Liability of Marina Operators

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Liabilities and Responsibilities of Marina Operators - Generally

A discussion of marina operators' liabilities involves a wide range of issues, arising from their dual role: as water-related and ordinary, on-shore businesses. The core water-related functions of any marina include a duty to provide a safe berth, proper mooring and dry-docking (as opposed to dry storage),[1] dredging and depth maintenance, navigation advice, managing debris and environmental concerns, weather preparedness and managing resulting damage. Often, marinas provide boat rental services, which open them to personal injury and property damage claims. As an on-shore business, in addition to having to manage concerns common to all land businesses, marinas are exposed to claims arising from storage, repairs and maintenance of their customers' vessels. Marina's activities, therefore, are regulated both federally, through legislation such as *Canada Shipping Act, 2001* and the *Marine Liability Act,* and provincially, through the provincial versions of the Occupier Liability Acts, consumer protection legislation, legislation related to the responsibilities of warehousemen and the laws of general application related to property and civil rights. This paper examines the sources of liability to which Canadian marina operators are exposed by virtue of their activities on water and on land. It is not meant to be an encyclopedic digest of every reported case, but should serve as a useful starting point for analysis of marina related claims.

Personal Injury Actions

Marinas are common places for people to rent boats. Operating a boat rental business out of a marina opens its operators to liability in relation to potentially very serious personal injury claims. It is commonplace for personal injury lawyers who represent victims of boating accidents to include in the lawsuit the owners of the involved vessel on the ground that the owner

[1] Dry docking refers to the placement of a vessel in water and, thereafter, removing the water from around the vessel. Dry storage refers to storage of vessels ashore. In the U.S., there is clear admiralty jurisdiction over a vessel in dry dock (as opposed to in dry storage) as the vessel is deemed to be in water for jurisdictional purses: *The Jefferson, 215 U.S. 130 (1909).* In Canada, jurisdiction over claims arising from dry docking is decided based upon the activity which gives rise to the claim while the vessel is in dry dock. The fact that she is in dry dock as opposed to in dry storage does not determinative jurisdiction in and of itself. The removal of the vessel from water constitutes a land based activity that is sufficiently connected with navigation to bring the matter within the ambit of the Canadian maritime law: *Isen v. Simms [2006] S.C.J. No. 41.* However, not all causes of action arising while a vessel is in dry dock will trigger the application of the admiralty jurisdiction and many such cases will be pursued in provincial Courts, under provincial law.

is "vicariously liable" for the negligence of the operator of the vessel. This practice is quite correct in motor vehicle collision cases, because most provincial *Highway Traffic Acts* create liability on the owners of cars for the negligence of their drivers[2], but it is misguided involving boats.

The owner of a vessel is not automatically vicariously liable for the negligence of a consensual operator. Vicarious liability of owners of cars is not mirrored in Canadian maritime law. Nothing in either *the Canada Shipping Act, 2001* or *the Marine Liability Act* provides for vicarious liability of the owner of a vessel. This issue was considered by the Ontario Court of Appeal in *Dixon et al. v. Leggat et al*.[3], where it was held that that Canadian maritime law does not automatically extend liability to the owner of a vessel. However, the Court of Appeal went on to say that Canadian maritime law permits the imposition of liability on an owner of a vessel on other bases, and in particular on the basis of ordinary principles of tort law, such as negligent entrustment. Therefore, it is possible for the Courts to find a marina liable for renting a boat to an incompetent operator and/or failure to adequately instruct or supervise the prospective operator. For example, if a marina operator entrusts a vessel to someone he knows to be impaired or to someone who is likely to become impaired, liability on the owner of the vessel could be found. This is, obviously, a very fact driven determination.

