

# ReportISM



The ISM Code Magazine...  
by experts for professionals.

INSIDE ISSUE 9

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# Dr Phil's Diagnosis...



Welcome to issue 9 of ReportISM – the unique electronic newsletter dedicated to marine safety management and ISM related issues.

Since the last issue of ReportISM there has of course been a 'Concentrated Inspection Campaign' (CIC) undertaken by the main Port State Control MOU's focussing on ISM implementation and related issues. At the time of preparation of this edition - the findings and conclusions of the CIC are inconclusive and so we have decided to defer any comment until the next issue when we hope a clearer picture will be available.

Readers will recall that in issue 8 we provided feedback that the IMO Marine Environmental Pollution Committee (MEPC) had approved the proposals with regard to an additional Annex to Resolution A.913(22) – Revised Guidelines on Implementation of the ISM Code by Administrations – setting out requirements relating to the experience, qualifications and training for the role of Designated Persons under the ISM Code, and to provide Guidelines for the operational implementation of the ISM Code by Companies. I am now delighted to advise that these proposals were considered by the IMO Maritime Safety Committee (MSC) meeting which was held in Copenhagen in early October where they were also approved by that committee.

These proposals should now become the subject of IMO circulars that will, hopefully, be disseminated in the very near future. I would like to express my personal congratulations to those involved in moving these proposals forward – I am in no doubt that they will make a very positive contribution towards the successful implementation of an efficient SMS.

On pages 4 and 5 of this issue I reflect upon the potential implications of the Corporate Manslaughter and Corporate Homicide Act 2007 – which received Royal Assent on 26th July 2007 and which will come into force on 6th April 2008. Many of the barriers that had previously inhibited the possibility of a successful prosecution of an organisation for Corporate Manslaughter have been removed, such that every ship operating company should take a very careful and close look at how it is managing health and safety. In the article I argue that it is the way in which a Company has developed, implemented and is monitoring its ISM safety management system which will fall under the prosecutors microscope and will form the crucial factor when deciding 'Guilty or Not Guilty'!

Other articles in this issue include the Nautical Institute's view on people and pollution, a look at India's vigorous ISM policing, the perennial issue of ISM and Checklists and a look back on the first 3 years of **ConsultISM**.

As ever I hope you find ReportISM interesting and stimulating, and please remember to regularly visit our educational website InformISM – [www.ismcode.net](http://www.ismcode.net) for (almost) everything you may need to know about the ISM Code and safety management – including BlogISM – where your input and views can be aired and shared with others involved in these important issues.



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# People and Pollution

With environmental crimes continuing to sadly tarnish the image of shipping, it is important to look at where shipping is failing to either interpret the rules, or where it is failing to take the right actions, both ashore and onboard.

When one thinks of management systems it seems that perhaps rather too much emphasis is placed on the instructions given and the procedures in place, rather than the surrounding motivation, commitment and enthusiasm they engender from the people who actually have to work within their constraints.

The Nautical Institute (NI) recently looked at this issue in more depth within the context of pollution control, and in the wake of the increasingly disturbing instances of "Magic Pipe" trials in the United States.

The issues of pollution control and environmental management have gained an increasing level of importance over the past couple of years, and there does indeed appear to be a real sense of urgency across the industry to not only make improvements to systems in place, but to make the current rules work across every vessel type and trading area.

A cursory glance at the stringent rules in place, and the many positive statements made by companies looking to implement them and to excel in their interpretation, it seems all is well, and that any problems have been overcome. However, when senior officers begin to voice doubts on this managerial commitment, and when they talk of dislocation between ship and shore, it seems we are heading for more troubled waters.



The concerns over the issues and practicalities of day-to-day environmental shipboard management were expressed by the NI's SeaGoing Correspondence Group (SGCG), and when those charged with making things happen raise concerns and identify some disconcerting trends then it is time to listen.

