

Criminalisation debate

➔ 'This house believes that the criminalisation of seafarers is unjust.'

This was the title of a debate organised by the Hong Kong branch as its contribution to Hong Kong Maritime Week in November. Despite a large number of competing events, there was a sizeable audience for the debate, ably moderated by Arthur Bowring FNI.

Speaking for the motion were committee member and barrister James McGowan MNI and local ITF inspector Jason Lam. They were opposed by Andrew Rigden Green, a partner with Stephenson Harwood, and committee member John Wilson FNI of SCBMCS, who bravely stepped in at the last moment to replace a speaker who had to travel overseas.

Mr Bowring began by calling for a vote on the motion. Perhaps not surprisingly, supporters outnumbered opposers by a wide margin.

The case for

James McGowan opened by pointing out that criminalisation can mean different things. He accepted that there must be rules that govern our behaviour. His objection was to the way certain mariners have been pursued using criminal laws as a result of doing their jobs – the case of *Prestige* being a prime example.

He also cited cases where seafarers have been put in a vulnerable position by their employers, and then denied the support of P&I clubs or other agencies that could advise them. Finally, he called for the establishment of proper legal practices internationally, so people are no longer punished merely for doing their jobs or deprived of their legal protections.

Jason Lam agreed that there were some legitimate prosecutions, but argued that many were not. A recent survey indicated the vast majority of seafarers involved in criminal cases had no legal representation and were not aware of their rights, especially the right not to incriminate themselves. Such people are often trapped on board or in jail without bail, and remain unpaid. In addition there is no uniformity, so the same law is applied differently in different countries.

The case against

Opposing the motion, Andrew Rigden Green assured us he was not immune to the emotional side of the argument, but said seafarers should not be able to avoid responsibility simply because they do a difficult job. He pointed out that the purposes of the criminal law are retribution, deterrence, removing people who are a danger to society, rehabilitation and restoration. Concentrating on the first two, he questioned whether a community service

order was sufficient punishment for a Captain who caused a massive oil spill when under the influence of alcohol. He also asked how we would deter others from committing criminal acts if there was no threat of prosecution. Recent guidelines offer a measure of protection for seafarers, but he agreed that such seafarers are often not supported by their employers. A more vigorous defence by owners who stand behind their employees might reduce the severity of sentences.

John Wilson compared certificates of competency with driving licences. When we hold a licence we are trained to obey the rules and if we break them we deserve to be punished. A punishment for speeding is similar to a breach of shipping rules: it would be unfair if one were punished and the other not. Many seafarers are blinded by emotion, he claimed, but if laws are broken then we, as highly paid professionals, should be accountable. This is not unjust – it is fair and proper.

Debate from the floor

The debate was then opened to the floor, and there were a number of audience comments – generally in support of the motion. One quoted a senior barrister who said that the charge of Endangering the Life of Others at Sea (a favourite in Hong Kong) is the only one he is aware of where you can be sent to prison for an error of judgement. Other criminal charges require some intent or knowledge, but seafarers can be imprisoned for merely having an accident.

Another suggested that criminal proceedings should not begin until the local marine investigation is completed, so courts would have the benefit of sound maritime advice before they start a case [Editor's note: in the UK, among other jurisdictions, the results of the marine inquiry are not permitted to be used as part of a legal case as a matter of principle.] A third mentioned a local case where the courts had reached a completely different conclusion on liability from the marine investigations – both local and flag state.

After other lively comments, the teams were invited to make their closing submissions.

A change of opinion?

Summarising in support of the motion, it was stressed that criminal charges often target individuals for matters beyond their control such as actions ordered by their employers. In addition, the courts do not understand the significance and consequences of factors such as fatigue or stress. For criminalisation of seafarers to be just, the courts must recognise the unique nature of the job and take it into account at all stages of the process.

In rebuttal, the opposition pointed out

that the proposers were focusing on emotive issues and ignoring the many prosecutions that were just and proper. They stressed that criminalisation itself is not unjust, even if some courts sometimes get things wrong. If seafarers were not subject to criminal sanctions then crimes would increase and professional behaviour would diminish. Also mentioned was the fact that officers study maritime and environmental law when gaining their certificates of competency, so they learn of the potential for penalties to be imposed if such laws are broken.

When Mr Bowring called for another vote, there was still a healthy majority in favour of the motion, but the opposition vote had actually increased. A victory for everyone who took part, perhaps?

On behalf of The Nautical Institute, James McGowan reminded everyone of the avenues available in Hong Kong for mariners who find themselves arrested or facing the prospect of criminalisation. There are several organisations that are able to assist, yet we still learn of mariners who are held on remand in Hong Kong for many months because they have nobody to apply for bail on their behalf or care for them and provide legal advice. As so often in cases of maritime peril, it is the Mission to Seafarers that is the first point of contact. Anyone who knows of any seafarer requiring assistance should contact the Senior Chaplain, the Rev Canon Stephen Miller, at seamenhk@biznetvigator.com or in writing at The Mariner's Club, 2 Container Port Road, Kwai Chung, New Territories, Hong Kong.

Alan Loynd FNI

