

Criminalisation of seafarers



Whatever happens, we'll be there.





Foreword from the General Secretary

Mark Dickinson
General Secretary
Nautilus International

The increasing criminalisation of maritime professionals is one of the biggest industry concerns that Nautilus International currently deals with. The Union has always been at the forefront of the drive to ensure that seafarers are not used as scapegoats in the event of a maritime incident, but in recent years the pressure to penalise those involved in accidents and incidents at sea has increased dramatically.

A great deal of concern rightly exists about criminalisation and, like piracy, it is a phenomenon where the fear of an incident is as significant as the threat itself.

This latest Nautilus survey underlines that this issue is not being taken seriously enough by governments, ship owners and the authorities. Too many seafarers do not appear to have access to the information they need when heading to foreign ports or the protection they deserve when accidents happen.

There have been many recent high profile incidents where seafarers have been made 'scapegoats' for accidents as the authorities, shipping companies, the media and insurers all seek to find someone to blame.

Accidents happen in every industry, but no other industry treats its workers like criminals when they do, with the implication that seafarers somehow deliberately set out to cause a collision, injury or spillage.

More legislation is being unveiled all the time which threatens seafarers with criminal action for simply carrying out their jobs and it is feared that more seafarers than ever are turning away from the industry as a result.

The results of this survey show first-hand what is happening in the industry and confirm that our members are increasingly fearful of being prosecuted and are questioning their future in the industry as a result.

In this context, one of the great benefits which the Union provides to members is the professional protection through legal representation to those involved in maritime incidents.

This survey was conducted as part of the launch of Seafarers Rights International and I hope it will serve as a lasting legacy to 2010 Year of the Seafarer. The findings have been supplemented with advice and information which was originally prepared for and presented to a series of criminalisation seminars held in the UK. We anticipate holding several more events in the UK and soon in the Netherlands when we will also develop further materials with advice on the Dutch experience of, and response to, criminalisation.

Many thanks to all those who took part – by sharing your experiences and thoughts on the matter with us, you help us to help you and together we can make a difference.

Yours sincerely



Mark Dickinson

Introduction

Criminalisation of seafarers is the expression used when a master, officer or other maritime professional faces criminal charges as a result of an incident or accident involving their vessel or someone onboard. It carries with it the implication that seafarers are being vilified due to their profession. Often when charges are brought against masters it is implied that there was the intent to commit an offence.

In many other industries self-regulation exists to hold to account individuals involved in accidents occurring in a professional context. For example, in the medical profession, if a patient dies due to errors made by medical staff, doctors are not routinely criminally prosecuted for manslaughter and sent to prison; they are judged by a board of colleagues and could have their practice license revoked if they are found to have acted negligently.

The seafarer is particularly at risk due to being subject to the laws of many jurisdictions and because of the difficulties in bringing together all those who could be involved, for example:

- Ship owner/manager/operator
- company's country of location
- flag state
- seafarer's home state
- coastal state
- port state

Common incidents which have resulted in criminal proceedings being brought against a seafarer include:

- collisions with other ships
- accidental pollution or spills
- the death or injury of a crew member or passenger

The number of cases in which seafarers have been detained or unfairly penalised by the authorities has been increasing at a startling rate in recent times.

National and international legislation often contains clauses which are detrimental to seafarers and places them at risk of criminal charges whilst undertaking common working practices.

Nautilus is concerned that seafarers are not supplied with information on local and international laws for the areas they are sailing in so as to avoid falling foul of them when entering foreign territorial waters and ports.

With high profile accidents such as oil spills, shipowners, insurers, the authorities and general public are often keen to hold an individual to account, even if they could not have affected the outcome by their actions. In some cases coastal states will want to be seen to be taking a political stance in pollution cases by taking aggressive action against individuals including seafarers.

This can leave seafarers feeling abandoned abroad and vilified, and further serves to destroy the reputation of seafarers and the shipping industry. As instances of criminalisation of maritime professionals rise, it is inevitable that the morale of seafarers will be further eroded and the recruitment and retention of new entrants will become even more difficult.

During 2010 International Year of the Seafarer, the Union launched a survey to mark the launch of Seafarers' Rights International. The purpose of the survey was to gain a clear understanding of members' views and experiences of criminalisation in the industry.

The survey was carried out online via www.nautilusint.org and 584 responses were received. Responses came from a cross-section of membership covering all levels of experience and maritime sectors.

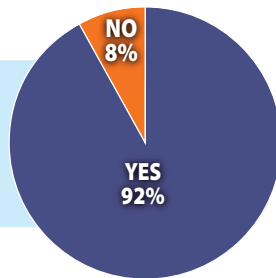
Statistical data was collected on the perceived and actual levels of criminalisation in the industry and most questions contained an option for additional information to allow members to convey their opinions on the subject.

To protect the anonymity of the participants, any information relating to specific cases or organisations has been removed.

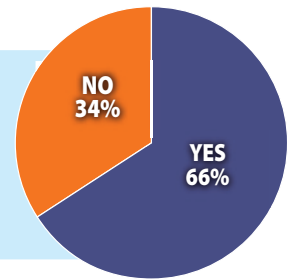
Some of the qualitative information received has been grouped together to provide for better analysis.

Report Findings – 584 respondents.

Are you worried about criminalisation of the maritime profession?



Does the fear of criminalisation have an impact on your feelings about working at sea?



What do you think are the most likely causes of being criminalised?

Response	Number/584
Pollution (oil/air)	164
Collision	72
Scapegoat for third party incidents/blame culture	26
Injury/death of a crew member/passenger	17
Condition of vessel or equipment	14
Accident caused by fatigue	11
Drugs	10
An infringement of a local law	10
Other	10
Corruption	6
Accidents (not specified)	5
Ignorance and generalisations	5
Incorrect/incomplete documentation (including visa)	5
MARPOL offences	4
Pornography	2
Alcohol	2

Some of the other comments included:

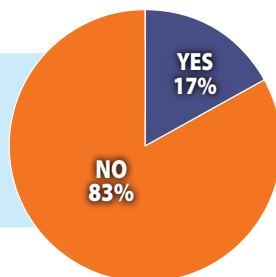
- The simplistic view of many land-based organisations and governments is that the ship can be regulated solely as a workplace and they ignore the fact that it is also a home – thus seafarers have less ‘down time’ leading to higher stress and fatigue levels.
- The need for governments to be seen as having ‘done something’, usually following media campaigns which are poorly researched and produced. The media go for the headlines and not the facts.
- A foreigner always gets treated second best to a local in most countries.
- Dealing with shore personnel that do not understand the functions of a ship.
- Any matter that the authorities deem it to be so. Ships and their crews are an easy target.
- Devolution of responsibility on the part of the companies. More onus is placed upon seafarers.

