

## A PILOT'S PERSPECTIVE – A LEGAL COMMENTARY

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The legal liability of pilots after an accident or incident is essentially disciplinary in nature. Damages liability for pilots is highly unlikely given the unequivocal provisions of the Maritime Transport Act 1994:

[60B. Limitation of liability where pilot engaged–

**(3) A pilot is not liable for neglect or want of skill while on board a ship and acting as a pilot.]**

[352. Liability of shipowners for damages for pollution damage only under this Act–

Where any pollution damage is caused in New Zealand, ...–

...

**(c) No claim in damages may be made under section 345 or section 346 against–**

...

**(ii) The pilot or any other person who, without being a member of the crew, performs services for the ship; or**

The pilot's role is then one of all care, but little if any direct legal liability "*for neglect or want of skill while on board a ship and acting as a pilot*".

That then sets the scene for this paper – a pilot will invariably do all that they can to avoid any accident or incident, but if it all turns to custard, how is a pilot likely to react prior to and during an investigation? From a legal perspective is that reaction justified?

William Corbett has clearly set out the cause of the vast majority of accidents – people. What then are the options – remove the human element, or reduce it. The first is not realistic. The emphasis therefore needs to be on the second.

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From a legal and policy perspective, how is reduction best achieved?

Training and systems go some distance to achieving that. The use of Bridge Resource Management (“BRM”) techniques and the like are clearly invaluable. Mistakes, accidents and incidents will however still occur. Reporting, and learning from one’s own mistakes, and others’ mistakes, is however a more major part. That imports or requires a no blame culture.

There is no incentive to report, and every incentive not to report, accidents incidents if by doing so one puts oneself at risk. William Corbett has referred to the loss of employment by deck officers (eg 1997 Kotuku case – addressed in an unreported Employment Court judgment<sup>2</sup>, as well as investigation reports), loss of licence, or criminal/quasi-criminal prosecution.

Without passing any judgment on validity, it is fair to say that the *perception* of many at the coal face (deck officers and pilots) about the current Maritime Transport Act 1994 investigation regime is that because there is a *potential* prosecution, or *potential* of loss of licence/employment, full reporting is contrary to individual interests. Reporting is though undoubtedly in the public interest – and required as a matter of statute (see eg s31 Maritime Transport Act). As to a failure to report see the recent Pacifica Shipping litigation.<sup>3</sup>

Consider an incident known only to the mariner concerned (clearly that is unlikely to include an ‘*accident*’ properly so-called). A navigation error recognised and remedied before the ship is on the hard is one example. Does one take a risk - calculated or naïve - that no-one else will discover the error, or does one stick one’s neck out for the greater public good? Does one cover one’s own butt, or report with the potential for punishment inherent within that? Does one comply with the

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<sup>2</sup> Employment Court Wellington, Chief Judge Goddard, WEC 67/97, 19/12/97

<sup>3</sup> Maritime Safety Authority v Pacifica Shipping (1985) Ltd unreported, 10 December 2001, William Young J, Christchurch, AP56/01

unequivocal statutory requirement to report the events, or does one take a risk in that regard? Which risk is greater – detection or prosecution given reporting?

If one sticks one's neck out (and complies with the statutory duty to report) what will the potential be for one's career? The naming of persons in reports of the MSA, and the Privacy Act ramifications of that (touched upon by William Corbett) might be one factor. Does one want the entire maritime community to know of one's misdeeds?

Under the Maritime Transport Act 1994 and the criminal law generally there is the potential for very heavy penalties following an accident: 12 months imprisonment and \$100,000 fine<sup>4</sup> under the Maritime Transport Act 1994; potentially life imprisonment under the criminal law generally in the worst case scenario of manslaughter.

In our closest neighbour, Australia, there seems to be a perception that jail time is now an expected outcome in the event of accident. That seems to be the case whether there is injury to humans, or even potentially damage to the Great Barrier reef: Doric Chariot.

It is readily acknowledged that prosecution is not the usual outcome of MSA investigations. Despite participating in about a dozen investigations in the last few years, a prosecution against an individual has not yet resulted (although in at least one case prosecution against a corporate has<sup>5</sup>). That said, it is the *potential* that attracts attention. Likewise the *potential* loss of maritime documents (and therefore livelihood) is of serious concern to individuals.

It must be emphasised that the MSA operates under the terms of the statute in wearing the hats of safety promoter and prosecutor. The concern is then one about the legislation, not the agency administering the legislation.

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<sup>4</sup> For corporates; maximum fine for individuals is \$10,000: s65(3)

<sup>5</sup> Maritime Safety Authority v Tranz Rail Ltd [2000] DCR 363

William Corbett has expressed his views about declining to answer questions in an investigation by the MSA. Clearly that action is not going to advance any learning of lessons by the community generally.

