trial that he had asked the Coast Guard investigator if this was a criminal investigation and was told "No". As a result, the investigators proceeded with the interviews in the absence of the lawyer for the Owners. Why should the lawyer have been present? With the Coast Guard's assurance, there was no danger that Captain Schröder might say something that would incriminate himself in a future prosecution. Then, of course, he was charged. At the Trial the Coast Guard special agent gave evidence disputed that he had said "No", arguing that he had said, "Not yet". In fact, it is apparent that the Coast Guard had already prepared its criminal case before interviewing the Master again, after which they were able to refine the charge in the indictment to improve the prospect of a conviction. If nothing else, the investigation evidence merely would have addressed civil liability in negligence, and it would have been a flagrant disregard of his rights to deceive or lull him into incriminating himself in the civil context when he was actually under criminal investigation for his activities.

Despite this, the Court refused to exclude the evidence of the statements apparently conducted after misrepresenting the situation to Captain Schröder, and the statements went before the Jury, who would have been entitled to draw a conclusion that there had been some inconsistency in Captain Schröder's position.

The Jury convicted him, and he was remanded in custody for sentencing, when the Prosecution pressed for the maximum sentence of 10 years imprisonment. At his sentencing, Judge Grenade noted that the law required jurors to find that Schröder was guilty of simple negligence, a lower standard of unlawfulness more commonly associated with civil disputes, and was almost apologetic in sentencing, stating:

While I certainly do not discount the terrible consequences that have resulted from this negligence, what he has been convicted of is really a civil offense. [12]

In these two cases, we can see that criminal accountability is dependent upon a sophisticated body of law which defines with certainty the elements which have to be proved beyond reasonable doubt, and that the proof must be relevant and admissible, based upon evidence which has been fairly obtained and tests those elements of the crime with which the Defendant has been charged. If we get it right, as in the case of Mr Hubble, then a Just Culture has been upheld. If we get it wrong, as in the case of Captain Schröder, the concept of a Just Culture collapses.

[12] *United States of America v Wolfgang Schröder* [2007] United States District Court, Alabama Southern District (currently unreported)

So where do we go from here?

The phrase ‘one belt, one road’ has become a core idea in China’s foreign policy and approach to the global economy. It guides us towards building networks that are based on the global geography which connects States and enterprises in locations worldwide; and like all relationships between peoples, it must be regulated by legal process. The law is no more than a mechanism for solving particular problems that the parties – the State and the Defendant - have not been able to resolve by consent or admission. But for the mechanism to work, it needs all parties to have the confidence that it delivers justice. This, after all, is the Just Culture, which has the golden objective to provide guidance to enforcement and prosecuting authorities on the criminal investigation and prosecution of potential criminal offences resulting from maritime casualties. We need a body of law, and a fair trial on fair evidence, to achieve that. Two recent cases give us guidance on where we should go from here.

The case of the *Kota Nebula*

On the 2 April 2012, the Singaporean-flagged *Kota Nebula* departed Shanghai for Ningbo, in Zhejiang. The second officer was officer of the watch at the time of the casualty, when it was alleged that he failed to maintain a proper lookout and proceed with safe speed in a complex navigation situation under poor visibility, when, at about 15.00, she collided with the fishing boat *Zhe Pu Yu 75185* near Zhoushan sea area.

Then, when the bosun realised that the collision had taken place and reported it to the second officer, instead of slowing down or stopping the vessel to undertake rescue measures, the second officer reported the accident to the Master, and continued to make full speed away from the accident location. On receiving notification of the accident, the Master made no attempt to undertake rescue or report the incident to the relevant authorities. He even ordered the crew to destroy evidence of the collision by removing the shattered glass of the fishing boat found on the bow deck.

It was nearly three hours later, that the Zhoushan Maritime Safety Administration (MSA) received a report of the collision, and preliminarily identified the *Kota Nebula* as the suspect vessel. The MSA ordered the *Kota Nebula* to berth and submit to an investigation. The navigation chart, log book and electronic navigation data of the vessel were preserved for further investigation and interviews were carried out by MSA officers with crews on board regarding the suspected collision. Despite the scrape found on both sides of the *Kota Nebula*’s bow, the Master, second officer and duty AB denied the occurrence of any collision during initial interviews. Only on the third day of the investigation did one of the crew admit that he had heard the sound of a collision and saw the *Kota Nebula* hit the fishing boat while he was working on deck at the ship’s bow. Relevant evidence regarding the condition of the vessel and the bridge at the material time was also available from the electronic data. In the face of the objective evidence against them, the second officer and the Master finally admitted the occurrence of the collision four days later.

