

## Select Developments in the Law of Marine Insurance and Maritime Law

Jan 2014 – Nov 2015

Prepared By:  
Christopher J. Giaschi\*

Presented at the 2015 Fall Conference of the  
Canadian Board of Marine Underwriters  
Held at Toronto, Ontario  
on 1 December 2015

### Table of Contents

Marine Insurance .....	2
Personal Injury .....	7
Limitation Periods.....	10
Carriage of Goods .....	15
Tug and Tow .....	18
Ship Building and Repair.....	18
Table of Cases.....	25
Appendix A – Limitation Periods .....	26
Appendix B – Limitation of Liability .....	27

NOTE: This paper contains summaries of select cases decided between January 2014 and November 2015 that the author considers may be of interest to the members of the Canadian Board of Marine Underwriters. The summaries contained in this paper are from Admiraltylaw.com. Readers are advised to consult Admiraltylaw.com for other cases and for updates and recent developments.

\*Christopher Giaschi is a partner of Giaschi & Margolis, a Past-President of the Canadian Maritime Law Association, a Titular member of the Comite Maritime International and the founder of, and main contributor to, Admiraltylaw.com.

## Marine Insurance

### Insurance - Duty to Defend and Indemnify - Driving while impaired

*Haryett v. Lloyd's Canada, 2015 ONSC 853*

The insured crashed his motor boat into a dock killing himself and injuring a passenger. At the time, the insured had a blood/alcohol level of more than three times the legal limit. The injured passenger sued the insured's estate and the estate sought defence and indemnity coverage from the insurer. The insurer refused on the grounds that the policy contained no "duty to defend" clause and that there was no coverage for illegal operation of the vessel. The estate then brought this application for a declaration the insurer had a duty to both defend and indemnify.

**Decision:** Application dismissed.

**Held:** The policy in issue does not contain a duty to defend clause and, in the absence of such a clause, there is no duty on the part of an insurer to defend. A duty to defend cannot be implied from a duty to indemnify. The clause in the policy relied upon by the estate provides that the insurer "will settle or defend, as we consider appropriate, any claim or suit asking for these damages". This wording does not oblige the insurer to defend every action but merely gives the insurer the discretion to defend where it determines, acting reasonably, that it is appropriate to do so.

With respect to the duty to indemnify, the policy provides the insurer is not liable if the vessel is operated illegally. It is an offence under the Criminal Code to operate a vessel with a blood/alcohol level of more than 0.08. The insured's blood/alcohol level was well above that limit and no insured would reasonably believe that there would be insurance coverage in the circumstances. There is probably no better example of illegal operation of a vessel.

### Fire Damage to Vessel While Being Repaired - Applicable Law - Direct Action Against Insurer - Liability of Repairer

*Langlois v. Great American Insurance Company, 2015 QCCS 791*

The plaintiff's fishing boat was damaged by fire while it was being repaired/welded at a ship yard. The plaintiff's boat was insured by the defendant, GAIC, who was also the liability insurer of the shipyard. GAIC assigned an adjuster who obtained several quotes to repair the damage caused by the fire but no agreement was reached between the plaintiff and GAIC as to the extent of the damage and necessary repairs. The plaintiff later hired his own surveyor whose estimate of damage and repairs was approximately twice that of GAIC's adjuster. GAIC then retained another surveyor for yet another estimate and submitted a cheque to the plaintiff in the amount of \$781,000 "as full and final payment". The plaintiff commenced this action against both GAIC and the shipyard.

**Decision:** Judgment for the plaintiff.

**Held:** The first issue is whether the applicable law is Canadian maritime law or the Quebec Civil

Code. As was held in *Triglav v. Terrasses Jewellers Inc*, [1983] 1 SCR 283, Canadian maritime law applies to contracts of marine insurance and, therefore, the Civil Code is not applicable to that part of the claim against GAIC. However, as to the claim against the ship yard and GAIC as its insurer, the applicable law is the Civil Code because the repairs were being done on dry land and there were no navigation or maritime operations involved. The plaintiffs therefore have a direct cause of action against GAIC as the liability insurer of the shipyard pursuant to articles 2501 & 2628 of the Civil Code. With respect to the amount the plaintiff is entitled from GAIC under his own insurance policy, the plaintiff is entitled to an additional \$69,000. With respect to the liability claim, there is a strong presumption that the shipyard is liable given the fire started while welding was being done and this presumption has not been rebutted.

**Comment:** (1) This decision is reported in French only and the summary is based upon a translation that may be imperfect. (2) The holding that the liability claim against the ship yard is not subject to Canadian maritime law is doubtful. Since *Wire Rope Industries v B.C. Marine Shipbuilders*, [1981] 1 S.C.R. 363, there has been no doubt that contracts and torts involving ship repair are subject to Canadian maritime law. However, this would not necessarily mean that articles 2501 and 2628 of the Civil Code would not apply. They may well apply incidentally pursuant to the double aspect doctrine.

### **Direct Action Against Motor Carrier Insurer - Misrepresentation - Policy Void**

*C.H. Robinson Worldwide v. Northbridge Insurance, 2015 ONSC 232*

The applicant, a freight forwarder, retained the services of a motor carrier, KLM, to transport a shipment of food products. The contract between the applicant and KLM provided that KLM would be liable for the value of any shipments tendered to it and also required KLM to maintain insurance coverage. KLM applied for and obtained coverage from the respondent. The insurance application contained a question as to whether there were any contracts with shippers that stipulated higher limits of liability than were contained in the KLM's standard bill of lading. KLM answered this question in the negative. During the course of transit, the truck was involved in an accident and the food products were destroyed. The applicant commenced proceedings against KLM and provided the respondent insurer with notice of the claim. Default judgment was subsequently obtained against KLM. The applicant then brought this proceeding against the respondent pursuant to s. 132(1) of the *Insurance Act* of Ontario, which provides for direct action against insurers. The respondent defended arguing that the policy was void for misrepresentation and contained a clause limiting recovery.

**Decision:** Application dismissed. The policy is void for misrepresentation.

**Held:** An applicant for an insurance policy has an obligation to fully and accurately disclose all matters within its knowledge relevant to the nature and extent of the risk to be insured. For the respondent to succeed it must prove the insured concealed or misrepresented a fact or circumstance concerning the insurance and that the fact or circumstance was material. Here the insured, KLM, did not disclose the contract term with the applicant. Under Ontario law any contract of carriage by motor carrier is deemed to include the Uniform Conditions of Carriage which limit the liability of the carrier to \$4.41 per kilogram. The contract with the appellant expanded the liability of KLM beyond that limitation. This was a material fact that plainly bears

on the issue of insurability and should have been disclosed. Further, the non-disclosure was material as the affidavit evidence establishes that there would have been an effect on the premium charged if the contract terms had been disclosed. Although the evidence did not establish the exact amount of the increase, this is not relevant. It is sufficient that there would have been an increase. Consequently, the policy is void and there can be no recovery under s. 132(1) of the *Insurance Act*. The second issue need not be considered.

### **Action Against insurance broker - Applicability of Canadian Maritime Law - Jurisdiction of Federal Court**

*Coastal Float Camps Ltd. v. Jardine Lloyd Thompson Canada Inc., 2014 FC 906*

The plaintiff's vessel capsized and sank on 5 November 2009. The plaintiff's insurer denied coverage on the grounds of material non-disclosure and misrepresentation. The plaintiff commenced this action against the insurer for a declaration that the loss was covered. The plaintiff later amended the statement of claim to include a claim against its marine broker for negligence and breach of contract. The broker then brought this application to strike the allegations against it on the grounds that the Federal Court had no jurisdiction in respect of those claims.

**Decision:** Application dismissed.

**Held:** The applicable test on a motion to strike is whether it is plain and obvious the claim discloses no reasonable cause of action. The fact that a claim is novel or difficult is not sufficient. "The burden on the defendant is very high and the Court should exercise its discretion to strike only in the clearest of cases." The broker relies upon the decision in *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co*, [1978] 2 FC 691 where it was held the Federal Court did not have jurisdiction over a marine insurance broker in agency and misrepresentation. However, the plaintiff cites a number of authorities that show the law concerning the jurisdiction of the Federal Court has evolved considerably since *Intermunicipal Realty* was decided and that it may no longer be good law. In the circumstances, it is not plain and obvious the plaintiff's claim cannot succeed.

