

Sinking Ships Loosen Lips: Privilege and the Right to Counsel in Marine Accidents

Be it a sinking, a collision, a catastrophic machinery failure, a personal injury or death aboard a ship, or an oil spill, a mariner is well advised to understand the nature of their responsibility to cooperate with marine investigations, and particularly their right to privilege over what information they disclose and how they disclose it. Knowing your rights can help to protect not only your own personal and professional life, but also those of your employees or your employer.

When a marine accident occurs there are many authorities that can become involved. In the chaotic hours after an accident you may have to deal with Coast Guard, the RCMP or local police, Transport Canada, the Transportation Safety Board, the local Port Authority, Workers Compensation, the coroner's office, the union, your employees/employer, and the media. Until the general circumstances of the accident are understood, there is often some confusion about what the role of each authority is, and who will take the lead on an investigation. Indeed, simultaneous investigations are often conducted - the police may attend an accident scene to take statements to support a criminal prosecution, at the same time the Transportation Safety Board is investigating as part of their mandate to improve transportation safety.

This image, the shock and aftermath of even a minor accident, and being peppered with demands for information from officials whose objectives have not been made clear to you, highlights the importance of not rushing to make statements, or explain events. In such cases it is critical that the mariner "push the pause button" on the situation, slow the events down, and seek counsel to help them understand what they do and don't have to say, and who they have to speak to. It is easy, and apparently self-serving, for a lawyer to say "in the event of a marine accident, call a lawyer", but there is more to this advice than meets the eye. When a lawyer is retained, information passed to that lawyer is protected by solicitor-client privilege and cannot be disclosed or used against you. Having this privilege, and the opportunity to discuss and consider facts following a marine accident prior to making statements, can ensure that what information you do provide is clear and used only for the purpose it was intended.

Unlike the United States, where parties to a marine accident can “plead the 5th”, or rely on the 5th Amendment to the U.S. Constitution to refuse to give statements that are incriminating, Canada law provides that a mariner must give statements regarding a marine accident. For example, s.244 of the new *Canada Shipping Act 2001* provides that a *marine safety inspector* or *any designated person* can board the vessel for the purposes of ensuring compliance with marine regulations and “direct any person to answer reasonable questions”. The penalty for not complying can be as high \$1,000,000 or 18 months in jail, or both (s.245(2)). There are similar requirements to answer questions in the *Small Vessel Regulations* (s.46). Similarly, under the *Canadian Transportation Accident Investigation and Safety Board Act* (“CTAISB”), which established the Transportation Safety Board (“TSB”) and provides its mandate to advance transportation safety by investigating and reporting on causes and contributing factors of an accident, a person is required to provide statements to investigators.

However, Canadian law recognizes that the requirement to give statements, and the possibility that they may be used in other legal proceedings, would have a chilling effect on people’s willingness to be frank. Therefore, various Canadian laws provide that statements given for the purposes of such an investigation are privileged, and cannot be used for other purposes. These laws include the *Charter of Right and Freedoms*’ guarantees against self-incrimination, as well as provisions in both provincial legislation (the B.C. *Evidence Act*) and federal legislation like the *CTAISB*.

That information provided by a mariner after an accident can be used against him in ways he did not expect was highlighted recently in the 2007 case of *Regina v. McKay*. In the case, on a foggy night in Halifax Harbour, the master of a pleasure craft carrying passengers home from a night out collided, at 55 knots, with a naval buoy that had moved 150 feet out of its expected position by the ebbing tide. The vessel capsized and sunk, with all but one of the occupants making it to shore. In the hours after the accident local police, port authorities, and marine safety officials attended at the scene and took statements, including several from the master, who understood he was obliged by *Canada Shipping Act* regulations to answer questions. However, he was later charged with criminal negligence causing death under the *Criminal Code*. At trial, the judge stated:

I think that a person in an accident, whether on land or sea, over which the police have investigative powers and where the police can and do wear several hats so to speak, should at least make it clear to an interviewee what hat they are wearing or to organize the investigation in such a manner that would minimize any intrusion upon protected rights. Here, I find that the accused although aware that he had to give the police information about the accident conceivably, he might not have done so and acquiesced to the questioning of the police believing, in the circumstances, that it was the lawful thing to do, if, as it was suggested, he had been informed that the police could use the information against him at a criminal trial it would have given him an opportunity to make a real informed choice that could affect the outcome of the trial. Not being fully informed that he

had a choice had indeed prejudiced him at his trial and would, in my opinion, render it unfair. The accused was statutorily bound to speak to the police and it would be unfair to use his statement, in the circumstances, against him.

Attempting to explain our innocence, or seek mercy from officials by admitting we did something wrong, is a common human response after an accident. However, one of the worst things a mariner can do after a marine accident is rush to explain what happened. Often these statements are made when the mariner is in a state of shock, or is tired and stressed, or only has some of the information that he will later have to help him interpret his experience. It is important that mariners appreciate that while they are required to answer questions regarding marine accidents, they do not have to provide answers as soon as they are asked. You have a right to consult counsel prior to answering questions, the object of which is to allow you to collect and analyze facts and respond to questions in a way that is both accurate and protects your right against self-incrimination. It is important that, in the heat of the moment, you do not forget that you have this right, and that you are not afraid to use it.

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