

# PROOF OF FAULT IN COLLISION CASES

W. Gary Wharton  
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# Erawan c/w Sun Diamond





# Chitose Maru c/w Marie Skou





# Tuo Hai c/w Tenyo Maru





# Queen of Oak Bay

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# Seaspan 195





# What is a collision

- Two vessels, both navigating, coming into contact

# The Golden Age

- Flag State Control
- The Radar assisted collision
- The 1957 Convention
  - “actual fault and privity”

# What happened?


- STCW
- Port State Control
- Pollution Liability

# Technology

- GPS Global Positioning System
- Traffic Separation Zones
- ECDIS Electronic Chart Display and Information System
- Radar ARPA Automatic Radar Plotting Aid
- AIS Automated Identification System



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**SPIRIT OF BC**  
**Flag:** Canada   
**Ship Type:** Passenger  
**Status:** Underway  
**Speed/Course:** 19.3 kn / 41°  
**Length x Breadth:** 168 m X 28 m  
**Destination:** TSAWWAS. SWARTZ..  
**Received (116):** 0h 1min 51s ago  
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# Liability

- **MARINE LIABILITY ACT**
- **17.** (1) Where loss is caused by the fault or neglect of two or more persons or ships, their liability is proportionate to the degree to which they are respectively at fault or negligent and, if it is not possible to determine different degrees of fault or neglect, their liability is equal.
- (2) Subject to subsection (3), the persons or ships that are at fault or negligent are jointly and severally liable to the persons or ships suffering the loss but, as between themselves, they are liable to make contribution to each other or to indemnify each other in the degree to which they are respectively at fault or negligent.
- (3) Where, by the fault or neglect of two or more ships, loss is caused to one or more of those ships, their cargo or other property on board, or loss of earnings results to one or more of those ships, their liability to make good such loss is not joint and several.
- (4) In this section, a reference to liability of a ship that is at fault or negligent includes liability of any person responsible for the navigation and management of the ship or any other person responsible for the fault or neglect of the ship.

# Athens Convention

- Article 3 - Liability of the carrier
- 1. The carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.
- 2. The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, shall lie with the claimant.
- 3. Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment shall be presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from or in connexion with the shipwreck, collision, stranding, explosion or fire, or defect in the ship. In respect of loss of or damage to other luggage, such fault or neglect shall be presumed, unless the contrary is proved, irrespective of the nature of the incident which caused the loss or damage. In all other cases the burden of proving fault or neglect shall lie with the claimant.

# The Collision Regulations

- The *Collision Regulations* are, the 'Rules of the Road'. They are divided into five parts; Part A deals with general principles, Part B deals with steering and sailing rules relevant to collisions, Part C governs the lights and shapes that ships must show for identification, Part D sets out the standard sound and light signals, and Part E has information on exempted vessels.



- The Rules are the guidelines to good seamanship. In *Whitbread v. Whalley*, [1990] 3 S.C.R. 1273 Justice LaForest stated as follows:

As is apparent from even a cursory glance at any standard text in shipping or maritime law, the existence and extent of such liability falls to be determined according to a standard of "good seamanship" which is in turn assessed by reference to navigational "rules of the road" that have long been codified as "collision regulations"

- . In *Dominion Shipping Co. v Celeste Admanta D'entremont* [1948] Ex. C.R. 651, stated that no reverse onus is placed on a vessel that has violated a 'rule of the road'. At paragraph 16, O'Connor J. stated,
- It is clear from this that when there is a breach of a rule, it is not for those who have been guilty of the breach of the rule to exonerate themselves or to show affirmatively that their fault did not contribute in any degree to the collision. And only faults which contribute to the accident are to be taken into account and the onus is on the party setting up a case of negligence to prove both.

# Experts and Assessors

- The Rules concerning experts and assessors underwent revisions which became effective on August 3, 2010 (SOR/DORS 2010-176)
- 52.1 – two or more parties may jointly name an expert witness.
- 52.2 – an affidavit or statement of an expert witness shall:
  - set out in full the proposed evidence of the expert;
  - the expert’s qualifications;
  - be accompanied by a certificate signed by the expert acknowledging that he or she has read the code of conduct for expert witnesses;
- 52.4 – Number of Experts - a party intending to call more than five expert witnesses in a proceeding shall seek leave of the court in accordance with section 7 of the *Canada Evidence Act*.
- 52.6 – Expert Conference - the court may order expert witnesses to confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ.
  - (2) counsel and parties are not precluded from attending an expert conference, but the conference may take place in their absence if the parties agree.
  - (3) the court may order that an expert conference take place in the presence of a judge or prothonotary.
  - (4) a joint statement prepared by the expert witnesses following expert conference is admissible at the hearing of the proceeding. However, discussions in, and documents prepared for, the expert conference are confidential and shall not be disclosed to the judge or prothonotary.
- 282.1 – Expert Witness Panel – the court may require that some, or all, of the expert witnesses shall testify as a panel after the completion of the testimony of the non-expert witnesses. Or, at any time that the court may determine.
- 282.2 – Examination of Panel Members – expert witnesses shall give their views in the panel, and may be directed to comment on the views of the other panel members. If the court permits, they may pose questions of the other panel members.
  - after the panel as completed their testimony, they may be cross-examined and re-examined in the sequence instructed by the court.

