Jokers Drinking Beer in a Motorboat
Present and Future Hangovers in Canadian Law of Recreational Watercraft

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There is a saying that goes: "leave your beer on the pier". Sadly, all too often the beer is not left on the pier but rather is consumed before, and during, recreational boating on one of Canada's many inland waterways. All too often this leads to tragic consequences and resulting personal injury litigation. This paper is an attempt to explore some of the issues that arise in the law of recreational watercraft.

Pleasure vs. Recreational Crafts

At the outset, a distinction should be made between the terms "pleasure craft" and "recreational craft" (or "vessel"). The terms are often used interchangeably. Most times, that is not an issue. However, we should be clear on the terms before embarking further. "Pleasure craft" is a defined term under the *Canada Shipping Act, 2001*. It means a vessel that is "used for pleasure and does not carry passengers"[1]. A pleasure craft does not have to be registered under the *Canada Shipping Act, 2001* with the Canadian Registrar of Vessels, although it may be it the owner so desires[2]. Importantly, a true pleasure craft is not used for a commercial or public purpose.

A recreational watercraft is a vessel that has no precise meaning. It is not a term of art in the same sense of the term "pleasure craft". It is generally understood to be a vessel used for the purposes of recreational (or pleasure) activities such as pleasure boating, fishing and water sports. A recreational vessel is not necessarily a pleasure craft if the term "pleasure craft" is used properly. There are many types of vessels, such as fishing charter vessels, whale watching tour boats or commercial water-ski operations which could all be used for recreational purposes, but are not, in fact, true pleasure craft.

For the purposes of this paper, the intent is to focus on pleasure craft that are used in a recreational manner. That is, the small boats, yachts, canoes and personal watercrafts used by everyday Canadians in the course of their summer holidays and weekends, without a commercial or public purpose. Although these recreational watercraft are designed for simple fun on the water, some of the legal issues that they give rise to back on land are not so simple.

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[1] *Canada Shipping Act, 2001*, S.C. 2001 c.26, s.2.

[2] Supra, at s. 46.

Recreational Boating Industry

The recreational boating is a major Canadian pastime and its industry in Canada is big business. It generates significant revenue and jobs across the country. In a population of approximately 33 million people, nearly 6 million or 18% of the total population participate in recreational boating activity on a yearly basis[3]. In 2006 Canadians owned 2.9 Million pleasure boats[4]. In terms of economic contribution, the direct and indirect spending in the recreational marine sector, including the economic spin-off effects, amounted to $26.8 Billion dollars and 373,606 jobs in 2006. Of those amounts, $17.5 Billion were for wages and salaries and $3.3 Billion dollars went to taxes for the various levels of government[5]. The recreational boating industry accounts for nearly 10% of the tourism dollars spent in Canada[6].

In addition to being a significant business, it is also a growing business. The rate of pleasure craft ownership is increasing faster than population growth. 66,000 new pleasure boats were purchased in 2006. The rate of growth is four times all manufacturing, two times the manufacturing of durable goods and 50% above the larger industry sector of transportation equipment manufacturing[7].

All of the foregoing makes sense, considering that Canada is a significant water based country. Canada has three oceans as well as one of the longest commercial seaway and canal systems in the world. In addition, Canada borders four of the five North American Great Lakes and has an immeasurable number of big and small inland lakes, streams and rivers. Canada's roots are in the canoe. The student of history will recall that much of the country was explored by the earlier explorers and settlers using canoes on the inland waterways. Many Canadians have fond memories of long summer days spent at the lakefront cottage, the dockside or at camp in view of powerboat, sailboat or canoe. Sadly, many of those memories are shattered by the nightmare of recreational watercraft personal injury.

Recreational Boating Is Dangerous

Recreational boating is also a dangerous activity resulting in significant numbers of death and personal injury. Although the general trend is that boating deaths and injuries are decreasing, it is still a major problem. Boating is responsible for approximately one-third of all water related deaths[8]. Most of those deaths occur in the course of recreational boating, by and to non-professional mariners. 75% of the boating deaths occur on the inland lakes, rivers and streams,

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[3] *The Economic Impact of Recreational Boating in Canada: 2006 Summary Report*; prepared by Discover Boating Canada, at page 2.
[4] *ibid.*
[5] *ibid,* at page 3-4.
[6] *ibid* at page 5.
[7] *ibid.*
[8] Canadian Boating Statistics, taken from "Pat's Boating in Canada" website, Boating in Canada.org, May 2009, hereinafter "Canadian Boating Statistics".

with 53% occurring on the lakes and additional 22% on rivers and streams[9]. The rest occur on oceans, many close to shore. 75% of all boating deaths are also in the recreational sector with 33% attributable to power boating, 27% attributable to fishing and the 13% caused by canoeing[10]. The provinces of Ontario and British Columbia lead the way in recreational boating injury and death, with the two provinces accounting for 49% of all of Canada's recreational boating deaths. Ontario alone, accounts for 28%[11].

Powerboats account for approximately one half of all Canadian recreational boat deaths, mainly in smaller craft, under 5½ metres (18 feet)[12]. Canoes are the second most common vessel involved in boating deaths, mainly due to their instability, lack of operator experience and training and ease of access by inexperienced operators. Canoes account for nearly 30% of Canada's boating fatalities[13]. In North America, 35% of all boating fatalities are connected to non motorized vessels[14].

Although personal water craft (such as Sea-doo's) account for a low number of total deaths, the overall rate is much higher consisting of approximately 11 fatalities per 100,000 PWC's with power boats amounting to 6 in 100,000 boats and non power boats 2-5 per 100,000 vessels[15].

