SAFETY SHOULD BE PARAMOUNT

BY PETER DAWSON, LL M (SHIPPING LAW)

Murphy's law is a popular adage in Western culture that broadly states that things will go wrong in any given situation, if you give them a chance.

Despite the best safety culture, accidents leading to loss of life or injury will happen in the marine environment. It is inherently dangerous. Once the matter comes out of the realm of Murphy's Law and into the New Zealand courts, a vessel owner's exposure to fines and possible reparations for a breach of the Health and Safety in Employment Act, or HSEA, is a real risk to their business.

As a junior maritime lawyer practising in Cape Town some 15 years ago, I could be forgiven for thinking that the then dominant cause of loss of life or personal injury at sea was the poor state of repair to the vessels involved. Indeed, the shocking parade of old bangers coming to grief in the cape supported this conclusion. Things have changed since then.

The amendment of Chapter IX of the SOLAS convention, and the adoption of the International Safety Management Code in 1993, effectively shifted focus away from the ships and towards management and management systems. An important component of the management systems is the companies' safety policy, and the guidelines to the ISM Code encourage the development of a safety culture in shipping.

The code has had a marked impact on the numbers of deaths and injuries in the industry. Since its introduction I have noted a distinct decline in the number of injuries and deaths as a consequence of poor maintenance or management of the vessels themselves. Coinciding with this decline has been a growing appreciation of the many ways in which people contribute to accidents in the maritime environment. It is now my impression that more accidents are now ascribed to "human error" than to mechanical failures of vessels.

The implementation of safety management systems in the wake of ISM has introduced into maritime parlance previously undefined terms such as "safety culture", 'hazard identification", "HSE" and others.

In 2004, amid some controversy, part two of the Maritime Transport Act (Duties relating to Health and Safety on Ships) was repealed, and these provisions were incorporated into the HSEA. The New Zealand marine industry has the daunting task of interpreting the HSEA and applying it in their watery domain.

Maritime New Zealand has the onerous task of prosecuting offenders who have not applied the legislation, and who have failed to take (all practicable steps) to mitigate hazards in the work environment.

It has become increasingly apparent to me in practice that while the underlying rationale behind the HSEA, and the implementation of a sound safety policy and safety culture is a laudable objective, the legislation is complex and often confusing and can place an onerous burden upon vessel operators to get to grips with it and apply it to their businesses.

The FishSafe initiative by MNZ and the fishing industry has recognised this and come up with a practical solution that is applied by fishing vessel operators. However, a myriad of other vessel operators outside the fishing industry are caught by these provisions, yet they have done little or nothing to implement them.

Many small vessel operators in particular have attempted to devolve this responsibility to their safe ship management, or SSM companies, unfortunately developing a false sense of compliance with the HSEA on the part of the vessel owner.

Safety management cannot be legally devolved, and those who pay lip service to the legislation will get stung. In some cases SSM companies are only now getting to grips with the true intricacies and pitfalls of this legislation, as their focus has traditionally been towards the boats, and away from the safety management of the vessel.

In other cases, SSM companies have attempted to educate their members on what the legislation requires, but vessel owners have placed their advice in the too hard basket. Generic documentation in the form of "hazard registers" and other documents will not pass the scrutiny of a court.

The consequences of ignoring the HSEA are not attractive. Readers should be aware of an uncomfortable trend in the New Zealand courts. Where prosecutions have begun against vessel owners under the HSEA, the courts have the power to order that reparations be paid to the families of the deceased or injured persons, in addition to a fine. In one case reparations of $195,000 were ordered, and fines can be as much as $500,000.

Safety management for ships is wide-ranging, and includes a sound safety policy, visible management commitment to safety, well understood safety standards, and techniques to measure safety and setting realistic safety targets and objectives. Additionally, regular audits of safety standards and practises, effective safety training, thorough investigation and follow-up of accidents and incidents and open reporting should be active features of any system.

It has been said that the safest company in the world would be bankrupt. However, to avoid the consequences of being at the bitter end of a prosecution, companies would be well advised to develop a hands-on safety culture in their business, introduce proper safety management planning and on-going risk assessment. The failure to do so to and have these procedures set out in writing would hamstring your defence in an HSEA prosecution.

Proper safety management is not without cost, but it is a sensible investment. An investment in time and money in safety management plans, asset protection structures, the training of staff and so on will have a practical legal outcome in that the level of reparations or fines ordered against the company or individual for a breach of the HSEA would be considerably reduced or excluded. Legalities aside, companies that achieve good safety performance records are generally those who have adopted a full-blown safety culture that goes beyond mere lip service to the legislation. After all, the safety of employees and contractors should be paramount.

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