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# Marine Regulatory and Criminal Investigations

A Practical Guide

Second Edition Summer 2024



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# How can we help you?

## Expertise

- Our department has many years' experience in the practice of shipping and transport law, as well as international trade
- We are proud to have long established working relationship with the majority of the International Group P&I Clubs for many years
- The firm has over 100 years' of experience acting for major shipping and transport businesses and operators
- Our breadth and depth of expertise makes us ideally placed to advise on all aspects of shipping, transport, logistics and insurance work

Our specialist team of shipping and transport solicitors have a national and international reputation as one of the most experienced shipping and transport teams based outside of London, working with clients throughout the UK and internationally.

Providing a 24-hour, seven days a week dedicated service, our shipping and transport solicitors undertake a huge variety of work, both contentious - spanning all aspects of dispute resolution work - and non-contentious, including a wide range of commercial agreements.

Our long-standing links with the shipping, logistics, transport and insurance industries also provide substantial commercial and strategic benefits for our clients.

Whilst mainstream shipping, transport and insurance work is at the heart of our practice, our team also have strong links and working relationships with port and harbour operators, passenger vessel owners and operators, ship builders and offshore developers to name but few key players in this sector. The team also has extensive experience of working with the commercial fishing industry, across the catching, transport, and processing sectors. We also have an increasing presence in the leisure market, particularly in the delivery of transactional work for luxury yachts.

In recent years, we have expanded our considerable offshore oil and gas experience into the offshore renewables industry, acting for both major internationally renowned windfarm developers and CTV owners and managers. As a result of this ever-expanding area of our practice, we now have a dedicated energy team, with specialist insight and experience within this fast-moving industry, which proves highly beneficial to our clients.

As a team, we have a breadth of expertise across all aspects of shipping casualty work, and regularly receive instructions from P&I clubs, hull and machinery insurers, ship owners and operators, and port authorities.

In terms of shipping cases, we regularly advise on a wide range of matters, including collisions and groundings; salvage; unsafe port and berth claims; towage; personal injury and industrial disease; crew & passenger claims; damage to fixed and floating objects; heavy weather claims; ship arrest and release; major casualty investigation and emergency response.

In addition, the team is regularly called upon to conduct on-site casualty investigations, which includes obtaining and preserving evidence, working with authorities, such as the MCA, MMO and MAIB and advising clients on liability, strategy, and regulatory issues. We also have experienced advocates who are able to represent owners and crew in connection with criminal prosecutions, public inquiries, and coroner's inquests.

# Introduction

Incidents at sea can have far-reaching consequences, including claims for damage done to a vessel, or damage caused by the vessel to the property of third parties. There may be damage to cargo carried on board the vessel, or cargo carried on board another vessel involved in the incident. The incident may cause pollution for which there will be claims from third parties for damage done by that pollution, as well as potential claims from the authorities that are responsible for dealing with such pollution. It is also likely that there will be claims between various cargo owners and other interested parties in a vessel that has been involved in an incident which will need to be resolved, so that they can share the costs of such incidents. Such claims are known as general average claims.

There may also be claims in relation to personal injuries sustained both on board the vessel and on other vessels. In extreme circumstances there may be deaths, because of which there will be claims for dependency. All the above claims are claims that arise in civil law. However, it is likely that any incidents will also result in a breach of criminal law, which will have serious consequences for the owners, managers and crew, including the officers of the vessel.

This booklet focuses on criminal law within this context or, as it is sometimes referred to, regulatory law, and the implications of incidents at sea. We also explore the difference between civil and criminal law, and outline the authorities who have the power to investigate breaches of the criminal law, the procedure that is used during the investigation of any incident and, in particular, what those who are being investigated for such offences can do to protect their rights. We also look at the potential penalties that can arise from breaches of the criminal law.

This resource should not be seen as an exhaustive 'self-help' manual and should not be regarded as a replacement for robust, timely legal advice and assistance from professional legal advisors. However, it can help prepare those involved when an incident happens, and provide some insight into the processes and the advice that may be being given to them by their legal representatives.

## Is it really a crime?

Does a breach of some obscure piece of merchant shipping legislation really constitute a criminal offence? The answer is almost certainly yes.

To understand why this is the case it is helpful to look at the difference between the civil law and the criminal law.

### Civil Law

Civil law is concerned with the relationships between individual members of society. Those individual members of society may be human persons, or they may be corporate bodies. When individuals interact, they form relationships between each other, and the civil law governs those relationships. For example, when a person enters a shop and purchases goods, a contract is formed between them. That contract will govern the price that the purchaser has paid and the nature of the goods that the seller has sold. It will also set out what expectations the buyer can have regarding those goods in terms of their quality and fitness for purpose, and (if bought on credit), will set out what the seller can expect in terms of payment for those goods. Likewise, when an individual takes a car on the road, he is interacting with other road users. The law of negligence sets out what is expected of him in terms of the care he must take not to harm other road users. If he causes a collision and injures someone, or causes damage to their property, the law of negligence will govern the relationship between those two individuals to resolve the dispute. In essence, the civil law regulates the issues arising between individuals to maintain a civilised society. Cases brought before the civil courts must be proven on the balance of probabilities.

### Criminal Law

The criminal law is concerned with the relationship between society in general and the individual. The criminal law sets out the boundaries of what society believes is acceptable behaviour and provides a mechanism for ensuring that members of society uphold and maintain those standards. If they fail to do so it provides a sanction, whereby they are punished in order to persuade them not to breach those agreed standards again, and also to serve as a deterrent to others who may be tempted to undermine or disregard those standards.

It is also important to note that the structure of the criminal courts reflects the role of society in general. The lowest criminal court in England and Wales is the magistrates' court, where magistrates are appointed from the local community. These magistrates are not trained lawyers, but simply representatives of the local community who hear cases and dispense justice on behalf of that community. In the Crown Court, which deals with more serious cases, guilt or innocence is decided upon by a jury of 12 people comprised of members of the public. At the heart of this is the notion that criminal law governs the relationship between society in general and the individual, so individuals who are alleged to have breached the criminal law are judged by their peers. Cases in the criminal courts must be proven beyond reasonable doubt, with the burden of proving the case being on the prosecution.