- Prosecution of drunken master
- Unfair dismissal
- Unpaid wages
- Vessel grounding/sinking
- Victim of false documentation

Those who had been involved in legal action received support from some of the following areas:

Response	Number
Company provided independent lawyer	41
Union provided lawyer	24
None	13
P&I Club	7
Lawyer (not specified)	5
Other	5

Have you ever been directly involved in a legal action?



Of the 17% who had been involved in legal action the issues involved were varied and in most cases extremely complex. They included:

- Accident/injury to shore worker/passenger/crew member
- Cargo damage/loss
- Collision in port/with another vessel
- Customs infringement
- Heavy weather damage
- Oil pollution/spill

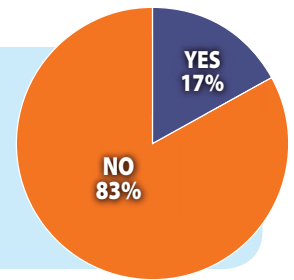
Does your employer provide you with information about your rights in the event of the following:

Response	Number
Death or injury onboard	211
Accidental pollution	128
Collision/grounding, etc	114
Detention and/or criminal prosecution	91
None	25
Other	348

Comments from those who selected other included:

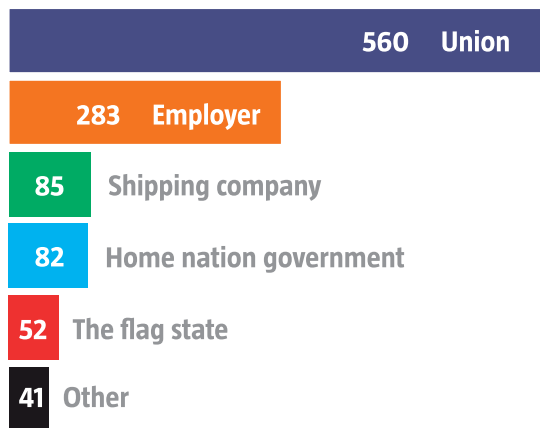
- I am confident I would receive this information on request.
- The information is available onboard but I am not up-to-date on it as it is not needed on a day to day basis.
- Up to 1980 and under a British Flag the information was available but once with FOC the information was no longer offered.
- Only rights as specified in the ITF crew agreement and that are covered by the P&I club.
- I believe the information could be sourced through the company however it is not offered in the same manner as other information e.g. HSEQ.
- We are made aware of all the penalties including our rights as part of the operations guidelines for the company. This safeguards the shipowner and their personnel as a consequence.
- All can be obtained normally from literature on board or by means of the use of computers and the internet.
- Only focus on D&A Policy; I understand that this is an important document regarding STCW-95 etc. but there is scant information disseminated that relates to the interests of the employee (is not yet a requirement of insurers).
- Some information, I would not call it complete. I would be directed to call our duty manager.
- Company gives full details of actions to be taken in all the above incidents but does not give the information regarding our personal rights.
- Specify that all communication must come from the employer rather than statements by master.

Are you given information about insurance cover for legal risks you may encounter while employed as a seafarer?



If you had a legal problem relating to your employment, who would you look to for assistance?

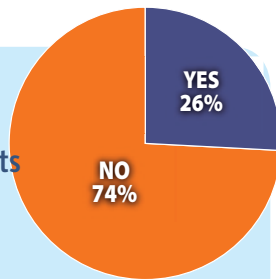
Response	Number
Union	560
Employer	283
Shipping company	85
Home nation government	82
The flag state	52
Other	41



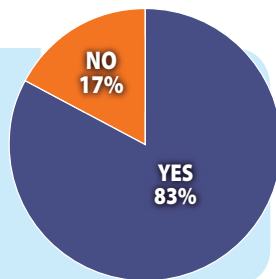
Other areas where respondents would seek assistance included:

- Employment/specialist lawyer
- Personal solicitor
- Independent legal adviser
- ITF
- Local MP
- Colleagues
- Citizens Advice Bureau
- P&I Club

Have you ever received information about the differing legal requirements between your home country and the flag state where your ship is registered, or any of the port states your ship visits?



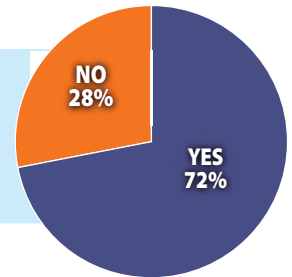
Are there some countries/parts of the world where you fear the risk of criminalisation is greater than others?



The areas by continent were:

Continent	Number
North America	325
Europe	118
Africa	114
Middle East	106
Far East	89
Oceania	27
Central and South America	24
All	13

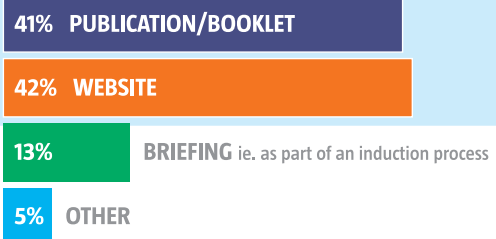
Would you like to receive more information concerning your rights?



The areas where respondents felt they needed more information fit broadly into categories:

Continent	Number
General information about rights at work	85
What to do in the event of accidental pollution	35
Access to legal support (especially when abroad)	33
Dealing with criminal proceedings	23
Rights and responsibilities in the event of an accident/collision	20
Death or injury onboard	11
Piracy	4
Other	34

In what form would you like to receive information concerning your rights?



Some of the 'other' methods included:

- Information via email
- PDF information on a flash drive
- Updates in the Telegraph
- Union led seminars

Survey conclusions

Nautilus members have made it very clear in this survey that criminalisation is a cause for great concern.

Over 90% of respondents are worried about the continued criminalisation of the industry and for over two-thirds of them, this had impacted on the way they felt about working in shipping.

Pollution was by far the biggest issue for which respondents thought they could be prosecuted and many felt this was simply because of the media attention such spills receive, and the desire for authorities to be seen to hold someone publicly accountable in their promotion of an environmental and/or political agenda.

There appears to be a shocking lack of information supplied to seafarers to alert them of the potential legal dangers and nearly all respondents stated that they would approach the Union for information rather than other sources including their own employers. Indeed, the Union legal department receives frequent calls from senior officers who have been caught up in incidents in UK waters and abroad, seeking advice in relation to being questioned by the authorities.

Very few respondents received information about the different legal requirements of the countries they were visiting and the USA was the country most feared in terms of likely criminalisation, more than three-times that of any other geographical area.

Actions

There is clearly a high demand for more information on the subject and rights at sea in general, and the Union will endeavour to make information and support more readily available.