At the time of the investigation, there was no indication that a criminal prosecution was being investigated. It was only after the MSA officials had drawn the conclusion that the Master and the

second officer had deliberately destroyed the evidence and sailed the *Kota Nebula* away from the accident position without taking any measures to rescue the fishing boat and reporting the accident, that they decided to transfer the case to Zhejiang Border Control Department prosecution.

So, firstly, we have a situation similar to that of Captain Schroder, in that evidence gathered for a casualty investigation would now be used against the seafarers in criminal proceedings. It would have been necessary for the officer of the watch to proceed at a safe speed adapted to the prevailing circumstances, such as the density of maritime traffic, the manoeuvring space, the sea state, and the conditions of restricted visibility, and to take evasive action if it became necessary and apparent. That, after all, would be the guidance in the International Regulations for Preventing Collisions at Sea.

But what were the criminal proceedings? There was no applicable law for maritime accidents under Chinese law in which seafarers would be criminally accountable for a fatal accident and then leaving the scene without reporting it. There was, however, a criminal offence under Chinese law in road traffic accidents in which a driver causes death or personal injury and then leaves the scene of the accident to avoid prosecution.

The apparently dishonest conduct of the Master who attempted to pervert the course of justice after the event may well have formed a separate issue, but, in the event, the Court tried and convicted the seafarers for the fatal maritime accident, based on the law and evidence required to establish guilt in a road traffic case. But the circumstantial issues surrounding a maritime collision are hardly relevant in establishing liability for a road traffic offence.

According to the criminal law of the People's Republic of China and the judicial opinion of the Supreme Court, the person bearing the major liability for a road traffic accident shall be sentenced to a term of three to seven years' imprisonment if the liable parties fled from the accident scene after the accident, or if the accident caused the death of more than two people or injured more than five. The second officer, as the seafarer operating the vessel at the time, was held to be the primary liable party, while the Master, who did not report the accident to the relevant authority and ordered the crew to destroy evidence, was held liable for negligent management of the vessel.

It says much to the credit of the Court, that they sought to meet the normative ethics of Society who demanded justice for what they perceived to be a crime but for which there was no applicable law. But thereby hangs the dilemma, for the criminalisation of the seafarer globally has been observed as a growing phenomenon, presenting a picture of increasing accountability even though their responsibilities remain essentially unchanged in generations of maritime law. Historically it has not been open to the Courts, but to the State legislative process, to respond to the demands of Society for criminal accountability. But the convictions in the *Kota Nebula* case have opened a new era of criminalisation, which erodes the concept of a Just Culture.

European society will readily recognise this growing phenomenon of criminalisation, for we have embraced and encouraged it in our own jurisdiction in recent years. The decision of the European Court of Human Rights in *Mangouras v Spain* has a chilling note on the approach to the criminalisation of the Master, even in the context of their own human rights:

The Court could not disregard the growing and legitimate concern both in Europe and internationally about offences against the environment. It noted in that connection the States' powers and obligations regarding the prevention of marine pollution and the unanimous determination among States and

European and international organisations to identify those responsible, to ensure that they appeared to stand trial and to punish them[13].

The fact that marine pollution events have been set only as strict liability offences, punishable only by financial penalties, both under UNCLOS and MARPOL, has conveniently been forgotten by Society in recent years. Criminalisation is an organic phenomenon that grows as society wants it to grow. In which case, Society must establish a Just Culture which protects seafarers' rights from the harm of criminalisation, or injustice will inevitably follow.

Conclusions: The *Dongfang zhi Xing* and the European experience of a Just Culture

Dongfang zhi Xing, which translates into English as *Eastern Star*, was a river cruise ship that operated in the Three Gorges region of inland China. On the 1 June 2015, she was traveling on the Yangtze River in Jianli, Hubei Province with 454 people on board when she capsized in a severe thunderstorm. Thirteen days later, after the search and rescue operation had been completed, 442 deaths were confirmed – just 12 souls survived. It has achieved notoriety as the deadliest peacetime maritime disaster in modern history in China.