- Rule 52 of the Federal Court Rules states:
- (1) Role of Assessor – The Court may call on an assessor
  - (a) to assist the Court in understanding technical evidence; or
  - (b) to provide a written opinion in a proceeding.
- (2) Fees and Disbursements – An order made under subsection (1) shall provide for payment of the fees and disbursements of the assessor.
- (3) Communications with Assessor – All communications between the Court and an assessor shall be in open Court.
- (4) Form and Content of Question – Before requesting a written opinion from an assessor, the Court shall allow the parties to make submissions in respect of the form and content of the question to be asked
- (5) Answer by Assessor – Before judgment is rendered, the Court shall provide the parties with the questions asked of, and any opinion given by, an assessor and give them an opportunity to make submissions thereon.
- Rule 52(6) allowing expert's to be called notwithstanding that an assessor has been called on, has recently been repealed and replaced with a new Rule 52.1:
- 52.1   (1)       A party to a proceeding may name an expert witness whether or not an assessor has been called on under rule 52.
- (2)       Two or more of the parties may jointly name an expert witness.



# Evidence from the TSB

- The Transportation Safety Board (TSB) is the investigatory body created by the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (“CTAISBA”).
- The TSB has a mandate established by s. 7 of the CTAISBA to conduct investigations into selected transportation occurrences; and to make findings on their causes and contributing factors. They are to identify safety deficiencies, make recommendations to eliminate or reduce these deficiencies and report publicly on the investigations and their findings. However, they are specifically enjoined from making determinations of fault or liability. Any findings of the Board is not to be construed as assigning fault or liability, and are not binding in any legal, disciplinary or other proceeding.

- (2) In making its findings as to the causes and contributing factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability, but the Board shall not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Board's findings
- (3) No finding of the Board shall be construed as assigning fault or determining civil or criminal liability.

# Potential TSB Evidence

- Representations to the TSB by interested parties
- Witness Statements
- Evidence gathered by TSB Investigators
- Voice Data Recorders
- Black Boxes

# Representations to the TSB

- Section 24 of the TSB says that the Board shall prepare and make public a report on its findings. The Report is intended to highlight any safety deficiencies and make recommendations with regard to improving transportation safety. Due to the limitation placed upon the Board at s. 7(2), the Board is not to assign fault. They may report on causes and factors even though fault or liability may be inferred from the findings.
- Pursuant to s. 24(2), the Board shall send a copy of the draft report of its findings, highlighting any safety deficiencies it may have discovered, to the persons considered by the Board to have a direct interest in the findings. Those persons contacted then have an opportunity to make representations to the Board, which will be considered before the Board makes its final report. The representations are protected by statutory privilege. Representations are not to be used in legal, disciplinary, or other proceedings.

- *Canadian Accident Investigation and Transportation Safety Board v. Canadian Press*, [2000] N.S.J. No. 139
- *Hayes Heli-Log Services Ltd. v. Acro Aerospace Inc.*, 2006 BCCA 419
- *Chernetz v. Eagle Copters Ltd.*, 28 ABQB 331

# Statements

- 30. (1) For the purposes of this section and section 19,
- (a) “statement” means
- (i) the whole or any part of an oral, written or recorded statement relating to a transportation occurrence and given, by the author of the statement, to the Board, an investigator or any person acting for the Board or for an investigator,
- (ii) a transcription or substantial summary of a statement referred to in subparagraph (i), or
- (iii) conduct that could reasonably be taken to be intended as such a statement; and
- (b) where a statement is privileged, the identity of its author is privileged to the same extent.

- (2) A Statement is privileged, and no person, including any person to whom access is provided under this section, shall knowingly communicate it or permit it to be communicated to any person except as provided by this Act or as authorized in writing by the person who made the statement
- (3) The Board may make such use of any statement as it considers necessary in the interests of transportation safety.
- (4) The Board shall make statements available to
  - (a) [Repealed, 1998, c. 20, s. 19]
  - (b) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or
  - (c) any person carrying out a coordinated investigation under section 18.