The failure to properly instruct, inform or train the operator of a boat can also be the basis of liability on the marina as owner. In *Wozniak v. Alexander*[4], the Alberta Court of Queen's Bench held that the owner, a boat rental company, was liable on the basis that the employees who rented out the boat did not adequately follow their own policies. The employees did not take adequate steps to determine the level of experience of the prospective renters of the boat or give them adequate instruction. The Court applied a material contribution test in determining the causation of the accident. It held that the failure by the owners to properly instruct the renters on the operation of the vessel and the emergency procedures to be employed materially contributed to the happening of the accident.

Finally, sections 3(2.1) and 4 of *Competency of Operators of Pleasure Craft Regulations*[5] have the effect of prohibiting marinas and their employees, as persons in charge of pleasure craft, to permit a person to operate a pleasure craft unless that person either has a Pleasure Craft Operator Card or unless both the marina operator and the renter complete and sign, before the boat is operated, a rental boat safety checklist. Breach of these provisions has not yet been considered by the Courts as the primary basis of marinas' liability.

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[2] Section 192(2) of the *Highway Traffic Act, R.S.O. 1990 Ch. H. 8* and equivalent sections in other Canadian jurisdictions.
[3] *Dixon et al. v. Leggat et al. (2003), 64 O.R. (3d) 347 (Ont. C.A.).*
[4] *Wozniak v. Alexander [2008] A.J. No. 788 (Q.B.).*
[5] *Competency of Operators of Pleasure Craft Regulations, SOR 99/53*

Winterization and Storage

With pleasure craft navigation season lasting only about five months in most of the Canada, winterization and storage of vessels is at the core of the business of many Canadian marina operators. These activities expose marina operators to liability on the ground that they act as bailees for hire. Typically, a boat owner will store his vessel at the marina, either over the winter or during the season, while the boat is not being used, and an accident will occur, resulting in damage or total destruction of the boat. Claims of this type involve thefts, fires, storage shed collapses (often due to snow build-up on the roof of the storage facility), boats toppling over, mould and improper winterization. Often, boats are damaged during launch or haul-out in the spring or fall, when they are handled using cranes or fork-lift trucks.

Generally, it is not difficult to establish liability on the marina for these types of claims. Once the boat is transferred into the possession and custody of the marina, a bailment relationship is established. As a bailee for reward, the marina has a legal obligation to exercise the same standard of care and diligence toward the property stored that a reasonable owner would have toward his own property[6].

The liability of the marina operator as a bailee is not, however, absolute. For example, in case of claims arising from fires, the marina is insulated from liability if the fire is held to be accidental. In *Neff et al. v. St. Catharines Marina Limited*[7], three boats owned by the plaintiffs were destroyed by fire while they were stored for the winter at the marina yard. The cause of the fire was unknown. The plaintiffs framed their action in bailment. They argued that the marina failed in its duty as a bailee, regardless of whether it was negligent for starting the fire or failing to stop it. The marina sought to rely on section 1 of the provincial *Accidental Fires Act*, which holds:

> *No action shall be brought against any person in whose house or building or on whose land any fire accidentally begins, nor shall any recompense be made by that person for any damage suffered thereby (. . .).*

The trial judge found that the marina failed to discharge its duty as a bailee for reward. However, the Ontario Court of Appeal reversed that ruling. It held that the key to reconciliation between the law of bailment and the *Accidental Fires Act* is the issue of whether the bailee can prove either that he took appropriate care of the property entrusted to him or that his failure to do so did not contribute to the loss. The Court of Appeal observed that in most cases of bailment the cause of the loss will be attributed, for example to theft, falling objects, oily rags or vandals. In those cases, damage is not the result of an accident, in the sense of being incapable of being traced to a particular cause. The evidence can then test whether the bailee's conduct contributed to that loss.

