

**Alcohol and Recreational Boating: Briefing Note**

**February 2009**

**Guidance and Advice for Harbour and Port Authorities**

## BREATH TESTS AND RECREATIONAL BOATERS

1. The Government has launched a consultation on draft Regulations that will govern which recreational vessels will come under the scope of the offence of being 'over the limit' when it comes to consuming alcohol afloat. Following an extensive consultation, the Government announced in 2007 that it would introduce similar alcohol restrictions for recreational boaters to those in place for professional mariners.
2. In 2003 the Railways and Transport Safety Act ('the 2003 Act') introduced criminal offences in relation to professional masters, pilots and seamen and non-professional seamen who have consumed drink or drugs<sup>1</sup>. The provisions of the 2003 Act in some respects are similar to the drink and drugs provisions in the Road Traffic Act 1988 ('RTA 1988') which apply to drivers of motor vehicles.
3. Section 80 of the 2003 Act will, when it is brought into force, introduce a maximum blood alcohol limit for 'non-professional mariners' – in other words, recreational boaters. The alcohol limit being introduced is the same as the drink drive limit: 80 milligrams per 100 millilitres of blood and will apply to those persons involved in the "navigation of a vessel".
4. The Government proposes that the offence should affect larger, faster vessels while providing an exemption for a limited number of smaller, slower craft. The Government has announced its new consultation on draft Regulations for an exception from Alcohol Limits for recreational boaters, prior to bringing Section 80 into force. This exemption, if accepted, will exempt non-professional mariners on ships which are less than 7 metres in length and which have a maximum design speed of 7 knots or less (see <http://www.dft.gov.uk/consultations/open/exceptionfromalcohol/>). These exemptions may cause problems in determining precisely which craft are exempt and which are not.
5. Whether or not these new Regulations are strictly necessary or not is effectively irrelevant. Social pressures now demand that we all act responsibly when it comes to alcohol consumption, and arguing against the regulations is akin to condoning alcohol abuse afloat. However, the issue now arises of when and how the new regulations will be enforced, and by whom.

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<sup>1</sup> We are only concerned in this advice with the issue of alcohol and not drugs.

6. Authorities will have the legal powers to be more proactive when it comes to avoiding alcohol-related incidents afloat, however these powers should only be exercised after careful consideration of the practical implications and how it may affect the harbour authority.
7. This advice is not focussed on testing an individual after an incident, when the results of excessive consumption may be all too apparent.
8. The main focus of this advice is on how authorities may actively exercise their new legal powers to avoid incidents, and the practical problems this may present.
9. To be effective and to improve safety the boating public need to be aware of the new regime, to respect the new laws and alter behaviour accordingly. It may therefore be necessary, and sensible, for harbour authorities to take a proactive role and adopt a regime of 'targeted' and/or 'random' testing in order to achieve the desired outcome.
10. In so doing, authorities will firstly have to address the logistical issues surrounding detention of individuals and/ or their craft, what this may mean for harbour staff and, in particular, whether detaining the skipper and/ or crew of a recreational craft at sea may place the safety of the vessel and remaining crew at even greater risk.
11. Most commercial vessels, faced with a similar event, have other qualified staff on-board to take over the master's responsibilities. This is not the case with recreational craft. Authorities will need adequate provision to ensure the safety of vessel or crew or risk facing considerable civil and criminal law liability, particularly if anyone on-board is injured or if the vessel is lost or damaged because the skipper was taken ashore and subsequently found to be innocent.

## **Background**

12. The *Marchioness* disaster in 1989, in which 51 people died, highlighted the devastating consequences to which the consumption of alcohol may contribute. The jury at the inquest made a number of recommendations on ship and river boat safety, one of which was that there should be a maximum blood alcohol level for seamen on duty. John Hayes conducted the inquiry into the disaster and in 1992 published a report which made 22 recommendations. Number 18 recommended the introduction of a breath test, similar to

that for vehicle drivers, which would apply to professional skippers and paid crew of vessels.

