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The Sinking of the *Queen of the North*: Criminally Negligent Navigation?

Four years after the March 22, 2006 sinking of the *Queen of the North,* the ship's Fourth Officer ("4/O") has been charged with criminal negligence causing death, a rare charge in the marine industry that carries a maximum sentence of life in prison. While not the first time a Canadian seaman has been charged with this offence, the widely publicized sinking and resulting criminal charge has caused many mariners to ask: what is criminal negligence in navigating a vessel? This article will answer that question and highlight some surprising examples previously decided by the courts.

Criminal Negligence: "Wanton" and "Reckless" Disregard for Safety

Negligence, which is the failure to act as a reasonably prudent person would do in similar circumstances, is a concept established by the courts over the last hundred years. There is no legislation that says when a person is negligent or not, though breaches of legislation (such as contravening the *Collision Regulations*) are often strong indications relied on by the court in finding a mariner negligent. Criminal negligence, on the other hand, sometimes referred to as deliberate negligence, does arise from specific legislation. Section 219 of the *Criminal Code of Canada* provides: *everyone is criminally negligent who in doing anything, or omitting to do anything, shows wanton and reckless disregard for the lives and safety of others.* "Wanton" and "reckless disregard" for lives and safety is not defined in the *Criminal Code*, however, so it falls to the interpretation judges to determine whether a mariner, in all of the circumstances, has acted with criminal negligence.

Examples of the Offence and the Defence of "Reasonable Belief":

Like most law, criminal negligence is best described by example. The first reported reference to criminally negligent navigation of a vessel in B.C. came in 1891. The *Zambesi*, a Japanese steamer en route to Victoria, collided with the lumber schooner *Dutard*, in heavy fog. Judge Begbie stated, "*without any doubt the [cause] of the calamity was the almost criminal negligence of the schooner...the most important instrument of safety on that foggy night was undoubtedly a fog-horn, - and this was clearly quite inadequate*". Judge Begbie's reference to the failure to carry a fog horn as "almost" criminally negligent reflects how the law requires more severe negligence before the mariner will be found to be criminally negligent.

100 years after the *Zambesi* case, the Ontario court was asked to hold the Master and Third Officer of the Coast Guard vessel *Griffon* liable for criminal negligence causing death when the *Griffon* failed to reduce speed or use her fog horn while operating in "extremely limited visibility", which resulted in a collision with a trawler. The Master had ordered not to reduce speed unless a vessel was detected on radar, and that the fog horn not be used because his crew was working on the bow. The court noted that in order to convict of criminal negligence the Crown had to prove the operation of the vessel amounted to "*a marked and substantial departure from the standard of a reasonable operator in the circumstances...and that the operator either recognized and ran an obvious and serious risk to the lives and safety of others, or alternatively*

gave no thought to that risk". The Third Officer was acquitted because he was found to have acted reasonably in following the Master's orders, and the Master was acquitted because the judge found that the Mater's conduct was not such a gross departure from the norm as to constitute criminal negligence.

In *R. v. Baker* (2004), the Ontario court found a recreational boater guilty of criminal negligence when, running at high speed at night on a lake, he struck a lit vessel and failed to stop at the scene. The defendant argued he thought he had hit a rock and continued on his way. In convicting the boater the judge stated "*it defies logic and common sense that, given the defendant's [30 years of] experience as a cottager and boater, in the circumstances it did not cross his mind that he might have collided with another boat*".

This last statement by the court is important because it highlights that a mariner may be found not to be wanton or reckless if they have a reasonable belief that there was no risk in their actions. In the *Griffon* case, the court said "*should the court find honest belief, or on all the evidence have a reasonable doubt, the court is then to look objectively at the evidence to determine whether the belief is reasonable by the standard of a reasonable person*". The court will look at the experience of the mariner to determine whether their belief was reasonable given their knowledge in the area. A surprising example of this comes from the Nova Scotia case of *R. v. McKay* (2008) in which a master was charged with criminal negligence when his vessel collided with a buoy at high speed (77 knots), ejecting and killing a passenger. Although the court found the high speed of the vessel was a significant factor in the accident, it noted the buoy had been swept 150 feet out of its typical position by unusually strong currents, and that the master had a reasonable basis to support his belief that he was not on a collision course.

How Does the Law Relate to the *Queen of the North*?

There have been many rumors about why the *Queen of the North* steamed for 14 minutes beyond the Sainty Point waypoint without the 4/O ordering the required course change. The Transportation Safety Board found "various distractions" during that time included a conversation with the Quartermaster. Those rumors, while intriguing, aren't relevant to this article. Suffice it to say, while negligence may appear obvious, in order to obtain a conviction for *criminal* negligence the Crown will have to prove that the 4/O either *recognized and ran an obvious and serious risk of hitting Gil Island,* or *gave no thought to that risk.*

The defence will seek to show the 4/O had a reasonable belief he was not running such a risk. It has been published that the 4/O reported he in fact believed he had given the order to change course at Sainty Point. The importance of this is that, if accepted by the court, his believe may provide a defence to the charge. However, as demonstrated in the cases above, the court must accept that this belief was a reasonable one given his experience. In my view, this may be difficult. Sound watch keeping practices dictate navigation is not a "set it and forget it" procedure. Experienced seamen such as the 4/O will know that verify speed, position and heading almost continuously is a must, particularly when traveling in confined waters at considerable speed (17.5 knots). The Crown may argue that steaming for more than 10 minutes (in that location) without checking any navigational instruments was either not giving thought to

the risk, or appreciating the risk and ignoring it. Whether the court will accept the 4/O was being reasonable in his belief, that 14 minutes (after he recalls making the course change) could safely go by without checking his heading and position, will depend on all of the evidence at trial.

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