### **Marine Insurance - Ship Repairer's Legal Liability - Application of Provincial Laws - "Faulty Design" Exception - Notice of Loss Requirement**

*Verreault Navigation Inc. v. The Continental Casualty Company, 2014 QCCS 2879*

The plaintiff ship repairer sued its primary liability underwriter (Continental) and its excess liability underwriter (Lombard Insurance Company of Canada) to recover costs incurred to correct certain deficiencies in the heating, ventilating and air conditioning (HVAC) system of a passenger ferry it had repaired for the Government of Canada. The actual defective work had been done by a subcontractor of the plaintiff. The underwriters denied liability on two grounds: first, that the policies contained a "faulty design" exception which applied in the circumstances; and, second, that both policies excluded losses not discovered and reported within one year of delivery of the vessel to the customer.

**Decision:** Action dismissed.

**Held:** The claim is subject to uniform Canadian maritime law and not Quebec civil law. The "faulty design" exception of the two policies applies since the HVAC equipment installed on the ferry was inadequate and defective. At the time of its installation, the equipment did not comply with applicable state-of-the-art standards for such systems on passenger vessels operating in Canada. In addition, the notice of loss was given more than 12 months after the redelivery of the ferry to the Government, contrary to the requirements of both policies. This was a violation of the assured's obligation of utmost good faith under s. 20 of the *Marine Insurance Act*.

### **Limitation of Liability - Marine Insurance - Wilful Misconduct**

#### *Peracomo Inc. v. Telus Communications Co., 2014 SCC 29*

The respondent was the owner of two submarine cables on the bottom of the St. Lawrence River. The appellants were the corporate owner and operator of a fishing vessel. The operator snagged one of the submarine cables belonging to the respondent while fishing. The operator cut the cable with a saw believing that it was not in use. A few days later he snagged the cable a second time and did the same thing. The respondent commenced these proceedings alleging negligence and damages of approximately \$1 million to repair the cable. The appellants denied liability saying insufficient notice had been given of the location of the cables and that, in any event, the cables should have been buried. The appellants further disputed the damages and claimed the right to limit liability. A further issue was whether the appellants' insurance coverage was jeopardized by reason of "wilful misconduct" on the part of the appellants.

At trial (reported at 2011 FC 494), the trial Judge found that the cables were included in notices to mariners and were shown on navigation charts and that it was the duty of the appellants to be aware of them. The trial Judge further found that it was not practical to bury the cables and held that the sole cause of the loss was the intentional and deliberate act of the appellant operator. With respect to damages, the trial Judge held that the respondent was entitled to damages in the nature of superintendence and overhead and allowed 10% for this. The trial Judge then turned to limitation of liability and noted that to avoid limitation the respondent had to prove a personal act or omission of the appellants committed either "with intent to cause such loss" or "recklessly and with knowledge that such loss would probably result". The trial Judge held, for the first time in Canada, that this test had been met and the appellants were not entitled to limit liability. The trial Judge said that the operator had intentionally cut the cable and that the loss was the diminution in value of the cable, not the cost of repair. The trial Judge said the operator intended the very damage that occurred but just did not think the cable would be repaired. The trial Judge further held that the operator was "reckless in the extreme" and that the loss was a certainty. Turning to the insurance issue, the trial Judge referred to authorities that established wilful misconduct "implies either a deliberate act intended to cause the harm, or such blind and uncaring conduct that one could say that the person was heedless of the consequences". The trial Judge had little difficulty in concluding this test had been met and the insurance coverage void.

On appeal (reported at 2012 FCA 199), the Federal Court of Appeal agreed with the trial Judge on the issue of liability finding, among other things, that the appellants ought to have used up-

to-date charts which disclosed the existence of the cable. A liability issue raised on appeal that does not appear to have been raised at trial was whether the operator could be jointly and severally liable with the corporate appellant. The operator argued that he should not be liable as his acts were those of the corporation. However, the Court of Appeal said that employees, officers and directors are personally liable for their tortious conduct causing property damage even when their actions are pursuant to their duties to the corporation. Concerning the limitation issue, the Court of Appeal also agreed with the trial Judge that the appellants intended to physically damage the cable and that it did not matter whether they were aware of the actual loss that would result. Finally, on the insurance issue, the Court of Appeal was not persuaded the trial Judge had made an error in concluding that the conduct of the appellants was "a marked departure from the norm and thus misconduct". Further, the Court of Appeal agreed that this misconduct was the proximate cause of the loss. The appellants appealed to the Supreme Court of Canada. There were three issues on the appeal:

1. Is the operator personally liable?
2. Are the appellants entitled to limit their liability?
3. Was the loss caused by wilful misconduct such that it is excluded from coverage under the insurance policy?

**Decision:** Appeal allowed, in part. The appellants were entitled to limit liability but the loss is excluded from the insurance coverage.

**Held:**

- (1) The Federal Court of Appeal correctly held that the operator was personally liable even though he was carrying out his corporate duties.
- (2) The Federal Court of Appeal took too narrow a view of the intent requirement under art. 4 of the *Convention on Limitation of Liability for Maritime Claims*. The Federal Court of Appeal held that if the operator knew he was cutting a cable that the intent requirement is satisfied. This undermines the *Convention's* purpose to establish a virtually unbreakable limit on liability and does not accord with its text. The conduct barring limitation is expressed in restrictive language. The person is entitled to limit liability unless it is proved that "the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". There is some dispute in the authorities as to how specifically the loss must have been intended. Some authorities say the "very loss" intended must have resulted. Other authorities say it is sufficient if the resulting loss was the "type of loss" intended. We do not have to take a firm position on this issue as, on either view, the appellants are entitled to limit their liability. The trial Judge found as a fact that the operator thought the cable was useless. The operator did not think his actions would damage someone's property or necessitate the repair of the cable. Therefore, there was neither "the intent to cause such loss" or "knowledge that such loss would probably result".
- (3) The policy of insurance covered the appellants in respect of their liability for damage to any

fixed or movable object arising from an accident or occurrence. The policy was subject to s.53(2) of the *Marine Insurance Act* which excludes coverage for any loss attributable to the “wilful misconduct” of the assured. The standard of fault under s. 53(2) is not the same as the standard under the *Convention*. Both the purposes and the texts are different. The essence of wilful misconduct includes not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. The findings of fact by the trial judge make it clear that the operator’s conduct constituted wilful misconduct. He had a duty to be aware of the cable and “he failed miserably in that regard”. His conduct exhibited a “lack of elementary prudence”. His actions were “far outside” the range of conduct expected of a person in his position. He was aware he was cutting a submarine cable and had knowledge of the risk that he could be cutting a live cable. His conduct is consistent with indifference to the risk in the face of his duty to know. The fact he believed the cable was not in use is beside the point. “To hold otherwise is to conflate recklessness with intention.” Wilful misconduct does not require either intention to cause the loss or subjective knowledge that the loss will probably occur. “It requires simply misconduct with reckless indifference to the known risk despite a duty to know.”

## Personal Injury

### Personal Injury – Mary Carter Agreement – Effect on Joint Liability

*Cormack v. Chalmers, 2015 ONSC 5564*

The plaintiff was badly injured when she was struck by a motor vessel while swimming. The plaintiff commenced proceedings in the Ontario Superior Court against the first defendant, the owner/operator of the vessel that struck her and also against the second defendant, the owner of the residence where she was staying at the time as a guest. The plaintiff alleged the second defendant had failed to warn her of the dangers of swimming off his dock. The plaintiff also alleged that the defendants were jointly liable for her injuries pursuant to the provisions of the *Negligence Act* of Ontario. Subsequently, the first defendant commenced limitation proceedings in the Federal Court pursuant to the provisions of the *Marine Liability Act*. The plaintiff and second defendant were parties to the limitation proceeding and consented to a judgement declaring that the first defendant’s liability was limited to \$1 million. The plaintiff and first defendant also entered into a settlement agreement to the effect that the first defendant’s liability to the plaintiff was limited to \$1 million and that the plaintiff would indemnify and hold the first defendant harmless in the event he was called upon to pay more than this amount. The second defendant was not a party to the settlement agreement and later brought this application to strike those parts of the Statement of Claim pleading that the liability of the defendants was “joint”.

