

Data and evidence

Safety investigations and the mariner on board



Capt Paul Drouin

FNI

Earlier this year The Nautical Institute published *Guidelines for Collecting Maritime Evidence*, a new and updated version of its highly acclaimed work *The Mariner's Role in Collecting Evidence*. More than 10 years after the first edition, and 28 years after its initial run as *The Master's Role in Collecting Evidence*, this publication continues to be a seminal marker in best practices following an accident, incident or other possibly litigious event on board a vessel.

This short article is intended to complement that publication by giving readers a deeper, more nuanced understanding of the word 'evidence', which can have different implications in different regimes and safety cultures.

Additionally, we will explore the processes that could unfold on a vessel during a safety investigation, based on the fictitious scenario below. Depending on which agency is carrying out the safety investigation, and according to its particular mandate and legislated power, there could be a variety of approaches. Hopefully, this article will raise awareness of some of these possibilities.

An accident has happened on your vessel in transit. As a senior crew member you have been tasked to collect evidence concerning the accident. Since you have read, and have on board as a reference, *Guidelines for Collecting Maritime Evidence* and *The Mariner's Role in Collecting Evidence – Handbook* you know your task; you know what, where, how and from whom to collect that precious evidence. But you are soon made aware that two investigators from the coastal state's transport safety board are on their way to your vessel. They are coming on board to undertake a safety investigation.

Are you now in a conflict of interest? Should you continue to undertake your evidence collection before they arrive? What is their mandate and what are their powers?

Evidence – a legally charged term

Let us start from the beginning. In the introduction to *Guidelines for Collecting Maritime Evidence*, the editor, John Noble FNI, says: "The key question for the Technical Editor was 'What is evidence?' The question may be simple enough, but the answers are many, to say the least. Some investigators or enforcers see evidence as a word only to be associated with criminal activity, while others see it in a broader light."

When courts are involved, as they must be for any dispute, or for civil/criminal wrongdoing, evidence must be collected in order to prove a collection of facts; that is, to establish these facts as true.

But what, then, is a safety investigation and how does it differ from an investigation that goes through the courts? Any case heard in the courts is there precisely for one purpose: to attribute or proportion blame. In

the simplest of terms, a safety investigation does not proceed through the courts and it does not seek to apportion blame or liability in any manner. A safety investigation seeks to establish the contributing, or causal, factors to the accident; almost invariably there is more than one contributing factor.

The definition of a marine safety investigation, as found in IMO's key document on the topic, the Casualty Investigation Code, MSC 255(84), is as follows:

...an investigation... conducted with the objective of preventing marine casualties and marine incidents in the future. The investigation includes the collection of, and analysis of, evidence, the identification of causal factors and the making of safety recommendations as necessary.

Such an investigation can be seen as the antithesis of a court proceeding or inquiry. But even a safety investigation needs to show that the collected facts are true – and it will need to do this through evidence.

Despite this, the legal connotations of the word 'evidence' are very heavy, and may appear to taint the 'safety' emphasis of the effort. So strong is this connotation that the Transportation Safety Board of Canada (TSB), for one, has resisted using the word evidence in all of its procedures and processes. Instead, the word 'data' is used.

Data versus evidence

Semantics are important. The use of the term 'data' rather than 'evidence' to ensure that a safety investigation stands on a solid, non-accusatory base is not a frivolous choice. But, debatably, the difference between 'data' and 'evidence' is greater than mere semantics. In the context of a safety investigation, evidence may almost be viewed as a sub-set of data; 'data' can be seen as a more expansive term. For example, often safety investigations will look backwards in time to view vessel operating practices, management decisions, risk acceptance and the like – sometimes quite distant from the actual accident location and time frame. This examination of the 'underlying conditions' of an accident or incident is one of the essential characteristics of a safety investigation, and one that gives weight to the use of the word 'data' over evidence.

Who owns the data?

Technically the data (evidence) relative to an accident on board or involving the ship is the property of the ship owner/operator. However, if an investigative body, generally the flag state of the ship, decides to send investigators on board, they usually have the legal authority to seize and hold that data. In most cases, they also have an obligation to share the results of their analysis of that data.

Even voyage data recorder (VDR) data that has been downloaded by safety investigators remains the property of the vessel owner. If the investigators leave with the VDR data, to establish facts and undertake their analysis, they are nonetheless duty-bound, as per IMO MSC Circ.1024, to make a copy of the VDR information available to

the shipowner. Further access to the information will be governed by the domestic legislation of the flag state, coastal state and other substantially interested states as appropriate and the guidelines given in the Marine Casualty Code. In Canada, for example, Transportation Safety Board investigators are prevented, by national legislation, from releasing audio data gathered from an accident under investigation, even to the owner of that data.

Notification

If the accident or incident on your ship becomes the subject of a safety investigation by the flag state or other independent agency, *you will be notified*. The Casualty Investigation Code calls for notification of:

- The casualty investigation;
- The time and place the investigation will begin;
- The name and contact details of the marine safety investigation authority (ies);
- Details of the legislation under which the marine safety investigation is being conducted;
- The rights and obligations of the parties subject to the marine safety investigation; and
- The rights and obligations of the state or states conducting the marine safety investigation.

Fair treatment of seafarers

Agencies undertaking a safety investigation have other commitments, too. These are outlined in IMO Resolution A.987(24), *Guidelines On Fair Treatment Of Seafarers In The Event Of A Maritime Accident*. These guidelines also describe recommended practices for the port or coastal state, the seafarer’s state, the shipowner and the seafarer.