13. The issue was further discussed in 1995 in *Alcohol and Drug Abuse Aboard Ships*, a report prepared by the Tavistock Institute, whose main findings suggested that alcohol abuse varied according to the different type of craft surveyed. The issue was addressed internationally by the International Maritime Organisation in Section B of the 1995 revised International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 95), which stated that seafarers under the influence of alcohol or drugs should not be permitted to perform watchkeeping duties. STCW came into force in February 1995 and Administrations such as the United Kingdom were asked to develop national legislation prescribing maximum blood alcohol limits for those undertaking watchkeeping duties.
  
14. Section 58<sup>2</sup> of the Merchant Shipping Act 1995 included general provisions making it an offence for the master or an employed seaman to endanger his ship or other ships by reason of being under the influence of drink or drugs. However, the section had very limited use because no maximum blood alcohol level was set. Likewise, harbour authorities have for many years had the power, through harbour byelaws, to prosecute mariners who are navigating under the influence of alcohol. These byelaws often prove ineffective due to the evidential burden on the authority and the cost of enforcement. The Port of London has used its powers under local byelaws to carry out breath tests, but because the equipment used was only approved for use under the RTA 1988, a positive test could not of itself be used to bring a prosecution. It could do no more than support the Harbourmaster's opinion as to whether or not a person was under the influence of alcohol.
  
15. More recently, a small number of tragic incidents involving recreational craft have occurred involving the excessive consumption of alcohol by persons on-board. These incidents have led to urgent demands from port and harbour authorities for more robust national legislation to control the consumption of alcohol by recreational boaters.

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<sup>2</sup> Originally section 220 of the Merchant Shipping Act 1894 replaced by section 27 of the Merchant Shipping Act 1970 amended by section 32 of the Merchant Shipping Act 1988 and replaced by section 58 of the Merchant Shipping Act 1995.

## Section 80(1) Non-Professionals

16. Section 80 is not yet entirely in force<sup>3</sup> but is extraordinarily wide. By virtue of Subsection (1)(a) it applies to anyone who is “*on board a ship which is underway*” and is not covered by Section 78 or 79. It applies to any person who:

(b) is exercising, or purporting or attempting to exercise, a function in connection with the navigation of the ship, ...

and the interpretation section<sup>4</sup> states that

a reference to the navigation of a vessel includes a reference to the control or direction, or participation in the control or direction of the course of a vessel.

17. Section 80 therefore applies to any person on a qualifying vessel who takes part in ‘navigating’ the vessel, or in ‘navigation’. The definition of navigating is so wide that it is hard to imagine circumstances in which someone on board is not subject to the section. On a motor vessel the section would apply to anybody who was steering or taking any part in operating the engine, radar or electronic navigation aids; ‘participation in the control or direction’ would also apply to, for example, an owner, skipper or anyone giving commands to the helmsman, and to any persons who are keeping a lookout or taking responsibility for course, speed or safety in any other way.

18. In relation to a sailing vessel, almost all activities affect course and speed, and from a practical perspective everyone on deck is responsible for keeping a lookout. Taking any part in controlling any sail would come within this definition; in other words pulling a sail in or letting a sail out, helping hoist a sail or any activity connected with the sail would affect both course and speed. Obviously helming would be covered. On smaller vessels course and speed are significantly affected by the movement of personnel. Taking an extreme interpretation of the 2003 Act, it is conceivable that if people were merely invited to go and sit on one side of the vessel or the other, they would be participating in the navigation of that vessel. This would therefore mean that everyone on board a racing yacht or sailing dinghy would be included.

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<sup>3</sup> Subsections 80(1), (2) and (3) are not in force yet; subsections 80(4) and (5) are. The latter subsections give the Secretary of State powers to make regulations determining when an offence under this section will not be committed. For detail on this issue see the *Consultation Paper on Exceptions for Application to the Alcohol Limits for Non-Professional Mariners and the Designation of Marine Officials* (DFE March 2004), and the consultation referred to in section 4 of this paper.

<sup>4</sup> Section 89(1)(b).