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[6] *Douglas v. Paragon Marina & Sports Inc. [1990] O.J. No. 981 (Ont. Dist. Ct.).*
[7] *Neff et al. v. St. Catharines Marina Limited [1998] O.J. No. 253 (Ont. C.A.).*

However, where the cause of loss is unknown, there is no reference point of yardstick against which to measure a bailee's conduct. The bailee, notwithstanding a high standard of care, is not an insurer of the items entrusted to it. Where the cause of the fire is found to be unknown, the marina, as bailee, will be held to have established that any failure on its part to care for the goods did not contribute to the loss. The Court of Appeal found, therefore, that the *Accidental Fires Act* bars actions based upon accidental fire damage, notwithstanding that the damage is suffered while the boat is in the care of the marina as a bailee for reward.

Exculpatory Clauses and Damage Arising During Moorage, Storage or Repairs

Marina operators are aware of this exposure and to manage it, they enter into contracts with the boat owners which contain liability waiver clauses. A typical clause of this kind will provide as follows:

> *Boats and engines are stored at owner's sole risk and the marina accepts no liability for same, regardless of negligence. Boat owners are required to obtain their own insurance.*

Some clauses can be much more extensive and may seek to establish limits on sums for which they may be liable, theories of recovery and types of damages recoverable, the time within which a claim may be made, the forum where the action can be brought and what law shall be applicable.

The determination of whether any given exculpatory or limitation of liability clause will be found to apply involves a careful analysis of the language of the clause and the facts surrounding the contract formation.

In *Dryburgh v. Oak Bay Marina (1992) Ltd.*[8], an action was brought against a marina and its president for damage to a boat which had occurred when the docks at the marina broke up during heavy weather. The plaintiff alleged that the design of the dock was negligent. The plaintiff annually signed a standard form moorage contract, which contained an exclusion of liability clause on reverse of the document. The plaintiff waived any arguments on lack of notice of the exclusion clause and the issues before the Federal Court were only whether, in all the circumstances of the case, the exclusion clause was sufficient to exempt the marina from liability for the damage to the boat and, if so, whether the clause could also protect the marina's president, who was not a party to the contract.

The exclusion clause provided as follows:

> *EXCLUSIONS ON LIABILITY*

[8] *Dryburgh v. Oak Bay Marina (1992) Ltd. [2001] 1 F.C. 192, affirmed at [2001] F.C.J. No. 1002.*

> *All vessels, boathouse and ancillary equipment of the Owner stored or moored on the Company's premises shall be solely at the Owner's risk, and the Company shall not be responsible under any circumstances for any loss or damage caused thereto whether caused by the negligence of the Company, its servants or agents, or the acts of third parties, or otherwise. All vehicles parked on the Company's premises and the contents therein are left at the Owner's risk. All persons using the Company's facilities, floats and ramps do so at their own risk and the Company assumes no responsibility whatsoever for the personal injury in the Owner or his invitees occurring within the Company's premises for any cause whatsoever.*

The Federal Court cautioned that clauses which exclude liability must be strictly construed against the party seeking to invoke them. While the moorage contract was held to be a standard form contract which did not involve a negotiation of the terms, the exclusion of liability clause was found to be clearly written. Significantly, the Court found that there was no imbalance of power between the boat owner and the marina and the moorage rates made it clear that the marina could not be reasonably acting as a port-risk insurer. Therefore, the contract was not found to be unconscionable, unfair or unreasonable and the Court declined to interfere with the parties' freedom to contract.

The Federal Court found that the damage must fit within the four corners of the exculpatory provision. In this instance, the moorage contract was a broad agreement for the provision of suitable moorage for vessels. The exculpatory provision was also broad, referring to "any loss or damage" whether or not caused by negligence. The rules of construction applicable to any written contract were found to be equally applicable to exemption clauses in order to determine the meaning the words were intended to bear. If a clause is expressed clearly and unambiguously, there is no justification for placing upon its language a strained and artificial meaning to avoid the exclusion or restriction of liability. The doctrine of *contra proferentem* should be invoked only if there is an ambiguity.