- (5) Notwithstanding anything in this section, where, in any proceedings before a Court or coroner, a request for the production and discovery of a statement is contested on the ground that it is privileged, the Court or coroner shall
  - » in camera, examine the statement; and
  - » if the Court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the statement by virtue of this section, order the production and discovery of the statement, subject to such restrictions or conditions as the Court or coroner deems appropriate, and may require any person to give evidence that relates to the statement.
- (7) A statement shall not be used against the person who made it in any legal or other proceedings except in a prosecution for perjury or for giving contradictory evidence or a prosecution under section 35.



# Right to Counsel

- *Parrish (Re)*, [1993] 2 F.C. 60
- The illusion of the privilege

- *R. v. W. (C.W.)*, 204 N.S.R. (2d) 144
- If these statements are not disclosed I must consider whether the public interest in the proper administration of justice will be compromised. For example, will there be a wrongful conviction if the information is not disclosed in the circumstances of this case. In other words, will there be a miscarriage of justice? After reviewing these statements I cannot reach such a conclusion. But the statutory test goes beyond relevancy and includes whether this information can be obtained from other sources as noted in *R. v. New Zealand Rail Limited, supra*. In the circumstances of this case each of the deponents have been interviewed by the RCMP and two of the five deponents have also been interviewed by CN Rail. Only in the rarest of circumstances should the privilege of the TSB statement be abrogated. This is not one of those rare circumstances as the same deponents were interviewed by other sources available to Crown counsel. Thus, the question becomes whether, in these circumstances, the proper administration of justice does not outweigh the privilege attached to these statements as defence counsel can obtain these statements from either the RCMP or CN rail through Crown counsel.

- *Desrochers Estate v. Simpson Air (1981) Ltd.*,  
36 C.P.C. (3d) 150
- *Canadian National Railway v. Canada*, 2002  
BCCA 689.

# Evidence Gathered by Investigators

- 32. Except for proceedings before and investigations by a coroner, an investigator is not competent or compellable to appear as a witness in any proceedings unless the Court or other person or body before whom the proceedings are conducted so orders for special cause.
- 33. An opinion of a member or an investigator is not admissible in evidence in any legal, disciplinary or other proceedings.

- 20. (1) Any thing seized pursuant to section 19, except recordings as defined in subsection 28(1), shall, unless
  - (a) the owner thereof or a person who appears on reasonable grounds to be entitled thereto consents otherwise in writing, or
  - (b) a court of competent jurisdiction orders otherwise,
- be returned to that owner or person, or to the person from whom it was seized, as soon as possible after it has served the purpose for which it was seized.
- (2) A person from whom any thing was seized pursuant to section 19, except recordings as defined in subsection 28(1), or the owner or any other person who appears on reasonable grounds to be entitled thereto, may apply to a court of competent jurisdiction for an order that the seized thing be returned to the person making the application.

- *White Estate v. E&B helicopters*, 2008 BCSC 12
- [19] In context , the word “cause” in s.32 must mean a reason or a ground that may be held to justify something, in this case a declaration; and the word “special” must mean exceptional or out of the ordinary
- [21] ... the privilege accorded the Investigator should not lightly be set aside

- The Court considered the following questions relevant in assessing the presence of special cause:
- How relevant and probative is the evidence which the investigator could provide?
- Is the evidence available from any other source?
- Has the party seeking the declaration done all that could reasonably be done in an attempt to obtain the evidence from other sources?
- Has the party seeking the declaration done, or refrained from doing, something that prevented the evidence sought to be adduced from being available by some other means?
- Will the integrity of the TSB investigative process be compromised by the declaration?
- Does the interest in the proper administration of justice outweigh the interest of administrative convenience afforded investigators by rendering them neither competent nor compellable?
- Is there a serious likelihood of injustice if the evidence is not adduced?

- 23. He cannot be required to testify regarding the question of whether what he observed corresponded to what he would expect to have observed, whether the components he identified were those that should have been found in the helicopter, or whether the manner of installation corresponded to acceptable standards. Those are matters of opinion in respect of which he is neither competent nor compellable. Opinions in respect of such matters will likely be based upon the Investigator's observations, photographs and test results, but must be provided by expert witnesses who are not TSB investigators.



