Rules of the Road: The Impaired Mariner

By: Darren William and Mel Hunt,

As lawyers, it would be improper for us to advise you on ways to avoid a conviction on charges for driving a motor vehicle or operating a vessel while affected by alcohol or drugs, except to say that the best advice we can give you is to not take the wheel or helm if you have consumed alcohol or drugs. However, as mariners we know that, realistically, this advice will not often be followed. Thus, there a few tips we would like to pass along if you find yourself behind the wheel or at the helm after having consumed alcohol or drugs.

Obviously, driving an automobile and operating a vessel are integral to earning a living as a mariner. A conviction that results in your being prohibited from engaging in either of these activities is a threat to your livelihood and to the financial security of your family and business. Despite this, an average person, or even a Premier, might find himself operating an automobile or a vessel after having consumed enough alcohol or drugs to put him or herself in legal jeopardy because he believes, often times wrongly, that he has not consumed enough to put them at such risk. There are also those circumstances where mariners, knowing they have had too much, simply decide to "roll the dice" and take the chance of not being caught or having an accident.

Aside from the criminal penalties that can result from an offence involving the use of drugs or alcohol while operating an automobile or vessel, there are other consequences. For example, if you were to be found at fault in an accident and convicted of such an offence your insurance coverage may well be voided because you were in breach of the policy. As a result you could find yourself paying large amounts of money to third parties who were injured. In addition, depending on all of the circumstances, the Workers' Compensation Board may exact fines on your company. It is very common for those caught up in such circumstances to be absolutely shocked at the fallout from the error he or she made in judgment in getting behind the wheel of an automobile or at the helm of a vessel. However, the purpose of this article is not to frighten or lecture readers, but rather to provide a few pearls of wisdom, we hope, in how you may minimize your exposure (your risk of loss) to the consequences of such an error in judgment. Let us get underway.

From Pub to Port:

A common situation mariners face is for that all-too-usual drive from the pub to the boat, or from the pub to home. Picture this, the refit work ends at around 5:00pm and you and your crewmates leave the shipyard go to the pub for a beer. The first beer tastes like another, and before you know it you have had three pints within an hour at which point you realize you are going to be late for dinner. On the way home you are stopped for

speeding or at a roadblock. In these circumstances, what is likely to happen next? What should you do? What should you avoid doing?

Prior to discussing the processes involved this roadside situation, it will be worthwhile to outline the basic offences and penalties associated with driving an automobile after having consumed alcohol or drugs.

Under the *Criminal Code of Canada*, you can be charged with: (1) impaired driving, (2) driving with a blood alcohol concentration exceeding 80 ml. of alcohol in 100 ml. of blood (commonly referred to as "over .08"), and (3) refusing to provide a suitable sample of your breath or blood upon a proper demand being made. It should be understood that a mariner can have one pint of beer, for example, on an empty stomach and be found to be "impaired", even though their blood alcohol concentration is not over .08. This is so because depending on a number of variables the person could display the hallmarks of impairment such as, poor motor coordination, slurred speech, watery eyes, lack of proper balance, etc.

Driving with a blood alcohol concentration of over .08 is also an offence under the *Motor Vehicle Act of British Columbia.* Under that Act as well as the *Criminal Code* a blood sample can be demanded under certain circumstances to measure your blood alcohol level. The blood alcohol level, however, is also a reasonable indication of whether or not you are impaired, even though each is a different offence. The table at figure 1 is a rough guide to the theoretical concentration of blood alcohol a person of a given weight will have in relation to the number of drinks consumed in 1 hour. A drink is counted as 12 ounces of beer, 1½ ounces of liquor, or 5 ounces of wine. Thus, following the table, if a person weighs 160 lbs. and has 4 drinks in 1 hour their blood alcohol concentration will be .094. It is called theoretical because this does not take into account the person's elimination of alcohol over a period of time. Although there are number of variables that have to be taken into account in a particular case, a rough guide is that your body will eliminate .015 in blood alcohol concentration every hour. So, in the example above of a person who weighs 160 lbs. who has had the 4 drinks over a period of 2 hours will now have a practical blood alcohol content of approximately .064 (.094 - .030). This puts the person under .08, but it should be understood that forensic scientists in this field are of the view that even a blood alcohol concentration of .05 or more means that it is unsafe for the person to be driving.