Boating fatalities are also predominantly male. 90% of all boating deaths are men and 50% of those are in the range of 18 to 34 years of age[16]. From a personal injury law perspective, those that are most at risk are also those that have the greatest potential to generate the most significant wrongful death claims. Men who are killed or serious injured in this age range are at the height of their employability, with long future income potential and young dependant families. These are the factors, when used in the assessment of damages, can generate big loss of income or loss of dependency awards.

Booze and Boats

Alcohol is the primary factor in boating related deaths. Just like with driving, drinking and boating kills. However, the presence of alcohol on boats is considerably more significant than on the highways. 66% of recreational boaters admit to occasionally consuming alcohol while boating and 37% admit to using alcohol every time they are boating[17]. Imagine the public outrage if 37% of all drivers admitted to using alcohol every time they got behind the wheel of a car!

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[9] *ibid.*
[10] *ibid.*
[11] *ibid.*
[12] *ibid.*
[13] *ibid.*
[14] "Don't Paddle Drunk: Canoeing under the influence now costs you your license in Ontario", Colin Campbell, Maclean's, July 24, 2006.
[15] Canadian Boating Statistics, *supra.*
[16] *ibid..*
[17] Canadian Red Cross, Alcohol Awaresness and Boating Safety, taken from Red Cross website May 2009.

Drowning is the most common boat related death[18]. The Canadian Medical Association has reported that two thirds of all boat related drownings are alcohol related[19]. In Ontario (the province with the highest amount of boating deaths) there are approximately 36 boating deaths a year and 31% are alcohol related[20]. Other statistics suggest that alcohol is a factor in 40% of recreational boating fatalities and ¾ of all water fatalities involve alcohol[21]. Consistent with the earlier theme, 81% of all drowning victims are male, mainly in the age group of 18 to 24 with one half of those deaths occurring on weekend evenings following the consumption of alcohol[22]. It does not take a lot of mental energy to figure out that there is a disturbing trend amongst young men to drink to excess on cottage weekends, get in their boats and wreak havoc to themselves and others. Any maritime injury defence lawyer can anecdotally confirm this unfortunate state of affairs.

The conclusion to be drawn from the foregoing is that there are a lot of boats on the recreational and inland waterways of Canada. Along with the boats there is a lot of booze, which combined, leads to fatalities and drownings. Unfortunately, these are neither new statistics nor a recent problem.

Boating and Alcohol Laws

The impaired operation of a vessel is an offense under the *Criminal Code of Canada*. Section 253 of the *Criminal Code* makes it an offense to operate a motor vehicle or vessel or to have the "care or control" of a motor vehicle or vessel, whether in motion or not, while the operator's ability to operate the vessel is impaired by alcohol. Impairment includes (but does not necessarily mean[23]) having consumed a quantity of alcohol such that the concentration of alcohol in the person's blood exceeds 80 milligrams of alcohol in 100 milliliters of blood (a.k.a "Over 80").

"Vessel" is a broadly defined term in the relevant part of the *Criminal Code*. The *Code* does not limit or restrict what is, or is not, a vessel and leaves the definition open for further interpretation and reliance on other definitions[24]. The term "vessel" is also defined in the *Canada Shipping Act*, 2001, as:

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[18] Mother's Against Drunk Driving, "Public backs impaired boating penalties – poll" taken from MADD website May 2009.
[19] Canadian Boating Statistics, *supra.*
[20] Canadian Red Cross and Mothers Against Drunk Driving, *supra*
[21] Ontario Provincial Police Statistics as reported by Mothers Against Drunk Driving.
[22] The Life Saving Society as reported by Mothers Against Drunk Driving.
[23] Section 253 of the *Criminal Code of Canada* makes it an offense for being impaired to operate a vessel which can be determined by objective evidence such as physical sobriety tests or by having a blood alcohol concentration of greater than 80 milligrams of alcohol in 100 milliliters of blood, regardless of any displays of physical insobriety.
[24] Section 214 of the *Criminal Code of Canada* defines "vessel" as: "includes a machine designed to derive support in the atmosphere primarily from reactions against the earth's surface of air expelled from the machine". This definition is meant to include such vessels as hydrofoils but does not limit what would be considered a vessel, such a powerboat, sailboat or canoe.

> a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction[25].

Thus, just about anything that can travel across water could lead to an impaired operation charge under s. 253 of the Criminal Code and related provisions. The *Criminal Code* does not require that the vessel be under power. A Court in Nova Scotia has held that a vessel is being "operated" for the purposes of the impaired driving sections of the *Criminal Code*, even if the engine is turned off and the boat is simply drifting[26]. In other words, drunken canoeing would be an offense under Section 253 of the *Criminal Code*.

Provincial liquor laws may also restrict the ability to have alcohol on board vessels[27]. In Ontario, it is contrary to the *Liquor License Act* to have or consume liquor in any place other than what is considered, by regulation, to be a "private place"[28]. In order for a boat (which under Ontario law includes any ship or boat or any description of vessel) to be considered a "private place" it must have permanent sleeping accommodations along with permanent cooking and sanitary facilities and the boat must be at anchor or secured to the dock or land[29]. Thus the typical fishing boat, small powerboat or canoe would not be a private place for the purposes of the *Liquor License Act*. The *Liquor License Act* also prohibits the conveying of liquor in a boat unless it is in an unopened container with an unbroken seal or it is stored in a closed compartment[30]. In sum and substance, the consumption of alcohol in a boat is most likely going to be an offense under the *Liquor License Act.* The favorite pastime of having a few beers while fishing or cruising the lake is in fact quite illegal.