19. Unlike commercial vessels, anyone can skipper a recreational craft and there is no formality required when a group of individuals go to sea. A skipper may be self-appointed, or there may be no discussion on the point if everyone is equally competent. Consequently identifying who is the person ultimately responsible of a recreational craft may be impossible.

20. Authorities should take care not to adopt a 'blanket approach' and hold all persons responsible for navigation, although identifying which persons involved in navigation were over the prescribed limit at that time, may present very significant evidential problems.

### **Extent**

21. When Section 80 comes into force, it will apply (subject to the proposed Regulations exempting smaller and slower craft) to all United Kingdom ships and all foreign and unregistered ships in United Kingdom waters. It will probably apply to more or less everybody on board every sailing vessel. For example, although designed to deal with non-professionals the section is wide enough to apply to professional seamen and would apply to those who are off duty but who then go on to exercise, or to purport to or attempt to exercise, any function in connection with navigation, and even when there are no passengers on board. We will obviously have to wait and see how wide the exceptions to Section 80 will be following the consultation process that is now underway.

### **The Prescribed Limit**

22. The limit is one which will be familiar to everybody because it is the same as the drink drive limit: 35 micrograms of alcohol in 100 millilitres of breath, 80 milligrams of alcohol in 100 millilitres of blood, or 107 milligrams of alcohol in 100 millilitres of urine.

23. In simple terms the limit is often described as being 3 units of alcohol where a unit is roughly a single measure of spirit, a small glass of wine or half a pint of beer. But in reality the limit is so low that any consumption of alcohol is risky. In theory the average person will burn off about 1 unit of alcohol per hour, but unfortunately there are a large number of variables involved: the size of the person involved, their individual metabolic rate (which varies widely), and the consumption of food before, during or after the consumption of alcohol. Probably the most variable of all factors is the strength of the alcohol which

people consume. Wine very obviously varies enormously in strength. So does beer. As for spirits, there are the problems that not only does the level of alcohol in spirits vary widely (and of course is often described on bottles in different ways depending on the country of origin, so that not much help can be gleaned by simply looking at the label), but also that spirits are rarely measured into glasses: they are normally just poured by a person whose view of an appropriate measure is a matter of taste. In truth most drivers – and the same will apply to people on boats – simply avoid drinking alcohol at all before using their car. The only safe way of approaching this relatively low limit is to abstain.

24. It should be noted that in all the relevant sections it is a separate offence if a master, pilot or seaman's "ability ... is impaired because of drink or drugs". A master, pilot or seaman can commit an offence even when below the prescribed limit if ability is impaired.

25. Noting the thrust of this legislation, the only safe step to take is to advise anyone on-board a recreational craft that, in all but a very few cases, because they will always play some part (however small) in the 'navigation' of the vessel, they must always be below the limit when the vessel is underway. This advice may be unattractive, but in the absence of any case law to suggest otherwise, we consider it is the most sensible course of action.

### **Potential Defences**

26. A large number of potential defences have been explored in relation to drink driving offences under the RTA 1988, and there is considerable case law. As examples, people argue that their drink was spiked and they did not know what they were drinking; sometimes they argue that there is a medical reason for the apparent reading caused by a prescription drug; sometimes they use what is known as the 'hip flask' defence of consuming a large amount of alcohol after driving but immediately before giving the breath test so that they can try to establish that they were under the prescribed limit at the time of the driving. People dispute the accuracy or otherwise of the machinery involved; sometimes they argue that they are unable to provide a satisfactory sample of breath, blood or urine for medical or other reasons. These defences are of general applicability and therefore will probably apply to the 2003 Act. But courts – whether at first instance or above – have had very little sympathy with defendants who attempt to put forward defences of this nature.

27. There is no technical loophole or device that will protect people who are subject to this 2003 Act. Total abstention is the only safe course. Very modest drinking of one or two units of alcohol, taking a cautious view of the amount of alcohol that constitutes a unit, spread over a longish time, and preferably with the consumption of food, is an alternative for those willing to risk a conviction.