As a result of the survey findings, the Union will:

- Provide up-to-date information on the network of lawyers overseas who can support members with issues in foreign jurisdictions.
- This information will be provided in the form of a booklet but other ways of disseminating the information will also be examined so that members can always access the information, particularly whilst at sea.
- Provide members with information on their rights following incidents and when facing a possible criminal investigation or charge.
 - The Telegraph will continue to carry features on current legislation and the impact on seafarers wherever relevant.
 - Some basic information on seafarers' rights is also included at the end of this report.
 - Extend the information we produce to include the Netherlands' jurisdiction and procedures.
- Lobby the UK and Netherlands governments and the EU to seek to ensure that legislation affecting seafarers does not increase the risk of criminalisation.
 - The Union will present a copy of the findings of this survey to the relevant authorities.
- Put pressure on all relevant bodies to ensure that the UK and Netherlands signs up to the ILO Maritime Labour Convention 2006 (MLC 2006) and IMO fair treatment guidelines.
 - This includes demanding that the governments ratify the MLC 2006 as soon as possible.
- Ensure that any members involved in investigations are able to access the provisions laid down under international conventions.
- Support to the fullest possible extent the work of Seafarers Rights International.
- Hold further criminalisation seminars in the UK and extend these to the Netherlands

What criminalisation means to maritime professionals

The number of cases of criminalisation has risen sharply over the last decade. The Herald of Free Enterprise disaster in 1987 and the subsequent Old Bailey court case marked a turning point in the way authorities dealt with maritime incidents.



The Herald of Free Enterprise capsized on 6 March 1987 with the loss of 193 passengers and crew.

Seven individuals were charged with gross negligence manslaughter, and P&O European Ferries (Dover) Ltd, was charged with corporate manslaughter. Despite the judge halting the trial due to lack of evidence against the company, shore staff, and master, there was a public and political backlash against the decision and the lack of any prosecutions being made.

A public inquiry found there was poor workplace communication and the relationship between seafaring staff and shore-based managers had almost completely broken down.

Lord Justice Sheen stated: 'From top to bottom the body corporate was infected with the disease of sloppiness,' and drew conclusions that the underlying fault for the disaster lay with the company management.

Since 1987 there have been a number of cases around the world that highlight the desire for authorities to find an individual to hold to account and the terrible pressures maritime professionals are placed under whilst such accidents are investigated.

Detention away from home...

On the morning of 7 December 2007 a crane barge snapped free from a tug due to rough seas and collided with the 269,600dwt VLCC Hebei Spirit. The Hong Kong flagged tanker suffered nine moments of impact in the collision, which punctured three of its five tanks and resulted in the leaking of some 10,800 tonnes of oil — South Korea's worst ever spill. Considerable public outrage and concern followed as Korean fishing communities were seriously affected.

An initial investigation into the incident, completed by the Korean Coast Guard just days after the accident, shared the blame between the tug masters, the barge master, and the officers of the Hebei Spirit. The tug masters and the barge master were charged with negligence and violating the marine pollution prevention law, and the Hebei Spirit officers, Captain Jasprit Chawla and chief officer Syam Chetan were charged with violating marine law and remanded in custody.

The district court later cleared the Hebei Spirit officers and the barge personnel, but ruled that the two tug masters were guilty. The barge owner, Samsung Heavy Industries, was also fined.

Despite their exoneration, the 'Hebei Two' continued to be detained in South Korea after prosecutors lodged an appeal which resulted in them being imprisoned (the master for 18 months; the chief officer for eight months). When delivering the sentences the judge said Capt Chawla should have gone full astern to drag the Hebei Spirit's anchor to avoid the collision and that chief officer Chetan should have reacted to the incident quicker; despite both men appearing to have followed international procedures for responding to such an incident.

Following intense campaigning by the world's shipping community against the detention of the officers, the Supreme Court of South Korea reversed the Appeal Court's decision to imprison them. However it dismissed



The captain and chief officer of the Hebei Spirit were detained in South Korea following a collision.

their appeal concerning charges of pollution and upheld the pollution fines imposed.

Both men returned home to India having spent 18 months detained in South Korea.

...At the mercy of public opinion...

The 26-year-old tanker Prestige, with owners in Greece through Liberia; registered in the Bahamas; classed in the United States; chartered by a Swiss-based Russian company with offices in London; crewed by Greek and Filipino seafarers and sailing from Latvia to Singapore, sank off Spain in November 2002.

The spill polluted thousands of kilometers of coastline and was the largest environmental disaster in Spanish history.

The public and political outcry that followed condemned the shipping industry and resulted in a range of emergency measures from the EU including new penalties for maritime pollution incidents and a recognition scheme for certificates issued to non-EU seafarers.

The Spanish authorities reacted to public opinion and detained the ship's Greek master, Captain Apostolos Mangouras, in a high security prison and set bail terms of around £2m. He was detained in prison for 83 days until his bail was paid by the London Steamship Owners' P&I Club. He was not allowed to return to Greece for more

than two years and when he eventually returned, his bail conditions remained, and he had to report to a police station every two weeks.

A report by the flag state in January 2005 cleared the captain of blame for the disaster, concluding that his conduct had been 'exemplary'. It claimed his detention violated his human rights and breached the United Nations Convention on the Law of the Sea.

The Investigators failed to find any firm evidence about the underlying cause of an initial structural failure but noted a weakness in the No 3 starboard wing tank which led to a breach of the hull and ingress of water, which, in turn caused a heavy starboard list.



The Prestige sank off the coast of Spain after being refused entry to a Spanish port.

The Spanish authorities were criticised for refusing to allow the stricken tanker a safe haven which may have prevented the pollution of 1,900km of coastline.

Capt Mangouras was charged with a crime against the environment and damaging a protected natural space, with the prosecution calling for a jail term of 12 years. Two other officers were charged and the ship's owner and insurer were charged with 'civil responsibility' and damages totalling more than €2.2m were being sought across the board.

The case has been continually delayed as the Spanish authorities try to prosecute as many people and organisations as possible to ensure that they can find who is ultimately responsible and recover some of their

costs, as well as showing the public that the matter was taken very seriously by the authorities and government.

Whilst the criminal proceedings were pending Capt Mangouras filed an application in the European Court of Human Rights alleging that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration and that therefore Spain was in breach of Article 5 (the right to liberty and security of the person) of the European Convention on Human Rights. The case eventually reached Strasbourg in September 2010 and the court found, by a majority of 10-7, that the level of bail was not excessive.

