Mariner Life, February 2005

Legal Desk - When being Impaired on Moored Vessel becomes a Criminal Offence

I recently went to trial for a towboat skipper who had been charged with being in "care and control" of his vessel while "impaired", contrary to section 253(a) of the Canada *Criminal Code*. If convicted, he faced a criminal record, a mandatory one year prohibition against operating a vessel, and a minimum fine of $600. Things looked dim for this professional mariner.

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Oddly, the charges arose out of an event that is quite common on this, or any, coast. That is, consuming alcohol on the vessel while it is tied to the dock, or returning to a moored vessel after having consumed alcohol ashore. Up to the conclusion of my client's trial there were no reported judicial decisions that considered under what circumstances an impaired mariner found on a moored vessel was in "care and control" of his vessel for the purposes section 253(a). This is not to say such charges had never been laid before, but that a judge's decision on the issue had never been recorded, and thus available for reference in other trials. To this end, the acquittal of my client would help to clarify the law in this area, and thus was an important case to many mariners.

The Circumstances:

The charges arose when city police, responding to a call of vandalism near the water, walked the docks and found my client, the master, having recently returned from the local pub, passed out in the wheelhouse chair of his tug. The police spied the master through a wheelhouse window and attempted to rouse him with shouts and lights so that they could question him regarding the reports of vandalism in the area. As the master woke one police officer boarded the tug to get closer to the master, and was met with the surprised master's demand to "get the fuck off" his boat. Although he could not remember doing so, the master then started the tug's main engines. The police concluded from his behavior that the master was impaired (a fact that was later agreed to at trial), and as the master turned to the police officer through the window he was shot in the face with pepper-spray, from a distance of three feet. The officer entered the wheelhouse and as the master struggled to wash the spray from his face the officer dragged him to the floor in an effort to handcuff him, and in doing so the accused received three facial blows. As a second officer piled on top of the master, a third officer shot the master in the kidney with 50,000 volts from a Taser, at a distance of four feet. Ninety seconds and a German Sheppard later, my client was being dragged down the dock to the waiting police cruiser.

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Issues of excessive force aside, the master was alleged to be in "care and control" of his vessel. The defence did not argue that accused was not "impaired" when the police found him in the wheelhouse – that was a losing battle. The master was clearly drunk. The defence hung on whether he was in "care and control" of his vessel when it was tied to the dock, with the engines running. Understanding the purpose of the law was to prevent persons in "care and control" from causing harm to others, the attending police testified that they were afraid the master was going to tear the dock apart, throwing the officers in the water, in an attempt escape. The police heard only the revving of a warming marine diesel and interpreted this as a threat. However, on cross-examination, all of the officers admitted they rarely visited docks or were around boats, had ever been on a dock at 3:30 a.m, and were nervous standing on the slippery dock regardless.

The Law:

Was the Master in "care and control" of his tug either before or after he started his engines? The marine case law up to the date of this trial was not terribly helpful. In a series of cases I refer to as the "Drifting Boat" cases, the B.C. and Nova Scotia courts found that a master impaired while a vessel was adrift (with engines off) was in "care and control" of the vessel (*R. v. Ernst* NSCA 1979; *R. v. Trosell* BCPC 1987*; and R. v. Reynolds* NSSC 1988). In each of these cases pleasure boaters were found drifting about in their boats, either fishing or simply enjoying the sun. In *Trosell*, a B.C. Provincial Court judge said "a vessel which is drifting, although its engine is incapable of operation, is in motion and the operator of such vessel maintains care and control of it, if only to keep a look out to ensure that others are not endangered".

An interesting case arose in *R. v. Wade* (Nova Scotia Provincial Court, 1975) when a trawler's net became entangled in the anchor line of another vessel. The trawler was unable to untangle its net, and the master testified that he could not move the vessel ahead or astern (evidence that may not have been accepted by another judge, as presumably the vessel could have swung around on its position). After the net became entangled and before peace officers arrived to assist, the master consumed a bottle of wine. Officers arrived and he was charged with "operating" a vessel while "impaired". Although the test for "operating" a vessel is slightly different than being in "care and control" of a vessel, in acquitting the master the judge considered that the master was not "operating" the vessel because the vessel could not be moved.

Importantly, section 258 of the *Criminal Code* provides that where an accused is found in the operator's seat of a vehicle or vessel, they are presumed to be in "care and control" of the vehicle. There is no need for the Crown Counsel to prove that the accused was actually in "care and control". If this presumption is satisfied, it is then up to the accused to show that they were in that position for a reason other than to set the vehicle or vessel

in motion. In my client's case, he was found in the wheelhouse chair directly behind the wheel and throttles – therefore the presumption that he was in "care and control" was satisfied. The onus was on the accused to show that he was in the wheelhouse for a reason other than to put the vessel in motion.

The Result:

At trial my client testified that he had arrived in port that afternoon following several days of work and had no intention of taking his vessel anywhere within 24 hours. He testified that he lived on his tug about 4 days every week, and typically started his main engines to top up the batteries prior to retiring for the night. The accused also testified that he had been using the deck pumps heavily that day, and without shore power, the mains were started to ensure the batteries were not low. I asked the accused to explain to the Court the breaking strength of the tie-up lines and the bollard pull of the tug.

In argument, I relied on a steam of motor vehicle case law where accuseds were charged with being in "care and control" of their vehicles while "impaired" after they were found behind the wheel of their vehicles, passed out, with the engine running. In all cases, the accuseds testified they were using their vehicles to stay warm, *and importantly, that they had no intention to drive anywhere (even after waiting to sober up).* Noting that there was little chance the vehicles could have been accidentally set in motion, the accused were acquitted. In other cases however, where accuseds were found in similar circumstances but testified they intended to drive "after a while" or "after sobering-up", the court did not hesitate to convict. It can be inferred that the stated intent of the accused at the time of arrest becomes important in these cases, although strictly speaking, the law does not require the accused to have the intent to operate the vehicle or vessel to be charged. The court can convict if there is a likelihood the vehicle or vessel could have unintentionally been set in motion

The judge accepted the evidence of my client, and held that although he was found in the wheelhouse chair he had rebutted the presumption of "care and control" because he was not there to set the vessel in motion. The Judge also found that given the breaking strength of the lines and the bollard pull of the tug, there was little likelihood that the vessel could have been set in motion accidentally. Consequently, the master was acquitted of being in "care and control" while impaired.

In reference to future cases, where the mariner expresses an intent to move the vessel, within for example 24 hours of being found impaired on the vessel, or where there is a likelihood of the vessel accidentally being set in motion, a conviction will likely result. To this end, what you say, or don't say about your intent, at the time of arrest is critical. Again, a conviction carries a mandatory minimum one year prohibition against operating a vessel.

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