The bundle of rights and immunities often described as the “*right to silence*” comes into play in relation to anyone who might be regarded as a suspect. See R v Director of Serious Fraud Office [1993] AC 1 at 30-31.<sup>6</sup>

The New Zealand Bill of Rights Act 1990 also appears to have direct application. Those *required* to attend for questioning (as is the case for those required to attend or be attended upon by an MSA investigator) are likely to be viewed as “*detained*” in terms of s23 Bill of Rights Act 1990, meaning that a formal caution is required<sup>7</sup>, and the principles known as the “right to silence” apply. That seems to be accepted, given the “blue card” presented to MSA interviewees, and the provisions of s58 Maritime Transport Act 1994 recognising:

(2) *A person who is required by the Director (or an authorised person) to do anything under subsection (1) has the same privileges and immunities as a person giving evidence before a commission of inquiry has under section 6 of the Commissions of Inquiry Act 1908.*

There is then a right to silence.

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<sup>6</sup> This is not one right, but a bundle of rights and immunities:

- (a) A general immunity from being compelled on pain of punishment to answer questions the answers to which may incriminate them;
- (b) A specific immunity possessed by persons suspected of criminal responsibility while being interviewed by enforcement officers from being compelled on pain of punishment to answer questions of any kind;
- (c) A specific immunity for accused persons to being compelled to give evidence or to answer any questions put to them in evidence;
- (d) A specific immunity, possessed by persons charged with a criminal offence, from having questions material to the charge put to them by enforcement officers;
- (e) A specific immunity against adverse comment about failure to answer questions before trial and not giving evidence at trial.

<sup>7</sup> See Official Assignee v Murphy [1993] 3 NZLR 63 (an investigation by the official assignee under the Insolvency Act 1967 in respect of which the High Court determined that the NZ Bill of Rights Act 1990 applied.)

Those principles have significant implications for not only the individual mariner, but for others 'involved' in any incident or accident. It also impacts (or potentially impacts) upon the rights of:

- The Employer, because by investigating and taking disciplinary action (such as dismissal) in advance of a criminal prosecution, an employer might prejudice the employee's rights to a fair criminal investigation or trial<sup>8</sup>;
- Fellow employees, who might themselves prejudice a fair trial by revealing matters bestowed upon them by a fellow employee (although it is suggested that this is extremely tenuous)<sup>9</sup>
- Any civil claim that might result against any party (eg owners) where the same facts are to be litigated in advance of a criminal prosecution being concluded<sup>10</sup>; and
- Even potentially the MSA (in that its investigation might not be able to be completed in the way or within the timeframes intended)<sup>11</sup>; and
- The community generally – given that lessons will not be able to be learned as quickly or as easily, and will not be able to be disseminated.

It must also be emphasised that the right to silence issue is one that will always feature large if there is *any* potential for prosecution; it is not dependant upon the agency that might undertake that prosecution. In the case of the MSA however the waters are muddied by the dual statutory purpose – tell us all so that lessons can be

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<sup>8</sup> see Sotheran v Ansett [1999] 1 ERNZ 548 and a number of other Employment Court cases usefully collated by AA Couch, NZ Law Society Employment Law Conference papers (2002)

<sup>9</sup> Sotheran; but see Couch (above) at p99ff questioning the correctness of this aspect of the case.

<sup>10</sup> see eg ADT Securitas v Geange (1992) 6 PRNZ 100

<sup>11</sup> see eg Thompson v Commission of Inquiry into the District Court at Wellington [1983] NZLR 98

learned; but if you do provide information it might be used against you for the purpose of prosecution.

The rationale behind the “*right to silence*” is of course the right that any citizen has to require the State to prove to beyond a reasonable doubt that an offence has been committed by them, and to refrain from assisting the State in doing so.

Policy makers and the Legislature need to consider whether the dual investigation/prosecution role is appropriate. Certainly there are issues of the type that William Corbett has raised.

The same issues do not arise in relation to the Transport Accident Investigation Commission under the current law: Part 3 TAIC Act 1990. Under that regime any information obtained by TAIC is marked off, and cannot be used for the purpose of a prosecution. A mariner being interviewed by TAIC then has a high degree of protection from any self-incrimination. The flip side of that coin is that a mariner is likely to be more open and honest with TAIC about events – so that others can learn from them.

Return to the issue of maximising reporting of incidents, accidents and mishaps so that the maritime community learns from those and avoids repetition. What legislative approach will maximise that?

It is suggested that the current legislation under which the MSA operates contains tensions or contradictions in policy. It is hoped that the current review by the MOT into the accident investigation regime will consider and address that.

One only needs to consider the issue by analogy to the Police. If the police were to front up to you after a fatal car accident and say “*we are here to see why the collision occurred, to maximise safety - so want you to talk frankly about that; but if we decide it was your fault you face a manslaughter charge*” what response would one

contemplate from the witness? Would one really expect a continuation of questioning?

Is a markedly different response to be anticipated from a mariner when questioned by a different arm of the state?

In summary then:

- The ideal legal environment is one in which learning from others' mistakes is maximised, and prejudice to one's personal interests in any such reporting is minimised;
- It is recognised that prosecution is properly a sanction for serious default;
- Wearing a prosecutor's hat, while also wearing a safety proponent's hat carries with it some real tensions; and
- The exercise of the right to silence is in accordance with both the law and perceptions of individual interest, however it tends to undermine the wider community interests of preventing recurrence.