In terms of shipping, the Merchant Shipping Acts and regulations made thereunder set out what society believes are the standards that should be maintained in terms of the operation of vessels. It sets out, amongst other things, safe manning levels, safe levels of equipment, the methods by which that equipment is maintained and used, how ships should be navigated safely and how owners of vessels should manage and operate their vessels.

Those who breach these established standards are brought before the criminal courts on the basis that they have not met the standards required by society, and should be judged and punished by their peers.

As a result, the answer to the question above is; "yes, the breach of a minor regulation under the Merchant Shipping Act is regarded as a criminal offence and is dealt with in the criminal courts."

In terms of shipping cases, we regularly advise on a wide range of matters, including collisions and groundings; salvage; unsafe port and berth claims; towage; personal injury and industrial disease; crew & passenger claims; damage to fixed and floating objects; heavy weather claims; ship arrest and release; major casualty investigation and emergency response.

In addition, the team is regularly called upon to conduct on-site casualty investigations, which includes obtaining and preserving evidence, working with authorities, such as the MCA, MMO and MAIB and advising clients on liability, strategy, and regulatory issues. We also have experienced advocates who are able to represent owners and crew in connection with criminal prosecutions, public inquiries, and coroner's inquests.

## Enforcement Agencies

### The Maritime and Coastguard Agency

The Maritime and Coastguard Agency (MCA) is responsible for maritime matters within UK waters. The MCA is an executive agency, sponsored by the Department for Transport.

Their website says that they;

**"work to prevent the loss of life on the coast and at sea. We produce legislation and guidance on maritime matters, and provide certification to seafarers. We provide a 24-hour maritime search and rescue service around the UK coast, and international search and rescue through HM Coastguard."**

The MCA are based in Southampton but operate from offices and coordination centres around the UK coast.

The MCA will be involved in any incident that occurs at sea, although their involvement will often result in them 'wearing many different hats', so it is important that the purpose behind the MCA's attendance after an incident is fully understood in order that your rights are properly protected.

The MCA is responsible for flag state control. Therefore, if the vessel is UK flagged then the MCA will attend as the flag state in order to inspect the vessel to ensure that it still complies with UK flag state safety requirements notwithstanding the incident that has occurred. It is likely that any attendance for this purpose will be by local marine surveyors from the local marine office of the MCA.

The MCA will also act as port state control authority. Therefore, if the vessel is non-UK flagged, the MCA will attend as a port state control authority in order to inspect the vessel for compliance with international regulations relating to the Safety of Life at Sea (SOLAS) and marine pollution (MARPOL). Again, attendance is likely to be by marine surveyors from the local marine office.

Thirdly, the MCA may attend in its capacity as an enforcement agency to investigate any potential breach of merchant shipping legislation. It is likely that any incident that occurred may be as a result of a breach of marine legislation. For example, a collision between vessels will almost certainly result in a breach of the International Regulations for the Prevention of Collisions at Sea (COLREGS).

An accident to a crew member whilst operating machinery may well be a result of a breach of legislation relating to the provision and use of work equipment, or regulations relating to working at heights or lifting equipment. The officers attending will likely be from the MCA's enforcement unit based in Southampton.

The MCA's enforcement unit has wide powers of investigation, including the right to come on board a vessel to inspect a ship's records and documents, seize documents or other items from on board the vessel and also to detain the vessel where required. In general, they do not have a power of arrest, but can engage the help of the local police to assist them in their duties. This latter situation is most frequently exercised in connection with breaches of Part 6 of the Railways and Transport Safety Act 2003, relating to offences involving mariners and excessive alcohol consumption. Generally, it is the local police who have the equipment and expertise in securing evidence by way of the use of intoximeters in cases involving excess alcohol.

If the MCA attend on board a vessel following an incident, the owners and master should immediately establish the purpose behind the MCA's attendance. Clearly, if their attendance is to investigate a potential criminal offence, then it is wise to seek legal advice at the earliest possible stage, so as to ensure that those who may be liable to a criminal investigation can take advice as soon as possible as to how best protect their position, and ensure that they exercise the rights that are given to them by law when under investigation.



## The Local Harbour or Port Authority

A local Harbour Authority will have rights of enforcement and therefore the right to investigate potential breaches of the criminal law. Generally, Harbour Authorities will investigate the breach of local rules and regulations imposed by them and known as byelaws. These are local rules imposed by the Port Authority under the authority given to them by their enabling act. These may include rules relating to local speed limits, Harbour Master's directions and the general conduct of vessels and their crews within the Port Authority's jurisdiction.

Port Authorities are also authorised to investigate and bring criminal proceedings in relation to oil pollution matters that occur within their harbour limits. This is pursuant to Section 143 (1) (b) and Section 143 (4) of the Merchant Shipping Act 1995. Thus any spill of oil, for example in connection with bunkering operations, which affects the local port is more likely to be investigated by the Port Authority than the MCA.

If a local Harbour Master boards the vessel after an incident, again, it is important to establish on what basis they are attending. If they indicate that they are attending by way of an investigation into a potential breach of local byelaws or other criminal matters then, as with the MCA, legal advice and assistance should be sought as soon as possible to ensure that legal rights and remedies are protected.

## The Health and Safety Executive

The Health and Safety Executive (HSE) is responsible for regulating and enforcing health and safety legislation in the terrestrial environment. They do also have jurisdiction in respect of offshore marine structures such as oil and gas rigs and renewable energy installations. In terms of marine incidents, you may come across the HSE if they are investigating accidents on board offshore marine structures or breaches of the exclusion zones around them, or in relation to quayside accidents.

There are memoranda of understanding between the HSE the MCA and the police in relation to those incidents, which may cross over boundaries. The police will always take priority in relation to investigations into potential offences of manslaughter or murder. If the police are not involved, the HSE and MCA will generally decide between them which authority is to lead the investigation.