## Enforcement

28. Section 83 of the 2003 Act sets out the provisions for enforcement and imports into the Act many of the powers already existing in relation to road traffic offences taking sections from the RTA 1988 and the Road Traffic Offenders Act 1988. Section 84 permits a marine official to detain a ship if he reasonably suspects a person who is or may be on board of committing an offence under section 78, 79 or 80. Marine officials include harbour masters, assistants or designated persons. Power to arrest is given to a constable in section 85, and a right of entry is granted to a constable in uniform by section 86, including his powers to use reasonable force and to be accompanied by one or more persons.

29. In general terms the mechanisms at section 83 are very familiar, suggesting that a preliminary test will be administered when it is suspected that a person either is or has committed an offence under section 78, 79 or 80, or where there is an accident. Failure to provide a preliminary breath test or specimen will itself become an offence.

30. Equally it can also be expected that the same pattern will be followed as is followed with allegedly drunk drivers: two breath specimens are demanded, and if the lower of the two specimens is under 50 micrograms a potential defendant can demand that it be replaced by another specimen. The police officer has the choice of whether it will be blood or urine; this is not a choice that the defendant can exercise. The device usually used is the lion intoximeter, even though it was conceded in *Reeves v. Enstone*<sup>5</sup> that this device can be inaccurate by 2 or 3 micrograms either way.

31. Once blood or urine has been provided this becomes the evidential specimen; breath cannot be used. However, when a potential defendant frustrates the efforts to provide blood or urine the breath test can be relied upon.<sup>6</sup>

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<sup>5</sup> *The Times*, 15<sup>th</sup> February 1985.

<sup>6</sup> *DPP v Poole* [1992] RTR 177.

## Back Calculation

32. There is a statutory presumption<sup>7</sup> that the proportion of alcohol in an accused's breath, blood or urine is 'not less' than in the specimen. This prevents a defendant challenging an analysis on the basis that he has only recently drunk the alcohol. The statutory presumption is irrebuttable, as was emphasised in the Divisional Court in *Beauchamp-Thompson v. DPP*.<sup>8</sup> Recent case law states that this position does not infringe a suspect's right under the Human Rights Act 1998. Interestingly, it seems that the presumption, which prevents back calculation on behalf of defendants, does *not* prevent the prosecution from back calculating and asserting that the alcohol level must have been higher at the time of the alleged offence.
33. One area which may prove problematic is the length of time that it may take to get a mariner back to provide a specimen. The assumption with drivers is that although they may provide a road side breath test which gives general indication of whether or not they are over the limit, they will be back in a custody centre within a relatively short period of time and able to provide blood or urine. But if a person is arrested or otherwise detained at sea it may be a very long time before he is able to provide a specimen. There is of course at present no case law dealing with this issue, and this means that – particularly with borderline cases – there may be considerable problems, especially for the prosecution, in putting forward satisfactory evidence of the state of intoxication of a mariner. One can envisage a situation where a sample of breath causes an arrest or detention at sea, but where by the time a proper specimen of blood or urine is provided so many hours have passed that the prosecution have to rely on back calculation, a notoriously difficult approach. It may be that in such cases there are substantial disputes as to the true level of intoxication at the time of arrest.

## Safety of Vessel and Crew

34. A very significant issue, which has already been touched upon, will be the safety of the vessel and crew if the skipper, or key members of the crew, are detained at sea for being over the prescribed limit. Authorities have effectively two options: (1) to order the vessel to return to port and to allow the skipper to remain on-board and retain responsibility for the vessel and crew until safely alongside, or (2) for the authority to assume responsibility for vessel and crew. Both present authorities with considerable risks, and any marine official

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<sup>7</sup> Section 15(2) of the RTO Act 1988.

<sup>8</sup> [1988] Criminal Law Review 758.

that assumes responsibility for a craft must have sufficient skill and experience to do so. However, having identified that a person is under the influence of alcohol, can the authority legally condone and permit that person to remain in charge of a vessel? This raises relevant practical points, particularly if there is an incident while on passage back to port.