- *British Columbia Ferry Services Inc. v Canadian Transportation Accident Investigation Safety Board*, 2007 BCSC 1434, [upheld at 2008 BCCA 40]

# VDR's and Black Boxes

- 28. (1) In this section, "on-board recording" means the whole or any part of
  - (a) a recording of voice communications originating from, or received on or in,
    - (i) the flight deck of an aircraft,
    - (ii) the bridge or a control room of a ship,
    - (iii) the cab of a locomotive, or
    - (iv) the control room or pumping station of a pipeline, or
  - (b) a video recording of the activities of the operating personnel of an aircraft, ship, locomotive or pipeline
- that is made, using recording equipment that is intended to not be controlled by the operating personnel, on the flight deck of the aircraft, on the bridge or in a control room of the ship, in the cab of the locomotive or in a place where pipeline operations are carried out, as the case may be, and includes a transcript or substantial summary of such a recording.

- (2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall
  - » knowingly communicate an on-board recording or permit it to be communicated to any person; or
- - » be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings.

- (6) Notwithstanding anything in this section, where, in any proceedings before a Court or coroner, a request for the production and discovery of an on-board recording is made, the Court or coroner shall
  - 
  - » cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;
  - 
  - » in camera, examine the on-board recordings and give the Board a reasonable opportunity to make representations with respect thereto; and
  - 
  - » if the Court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the Court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.
  -

- 28(2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall
  - » knowingly communicate an on-board recording or permit it to be communicated to any person; or
- - » be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings.
-

- (3) Any on-board recording that relates to a transportation occurrence being investigated under this Act shall be released to an investigator who requests it for the purposes of the investigation.
- (4) The Board may make such use of any on-board recording obtained under this Act as it considers necessary in the interests of transportation safety, but, subject to subsection (5), shall not knowingly communicate or permit to be communicated to anyone any portion thereof that is unrelated to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies.

- (5) The Board shall make available any on-board recording obtained under this Act to
- (a) [Repealed, 1998, c. 20, s. 17]
- (b) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or
- (c) any person carrying out a coordinated investigation under section 18.

28 (6) Notwithstanding anything in this section, where, in any proceedings before a Court or coroner, a request for the production and discovery of an on-board recording is made, the Court or coroner shall

- - » cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;
- - » in camera, examine the on-board recordings and give the Board a reasonable opportunity to make representations with respect thereto; and
- - » if the Court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the Court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.
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- 28(7)An on-board recording may not be used against any of the following persons in disciplinary proceedings, proceedings relating to the capacity or competence of an officer or employee to perform the officer's or employee's functions, or in legal or other proceedings, namely air or rail traffic controllers, marine traffic regulators, aircraft, train or ship crew members (including, in the case of ships, masters, officers, pilots and ice advisers), airport vehicle operators, flight service station specialists, person who relay messages respecting air or rail traffic control, marine traffic regulation or related matters and persons who are directly or indirectly involved in the operation of a pipeline.

- *Wappen-Reedereie GmbH & Co. K.G., a body politic and corporate of Hamburg, Germany, and Reederei MS Eilbek GmbH & Co. K.G. a body politic and corporate of Hamburg, Germany v. M.V. “Hyde Park”, the Owners and all others interested in the Vessel M.V. “Hyde Park, 2006 F.C. 150 (“Hyde Park”),*

- Gauthier J.
- Considerations in the “balancing exercise”
- The nature and subject matter of the litigation
- The nature, probative value and necessity of the evidence
- Alternate means to get the evidence
- Possibility of miscarriage of justice

- *Société Air France et al. v. Greater Toronto Airports Authority*, 2010 ONSC 432
- “the privilege depends upon the court’s assessment of the relative importance of competing interests in the circumstances of the particular case

# Strathy J. in Air France

- Cited the factors enunciated by Gautier J. in *Hyde Park* and Pitfield J. in *E&B Helicopters*
- In ordering a limited confidential production of the CVR, he considered the following relevant:
  - The CVR contained relevant, probative evidence, central to the case

– The circumstances of the case:

- 300 claimants and damages in the hundreds of millions
- A large amount of evidence was available from other sources (FDR data, traffic Control, viva voce evidence)
- Some concern about the reliability of the pilot's evidence
- The CVR had already been used to refresh the pilot's memory
- The lack of personal/sensational content in the CVR
- The lack of criminal/disciplinary proceedings
- The ability to address privacy concerns through limited disclosure and confidentiality orders

- The public interest in the administration of justice
  - Without the CVR, there is a real risk that the parties and the trier of fact will not have the best and most reliable evidence concerning a central issue
- Importance of Privilege
  - There was no evidence that the limited disclosure with confidentiality requirements would impact aviation safety, the employment relationship between pilots and their employers or impede accident investigations

