

**Criminal Negligence and Dangerous Operation of Vessels:**

It is commonly thought that criminal charges only arise where a person intends to commit the criminal act. Television shows often depict people being acquitted of a criminal charge, such as theft or assault, because although it was proven that the accused committed the theft or assault, there was no evidence they did so intentionally. It is a mistake, however, to assume that when it comes to operating a vessel, a mariner cannot be convicted of a criminal offence simply because they did not have the positive intent to commit the illegal act. With imprisonment being a possible consequence, and lengthy prohibitions against operating vessels being a common penalty, it is important for mariners to appreciate the lasting effects of momentary carelessness at the helm.

**Criminal Code Offences:**

The *Criminal Code of Canada* contains two important vessel-related offences: *dangerous operation* of a vessel, and *criminal negligence*. Regarding *dangerous operation*, s.249 of the *Criminal Code* states:

*every one commits an offence who operates a vessel.... in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea.*

The more serious offence, *criminal negligence*, comes from s.219 of the *Criminal Code*:

*Every one is criminally negligent who in doing anything, or in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.*

**Negligence, Not Intent, is the Test:**

What is important about these offences in regards to mariners is that, unlike most criminal charges, it is not necessary for the Crown to prove the accused intended to commit the act in order to get a conviction – it is enough that the accused was careless or willfully blind to the

risk. In 2005 a pontoon boat capsized in Lake Okanagan with 54 people aboard shortly after leaving the dock, killing one passenger who was trapped in the head. The Crown charged the skipper of that vessel with *dangerous operation of a vessel causing death* and *criminal negligence causing death* on the basis that the skipper should have identified that the vessel was overloaded and unstable and that he should not have reversed the vessel away from the dock after two passengers had untied the vessel without instructions. The court said: “For either criminal negligence or dangerous operation of a vessel, the basis of a finding of guilt is negligence, and the question is whether, viewed objectively, the accused exercised an appropriate standard of care. If an accused has fallen below an accepted standard of care, then the question is the extent to which he has fallen below the accepted standard of care.”

The Court referred to the progressively severe nature of conduct that was required to convict a person of mere negligence, versus the more severe criminal charges of *dangerous operation* and *criminal negligence* when it said: “negligent driving or negligent operation of a vessel can be thought of as a continuum that progresses, or regresses, from momentary lack of attention giving rise to civil responsibility through careless operation of a vessel, under the Canada Shipping Act, to dangerous [operation], culminating in criminal negligence which is conduct that shows a wanton or reckless disregard for the lives or safety of other persons”.

### **Dangerous Operation: Requires “Marked Departure” from Standard of Care**

Simple negligence (such as rear-ending someone in your car, or losing an engine while docking and colliding with a moored vessel – see “Foul Berths”, May 2008 Legal Desk) is not a criminal offence and requires only that the conduct falls *slightly* below the appropriate standard of care. *Dangerous operation*, on the other hand, while still requiring negligence, requires that the sub-standard conduct be more than just slight. In a 2006 B.C. Supreme Court case that considered charges of *dangerous operation* against a Campbell River man who injured passengers when he drove his skiff at high-speed between dock pilings (but didn’t quite make it), the court said “in order to establish dangerous operation, it must be shown not only that the accused’s conduct was a departure from what a reasonable person would have done, but also that it was a marked departure from that standard.” What is a “marked” or a “significant” departure from appropriate care in the circumstances can only be considered on a case by case basis, but suffice it to say that it has to attract enough of the police’s attention to warrant the preparation of the paperwork necessary to charge the mariner. This more is likely when people are injured or killed, though not a requirement.

### **Criminal Negligence: Requires Proof of Wanton or Reckless Disregard for Safety**

*Criminal negligence*, the most severe charge, on the other hand, requires not only that the accused be shown to be negligent, but that they had a wanton and reckless disregard for the safety of others. In a recent Nova Scotia case where a mariner struck an unlit military buoy in the fog, killing a passenger, the court declined to convict the accused of criminal negligence causing death, but did convict of dangerous operation causing death, finding that his speed, in excess of 55 knots, was imprudent. In doing so the court stated: *"notwithstanding that I have found him in breach of a duty imposed by law [the Collision Regulations], it is clear that mere proof of such a breach is insufficient to support a conviction for criminal negligence unless there is accompanying evidence of wanton or reckless disregard for the lives or safety of others"*.

The court considered whether the mariner disregarded, or was willfully blind for the safety of others and said: *"with no evidence to the contrary, it would appear, and I find that he had a reasonably held belief that it was safe to operate the vessel in that direction. As there was no other vessel in the vicinity there was no foreseeable risk in him doing so as he was also familiar with the waters. Moreover, the boaters on the vessel had full confidence in his seamanship and the manner in which he was operating the vessel. The waters were calm, he was not intoxicated, he was a competent operator and there was no evidence that the vessel was being operated in an unsound mechanical condition or that a reasonably prudent person would have foreseen that the buoy would have drifted fifty-three to fifty-seven metres from its charted position into the vessel's navigational pathway"*. In short, the court found the mariner had a genuine belief, at least to himself, that he was operating the vessel safely, despite his excessive speed.

Each of the above offences can arise whether or not the mariner's action or inaction results in damage to property or injury to a person, but in the case of injury to a person, they can be upgraded to, for example, dangerous operation "causing bodily harm" or "causing death", which results in higher penalties. On the lower end, for example, in 1998 a Vancouver based seine-boat operator was convicted of dangerous operation when he cut through a group of pleasure vessels in Plumber Sound, narrowly avoiding a collision – he was fined \$2,500. On the other hand, the Nova Scotia master who collided with the unlit military buoy was given an 18 month sentence (to be served under house-arrest), and a 5 year operating prohibition.

In summary, accidents while operating a vessel can give rise not only to civil law suits between private parties for property damage and personal injury, but also to criminal charges by the Crown for *dangerous operation* and *criminal negligence*. While the tests for being convicted of dangerous operation (“marked departure” from standard of care) or criminal negligence (“reckless disregard” for safety) are more stringent than simple carelessness, the consequences are much greater and mariners are well advised to remember that when it comes to operating vessels there can be a surprisingly fine line between being careless, and being a criminal.

Darren Williams, a former commercial fisherman, is a marine lawyer practicing with the firm of Williams & Company in Victoria, British Columbia and can be reached for question or comment at [dw@MarineLaw.ca](mailto:dw@MarineLaw.ca) or 1-866-765-777, or by emergency phone at 250-888-0002.