

RISK MANAGEMENT

Criminalization of risk management: **The *Prestige* — A lesson in “zero-risk”?**

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*...a merchant captain is sentenced to two years in jail...
for refusing to co-operate with authorities who wished to
tow his ship to sea rather than granting safe haven...*

You would think it has to be an interesting story when Greenpeace argues the case of a master accused of spilling 50,000 tons of oil and polluting hundreds of kilometres of coastline. In this case, it turns out merely to be sad: a merchant captain is sentenced to two years in jail as a “reckless criminal” for refusing to co-operate with authorities who wished to tow his ship to sea rather than granting safe haven for the stricken ship, which subsequently sank.

What lessons can we take from this story here on the B.C. coast, where there is such vocal concern for the environment and the trend of public risk tolerance is towards zero?

The sad (but true) story

This story is well known in shipping circles and previously added renewed vigour to discussion on the subject of criminalization of seafarers. It also sent chills through the seafaring community by suggesting that the traditional “right

of refuge” would no longer be honoured. The basic facts are these:

The single-hulled tanker *Prestige*, was carrying 77,000 tons of fuel oil from St. Petersburg to Singapore in November of 2002. The ship was 26 years old; while reportedly poorly maintained, it had been certified as seaworthy six months previously by its classification society, ABS. It was sailing under Liberian ownership, Greek management and Bahamian flag. On November 13, as a result of two starboard wing tanks flooding, the ship developed a list of 25 degrees and subsequently lost power 30 miles off the Spanish coast. While the ship was substantially righted by counter-flooding and taken under tow, France and Portugal joined Spain in refusing a port of refuge. The ship was,



A sunny day for refusing help to the injured...

Source: <http://www.crcco.com/>

at the insistence of the Spanish authorities, towed some 133 miles offshore, where six days later she succumbed to the dynamic stresses of wave action, breaking in two and sinking in about 4,000 metres of water.

The master, who had safely evacuated his crew but stayed on board until the closing moments of this drama, was rescued by helicopter before the ship sank, thus ending 32 years as a master at sea. The Nautical Institute and Lloyd's List recognized his fortitude and valiant efforts to save ship and crew by nominating him for the 2004 Shipmaster of the Year Award. The Spanish government arrested him.

This was just the beginning of the ordeal. The *Prestige* wreck continued to leak oil, which fouled the beaches of Galicia and southern France. This led to a massive cleanup operation and a deep-water salvage operation to remove the remaining oil from the wreck. The combined cost of these activities has been estimated at 368M Euros. The environmental impacts, variously reported as equivalent to the *Exxon Valdez* incident or otherwise largely remediated within a year, were normalized within 10 years; "complete biological recovery" was expected by 2015.

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The impact on the aging shipmaster has been more extensive. Released to house arrest on a bail of 3M Euros in 2003, he has been subjected to repeated legal prosecutions. Spain's original claim against the classification society ABS was disallowed. However the Captain and officers, as well as the head of the Spanish Merchant Marine, were tried in 2012 under criminal charges of causing damage to the environment. While acquitted of this, Captain Mangouras was found guilty of disobeying an order to restart the ship's engines to remove the ship offshore, for which he received a nine-month suspended sentence. Last year, he was tried again on the original charges and found guilty of "recklessness" in sailing a ship in a weakened condition while overloaded with 2,000 tons of oil.

Captain Mangouras was sentenced in January to two years in prison, at 81 years of age, 13 years after the event. While this sentence is again suspended, it opens the door to further civil

damage claims against the captain and the ship's insurers, which was the point of the Spanish Government's appeal of the first conviction. The first trial had concluded that the captain's crime (serious disobedience of the Spanish authorities in refusing a tow to sea) had nonetheless not contributed to the environmental damage, thus limiting compensation. The further scapegoating of Captain Mangouras now clears this hurdle. Even Greenpeace identifies the unfairness of this, when so many of the other key players in this drama were not held accountable. The head of the Spanish Merchant Marine, who ordered the ship towed to sea, was absolved of responsibility in both trials.

Who shares the risk?

It seems in this case of the *Prestige* that many of those who evaded responsibility for the outcome of refusing refuge were on clearly defensible legal ground.