However, in a strong dissenting ruling the judges in the minority made the following key points:

- the general principle that the accused and his assets must be the principal reference point for setting bail
- national courts have an obligation to consider the person's resources before setting bail and it was recognised this did not take place in the case of Captain Mangouras
- the seriousness of the charge cannot be the 'decisive' factor in justifying the amount of bail set
- Captain Mangouras's case was not of an exceptional nature due to the relationship between the applicant and the owners/insurers and the gravity of the offences. These two features were not such as to justify the level of bail demanded
- the failure of the domestic courts to properly consider the master's personal circumstances and the possibility



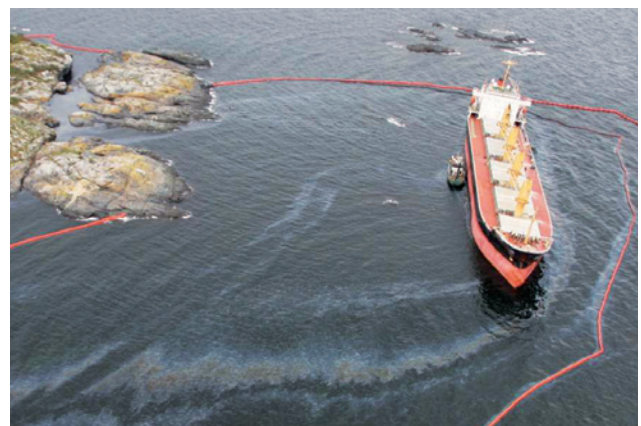
of alternative measures, which could have been combined with the bail to secure his attendance at trial

The criminal proceedings against Captain Mangouras, now in his 70s, are still pending and he remains on bail while his case progresses.

...Imprisoned for events out of their control...

The Panama-registered freighter Full City ran aground in bad weather off the Norwegian coast following engine trouble at the end of July 2009, spilling some of its bunker fuel.

An estimated 300 tonnes of fuel oil were spilled after the ship dragged its anchor while sheltering from a storm. The spill polluted 75 miles of coastline and cost some Nkr200m (£23m) to clean up.



The Full City ran aground on 31 July 2009 spilling 300 tonnes of oil.

The Chinese shipmaster Zong Aming and chief officer Qilang Lu were detained on charges of negligence in failing to avoid the grounding and environmental charges that carried a maximum 10-year sentence.

They were only allowed to return to China after a Court of Appeal decision and payment of NOK1m (£110,000) each in bail.

Both pleaded not guilty and defence lawyers argued that their alleged negligence did not warrant pre-trial

detention and claimed the men had suffered stress while being detained in Norway.

However, the two men were found guilty in June 2010 following a two-week trial. Capt Zong Aming was sentenced to six months in prison, with four months suspended in consideration of time already spent in detention awaiting trial, and chief officer Qilang Lu was sentenced to two months, with five weeks suspended.

Prosecutors argued that the pair had failed to properly respond to weather warnings and had delayed contact with VTS or emergency services, both when the ship started to drag on the anchor and after the grounding.

But defence counsel said that contact with the authorities would not have made much difference to the events and pointed out that the ship's engines had been started within 10 minutes of the anchor breaking.

... And the vital support of your Union

Three crew members onboard the 928gt emergency response and rescue vessel Viking Islay died of asphyxiation on entering an enclosed space in September 2007.

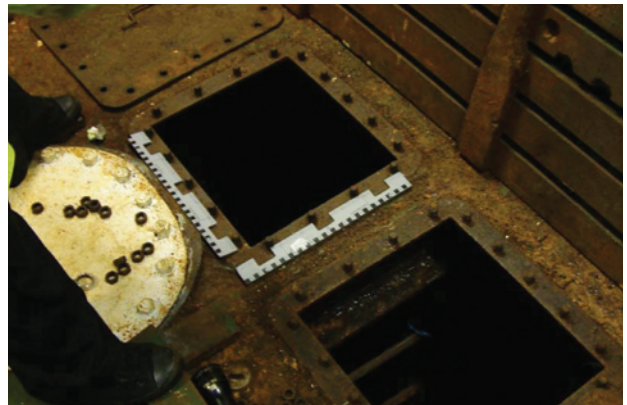
The crew's sleeping quarters were near the anchor chain locker and its rattling was keeping them awake. Crew



Three seafarers died onboard the Viking Islay after entering the chain locker.

members decided to tie up the anchor chain as others had done before.

Investigators found that one of the men collapsed after going into the chain locker to secure the rattling anchor chain. Two other shipmates died in subsequent rescue attempts, and the Marine Accident Investigation Branch report said they had 'failed to recognise the chain locker was a potentially dangerous enclosed or confined space or the likelihood that the atmosphere inside could become oxygen-deficient over time'.



Capt Don Fryer, in charge of the vessel at the time of the tragedy, was arrested and charged with two counts under section 58 of the Merchant Shipping Act 1995 (which is the section dealing with conduct endangering ships, structures or persons). A conviction can result in a maximum term of imprisonment of two years.

Prosecutors said the master had failed in his duty to protect the crewmen – which led directly to their deaths. It was alleged that when told that the men wanted to enter the compartment he had not given any directions on how the job should be done safely.

They claimed that the master should have refused permission for the men to enter the locker.

In his defence the court was told Capt Fryer should not be convicted for these offences as he could not have foreseen that, as experienced seafarers, the men would have entered the locker without taking proper precautions.



Capt Fryer endured a nineteen month ordeal waiting for the trial, which lasted two weeks, after which he was found not guilty by a jury on both counts.

Following the trial Capt Fryer said he could not believe it when the police confirmed they wanted to question him on suspicion of manslaughter (for which he was originally arrested and interviewed).

He praised Nautilus International and said he did not know how he would have survived the nightmare without their support.

He said: 'You join for the pay negotiations and you think you might need it if there were problems like a collision or a grounding but nothing like this...'

'The protection I was given was second to none,' he continued. 'I would say to anyone who is not in the Union that they should be.



International protection

There are international conventions and guidelines which aim to protect maritime professionals when authorities investigate incidents or accidents at sea or in a port.

The four main conventions of UN bodies are:

- IMO – International Convention for the Safety of Life at Sea (SOLAS)
- IMO – International Convention for the Prevention of Pollution From Ships (MARPOL)
- IMO – International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)
- ILO – Maritime Labour Convention 2006 (currently waiting ratification)

These conventions should all be incorporated into national laws and take precedence over local legislation. SOLAS and STCW form the underlying principles which establish the International Safety Management Code (ISM Code). This aims to:

- ensure safety at sea
- prevent human injury or loss of life
- avoid damage to the environment and to the ship

UNCLOS

The United Nations Convention on the Law of the Sea 1982 (UNCLOS) defines the rights and responsibilities of nations in relation to the extent of their territorial seas and the use of the world's oceans.

Part XV of UNCLOS specifically relates to the settlement of disputes and seafarers should become familiar with some of its Articles.

