

Law and Order: The Emergence of the Seaman's Manslaughter Statute

By Jeanne M. Grasso

Overview

Over the last decade, criminal prosecutions have become increasingly familiar to the maritime industry. The most common prosecutions by far relate to environmental violations and the attendant post-incident conduct, including false statements, conspiracy, and obstruction of justice. Over the last five or so years, however, a new trend has begun – that of prosecutions under a rather obscure federal statute commonly known as the Seaman's Manslaughter Statute.¹ These prosecutions have come to the forefront in the wake of the Staten Island Ferry incident on October 15, 2003, where the Seaman's Manslaughter Statute was used to prosecute a shoreside official, as well as a member of the crew.

The Origins of the Seaman's Manslaughter Statute

The More Things Change, The More They Stay The Same... A Brief Sail Through The History of the Seaman's Manslaughter Statute

From the advent of steamships in the early 1800s, thousands of passengers died, mostly from boiler explosions and fires. States began to step in and regulate steamboats, but the effort was disjointed and ineffective. Congress simply did not get involved, as it was hesitant to regulate private industry. In 1833, however, Senator Josiah Johnson was killed in a steamboat explosion and President Andrew Jackson, in his State of the Union address, stated that "the number of those [steamboat] disasters is increasing, notwithstanding the great improvements ... in the machinery employed, ... show very clearly that they are in great degree the result of criminal negligence on the part of those by whom the vessels are navigated..." Congress, in reacting to the President's statement, faced many challenges while endeavoring to develop a remedy, including opposition from steamboat owners, disagreements as to causation, and interference with private property rights.

Nonetheless, a few years later in 1838 Congress passed "An act to provide for the better security of the lives of passengers aboard vessels propelled in whole or in part by steam" (the "1838 Act"). The 1838 Act was the beginning of federal regulation of the private sector for public welfare reasons and set the precedent for the bevy of consumer protection legislation enacted during the 20th century. The 1838 Act also set

forth various licensing, inspection, and safety requirements for steamboats, though the bill that was ultimately passed by Congress was significantly watered down from the original draft of the bill. The focus of the 1838 Act, however, was to demand the "utmost vigilance of the crew by attaching criminal liability for fatal lapses." According to the legislative history, "[i]t was designed to punish captains, engineers, and pilots of steamboats for their negligence or inattention..." in light of the carnage that can result from a mistake.

Even so, the 1838 Act did not go far enough, and by 1852 over 7,000 people had died in steamship incidents. The inspection provisions in the 1838 Act did not adequately prevent explosions, and the liability provisions failed to deter and punish those responsible. Congress finally realized that the technology was a legitimate problem and that imposing criminal liability on the crewmembers may not be an effective solution to the problem. The prospect of more regulation, however, pitted operators in the East against those in the West, as the Western steamboat operators were having more incidents. Objections to more regulation also centered on the belief that the steamship inspectors, as government agents, were corruptible and would wield too much power that was subject to abuse.

In 1852, President Millard Fillmore signed another steamship safety bill into law ("the 1852 Act"), beginning the second trial into federal regulation of private industry. The new law applied to all passenger steamboats, except ferries. The 1852 Act required hydrostatic testing, safety valves, gauges, manufacturer's stamps, lifeboats, life preservers, and firefighting equipment, as well as licenses to carry hazardous materials. In addition, the 1852 Act upgraded the U.S. Steamboat Inspection Service by requiring inspections and inspectors in all major ports who, in addition to performing annual inspections, were authorized to board vessels in port at any time to ensure compliance. As a result, steamboat-related deaths decreased dramatically after enactment of the 1852 Act, which largely provided the basis for the U.S. Coast Guard inspection regime as we know it today.

The Seaman's Manslaughter Statute

As it exists today, the Seaman's Manslaughter Statute reads as follows:

¹ 18 U.S.C. § 1115.