IMO Resolution A949(23) [introducing the Guidelines on Places of Refuge



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RISK MANAGEMENT



The Simushir: "Much Ado..."

Source: MARPA/Facebook

How do non-seafaring Canadians correctly acknowledge and accept a share of the risk of ships operating on our coasts?

for Ships in Need of Assistance] was passed in 2003, as a direct consequence of the *Prestige* incident and two other similar cases. In conjunction with these guidelines, IMO has applied much pressure on coastal states to honour their responsibility for providing ports of refuge. The IMO resolution correctly points out that the issue is not one of theoretical or doctrinal debate but one of "solution to a practical problem" — that is, how to manage and accept a recognized risk in light of potentially grave consequences.

The Guidelines acknowledge responsibilities and obligations under IMO Conventions on Safety of Life at Sea, and Salvage, and provide a good framework for assessing risks and options. Nevertheless, they end up where they started: there is no obligation for a coastal state to accept the risks of providing a harbour of refuge. Rather, in recent legal discussions on the subject, the only absolute appears to be a grim affirmation of the coastal state's right to *refuse* to grant refuge, subsequent to their own appreciation of risks to themselves.

This legal conclusion will not change; it is the equivalent of "right of self-defence." In that way it is logical and correct. But it allows the discussion to turn from a consideration of "how do I help solve the problem" to "how do I make it go away?" The Guidelines thus still leave

the door open for NIMBY-minded states (peoples!) to decide: "better on someone else's doorstep." But that is not how wind and tide work, and the consequences of refusing aid may wash back under one's own door, as it did for Spain.

So how do we get beyond all the legal defences and evasions, the political pressures and special interest groups, the uninformed or purposefully ignorant perspectives, which would collectively enable or encourage us to deny help to such a ship as the *Prestige*? How do non-seafaring Canadians correctly acknowledge and accept a share of the risk of ships operating on our coasts?

The first step in this is for us to acknowledge that we all "own a share" in the profits of the shipping industry. A recent book, "Ninety Percent of Everything" (Rose George, Picador, 2013) puts it plainly: that is the percentage of modern trade that travels by sea. This is the trade that makes modern life "modern" and affordable. Try living for a year without any part of this and you will soon (weeks in) realize what you are missing...it is not just bananas at breakfast!

The ancient laws of the sea, the Lex Rhodia, and Rolls of Oleron which were followed in medieval times, gave formality and process to the principle that those who share the profits share

the risk. In practical terms, they share the potential (and sometimes real) losses. This is done fairly, relative to their stake in the enterprise. We, who all share and rely on the economic advantages of secure maritime trade, need to be part of this equation. This means not just hiding behind legalist rationales for refusing safe refuge, but positively appreciating that in accepting a degree of risk we may be doing our part in averting a more calamitous outcome.

How do you manage "zero" risk?

So how will this play out when B.C. has its "*Prestige*" moment? Will we grab a fleeting opportunity to boldly manage the risk, or "lawyer-up" to assert that "it is not our problem" and dedicate ourselves instead to prosecution of the most available scapegoats?

Two recent incidents on the coast do not offer much reason for advanced self-congratulation in this matter. The breakdown of the *M/V Simushir* off Haidai Gwaii in 2014 was met with exaggerated media concern about the "fuel-laden" ship. And the multiple recriminations following a small spill from the *Marathassa* in English Bay in April this past year seemed to generate failure out of a successful response (see editorial in Jun2015 BCSN).

Notwithstanding that the *Simushir* was taken in tow before approaching dangerously close to the shore, the hyperbolic reporting on this relatively small container vessel suggests that we (the public) are not mentally ready to deal with a serious risk of an oil tanker in a similar situation. And yet this is not true professionally. Within the industry and Transport Canada, many well-qualified and conscientious people are working to make sure that we have contingency plans for this sort of event. Our connections within the shipping world enable us to anticipate arrivals and exercise the rights and responsibilities of a port state to regulate the condition and seaworthiness of ships calling at our ports. And thanks to the developing plans for increased oil shipments to our ports, the World-Class Tanker Safety program of

Transport Canada is increasing our capacity for both prevention and preparedness to respond to incidents.