Ontario's Impaired Boating Crackdown

In Ontario, impaired boating is impaired driving. The Ministry of Transportation, which is responsible for the regulation of motor vehicles on Ontario highways, has expanded its reach into the boating sector. The Ministry of Transportation provides for administrative penalties for impaired driving apart from those under the *Criminal Code of Canada.* The *Highway Traffic Act* permits a police officer to stop a motor vehicle on the road and demand that the driver provide a breath sample for the purposes of determining blood alcohol content[31]. If the driver provides a breath sample that is in the "warn" range or indicates a blood alcohol content of 0.05 mg/mL or higher, the Ministry now imposes an automatic three day administrative driver's license suspension[32]. The license suspension is based on the road side test or the approved screening device, if one is used. The second suspension is for seven days and the third suspension lasts for 30 days. These suspensions take effect at the time that the breath sample is provided[33]. The

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[25] *Canada Shipping Act*, 2001, S.C. 2001, c.-26, s.2.
[26] *R v. Ernst* (1979), 50 C.C.C. (2d) 320 (NS. C.A.).
[27] See e.g. Ontario *Liquor License Act*, R.S.O. 1990, c.L.19.
[28] *Liquor License Act*, s.31(2).
[29] *Liquor License Act,* General Regulation, R.R.O. 1990, Reg. 718 s.3.
[30] *Liquor License Act* s.32(3).
[31] *Highway Traffic Act*, R.S.O. 1990, c.H.8, s.48(1).
[32] *Highway Traffic Act*, s.48(2) and (14).
[33] *Highway Traffic Act*, s.48(4).

Ministry of Transportation also imposes administrative suspensions of driver's licenses for one year upon the first conviction under Section 253 of the *Criminal Code*.

In 2006, the administrative roadside license suspensions imposed by the Ministry of Transportation were extended to those operating or having the care, charge or control of a vessel. Under the Ontario *Highway Traffic Act*, a police officer may stop the operator of a boat for the purposes of making a demand under the *Criminal Code*. If that operator has a blood alcohol content of 0.05 mg/mL or higher, then the vessel is impounded and the operator's driver's license is administratively suspended for three days.

The extension of the Ministry of Transportation's reach into recreational boating arose by way of a private member's bill in 2006[34]. For years there has been an increasing uproar over the ongoing waterway carnage in the Muskoka cottage region of Ontario. There are a series of large lakes and waterways populated by cottages and restaurant/bars. The consumption of alcohol and operating of boats was a known problem. Those that practice personal injury law in Ontario are very familiar with the summer long weekends which generate a number of accidents. Following the death of the 20 year-old son of a prominent lawyer the provincial government took steps to crackdown on drinking and boating. The result was to link motor vehicle driver's license suspensions to impaired boating.

The legal effect of the Ontario regime, taken to its logical extensions, is that the operator of a canoe[35], who is found to have a blood alcohol content of more than 0.05 mg/mL can have their driver's license administratively suspended for three days. There is an interesting, but untested, legal issue as to whether the Ontario *Highway Traffic Act,* and its regime of administratively suspending driver's licenses can apply to the impaired navigation of vessels. One must wonder if the province has acted *ultra vires* by extending provincial highway legislation into area of federal competence.

Liability for Pleasure Craft Incidents

Jurisdiction

It is well settled that Canadian Maritime Law is a body of Federal law encompassing the common law principles of tort, contract and bailment. It is also uniform throughout Canada.[36] The bigger question is whether a particular incident that involves a recreational watercraft is a maritime incident and governed by Canadian Maritime Law. The Federal Government's power under "navigation and shipping" pursuant to Section 91(10) of the *Constitution Act* is the basis for Canadian Maritime Law. General negligence or tort claims, which encompass almost all

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[34] Bill 209, *An Act to amend the Highway Traffic Act with respect to the suspension of drivers' licences*, S.O. 2006 c.20, Royal Assent June 22, 2006.

[35] The *Highway Traffic Act* uses the same definition for "vessel" as s.241 of the *Criminal Code*. This is the general definition which leads us back to the *Canada Shipping Act*, 2001 and the very broad definition as to what constitutes a "vessel".

[36] *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752.

forms of personal injury, are within the provincial law sphere under the constitutional division of powers giving the provinces jurisdiction over "property and civil rights"[37].

The starting point for a jurisdictional analysis is the Supreme Court of Canada's decision in *ITO – International Terminal Operations Ltd. v. Miida Electronics Inc*[38]. That seminal decision on the scope of Canadian Maritime Law held that tortious liability in the maritime context is governed by maritime law, which is in the exclusive jurisdiction of the Federal Parliament. *ITO* was a case involving the international shipment of goods and whether a tort which occurred on land, in the course of the international shipment of goods, was within the scope of Canadian Maritime Law or Provincial land based law. The Supreme Court of Canada held that the theft of goods, on land, from a warehouse in a commercial port was sufficiently connected with "navigation and shipping" to make it part of Canadian Maritime Law.

The Supreme Court of Canada also made it clear that Canadian Maritime Law applied to recreational boating cases in *Whitbread v. Walley*[39] decided in 1990. *Whitbread* was a personal injury case arising out of a single vessel allision with some rocks on Indian Arm Inlet, north of Vancouver, British Columbia. Mr. Whitbread was on board a 32 foot pleasure craft, the CALROSSIE, when he turned over control of the vessel to his friend Walley. While Walley was at the controls, the CALROSSIE struck the rocks resulting in severe injuries (quadriplegia) to Mr. Whitbread. Whitbread sued Walley for his damages and Walley sought to invoke the limitation of liability provisions under the *Canada Shipping Act.* The principle issue to be decided by the Supreme Court of Canada was whether this was a matter of Canadian Maritime Law and governed by federal legislation, such as the *Canadian Shipping Act* and its limitation of liability provisions. The plaintiff's position was that an incident of this nature was a personal injury case which is one of "property and civil rights" and therefore within the realm of provincial law, not the federal maritime law.