The HSE has wide powers with regards to workplace incidents and, again, if an HSE Inspector attends on board your vessel/s, you should immediately seek legal advice and assistance in order to ensure that your legal rights are properly protected in connection with any prospective criminal investigation.

## The Marine Accident Investigation Branch

The Marine Accident Investigation Branch (MAIB) investigates marine accidents involving UK vessels worldwide, and all vessels in UK territorial waters.

It is important to note that their role is to help prevent further avoidable accidents from occurring and not to establish blame or liability. They do not prosecute.

The investigators from the MAIB have wide powers to interview and obtain evidence with regards to incidents that occur at sea. However, evidence given by individuals to MAIB inspectors cannot be used to incriminate that individual and, therefore, cannot be used in any court of law, whether a civil court or a criminal court. Similarly, any report published by the MAIB cannot be used in the courts to establish blame or liability. This immunity is essential for the MAIB to be able to carry out their role and investigate incidents fully to save lives in the future. Without this immunity, it would be near impossible for the MAIB to effectively carry out detailed investigations and produce accurate reports, due to the fear of those being interviewed that they may be incriminating themselves.

As a result of this immunity, MAIB inspectors do not like those who are assisting them with their investigation to be legally represented. They take the view that, as any evidence that is given cannot be used against that individual, there is no requirement for legal advice and assistance. This can lead to some tension between the MAIB and marine law specialists, on occasion.

Those who are being interviewed and are part of a MAIB investigation may wish to seek legal advice in order to be acquainted with the MAIB's powers and methods, and to seek reassurance against self-incrimination, but it is unlikely that that legal representation will be allowed or is needed in connection with a MAIB investigation.

In those few cases where the MAIB investigates fully and where a report is published (on average c.30 times a year), those involved in the investigation will be given the opportunity to read and comment on a draft report prior to its publication. It is advisable at that stage for legal representation to be sought from experienced

marine lawyers in order to ensure that the report is regarded as fair and unbiased, and reports the correct factual information. Whilst the MAIB report cannot be used to apportion blame or liability it will nevertheless have other impacts upon those who may be criticised in the report, for example reputational damage and/or potential future difficulties in obtaining insurance coverage including increased premiums. It is therefore essential that, whilst maintaining the overall objective of an MAIB report, the report is fair, balanced, and above all factually correct.

## Police

The police will always be involved in the aftermath of any incident involving a death. In this respect, they will wear one of two 'hats'.

Firstly, they will act as the coroner's officer, collecting evidence for the purposes of a coroner's inquest or fatal accident inquiry (in Scotland). In that role, the police are simply gathering evidence rather than investigating whether a crime has been committed. The relevant enforcing authority, in marine cases (generally the Maritime and Coastguard Agency) will investigate health and safety offences.

The other hat that the police may wear is an investigatory role, where there is a suspicion that a negligent homicide caused the death, or in the case of someone who has been seriously injured, according to medical opinion there is a strong likelihood of death.

In circumstances where there has been a death in the workplace, there is a nationally recognised protocol that comes into play. This is known as the Work Related Deaths Protocol for Liaison (England and Wales).

The Protocol has various signatories including the National Police Chief's Council, the British Transport Police, the Chief Fire Officers Association, the Crown Prosecution Service, the Health and Safety Executive and the Maritime and Coastguard Agency amongst others.

The Protocol is a high level document supported by and read in conjunction with The Work-Related Deaths Protocol Practical Guide which sets out a straightforward step-by-step approach to the joint investigation of work related deaths.

The police will investigate when there is a suspicion of negligent homicide and will generally assume primacy, but on the basis that all relevant investigating authorities will nevertheless progress their own investigations with coordination between those authorities.

Whilst the Protocol states that the investigating authorities will maintain effective, liaison experience suggests that that liaison can be lacking, especially in connection with police investigations. In particular, those subject to an investigation should keep a record, as far as they possibly can, of any documents or evidence seized by the various investigating authorities. In one investigation that the firm was involved with the police seized documentation from a vessel relating to the ISM code without giving proper receipts. This led to complications in connection with an MCA investigation, the MCA regarding the absence of ISM documentation on board as a potential ISM offence.

Where there is a multi-agency investigation it is imperative that legal advice is sought as soon as possible in order that the investigating authorities can be held to account in terms of the protocol.



# The Investigation

Having dealt with the enforcement authorities that you may encounter in the aftermath of an incident on board a vessel, we now turn to look at some of the considerations that should be taken into account as those enforcement authorities go about their enquiries.

## Conflicts of interest

This is an important issue, which is sometimes overlooked in the heat of the moment following an incident. It is important to consider whether there may be conflicts of interest between various individuals and parties in connection with a criminal investigation. If there is a potential conflict of interest then the parties in conflict should have separate legal representation.

What do we mean by a conflict of interest? Consider the following situation. A crew member has been injured on board a vessel having tripped and fallen. The cause of the trip was a known trip hazard which had been reported through the vessel's safety committee, the ship's safety officer and the master to the owners. Both the master and the owners may face investigation for criminal offences. The master however may wish to say that although he was aware of the trip hazard he had notified his owners of the same and they had done nothing about it. There is an immediate conflict between the master and the owners.

In another situation the owners have a rigorous safety management system which provides for toolbox talks and risk assessments before certain operations are carried out on board the vessel. An operation goes wrong and it transpires that the relevant toolbox talk and risk assessment had not been completed and signed off by the master. On this occasion the owners may wish to point the blame at the master for not complying with their safety management procedures and ensuring that the relevant procedure was carried out and the relevant permits were issued.

If there is a conflict between parties that does not necessarily mean that it will be all out war! There should be scope for cooperation and possible agreement in order to lessen the impact on both parties. A good legal representative should be able to spot conflict like this at an early stage and advise the parties of the need for separate representation. It is especially important if, for example, insurers appoint solicitors on behalf of the owners with a brief to also look after the master's interests. All parties should be alive to the potential for conflict and the fact

that representing multiple parties in criminal proceedings may result in the best interests of all parties not being properly protected.