The response to the *Marathassa* spill was an operational success and a political failure. While the clean-up was a success, with perhaps some minor reservations about information flow, the political grandstanding on this stage by both the Premier and the Mayor of Vancouver seemed rather to broadcast to the world that Vancouver is not ready to play its part as a respected port in the modern shipping world. Why would one do that? Is the standard of response really perfection (zero risk)? Perhaps instead this would have been a good opportunity to celebrate successes:

- Shipping safety in B.C. is not perfect but it is at a very high standard.
- The culture of risk management in the industry is well established, with a view toward continuous improvement
- B.C. is home to many industry sectors who are world-leaders in their fields (tug design and pilotage being just two of them), and
- A great many professional mariners, both at sea and ashore, are using their hard-won experience to run an inherently risky business in a publicly and environmentally responsible manner

To be fair, Transport Canada has, since 2003, worked hard to plan for just such an arising as the *Prestige*. They have followed IMO's lead in promulgating a National Places of Refuge Contingency Plan that lays out the risk-appreciation, consultative and decision-making processes. This is elaborated by the Pacific Region contingency plan, first published in 2009 and now under review to improve the role of coastal communities, especially First Nations. But this reads as a recipe for maximum inclusion in a ponderously deliberate risk assessment in which a consensual decision is shared among several parties. What it needs to be is an urgent process of decision-making, recognizing that lack of complete information and time-pressure will force a choice between almost equally unpalatable outcomes, the results of which may only be distinguished by being more or less obvious or immediate. The decision-maker in this process must be enabled to bold action, not just what is considered safe by the majority. Can the right decision in this process be obtained without all parties at least coming to the table with willingness to accept some risk, rather than avoid it?

And yet it seems that when misfortune arrives, as in the *Prestige* case, that it is too easy to vilify the Captain, while ignoring the fact that there was an opportunity to solve the problem, and that part of the shared risk was refused. How will B.C. act in a similar situation?

Lessons for shipping safety on B.C.'s coast

B.C. is on the threshold of significant changes in the nature of shipping on our coast. While not revolutionary, they will bring more, and bigger, ships to Vancouver as well as north-coast destinations. Bright-eyed expectations of LNG



Captain Mangouras on trial.

particularly are driving investment and encouraging economic forecasts. But is this expectation also clear-eyed? Does it recognize the risk honestly, that is: low but finite. Or does it expect that we can have our cake and eat it also. That we can take a share of the profits and benefits and still criminalize the misfortunate, heaping a disproportionate penalty on the unfortunate mariner, making the master a proxy for equally-culpable parties that cannot be touched?

Perhaps you will say that I am simplifying a complex issue. Admittedly. That I am taking a specific instance in a different place and time to hypothesize the outcome on the B.C. coast tomorrow. Certainly I am. That the spirit of Canadian "can-do" and generosity would not allow a "*Prestige*" incident to happen on our shore. Well, of that last piece, I am not so sure.

These are the problems I see: Is it rational to demand a zero-risk tolerance when individuals do not conduct themselves so in their private lives? Should shipping be obliged to prove itself as safe as driving to the corner store for milk? While in many ways modern international shipping can and does meet the latter standard, how does the industry persuade the public that risk is being recognized and managed at an acceptable level? How do we develop a public appreciation (informed belief) of the shipping industry's ability to recognize and manage risk responsibly?

The real answer has to be in celebrating Canadian professional excellence in more than just hockey. In accepting that misfortunes happen and can be anticipated and addressed. In recognizing that risk management is not just risk avoidance, or risk refusal. And in collectively agreeing that individuals doing their best to recover a bad situation will not be unduly scapegoated by those who eschew any form of risk themselves.

If we do not do this, the consequences of continuing *Prestige*-like prosecutions will send a deadly chill through the neophyte ranks of an industry that is already undersubscribed in Canada. How would we then encourage our best and brightest to pursue careers at sea, when they can find something to do more lucrative, comfortable, publicly celebrated, and safe (from prosecution)? Who will man our ferries and pilotage service then?

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