

Know your rights: when to request a lawyer if police board your ship – Crew have the right to seek legal advice before being questioned by police

Our law firm is frequently requested to assist in cases involving personal injuries on board ships. If the injury is serious or fatal, then most of time it will have a large impact on the officers and other crewmembers, especially to those who worked closely with the injured crewmember.

Once an accident causing serious personal injury occurs, immediate action has to be taken by the Master and other crewmembers, one of which is notifying the shipowners, the P&I Club and, depending on the ship's position, various authorities. In nearly all cases the police will be involved either as a result of a ship's emergency call or upon the instructions of higher authorities. Not seldom the police will be the first party that embarks the ship after the accident occurred. These policemen will wear a full uniform and in the Netherlands, like in several other European countries, they will be armed. Furthermore, they are trained to radiate authority. It is our experience that at least crewmembers of the lower ranks, coming from non Western, lawabiding countries, are usually very impressed.

Once the police has embarked the ship they will try starting with the interrogation of the crew as soon as possible. It occurs frequently that the police starts with the interrogation prior to the time the crew has spoken to a lawyer. This could harm the crew's and/or the shipowners' position. The crewmembers might declare things that they would not have declared if they would have spoken to a lawyer prior to the police interrogation, due to the fact that the crewmembers are emotionally involved because of the accident, and further, are overwhelmed or even frightened because of the view of all the policemen being in full uniform. Further, if the police has left prior to the time the lawyers have boarded the ship, then afterwards it might be difficult for the lawyers to obtain copies of the crew's statements. In that view it is interesting to discuss what the consequences are of the court case of the Grand Chamber of the European Court of Human Rights in the case *Salduz v. Turkey of 27 November 2008, [2008] ECHR 36391/02*, in respect of the police interrogation on board a ship. We will discuss this case from a Dutch point of view.

In the *Salduz* case the European Court of Human Rights (ECHR) held that Article 6 Paragraph 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. In the light of this court case the Dutch Supreme Court held on 30 June 2009, *NJ 2009, 349*, that prior to the first police interrogation the police should notify the suspect that he is entitled to access to a lawyer. The suspect who has not irrevocably renounced this right should reasonably been given the possibility to gain access to a lawyer. According to the Dutch Supreme Court, violation of this right by the police will result in an omission in the meaning of Article 359a *Dutch Criminal Code of Procedure* (hereinafter referred to as: "DCrCP"), which means that the statement the suspect made prior to the time he had access to a lawyer will be excluded from the evidence. The Supreme Court however also held that the lawyer is not entitled to attend during the police interrogation of a suspect.

The question is whether the consequences of the Salduz-case also apply to the police interrogation on board a ship. We believe it does. In that respect we refer to the court case of the Dutch Supreme Court of 2 October 1979, *NJ 1980, 243*. In that case the Supreme Court held that all questions asked by a police officer to a suspect regarding his involvement with a criminal offence will be regarded as interrogation in the meaning of Article 29 DCrCP. Consequently, as such it seems irrelevant where the interrogation is held. Therefore, we believe that also in case the Dutch police interrogates the crew on board a ship, even if foreign, the Salduz-case applies.

Once an accident has occurred on board a ship it first has to be determined where the accident occurred. Did it occur while the ship was in territorial waters or at the high seas? If the accident occurs while the ship was in territorial waters, then the District Attorney of that country has authority to send the police to the ship to interrogate the crew. If on the other hand the accident occurred on the high seas, then the flag state has jurisdiction. In that case it is very common that the flag state will request legal assistance from the country where the ship will sail to after the accident. Evidence of the request for legal assistance by the flag state will then have to be shown by the police when embarking the ship.

When the police embarks the ship they will try to find out which officers and/or crewmembers they will interrogate as suspects and which crewmembers as witnesses. If the Dutch police indicates to a crewmember that he will be interrogated as witness, then the crewmember does not have to cooperate. There is no provision in the Dutch Criminal Code of Procedure that gives the police means to force a witness to cooperate. On the other hand, during the eventual court proceedings the Dutch Court does have means to force the witness to cooperate. Consequently, there will in that case be a possibility that the crewmember will eventually have to testify in Court. Further, it will cause suspicion if a crewmember refuses to be interrogated as witness. The police could in that case decide to interrogate the crewmember as a suspect after all. We therefore recommend that even if the police indicates they would like to interrogate a crewmember as a witness, the crewmember will notify the police he would first like to speak to his lawyer. In that case it could also be decided whether or not the lawyer will attend during the interrogation of the witness by the police.

In respect of the interrogation of a crewmember as a suspect, the police should based on the Salduz-case and the abovementioned case of the Dutch Supreme Court, first notify the crewmember that he has the right to access to a lawyer. In that case we recommend the crewmember to indeed contact a lawyer through the appropriate channels and not start with the interrogation until he has spoken to his lawyer. The lawyer can then discuss the accident with the crewmember and give him legal advice regarding the police interrogation and the possible subsequent court proceedings. In that way the lawyer will also be able to calm down the crewmember and prepare him for the police interrogation. The lawyer can in that case also try to attend the police interrogation on board the ship, although legally he does not have the right to attend.

If the police starts with the interrogation without notifying the crewmember he has the right to access to a lawyer, then in the Netherlands this results in an omission in the meaning of Article 359a DCrCP, which means that the statement will be excluded from the evidence. It would not surprise us if the result will be the same in other EU jurisdictions.

Based on Article 29 Paragraph 2 DCrCP the police will further notify the suspect prior to the interrogation that he has the right to remain silent. If the police fails to do so, then this could also result in an omission in the meaning of Article 359a DCrCP. This provision is similar to the Miranda Rights as known in the United States.

In view of the above we recommend the P&I Clubs to advise their members, and further, recommend the shipowners to discuss the Salduz-case consequences with the captains and the crew. The captain and the crew should be aware that once an accident occurs in European waters and the Police of an European Union Country embarks the ship, they are entitled to access to a lawyer prior to the police interrogation, once considered as a suspect. Further, we are of the opinion that the crew should receive instructions not to cooperate with the police interrogations prior to the attendance of a lawyer on board the ship, even if only interrogated as witness. This to protect the rights of the crew and shipowners.

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