“Collapsed Crane—Where do you stand?” A Hypothetical Debate

The tragic accident involving the container vessel *Zim Mexico III* in Mobile, Alabama in 2006 and the subsequent arrest, harsh treatment and sentencing of the ship’s master under very obscure US legislation, caused great concern throughout the shipping industry. (see, Philip Wake, “Master freed” in *Seaways*, March 2007 at 23). As we know the accident was caused when the vessel had an electrical failure whilst turning at its berth. The failure resulted in the vessel’s bow thruster becoming inoperable and the bow of the vessel striking a large container crane ashore. Two mechanics were servicing the crane without authorization and one was regrettably killed when the crane collapsed. Several trips later the master was charged with manslaughter, held in jail under harsh conditions for several months and subsequently found guilty, sentenced to the time already served, and then deported.

Many in the maritime industry in Australia and elsewhere felt that this type of accident could occur anywhere and that it might be useful to examine whether the repercussions that resulted in Mobile might also occur elsewhere. In Australia the Nautical Institute (Queensland Branch), the Company of Master Mariners of Australia (Brisbane Branch) and the Marine and Shipping Law Unit of the University of Queensland decided to hold a Hypothetical Debate on this subject on 19 April 2007 in Brisbane. The meeting was held at the excellent premises of the law firm Blake Dawson Waldron and attracted an audience of over 100. In fact, a number of interested persons had to be turned away due to lack of space! The audience consisted of a cross section of the local maritime industry, as well as some interstate visitors and a number of students.

A working group from the sponsors had developed a briefing paper in which the exact *Zim Mexico III* case was faithfully transposed to the Port of Brisbane. The hypothetical situation was then placed before a panel of persons who played the role of those with a direct interest in such an accident: The master; the pilot; the chief engineer; the terminal manager; the local P&I correspondent; the state and federal regulatory investigators; the police; the crown prosecutor; and the deciding judge. It was decided that these ‘role players’ should all hold professional qualifications and designations exactly conforming to their role in the debate. As a result, a very prominent group of experts was recruited to be on the panel.

The meeting was opened by Captain Peter Liley, MNI, the chairman of the NI Queensland Branch, who also provided an outline of the case. He then handed the debate over to the facilitator, the Hon. Justice James Allsop of the Federal Court of Australia, Sydney. Justice Allsop is a senior maritime law judge and was a prominent maritime law

barrister before being elevated to the bench. He commenced the debate by probing the actions taken by the master (Captain John Cardelli, an experienced container ship master and Great Barrier Reef Pilot) as well as the pilot (Captain Steve Pelecanos, FNI, a senior Brisbane pilot, Vice-President of the International Association of Marine Pilots (IMPA) and a NI Council member). With the help of a computer simulation the actual manoeuvre of the vessel, as well as the communications between master and pilot were closely examined. It was found that during port manoeuvres the use of a bow thruster powered solely by the shaft generator involved a certain amount of risk, especially if no tug was used. The chief engineer (Mr. John Hosie, an experienced senior ship's engineer) confirmed that it is standard practice to connect thrusters to alternate power sources instead of the main shaft generator when the vessel is moving in and out of port. There was a significant amount of discussion on whether the master should have told the pilot that the thruster was connected to the shaft generator and also that there had been two previous failures with this type of operation. There was general consensus that this should have been disclosed and that it probably was not up to the pilot to enquire. On the other hand, it was also apparent that the use of the shaft-connected thruster was not necessarily negligence as vessels without thrusters were regularly turned without mishap.

At that stage Justice Allsop turned his questions to the state and federal regulators (Captain John Watkinson, FNI, Manager, Maritime Safety Queensland (MSQ)**,** and Captain Michael Squires, an experienced investigator for the Australian Transportation Safety Board (ATSB), Canberra). The ATSB investigator confirmed that his agency's principal interest was to determine what had actually occurred in order that a similar accident could be prevented in future. All the ATSB's information was confidential and could not be used in any other hearing or action. On the other hand, the MSQ's investigation would be much more wide-ranging, covering not only the activities on board that led to the accident, but also everything that resulted from it. It was apparent that, although both of these investigations would also look at the bow thruster malfunction, it was far from clear whether this would lead to any determination of negligence.