With regulations affecting everything from bilge oil and sludge, cargo waste, garbage, air emissions and ballast water, Captain Harry Gale, NI Technical Manager stresses that, "Rules and management systems do not work in isolation. Urgent action is needed to ensure that people onboard have the equipment, the guidance, the motivation and empowerment needed to act on pollution".

In examining why there appear such difficulties in complying, there are reportedly repeated failures by many owners to engage in a positive interpretation of the rules and procedures, and to communicate these to their shipmasters.

In today's environmentally aware society, and as the entire shipping industry looks to boost its "green credentials", it is vital that in the face of vigorous policing and enforcement that pollution prevention requirements

must be matched by positive onboard systems and encouragement, and this can only be achieved through positive leadership from shore management.

According to the NI it is not enough for management systems to simply state what should be done, there needs to be a consistent approach by owners and operators to ensure that their words are matched by the right equipment, training and a real commitment to connect with those onboard in order to prove they are truly serious about tackling

pollution.

With the risk of enormous financial penalties and with jail time a real possibility, owners who simply relax and assume all is in order can get a real shock when things go wrong.

The NI has identified a number of potential pitfalls in ensuring compliance, and these include poor equipment and maintenance, procedural problems and out dated practices, through to ill equipped port facilities.

However, not all the problems stem from equipment or procedures, and the NI regrettably recognises the age-old "can do" attitude of many seafarers can be damaging. In too many instances there appears the problems of falsified records, and of a continued willingness to do what is thought best by an individual, even when that flies in the face of the Safety Management System (SMS). To guard against this, it is vital that companies do not simply pay lip service to the rules, they need to impose tangible, positive steps to guard against complacency, to mitigate the risks of mistakes, and to guard against misguided errors of judgement and to ensure the actions of those onboard are always the right actions.

# Corporate Killings



prosecution against a company for manslaughter. The problem has been the necessity for the prosecution to demonstrate a causal link between a grossly negligent act or omission by a person who is considered to be the alter ego or controlling mind of the company and the actual fatality. It has been extremely difficult to establish that level of proof – beyond all reasonable doubt – such that there have been very few convictions of companies for manslaughter.

However, the new Act will attempt to overcome those problems of the past such that, from 6th April 2008, where there are management failings at a senior level – either individually or collectively – the Courts will now have an instrument which may allow a successful prosecution.

In the UK the Corporate Manslaughter and Corporate Homicide Act 2007<sup>1</sup> finally received Royal Assent on 26 July 2007. Whilst the Act will not come into force until 6th April 2008 - Ship Owners, chief executives and other senior managers of ship operating companies should waste no time in considering the potential exposure of their companies.

Contrary to earlier expectations, it is now clear that the Ship Owner or Chief Executive will not personally serve prison sentences if the ship operating company is found guilty of corporate manslaughter. However, should an incident occur, the activities of the high ranking officials in a ship operating company, as well as ISM Designated Persons and the management generally, will fall under the microscope of close investigation. It is likely to be the management activities, particularly the management of health and safety activities, which will determine whether the Company is or is not found guilty of corporate manslaughter. That in turn will depend upon how well the

safety management system (SMS) of the ISM Code has been developed, implemented and is working in practice.

Companies, as well as other organisations and even Government bodies, now face an unlimited fine if they are found to have caused death due to, for example, gross corporate health and safety failures.

It is suggested that the exposure involves not only prosecution under the Act – and the immediate devastating consequences which may flow from that – but also a potential risk of losing liability insurance cover. There will also be immense stress and psychological pressure on all those within the company falling under the prosecutor's microscope.

Industrial, and similar, accidents can and do happen. Unfortunately, on occasions, people lose their lives as a result of accidents. Up until this time, under existing legislation in the UK, it has been difficult to bring a successful

Although individuals may still face personal manslaughter charges where there is direct evidence of their culpability.

Section 1(1) of the Act defines the situations under which a company, or other organisation, will be guilty of corporate manslaughter by making direct reference to the way in which the activities are managed or organised.