The Federal Court held that the clause was broad enough to cover acts of negligence alleged as against the marina. The second issue was whether the exculpatory clause which protected the marina also extended to its president. Under the doctrine of privity of contract, a person who is not a party to a contract, such as the president of the marina, could not benefit from a clause in the contract. However, the Federal Court noted that the Supreme Court of Canada's decision in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*[9], recognized a narrow exception to the doctrine of privity of contract, in the case of employer-employee relationships where there was an intent to extend the protection of an exculpatory clause to employees and that the employee must have acted in the course of his or her employment at the material time. The Federal Court

[9] *London Drugs Ltd. v. Kuehne & Nagel International Ltd. [1992] 3 S.C.R. 299.*

found that both elements were present. It would be absurd to find that, in the case of a company wholly owned by its president, the corporation would be exempt from liability but that the president or the insurers be open to the same liability. The Federal Court noted that given that corporations perform their services through employees, it is sensible that a party to a contract not be able to avoid the incidence of loss by suing individuals doing the actual work as employees or as hands-on executives and owners.

On the other hand, in *Swinburne v. Dike*[10], the plaintiffs were the owners of a vessel that was moored at the docks owned and operated by a marina. The marina was damaged in a storm. Following the storm, the defendants effected temporary repairs to the marina, expecting that they would be able to proceed with dredging and the building of a state of the art marina shortly thereafter. However, there was a delay in the dredging, and when another storm struck, the marina broke apart causing damage to the plaintiffs' vessels.

The plaintiffs signed a moorage agreement. In the fine print on the back of the contract there were a number of exculpatory provisions, which the marina said protected it from any liability for negligence. However, no one at the marina could recall pointing these clauses out to the plaintiffs and it was not their practice to do so. There was nothing on the front page of the contract that would indicate there was a provision on the back which purported to exclude the marina's liability. The plaintiffs took the position that they were either not aware of these clauses or that they did not read them, but all plaintiffs did sign the front of the moorage agreement which stated that:

> *I have read and understand the "Rates and Terms" below and the "Conditions" on the reverse side.*

The disclaimer of liability was worded as follows:

> *THE MARINA shall not be liable for personal injury to or the death of the Owner or his invitee or any other person or persons at the premises of the Marina, or on the Vessel, with the explicit or implicit consent of the Owner, and shall not be liable for any loss of or damage to any property of the Owner or any other such person or persons by theft or otherwise, whether such personal injury, death, loss or damage is caused by the negligence of the Marina or attributed to the nature, construction, design, condition or state of repair of the Marina, its servants or agents, or otherwise.*

The Court held that the clause was ambiguous and did not relieve the marina from its duty to warn its customers of the dangerous condition of the dock. Crucially, the Court was critical of

[10] *Swinburne v. Dike [1995] B.C.J. No. 1027.*

the marina for failing to specifically point out the clause to its customers. In the U.S., this problem is addressed by printing the clauses of this type in bold or capitalized print or red ink, which leads to the colorful reference to exculpatory clauses of this kind as "Red Letter Clauses."[11]

Conclusion

Marinas, as small boat facilities capable of providing necessary logistical support, repair and storage facilities and rental services to pleasure-craft operators, face multiple sources of liability. As many marinas in Canada are small, family owned operations, the strain of litigation can apply a considerable pressure on marina operators' resources and divert their attention from their core business, even when they are insured.

Awareness of potential sources of liability is a key to marina operators' ability to manage risks. Marine law practitioners providing advice to marinas are well advised to go over the common sources of marina liability with their clients at the beginning of each navigation season, to bring their attention to the areas of their business which may give rise to liability. This is a good time to review rental and storage contracts, to ensure that the exculpatory or Red Letter clauses are properly highlighted and explained to the marinas' clients and that marina staff, who are often local teenagers working seasonally, are given adequate training. An ounce of prevention can be worth a pound of cure when it comes to managing marina liabilities.

[11] Harris, Jason R., "Sources of Marina Liability for storage and repairs Ashore and the Effectiveness of Red Letter Clauses," Journal of Maritime Law & Commerce, Vol. 37, No. 4, October, 2006 at page 551.