



**Dr Phil Anderson,**  
Managing Director

**Dr Phil's Diagnosis...** Since the last issue of ReportISM, ConsultISM has received many new instructions to act as ISM Consultant and/or potential expert witness in major shipping incidents which are being investigated in preparation for possible litigation or arbitration.

Whilst many of the instructions are coming from lawyers acting on behalf of ship operators and their insurers / P&I Clubs, an increasing number of instructions are now coming from lawyers and recovery agents acting on behalf of cargo claimants and their insurers against ship operators. Also, the first approach has been received in respect of a major criminal action where the relevance of ISM will come under consideration.

Without doubt, the way in which a ship operator and its staff have developed and implemented their Safety Management System is becoming increasingly significant when evaluating potential liability in legal claims and disputes. That relevance and significance will increase over time and will become more apparent in smaller cases as well as the very large / high value cases.

In this issue of ReportISM we again explore a wide range of ISM related topics which I hope you find of use and general interest. Our genuine desire is to help reduce the risk of accidents and incidents occurring – rather than dealing with the aftermath.

If you have specific questions about ISM or if you have an ISM related issue you would like to raise or share with other readers of ReportISM – please contact me, details on the back page – or for more information about the services we provide please visit our website at [www.consultism.co.uk](http://www.consultism.co.uk)

Best regards,

## Port State & ISM

Each year the port State Control (PSC) regions agree to carry out special inspection programmes called Concentrated Inspection Campaigns (CIC).

Each CIC usually runs for three or four months and focuses on a particular subject of interest. The most recent campaign ended on April 30<sup>th</sup> 2006 and examined compliance with Marpol Annex 1 and the operation of oily water separators.

As one campaign ends attention turns to the next in the series, and 2007 will see a spotlight on the shipboard implementation of the International Safety Management (ISM) Code. The campaign reflects the fifth anniversary of the Code's implementation and the

need for owners to renew their initial ISM certification.

The 2007 CIC on the ISM Code will be conducted simultaneously with the Paris and Tokyo MOU's, US Coast Guard and may be joined by other regions.

Throughout the CIC, and during every port State inspection a number of specific ISM related areas will be scrutinised. If the PSC Officer discovers deficiencies, an in depth investigation into other aspects of the Safety Management System, and of the ISM Code will be conducted.

On these occasions, sanctions enforced by PSC can vary but may include recording the deficiency,

instructing the Master to rectify any deficiencies within 14 days or the detention of the ship until all deficiencies have been rectified.

As with normal PSC control actions there is the possibility that further inspections in other MOU ports will take place. One slip can perpetuate a cycle of PSC action and detention that it can become difficult to break.

The Paris MOU Secretariat informed ConsultISM that a taskforce is currently working out all details of the campaign. Though they stressed that detailed guidelines and the questionnaire are confidential and will not be released prior to the campaign.

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## Port State & ISM continued...

There have been ISM Code related inspection campaigns in the past, and these posed the following basic questions:

Is the ISM Code applicable to the ship?

ISM certification on board?

Are certificates and particulars in order?

Is Safety Management documentation (e.g. manual) readily available on board? (Section 1.4 of the ISM Code)

Is relevant documentation on the SMS in a working language understood by the ship's personnel? (Section 6.6)

Can senior officers identify the Company responsible for the operation of the ship and does this correspond with the entity on the ISM certificates? (Section 3)

Can senior officers identify the "designated person"? (Section 4)

Are procedures in place for establishing and maintaining emergency contact with shore management? (Section 8.3)

Are programmes for emergency drills and exercises available on board? (Section 8.2)

Can the master provide documented proof of his responsibilities and authority, which must include his overriding authority? (Section 5)

Does the ship have a maintenance routine and are records available? (Section 10.2)

Do detainable deficiencies, if found, indicate a failure of the Safety Management System?

The number of port State ISM related detentions suggest that many shipowners need extra help in making their systems work. Faced with such a short time to effect positive safety management change we believe that expert advice is needed to provide a more complete view and analysis of the full extent of the 2007 campaign. ConsultISM can provide the assistance and guidance you need, so please contact us to discuss your requirements.

## Delegated Responsibility

A situation we frequently encounter is where the ship owner has delegated the task of running the SMS to, for example, a third party ship manager – maybe along with technical management and crewing.

However, quite often the ship owner remains involved with the commercial operation of the ship. When bills of lading are issued it is the ship owner, in most cases, who would be regarded as the legal carrier and who would have to comply with the obligations of, say, Article III, Rules 1 and 2 of the Hague Visby Rules – to exercise due diligence to make the ship seaworthy and to properly care for the cargo.