### **Proposals for Statutory Exemption**

35. We are asked by the Government to consider what proposals should be made for statutory exemptions for smaller and slower craft.
36. Exempting craft on the basis of 'length overall' but excluding from this definition any 'functional arrangement' such as pulpit and stern guard will make it difficult, and possibly virtually impossible, to identify at sea whether a borderline craft is exempt or not. Most manufacturers measurements are the genuine length overall, taken into account all fixtures and fittings, so a manufacturer's measurement will not be a reliable guide as to whether the persons on-board have to comply with the legislation. Detaining a vessel that is subsequently found to be below the prescribed length could result in allegations of trespass against the individuals concerned, and even false imprisonment, resulting in a significant legal liability for the authority and individuals concerned.
37. Speed exemptions present similar problems. Sailing craft manufacturers, especially manufacturers of sailing dinghies, rarely have any formal calculations which confirm a vessel's maximum design speed. In most cases the design speed will vary for any given wind strength.
38. Powered craft that have been modified, for example by installation of new engines, will be in a similar position with no formal figures available for maximum design speed. In most cases the hull design will determine the maximum speed possible for that vessel, but it is arguable that having a smaller engine fitted will take the craft outside of the new legislation. Exemptions based on speed and length will be obvious in the case of many large and/ or fast craft, with personal watercraft and speed boats being obvious examples.
39. However, there will be many craft where the distinction is not clear, and authorities will have to exercise extreme caution before detaining any vessel or individual and exposing them to the full force of the law.

## Summary

40. The exemptions being proposed by Government may, without further clarification, create confusion and uncertainty. In some ways it would be far more straightforward to have no exemptions at all, thereby removing any enforcement difficulties.
41. However, Government is to a large extent bound by what was said in Parliament when the 2003 Act was being debated. Significantly, Alistair Darling (then Secretary of State for Transport) said: *"We could have extended the provision to apply to professional mariners to all boats, whatever their size and speed, but we considered that they should be proportionate. There is a difference between what is needed in relation to a large passenger carrying ship with a professional crew and in relation to a man rowing a boat in a harbour. We will consult carefully on how best to deal with non-professional mariners. The Bill contains a power to exempt vessels with reference to the power of their motor, size or location. We want to consult on the repercussions as we need to get the matter right. Nonetheless we are minded, for example, to exempt rowing boats, sailing dinghies and narrow boats. However larger higher powered recreational vessels will probably be included. We want to strike the right balance to ensure we get the legislation right."*
42. With this in mind, Government appears bound to introduce some exemptions. Port and harbour authorities will therefore have to make the best of what is presented to them, or lobby hard during the consultation to ensure that exemptions are in fact unambiguous and clearly understood by all concerned.

This note is a summary of some of the key principles and issues involved in this specialist area of law. It is not a substitute for full legal advice tailored to the particular facts of any given situation. Dorade Law LLP are specialists in this area and generally in relation to the legal issues affecting the marine and yacht industry.

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## **ANNEX A: ADVICE TO RECREATIONAL BOATERS REGARDING ALCOHOL CONSUMPTION**

1. Section 80 of the Railways and Transport Safety Act 2003 makes it an offence for non-professional seamen to navigate a vessel while over the prescribed limit for drink (when this section comes into force) or when impaired by drugs.
2. Navigating a vessel includes, for example, participation in the control or direction of the course of a vessel and will apply to all persons who take any active part in tending sail, being on the helm, being a lookout or operating the motor.
3. The skipper will be liable at all times whilst at sea, whether you consider yourself to be on or off duty.
4. The limit is the same for drink driving offences on roads and is so low that you should abstain from drink while at sea. You must therefore ensure that you do not assume any of these duties if you are over the legal limit regarding alcohol consumption.
5. You should report to the SKIPPER if you are, or believe you may be over that limit. Similarly, you should report to the SKIPPER any other person on board who you consider to be over that limit.
6. You are reminded that alcohol (and drugs) stays in the body for many hours after being consumed. It is therefore imperative that if you drink ashore before going to sea you only drink in moderation if you are to be able to carry out your tasks on board.