The penalties for a first conviction of impaired driving, driving over .08, or refusing to provide a sample of one's breath or blood is a fine in the minimum amount of $600.00 and a minimum of a one year driving prohibition. For a second or subsequent offence penalties quickly escalate and, thus, for a second conviction a minimum of 14 days imprisonment is prescribed. In cases where the offender has more than twice .08 the court may impose more severe penalties for either a first or subsequent offence. It should also be noted that where a person is found guilty of impaired driving that results in bodily harm to a third party the maximum term of imprisonment is for 10 years and of death results, the maximum penalty of life in prison.

You should also be aware in this context that you do not actually have to be driving the motor vehicle or operating the vessel when apprehended. It is sufficient that you had "care and control". Care and control exists when it is possible for you to put the motor vehicle or vessel in motion, even accidentally. Accordingly, even those sleeping in their motor vehicle or vessel, or even attending to it while it is disabled, during the period while under the influence of alcohol or drugs, may well be considered to have been in care and control of it by a Court of law. For instance, under the *Criminal Code* anyone found in the driver's seat of a motor vehicle is deemed to be in care and control, unless that person can establish that they occupied the seat for a purpose other than to put the vehicle in motion. Interestingly, a "motor vehicle" is defined under the *Criminal Code* as being any vehicle, except a train or streetcar, that is propelled by means other than muscle power. Therefore, a motor vehicle includes any kind of boat, a herring punt, a dingy with outboard, a jet-ski, and even a sea plane. Operating any of these machines while committing one of the offences referred to above is a criminal offence.

In addition to the offences referred to under the *Criminal Code*, and *Motor Vehicle Act*, operators of automobiles and vessels are subject to administrative driving prohibitions. For example, a 24-hour driving prohibition can be imposed by a peace officer whenever he or she has reasonable and probable grounds to believe that a driver's ability to operate a motor vehicle is affected by alcohol or a drug. This can be contested if the driver or operator believes that his blood alcohol level is below .05 by demanding a breathalyzer test. In a large number of cases, this is not a prudent thing to demand because it may be established that you are far in excess of .05. You may be putting yourself at risk of a criminal charge, rather than just an administrative driving prohibition.

The 24-hour driving prohibition is separate and distinct from an Administrative Driving Prohibition that can be imposed for a 90 day period under the *Motor Vehicle Act*. This latter prohibition can result if a person if found to have a blood alcohol concentration over .08 or refuses to provide a suitable sample of their breath for testing or a blood sample. This prohibition becomes effective 21 days after the notice is provided to the driver or operator, usually immediately after it has been determined that he has a blood alcohol level in excess of .08 or refuses to provide the appropriate sample. He or she then has 7 days to file for an application for a review of this prohibition. Thus, if issued such a prohibition the wisest course is to seek legal advice immediately in order to determine whether or not you have the grounds to contest the prohibition. We emphasize here that this Administrative Driving Prohibition is separate and distinct from the 1 year driving prohibition that will be imposed if you are convicted of impaired driving or with a blood alcohol concentration of over .08, or refusing to provide the appropriate sample of your breath or blood.

It is of some interest to note that a driving prohibition that comes about as a result of operating one type of vehicle (motor vehicle versus a boat) will ordinarily apply only to that mode of transportation. If, for example, you are given a 24-hour roadside driving prohibition while returning from the pub to the boat, this does not prevent you from

leaving the dock immediately as the operator of the vessel, but it would be wise to wait until you are free of the effects of any alcohol or drugs you have consumed.

Let us go now back to the situation I cited in the example earlier, i.e., you get stopped for speeding on your way home from the pub or at a roadblock. Bear in mind that if a peace officer (which can be a member of the RCMP, a municipal police officer, Coast Guard officer, etc.) approaches you he or she must form a "reasonable suspicion" in order to lawfully demand that you provide a breath sample into the handheld roadside device called an Approved Screening Device. This device registers simply a pass, caution, or fail. The "reasonable suspicion", need only be based on the peace officer believing that you have consumed alcohol, i.e., the smell may well be sufficient. This is enhanced by your indicating to the peace officer in response to his question that, "I have had a couple, etc.". You will note that a reasonable suspicion is a very low threshold for the peace officer to meet. Depending on what the roadside screening device indicates, the peace officer may well decide to give you a 24 hour prohibition or make the demand that you provide a suitable blood or breath sample at the police station.