## Privilege

Generally investigating authorities have wide powers to search and seize any documentation on board the vessel as well as records within the owner's offices including documentation, correspondence, emails, minutes of meetings, and surveyors' reports. However, investigating authorities are not entitled to have access to communications and documents created as between a solicitor and his client. These documents are known as privileged.

An important consideration is therefore in connection with the commissioning of surveyors' reports following an incident. If that report is commissioned by the party's solicitor then it falls within the scope of privileged documentation and is therefore not disclosable to the investigating authority. If the report is ultimately critical of the party under investigation then clearly it is not in that party's interest for the report to be seen by the investigating authority. If however a surveyor's report is commissioned by the owners or their insurers direct then it is potentially disclosable to the investigating authority. Therefore if the report is critical the report may harm the party under investigation. It is therefore important that if surveyors or experts are to be commissioned to investigate that report should be commissioned by solicitors in order to maintain privilege.

## Cooperation

It is generally in the interests of a party who is being investigated to cooperate fully with the investigating authorities. Cooperation does not mean capitulating to every request made by the investigating authority but it does include providing the investigating authority with space to carry out its investigation, refreshments, acting in a civil and hospitable manner towards them and generally trying to comply with any request they make with regard to access to the vessel, documents, paperwork, and witnesses. Generally there is little to be gained from being confrontational and obstructive. Indeed if a party under investigation is intentionally obstructive so far as to materially hinder an investigating officer in the carrying out of his duties then that in itself may constitute the criminal offence of obstruction resulting in additional penalties.

The reason for cooperating with the investigating authorities is with one eye to the future. If at some point the case comes before the court then

the fact that the party under investigation has cooperated with the investigation will count in their favour either in front of the magistrates or a jury in terms of a decision as to guilt or innocence. If a guilty plea is tendered, cooperation can be a valuable mitigating factor helping to reduce the penalty that is ultimately imposed.

A cooperative and professional approach can often create the right impression with the investigating officers so as to affect their views on the overall organisation that is being investigated. In some cases this may assist the party under investigation when a decision is made as to what further action is to be taken against them.

## Should I be interviewed under caution?

Investigating officers will wish to gather evidence by way of statements from individuals who have been involved in an incident. There are two ways in which they can do this.

The first is to obtain a witness statement which is generally recorded on a standard form. The person making the statement must declare that the statement is true on the basis that if they were found to have intentionally lied they may be liable to prosecution. That witness statement can then be used in criminal courts as evidence.

If however an investigator wishes to speak to a person who he has reasonable cause to suspect has committed an offence then he must interview that person in a particular way known as an interview under caution. This is in order to comply with the provisions of the Police and Criminal Evidence Act 1984. This very lengthy and extensive act provides those charged with investigating criminal activity with a set of guidelines in connection as to how they carry out their investigations including the way in which those suspected of committing an offence are interviewed.

Interviews under caution are recorded. They can be recorded in a number of ways. It is still possible for the interview to be recorded contemporaneously in writing on forms designed for the purpose. However it is much more likely that the interview will be audio recorded either on cassette or CD. More recently certain enforcement authorities, including the MCA, are recording interviews audio visually by means of cameras and microphones. Following the interview the recording will be sealed and retained in an original format either as a tape or CD or digital file for use at court if the need arises. Copies will be made available to the defendant and the prosecutor as working copies if the case progresses.

The question however remains should I be interviewed, and if so how should I deal with that interview?

The first point to make is that saying nothing and refusing to be interviewed can be just as prejudicial to a defendant as agreeing to be interviewed. This is on the basis of the caution that is given to a person under interview before the interview starts.

Many readers will have watched police shows on television and therefore may be familiar with the caution but might not understand its implications. The caution is as follows:

"You do not have to say anything. But, it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."

What this caution means is that the interview is your opportunity to explain the circumstances surrounding the potential offence. You do not have to do say anything however if you say nothing and then at a later stage in court offer an explanation to the court which you could easily have proffered at the time you were interviewed, the courts can draw an adverse inference. This is on the basis that you had the opportunity to put forward an explanation at an early stage, refused to do so and are now putting forward an explanation at court once you've had the opportunity of inspecting all the prosecution's evidence against you. The inference the court can potentially draw is that the evidence you're giving in court is not reliable.

If the offence is because of an administrative error or a strict liability offence (see below) which you had no intention to commit, it is generally much better to put forward an explanation of the circumstances surrounding the potential offence at the earliest possible stage.

Another potential reason for agreeing to an interview may be to see what evidence the prosecution have. Generally, an interview will progress on the basis of the investigating officer putting forward various questions and facts to you thus revealing the information that the investigating officer has. It is not unheard of or inappropriate to simply attend the interview and allow the investigating officer to ask his questions on the basis that you refuse to answer by simply saying "no comment" to those questions. Once you and your lawyer have assessed the evidence that the investigating authorities have against you a decision can then be made as to whether or not an admission might be appropriate, or a further interview given.

If however, you do not wish to say anything and make the prosecution prove their case against you, or you believe there is little evidence against you unless you were to make an admission, then it may be best to say nothing.

It is therefore important that at an early stage you seek legal advice from your solicitor as to the best tactic to adopt when invited to provide an interview under caution.

In addition to an interview under caution there are other alternatives available to you. One such alternative is to provide a prepared written statement in which you can explain your version of events without the potential for being asked awkward questions by an investigating officer.

Some prosecuting authorities may also be prepared to send you written questions for you to answer. This can be useful if you live some distance from the proposed place of interview.

Finally, it should be noted that if you are invited to interview you should always enquire if the investigator is prepared to provide 'pre-interview disclosure'. This is documentation or facts he wishes to ask you questions about or theories he wishes to put to you under interview. A professional investigator should provide such disclosure so as to give an indication of the matters you are to be questioned about.

## Classification of offences, the decision to prosecute and court procedure

### Classification of offences

#### Strict liability or with intent

Certain criminal offences are known as ones of strict liability. Such offences are generally of a regulatory nature. With strict liability offences the prosecution do not need to show that the person who committed the offence intended to commit the offence. The only thing the prosecution must prove is that the facts of the offence were committed. The best example of this is the offence of speeding in your car. To secure a conviction for speeding the only issues that the prosecution must prove are that you were the driver and that your vehicle was exceeding the relevant speed

limit. They do not have to show why you were exceeding the speed limit or that you intended to exceed the speed limit. If they can prove your vehicle was travelling more than the relevant speed limit the offence is made out.