Specifically if those activities:

1. cause a person's death, and
2. amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

From the perspective of commercial shipping, that management activity should be set out within the SMS manuals and other supporting documents, which should be brought alive within the day-to-day operation of the Company and its ships and documentary evidence, by way of records etc., should be available to demonstrate that the correct

1. See: [www.opsi.gov.uk/acts/acts2007/ukpga\\_20070019\\_en.pdf](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070019_en.pdf)

# Corporate Killings cont....

management procedures were being followed in practice.

The questions every Company, and every manager within a ship operating company – especially the DPA – should be asking themselves are:

- how well are we really managing health and safety in this Company?
- can we prove it?
- can we do better?

If there is any doubt about the honest answers to any of those questions then action should be taken to review the SMS and the way it is being implemented and monitored.

It is perhaps worth reminding ourselves, when considering such questions, of the stated objectives of the ISM Code as set out in Section 1.2 of the Code:

## 1.2 Objectives

*1.2.1 The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property.*

*1.2.2 Safety management objectives of the Company should, inter alia: 1 provide for safe practices in ship operation and a safe working environment; 2 establish safeguards against all identified risks; and 3 continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.*

*1.2.3 The safety management system should ensure: 1 compliance with mandatory rules and regulations; and;*

*2 that applicable codes, guidelines and standards recommended by*

*the Organization, Administrations, classification societies and maritime industry organizations are taken into account.*

It is also worth remembering that it is not sufficient for a Company merely to put in place a set of procedure manuals, checklists, guidance notes and the like and place these on board ship with instructions to the Master along the lines of: '...here it is now get on and implement it!' The responsibility remains with the Company to ensure that the SMS is being implemented properly and effectively and this requires monitoring of the system. Whilst the DPA will play a crucial role in that monitoring it will also fall upon all line managers, port Captains, Superintendents and the like to participate in the monitoring activities.

Reverting to the question raised over the possible loss of liability insurance cover – ship operating companies should contact their P&I Club or other liability insurance provider to seek clarification.

The potential problem arises from the general legal principle that no person can profit from his or her own wrongdoing. Consequently, an insured will not be permitted to recover under a policy of insurance for his or her own criminal or tortious act – although this may require proof of intent.

Clearly, if liability insurance cover was lost then that could not only result in penalising the ship operating company – but could also result in the injured party, or rather their dependents, receiving compensation.

At this time the answers to the questions raised in this article are far from clear. However, it is suggested that the time to consider their relevance and significance is not after a fatality has occurred. These issues should be considered and addressed now.

The most obvious solution however is clearly to ensure that the Company is providing full commitment to the development, implementation and monitoring of its SMS and all that is needed to ensure such compliance. Remember, the ISM Code will be the greatest friend you could ever wish for – or the worst enemy you could ever imagine. It will all depend upon the way in which the SMS has been developed and implemented in practice.

ConsultISM can undertake a review of the safety management system of ship operating companies and provide independent, objective and confidential advice on how well the SMS is set up and working in practice, where weaknesses may exist and what may need to be done to tighten up the systems. Such a review should help towards reducing the risk of incidents occurring and help provide the framework within which a Company can demonstrate that it is doing all that it reasonably can to manage health and safety and protect its employees and other people to whom it may owe a duty of care. Do not wait for a fatality to occur before undertaking a review of your Company SMS – it needs to be done today!