Article 287: Choice of procedure

1. When signing, ratifying or acceding to this Convention

or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI
 - (b) the International Court of Justice
 - (c) an arbitral tribunal constituted in accordance with Annex VII
 - (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein
2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.
 3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.
 4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
 5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.
 6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.
 7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction

under this article, unless the parties otherwise agree.

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 292: Prompt release of vessels and crews

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
2. The application for release may be made only by or on behalf of the flag State of the vessel.
3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

Article 293: Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules

of international law not incompatible with this Convention.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono* [“according to the right and good” or “from equity and conscience”], if the parties so agree.

The lawyers’ view

In March 2010, Emma Groves and David Handley, lawyers from Hill Dickinson, discussed the questions arising from the increase in criminalising maritime professionals. This followed the custodial sentences given to four maritime professionals involved in a collision between the support vessel Neftegaz 67 and the bulk carrier Yao Hai in Hong Kong waters in March 2008.

Eighteen people lost their lives when the larger of the two vessels, Yao Hai, under the direction of two licensed Hong Kong pilots, hit and holed the Neftegaz 67 which capsized and sank.

The court prosecuted the master of Neftegaz 67, the master of Yao Hai, a Hong Kong pilot and a Hong Kong co-pilot who was assisting.

They were all found guilty of breaching section 72 of the Shipping and Port Control Ordinance Cap 313 (SCPO) and

received custodial sentences of up to four years.

According to these UK lawyers, the case raises a number of questions around the criminalisation of seafarers:

How appropriate is the use of criminal prosecution and sanctions where professionals are going about their routine duties?

When sentencing the four defendants, Judge D’Almeda Remedios considered the case of the Malojall, where the judge stated that the most serious errors of navigation are those made by an officer who has time to think. It is clear that the judge considered the fact that action had been taken so late it was a very serious error of navigation.

For all ships in UK waters and UK ships in international waters, prosecutions are brought against seafarers either under the Merchant Shipping Act 1995 or under the common law of manslaughter (where there is culpability in causing death but without intent to kill).

Section 58 of the Merchant Shipping Act 1995 deals with prosecutions against the master and crew, for conduct endangering ships, structures or individuals. The maximum term of imprisonment is specified as



not exceeding two years, with any custodial sentence imposed for a conviction for common law manslaughter likely to be significantly more— especially where there are likely to be 18 counts of manslaughter.

In the *Neftegaz 67* case, comparisons were drawn with the leading English case of *R v Cooksely* (2003) which considered sentencing guidelines for dangerous driving causing death. Lord Woolf, in his judgement, considered that although the offence does not require an intention to drive dangerously or an intention to injure, there is a requirement that the offender's driving has to fall far below the standard that would be expected of a competent and careful driver.

Perhaps some perspective can be brought by examining other cases. In a case involving the crash of a National Express coach in January 2007, the driver received a sentence of five years in addition to a three-year driving ban for three counts of death by dangerous driving. It would be fair to say that, as the driver of a car that had been driven dangerously causing the death of other road-users; one would expect a custodial sentence. It may be that in the National Express case a higher level of care can be expected from a professional coach driver who should hold a licence for driving public vehicles containing many passengers. This poses the question – does the bus driver hold a higher duty than the driver of a car? At sea, this would be the comparison of duties



A checklist for fair treatment

The Union has provided some advice, based on general principles laid down in international laws, as a useful safeguard for seafarers to be used in conjunction with national laws in the country concerned.

If the vessel is boarded by officials

- request to see proper identification of any law enforcement officer and record full details of the identification
- notify owner/operator, flag state, and any consular authorities of the incident and any enquiries made
- cooperate reasonably with the law enforcement authorities involved without incriminating yourself or waiving any of your legal rights
- request to be informed of your rights under the national law of the boarding state in a language that you can understand
- assert your rights with the flag state to be dealt with by the authorities of the flag state

If a search is carried out

- refuse to allow a search of either yourself or your personal belongings unless a valid search warrant is produced
- if there is no search warrant, but the law enforcement officers still insist on the search, clearly state that you do not consent to the search — preferably in front of witnesses
- do not use force to prevent a search
- request legal representation before any search is carried out of your person or your belongings
- request contact with Nautilus International or a local trade union official before any search is carried out of your person or your belongings

- remain present during any search of your belongings, preferably also with another crew member present, and note any personal items removed or damaged during the search

If an interview is conducted

- request legal representation before agreeing to answer any questions
- you have the right not to incriminate yourself, make no admissions without taking legal advice
- if you decide to speak without a lawyer present, or cannot avoid doing so, then request that there are witnesses present whom you can trust, including a Nautilus or a local trade union official
- request the use of a translator before giving a statement or answering any questions if the language spoken by the law enforcement officers is not your own, or if English is being spoken and you are not a native speaker
- do not rely on promises of immunity made by law enforcement officers in exchange for any statement or for answering any questions
- valid offers of immunity from criminal prosecution can generally not be made by law enforcement officers
- if the interview is to be conducted outside the ship, refuse to leave unless accompanied by a lawyer and an interpreter, and only after your consular authorities have been notified of your whereabouts
- do not use force to resist your removal from your ship
- if intimidated, notify your lawyer and/or consular authorities



If you are detained or arrested

- request to be informed at the time of your arrest/detention the reason for it and of any allegations against you
- request legal assistance and confidential communication with counsel
- request consular assistance
- request the right to an interpreter (approved by consular authorities) and to translation of essential documents
- assert the right to be brought promptly before a judge to have the lawfulness of your detention reviewed
- assert the right to have a trial within a reasonable time and not to be detained pending trial without good reason
- declare right not to be subjected to arbitrary arrest or detention, and not to be deprived of liberty except on such grounds and in accordance with such procedures as are established by law

Maritime investigations in the UK

What to know

Andrew Oliver, Partner at Andrew Jackson lawyers has worked on many maritime legal cases and has compiled some guidance for members when facing an investigation in the UK.

These notes provide an overview of the type of investigation that may ensue following a maritime incident or a casualty on board a vessel, particularly with regard to the potential for the authorities trying to establish if there is any criminal liability against the master, crew or owners of the vessel.

The first section deals with the authorities you are likely to come across in the aftermath of a maritime incident. Very shortly after the casualty occurs a multitude of officials will descend on the vessel. The role of some may be quite innocuous but others may be trying to establish if there is any criminal liability and, if so, by whom.

The second section deals with just what powers all these visitors on board have, and more importantly, the seafarer's rights during their investigations. With so many investigators onboard a vessel there is a need for the master, owners and crew to be astute as to whom they are and are not obliged to cooperate with. Such circumstances are undoubtedly stressful and it is important to ensure so far as possible that nothing is said or done which could incriminate a party and at some stage lead to a criminal trial.