Certain offences however require the prosecution to prove that the person who committed the offence intended to commit that offence. The best example of this is theft. To prove that a person has committed theft the prosecution must not only show that the person took something that did not belong to them but also that the intended to permanently deprive the owner of it. With offences involving intent then the prosecution's burden is higher than with strict liability offences.

Most offences that a seafarer will come across in connection with the Merchant Shipping Acts, or regulations made thereunder, are strict liability offences. Therefore, whilst it may seem unfair there is often little option but to plead guilty to an offence even though the party did not intend to breach the law.

### Statutory defences

Many strict liability offences do have a potential defence built into them. On many occasions it is stated to be a defence if a person took all reasonable steps to prevent the commission of the offence or took appropriate or reasonable precautions to prevent the offence. The burden of proving that defence is on the defendant. This is the situation where the issue of conflicts may come into play. A master may state that he did not intend to commit the offence but that because of the lack of equipment supplied to him, or a lack of updated navigational data supplied to him by owners despite his best efforts the offence was committed. Similarly, an owner may say that that they took all reasonable steps to prevent an offence happening by supplying the vessel with proper safety management system, proper charts, proper equipment or appropriate standing orders and yet despite this the master still did something wrong resulting in the commission of an offence.

Therefore, at the onset of an investigation it is important to identify the potential offences that may have been committed in order to identify whether that offence is a strict liability offence or one of intent, and whether there is any potential statutory defence open to those under investigation. It will then be possible to identify if by utilising that defence there may be the potential for a conflict of interest. Again, early legal advice and assistance can minimise these types of problem further down the investigatory timeline.

### In which court will my case be dealt with?

In England and Wales there are two criminal courts of first instance.

The first is the Magistrates Court staffed by voluntary magistrates who are members of the public with some limited legal training assisted by a qualified legal advisor. Magistrates decide on both matters of law and matters of fact (guilt or innocence).

The second court in which a case may appear is the Crown Court staffed by a professional judge who is generally a barrister or solicitor of many years' standing who decides upon matters of law, and the jury who will decide on matters of fact if the case proceeds to a trial.

Which court your case will be dealt with will depend on the seriousness of the offence.

Certain offences are known as summary only offences. These typically include byelaws of local port authorities and minor regulatory offences. Summary only offences can only be dealt with in the Magistrates Court. In addition, proceedings for summary only offences must be commenced within 6 months of the date upon which the offence was committed.

Certain serious offences can only be dealt with in the Crown Court. These are known as indictable offences and include the most serious offences such as manslaughter and murder.

Certain offences however can be dealt with in either court depending upon how serious they are. These are known as either way offences. The best example of an either way offence is once again theft. Theft can constitute minor shoplifting i.e. stealing some sweets from a shop, or a very serious offence such as taking the payroll from the same shop. The minor pilfering would be dealt with in the Magistrates Court, the more serious offence in the Crown Court.

All cases will commence in the Magistrates Court. Summary only offences will be dealt with to a conclusion. Indictable offences will immediately be transferred to the Crown Court. In the case of either way offences then the prosecution will outline the facts of the case to the magistrates and the magistrates will then decide whether they feel they have sufficient powers to

deal with the matter or whether it should be "committed" to the Crown Court.

Historically the Magistrates Court had lesser sentencing power than the Crown Court but since March 2015 this has changed in that the Magistrates Court now generally has unlimited sentencing power in terms of fines unless the legislation stipulates a lower level of fine. Generally, the Magistrates can only sentence someone to imprisonment for a term not exceeding 6 months. If the Magistrates think that their sentencing powers are insufficient to deal with the case, they will commit (send) it to the Crown Court for sentencing. A defendant still has the right to elect for a trial by jury even if the Magistrates Court accepts jurisdiction the Magistrates Court accepts jurisdiction. Many Magistrates Courts are now staffed by professional district judges – then continue with what is there (known in the past as a Stipendiary Magistrate). Offences with unlimited penalties are generally listed before the District Judge.)



# The Decision to Prosecute

In deciding whether to prosecute reference should be made to the Code of Conduct for Crown Prosecutors. This provides a two part test to decide upon prosecution. Strictly this code applies only to prosecutions brought to by the CPS but as has been demonstrated in the inquiry into the Post Office prosecution scandal private prosecutors should also use the code.

The first test is the evidential test. The prosecutor must decide whether having reviewed all the evidence available there is a better than 50% chance of securing a conviction. If he feels that that test is met, then the evidential test is satisfied. If he feels that that test is not met, then the evidential test is not satisfied and he may refer the case back to the investigating authority with recommendations as to what further evidence should be obtained in order to satisfy the test.

The second test is the public interest test. The prosecutor must ask whether it is in the public interest to prosecute? Factors pointing towards a prosecution will include the fact that the offence was premeditated, it was not the first time that such incidents had occurred, this is a particularly prevalent incident or problem and a message needs to be sent to the industry to stamp it out, the offence was committed with a view to commercial gain or to seek a commercial advantage, the offence was committed out of

recklessness without any thought or care for those affected by the commission of the offence. Factors mitigating away from prosecution include the minor nature of the offence, the lack of harm done to a person's property or the environment, a complete lack of intent or freak or unusual circumstances resulting in the commission of the offence.

Based on these two tests the prosecutor will then decide whether to commence proceedings.

## The commencement of proceedings

Proceedings will generally be commenced in the Magistrates Court by the prosecutor laying an 'information' before the Magistrates Court. The information informs the Magistrates Court that the prosecutor believes there is a case to be answered i.e. the defendant has breached the criminal law and should appear before the courts.

The court will then issue a "summons" whereby it summons the defendant to court to answer the information that has been laid by the prosecutor.