The investigators are coming – what to do?

In some cases well-intentioned crew have cleaned up a fire scene before the investigators have arrived. This is a good example of what not to do. As far as possible, always leave accident scenes as they have been found so the investigators can examine the accident site as it happened. Once a fire has been extinguished, for example, you should leave the scene as it is, to the extent possible. Even if safety investigators do not come on board, you will need the scene to be kept in this state in order to begin your own fire investigation and find the point of origin.

To go back to the scenario laid out above, you have been informed that the investigators are on their way to your vessel – so what do you do? In the first place, you must still collect evidence for your owner; you have a job to do. But any evidence you collect must not hinder

Country or authority	Proviso
Transportation Safety Board of Canada	The Transportation Safety Board of Canada (TSB) investigated this occurrence for the purpose of advancing transportation safety. It is not the function of the Board to assign fault or determine civil or criminal liability.
Marine Accident Investigation Branch (UK)	The sole objective of the investigation of an accident under the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 shall be the prevention of future accidents through the ascertainment of its causes and circumstances. It shall not be the purpose of an investigation to determine liability nor, except so far as is necessary to achieve its objective, to apportion blame.
Australian Transport Safety Bureau	Readers are advised that the ATSB investigates for the sole purpose of enhancing safety. Consequently, reports are confined to matters of safety significance and may be misleading if used for any other purpose.
Bureau d’enquêtes sur les accidents de mer (France)	...the analysis of this incident has not been carried out in order to determine or apportion criminal responsibility nor to assess individual or collective liability. Its sole purpose is to improve maritime safety and the prevention of maritime pollution by ships. The use of this report for other purposes could therefore lead to erroneous interpretations.
The Hong Kong Special Administration Region Marine Department Marine Accident Investigation Section	The purpose of this investigation... is to determine the circumstances and the causes of the incident with the aim of improving the safety of life at sea and avoiding similar incident in future....They are not intended to apportion blame or liability towards any particular organization or individual except so far as necessary to achieve the said purpose.
National Transportation Safety Board (USA)	The Independent Safety Board Act, as codified at 49 U.S.C. Section 1154(b), precludes the admission into evidence or use of Board reports related to an incident or accident in a civil action for damages resulting from a matter mentioned in the report.
Dutch Safety Board	The aim in the Netherlands is to limit the risk of accidents and incidents as much as possible. If accidents or near accidents nevertheless occur, a thorough investigation into the causes, irrespective of who are to blame, may help to prevent similar problems from occurring in the future. It is important to ensure that the investigation is carried out independently from the parties involved.
Danish Maritime Accident Investigation Board	The investigations are carried out separately from the criminal investigation, without having used legal evidence procedures and with no other basic aim than learning about accidents with the purpose of preventing future accidents. Consequently, any use of this report for other purposes may lead to erroneous or misleading interpretations.
Japan Transport Safety Board	The objective of the investigation conducted by the Japan Transport Safety Board... is to determine the causes of an accident and damage incidental to such an accident, thereby preventing future accidents and reducing damage. It is not the purpose of the investigation to apportion blame or liability.
BSU (Germany)	... the sole objective of this investigation is to prevent future accidents and malfunctions. This investigation does not serve to ascertain fault, liability or claims. This report should not be used in court proceedings or proceedings of the Maritime Board.
Marine Safety Investigation Unit, Malta Transport Centre	This safety investigation report is not written, in terms of content and style, with litigation in mind and... shall be inadmissible in any judicial proceedings whose purpose or one of whose purposes is to attribute or apportion liability or blame, unless, under prescribed conditions, a Court determines otherwise.

the impending safety investigation. The investigators may even have to leave the vessel with some of ‘your’ evidence – a broken piece of machinery, for example. Normally, if they do, all the results of tests or analysis will be made available to the owner nonetheless. In all cases, it is important to co-operate with the investigators. At the end of the day, they are on your side.

Know that if there are safety investigators on the way or already on board, they essentially want the same thing as you – facts, that can be shown to be true. These facts will help establish the sequence of events. To do this, they will collect data.

No-blame approach

The blame-free approach is so important to a successful safety investigation that most investigative agencies have gone to the trouble of indicating this principle in their published reports. Some countries or authorities that undertake safety investigations with the intent and spirit of the Casualty Investigation Code are listed on the preceding page, along with any provisos found in their respective reports.

As can be seen, and with the possible exception of Hong Kong, which has a slight dip towards blame, each authority has taken great pains to emphasise the ‘no-blame’ approach. The Casualty Investigation Code is quite clear, stating that “...it is not the intent of the Code for a State or States conducting a marine safety investigation to refrain from fully reporting on the causal factors of a marine casualty or marine incident because blame or liability may be inferred from the findings.”

Nonetheless, the Code also stresses that:

States involved in a marine safety investigation... should ensure that any marine safety record in its possession is not disclosed in criminal, civil, disciplinary or other administrative proceedings unless:

- the appropriate authority for the administration of justice in the State determines that any adverse domestic or international impact that the disclosure of the information might have on any current or future marine safety investigations is outweighed by the public interest in the administration of justice; and
- where appropriate in the circumstances, the State which provided the marine safety record to the marine safety investigation authorises its disclosure.

As in life, nothing is starkly black or white. The truth lies in shades of grey. 🇺🇸



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