What happens though if the cargo is lost or damaged because the SMS of the third party ship manager had not been working properly? Is it a possible defence for the ship owner to argue that it exercised a high level of due diligence in choosing a very highly respectable ship manager whose SMS had been verified by one of the worlds leading Classification Societies on



*“He calls it “delegating responsibility” - I call it passing the buck”*

behalf of a very respectable Flag State Administration?

contracts, as well as their respective insurances.

The answer is almost certainly no! The obligation of seaworthiness is non-delegable. As far as English Law is concerned this legal principle was stated most clearly in a very famous case of the *“Muncaster Castle”* in 1961. (*Riverstone Meat Co. v. Lancashire Shipping Co. [1961] AC80*)

It is vital to ensure that they are adequately protected should a ship owner find itself having to settle a cargo claim because of a failure on the part of the third party ship manager to properly operate their SMS, or to supply suitable and adequate crew members or indeed to properly maintain the ship. The financial implications could be quite significant

Both ship owners and third party managers should look very closely at the terms of their management

## Who Can Best Assess Risk?

Most ship operators and their staff do practice Risk Assessment at one level or another. For many, however, it is probably restricted to quite specific 'high risk' activities such as 'entry into an enclosed space', 'working aloft' or 'working over-side' or similar.

A much smaller group appear to have recognised the significant benefits which can be achieved from making Risk Assessment a tool which is used extensively to facilitate the way day-to-day work and activities are undertaken on board.

Although it may be argued that a form of Risk Assessment is anticipated or implied within the ISM Code, for example at Section 1.2.2, there is actually no specific obligation which would make it compulsory/mandatory.

Although, this may well change if/when the Code is amended at some time in the future. Some jurisdictions however, such as the U.K., do make Risk Assessment mandatory.

At ConsultISM we believe that a properly implemented Risk Assessment system will provide the most efficient and beneficial method of structuring and implementing an ISM Safety Management System.

Risk Assessment can be considered the process of establishing whether or not risks are adequately managed – in other words, whether a safe system of work exists. It would establish whether:

- **Risks are reduced to the lowest level that is reasonably practicable to achieve,**
- **Best practice is being followed,**
- **Legal standards are being met.**

Initially, the most important function of Risk Assessment is the identification and evaluation of the hazards. Once the hazards have been identified and evaluated, and when appropriate, control measures can be introduced to



eliminate the hazards altogether, which is rare, or, more usually, to reduce / minimise the risk.

The question is therefore raised as to who makes the best Risk Assessors?

With few exceptions the people who make the best Risk Assessors are the staff at the sharp end – they know and understand better than anyone else what the hazards are, whether those hazards are controlled and what should be done to control those hazards.

Although this rather simplistic and sweeping answer does come with some qualifications. All personnel need to understand and accept the value of risk assessment, they will need to be empowered with authority and responsibility and they will require proper training in Risk Management techniques.

What is very important to realise, and what is frequently not appreciated, is that the Risk Assessment process must apply not only to the 'obvious' or high-consequence failures but also to the routine tasks or low consequence outcome.

Fortunately, major incidents are, relatively, rare but there tend to be many much smaller incidents occurring on a much more frequent basis. Each of these smaller incidents

represents a loss to the Company and maybe to an individual. Cumulatively these relatively small losses can start to take on a significant level in financial and / or man power terms. Also, many of these losses will be uninsured. Consequently, the losses represent a haemorrhaging of money out of the Company – unnecessarily.

With the intelligent use of Risk Assessment, utilising the knowledge and expertise of properly trained, motivated and empowered sharp-end staff, those small losses can be prevented. As each of those small holes is plugged the haemorrhaging eventually stops. The end result is a safer Company with highly motivated sharp-end staff, a more efficient Company and a more profitable Company.

Whilst Risk Assessment, hazard identification, probability and risk factors may be unfamiliar or strange words – coming out of 'management speak' – it may be worth reflecting upon a suggestion that what we are really talking about is not much more than good old fashioned seamanship practiced in the way that it should be practiced!

If you would like to discuss with ConsultISM how Risk Assessment techniques could benefit your company please do get in touch.

## Standards Slammed



Since the last issue of ReportISM there has been much debate over the standards of Officers and watchkeeping. ConsultISM is often approached for advice on such matters, as Owners/Managers look at ways of guarding against poor crew performance within their Safety Management System (SMS).

The most vociferous call for action regarding these standards has come from the UK Marine and Coastguard Agency (MCA), in response to what they see as the alarming increase in accidents caused by excessive speed, lone watchkeepers falling asleep and generally poor watchkeeping practices.