**Decision:** Motion Dismissed.

**Held:** The second defendant argues that the hold harmless provision in the settlement agreement has the legal effect of nullifying the joint liability of the defendants under the *Negligence Act* and renders him severally liable only. This is not the effect of the agreement as the liability of the first defendant is capped at \$1 million with or without the settlement

agreement. Whether a settlement agreement has the effect of changing a defendant's liability to one of several from joint and several depends on the language of the agreement in question. This case is analogous to a situation where one of several defendants enjoys legal immunity or limitation of liability and, in such circumstances, the remaining defendants are not protected from joint liability.

**Personal Injury - Gangway Accident - Liability of Terminal – Damages - Wage Loss - Employability of Plaintiff - Failure to Mitigate - Refusing Treatment**

*Ranjbar v. Islamic Republic of Iran Shipping Lines, 2014 BCSC 1983*

The plaintiff, a ship's cook, fell from a gangway while boarding a vessel at a terminal in the Port of Prince Rupert and fractured his right femur. The gangway was owned and operated by the terminal. It was an unmanned automatic lifting gangway that moved up and down and side to side as the position of the ship shifted. A horn would sound before movement of the gangway was initiated and posted signage warned that the gangway should be cleared immediately when the horn sounded. The plaintiff was thrown from the gangway onto the deck of the ship when it raised automatically. The plaintiff had heard the horn sound but did not understand its purpose. He had not seen the posted signs and would not have understood them in any event as he had a very limited knowledge of the English language. The plaintiff commenced these proceedings against the owner of the vessel and against the terminal. The defendants each alleged that the other was responsible and that the plaintiff was contributorily negligent. Damages were agreed except for past and future wage loss and it was alleged the plaintiff failed to mitigate.

**Decision:** The terminal is 100% liable for non-pecuniary damages which are reduced by 15% for failure to mitigate.

**Held:** The terminal owed a duty to persons using the gangway to take reasonable care that the gangway was safe from an unusual danger of which the terminal was aware. An unusual danger is one that is not usually found in the place concerned and depends on the class of persons involved. A danger that is usual for one class of persons may be unusual for another class. Prior safe use is a factor to be taken into account in assessing whether something constitutes an unusual danger and whether reasonable care was taken but is not determinative. Where an occupier knows of an unusual danger it must warn users of the danger but a warning is only adequate if it provides sufficient detail about the danger such that the users understand the full danger and how to act to avoid it. Here the gangway posed an unusual danger even though it had been used for 24 years without a mishap. Adequate steps were not taken by the terminal to notify users of the danger. The signs were inadequate and confusing especially for persons who could not read and understand English, a foreseeable issue at a terminal. The terminal could easily have taken other measures to warn users. The failure to adequately warn the plaintiff of the danger was the cause of the plaintiff's fall and injuries and the terminal is liable.

The ship owner also owed a duty to the plaintiff and other crew members to take reasonable care for their safety. If the ship owner knows of a dangerous condition it should ensure the condition is addressed and made safe. In this case, the ship owner was not aware of the danger posed by the automatic gangway and is therefore not liable.

The plaintiff was not contributorily negligent. He was not aware of the risk and could not have been reasonably aware of the danger posed by the gangway. In the circumstances, he took reasonable precautions for his own safety.

The plaintiff is entitled to non-pecuniary damages in the agreed amount of \$95,000. The plaintiff also claimed \$100,000 for past wage loss during the four years between the accident and trial and \$300,000 for loss of future earning capacity. However, the plaintiff elected to remain in Canada following the accident but he lacked motivation to learn English and was not competitively employable, regardless of the injury. It is extremely unlikely the plaintiff could obtain employment in Canada even if the injury had not occurred. In these circumstances, no award is made for past wage loss or loss of future earning capacity.

A plaintiff has an obligation to take all reasonable measures to reduce his damages, including undergoing surgery to alleviate or cure injuries. The defendant has the burden of showing the plaintiff has failed to mitigate his damages, including to prove that the plaintiff acted unreasonably in avoiding the recommended treatment and the extent to which the plaintiff's damages would have been reduced if he had acted reasonably. Here, the plaintiff has unreasonably refused recommended surgery and physiotherapy which would have reduced his pain and discomfort and increased mobility and function. Accordingly, damages are reduced by 15% for failure to mitigate.

### **Pleasure Craft Collision - Apportionment of Liability - Liability of Owner - Failure to Keep Lookout - Alcohol**

*Atkinson (Guardian ad litem of) v. Gypsea Rose (Ship), 2014 BCSC 1017*

On 30 June 2008 a vessel owned by Maridee Skidmore and driven by her son Cory Skidmore (the "Skidmore Vessel") collided with a vessel owned and operated by Norman Atkinson (the "Atkinson Vessel") causing personal injury and property damage. At the time of the collision, the Atkinson Vessel was stationary in the water with its engine off and had been stationary for about 30 minutes. The operator of the Atkinson Vessel was at the back of the boat attempting to untangle a tow line from the propeller. A passenger in the Atkinson Vessel noticed the Skidmore Vessel approaching at a distance of about 300 feet with its hull straight out of the water. She alerted the others in her vessel and jumped on the seat to wave her arms and scream at the approaching vessel. The operator of the Skidmore Vessel did not see the Atkinson Vessel because he could not see over the bow and did not hear the screams until it was too late. The Skidmore Vessel hit the starboard bow of the Atkinson Vessel at a speed of 15 mph. The operator of the Skidmore Vessel was impaired at the time and the Skidmore Vessel had the wrong propeller with the result that at a speed of 15 mph it would not plane and the operator could not see over the bow.

Three actions were commenced against the owner of the Skidmore Vessel, the operator of the Skidmore Vessel and the owner/operator of the Atkinson Vessel. The operator of the Skidmore Vessel admitted his liability. The issues were whether the Owner of the Skidmore Vessel and the owner/operator of the Atkinson Vessel were also liable and how liability ought to be apportioned.

**Decision:** The Owner of the Skidmore Vessel is not liable. The owner/operator of the Atkinson Vessel is liable. Liability is apportioned 80% to the operator of the Skidmore Vessel and 20% to the owner/operator of the Atkinson Vessel.

**Held:** With respect to the liability of the owner of the Skidmore Vessel, it was held by the Nova Scotia Court of Appeal in *Conrad v Snair*, 1995 CanLII 4175, that a boat owner's responsibilities could be divided into three principal categories: (1) the ship must be seaworthy for the intended voyage, in good repair and properly equipped and safe for those on board; (2) the ship must be provided with proper navigational aids including charts, rules and information; and, (3) the ship must be properly and competently staffed. In addition, for the owner to be at fault there must be consent, express or implied, for the operator to have the vessel at the time of the accident. The owner of the Skidmore Vessel had a strict rule that no one was to drive or be on board the vessel if they had been drinking alcohol. The operator was aware of this rule and had been refused permission to use the boat on two prior occasions when he had been drinking. On this occasion, the operator did not ask for permission to use the boat as he knew it would be refused. On the facts, the owner did not provide consent and no consent can be implied. Further, although the Skidmore Vessel was unseaworthy to the knowledge of the owner because it had the wrong propeller, the lack of consent vitiates the breach of that duty.

With respect to the liability of the owner/operator of the Atkinson Vessel, he was not keeping a proper lookout and did not instruct the other adults to keep a look out.

The apportionment of liability under the Marine Liability Act is to be handled in the same way as under the Negligence Act. The Court is to assess the degree to which each party is at fault not the degree to which each party's fault has caused the loss. In other words, the Court is to assess the respective blameworthiness of the parties. The actions of the operator of the Skidmore Vessel are far more blameworthy than those of the owner/operator of the Atkinson Vessel. He drunkenly set out in an unseaworthy vessel with reckless indifference and disregard for the safety of others. In contrast, the negligence of the owner/operator of the Atkinson Vessel was a minor lapse of care. Therefore, liability is apportioned 80% to the operator of the Skidmore Vessel and 20% to the owner/operator of the Atkinson Vessel.