Every captain, engineer, pilot, or other person employed on any...vessel, by whose misconduct, negligence or inattention to his duties...the life of any person is destroyed, and every owner, charterer..., through whose fraud, neglect,... misconduct, or violation of law the life...is destroyed, shall be fined...or imprisoned not more than ten years, or both.

When the owner or charterer of any...vessel is a corporation, any executive officer of such corporation, for the time...charged with control and management of the operation, equipment, or navigation..., who has knowingly and willfully caused or allowed such fraud, neglect...misconduct or violation of law, by which a life...is destroyed, shall be fined...or imprisoned not more than ten years, or both.

The elements of the crime are that: (1) the defendant was [captain, pilot, operations manager, *etc.*] of the vessel; (2) the defendant was guilty of misconduct, negligence, or inattention to his duties on the vessel; and (3) that by reason of such misconduct, negligence, or inattention, life was destroyed.

It is important to note that intent is not an element of the offense and it is unnecessary to show that the acts or omissions that caused the loss of life were willful or intentional. And, depending on the jurisdiction in which the prosecution takes place, simple negligence may be enough for a prosecutor to secure a conviction.

Prosecutions Over the Last Century

Until recently, prosecutions under the Seaman's Manslaughter Statute were a rare event. Recent high-profile casualties, however, have given the statute a new life. Over the last several years, it has been used to convict not only crewmembers, but also shoreside personnel as well, who are involved with vessel operations.

The Past

During its first 142 years, there were roughly eight major prosecutions, spanning 1848 through 1990.² The most notable of these prosecutions involved the General Slocum disaster. On June 15, 1904, more than 1,000 people died when the General Slocum burst

² See, e.g., *United States v. Warner*, 28 F. Cas. 404 (D. Ohio 1848); *United States v. Farnham*, 25 F. Cas. 1042 (S.D.N.Y. 1853); *United States v. Collyer*, 25 F. Cas. 554 (S.D.N.Y. 1855); *United States v. Keller*, 19 F. 633 (D. W.Va. 1884); *United States v. Van Schaick*, 134 F. 592 (S.D.N.Y. 1904), *aff'd*, 159 F. 847 (2d Cir. 1908); *Hoopengartner v. U.S.*, 270 F.2d 465 (6th Cir. 1959); *United States v. Hilger*, 867 F.2d 566 (9th Cir. 1989); and *United States v. Holmes*, 104 F. 884 (N.D. Ohio 1900).

into flames on the East River in New York. This incident represents the most deadly peacetime maritime disaster in American history. A fire began when a carelessly thrown match ignited a barrel of straw. What came out of the investigation was the fact that the vessel captain did not conduct fire drills and provided no emergency training to crewmembers. In addition, the investigation uncovered rotten fire hoses that ruptured under the pressure of the water and rotted lifejackets with disintegrated cork, which resulted in many passengers drowning. Further, the captain reportedly did not dock the vessel at the closest dock after the fire started because of oil tanks in the vicinity, and proceeded at top speed for another mile down river, which served to fan the flames and increase the ferocity of the fire.

Captain Van Shaick, executives of Knickerbocker Steamboat Co., and the inspector who had recently certified the vessel as fit for service were all indicted. Van Shaick was convicted of manslaughter and was sentenced to 10 years hard labor, though he only served three years before being pardoned by President Taft. Knickerbocker escaped with only a nominal fine, despite the fact that the trial revealed that the company had illegally falsified records to cover up its lack of attention to passenger safety.

The General Slocum incident led to a major upgrade of the steamboat safety regulations and a reform of the U.S. Steamboat Inspection Service, which was largely blamed for the tragedy because one month before the fire, the vessel had passed a safety inspection. The safety measures subsequently enacted included fireproof metal bulkheads, a requirement for steam pipes to extend from the boiler into cargo areas to act as a sprinkler system, improved lifejackets (one for each passenger and crewmember), fire hoses capable of handling 100 pounds of pressure, and accessible life boats.