The Supreme Court of Canada held that tortious liability which arises in a maritime context is governed by a body of maritime law which is in the exclusive legislative jurisdiction of Parliament. This includes the high seas and tidal bodies of water or those which are within the "ebb and flow of the tide". In addition, the Supreme Court of Canada held that the federal power over navigation and shipping extends beyond the ebb and flow of the tide but also to the activities of those who "directly engage in the activity of navigation on Canada's inland waterways"[40]. Maritime law under the Constitution was not restricted to commercial navigation and shipping, but all navigation and shipping. Recreational and commercial operate in the same navigational network and should be subject to a uniform legal regime. Accordingly, the tortious liability of owners and operators of pleasure craft, which include ocean going yachts to small motorboats, were within the ambit of Parliament's jurisdiction over navigation and shipping. If the tortious liability of negligently navigated pleasure craft was within the purview of Canadian

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[37] Canada's Constitution divides powers between the Federal and Provincial Governments. The power to legislate in the area of "navigation and shipping" is reserved exclusively to the Federal Government under s.91(10) of the Constitution. The power to legislate in respect of property and civil right is reserved exclusively for the Provincial Government under s.92(13) of the Constitution. The right to a remedy for damages suffered as a result of personal injury is a "civil right".

[38] *Supra*, note 36.

[39] [1990] 3 S.C.R. 1273.

[40] *Supra*, at para. 25.

Maritime Law, it would also subject to the limitation provisions under the *Canada Shipping Act.* The effect of *Whitbread* was to expand the scope of Canadian Maritime Law to beyond just commercial activities but also apply it to recreational watercraft on inland lakes.

The scope of the applicability of Canadian Maritime Law, in the recreational setting, was again revisited by the Supreme Court of Canada in *Isen v. Simms*[41]. In *Isen,* Dr. Simms was partially blinded when struck in the eye with a bungee cord that was being affixed to the rear of a pleasure boat. The boat had been taken out of the water and was on land when the owner of the boat, Dr. Isen, was stretching the bungee cord in order to make preparations to transport the boat by car along the highway. The cord slipped from Dr. Isen's fingers and struck Dr. Simms in the face. Dr. Simms sued Dr. Isen for his injury and Dr. Isen sought to invoke the limitation of liability provisions of the then *Canada Shipping Act.* In *ITO v. Miida*, the Supreme Court of Canada extended Canadian Maritime Law to torts which occur on land (such as the theft of goods from a warehouse) so long as they were sufficiently connected to navigation and shipping. In *Whitbread* the Supreme Court of Canada applied Canadian Maritime Law to inland waters and recreational water craft. By extension, it was argued for Dr. Isen that if maritime law applies to recreational water craft, and to land based activities that are sufficiently connected with navigation and shipping, it ought to apply in circumstances where a recreational boat, on land, was the central actor and was being operated in its intended manner[42]. The court disagreed.

The Supreme Court of Canada previously held that the question of whether a claim falls within the ambit of Federal Maritime Law requires an examination of the factual context of the claim[43]. While there was a potential liability of an owner of a pleasure craft (Isen), it did not arise out of the navigation of the pleasure craft. The international shipping considerations that drove the analysis in *ITO* to extend federal power over "navigation and shipping" to land based negligence were not present. Although *Whitbread* involved a pleasure craft, the Supreme Court of Canada clarified that Parliament does not have jurisdiction over a pleasure craft *per se.* The mere involvement of pleasure craft does not ground Parliament's jurisdiction, but rather the negligent acts must be examined and determined whether the activity in issue was integrally connected to navigating the pleasure craft on Canadian waterways such that it was practically necessary for Parliament to have jurisdiction over the matter. In *Isen*, the recreational craft was not being navigated nor was there any connection to shipping. The Supreme Court of Canada pulled back the scope of Canadian Maritime Law over pleasure craft incidents to matters involving navigation or which have such a close connection thereto. Thus, unless the tortious act is somehow integrally connected to the navigation of a vessel such that it is practically necessary for Parliament to have jurisdiction, it will not fall within the jurisdiction of Canadian Maritime Law.

Other cases have also reviewed the application of Canadian Maritime Law and focus on the act, not the location or type of vessel. It is the negligent act that it is complained of that must be

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[41] [2006] 2 S.C.R. 349.

[42] Dr. Isen's boat was a 17 foot motorboat that he kept at his cottage and took by trailer to use in different lakes. By its nature, one of the intended uses of this vessel, was for it to be transported over land to go from lake to lake. It was submitted that taking the steps to secure it for proper transport over land was part of the manner in which the vessel was properly operated.

[43] See, *Ordon Estate v. Grail,* [1998] 3 S.C.R. 437.

examined to determine whether it is one of navigation and shipping. For example, in *Dreifields v. Burton*[44] a man died in a scuba diving accident. The cause of death was an embolism while at depth. The plaintiff had started his dive from a chartered boat. The scuba tour operator sought to limit to potential liability based on the provisions of the then *Canada Shipping Act*. The Ontario Court held that not every tortious activity engaged in on Canada's waterways is subject to Canadian Maritime Law. It is only if the activity is sufficiently connected to navigation or shipping that it falls to be resolved under Canadian Maritime Law. In the *Dreifields'* case, the negligent activity complained of was not sufficiently connected to navigation and shipping. The alleged negligence related to the preparation for and the conduct of the scuba dive. No negligence was alleged in the operation of the charter boat. The boat was just a means of transport, not a cause or contributor to the accident. This was a general negligence case subject to relevant Provincial law and legislation. To attract the scope of Canadian Maritime Law, the negligence must relate to navigation of the vessel or another activity, directly relating to either shipping activity or navigation of the vessel such that it makes it a practical necessity for Parliament to have jurisdiction over the matter. The focus of the enquiry is not so much on the vessel's location, but on the specific acts that form the basis of the complaint. If that act is one that is integral to navigation or shipping activity, then it comes within the purview of Canadian Maritime Law.