It goes without saying that anyone receiving a Magistrates Court summons should immediately seek legal advice. The summons may be served along with a bundle of documents outlining the prosecution's case. If no such accompanying information is received with the summons, then the defendant is entitled to 'advanced disclosure' of the prosecution case in order that the defendant at least knows the evidence which is to be used against him.

An in-depth review of criminal procedure from this point onwards is beyond the scope of this booklet.

## Alternative methods of disposing of criminal cases:

### Letter of concern

In certain circumstances the investigating authority may simply issue a letter of concern. This is a simple letter outlining the fact that the investigating authority has carried out an investigation and whilst not proceeding with the prosecution wishes to express its concern at the way in which the defendant has conducted himself and indicating that if there is any repeat of such conduct in the future, they will not take such a lenient view again. Letters of concern should not be treated lightly, and note should be taken of any concerns expressed, or recommendations made by the investigating authority. Failure to do so may well be referred to if there is any further incident in the future. The court will take a dim view of any defendant who has not remedied deficient procedures or heeded any advice given by a prosecuting authority resulting in further incidents.

### Caution

The investigating authority may issue a formal caution. In order to issue a caution, the defendant must admit his guilt but in doing so the case does not go before the courts with the prosecuting authority issuing a homily instead identifying their concern and indicating that any future transgression will not be treated so lightly. A caution does not result in a criminal record but can be referred to in court in the future if there is further offending.

### No further action

As the title suggests the prosecution may decide that it is not in the public interest to prosecute or indeed there is no evidence i.e. the Code of Conduct for Crown Prosecutors tests are not met and therefore no further action is taken against the defendant. Even if this is the case it would be a foolish person who did not learn from an incident occurring and did not take all possible steps to ensure that such an incident could never happen again. Indeed, most Owners and managers have 'near miss' reviews. If no such procedure is in place, consideration should be given to implementing one.



# Sentencing

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (Commencement No. 11 (Order) 2015 came into force during 2015 and raised the maximum penalty a Magistrates’ Court can impose to an unlimited fine. Previously their powers had been limited.

In addition, sentencing guidelines have changed the way in which courts sentence companies and individuals found guilty of corporate manslaughter and health and safety offences and are already leading to a significant increase in the sentences being imposed by the courts. The guidelines came into force on 1 February 2016.

The guidelines represent a significant change of emphasis in the approach to sentencing health and safety cases. In the past the courts based its approach upon the actual consequences of the offence. However, the new guidelines emphasise the risk of harm being created. Indeed, the guidelines state.

“Health and safety offences are concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. **The offence is in creating a risk of harm.**”

Generally investigating authorities have wide powers to search and seize any documentation on board the vessel as well as records within the owner’s offices including documentation, correspondence, emails, minutes of meetings, and surveyors’ reports. However, investigating authorities are not entitled to have access to communications and documents created as between a solicitor and his client. These documents are known as privileged.

Therefore, in circumstances where an accident occurs but nobody is seriously injured or affected, but there is high potential risk of harm, the penalty will be based on that high risk as opposed to the fact that no harm was actually done.

Secondly, once harm has been assessed, sentencing will also be based on a corporate body’s turnover, not its profit. The table below shows the classification of company size and the minimum and maximum potential penalties suggested by the guidelines. The minimum figure is based on a low risk of harm increasing to the upper figure as the potential risk increases.

Large Company	Turnover £50m +	Min £60k	Max £10m
Medium Company	Turnover £10m - £50m	Min £10k	Max £4m
Small Company	Turnover £2m - £10m	Min £5k	Max £1.6m
Micro Company	Turnover less than £2m	Min £2k	Max £450k

These figures are eye-watering and are meant to act as both a punishment and a deterrent.

Individuals are similarly hard hit, with imprisonment a real risk for individuals.

The courts have already started to utilise the sentencing guidelines in marine cases. Strictly speaking, whilst the guidelines do not apply to offences, case law has stated the guidelines should be used as guidance by the Court.

In April of 2016 the Mold Crown Court applied the guidelines when sentencing Master Alexander Baird for a failure to manage his vessel in a safe manner contrary to Section 100 of the Merchant Shipping Act 1995. Skipper Baird was the master of the “ST AMANT”. Drills were not completed, crew were not certificated, the deck was cluttered, and safety equipment was not operational. The court readily applied the new sentencing guidelines and in doing so sentenced Mr Baird to nine months’ imprisonment.

The message from this new approach to sentencing is clear. Not only is the application of health and safety legislation important but the management and auditing of it is equally - if not more - important, given that future penalties will be based on risk of harm as opposed to actual harm done. Put bluntly, a safety management system without management or auditing is ineffective and indeed may be worse than a situation where there is no safety management system in place at all.

It is certain that there is a judicial appetite for higher sentences for health and safety related.

## Reducing the sentence

On a finding of guilt or if a guilty plea is entered the case will fall to be sentenced by the court. The court will apply the guidelines outlined above.

However, in doing so it must also take account of any mitigation presented to the court in an effort to reduce the sentence the court would otherwise impose.

## The defendant’s plea.

Under current rules a defendant who pleads guilty at the first reasonable opportunity will receive a one third reduction on the sentence the court would otherwise impose. There is then a sliding scale of reduction to the point that a not guilty plea at trial will receive no reduction.

## Mitigating factors

Mitigation often presented to the court may include the following.

Lack of previous offending. If a defendant can show no previous offending, then he will gain a discount.

Character Evidence. A defendant may bring references to court to demonstrate his good character, standing in the community, contribution to society, charity, or trade bodies. These are often presented in writing but can include oral testimony.

Cooperation with the authorities. As discussed earlier a positive and helpful engagement with the investigating authority will always engender goodwill with the Court.

Pro-active steps to remedy any wrong and prevent re-offending. A defendant who can demonstrate that they have voluntarily remedied any wrong done – for example paid for a pollution clear up, or compensated those who have suffered loss and damage because of an accident or spill will gain credit. Similarly, a court will also view positively any steps taken by a defendant to avoid further offending. For example, a full review of safety procedures by an external consultant resulting in a change in those procedures or re-education or training, or the replacement fleet wide of faulty or old equipment will assist in reducing any sentence.