The Present

Unlike the paucity of prosecutions during its first 142 years, during the last seven years, there were six major prosecutions under the Seaman's Manslaughter Statute.³

The first of the recent prosecutions, *United States v. Lee Peng Fei*, involved a human smuggling scheme.

³ See, e.g., *United States v. Lee Peng Fei*, 225 F.3d 167 (2d Cir. 2000); *United States v. Mitlof*, 165 F. Supp. 2d 558 (S.D.N.Y. 2001), *aff'd*, *United States v. Sheehan*, 89 Fed. Appx. 307 (2d Cir. 2004); *United States v. O'Keefe*, 2005 AMC 21 (E.D.La. 2004); See Sentencing Memorandum of United States in *United States v. Shore*, No. 1:02-cr-10413-RW2-ALL (D. Mass. Sept. 3, 2004); *United States v. Smith*, No. 1:03-CV-06049-ERK-VVP (E.D.N.Y.); and *United States v. Thurston*, 362 F.3d 1319 (11th Cir. 2004).

Fei, the mastermind, endeavored to smuggle 298 Chinese aliens aboard the Golden Venture into New York in 1993. When his plan to send small vessels to disembark the passengers fell through, he ordered the ship to ground in New York, which resulted in ten people dying while trying to swim ashore. After a manhunt, which lasted over two years, involving United States and Thai enforcement agents, and a subsequent extradition battle, Fei pled guilty to the manslaughter deaths of six persons who drowned, conspiracy to smuggle, and actually smuggling 298 Chinese aliens. Twenty-one others were also convicted for their roles in the smuggling operation. Fei was sentenced to 20 years in prison.

In *United States v. Mitlof and Sheehan*, a water taxi capsized, killing one passenger. Here, the owner allowed the vessel to operate with numerous mechanical and structural deficiencies, and the vessel did not have the required Coast Guard Certificate of Inspection, despite the owner's knowledge that it needed one. The vessel's owner and captain were convicted of conspiracy, manslaughter, and wire fraud, the latter count because the owner advertised the vessel as being Coast Guard inspected. *United States v. O'Keefe* involved a cocaine-impaired tugboat pilot who caused an accident resulting in the sinking of the vessel and the death of a crewmember. The pilot was convicted of manslaughter, sentenced to one year in prison, and ordered to pay \$640,000 in restitution. On appeal, the dispute is the degree of negligence sufficient to trigger criminal liability. The district court concluded that any degree of negligence was sufficient – gross negligence was not required. The court stated, "In light of the unique dangers of maritime travel [and] the vulnerability of passengers on board such vessels ..., it was reasonable to impose on such crews a heightened degree of care with the parallel lower threshold for criminal liability." The 5th Circuit heard oral arguments in early April 2005, but a decision had not been rendered at the time of this writing.

In *United States v. Shore*, the captain and first mate (a father and son) pled guilty to manslaughter charges resulting from the death of a young woman on a booze cruise, after tickets were sold to underage passengers, none of whom had their identification checked. After several hours of partying, the vessel's anchor dragged and it collided with a moored sailboat, causing a two to three foot section of the rail to break. The first mate motored away, knowing the rail was broken, without fixing it or having anyone stand guard. A woman fell overboard and drowned, and the Coast Guard was not called for about 50 minutes. The captain and first mate pled guilty to manslaughter, were sentenced to six months home detention with electronic monitoring,

500 hours of community service, and a \$10,000 fine, and ordered to pay \$40,000 in restitution.