The Standard of Care

In Canadian law, the Supreme Court has reaffirmed that liability for negligence requires a breach of a duty of care arising from a reasonably foreseeable risk of harm to one person created by the act or admission of another[45]. The breach of the duty of care is adjudged by a standard, known as the "standard of care". When the individual accused of negligence falls below a certain standard, then the duty is considered breached. The question often becomes what is the standard to which a defendant is going to be held to determine whether they have acted negligently. In the commercial setting Courts have held that the standard is not that of the ordinary reasonable person but that if of the ordinary reasonable seaman. This brings in an expectation of the professional mariner[46].

In the recreational setting, the standard is that of the reasonably prudent operator of a recreational vessel. There is no clear definition of what constitutes a reasonably prudent operator of a vessel. The superior navigation skills of professional mariners should not be expected in a recreational setting. At the same time, the standard of care should be greater than that of the reasonably prudent person since some additional level of skill and training is necessary to properly operate a vessel on the water. There should be a requirement of some level of skill or training to raise the standard for operation of a recreational vessel to more than just the reasonably prudent person. It is for this reason that I suggest that the standard should be that of the reasonably prudent operator of a recreational vessel. One Court has referred to it as the "reasonable boatman"[47]. In practicality, whether the standard is that of a reasonably prudent person or a reasonable boatman

[44] 38 O.R. (3d) 393 (O.C.A.).
[45] See, *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333.
[46] Gold et. al., "Maritime Law", (Irwin Law: Toronto) 2003, at page 522.
[47] *Pawlak v. Doucette*, [1984] B.C.J. No. 3079 (BCSC).

or even that of the reasonable seaman, it is often of no consequence. In many recreational watercraft cases, there is a clear violation of one of the navigational rules such as a failure to keep a proper lookout or traveling at too high of a rate of speed.

The reasoning behind the Supreme Court's decision in *Whitbread* can also be applied to hold that the standards of good seamanship should apply to all ships, whether commercial or recreational. The basis underlying the decision to extend Canadian Maritime Law to recreational craft was the fact that both types of vessels share the same "navigational network" and the need for uniformity[48]. Also, guidance can be found from the *Small Vessel Regulations* which prohibit the operation of a small vessel in a "careless" manner, meaning "without due care and attention or without consideration for other persons"[49]. In addition, a breach of the *Collision Regulations*, such as failing to keep a proper lookout, avoid a collision or yield the right of way, are also standards upon which liability is determined.

In addition to the common law standards relating to the exercise of due diligence and the standard of care in the operation pleasure craft, evidenced by the *Collision Regulations* there is also the *Competency of Operators of Pleasure Craft Regulations*[50] made under the *Canada Shipping Act, 2001*. These regulations, promulgated in January of 1999 brought in a requirement for the operators of pleasure crafts to have a certain level of minimum competency demonstrated by the passing of a test. By September 15, 2009 all operators of a pleasure craft fitted with a motor (other than those in the waters of the Northwest Territories and Nunavut) will have to be able to produce a pleasure craft operator card. This includes all motor boats and sailboats that are fitted with a motor.

There is an exception for rented pleasure craft. A short term renter does not need a Pleasure Craft Operator's Card if the renter that the renter reviews and signs a rental boat safety checklist containing certain prescribed information at the time of the rental.[51]

In order to obtain a Pleasure Craft Operator Card the person has to pass a course which reviews safety requirements, the Canadian buoy system, sharing of waterways, regulations and emergency procedures. The course can be taken through class work, correspondence or even by the internet[52]. Once a person obtains a pleasure craft operator card, it is good for life and cannot be taken away.

While the regulation does not expressly state that civil liability flows from the operation of a pleasure craft without a Pleasure Craft Operator Card, the regulations provide that "no person shall operate a pleasure craft" unless the person has the Pleasure Craft Operator Card[53]. While there are no decided cases directly on point, it is anticipated that in the right circumstances a Court will use the failure to have a pleasure craft operator card as evidence of a lack of competency and support a finding of negligence.

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[48] Gold, supra, at p.554.
[49] *Small Vessel Regulations*, C.R.C. c. 1487, s. 44.
[50] *Competency of Operators of Pleasure Craft Regulations*, S.O.R./99-53.
[51] *Competency of Operators of Pleasure Craft Regulations*, s.4(1)(c) and s.8.
[52] *Competency of Operators of Pleasure Craft Regulations*, s.6 and s.7.
[53] *Competency of Operators of Pleasure Craft Regulations* s.3(1).

Owner's Liability

It is common practice in personal injury claims arising out of recreational watercraft incidents for the plaintiffs to sue the owner of the vessel involved, along with the operator of the vessel (if they are different). The basis of the claim against the owner of the vessel is that he/she is "vicariously liable" for the actions and negligence of the operator. This stems from the practice in motor vehicle collision cases where most provincial highway traffic acts create liability on the owners of automobiles for the negligence of their consensual drivers[54]. This is part of a larger scheme that relates to compulsory automobile insurance and the availability of injured plaintiffs to obtain access to insurance policies which are obtained by the owners of vehicles for the benefit of drivers and potential victims[55].

The owner of a vessel, however, is not automatically vicariously liable for the actions of a consensual operator. The foregoing provisions that make owners vicariously liable in the case of car accidents is a creature of statute which does not exist in Canadian Maritime Law. There is nothing in either the *Marine Liability Act*[56] or the *Canada Shipping Act, 2001* which provides for liability on the owner simply by virtue of being the owner of the vessel involved. The Ontario Court of Appeal has also held that there is nothing in Canadian Maritime Law which automatically extends liability on the owner[57]. Be that as it may, the Ontario Court of Appeal has also confirmed that Canadian maritime law permits the imposition of liability on an owner of a vessel on other bases, such as negligent entrustment[58]. The Courts have room to find an owner liable for failing to supervise or instruct the operator or entrusting the vessel to an individual who is incompetent to operate it. If an owner were to entrust a vessel to someone that they knew to be intoxicated (or is likely to become intoxicated) or simply unable to navigate the vessel, then the owner could be held responsible along with the operator. The finding of liability would not be automatic because of the operator's negligence, but it would require separate proof of the owner's negligence.