As a result they have taken the step of publishing an extensive Marine Guidance Note to owners, operators, managers, masters and officers of merchant ships. (See [www.mcga.gov.uk](http://www.mcga.gov.uk) for full details).

MGN 315 "Keeping a Safe Navigational Watch on Merchant Vessels", addresses a range of issues which have been identified as contributing toward accidents, notably fitness for duty, what is expected of the Officer of the Watch, watch arrangements, the maintenance of a safe lookout, safe speed, restricted visibility and anchor watches.

The guidance acknowledges that Masters are under considerable commercial pressure, but emphasises the priorities of safety and stresses the fact that the authorities will take "appropriate action against officers who jeopardise their vessels or the lives or property of others".

One of the key concerns posed by the MCA is the fact that excessive speed has been an issue in a number of recent collisions.

One famous case with particular relevance is that of the "*Lady Gwendolen*", a collision in which the owners were refused leave to limit their liability after their ship had been found operating at excessive speed in fog. This loss of limitation of liability can have catastrophic financial implications for any Owner.

The UK Officers Union, Numast has responded to the MCA guidance, by stating that the word "Officers" should have been substituted with "Owners", as that is where they believe the ultimate power and responsibility for operational standards to rest.

So we see that the risks associated with poor onboard policies and the calls for increased standards and proficiency impact heavily on the ISM provisions within any Company – after

all, the standard of the Officers is the Achilles heel of all operations, but how can a Company guard itself from criticism while ensuring that it does all possible to monitor and improve the standards of its personnel?

The ISM Code addresses these concerns across a number of its sections – and the demands on the Company are plain to see. Failure to adequately address any of these areas can have obvious financial and legal repercussions.

From the very outset the Code requires compliance with mandatory rules and regulations, and the Company should ensure that all personnel involved in the Company's safety management system have an adequate understanding of relevant rules, regulations, codes and guidelines. The Code even stresses that the Owner must make a statement of intent on how this will be achieved.

It should be remembered that if the correct procedures and resources are in place, and if the Company is genuinely committed to safety and the improvement and support of their personnel, then there will be nothing to fear in the courts. With the correct procedures in place the standards of shipboard management will, over time, guard against such devastating incidents ever occurring.

Shipping companies often come in for criticism, and the Numast response stressed their belief that there are great swathes of the industry in which human factors are treated with scant regard and take second place to short-term cost-cutting.

With such criticisms, and with the threat of legal action in the event of an incident in mind, it is vital that any Safety Management System adequately addresses not just the requirements of ISM, but must be robust enough to stand up in Court.

For further advice on these issues, or to arrange an in-depth review of your ISM provisions please contact ConsultISM

## ISM FAQ's...When is a non-conformity not a non-conformity?

There still seems to exist, in some quarters, confusion about what is actually meant by a non-conformity or non-compliance with the ISM Code and a non-compliance with some other Resolution, Convention or law.

The easiest way to explain how the misunderstanding arises and how the differentiation should be made will be to use a common example. Consider the following question:

**“...would a failure to maintain Oil Discharge Monitoring Equipment constitute a violation under the ISM Code?”**

Put that way – the answer would be No!

However, if the question was:

**“...would a failure to have a management system in place to ensure that the Oil Discharge Monitoring Equipment was**

***maintained constitute a violation under the ISM Code?”***

Then the answer would be Yes!

The ISM Code basically requires a Company to set up a Safety Management System.

Section 1.2 of the Code sets out the ‘Objectives’ and section 1.2.3 states that:

*‘The Safety Management System should ensure:*

*.1 compliance with mandatory rules and regulations; and  
.2 that applicable codes, guidelines and standards recommended by the Organisation, Administrations, classification societies and maritime industry organisations are taken into account.’*

Section 10 of the Code deals with ‘Maintenance of the Ship and Equipment’ and section 10.1 states:

*‘The Company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company.’*

The relevant Regulations would probably be MARPOL 73/79 – Annex 1 - Regulation 16 – and, possibly, IMO Resolution MEPC.60(33). The manufacturers maintenance manual would also be relevant.

Consequently, a failure to maintain the equipment – or a failure of the equipment to maintain oil content levels below 15 ppm is a non-compliance with MARPOL 73/79. A failure to have a system in place to ensure that the relevant maintenance was being carried out or to monitor and check that the equipment was operating correctly would be a non-compliance under ISM.

## Meet the team...Peter Boyle

One of the aims of ReportISM is to introduce members of the ConsultISM team to clients and potential clients. In this issue we introduce one of our senior master mariners – Captain Peter Boyle MA, FNI, FRSA, AFRIN.