**Comment:** The finding that the operator of the Atkinson vessel was 20% at fault for not keeping a proper lookout might be questioned. As is apparent from the facts, the Skidmore vessel was observed prior to the collision and efforts to alert the driver of that vessel were not successful. Under these circumstances, it is difficult to say there was not a proper lookout and, even if that was true, the lack of a proper lookout was not causative. Also, in the circumstances, one might question whether the owner of the Skidmore vessel should have been held liable as she was aware it had the wrong propeller and would not plane properly. Her lack of consent had nothing to do with the unseaworthiness of the vessel.

## Limitation Periods

**Athens Convention - Limitation Period - Provincial Limitation Laws not Applicable - Change in legislation not given retrospective effect - No Discretion to Extend Limitation Period - Choice of Provincial Law in Contract**

*Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited, 2014 NSSC 217*

In August 2008 a twelve year old boy fell out of a zodiac owned and operated by the defendant while participating in a rafting excursion on the Shubenacadie River. Although the boy suffered immediate personal injuries which required treatment, this action in the Nova Scotia Supreme Court was not commenced by his litigation guardian until 23 May 2013. The defendant brought this motion to strike the statement of claim on the basis that the limitation period had expired. The plaintiff argued: (1) that the Nova Scotia *Limitation of Actions Act* applied; (2) that the amendments made to the *Marine Liability Act* in 2009 exempting adventure tourism activities from the *Athens Convention* ought to be given retrospective effect; (3) that any limitation period ought to be postponed as the plaintiff was an infant at the time of the accident: and (4) that the "Waiver" signed by the plaintiff, which provided for Nova Scotia law, had the effect of making the claim subject to the law of Nova Scotia and not Canadian maritime law.

**Decision:** Order granted. The action is dismissed.

**Held:**

- (1) Any question of the limitation period applicable to this claim is settled as being the two year limitation period in Article 16 of the *Athens Convention* attached as Schedule 2 to the *Marine Liability Act*, S.C. 2011, c.6. The decision of the Supreme Court of Canada in *Marine Services International v Ryan Estate*, 2013 SCC 44, which reframed the constitutional test for determining when provincial laws can apply to maritime matters does not undermine the rationale for the earlier decisions applying the *Athens Convention* to these types of claims. "The important objective of uniformity in Canadian maritime law and in the international community of maritime states should not be undermined by the application of individual, and different, provincial statutory regimes."
- (2) The fact that the *Marine Liability Act* was amended in 2009 to exempt adventure tourism activities from the application of the *Athens Convention* is not relevant. Limitation periods are substantive, not procedural, and the 2009 change in the *Marine Liability Act* is not to be given retrospective effect. The substantive law governing this claim at the time of the injury, including the limitation period, is the *Marine Liability Act* as it existed at the time.
- (3) Section 4 of the Nova Scotia *Limitation of Actions Act*, which provides for the suspension of limitation periods for claims by infants, has no application as it is not part of federal maritime law. The *Athens Convention* and the *Marine Liability Act* contain no provisions postponing limitation periods for infants and without such a provision there is no basis for the Court to do so. Further there is no general discretion to suspend or postpone the limitation period. Under the *Athens Convention* the two year limitation period commences to run from a fixed event, the disembarkation of the passenger, and the discoverability principle has no operation. The only provision in the *Athens Convention* permitting suspension or interruption of the limitation period is Art.16 s.3, which allows for a maximum extension of up to 3 years from the date of disembarkation.
- (4) With respect to the "Waiver", it merely says that the laws of Nova Scotia shall apply. Nova Scotia law includes federal law. The "Waiver" incorporates rather than excludes Canadian

maritime law.

**Comment:** It is arguable that this case is correctly decided but for the wrong reasons. Specifically, the holding that limitation provisions are always substantive and will never be given retrospective effect is questionable. As discussed in *St. Jean v Cheung*, 2008 ONCA 815, a decision by the Ontario Court of Appeal, limitation provisions may be classified as procedural or substantive and may have retrospective application depending on their effect. The changes to the *Marine Liability Act* in 2009 had the effect of exempting adventure tourism activities from the two year limitation period contained in *Athens Convention* and substituted the three year period contained in s.140. For this action, at the time the changes to the *Marine Liability Act* came into force on 21 September 2009, the two year period under the *Athens Convention* had not expired and the effect of s. 140 was to extend the time within which the plaintiff could bring its action to August 2011. In such circumstances, under the approach discussed in *St. Jean v Cheung*, the amendments arguably should have been given retrospective effect and the limitation period would have expired in or about August 2011.

### **Passengers - Athens Convention - Limitation Period - Suspension/Interruption**

*Gaudet v. Navigation Madelaine Inc., 2014 QCCS 4106*

The plaintiff was a passenger on board the defendant's vessel and was injured when a door closed on his index finger. The accident occurred on 12 March 2011. The plaintiff subsequently commenced proceedings in the Quebec Superior Court against the defendant on 4 December 2013, more than two years after the accident. The defendant brought this application to dismiss the claim on the grounds that the limitation/prescription period had expired.

**Decision:** Application allowed and claim dismissed.

**Held:** The plaintiff's claim is governed by Canadian maritime law. Article 16 of the *Athens Convention* stipulates a two year limitation/prescription period from the date of disembarkation for claims for the death or injury of a passenger. The plaintiff argues that the three year limitation period in s. 140 of the *Marine Liability Act* applies or, alternatively, that the provincial limitation period applies pursuant to s. 39 of the *Federal Courts Act*. However, these provisions only apply if there is no specific prescribed limitation period. Here there is a prescribed period namely, the two year period in the *Athens Convention*. The plaintiff further argues that the limitation period should be extended or interrupted because he was not able to fully quantify his claim until he received his expert assessment on 14 November 2013. Article 16(3) of the *Athens Convention* provides that issues of suspension or interruption of the limitation period are to be governed by the law of the court seized of the case and Art. 2904 of the *Civil Code* provides for suspension/interruption of limitation periods in limited circumstances. However, ignorance of the exact extent of the damage is not a grounds for suspending a limitation period.

**Comment:** The holding in this case that Art. 2904 of the Quebec *Civil Code* could apply to extend the limitation period is questionable. Cases to the contrary include: *MacKay v. Russell*, 2007 NBCA 55; *Frugoli v. Services aeriens des Cantons de l'Est inc.*, 2009 QCCA 1246; and *Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited*, 2014 NSSC 217.

## **Pleasure craft Accident - Personal Injury - Limitation Period - Date from which s.140 MLA Limitation Period Runs**

*G.B. v L. Bo., 2014 QCCS 18*

The plaintiff was injured on 4 July 2008 while surf skiing behind his own boat which was being driven by the first defendant. At the time, the plaintiff and first defendant were living together. On 13 June 2012, almost four years after the accident, and one year after the couple separated, the plaintiff commenced these proceedings against the first defendant and against the plaintiff's own insurance broker, the second defendant. The defendants brought these motions to dismiss the proceedings on the grounds, *inter alia*, that the limitation period had expired.

**Decision:** Motions dismissed.

**Held:** The issue of the applicable law governing limitation periods in a case such as this is a difficult one. In *Frugoli v Services aeriens des Cantons de l'Est inc.*, 2009 QCCA 1246, the Quebec Court of Appeal affirmed that the two year limitation period in s. 14(1) of the *Marine Liability Act* applied to a claim by dependants of two passengers who were drowned when their boat capsized on a lake in Northern Quebec. On the basis of this case, it is concluded that Canadian maritime law governs the limitation period in the present case. However, as this is neither a claim by dependants nor an accident arising out of a collision between two vessels, ss. 14 and 23 of the *Marine Liability Act* have no application. The relevant section would be s. 140 which provides a period of three years "after the day on which the cause of action arises". But, s. 140 was not enacted until 23 June 2009 and became law on 21 September 2009. Therefore, there was no limitation period in effect during the period from the date of the accident, 4 July 2008 to 21 September 2009. The three year period under s. 140 did not begin to run until 21 September 2009 and did not expire until 21 September 2012. This action was therefore commenced within the limitation period.