The master's role

In being involved in a maritime incident the master will clearly be under pressure and in a stressful situation. Not only will he or she continue to be responsible for the management and navigation of their vessel but they will also have to additionally coordinate any emergency response, to ensure that appropriate reports are made

to the various authorities, as well as coordinating the practical and administrative follow up after the casualty and quite often for some considerable time thereafter. In those circumstances the master should never hesitate to obtain support and guidance from Nautilus International. This is particularly important because although the master is the owners' representative onboard the vessel he should always be mindful that on occasions his personal position may be in conflict with that of the owners. Therefore even if owners appoint legal advisors to assist, the master should always be mindful as to whether there is any conflict between themselves and the owners and, if they suspect such a conflict, take independent advice via Nautilus.

Who is on the ship?

After a maritime incident a bewildering array of officials will appear on board and present themselves to the master. It can be confusing as to exactly who these people are and on occasions they may have more than one role to fulfil.

Marine Accident Investigation Branch (MAIB)

The MAIB is a government agency and will investigate any significant marine accident. Its sole role is to investigate marine accidents and highlight the lessons to be learned so as to improve marine safety. The MAIB clearly states that it is not in business to apportion blame or establish liability.

The police

In any marine incident which involves a fatality the police are almost certain to become involved. This is one of those occasions where an official has a dual role and the police officer who comes on board could be wearing 'two hats'. Firstly, they may be there as an investigatory body in order to investigate and ascertain whether there has been any crime (suspicious circumstances) which has led to the fatality. This could range from the most serious, murder, through to manslaughter or a lesser breach of regulations which nevertheless led to a fatality. The other role (in England and Wales) is acting as the Coroner's officer. All workplace deaths in England and Wales are likely to result in a Coroner's inquest. In Scotland a similar procedure is known as a Fatal Accident Inquiry. The police act as the Coroner's officers in gathering evidence and preparing a file for presentation to the Coroner. It is therefore important to establish at an early stage what the police remit is: are they happy there are no suspicious circumstances which may give rise to criminal liability and are they simply acting as Coroner's officers?

Maritime and Coastguard Agency (MCA)

This is the lead agency in connection with the management and regulation of shipping in the UK and an MCA officer coming on board a vessel could be wearing one of many hats. The first may be in respect



of a port state control surveyor or inspector. In this role they have the power to carry out a full audit of the vessel for compliance with UK, European and International merchant shipping requirements, including manning, officer certification, and ship certification issues. Ultimately if they are unhappy they have the power to order the detention of the vessel until any defects have been remedied to their satisfaction. In addition to the port state control role the MCA also has the role of investigating breaches of Merchant Shipping Act legislation and bringing enforcement proceedings where necessary. Accordingly, MCA officers have investigatory powers similar to that of a police officer therefore it should be established at an early stage why the agency is involved. It may be that certain officers attend from the local MCA office in the certification and port state control role, whereas specialised officers from the MCA's enforcement unit in Southampton attend in an investigatory role.

Health and Safety Executive (HSE)

The HSE is responsible for investigating and, where appropriate, taking enforcement action in connection with workplace accidents ashore. Accordingly, it may become involved in connection with marine accidents where they involve dock or port facilities. Interestingly, it also has responsibility in respect of offshore installations, so any incident involving an offshore installation (one example the writer has dealt with was a collision between a vessel and an offshore installation) will result in a HSE investigation. In addition there may also be circumstances where it is unclear as to whether the HSE or the MCA will have jurisdiction, for example, in connection with accidents occurring on ramps and gangways. The HSE has broad investigatory and enforcement powers and again any failure to cooperate could result in an offence of obstruction. As with any criminal investigator, once again care should be taken not to make comments that could be regarded as significant to any investigation without legal advice and advice sought if any concerns arise.

Flag state/class surveyors

It is becoming increasingly the case that the flag state of the vessel may send investigators and/or surveyors in circumstances where there has been an incident. Any investigation by flag state or class surveyors will be in addition to those carried out by the MCA as port state control. It should be noted that flag state surveyors, and indeed class, have the ability to take steps which could effectively cause the vessel to be detained even in circumstances where the port state control inspectors have issued the vessel a clean bill of health and authority to sail. Dependent upon the laws of the particular flag state, it may also be that the flag state surveyors may have powers of criminal investigation which could result in proceedings or disciplinary action within the flag state. As always, if in doubt take advice.

P&I and owners' representatives

It will almost certainly be the case that with any major incident the vessel's P&I insurers will attend to carry out their own investigation. Normally that will also involve the P&I club's lawyers coming onboard to carry out their own investigation. That investigation will be for the purposes of establishing what happened and as to whether there may be any civil liability. It may be that the P&I club's lawyers can assist the master and crew and certainly they should be afforded every cooperation.

The master is of course the owner's representative on board and is under a duty to assist the owners and their representatives in connection with any investigation relating to the vessel. In addition to the P&I club's surveyor and lawyers it may also be that hull and machinery insurers will put a surveyor or lawyers onboard and similar considerations apply to them in terms of cooperation. However, one issue that the master and crew should always be aware of is as to whether there may be a conflict situation as between the owner and the master. If there is any possibility that a situation could develop where a master may have some form of grievance against owners, or may be in a

position where he believes an incident has been caused by the owners' management of the vessel, the master should obtain separate independent advice.

Similarly owners, surveyors and lawyers should always be alert to the potential for conflict in circumstances where an owner may wish to apportion some of the liability for an incident on the actions of the master or crew. An example of this may be where there is a suggestion that the master or crew have failed to comply with owners' standing orders or have acted outside the remit of the vessel's ISM documentation and the owner's safety management system. In such circumstances it is vital that the master or crew of the vessel should obtain separate independent legal advice as soon as possible. It should also be noted that by obtaining independent legal advice that does not preclude the master and the owners working together where appropriate or advantageous.

Third parties

It may be that there are other interested third parties who may wish to gain access to the vessel for the purposes of carrying out their own investigation. This may, for example, be the representatives of the owners of another vessel that has been involved, lawyers for an injured party, or indeed the press. The master of the vessel does have authority over those who come on board his vessel. Whilst bodies such as the MCA, MAIB, police, etc do have the legal right to come aboard, third parties such as those mentioned above do not. Accordingly if there is any doubt about whether they have such a right, they should be excluded access to the vessel and advice sought from owners. Certainly in terms of press involvement, the best course of action is usually to say nothing on the basis that you do not wish to prejudice any investigation being carried out by the regulatory authorities. Simply refer any press interest to the owners.

What powers do the authorities have and what rights do I have?