You should be aware that when a peace officer demands that you blow into a roadside screening device you are not entitled to contact a lawyer. Furthermore, the grounds for legally refusing to provide a sample at this point are very narrow, i.e., basically medical evidence would have to be produced to show that you were not capable of providing such a sample or that it would be harmful to your health to do so. Otherwise, you can be convicted of an offence for refusing to provide this sample.

If the peace officer declares that the roadside screening device shows that you have failed, he or she can then demand that you provide the breath sample for the breathalyzer at the police station at which point you are entitled to contact a lawyer. Once at the police station you will be provided with a telephone to speak with a lawyer in private. The likelihood of you being able to contact any lawyer you know if it is after business hours is small. Thus, you will probably find yourself talking to a Legal Aid lawyer, who will likely advise you to provide the sample of breath unless you have proper medical grounds for declining to do so. From the perspective of defending a person charged with having a blood alcohol content in excess of .08, it is much better to provide the sample of breath unless the proper medical grounds to refuse exist. Throughout all of these initial procedures, it is not prudent to admit to having consumed any alcohol or drugs, but rather to exercise your right under Canadian law to remain silent about such matters. You are only required under the law in the circumstances being discussed here to produce your driver's license and proof of insurance for your vehicle.

It is significant to know that the operator of a motor vehicle or vessel is not required to submit to any roadside physical tests such as walking a straight line, putting your fingers to your nose, balancing on your heels, counting backwards, etc. However, the peace officer will often attempt to structure his initial questions to you such that you feel obligated to perform such physical or mental tests. The results of such tests cannot be used as evidence of impairment at a trial but they can be used by the peace officer to

make a demand that you provide a suitable sample of your breath for testing. If you choose not to perform any of these tests, it is best to maintain an otherwise cooperative attitude with the peace officer. And, more importantly, it is an offence to refuse to submit to a roadside test, providing, of course, that the peace officer has the requisite "reasonable suspicion". Let us emphasize what we said previously in a different way - there are more potential defences available to you if you submit to a test by the Approved Screening Device and then the more sophisticated machine at the police station than there are if you refuse to take either or both tests.

In order for a peace officer to legitimately make the demand on you that you submit to suitable tests of your breath at the police station he or she must have reasonable and probable grounds to believe that you have committed the offence of impaired driving or have had a blood alcohol concentration over .08 within the preceding 3 hours while driving a motor vehicle or operating a vessel. As to whether the peace officer had reasonable or probable grounds is a matter for the Court to determine, not the driver or operator.

From Port to Port:

Charges for being impaired while driving a motor vehicle or being "over .08" are much more common than for operating a vessel on the same allegations. However, the effects on mariners of a conviction for such an offences are equally devastating.

As mentioned above, the offences and penalties under the *Criminal Code* apply to the operation of vessels. The penalties in relation to vessels are the same as those that apply to driving a motor vehicle while committing such offences. There is, of course, no "driver's license" to revoke from a mariner. Mariners that rely on their Watchkeeping Mate's, or Masters, or other Certificate may run the risk of having these tickets cancelled should they be convicted of operating a vessel while impaired, notwithstanding, to the author's knowledge, this has never occurred in British Columbia. It is the *Canada Shipping Act* that allows for these tickets to be cancelled on the hearing of a Board of Inquiry, though these are typically only convened upon a "shipping casualty" occurring. There are cases to our knowledge where a vessel has been boarded for a hold inspection or other reason, and finding the master or crew to be impaired, the Department of Transport determined there was a "shipping casualty".