**Comment:** The approach adopted by the Quebec Superior Court in this case is different from what is arguably the more traditional approach as discussed in *St. Jean v Cheung*, 2008 ONCA 815, a decision by the Ontario Court of Appeal. The more traditional analysis distinguishes between retroactive and retrospective statutes. If the new limitation provision extinguishes an existing claim, it is retroactive and will not apply. However, if the new provision merely abridges (or extends) the time left to bring a claim, it is retrospective and will apply. If this approach had been followed in this case, s. 140, which came into force on 21 September 2009, should have been given retrospective effect since it did not extinguish the claim on its coming into force but merely created a new three year limitation period expiring on 4 July 2011. As the plaintiff did not commence proceedings by 4 July 2011, the claim was out of time.

## **Personal Injury - Dependants' Claims - Applicable Limitation Period - Bereavement Claim under Alberta Statute**

*Toney v. Canada, 2014 ABQB 585*

This proceeding arises out of a boating accident on an Alberta lake in which a five year old child died. The accident occurred on 27 September 2008 and was witnessed by the plaintiffs, the parents and siblings of the deceased child. The plaintiffs alleged Canada (the Royal Canadian

Mounted Police) and Alberta (the Alberta Fish & Wildlife Department) were negligent in mounting and carrying out search and rescue operations. The plaintiffs' claim was originally filed in the Federal Court against both Canada and Alberta but was dismissed as against Alberta on 18 December 2013 on the grounds that the Federal Court was without jurisdiction (reported at 2013 FCA 217). The remaining claim in the Federal Court against Canada was stayed on 23 October 2013 at Canada's request pursuant to s. 50.1 of the *Federal Courts Act*. This permitted the plaintiff to commence these proceedings in the Alberta Court of Queen's Bench against Canada (otherwise such a claim had to be brought exclusively in the Federal Court) and also permitted Canada to file third party proceedings against Alberta. The plaintiff commenced these proceedings on 20 November 2013, more than five years after the accident. The defendants brought this application to strike the plaintiffs' claim on the grounds that the claim was statute barred. The defendants argued that the applicable limitation period was two years from the date of death pursuant to s. 14(2) of the *Marine Liability Act* which governs claims by dependants. The plaintiffs, on the other hand, argued that their claims were not dependants' relief claims but claims for their own personal suffering. The plaintiffs further argued that any limitation period should not commence before June 2011 when an inquiry was held and they learned the details of the accident and the defendants' involvement. The Plaintiffs also claimed for "grief" under the *Fatal Accidents Act* of Alberta.

**Decision:** All claims are struck with the exception of the claims for personal injuries as against Canada.

**Held:** A reading of the pleadings discloses the plaintiffs' claims include nervous shock, post-traumatic stress and depression. Such claims are compensable personal injuries under Canadian maritime law, are not derivative claims and are not restricted in any way by s. 6 of the *Marine Liability Act*. The limitation period applicable to such claims is either the two year period in the *Athens Convention*, if the plaintiffs were passengers, or the three year period set out in s. 140 of the *Marine Liability Act*. In respect of the personal injury claims against Canada, s. 50.1 of the *Federal Courts Act* deems the date of commencement of the claim to be the date the original claim was filed in the Federal Court. That date was 26 September 2011, a date within three years of the accident. Since it is not plain and obvious the plaintiffs were passengers subject to the two year limitation period in the *Athens Convention*, the plaintiffs' claims for personal injuries as against Canada should not be struck. However, in respect of the personal injury claims against Alberta, the deeming provision in s. 50.1 of the *Federal Courts Act* is not applicable. The date of commencement of the action against Alberta was more than five years after the accident, well past the three year limitation period in s. 140 of the *Marine Liability Act*. The plaintiffs' argument that they did not discover the details underlying the cause of the accident until the inquiry in June 2011 is not accepted and the discoverability principle has no application. The personal injury claims against Alberta are out of time.

With respect to the claim for "grief" under the *Fatal Accidents Act* of Alberta, it is questionable whether such a claim can be made on constitutional grounds but this need not be decided as the limitation period applicable would be the two year period in the provincial *Limitations Act*. That limitation period expired on 28 September 2010.

**Comment:** Although the court correctly identified that there was a constitutional issue with

respect to the “grief” claim advanced under the *Fatal Accidents Act* of Alberta, the determination that the provincial *Limitations Act* would apply to the “grief” claim is questionable. It has been repeatedly held that provincial limitation statutes do not apply to maritime matters.

## Carriage of Goods

### Carriage by Sea - Dead Freight – Practice – Summary Judgment

*Asia Ocean Services, Inc. (UPS Asia Group Pte Ltd) v. Belair Fabrication Ltd, 2015 FC 1141*

The plaintiff, a logistics company, entered into an agreement with the defendant to carry the defendant’s cargo from China to Vancouver. The agreement was contained in a booking note that contained an estimated shipping date of 23 May 2013 and a “dead freight” clause requiring the defendant to pay the full amount of the freight if the booking was cancelled. The plaintiff subsequently sub-contracted the carriage by entering into a booking note with another carrier. This contract also contained a dead freight clause. The cargo was not ready to be shipped on 23 May and the vessel sailed without the cargo. The parties attempted to come to agreement to ship the cargo on another vessel but were unsuccessful. The defendant ultimately shipped the cargo with another carrier. The plaintiff was required to pay dead freight to the carrier with whom it had sub-contracted and now claimed dead freight from the defendant. The defendant filed a counterclaim. The plaintiff brought this application for summary judgment.

**Decision:** The plaintiff’s motion for summary judgment is allowed. The defendant’s counterclaim is dismissed.

**Held:** The defendant argues that this matter is not suitable for summary judgment as the affidavit evidence is contradictory and disputed and a full trial is required to adequately address the issues. However, conflicting affidavits and disputed evidence do not necessarily render a matter inappropriate for summary judgment. The conflicting evidence can be tested against the documentary evidence and the cross-examinations. Other factors to consider include the amounts involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, and proportionality. Proportionality and the other factors support a disposition by way of summary trial.

The defendant seeks to avoid liability under the dead freight clause of the booking note by first arguing that the corporate entity that paid dead freight to the other carrier was not the plaintiff but a related company. There is no evidence of how or why the plaintiff accounted for the dead freight payment within its group of companies but this is not relevant. The issue is whether the defendant is required to pay dead freight to the plaintiff under the booking note as between them.

The defendant next argues it should not be required to pay dead freight because such a clause is a penalty clause or, alternatively, that the amount it should pay should be limited to the amount the plaintiff paid to the other carrier. The dead freight clause is, however, a reasonable

attempt to estimate the damages and is not a penalty clause. Such clauses are to be assessed at the time they were made and are enforceable whether or not the actual damages are less than the estimated amount. It is therefore not relevant that the plaintiff may have paid less in dead freight to the other carrier than is owed by the defendant.

Finally, the defendant argues that at the time the booking note was entered into the plaintiff agreed to communicate with the defendant's supplier and to ensure that the cargo would be at the port when required. The defendant says the plaintiff failed to do this and that it is therefore not liable to pay dead freight. But, the evidence does not support the defendant's arguments in this regard. The booking note contains no such term and the extensive correspondence does not support such a term.

### **Damage to Yacht while being re-positioned - Is the contract one of carriage? - Jurisdiction of Quebec Courts**

*St. Paul Fire & Marine Insurance Company v. Vallée, 2015 QCCQ 1891*

The plaintiff was the insurer of a yacht that was damaged while being re-positioned. The yacht owner contracted with the defendant to transport the yacht from Quebec City to the State of New York. The transportation involved the defendant taking possession of the vessel and sailing it to the destination. During the voyage the yacht was damaged. The plaintiff fully indemnified its insured and commenced these subrogation proceedings against the defendant. The defendant then brought this application to dismiss the action on the basis that: (1) the Quebec courts were without jurisdiction: and, (2) no notice of claim was provided within 60 days of delivery as required by art. 2050 of the *Quebec Civil Code*.

**Decision:** Application Dismissed.

**Held:** (1) The Quebec Court has jurisdiction in admiralty and s. 22 of the Federal Courts Act does not operate to restrict that jurisdiction. (2) The contract was not a contract of carriage but a service contract and art. 2050 does not apply. In any event, notice is not required where, as here, the carrier notifies the property owner of the damage.

