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Bodily Injury News

The journal of the Thomas Miller Americas' Bodily Injury Team

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Root Cause Analysis Reports: Privilege Issues and Emerging Law

Liam O'Connell, of Farrell Smith O'Connell LLP, presented on Root Cause Analysis Reports, Privilege Issues and Emerging Law. **Taylor Coley** highlights some of Liam's recommendations.

After an onboard incident, most shipowners perform a reactive root cause analysis, which is then internally used as a tool to help discover the why's and how's – and prevent them from happening again. Typically, shipowners must balance the desire to be deeply self-critical to effectively ensure change, with the need to protect their interests from inevitable litigation. Liam spoke to Members at the Bodily Injury Seminar about ways to ensure root cause analysis reports proactively, rather than reactively, seek to address issues, and about a recent litigation victory involving protection of a root cause analysis report from litigation disclosure.

Tip: A more deliberate, thorough and proactive management approach will help ensure root cause analysis reports prevent future problems by finding the true cause of an incident.

Proactive Management	Reactive Management
Goal: Prevent Problems from Occurring ▪ Speed is not as important as accuracy and precision of diagnosis ▪ Focus is on addressing the real cause of the problem, rather than its effects	**Goal: React Quickly in Crisis Only** ▪ Treating the symptoms of the problem ▪ Focus is on alleviating the effects of the problem as soon as possible

Four steps involved in Root Cause Analysis:

- Identify and describe clearly the problem.
- Establish a timeline from the normal situation up to the time the problem occurred.
- Distinguish between the root cause and other causal factors (e.g., using event correlation).
- Establish a causal graph between the root cause and the problem.

Root Cause Analysis Report Suggestion: Stick to the Facts to Avoid Unforeseen Legal Issues!

Unnecessary Opinions

- "Watchstander was talking about his girlfriend when he should have been keeping watch!"
- "The manhole cover flipped open because we didn't want to spend $60 for a hinge."

Facts Only

- "The VDR did not capture any comments about oncoming ."
- "The manhole cover flipped open when stepped on."

Specifically, Liam addressed the "Self-Critical Analysis Privilege" in the context of his recent litigation *In re Block Island Fishing, Inc*. 323 F.Supp 3d 158 (D. Mass. 2018). In that case, a small lobster fishing boat, the HEDY BRENNA, collided with an LNG carrier, the BW GDF SUEZ BOSTON ("GDF SUEZ") in a ship traffic separation scheme off the coast of Massachusetts. The GDF SUEZ sustained a disproportionate amount of damage in relation to the fishing ship, and predictably the fishing ship filed a limitation action in the United States District Court for the District of Massachusetts.

After the collision, the GDF SUEZ returned to Boston for temporary repairs and a Superintendent from the ship-owning-company immediately came to the ship and began their internal investigation, pursuant to their company's Safety Management System ("SMS"). When the owners of the GDF SUEZ entered the limitation action to claim against the fishing ship, counsel for the fishing ship tried to force the GDF SUEZ's owners to disclose their Root Cause Analysis Report. Liam, acting for owners, moved for a protective order to prevent, or at least mitigate, disclosure under the Self-Critical Analysis Privilege.

The Self-Critical Analysis Privilege is a qualified privilege that aims to protect certain self-critical, evaluative analysis from discovery. Precedent from the District for the District of Columbia has described the privilege's intent as "to protect the opinions and recommendations of corporate employees engaged in the process of critical self-evaluation of the company's policies for the purpose of improving health and safety." See *Felder v. Wash. Metro. Area Transit Auth*., 153 F. Supp. 3d 221, 224–25 (D.D.C. 2015) (emphasis added).

Courts in Massachusetts use a four-part test to determine when and where to apply the privilege. (1) The materials protected have generally been those prepared for mandatory governmental reports; (2) only subjective, evaluative materials have been protected; (3) objective data in those same reports have not been protected; and (4) in sensitivity to plaintiffs' need for such materials, courts have denied discovery only where the policy favoring exclusion has clearly outweighed plaintiffs' need.

Liam, as counsel for GDF SUEZ, argued that Part 1 applied here because the internal investigation was conducted in accordance with the Company's obligations under an international treaty. He noted that the GDF SUEZ was Norwegian-flagged and Norway has adopted SOLAS. Further, SOLAS makes the ISM Code mandatory. The ISM Code requires companies to have safety management systems (SMS) that comply with the Code's requirements. Therefore, he argued, any internal investigation report, prepared in accordance with the Company's SMS, was actually a mandatory governmental report, entitling its contents to privileged protection.

Regarding Parts 2 and 3, Liam argued that the Company only sought protection for subjective content, and did not object to disclosure of objective data and facts by pointing out that VDR data had already been shared with opposing counsel and that the limitation action Plaintiff (aka the owners of the HEDY BRENNA) had been able to depose relevant crewmembers of the GDF SUEZ to obtain objective facts.

Finally, Part 4 elicited a public policy argument that was bolstered by other areas of law. For example, there is already extensive analogous precedent concerning withholding evidence of subsequent remedial measures from trial so as to not discourage companies from taking steps in furtherance of added safety. Essentially, courts are reluctant to allow a company's efforts to investigate an incident, and prevent it from reoccurring, to be held against them lest companies decide that investing in safety is not worth the possible future legal risk. Thus, the general public has a strong interest in preserving the free flow of self-critical analysis.

Ultimately, the Court in *In Re Block Island Fishing* allowed the GDF SUEZ to redact its root cause analysis report under the Self-Critical Analysis Privilege, but added a fifth part to the privilege's test: the document at issue "must have been prepared with the expectation that it would be kept confidential." Liam explained that his client in this matter was contractually required to produce their root cause analysis report to several parties-charterers and "Oil Majors". However, he was able to argue that because the report was only submitted to those parties who shared contractual privity with GDF SUEZ's owner, and only because of an obligation to do so, that the report remained "confidential".

Liam ended his presentation with a healthy dose of reality. Though the General Maritime Law of the U.S. recognizes the Self-Critical Analysis Privilege, it is not uniformly enforced or recognized. Nevertheless, defense counsel around the country have been working to present the matter to courts and secure precedentially positive results aimed at turning the tides. ■

Liam O'Connell is a Partner with the law firm of Farrell Smith O'Connell LLP, serving all New England ports. His practice includes marine insurance defense, criminal defense, regulatory compliance, oil pollution and environmental law.

Liam graduated from Massachusetts Maritime Academy with a BS in Marine Transportation and a 3rd Mates Unlimited USMM License. He served as a Commissioned Officer in the USCG, with various assignments. Notably, he served as a Marine Inspector in Houston, TX and as Officer in Charge of a US Navy small boat anti-terrorism detachment at US Submarine Base New London, CT.