The Marine Accident Investigation Branch

The MAIB derives its powers from the Merchant Shipping (Accident Reporting and Investigation) Regulations 2005. It is a government agency based in Southampton and there is a duty for the master (or senior surviving officer) to report all significant marine incidents to it. The MAIB will then decide if it is going to investigate and if so whether it will be a preliminary investigation only or a full investigation. If it decides to investigate, the MAIB will send a team of investigators to the vessel to obtain the ship's report. From that report investigators will decide whether they wish to carry out a preliminary examination which will result in a short summary report or whether there should be a full investigation. Full investigations are generally reserved for serious incidents, novel incidents or incidents which are of common concern within the maritime industry. A full investigation will result in a full report.

It should be noted that the MAIB is subject to memoranda of understanding (MOUs) with the MCA, HSE and police which generally give the MAIB precedence in connection with investigations. Whilst the MAIB's role is one of accident prevention and dissemination of information within the marine industry, there are certain criminal offences which are relevant to MAIB investigations. It is an offence to fail to report an accident, deliberately fail to make evidence available or to make a false declaration to the MAIB. The best advice is to always cooperate with the MAIB but seek advice if there are any concerns.

The MAIB does have the power to interview witnesses. These will usually be tape recorded for future reference. The person being interviewed can ask for independent representation at the interview although

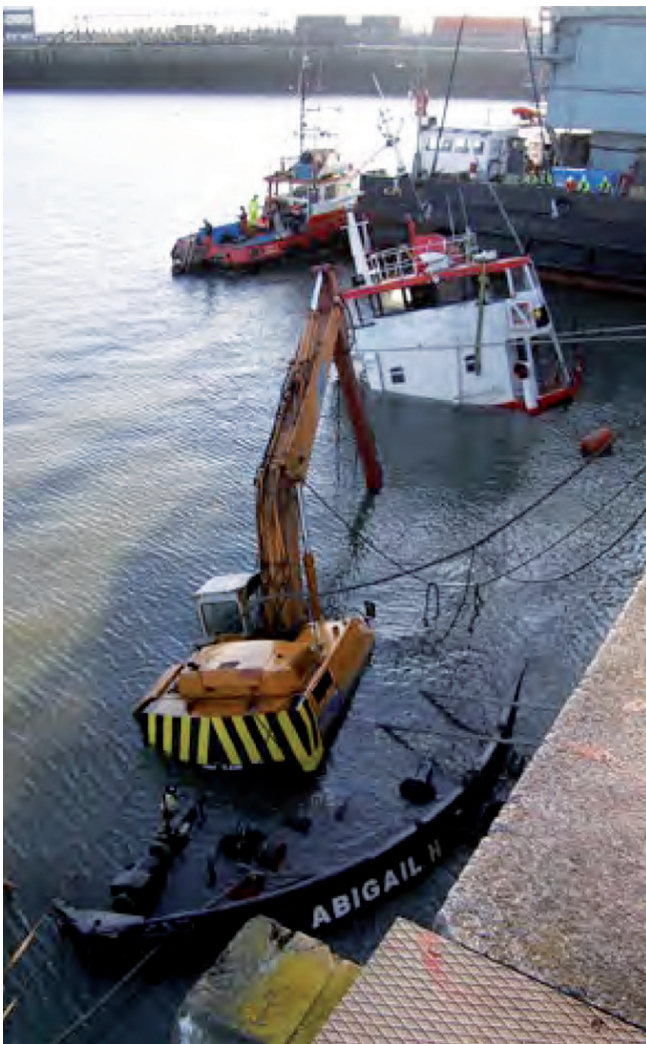


it is fair to say the MAIB is reluctant to allow lawyers to attend. Whilst the MAIB does not have any powers to prosecute individuals for breaches of legislation, care should however be taken as to the way things are said to investigators as MAIB reports can in certain circumstances be used against an individual. Whilst the MAIB's role is not to apportion blame and its reports cannot be used as **evidence** in criminal proceedings, they are nevertheless public and are often referred to in legal proceedings, although they do not have evidential value. Importantly, statements made to the MAIB cannot be used for any purpose other than the investigation unless a court orders otherwise.

The police

In terms of the police officer carrying out an investigation into a crime, there is a general requirement to cooperate although there is no compulsion to incriminate yourself or others. The police will usually carry out their own investigation but may at some point wish to interview the master, crew or owners.

In general the police can carry out two types of interview, being an interview of a suspect under the Police and Criminal Evidence Act 1984 (a PACE or caution interview) or the interview of a witness under section 9 of the Criminal Justice Act 1967 (a section 9 interview).



PACE interview - suspects

Such interviews are carried out where the police have reasonable grounds to suspect that the person being interviewed has committed a criminal offence. Any request for a PACE interview should be considered very carefully and independent legal advice should also be immediately sought, which Nautilus can assist with.

There is no compulsion to answer questions at a PACE interview. Alternatively a person can refuse to answer some or all of the questions being put. In some circumstances it may be best to decline a PACE interview but to arrange, through lawyers, to submit a prepared statement to the police. It is important to take legal advice as to which option to pursue because anything that is said in a PACE interview, which will generally be recorded on tape or CD, can be used in evidence in criminal proceedings.

Furthermore, in England and Wales, if you fail to mention at an interview something which you later raise in court, the court can draw an inference from this on the basis that if you had something to say you should have mentioned it when you were interviewed. A judge or jury is entitled to form the opinion that anything mentioned only at trial may be given less weight in evidence if it was possible for the defendant to have mentioned it earlier. Any request for a PACE or caution interview should therefore be treated with the utmost seriousness. Legal advice should be sought and a legal representative taken to the interview as it is a person's right to have independent legal advice available and in attendance throughout. Caution interviews can be undertaken by the police, the MCA or indeed the HSE.

Section 9 interview - witnesses

The second type of interview that the police may wish to conduct is what is known as a Section 9 interview. This is purely in circumstances where the police believe that the person may provide valuable evidence as a witness. Again it would be sensible to take legal advice regarding this, but generally the witness interview will not infer

any criminal liability on the party being interviewed. The interviewee will normally be recorded in writing on a form for the purpose and the interviewee will have the opportunity of reading through the statement and making any amendments or alterations before signing it. The witness statement should be checked very carefully before it is signed, especially if the interview is being carried out by the police or the HSE as they tend to have little marine knowledge and can sometimes become confused over marine procedures or terminology. Care should therefore be taken that the witness statement is accurate and is not inadvertently misleading or ambiguous. Again the police, HSE and MCA will take Section 9 witness interviews.

Interviews - general

When giving any form of interview to the investigating authorities care should be taken with regard to what is known as 'significant statements'. Generally anything said by an individual cannot be used in criminal evidence against them unless prior to any statement/interview they have been read the caution. In England and Wales this is the caution we have all seen on police dramas starting with the words 'You are not obliged to say anything but if you do not mention when questioned...'. Anybody being interviewed under a PACE interview will have that caution read out to them at the start.