To discuss how ConsultISM could help your Company with such a review – please contact the Managing Director- Dr Phil Anderson on [philanderson@consultism.co.uk](mailto:philanderson@consultism.co.uk) or +44(0)1434 600839



# Checklist Mentality

Since the very early days of ISM and QA type management systems – the very idea of checklists has been the subject of protests by many seafarers who seem to insist:

- **Masters and ships officers are professionals and checklists are an affront to their professionalism,**
- **they do not need checklists to do their job properly,**
- **checklists merely add to the workload of already overburdened Masters and officers,**
- **it is merely a ‘ticking the box’ exercise with no practical value other than to satisfy the internal and external auditors.**

Recently we were undertaking a review of a Company SMS and this involved travelling onboard one of their vessels. On the Bridge we observed the duty deck officer undergoing the pre-departure check of the Bridge Equipment. He systematically moved from telegraph to helm, radars to GPS etc. – when he had finished he pulled a checklist from a drawer, which already had all the boxes ticked and duly signed and dated the checklist ready for presentation to the Master. We asked the officer two questions:

1. **How do you know that you have not forgotten to check some particular item of equipment?**
2. **What purpose does the checklist serve?**

In answer to the first question he explained that he performs the pre-departure checks on a very regular basis and he knows what to check. In answer to the second question, he explained that the checklist is merely a record to confirm that the checks were done.

The worrying point is that the officer seemed to genuinely believe that he was performing his job properly and was using the checklist correctly. It would suggest, to us, that he had not understood the first principles of checklists and that he was performing his job in a most dangerous, unsafe and unprofessional manner.

The whole purpose behind the systems approach to managing safety is to create barriers which reduce to a minimum the chances of human errors occurring. However infallible we may think we are – we human beings do have the propensity to forget things on occasions – and indeed we do forget things! The correct use of checklists i.e. completing them at the same time as we are actually involved in carrying out our checks, will reduce the risk of us forgetting something to a minimum and thus create a strong barrier against a human error occurring.

Airline pilots don't seem to have a problem understanding the importance of checklists so why should it be such a problem with mariners?



# Dangers of Drink



A recent decision under the UK Railways and Transport Safety Act 2003 has given insight into the concept of a Master's "duty", and provided stark warning of the risk of prosecution after drinking.

While waiting alongside an east coast UK port, a supply ship Master was instructed that the vessel was not required for working until the following morning.

Upon receiving this instruction the Chief Officer went on duty for the night, and deck and engine-room port

watches were set. The Master went ashore and returned later in the evening, having consumed 3-4 pints of beer.

Some hours after his return an incident occurred and the police arrived onboard. Though not involved in the incident, the Master was breathalysed, arrested and

charged with having alcohol in his breath over the prescribed UK limit (35 micrograms per 100ml of breath), while being on duty as a professional Master of a ship, contrary to Section 78 1(a) of the Railways and Transport Safety Act 2003.

The case subsequently turned on whether the Master was 'always on duty' for the purpose of the Act. For the Master it was argued: "...on duty means, in the course of his employment as a professional Master of a ship, performing or being liable to be called on to perform a safety

critical function in the operation of the ship, which it is his duty to perform."

The Judge accepted this definition, and as the Master had not performed any "safety critical" function when over the limit, the Master was acquitted accordingly.

While the acquittal seems prudent, it could so easily have been different. Therefore, whatever a company's policy as regards alcohol on board their ships, the dangers of drink consumed ashore remain. So it is vital staff are fully aware of the relevant legislation and their own internal rules.

While future prosecutions might, as here, rest on important legal definitions, the risk can be minimised by awareness and informed behaviour, amid good practices and procedures.

Thanks to Andrew Glynn-Williams ([andrew.glynn-williams@hild Dickinson.com](mailto:andrew.glynn-williams@hild Dickinson.com)) and Hill Dickinson LLP for allowing us to reproduce extracts of an original article from their September 2007 Marine Newsletter.

## SECA's & SOx

As ship's officers continue to wrestle with the confusion wrought by MARPOL 73/78 Annex VI, and with the limits of SECA's and SOx, clear information is at a premium.

Master's and Chief Engineers now have to ensure their vessels are compliant when entering the newly formed North Sea , Sulphur Emission Control Area ( SECA ), and yet confusion still surrounds application of the rules, and the extent to which they effect ship's officers control of emissions in port and at sea.