Friskies Schedule

Named after a case involving the pet food manufacturer of that name a Friskies Schedule may often be prepared by the prosecution and the defence to assist the court with sentencing. The schedule sets out the prosecution’s views on the case and the aggravating features they believe the court should consider and sets out the defence’s views and the mitigating factors. Alternatively, the defence should submit a mitigation bundle properly presented and paginated with all mitigating material available, and a skeleton argument on mitigation for the court to hopefully read in advance and take with them to the retiring room when considering sentence.

Basis of Plea/Newton Hearing

Occasionally a defendant will agree to plead to an offence but on a particular basis or set of circumstances i.e. that the offence was committed but for specific reasons or because of certain factors. This basis will be reduced into writing, signed by the defendant, and submitted to the court. The document is often the subject of negotiation with the prosecution so that the prosecution can advise the court that the basis is accepted. The guilty plea and sentencing will then proceed on the basis as written down.

If the prosecution does not accept the basis, then it may be necessary for the court to hear evidence as to the basis of plea and mitigation presented, so they it can decide on what basis the defendant should be sentenced. This is known as a Newton Hearing.

Goodyear Indication

If the defendant is facing a custodial sentence, then it is possible to ask a Crown Court Judge to give an indication as to what the maximum sentence he would impose might be, based on a hypothetical guilty plea to a particular offence and on a particular basis of plea. That indication can then be considered by the defendant, and he can then choose to either fight on, or plead on the basis presented to the judge in the full knowledge of the maximum sentence he likely to receive. This is often a tactic used to gain an indication from the Judge as to whether he may suspend a custodial sentence, i.e. sentence the defendant to imprisonment but then say he need not go to prison if he keeps out of further trouble for a set period of time.

The sentence and appeal

The court will impose its sentence. If the sentence is a fine then the court will, after enquiry, order how the fine is to be paid i.e. in one lump sum, or by instalment, and if so, how much and how often.

In the Magistrates’ Court there is an appeal against sentence to the Crown Court. However, this is heard by a Judge and two magistrates and is a complete rehearing when the court can increase as well as reduce the penalty. Any appeal must be made within 21 days.

In the Crown Court the appeal is to the Court of Appeal (Criminal Division) and must be made within 28 days by seeking permission to appeal from a judge on the appropriate form NG available from the Crown Court.

Our reported cases

**Messemaker v Ministry of Agriculture, Fisheries and Food (2001) EWHC Admin 840**

**Isle of Anglesey CC v Welsh Ministers** (2009) EWCA Civ 94; (2010) Q.B. 163; (2009) 3 W.L.R. 813; (2009) 3 All E.R. 1110; (2009) L.L.R. 446; (2009) 153(8) S.J.L.B. 27; (2009) N.P.C. 28; Official Transcript

**R. (on the application of Unitymark Ltd) v Department for the Environment, Food and Rural Affairs (C535/03)** (2006) E.C.R. I-2689; (2006) 2 C.M.L.R. 21

**Jersey Fishermen’s Association Ltd v Guernsey Also known as: Guernsey v Jersey Fishermen’s Association Ltd** (2007) UKPC 30; (2007) Eu. L.R. 670; Official Transcript

**R. v Ministry of Agriculture, Fisheries and Food Ex p. Bray** (1999) C.O.D 187; (1999) 96(16) L.S.G. 36; Times, April 13, 1999; Official Transcript

**United Kingdom Association of Fish Producer Organisations v Secretary of State for the Environment, Food and Rural Affairs** (2013) EWHC 1959 (Admin); Official Transcript

**R. (on the application of Deepdock Ltd) v Welsh Minsters Anglesey CC v Welsh Ministers** (2007) EWHC 3347 (Admin); Official Transcript

**Loose v Lynn Shellfish Ltd** (2017) 1 All E.R. 677

**Andrew is also the editor of Halsbury’s Laws of England in respect of commercial fisheries**

## Andrew Oliver

### Partner

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Andrew qualified as a solicitor in 1990 and since that time has gained a wealth of experience in dealing with regulatory law matters.

Andrew is involved in marine casualty investigations, pollution claims and prosecutions relating to breaches of Merchant Shipping legislation. He regularly appears in the courts of England and Wales on such diverse matters as Oil Pollution, ISM compliance, Collision Regulation breaches and breaches of Health and Safety legislation at sea. He also advises in connection with MAIB inquiries and Coroner's inquests arising from deaths on board ships or at sea.

He has advised on investigations and prosecutions by organisations such as DEFRA, the MMO, Inshore Fisheries and Conservation Authorities, the MCA, Environment Agency, Natural England, Trading Standards and HSE.

He is a regular public speaker and contributor to the marine press. He has recently co-edited Halsbury's Laws of England Volume 51 relating to Sea Fisheries.

Andrew is also Chairman and a director of Grimsby Fish Dock Enterprises Limited, both a major UK fish auction and the largest Offshore Wind Power Operations and Maintenance base in Europe.

**"I can personally recommend Andrew Oliver and Andrew Jackson, who have assisted Mainprize Offshore Ltd for over 10 years. The service is simply 5 star. They go above and beyond what is expected."**

Bob Mainprize,  
Mainprize Offshore Ltd

### Examples of work within the sector include the following:

- Acting for owners/insurers in respect of a triple fatality on a North Sea standby vessel including police and MCA investigations, MAIB report consultation, Crown Court proceedings and civil claims
- Scottish Fatal Accident Inquiry relating to the death of a ship's master trapped between a vessel and quayside whilst berthing
- Acting for owner in connection with death of a crewman on board a tug. Dealing with MAIB consultation and coroner's inquest
- Advising passenger vessel owners regarding ISM compliance
- Advising vessel owner regarding MAIB investigation following no injury total loss due to vessel flooding
- Advising prosecution regarding s100 Merchant Shipping Act 1995 safe management prosecution
- Various defence cases regarding collision regulation infringements
- Advising owners and insurers relating to MCA, MAIB and HSE investigations relating to collisions between vessels and offshore structures.
- Acting for owners/insurers in respect of triple fatality and one personal injury when a fishing vessel swamped and sank an angling vessel including police and MCA investigations, MAIB report consultation, Crown Court proceedings and (with Sarah Pether) the civil claims
- Various oil and other pollution cases
- Defence of ship's pilot in relation to a collision and offence under the Pilotage Act 1987
- Various prosecutions relating to excess alcohol offences at sea
- Means of Access regulations including death of crewmen by drowning and coroner's inquest that followed
- Prosecution of ship owner for failure of boarding ladder resulting in immersion of inspection authority officer
- Both prosecuting and defending fisheries offences and port authority byelaw offences
- Advising port authorities on conservancy issues
- Drafting new legislation relating to Cockle fishing in both The Wash and the River Thames