The next stage of the discussion turned to the actual damage that occurred. Firstly, the Terminal Manager (Mr. Matthew Hollamby, the Brisbane Terminal Manager for Patricks Ltd) was examined. He explained that there were standing orders that container cranes would be placed at the centre of the berth when vessels were being moved in order that they would be as far away from vessel bow and stern. He also confirmed that all terminal employees,

including contractors, were strictly forbidden from being anywhere near cranes when vessels were being moved. He could not explain why the mechanics were on the crane when the accident occurred, except to indicate that they must have been "keen to get the job done!" The Terminal Manager also explained that wharf equipment was now extremely valuable and that damage, such as occurred here, had significantly wide effects. For example, a replacement crane would cost in excess of AUD 10 million but would also require an order delay of up to 18 months. This would have a knock-on effect on the terminal's operations in terms of: the removal of the damaged crane; the speed of completing vessels; the requirement to use other (competing) terminals; and, overall loss of business.

In this type of occurrence the ship owner's local representative is very likely to be a lawyer who represents the owner's P&I club. In this instance the P&I correspondent (Capt. Ernest van Buuren, MNI, partner with the major Australian law firm Blake Dawson Waldron in Brisbane, and Deputy National Master of the Company of Master Mariners of Australia) indicated that he would be acting under owner's instructions. Although he would be required to cooperate fully with all regulatory investigations, he must also ensure that the shipowner's interests were fully protected and that no admissions as to liability would be made. Although this would include assisting the master as much as possible, it was made clear that a conflict of interest situation could arise when the master's and owner's interests diverged. This led to some discussion as to who would really protect the master in this type of situation. Justice Allsop asked Professor Edgar Gold, QC, FNI, who was in the audience, to provide a brief outline of the IMO/ILO Guidelines on the Fair Treatment of Seafarers which are very relevant in this type of situation. It was explained that these voluntary guidelines, which only entered into force in July 2006, are not yet widely accepted. However, they are designed to ensure that in the aftermath of accidents seafarers are treated fairly by state authorities.

As the accident caused injury and death the police had to be involved. The police officer (Sgt. Gerald Ould, of the Queensland Police, who has marine responsibilities), explained that cases involving death and injury would ultimately lead to a coronial enquiry and a decision by the crown prosecution service whether criminal charges would be laid. It was disclosed that whilst the police had jurisdiction to require alcohol and drug testing of officers and crew members on Australian-flag vessels that were involved in accidents, they had no such powers on foreign-flag vessels unless directed by government regulators, such as MSQ or ATSB. This discussion was followed by questioning the prosector (Anthony Moynihan, S.C., a prominent criminal lawyer and Deputy Public Defender, who is a former

crown prosecutor) on what charges, if any, would be laid in a case such as this. He confirmed that from the evidence presented he doubted whether a charge of manslaughter against the master would be viable. However, he suggested that further investigations might result in some lesser charge, i.e. dangerous operation of a vehicle etc., might be possible. The judge (the Hon. Justice George Fryberg of the Supreme Court of Queensland) was quite firm in his view that there was no evidence whatsoever to lay criminal charges. He suggested that such a charge would not even be sustainable at lower court/magistrate level. In other words, what happened to Captain Schroeder in Mobile could not happen in Australia!

It should be obvious that this was a highly successful and emotionally charged debate. It illustrated fully that maritime accidents require thorough investigations carried out by maritime experts at the initial stage. The criminal law should only be resorted to if it can be shown ‘beyond a reasonable doubt’ that there was a serious breach of the standard of care required for safe ship operations and that such breach ultimately led to tragic results.

Prof. Edgar Gold, AM, CM, QC, PhD, FNI