Following a Cadetship in the British Merchant Navy, starting in 1954, Peter was promoted through the ranks obtaining his Master Mariner Foreign Going Certificate of Competency in 1964. He was given his first command in 1969 and sailed as Master for the next 27 years – in command of a wide variety of ships ranging from small coastal vessels to VLCC’s .

Peter’s vast command experience included not only tankers and bulk carriers but also Cadet training ships which provided him with an additional insight into education and training. Working with crews of many different nationalities provided Peter with

valuable insight into multicultural relationships.

Following a long and distinguished seagoing career, including three years as President of the Nautical Institute, Peter eventually came ashore to work, initially as a ship and cargo surveyor in the Arabian Gulf before settling into a more permanent position as a member of the ship inspection team of a major P&I Club. As part of that team he was instrumental in assisting Club Members to introduce Phase 1 of the ISM Code into their offices and on board their ships.

Peter is passionate not only about safety in shipping but also about education and broadening the knowledge of shipping amongst those employed throughout the industry as well as the public in general.

We asked Peter to share with us



some of his views on a number of important contemporary issues:

### How can safety best be achieved?

‘Good education is paramount, and The ISM Code through a well developed Safety Management System will provide an excellent opportunity to build and develop such learning to include everyone on board ship as well as the office ashore.

I am concerned that some ship operators still seem reluctant to make

## Meet the team continued...

an investment in education and training – this is not only short sighted but a false economy. I am in no doubt that Continuous Professional Development – CPD is amongst the best investment any individual seafarer and ship operator can make and will be the key to success for the future of our industry.

There is also an ethical dimension to safety. We have a personal obligation to protect ourselves, our colleagues, mankind in general and our environment.'

### Who should be responsible for safety on board ship?

'This has got to be a team effort involving not only the Master but also the team in the office ashore and the rest of the team on board. Through good team resource management the Master must be skilled in his

leadership role. He must ensure that each team member understands his or her responsibility for their own personal safety as well as the safety of others.

A well constructed and fully functioning SMS will provide the structure and framework to help the Master and his team manage safety on board. A supportive D.P. and management ashore will ensure that adequate resources and support are provided to achieve that end.'

### Does safety pay the bills?

'I would put it this way – an absence of safety is always very expensive for the ship operator – even if they are insured! I am in no doubt that a safe ship is an efficient ship – with fewer accidents and claims – and, consequently, a more profitable ship.

A Master and crew on board cannot influence freight or charter rates but can have a huge influence on the bottom line and the retention of profit. Accidents such as collisions, cargo damage, personal injuries, oil spills etc. result not only in insurance claims but in significant uninsured losses. This is money just draining out of the Company profits.

By committing to safety this draining of profits can be stopped – this is a basic law of economics and good management – it is amazing to me that some ship operators have still to wake up to this simple fact of life.

I am delighted to be working with the team at ConsultISM because I believe we can help ship operators increase their profits through helping them with their management of safety.

## ConsultISM – Out and About



In mid April Dr. Anderson paid a visit to Washington D.C. in his capacity as President of the Nautical Institute.

During that visit he availed himself of the opportunity to meet with senior staff members of the United States Coast Guard at their Head Quarters.

An extremely useful series of discussions ensued relating to ISM issues. Further areas of mutual interest were also explored.

In addition to meeting with key members of the USCG safety team, Dr Anderson also held meetings with members of MARAD, the United States' Marine Administration.

A number of presentations and workshops have taken place recently with leading Maritime Law Firms and P&I Clubs in which we explored the relevance of the ISM Code to Claims, the collection and evaluation of evidence and claims handling.

These sessions have been extremely well received and feedback has confirmed that participants found them very useful and enlightening.

ConsultISM would welcome invitations from other Law Firms, P&I Clubs, marine insurers or indeed ship operating companies to make similar presentations or to run a workshop and share ideas about the potential

significance of the ISM Code in claims handling.

At the time of going to press, Dr Anderson was preparing for his 'day in court' in Athens, as Expert Witness, with the London Shipping Law Centre / BIMCO 'Mock Trial' scheduled for the 5<sup>th</sup> May.

A new scenario has been devised which will explore in detail the extent to which various failures to properly implement a safety management system could affect the way in which the obligation to 'exercise due diligence' to make the vessel seaworthy under the Hague Visby Rules might be interpreted.

The case will be argued by two Queens Counsel, Simon Kverndal and Steven Berry and will be presided over by a very senior and experienced Judge – Sir Anthony Evans.

A last minute booking may still be possible – visit the LSLC Website at [www.london-shipping-law.com](http://www.london-shipping-law.com)

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