Vicarious owner's liability in a recreational setting has been applied on this basis in previous cases such as in British Columbia in *Pawlack* v. *Doucette*[59]. In *Pawaick* the owner of a power boat was attempting to teach a friend how to water-ski. He had another friend operate his boat, and did so negligently which injured the novice water-skier. The Court found that the operator of the boat was not for furthering any purpose of his own but furthering the purposes of the boat's owner, being to teach his friend how to water-ski. The difficulty with this decision is that it applies a vicarious liability theory, typically used in an employment setting or where the owner of the asset receives financial gain, to a gratuitous situation where the owner of the boat did not have any particular purpose of his own other than showing a friend a new sport. It is more of an exercise in judicial intellectual gymnastics to create liability on the owner of the boat (who is

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[54] See e.g. Ontario *Highway Traffic Act*, R.S.O. 1990, c.H.8 at s.192.
[55] See e.g. Ontario's *Compulsory Automobile Insurance Act*, R.S.O. 1990, c.C.25 and Ontario's *Insurance Act*, R.S.O. 1990, c.I.8 s.258.
[56] *Marine Liability Act*, S.C. 2001, c.6.
[57] *Leggatt Estate v. Leggatt* (2003), 64 O.R. (3d) 347 (O.C.A.).
[58] *Supra*, at para. 44.
[59] [1984] B.C.J. No. 3079.

presumably insured). However,it does set forth an example that vicarious liability can be extended, in the right situation, to make the owner liable for the negligence of the non-owning operator.

In a similar vein, the failure to properly instruct or inform the operator of a boat can also be the basis of liability on the owner. In *Wozniak* v. *Alexander*[60] the Alberta Court of Queen's Bench held the owner, a boat rental company, to be liable on the basis that the employees who rented out the boat did not adequately follow procedure. The employees did not take adequate steps to determine the experience level of those who were going to be operating the vessel or give them adequate instruction in light of their low level of experience. The accident may have been a result of or partially attributable to the operator's lack of instruction or experience in vessel operation. The decision in *Wozniak* occurred in the circumstances of a commercial rental enterprise renting small pleasure vessels to the public. The decision can be understood in the context that because the rental company received remuneration and because it was in position to instruct prospective renters on the proper use of the boat or deny the rental, then should bear the economic risk of loss[61]. It can be expected that the reasoning in *Wozniak* will be extended into the personal pleasure recreational watercraft area whereby an owner will be held liable (in negligence) for failing to properly instruct or supervise the operator of the recreational watercraft.

In addition to the negligent entrustment or failure to instruct theories of liability the *Competency of Operators of Pleasure Craft Regulations* also prohibit any owner, master, operator, or person in charge of a pleasure craft to permit a person to operate a pleasure craft, unless that person has a Pleasure Craft Operator Card[62]. We can expect to see future cases whereby the Courts will likely find liability against the owner for failing to ensure that the operator has the minimum level of competency which is evidenced by the pleasure craft operator card.

Damages

Damages in maritime personal injury are assessed in accordance with the regular approaches in personal injury law[63] being to provide compensation for non-pecuniary general damages (i.e. pain and suffering), special damages (i.e. past expenses incurred), past loss of income, and future loss of income and future medical care expenses. As part of the special damages, provincial health insurance plans also have a subrogated interest. In Ontario, the subrogated claim on

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[60] [2008] A.J. No. 788.

[61] The concept of shifting the economic consequences of a loss or the risk of loss, can be seen in other types of personal injury decisions. There is a perspective, held by some, that a defendant should bear the risk of a loss if it is in an economic position to do so. This is, in reality, a form of social engineering. The theory suggests that those who are in position to best bear the loss can insure themselves for potential losses by collecting money which could be used for the payment of insurance premiums. For example, taverns can add a small price to the cost per drink to cover the risk of an intoxicated patron causing injury to a motorist once they have left the bar or a rental company can marginally increase its rental cost to insure against claims brought as a result of inexperienced renters causing injury to others. This leads to alternate, and sometimes difficult, theories of liability.

[62] Competency of Operators of Pleasure Craft Regulations, s.3(2.1). In the case of renters, a renter does not need a pleasure craft operator's card but must have reviewed and signed a boat rental safety checklist at the time of renting the boat.

[63] *Restitutio in integrum*, or the making of the plaintiff whole, to the extent that money can do so.

behalf of the Ontario Health Insurance Plan has existed by statute for many years[64]. British Columbia has recently clarified its rules relating to the enforcement of healthcare claims arising out of marine personal injury as well[65]. In essence, when advancing or settling a marine personal injury claim, the provincial health insurance plan's subrogated interest must be taken into account and damages paid in satisfaction of that claim and a release procured from the appropriate authority.

With respect to dependant's relief claims, the Federal Court has clarified the approach to be taken in the assessment of damages under Section 6 of the *Marine Liability Act*[66]. Section 6 of the *Marine Liability Act* provides that dependants are entitled to advance claims against tortfeasors for compensation for their "loss of guidance, care and companionship". There were typically two approaches to the assessment of dependant's relief damages which were the "conventional award" and the "case by case" approach. Under the conventional award approach, generally recognized sums (or if stipulated by statute) would be awarded for the loss of a spouse, a parent, a child, etc. These amounts would be awarded, subject to some modification on the edges, without much consideration to the relationship between the injured person and the dependant. Under the case by case approach, more detailed factors are considered, including the circumstances of death, ages, nature and quality of the relationship, the dependant's personality and ability to manage the emotional consequences of the loss, the overall effect of the loss on the dependant's life etc.[67] The Federal Court has determined that the appropriate approach for damages under Section 6 of the *Marine Liability Act* for dependants relief claims is the case by case approach. In *Wilcox* v. *The MISS MEGAN*[68] the Federal Court rejected the conventional award approach in favour of the case by case analysis making reference to the provisions of the *Marine Liability Act* bear close resemblance to the provisions of the Ontario *Family Law Act* which has developed a case by case approach.

