Mariner Life

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A Primer on Regulatory Offences: Absolute and Strict Liability.

The majority of legal liabilities a mariner may face in the course of their nautical career will be "regulatory offences". Regulatory offences include 'crimes' like oil pollution, unlicenced fishing, maintaining an unsafe work place, even speeding in the harbour or following a whale. Regulatory offences are the finer details of what larger, more general law and policy are meant to achieve. They are the weapons, or tools of enforcement that is, of forces like Transport Canada, Department of Fisheries and Oceans, Workers Compensation, and other government bodies.

A regulatory offence is not truly a 'crime' because it does not appear in the *Canada Criminal Code*, however it is considered a 'wrong' against the government and the public at large, it is prosecuted by the government, and is therefore treated with the same judicial process as a true crime. In other words, if a regulation requires a mariner to maintain a log book for example, and they fail to do so, they may be rubbing shoulders in the courtroom with some very unsavory characters. I am referring to drug dealers and burglars, not the lawyers, though they will have to face those characters also.

There are some interesting distinctions between being charged with a regulatory offence, where the government sues the accused for the alleged wrong, and other types of law suits, such as civil law suits. A civil law suit is a court action brought by one private person against another private person, including a company. These suits often involve matters like breach of contract, personal injury, real estate and other property. These civil suits differ from a criminal or regulatory suits, where it is basically the government, or the state, suing the accused.

The legal test for determining guilt in a criminal, civil and regulatory matter are quite different. As some readers may know, in a criminal offence it must be proven *beyond a reasonable doubt* that the accused had <u>both</u> the mental intent ("*mens rea"*) to commit the crime, as well as actually having had committed the crime ("*actus reus*"). Generally, a "reasonable" doubt is an explanation of why the offence might have not been committed that has a *rational basis* and the occurrence of which is *reasonably likely*. Therefore, the Crown must show there is <u>no</u> reasonable doubt that both the mens rea or the actus reus were not committed before a conviction may be entered. This is the most difficult of legal tests, and is so because the Court recognizes conviction of a crime may result in loss of liberty, otherwise known as the 'slammer'.

Unlike a criminal matter, the legal test to prove the guilt of a person in a civil matter is relatively easy to satisfy. This test is that the plaintiff must show on the *balance of probabilities* the accused committed the wrong. Proving something on the *balance of*

probabilities merely means that you have shown it is more likely than not that the event occurred. Strictly speaking, this means it is 51% or more likely that the event occurred.

The reason I have explained the burden of proof in criminal and civil law suits is to demonstrate how the burden of proof in most regulatory offence is different – how it is somewhere in the middle of the tests of *beyond a reasonable doubt* and *on the balance of probabilities.*

The burden of proof in regulatory offences is unique, and comes in two flavours, strict liability and absolute liability. The vast majority of regulatory offences are strict liability offences. The strict liability offence means that the Crown must show that the alleged wrongful act (oil spilled, log book forgotten) actually occurred; the Crown does not have to show that the accused had any mental intent to commit the offence. Once the Crown has shown the act was committed (regardless of the intent), the burden then falls on the accused to show they exercised *reasonable care,* or were *duly diligent*, in avoiding committing the offence. On the other hand, an absolute liability offence is one where the accused cannot benefit from showing they attempted to avoid the offence, they are guilty in any event. Absolute liability offences (example below) are the ugliest of offences – stay away from them.

It is important for the well-rounded mariner to understand these characteristics of regulatory offences, for someday you might find yourself charged with one. Let us take a common example of a regulatory offence, oil pollution. I am not referring to Exxon Valdez-type accidents, I mean the vessel engineer who forgets he is filling the day-tank and spills 100 litres of diesel into the harbour, or the hydraulic lines that breaks and sprays the adjacent Coast Guard cutter and water with oil. It happens.

Oil pollution is a useful example of a regulatory offence because it shows how a single act (spilling oil) can be caught by various regulations, each of a different character, each with their own bite. For example, oil originating from a vessel may trigger offences under the *Fisheries Act*, the *Canada Shipping Act*, the *Transportation of Dangerous Goods Act* and various provincial regulations.

Under the *Canada Shipping Act* oil pollution is a strict liability offence. Therefore, the offender can avoid a conviction if they can show that they took steps to avoid the offence. On the other hand, under the *Fisheries Act*, the same oil spill could draw a charge of "harmful alteration, disruption or destruction" (a "HADD") of fish habitat, which is an absolute liability offence. Because there is no defence of due diligence to a absolute liability offence, the charge of HADD under the *Fisheries Act* is more problematic to the mariner than the charge of discharging a pollutant under the *Canada Shipping Act*. Whether you are charged with one offence rather than the other, or both, will largely depend on how and who discovered the spill, and how motivated the prosecution is. This can only be determined on a case by case basis.

The best advice is to exercise due diligence at all times. In terms of oil pollution this may include maintaining a vigilant (multi-person) watch during fueling processes, ensuring

machinery and piping is maintained and operated correctly, having personnel trained at spill response and having the proper spill response equipment (primarily absorbent pads) ready for small spills and the telephone number of a spill response company at hand at all times. These steps alone will not ensure you are found to be diligent, and thus innocent, of a charge of discharging oil, but they are important steps to establishing you have taken reasonable care, which is your primary defence in any regulatory offence.

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