**Comment:** Although the plaintiff in this action was the insurer of the vessel, in the common law provinces is not usual for an insurer to be named as the plaintiff in subrogation proceedings. In the common law provinces the insured is normally the named plaintiff.

### **Jurisdiction - FOB Contract of Sale - Liability of Vendor/Shipper to Indemnify Purchaser/Charterer for Demurrage and other Expenses**

*Arcelormittal Mines Canada Inc. v AK Steel Corporation, 2014 FCA 287*

The plaintiff was the purchaser of a cargo of iron ore pellets and the voyage charterer of the "Rt. Hon. Paul J. Martin", a self-unloading bulk carrier and the ship that was to carry the pellets. The defendant was the vendor of the pellets. The cargo was sold FOB ship's hold. The terms of sale specified the cargo was to have a maximum moisture content of 2.5% (to prevent freezing) and required the vendor to indemnify the purchaser for additional costs incurred in the event the pellets were frozen. The cargo of iron ore pellets was loaded in very cold weather, about

-18 degrees Celsius, at Port Cartier, Quebec. The “Rt. Hon. Paul J. Martin” then sailed to Toledo, Ohio where it was to discharge the cargo. Upon discharge it was discovered that the cargo was frozen and, as a consequence, the plaintiff was required to pay to the ship owner demurrage, additional loading costs and costs to repair damage to the ship during the unloading. The plaintiff brought this indemnity action against the defendant alleging that the moisture content of the cargo was in excess of that required by the contract of sale. The defendant argued that it was not in breach of its contract with the plaintiff, that the cause of the loss was the failure of the carrier to properly load, carry and discharge the cargo and that it had not been given timely notice of the alleged breach of contract.

At trial (2014 FC 118), the Judge addressed two issues; whether the Federal Court had jurisdiction; and whether the defendant was liable. On the first issue, the trial Judge held that the claim was really about the suitability or fitness of the cargo for transport, a matter of navigation and shipping, and therefore within the maritime jurisdiction of the Federal Court. On the second issue the trial Judge held that the cause of the freezing was the excessive moisture content of the pellets and was not due to any fault on the part of the carrier. The Judge further held the defendant was aware of the breach before the plaintiff and did not require notice. Accordingly, judgment was rendered for the plaintiff. The defendant appealed the substantive finding that it was liable (but apparently not the decision concerning the jurisdiction of the Federal Court).

**Decision:** Appeal dismissed.

**Held:** The appellant challenges the trial Judge’s findings on liability, reasonable notice, and spoliation. These are, however, questions of fact or mixed fact and law and the appellant must show the Judge committed a palpable and overriding error. The appellant has failed to meet this threshold. The Judge’s findings are supported by the evidence.

### **Road Carriage - Goods Stolen in Transit - Limitation - Invoice Attached to Bill of Lading - Whether Declaration of Value Sufficient**

*A & A Trading Ltd. v. DIL’S Trucking Inc., 2015 ONSC 1887*

The plaintiff hired the defendant to transport goods by truck from Toronto to Calgary. The goods were stolen while in transit and the plaintiff commenced this proceeding to recover the value of the goods. During discussions between the plaintiff and defendant, the plaintiff advised the defendant the goods had a value of between \$250,000 and \$263,000 and inquired whether the defendant had sufficient insurance. The defendant confirmed there was sufficient insurance. On the day of the shipment a bill of lading was filled out by the plaintiff to which was attached an invoice showing the value of the goods to be \$263,000. The plaintiff's bill of lading was given to the defendant but the defendant also filled out its own bill of lading which referenced the invoice number. The defendant's bill of lading was signed by both parties. Neither bill of lading contained a declaration of the value of the goods. The main issue in the case was whether the defendant could limit its liability to \$4.41 per kilogram as provided in the applicable Ontario regulations. The limitation amount would have been approximately \$100,000.

**Decision:** The defendant is liable for the full value of the goods stolen.

**Held:** The contract of carriage is not limited to the contents of the bill of lading. The contract of carriage includes the oral representation by the defendant as to insurance as well as the bill of lading prepared by the plaintiff and the invoice that was attached to it. A declaration of value need not be set out in the space provided in a bill of lading. The intent is to provide the carrier with notice of the value of the goods. Given that the defendant's bill of lading contained a reference to the invoice which contained the value of the goods, there was a sufficient declaration of value on the face of the bill of lading and the defendant cannot limit its liability.

## **Tug and Tow**

### **Tug and Tow - Clearing of Fouled Anchor by Tug - Liability - Marine Personnel Regulations - Value of Lost Tug**

*Snow Valley Marine Services Ltd. v. Seaspan Commodore (The), 2015 FC 304*

The plaintiff's assist tug was sunk and lost on 5 October 2011 when she was assisting the defendant's vessel with a fouled anchor. Specifically, a line was attached from the plaintiff's tug to the anchor of the defendant's vessel and when the anchor came free it fell rapidly and sunk the plaintiff's tug. The plaintiff commenced this proceeding against the defendants alleging they were solely responsible for the sinking. The defendants argued that the cause of the accident was the failure of the plaintiff's crew to take reasonable steps for their own safety including that they failed to utilize a release mechanism when they attached the line to the tug. The defendant further argued that the crew of the plaintiff's tug did not have the certificates required by the *Marine Personnel Regulations* passed under the *Canada Shipping Act, 2001*.

**Decision:** Judgment for the plaintiff.

**Held:** Neither of the crew of the plaintiff's tug held a Master's certificate as required by s. 212 of the *Marine Personnel Regulations* but they had years of experience and this cannot be ignored. They were responsible for the safety of their own tug and they were the ones that attached the line to the tug, however, that tow line connection was not the cause of the sinking. The cause of the sinking was the failure of a safety chain from the defendant's vessel to the anchor and anchor chain. The defendants alone were responsible for securing the safety line and their failure to properly secure it caused the sinking. With respect to damages, the proper measure of damages is the value of the lost tug to the plaintiff as a going concern at the time and place of loss. This is to be assessed by considering the market value of comparable tugs, the costs of refitting tugs to do her work and the compensation required to put the plaintiff in the same position it would have been in had the loss not occurred.

## **Ship Building and Repair**

### **Sale of Marine Crankshaft - Product Liability - Defects - Exclusion Clause - Application of Provincial Law**

*Transport Desgagnes Inc. v. Wartsila Canada Inc., QSC File 500-17-060283-101*

The plaintiff purchased a new bedplate and reconditioned crankshaft from the defendant for installation in one of its vessels. The defendant assembled and mounted the crankshaft to the bedplate in November 2006 and delivered both items to the plaintiff at Halifax in February 2007. On 27 October 2009, after 13,653 running hours, the new crankshaft suffered a catastrophic failure. The plaintiff commenced this proceeding for damages in excess of \$5.6 million. It was undisputed that the failure was caused by insufficient tightening of “the big end stud of the connecting rod of unit 5L”. The plaintiff alleged that the crankshaft was defective when delivered whereas the defendant alleged the plaintiff was responsible for the improper tightening during routine maintenance. The defendant also relied upon the terms of the sale contract between the parties which provided a six month limited warranty and a limitation of liability equivalent to approximately \$80,000. The plaintiff argued that the limitation of liability was invalid in the circumstances and pursuant to the Civil Code of Quebec.

**Decision:** The plaintiff is entitled to judgment.

**Held:** The issues in the case are: (1) whether the transaction is governed by Canadian maritime law or Quebec civil law; and, (2) based on such governing law, is the defendant liable or entitled to limit its liability.