Limitation of Liability

Much of the litigation in recreational watercraft cases surrounds the issue as to whether a defendant can limit his/her liability based on the limitation of liability provisions in the *Marine Liability Act*. Indeed, the two influential cases dealing with the ambit of Canadian maritime law in the recreational boating area, *Whitbread v. Walley* and *Isen* v. *Simms* were both cases where the central issue was the defendant's entitlement to limitation.

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[64] *Health Insurance Act*, R.S.O 1990 c.H-6, s. 30.

[65] *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27.

[66] In provincial superior courts damages should be assessed in accordance with the custom of the court. As a matter of conflicts of law principles, the heads or types of damages that are recoverable are governed by the substantive law of the case i.e. Canadian Maritime Law and the *Marine Liability Act*. However the assessment or quantum of damages to be awarded for each of those heads of damages is a procedural question to be determined by the law of the forum hearing the case.

[67] See, *Wilcox v. The MISS MEGAN*, [2007] F.C.J. No. 1347 at para. 90 citing *Augustus v. Gossett* [1996] 3 S.C.R 268.

[68] [2007] F.C.J. No. 1347 aff'd [2008] F.C.J. No. 645

Under the soon to be amended *Marine Liability Act*[69], Section 29 of the *Marine Liability Act* provides that the maximum liability for maritime claims (which would include personal injuries) that arise on a distinct occasion involving a ship less than 300 gross tonnes (which almost all recreational watercraft are), other than passenger claims which are addressed in Section 28, is $1,000,000.00 for claims in respect of loss of life or personal injury.

Section 29 of the *Marine Liability Act* deals with liability to persons carried onboard a vessel to which the Athens Convention on Passenger Carriage[70] does not apply. Section 37 of the *Marine Liability Act* adopts the Athens Convention into the law of Canada. The Athens Convention applies to persons carried under a contract of carriage in the international carriage of passengers and, under the Canadian adoption in the *Marine Liability Act*, to passengers from one place in Canada to another place in Canada. The Athens Convention is also extended to those onboard a vessel, otherwise than under a contract of carriage, but does not include the master and crew, persons on a ship which is not being operated for a commercial or public purpose (i.e. solely a pleasure craft), shipwreck survivors, stowaways and trespassers. Section 37(2)(b)(ii) of the *Marine Liability Act* provides that if a person is not being carried under a contract of carriage and is not on a ship operated for a commercial or public purpose, then the Athens Convention does not apply. Accordingly, if a person is carried onboard a ship which is operated for a commercial or public purpose (although not a passenger), then their claim would be subject to the Athens Convention and the limitation of liability found therein[71]. The limitation of liability in the Athens Convention would limit claims to approximately $300,000.00 CDN based on the prevailing exchange rate of Special Drawing Rights at the International Monetary Fund.

The potential applicability of the Athens Convention to some forms of recreational watercraft pursuits, or the application of the general limitation of liability provisions creates a significant swing in the value of the plaintiff's case. This leads to a necessary determination as to whether the ship is being operated for a commercial or public purpose. While at first glance it may seem obvious, the dispute can arise in the context of a ship being operated in connection with or ancillary to a commercial enterprise. For example, a northern Canada fishing lodge may only have access by water. If it sends a boat to the mainland to pick up a customer to transport that person to the lodge, and the boat capsizes, a legitimate question arises as to whether the Athens Convention would be applicable. One may argue that the Athens Convention is applicable by virtue of Section 37(2)(b)(ii) since it involved the carriage by water, otherwise than under contract of carriage and the person is not excluded because it was not a ship "other than a ship operated for a commercial or public purpose". The ship was being operated for the commercial purpose, being in connection with the commercial fishing lodge. At the same time, the ship itself was not operated for commercial purpose but rather it was ancillary to a larger commercial enterprise which is the fishing lodge, not the carriage of persons. This point remains undecided.

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[69] At the time of writing this paper in May 2009 the amendments to the *Marine Liability Act* (Bill c-7) had passed third reading in the House of Commons and were under consideration by the Senate. If passed the amendments will likely take effect some time in 2009.

[70] Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

[71] Article 7 of the Athens Convention limits liability for death or personal injury to a passenger to 175,000 Special Drawing Rights at the International Monetary Fund.

Limitation Period

The limitation period for personal injury claims arising out of recreational boating accidents is inconsistent and somewhat confusing. It is only going to become more confusing following the enactment to the amendments to the *Marine Liability Act*[72]. There are differing limitation periods which may lead to Court battles over whether a particular claim falls within a limitation period. This will also lead to potential lawyer's negligence cases.

As the law currently stands, the person who is directly injured (the claimant) is not subject to a limitation period unless their claim arises as a result of a collision. However, s.6 of the *Marine Liability Act* provides that certain "dependents" are entitled to claim damages as a result of injuries sustained to another person (the claimant) for the dependant's loss of guidance, care and companionship. These claims, brought by dependents, are subject to a two year limitation period pursuant to s.14 of the *Marine Liability Act*. Although the dependents' relief claim may be time barred, the claimant's claim is not subject to the same limitation period.