Notwithstanding this, the principle of "care and control" discussed above applies to vessels such that you do not have to be at the helm of a vessel making way to be in the care and control of the vessel while impaired. A vessel moored with it's main engine in a state of repair, a vessel chained to the dock, a vessel without fuel, or a vessel in dry dock are all examples where an operator would likely be found not to be in care and control of the vessel. In one case, the Nova Scotia provincial court considered whether a dragger that was immobilized by its fishing nets being tangled around the mooring cables of another vessel was under the care and control of its then intoxicated master. The Court found there could be no care and control where the vessel was so immobilized. On the

other hand, a captain found to be intoxicated while the vessel was drifting for the night, was found to be in care and control of the vessel and charged accordingly.
Probably the most significant effect that operating a vessel while impaired will have is in relation to the vessel insurance. The implications on your insurance will depend on the wording of the insurance policy that you hold, and what position the underwriter will take with respect to the specific facts of the situation. Marine insurance policies typically come in two forms – "hull and machinery" and "protection and indemnity" or "P&I".

Hull and machinery policies, the purpose of which is to reimburse the owner for fortuitous loss or damage to the vessel itself, may contain a clause that allows the underwriters to avoid paying for any claim that arises as the result of the master's impaired operation of the vessel. The Federal *Marine Insurance Act* and the Provincial *Insurance (Marine) Act* provide that there are certain warranties implied in every contract of marine insurance. These warranties are the Warranty of Legality and the Warranty of Seaworthiness. Being impaired while operating a vessel can be argued to be a breach of the Warranty of Legality because the operator was acting illegally when he was in care and control of the vessel while impaired. Similarly, an impaired master or crew member may also be the basis for arguing that the vessel was not seaworthy when it left port – therefore a breach of the Warranty of Seaworthiness. One coastal underwriter's hull and machinery policy contains the explicit warranty of the insured that the policy will be "free from claims whilst impaired or drunken operation of vessel".

A breach of either a warranty entitles the underwriter to void the policy, even if the cause of the claim is not directly related to the fact the crewman was impaired. For example, you return to the boat after having three beers at the pub and while leaving the harbour an inexperienced yachty rams your vessel from astern. You happen to be completely without fault. Despite the event might have occurred whether you had the beer or not, your insurance may not cover the loss depending on the term of the policy and the position of the underwriter.

Impaired operation can also fall under the statutory exclusion for loss arising from "willful misconduct" of the insured. In one case the Federal Court Trial Division found that a master of the vessel operating while impaired did not show "willful misconduct" within the terms of his insurance policy, because although his drinking was willful, the consequences were not. Perhaps a worst case scenario would arise when an oil pollution incident results from negligence of crew involving alcohol or drugs. In this case, the uninsured losses could easily be in the millions of dollars, even for a relatively small vessel. The insurance consequences related to a conviction for a drinking offence can be ruinous, especially in the marine environment where damage can be extensive and widespread.

Keep in mind that just because you have "blown over" does not mean that you will be found guilty of either impaired operation or operating with a blood alcohol concentration in excess of .08. Not only may the results of the tests be inaccurate, but the legal

requirements for obtaining and using such results may not have been fulfilled properly by the peace officers involved. It is extremely important to have a lawyer, who is familiar with this type of law, review your case and determine whether a defence exists prior to determining whether or not you will contest the charge. Even where the case against a mariner is apparently strong on its face, the lawyer may be able to assist in reducing the impact of a conviction on him or her. You may also wish to take note that the legal costs for defending a person against a charge for one of the offences referred to above commonly range from $2,000 to $4,000, but may be much higher depending on all of the circumstances.

We have avoided getting into all of the complications that can arise in offences that can be alleged against someone who has been consuming alcohol or drugs and then drives an automobile or operates a vessel. I hope, however, at least some of what we have said in this article will assist you in avoiding getting caught up in the tentacles of the law that applies to such offences. The following 5 simple rules will assist you in this regard:

1. Do not consume alcohol or drugs and then drive a motor vehicle or operate a vessel.
2. If you do consume alcohol or drugs use taxis or driving alternatives such as having a family member or friend pick you up (he or she will not be upset by this, but is much more likely to applaud your good judgment).
3. If stopped by a peace officer be cooperative, and do not volunteer information about the consumption of alcohol or drugs (it is open to you in this context to advise the peace officer that your lawyer has advised you not to respond to questions concerning these matters).
4. If a demand has been made upon you to provide samples of your breath whether into an Approved [roadside] Screening Device or a more sophisticated machine at the police station do not refuse unless you have good medical grounds for doing so.
5. When advised of your right to contact a lawyer by the peace officer take advantage of it.