- (1) With respect to the applicable law, this matter relates to a contract of sale and such contracts are not integrally connected to the pith and substance of Parliament’s jurisdiction over navigation and shipping. Although related to maritime activities, this matter is not integrally connected with same. Moreover, there is no practical necessity for a uniform federal law to prescribe the rules governing a seller’s obligations. The fact that such rules may vary by province does not hinder the efficient and coherent conduct of the activities of navigation and shipping. Therefore, as the contract of sale was formed in Quebec, it is the laws of Quebec that apply.
- (2) Pursuant to the Civil Code of Quebec: a seller of property is required to warrant that the property to be sold is free of latent defects (art. 1726); in the case of a sale of property by a “professional seller”, a defect is presumed to have existed at the time of sale if the property malfunctions or deteriorates prematurely (art. 1729); and, a seller may not exclude or limit liability unless the defects of which he was aware or could not have been unaware are disclosed (art. 1733). These provisions apply here. The defect is presumed to have existed at the time of sale and this presumption has not been rebutted on the balance of probabilities. The defendant, as a professional seller, is presumed to have known of the existence of a defect at the time of sale and is deemed to be acting in bad faith. This has the effect of rendering any exclusion or limitation clause invalid unless the seller rebuts the presumption of bad faith. Evidence of the seller’s good faith or ignorance of the defect or honest belief in the adequacy of the product sold is not enough. The seller must either demonstrate that the buyer or a third person caused the defect or that only scientific or technological discoveries made after the product was sold would have permitted discovery of the defect at the time of sale.

**Comment:** The constitutional analysis in this case is deficient but the result may be correct.

There would seem to be relatively little doubt that the sale of a piece of equipment installed on a ship, such as a crankshaft, is subject to federal Canadian maritime law, as has been held in a number of cases. However, the provinces also have *prima facie* jurisdiction over such a sale. The real constitutional issue is whether the doctrines of paramountcy or inter jurisdictional immunity apply to render the provincial law inoperative or ineffective.

### **Liability for Repair Costs in Excess of Quotation - Liability of Repairer for Damage During Launching**

*Ehler Marine & Industrial Service Co. v. M/V Pacific Yellowfin (Ship), 2015 FC 324*

The plaintiff ship repairer provided an estimate to re-fasten and re-caulk the defendant's wooden vessel pursuant to a request for proposals that asked for a "reasonably accurate estimate" for 15 seams below the waterline. The estimate included some items that were quoted on the basis of the actual time and materials to be expended and other items, including the re-caulking and re-fastening, that were not so qualified. The final costs for the re-caulking and re-fastening exceeded the estimate. Additionally, when the vessel arrived at the repair yard it was discovered that there were more than 15 seams below the waterline that required re-caulking and re-fastening. It was agreed that the additional seams would be repaired but the plaintiff thought the agreement was to proceed on a time and materials basis whereas the defendant thought there would be proration of the original contract price. Finally, during the launching of the vessel, the vessel was damaged. The plaintiff commenced proceedings to recover the actual amount of the re-caulking and re-fastening and the defendant counterclaimed for the damage caused to the vessel during launching.

**Decision:** Judgment for the plaintiff, in part. The counterclaim is dismissed.

**Held:** The plaintiff argues the estimate was only a "best guess" and that it was entitled to charge on the basis of actual time and materials expended on the repair. The defendant argues that the estimate was an agreed amount that would be charged. The proper test is not what the parties subjectively believed the terms of the contract to be but what a reasonable person would understand the contract to be. Such a person would conclude in the circumstances that the estimate was an agreed price. The fact that the estimate did not qualify the disputed items as being billed on a time and materials basis favours this interpretation as does the fact that the defendant asked for a "reasonably accurate estimate" and "hard numbers". In relation to the additional seams, a reasonable person would similarly conclude that the price for the additional work would be prorated based on the original contract. With respect to the counterclaim, the evidence of the damage is incomplete and contradictory and the counterclaim is therefore dismissed.

### **Damage to Ship during Lifting Operation - Bailment - Presumption of Liability - Exclusion Clauses**

*Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. v. Pêcheries Guy Laflamme Inc., 2015 CAF 78*

The fishing boat "Myrana I" was damaged when it was dropped into the water while being

lifted with a crane. The ship owner demanded damages in excess of \$550,000 from the crane operator and its employee operating the crane at the time. The crane operator and employee denied liability and further asserted that they were protected by an exclusion clause in the contract. The crane operator, its employee and their insurer commenced this action for a declaration that they had no liability. The defendant ship owner counter-claimed for damages to the ship. The exclusion clause in the contract provided "I accept liability for any risk resulting from the towage, docking, wintering and/or launching of this vessel, and I release the Owner of this dry dock and its Operator, \_\_\_\_\_, from any civil liability resulting from these associated operations or handling".

At first instance (2014 FC 456), the trial Judge held the plaintiffs had failed to rebut the presumption that they were liable as bailees. However, the Judge further held the exclusion clause was broad enough in scope to cover any negligence. The Judge relied on *Tercon Contractors v British Columbia*, 2010 SCC 4, where Justice Binnie said "There is nothing inherently unreasonable about exclusion clauses..." and added that there are many valid reasons for contracting parties to use exemption clauses, most notable to allocate risks. The trial Judge further held the clause was neither abusive nor draconian and that the defendant should have been aware of it as the contract was sent to the defendant on at least 36 prior occasions. The defendant appealed.

**Decision:** Appeal dismissed.

**Held:** The interpretation of a contract is a question of mixed fact and law and is reviewable only if the trial Judge made a palpable and overriding error. The same is true of the Judge's conclusion as to whether the exclusion clause was harsh or unconscionable. The defendant argues that the clause does not expressly exclude negligence and the trial Judge failed to read it *contra proferentem*. However, the clause in question releases the plaintiff from "any civil liability" and it is clear that the term "liability" is synonymous with negligence. There was no ambiguity in the clause so as to attract the *contra proferentem* doctrine. In addition, the Judge's finding that the defendant was bound by the exclusion clause is supported by the evidence as is his conclusion the clause was not abusive or draconian. "Risk allocation avoids litigation and heavy expenses they entail."

### **Vessel Damaged Falling from Cradle - Bailment - Exclusion Clause - Spoliation of Evidence - Survey Costs as Damages - Appeals - Interpretation of Contract is Mixed Fact and Law**

*Forsey v. Burin Peninsula Marine Service Centre*, 2015 FCA 216

The plaintiff's/respondent's fishing vessel was lifted out of the water and placed on a cradle at the premises of the defendant/appellant for the purpose of repairs and maintenance. The cradle failed 13 days later causing the vessel to fall, as a consequence of which it was damaged. The respondent claimed against the appellant for the damages to the vessel and for the costs of fuel containment and clean up. The appellant denied liability saying the cradle was constructed by the respondent and further relied upon a sign that provided "Boats stored at Owner's Risk" and an exclusion clause that provided:

“I understand and agree that the securing and locking of my boat is my responsibility, and not that of the said Marine Service Centre, or of its agents, servants, employees, or otherwise. Furthermore I agree to indemnify and save harmless the said Marine Service Centre and its officers, agents, employees, servants or otherwise from, any claims on my part with respect to the same.”

At first instance (2014 FC 974) the trial judge held that a bailment was created and that the cradle had been constructed by the defendant. As bailee, the burden was on the appellant to prove that it was not negligent in relation to the fitness of the materials used to construct the cradle and the manner in which it was constructed. She held that this onus had not been discharged. In doing so she noted that the materials used to construct the cradle were disposed of by the appellant within 48 hours of the incident. She held that this gave rise to a presumption that the materials were intentionally destroyed, which was not rebutted, and an adverse inference that the materials were unfit. With respect to the exclusion clause, the trial judge held that neither the sign nor the exclusion clause in the contract expressly or impliedly excluded liability for negligence. She also applied the rule of *contra proferentum* to the words “securing and locking” in the exclusion clause and held that they did not transfer responsibility for the safety of the vessel to the respondent. In result, the respondent was entitled to damages for the vessel (which was declared a constructive total loss), the containment and clean-up costs and the costs of a surveyor. The survey costs were recoverable notwithstanding they were not paid for by the respondent on the grounds that they were a natural and probable consequence of the tort. The appellant appealed.

**Decision:** Appeal dismissed.

**Held:** The two issues on appeal are whether the trial judge erred in drawing an adverse inference for destruction of evidence and whether she erred in her interpretation of the exclusion clause. The appellant argues there was no evidence supporting an inference the cradle materials were intentionally destroyed and that the issue was not pleaded and was raised by the trial judge *proprio motu*. It argues that procedural fairness was breached as it was not given a chance to respond to the trial judge’s theory of the case. The respondent, however, notes that the issue had been pleaded, raised in advance of the trial and was argued at trial. In the circumstances, there was no procedural unfairness. The true question is whether the trial judge made a palpable and overriding error in concluding the appellant failed to rebut the inference of negligence. The appellant as bailee had the onus of proving it was not negligent which required it to prove the materials used to construct the cradle were in good condition. Having removed those materials, the appellant could not disprove the presumption of negligence. There was no need on the part of the trial judge to find the appellant intended to destroy the materials.