If the claim is in respect of collision, then the two year limitation period for both the dependents as well as the claimant may apply. However, the two year limitation period for claims arising as a result of a collision arguably may be restricted to only claims against a third party vessel and then only claims that are brought *in rem* or against the owners. Section 23(1) of the *Marine Liability Act* provides that an action may not be commenced later than two years after the loss to "enforce a claim or lien against a ship in collision or its owners". This terminology of enforcing a claim or lien against a ship or its owners can be interpreted to exclude the operator[73]. Thus, while a claim for a arising as a result of a collision against the owner or an *in rem* claim against the vessel itself may be subject to a two year limitation period, a claim against the operator of the vessel may not be barred. Furthermore, s.23 would only apply to claims brought against the ship, other than the ship that the claimant was on board. Section 23 also provides that the claims are for losses "suffered by any person on board that other ship, caused by the fault or neglect of the former ship". This wording suggests that the time bar only applies to claims against the vessel which collided with the vessel in which the person was carried on board. A claimant's claim against the owners or operators of the vessel on which they were being carried, may not be so barred by s.23(1). It should also be noted that the Court has the discretion to extend the limitation period under s.23(1) "on the conditions that it thinks fit"[74].

Claims arising out of passenger carriage, to which the *Athens Convention* would be subject (and therefore not true recreational water craft claims) are subject to a two year limitation period pursuant to Article 16 of the *Convention*. Other types of claims, not arising as a result of a collision, such as a slip and fall on a boat, a grounding, an allision, or the striking of a swimmer or water skier would not be subject to a limitation period.

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[72] See note 69 above.

[73] Section 23 of the *Marine Liability Act* reads: 23(1) no action may be commenced later than two years after the loss or injury arose to enforce a claim or lien against a ship in collision or its owners in respect of any loss to another ship, its cargo or property on board, or any loss of earnings of that other ship, or for damages for loss of life or personal injury suffered by any person on board that other ship, caused by the fault or neglect of the former ship, whether that ship is wholly or partly at fault or negligent.

[74] *Marine Liability Act*, s. 23(2).

Once the *Marine Liability Act* is amended, there will be a general three year limitation period for all claims[75]. This would encompass "any proceedings under Canadian Maritime Law in relation to any matter coming within the class of navigation and shipping". This broad language would cover all sorts of claims, provided that they are subject to Canadian Maritime Law. As we have learned from the *Isen* decision, not all claims involving a recreational water craft are covered by Canadian Maritime Law.

We could see a situation where different claims, all arising out of the same incident, could be subject to different limitation periods. For example, suppose there was an incident between two recreational boats on a lake. A close quarters situation develops due to the inattentiveness (negligence) of both operators of the vessels. At the last moment vessel A swerves to avoid a direct collision with vessel B. There is no contact between the vessels, but a person on board vessel A is thrown hard to the ground as a result of the evasive maneuver and is injured. First, there is a question as to whether this incident constitutes a "collision"[76]. Assuming that it does not, then the claimant has no limitation period in which to sue the owners and operators of vessels A or B. Assuming that it is a collision, then the claimant has no limitation period in which to sue operator A, potentially no limitation period in which to sue operator B but two years in which to enforce a claim or lien against vessel B and its owners. Regardless of whether it is a collision, the dependants have two years to sue the owners and operators and vessels A and B. Once the *Marine Liability Act* is amended, the dependents will still have two years in which to sue the owners and operators of vessels A and B and the claimant will have three years to sue the owners and operators of vessels A and B, unless it is a collision in which case the claimant will have two years to sue the owners of vessel B. This inconsistency in the scheme of limitation periods is unfortunate and will likely lead to litigation to determine the applicability of limitation periods.

Future Issues

Some of the future issues which remain to be determined in the law of recreational watercraft, and we will likely see on the horizon over the next few years will likely include:

1. The legal effect of a vessel operator's failure to have a pleasure craft operator's card in terms of whether that, by itself establishes negligence or liability. Will the simple failure to have a card and be in breach of the *Competency of Operators of Pleasure Craft Regulations* be a sufficient basis for liability or will something further, such as a breach of a collision avoidance rule still be required?

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[75] The new limitation period under the *Marine Liability Act*, once amended, will read: Except as otherwise provided in this *Act* or in any other Act of Parliament, no proceedings under Canadian Maritime Law in relation to any matter coming within the class of navigation and shipping may be commenced later than three years after the day on which the cause of action arises.

[76] There is legal authority to suggest that a "collision" does not require actual contact. That topic is beyond the present scope of this paper.

2. The extension of liability to owners of pleasure craft for permitting the vessels to be operated by persons without pleasure craft operator cards or based on other theories of vicarious liability such as failure to properly instruct, failure to properly supervise and negligent entrustment.

3. Challenges to whether an activity involving recreational watercraft, other than instances arising in the course of navigation, are sufficiently connected to maritime navigation so as to come within the ambit of Canadian maritime law and the limitation of liability provisions.

4. Challenges on whether vessels are operated for commercial or public purpose of whether the vessels were operated for some ancillary or incidental purpose so as to make the Athens Convention applicable or not.

5. Application to Determine the Applicability of a Particular Limitation Period (whether two or three years) to a particular type of claim.

6. Challenges to whether Ontario's provincial *Highway Traffic Act* and its automatic suspension of motor vehicle driver's licenses will be constitutionally valid.

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Following his graduate studies, Marc returned to Toronto to begin an active practice in maritime law. Marc was a partner at Strathy & Isaacs which became Isaacs & Company in late 2007 upon the appointment of Mr. Justice George Strathy to the Ontario Superior Court of Justice. Marc represents all facets of the maritime industry which includes ship owners and their insurers, cargo owners and their insurers, participants in the ship supply industry as well as recreational marine insurers.

Marc serves as an adjunct professor of maritime law at the University of Toronto Law School. Marc is a director of the Canadian Maritime Law Association, the Marine Club and is a member of the National Executive of the Canadian Bar Association Maritime Law Section. In 2009 Marc was named a leading lawyer in maritime law by Law Day and listed as of the "Best Lawyers in Canada" in the field of maritime law.