However on occasions somebody makes a comment or statement which is directly relevant to the commission of any offence that can be regarded as a 'significant statement'. That significant statement can be recorded and can be used in evidence against that person, although the police investigating officer should stop any questioning at that point and administer the caution. The significant statement should then be put to the person once again after the caution has been administered effectively to confirm what was said and bring it within the category of admissible evidence given under caution. Care should always be taken when speaking 'off the record' to any investigating officer that a significant statement is not made. Again the best possible recommendation is to take legal advice if there

is any suspicion that a criminal offence may have been committed.

MCA

The MCA's Enforcement Unit has very similar powers to that of the police in terms of the investigation of offences contrary to Merchant Shipping Act legislation. In particular it has the power to conduct PACE interviews and take Section 9 statements. Therefore the same advice as given above relating to police investigations applies to MCA investigations.

Entitlement to advice

Everyone is entitled to take advice at any stage of an investigation. It is very important that in the heat of the moment or in the madness of an investigation, with people crawling all over a vessel each getting in the other's way, that the master or crew take time out. Quite on top of the stress of an investigation and the aftermath of an incident, there are all sorts of human emotional issues that will be going through people's minds – especially if they have seen a fellow crew member and friend injured or killed. It is entirely appropriate and permissible for the master or crew to take some time for themselves. Having a good representative onboard the vessel advising you can assist in this, on the basis that the master or crew can either leave the vessel or return to their accommodation allowing the adviser to deal with queries from the investigating authorities.

In respect of the regulatory authorities such as the MCA, MAIB, HSE and the police, there is a duty to cooperate – but there is no requirement to incriminate one's self. Accordingly, if you believe there may be a situation developing where if you speak or take part in the investigation you may incriminate yourself you are entirely within your rights to withdraw and state that you want to take independent advice. The taking of independent advice does not show a sign of weakness or indicate guilt, and professional investigators should respect your wish to do so.

When taking advice, care should be taken as to whom it is taken from. The owners and/or their P&I representative may not be the most appropriate person to take advice from. As already stated there may be a conflict situation between the owner and the master or crew. That conflict may only be a potential conflict but nevertheless care should be taken to obtain independent legal advice and therefore contact Charles Boyle, director of legal services at Nautilus.

As has already been stated there are a number of options that one can consider when asked for a PACE or caution interview. There is the option to cooperate fully, the option to attend but only answer selected questions or the option to postpone the interview to obtain legal advice and assistance. In addition, a request to interview you could simply be refused point blank or alternatively a prepared witness statement presented to the investigating authority.



Where to go for support

Nautilus International worldwide legal network

Nautilus International is there to support members whenever they need it. This includes occasions when they may be at risk of facing criminal charges after an accident or incident, anywhere in the world.

As our members work across the globe, we provide them with worldwide support. One of the main ways we do this is through our network of nearly 120 law firms around the world. This means that whenever trouble strikes, members can find fast, local, support. The Nautilus International Legal Services guide and the Union website contain details of who to contact in the countries represented.

This service covers a wide range of employment related issues such as representation at official inquiries and non-payment of wages, etc. The booklet also contains some brief guidance for maritime professionals who may be interviewed by various authorities following a maritime incident, based on the information contained here.

Professional protection for full members of Nautilus International

A major benefit for full members of the Union is the provision of professional protection which is subject to terms set out in rule 6 of the Nautilus International Rule Book. Subject to the discretion of Council (which applies in all cases) the legal department will arrange legal representation or advice for members who are:

- required to attend as a witness or party at an official inquiry in the UK or the Netherlands; this would include proceedings to revoke professional qualifications or the defence of criminal charges arising out of a maritime incident

- ordered to attend as a party a naval court or other court of inquiry held outside the UK or the Netherlands

A member may be reimbursed all or any part of their loss of salary directly arising from the cancellation or suspension of any certificate or licence. The relevant limits which apply are set down in detailed regulations which can be obtained from the Union and may change from time to time. However, currently (from 1 January 2011) the maximum levels of reimbursement for cancellation and suspension cases are £108,200 and £74,400 respectively.

To access this benefit contact the legal department on **020 8989 6677** or email legal@nautilusint.org

Seafarers' Rights International

Seafarers' Rights International (SRI) was launched on World Maritime Day 2010 and aims to:

- commission research into critical legal issues
- raise awareness of seafarers rights
- promote education and training

- produce materials to help seafarers understand their rights

The SRI board (which includes former Nautilus general secretary Brian Orrell) has approved four initial projects:

- **Seafarers' rights and the criminal law** — to secure the mandatory application of human rights protection for seafarers facing criminal prosecution for any crime in any jurisdiction, and to establish a structure for assistance to such seafarers at a practical level.
- **Flag state responsibilities and seafarers' rights** — to identify the obligations of flag states under international conventions, to conduct an audit of compliance with these obligations, and to engage at a practical level to secure effective observance of seafarers' rights by flag states.
- **Abandonment of seafarers** — to stimulate international and national efforts to secure a rapid and effective financial security system for seafarers when abandoned and to produce a series of advice notes designed for both seafarers and those assisting them on the practical issues when faced with abandonment.



- **Compendium of laws** — to create and maintain a searchable database of seafarers' rights at the international, regional and national levels, including jurisdictional complexities peculiar to seafarers' claims and the relevant compliance and enforcement mechanisms.

The SRI is led by Deirdre Fitzpatrick and on its launch she said: 'The scourge of unfair criminalisation of seafarers is a major problem, and abandonment continues to be a critical issue – with the number of cases rising four-fold between 2008 and 2009.

'Knowledge and information is power and seafarers can benefit from access to information.

'The law affects seafarers in so many ways, and we are

trying to confront some of the issues so that people are more aware and better resourced. Currently, there is not an established forum for research and dissemination of ideas and information regarding employment law in the field of maritime transport. SRI will work to fill that gap.'

ITF inspectors

The ITF maintains a network of FOC Inspectors seconded from affiliated seafarer and docker trade unions across the globe. Members can find details in the ITF **Message to Seafarers** booklet along with the details of ITF inspectors and maritime trade unions.

Contacts

Nautilus website www.nautilusint.org

Nautilus International Legal Services guide
www.nautilusint.org/Membership

Nautilus guide to fair treatment for seafarers
email centralservices@nautilusint.org

MLC 2006 A Seafarers' Bill of Rights
www.ilo.org/global/standards/maritime-labour-convention

Seafarers Rights International
www.seafarersrights.org

ITF Message to seafarers
www.itfglobal.org/seafarers/message

International Seafarers Assistance Network (ISAN)
www.seafarerhelp.org

You can follow Nautilus with...





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