On the 1 June, the ferry was underway on a 930 mile voyage from Nanjing to Chongqing via the Yangtze River, when she was caught in a storm and capsized in approximately 15 metres of water. The skipper and the chief engineer said that the ship was hit by a tornado, and the China Meteorological Administration confirmed that a tornado occurred in Jianli County with wind-speeds up to 110 miles per hour. Evidence has to be tested and must stand up to scrutiny, though, and in this case, subsequent evidence suggested that the tornado struck a location 5 miles away and did not affect the ship. On the 30 December 2015, the Chinese government issued the investigation report, which concluded that a massive downburst in the thunderstorm, with gusts over 70 miles per hour, was the likely cause of the capsizing. Severe weather reports were issued for the area, which should have subsequently been sent to all vessels on the river in the area for them to take necessary precautions, but there was no confirmation that *Dongfang zhi Xing* had been properly notified, although at least one other vessel travelling nearby was shown to have taken precautions due to the weather warning. It was also found that the Owners and local authorities had flaws in their daily management, with the consequence that 43 people might face prosecution. In the criminalisation phenomenon, this strikes a chord in the West with civil aviation prosecutions, and the Schiphol Air Traffic Controllers case.

On the 10 December 1998, an incident occurred at Schiphol (Amsterdam) Airport in which a Delta Air Lines Boeing 767 aborted its take-off roll when the pilots observed a towed Boeing 747 crossing the runway in front of them. At the time of the incident, low visibility procedures were in force. After unclear radio transmissions with the tow truck driver, an assistant controller had passed her interpretation of the tow's position to the trainee controller responsible for the runway. The assistant controller did not have a screen that could show ground-radar pictures. The trainee controller did, and

[13] *Mangouras v Spain* (12050/04); Para 3 Summary of Judgment

took the position of the tow at the edge of the runway to mean that the crossing had been completed. Buttons on a newly-added panel in the tower for controlling lighted stop-bars at runway intersections proved ambiguous, but at the time all looked in order, and he cleared the other jet for take-off. Meanwhile, the coach of the trainee controller was performing supervisor duties in the tower.

Air accident investigations were carried out by the Incident Investigation Department of ATC The Netherlands (LVNL)[14], and the Dutch Transport Safety Board (DTSB)[15]. It is emphasized that such reports were carried out for the purpose of air safety, not for the prosecution of an offender. Both investigations drew conclusions and arrived at similar conclusions, and both made recommendations that were all aimed at correcting identified systemic deficiencies in the organisation of air traffic control generally and Schiphol in particular. But, two years after the incident, the Dutch aviation prosecutor went much further, by identifying grounds to establish criminal liability for gross negligence, although no fatal consequences had followed. All were in the air traffic control service, who were on duty at the time of the incident, consisting of the trainee, the coach/supervisor and the assistant controller. They were all charged *with the provision of air traffic control in a dangerous manner, or in a manner that could be dangerous, to persons or properties*.

At the first hearing, held in August 2001, the judge ruled that the assistant controller was not guilty, but that both the trainee and the coach/supervisor were. They were sentenced to a fine or 20 days imprisonment. The trainee and the coach/supervisor lodged an appeal, while the prosecutor, equally disappointed, appealed against the assistant controller's acquittal. In September 2002, nearly four years after the incident, the appeal was heard, in which the court found all three accused Guilty as charged but did not impose any sentence. This determination treated the case as an *infringement of the law* rather than an *offence against the law*, a somewhat difficult decision to rationalize because it meant, essentially, that they had not been guilty of a criminal offence but were culpable, in that they were to blame, nevertheless, as one would imagine culpability in a case of strict liability, when the probative value of any evidence is not tested. Indeed, the only admissible defence against such a determination would have been if the Defendant was off duty and not at their work station at all. Remarkably, the determination also had the effect of removing any option of appeal because there was no conviction of an offence and no punishment.

The danger of broadening the criminalisation phenomenon may well satisfy the normative ethics of Society, but if the effect is to erode the principles of a Just Culture, then we will need to embark on a new journey, which redefines policy in the criminal accountability of seafarers. We will need to scrutinise not only the way in which the law is defined, but also how we are to manage the underpinning evidence upon which a case will be prosecuted, and defended. We can use the Schiphol case as a cautionary tale, and make the *Dongfang zhi Xing* our starting point. And there is no time to start like the present.

[14] Report published 4 March 1999
[15] Report published January 2001