# Rules of the Road: The Impaired Mariner

*By: Darren Williams*

For many of us, boating is a primary source of enjoyment in our lives. For others, it is a livelihood. A conviction for operating a vessel while affected by alcohol or drugs, resulting in being prohibited from operating a vessel for one year, is a threat to our quality of life, and in some cases, our financial security. Safety for others at sea is, of course, an even more important concern. Despite this, an average person might find him or herself operating a vessel after having consumed enough alcohol or drugs to put him or herself in legal jeopardy because he or she believes, often times wrongly, that they have not consumed enough to put them at such risk. There are also those circumstances where boaters, 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 a 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 huge sums of money to people who were injured or their property damaged. 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 taking the helm while impaired. However, the purpose of this article is not to frighten or lecture readers, but rather to provide a few pearls of wisdom, I hope, in how you may minimize your exposure to the consequences of such an error in judgment. Let us get underway.

Prior to discussing the processes involved in being apprehended for impaired operation of a vessel, it will be worthwhile to outline the basic offences and penalties associated with operating a vessel after having consumed alcohol or drugs.

Under the *Criminal Code of Canada*, whether operating a vessel or a motor vehicle, 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, for example, one pint of beer on an empty stomach, or strong painkiller or other drug, and be found to be "impaired", even though their blood alcohol concentration is not over .08. This is so because determination of "impairment" is based on a number of variables the person could display, including poor motor coordination, slurred speech, watery eyes, lack of proper balance, etc. Generally it is easier to determine impairment by alcohol than by drugs.

Under the *Criminal Code*, in addition to a breath sample, a blood sample can be demanded to measure your blood alcohol level. However, blood samples must be taken at a police station or other authorized facility, so unless the boater is apprehended at a dock where the facility is fairly close, it is much less likely that a boater, than say a motorist would be asked to give a blood sample. Impairment by drugs cannot be determined by breath sample and can only be determined by blood sample.

Although there are number of variables that have to be taken into account in a particular case, a rough guide, in terms of impairment by alcohol, is that your body will eliminate .015 in blood alcohol concentration every hour. A person who weighs 160 lbs. who has had 4 drinks over a period of 2 hours will have a practical blood alcohol content of approximately .064. 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. While you may not be charged with over .o8, you may be charged with *impaired* operation. The effects of drugs is much less clear.

The penalties for a first conviction of impaired "care and contol", operating with a blood/alcohol level of 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 prohibition against operating a vessel. 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 operation 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 that you do not actually have to be at the helm of a moving vessel when apprehended to be in "care and control" of it. "Care and control" will exist when it is possible for you to put the vessel in motion, even accidentally, or where you actually intend to move the vessel. For example, a boater tied to a wooden dock, having a couple of drinks (or being under the influence of a drug) while running their engines to charge the battery, may be found to be in "care and control" while impaired because the vessel could be accidentally set in motion. To this end, proper mooring of the vessel will reduce the likelihood of accidental movement and assist in a finding that there was no "care and control" of the vessel during impairment. This was the result in a recent court decision where my client was acquitted on being in care and control because his tug was securely moored to a steel frame dock and the risk of accidental movement was negligible. By other example, a drunken boater found passed out on his moored vessel (with engines off) may be in "care and control" if he is awoken and states "I was waiting for an hour to sober up before getting underway". The peace officer may decide to lay a charge of being impaired while in "care and control" because he feels it was the boater's intention to move the vessel before he was no longer impaired. Many of these issues will

be avoided where there is more than one person on board who is qualified to operate the boat and that person remains unimpaired. However, of course, this will be of no assistance where the impaired person operates the vessel despite having his sober friend present.

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 a prudent boater would be wise to wait until free of the effects of any alcohol or drugs consumed.

Let us now consider the situation where you are stopped by a peace officer, either at sea or at the dock, for suspected impaired operation. 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 device called an Approved Screening Device (ie. "makes you blow"). 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. Despite what the 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. Even though the screening device indicates you are unimpaired, observations collected by the officer (such as bloodshot eyes, slurred speech) may cause him to conclude you are impaired.

You should be aware that when a peace officer demands that you blow into a 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. Refusing to provide a sample carries the same penalty as being impaired, a mandatory one year prohibition against operating a vessel and a minimum $600 fine.

If the peace officer declares that the 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. However, unless the boater is apprehended at the dock in an area that is relatively close to a police station, the peace officer will not likely require this – consider though that the most likely place to be apprehended while impaired is at the dock. 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 open to the person being apprehended to exercise their rights under the Charter of Rights and Freedoms and not say anything that could be construed, properly or not, as an admission that they had consumed any alcohol or drugs. At law, you are only required in these circumstances to produce your identification, nothing more.

It is significant to know that the operator of a vessel, or a motor vehicle, is not required to submit to any 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 – a person is more likely to be convicted if they refuse to submit to a test by a screening device than if they cooperate with the peace officer and complete the screening test\

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.

As alluded to above, the principle of "care and control" discussed 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 could be found not to be in care and control of the vessel. 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.

I recently defended a tow boat captain at trial that was charged with impaired care and control after the city police found him passed-out in the wheelhouse of his tug while tied

to the dock, with his main engines running. Facing a mandatory one year prohibition against operating his tug, the mariner was confronted with losing his livelihood for a year. The Court acquitted my client because it was shown there was a negligible likelihood that vessel would have been set in motion.

Probably the most significant effect that operating a vessel while impaired can have is in relation to the vessel insurance. Like automobile policies, coverage will not be provided by a vessel hull or liability insurance policy where the claim arises as a result, in whole or in part, of the operator being impaired. One coastal underwriter's hull and machinery policy contains the term that the insured warrants that the policy will be "free from claims whilst impaired or drunken operation of vessel" – a breach of this warranty will void the policy. If your policy does not include such a provision, do not believe this will prevent the underwriter from denying coverage if an accident occurs while you are impaired. Federal law provides there are implied (unwritten) warranties that the vessel is seaworthy and being operated legally – being impaired will likely breach both of these warranties and void the policy. Should personal injury or oil pollution result from an accident while you are impaired, your uninured exposure could easily be in the millions of dollars.

I 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 operates a vessel. I hope, however, at least some of what we have discussed 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, ensure there is someone else on the vessel that can assume care and control for it.
3. If stopped by a peace officer while you may be impaired, be cooperative. There are many cases where people would not have been charged had they been polite and cooperative.
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.

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