## Sarah Pether

### Associate

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Sarah is experienced in advising on personal injury claims resulting from accidents onshore and offshore, due to negligence or breaches of merchant shipping legislation and has worked for P&I clubs in respect of severe and high value personal injury claims, including claims made by dependants following fatal accidents. Sarah also has experience of dealing with low value cases in a cost effective manner and negotiating settlement.

Sarah has dealt with personal injury claims since qualifying in 2002 including fatal accident claims, head injury and amputation cases dealing with rehabilitation and care issues and attending mediations.

Sarah has also advised on insurance disputes, including cases in which cover is refused, or the level or type of cover is disputed, including issues such as disclosure and late notification.

Sarah is a member of the Chartered Insurance Institute (CII).

**“Sarah guided me through the legal procedures and supported me through what was a very difficult time for me when the reputation of my business was at stake.”**

Kelly Tegglin

#### Examples of work within the sector include the following:

- Acting for vessel insurer dealing with child settlement approval in fatal accident case
- Acting for P&I club defending claim from ferry passenger who fell from bunk ladder – claim abandoned and partial costs recovery from passenger
- Acting for charterer of vessel after owner failed to take out insurance and defending claim by share fisherman – career prospects challenged and claim settled for less than half of the amount claimed
- Acting for owner defending claim by share fisherman – successful application to withdraw admission of liability after issue of proceedings when new information came to light
- Acting for defendant under excess – expert evidence proven to be inaccurate and value of the claim reduced
- Acting for P&I club defending claim by employee and establishing considerable degree of contributory negligence resulting in low level settlement
- Various engine repair and shipbuilding disputes
- Acting for owners and insurers in respect of one personal injury and triple fatality following the swamping of an angling vessel by a fishing boat.

## Andrew Coish

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Andrew works across all areas of shipping law including logistics, carriage of goods by sea and casualty work. His case-load includes arbitrations and High Court claims as well as dealing with non-contentious matters relating to supply chains and marine projects.

Having qualified in 1999, Andrew worked in the shipping and transport department for 12 years, before returning to Andrew Jackson in 2023.

Andrew advises owners, cargo interests and logistics companies on all aspects of the international carriage of goods, including regulatory impacts on the same.

Andrew has been involved in numerous marine casualty investigations. He has regularly appeared in the courts of England and Wales in matters such as fishery prosecutions, ISM compliance, healthy & safety at sea and marine pollution.

He has advised offshore developers on various developments around the UK coastline and successfully obtained an injunction for one developer following interference with an offshore construction project by protesting fishermen.

#### Examples of work within the sector include the following:

- Acting for a major international shipping company to enforce an arbitration award by way of attachment proceedings out of the jurisdiction
- Advising multinational food importer/exporters on the impact of UK and EU Deforestation Regulations
- Advising a multinational logistics company on the legal effect of a “force majeure” clause invoked following the Red Sea Crisis
- Representing one of the parties in a multi party arbitration arising from the impact of Covid 19 on the interpretation and operation of a string of charterparties.

- Acting for P&I Clubs representing their members in numerous fatal accident investigations, including the subsequent civil/criminal proceedings and representation at Coroners Court
- Acting for large offshore developers in relation to marine regulatory issues arising from the construction of subsea pipelines, offshore wind farms and coastal defence work
- Advising a major port authority in relation to all aspects of Ports and Harbours operations/practice, including conservancy, vessel arrest and enforcement of oil pollution and other merchant shipping regulations
- Representing a major defence contractor in an inquest involving the death of two sub mariners on a nuclear-powered hunter killer submarine

# Dominic Ward

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Dominic has specialised in shipping law for over 35 years. He handles High Court cases and international arbitrations involving all aspects of marine litigation including casualty investigation, bad berths, ports and harbour law, conservancy and pilotage issues. Dominic also regularly advises in connection with cargo claims arising from marine casualties.

Dominic's expertise in advising on international agreements and his regular dealings with lawyers outside of the UK are of great assistance to companies trading with, or considering trading with, other jurisdictions. His experience includes international trade transactions and contracts covering such matters as letters of credit and duty issues.

Dominic has represented hauliers and distributors for many years. He can advise on and draft agreements as well as representing companies when disputes arise and regularly advises companies on issues surrounding the transportation and distribution of goods whether by sea or road.

Dominic has been a practising Notary Public for many years and provides a diverse range of notarial services to local businesses.

**"We use Andrew Jackson and in particular Dominic Ward as I know we get excellent service. Dominic has extensive knowledge and experience in shipping law and can always be relied upon to deliver sound legal advice."**

James Doyle,  
J R Rix & Sons Limited



**Examples of work within the sector include the following:**

- Acting in relation to accident involving marine surveyor disembarking VLCC at anchor
- Acting in relation to collision between VLCC and fishing vessel including subsequent investigation by MCA surveyor
- Acting for vessel owners in connection with an accident involving chief engineer falling from a platform
- Acting for Ports in connection with the Port Marine Safety Code and Guide to Good Practice in relation to port operations and provisions of pilots
- Advising on a major international logistics transaction involving the movement of project cargo by sea and river from Asia to Central Europe.
- Numerous transactions involving the sale or purchase of commercial vessels
- Advising on the construction of new vessels for both yards and buyers

## Notes

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