On May 18, 2000, Chief Mate Gilbert Charles Thurston instructed a crewman on the S.S. Trinity to enter and clean a tank that had contained MTBE. When the crewman entered the tank, he was overcome by fumes, was asphyxiated and died. Thurston was indicted under the Seaman's Manslaughter Statute. See *United States v. Thurston*. His first indictment resulted in a dismissal by the district court based on the fact that the indictment stated that only simple negligence was required for a conviction. A second indictment was brought against Thurston charging him with the same violation, but by acting with gross rather than simple negligence. Thurston's case went to trial and he was acquitted in December 2004.⁴

On October 15, 2003, the Andrew Barberi veered off course and allided with a concrete maintenance pier, killing 11 people and injuring 73 others. Immediately thereafter, the U.S. Attorney's Office, the New York Police Department, and the Coast Guard initiated an investigation into the cause. Crewmembers, shoreside employees, and corporate officers were interviewed and, after a 10-month investigation, the government concluded they were not giving truthful accounts. The Captain, Assistant Captain (Pilot), Director of Ferry Operations, Port Captain, and the Pilot's physician were indicted on criminal charges.

On August 4, 2004, the Pilot pled guilty to 11 counts of seaman's manslaughter and to making a false statement to the government. He admitted that he was overly tired, taking painkillers, and in such pain that he was not in the proper physical condition to operate the vessel and, as a result, he lost consciousness. In his license renewal application, the Pilot stated that he was on no prescription drugs, noting he did not want the Coast Guard to know for fear of losing his job. At sentencing, the judge stated that under the federal sentencing guidelines, the Pilot was likely to spend 33 to 41 months in prison. The Director of Ferry Operations was also charged with 11 counts of manslaughter, as well as obstruction of justice and making false statements. The manslaughter charge stemmed from his failure to ensure that the vessel was in the control of an attentive and qualified pilot and that necessary precautions were taken to guard against a pilot's sudden disability, thus negligently causing the 11 deaths. His lapses included failure to distribute and enforce the two-pilot rule, which was being revised

⁴ The divergence of opinion between the district courts in Florida and Louisiana as to whether simple or gross negligence is required for a Seaman's Manslaughter Statute conviction makes the upcoming 5th Circuit decision in *United States v. O'Keefe* all the more interesting and significant.

and which had a long history in ferry operations. The two-pilot rule required that two pilots be in the pilothouse during docking operations. The Director of Ferry Operations reportedly told the National Transportation Safety Board and Coast Guard that the two-pilot rule was distributed and in force. He entered a guilty plea on April 22, 2005, to a single count of manslaughter with a prison sentence not to exceed 12 months. The judge, however, still must accept this plea.

The Captain, who was not in the pilothouse at the time of the allision, was indicted for making a false statement to the government, *i.e.*, lying to the investigators. The Captain originally claimed he was in the pilothouse at the time of the allision and said he was unsuccessful in trying to take control of the vessel. The criminal charge was dismissed in exchange for his cooperation.

The Port Captain was indicted for obstruction of justice and making false statements to the government for asserting that the two-pilot rule was distributed to the vessels and enforced. The Pilot's physician was indicted for making false statements to the government by signing a false and fraudulent medical form that accompanied the Pilot's license renewal application submitted to the Coast Guard, which indicated that the Pilot was not taking any prescription medications. These two indictments are still pending. According to AUSA Roslynn R. Mauskopf, "Eleven people died and scores were seriously injured because [the Pilot] and Ferry Director ... failed in their paramount duty to safeguard the passengers of the Staten Island Ferry. Thousands of lives were entrusted to their care. Their

criminal conduct put lives at grave risk, with disastrous consequences. This was a tragedy waiting to happen. The crash had foreseeable causes – the causes were, in fact, foreseen and ignored."

Conclusion

The maritime industry has increasingly been the target of criminal prosecutions for the better part of the past decade, originally for environmental crimes and now also for incidents resulting in the deaths of passengers and crew. The recent frequent use of the Seaman's Manslaughter Statute should serve as a wakeup call for companies to take action to avoid becoming a part of this trend. This includes establishing and effectively implementing a compliance program based not only on regulatory requirements, but also on other assessed risks. Based on the recent trend, failure to take such actions will most certainly result in prosecutors finding creative ways to apply draconian criminal statutes to address such failures.

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