Indeed MARPOL 73/78 Annex VI places tough legal obligations on ship's officers and crew as well as their managers ashore. Any failure to comply with such obligations could

lead to serious penalties. With this in mind, Shiptalk and Clyde and Co. recently produced a short guide to put aside the myths and mysteries in a concise and easy to follow explanation. With this implementation and enforcement in mind this concise guide covers:

- MARPOL Annex VI
- Sulphur (SOx) Content Limits
- EU SECA and Other SECA 's
- Monitoring and Compliance
- Penalties for non-compliance
- What does the future hold?

We at **ConsultISM** are aware and concerned by the level of misunderstanding, or possibly lack of full understanding in the minds of many people both ashore and

onboard ship, of the requirements of the new Annex VI of MARPOL 73/78. As such we see that this short SECAs and SOx guide is worthy reading for ship's officers, crew, managers, superintendents, as well as marine students both deck and engine who may be asked searching questions in their oral examinations about compliance with MARPOL 73/78 Annex VI.

Order at [www.shiptalkshop.com](http://www.shiptalkshop.com)



# India Tackles ISM

It is not just Paris MOU port State authorities that are taking a closer look at ISM and safety management. After 17-18 shipwrecks on the Indian coast, mostly involving foreign ships, the Directorate General of Shipping (DGS) has decided to take action.

DSG has tightened Flag State and port State controls by imposing stringent measures and has strengthened its detention regime for non-compliance of the ISM code.

According to Ajoy Chatterjee of DSG, "There is a total negligence and lack of interest in implementing the ISM Code by companies".

He added, "If the ISM Code is implemented, you can be sure that there will be total safety. I would say even old vessels, if properly



maintained, can be safe. The main reason for accidents is negligence and not having proper officers and crew,".

The investigations carried by DSG revealed that the majority of the recent rash of accidents involved grounding and sinking of general cargo ships due to poor maintenance of the hull and machinery equipment.

Considering the fact that most shipwrecks involved foreign flag vessels, the official said, "The trade does not believe in maintaining balance between commercial activity and safety. Accordingly, 'advisory' issued highlights the need for due diligence and basic seamanship to be exercised by the ship's crew calling at the ports, irrespective of the flag.

With the DSG so strongly stressing the hugely positive role ISM plays in protecting vessels, and of the benefits of the tanker management self assessment (TMSA) scheme there is an increased importance placed on management systems by the Indian authorities, and such this will no doubt be reflected in the level of port State inspections in the region over the coming months.

See [www.iomou.org](http://www.iomou.org) for details.

## Happy Birthday!

ConsultISM has recently celebrated its third birthday. This has been an exciting and interesting time for its Managing Director Dr. Phil Anderson who reflects that '...this has been a natural career progression following 11 years at sea and 25 years working in P&I insurance.'

During this three year period Dr. Anderson and ConsultISM staff have been instructed as expert witness' and consultants in nearly 50 legal and insurance claims and disputes – involving criminal, civil and commercial actions. The disputes and claims have involved both courts and arbitration tribunals around the world including the United States and Canada, South America, Mediterranean and Northern Europe but mainly in the U.K. Many of the incidents involved navigation related incidents – collisions,

groundings and strandings, some major pollution incidents, cargo explosions and fires as well as serious personal injuries and fatalities – where manslaughter and corporate manslaughter were involved.

In this wide range of incidents there was one common theme – the management of safety – the extent to which a failure to manage

safety contributed to the incident and whether any failure to manage safety constituted a failure by the ship operator to comply with the requirements of the ISM Code.

Increasingly ConsultISM staff are being recognised internationally as the ISM experts and indispensable advisers to both the claimant / prosecution and defence teams.

So we would like to add a special thank you to all our clients, and those that have helped out over this first 3 years.



For further information about ConsultISM visit our website on [www.consultism.co.uk](http://www.consultism.co.uk) or contact Dr. Phil Anderson, via:  
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