With regard to the exclusion clause, the parties disagree as to the meaning of the words “securing and locking”. The appellant says these words refer to the placing of the vessel on the cradle whereas the respondent says they refer to the securing of lines, buoys and equipment and the locking of hatches, doors and windows. The trial judge applied the *contra proferentem* rule of construction and, because it was clear the erection of the cradle was the responsibility of the appellant, held the words could not have had the meaning advocated for by the appellant. There is no basis to interfere with this holding. The main concern of contractual

interpretation is to determine the parties' intent and scope of their understanding. This is not a question of pure law but of mixed fact and law and can only be interfered with on appeal if there is a palpable and overriding error. There is no such error. Moreover, even if the word "securing" was given the meaning advocated for by the appellant, the clause would not protect it since it is not an exclusion clause. Once the appellant assumed the responsibility for securing the vessel, it was bound to secure it properly.

### **Damage to Vessel Caused by Grinding Dust - Liability - Practice - Summary Judgment - Motion for Non-Suit - Joint and Several Liability**

*0871768 B.C. Ltd. v. Aestival (Vessel), 2014 FC 1047*

The plaintiff commenced these proceedings for damage allegedly caused to his vessel by grinding dust, including metal particles, that spread from the defendant vessel. The plaintiff's vessel had been on blocks next to the defendant vessel while grinding work was being carried out. The defendants were the owner of the defendant vessel and a repairer hired by that owner. The defendants denied liability. Shortly before trial the defendant owner brought an application for non-suit and/or no-evidence and, at the trial brought a motion to file affidavit evidence.

**Decision:** Judgment for the plaintiff against the defendant owner but not the repairer.

**Held:** With respect to the non-suit motion, there is doubt as to whether such a motion is compatible with a motion for summary judgment or summary trial but, in any event, the defendant owner did not comply with the time requirements for bringing such a motion. Moreover, even if the motion for non-suit had been properly brought, it would not succeed as the plaintiff has established a *prima facie* case. The defendant owner says there is no causal link between the grinding and the damage done to the plaintiff's vessel but there is some evidence supporting causation and this is sufficient to dispose of the non-suit motion.

The defendant owner's motion to file affidavit evidence is also dismissed. Non-suit rules require a defendant to elect whether to call evidence. If they elect to call no evidence, the non-suit motion is decided immediately and the defendant forfeits the right to call evidence.

The plaintiff has established the four elements necessary to support its claim against the defendant owner, those elements being: a duty of care; breach of the standard of care, causation and compensable damage. On the evidence there was a duty of care. The vessels were "neighbours" in close physical proximity and the defendants knew or should have known that the defendant vessel should be tarped before sanding or grinding. It was reasonably foreseeable that failure to contain debris would cause damage to other vessels. The standard of care is that expected of an ordinary, reasonable and prudent person in the same circumstances as the defendant. Grinding without a tarp or other containment mechanism was in breach of the standard of care. However, the evidence establishes that only the defendant owner was carrying out grinding on 26 July 2012 and only the defendant repairer was carrying out the grinding on 27 July 2012. Accordingly, the defendant owner breached the standard of care on 26 July and the defendant repairer breached the standard on 27 July. With respect to causation, the proper test is the "but for" test. The plaintiff must prove that "but for" the negligence of

the defendant the damage would not have occurred. This burden has been met but, because the damages caused by the 26 July grinding are divisible and separate from the damages caused by the 27 July grinding, this is not a case of joint and several liability. Each defendant is liable only for the damages caused by their own negligent acts. The defendant owner is liable for the damage caused as a result of the grinding that occurred on 26 July. The defendant repairer would have been liable for any damage caused on 27 July but no damage was caused to the plaintiff's vessel that day.

## Table of Cases

### Cases

0871768 B.C. Ltd. v. Aestival (Vessel), 2014 FC 1047 .....	23
Arcelormittal Mines Canada Inc. v AK Steel Corporation, 2014 FCA 287 .....	16
Asia Ocean Services, Inc. (UPS Asia Group Pte Ltd) v. Belair Fabrication Ltd, 2015 FC 1141. 15	
Atkinson (Guardian ad litem of) v. Gypsea Rose (Ship), 2014 BCSC 1017 .....	9
C.H. Robinson Worldwide v. Northbridge Insurance, 2015 ONSC 232 .....	3
Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. v. Pêcheries Guy Laflamme Inc., 2015 CAF 78.....	20
Coastal Float Camps Ltd. v. Jardine Lloyd Thompson Canada Inc., 2014 FC 906 .....	4
Cormack v. Chalmers, 2015 ONSC 5564 .....	7
Ehler Marine & Industrial Service Co. v. M/V Pacific Yellowfin (Ship), 2015 FC 324 .....	20
Forsey v. Burin Peninsula Marine Service Centre, 2015 FCA 216 .....	21
G.B. v L.Bo., 2014 QCCS 18 .....	13
Gaudet v. Navigation Madelaine Inc., 2014 QCCS 4106.....	12
Haryett v. Lloyd's Canada, 2015 ONSC 853 .....	2
Langlois v. Great American Insurance Company, 2015 QCCS 791 .....	2
Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited, 2014 NSSC 217 .....	11
Peracomo Inc. v. Telus Communications Co., 2014 SCC 29 .....	5
Ranjbar v. Islamic Republic of Iran Shipping Lines, 2014 BCSC 1983 .....	8
Snow Valley Marine Services Ltd. v. Seaspam Commodore (The), 2015 FC 304 .....	18
St. Paul Fire & Marine Insurance Company v. Vallée, 2015 QCCQ 1891 .....	16
Toney v. Canada, 2014 ABQB 585 .....	13
Transport Desgagnes Inc. v. Wartsila Canada Inc., QSC File 500-17-060283-101 .....	19
Verreault Navigation Inc. v. The Continental Casualty Company, 2014 QCCS 2879.....	4

## Appendix A – Limitation Periods

The limitation periods that apply to claims governed by maritime law are not always easy to identify or locate. The federally prescribed limitation periods for many of the more common claims subject to maritime law are addressed below. For those claims for which there is not a specific limitation period, s. 140 of the Marine Liability Act now provides for a general limitation period of three years.

### Application of Provincial Limitation Statutes

It is now reasonably clear that the limitation periods under provincial limitation statutes will not apply to matters governed by Canadian maritime law as there is now a general three-year limitation period in s. 140 of the Marine Liability Act that was enacted on 23 June 2009. Cases since then have generally refused to apply provincial limitation statutes.

### Federally Prescribed Limitation Periods (MLA = Marine Liability Act)

Claim	Statute	Period
Personal Injury from Collision between ships	MLA s. 23(1)	2 Years
Personal Injury to a “passenger”	Athens Convention, art. 16 r. 1	2 years
Other Personal Injury	MLA s. 140	3 years
Dependant’s Claims	MLA, s. 14	2 years
Property Damage from Collision between ships	MLA s. 23(1)	2 years
Damage to Cargo Governed by Hague Visby	Hague-Visby Rules, art. 3. r.6	1 year
Other Property/Cargo Damage	MLA s. 140	3 years
Pollution Claim Against Owner of a Ship	MLA, Sched. 5,	3 years (but can be as much as 6 years)
Pollution Claim Against Administrator of SSOPF	MLA, s. 103	2 years (but can be as much as 5 years)
All Other Claims under Canadian Maritime Law	MLA, s. 140	3 years

## Appendix B – Limitation of Liability

### Limitation Amounts - Non-Passenger Carriage

Ship's Gross Tonnage	Claims For Loss of Life or Personal Injury (except passengers or persons carried on a ship)		Other Claims (except passengers or persons carried on a ship)	
	Pre 8 June 2015	Post 8 June 2015	Pre 8 June 2015	Post 8 June 2015
Less than 300	C\$1,000,000	C\$1,000,000	C\$500,000	C\$500,000
300 - 2,000	2,000,000 SDR (C\$3,500,000)	3.02 million SDR (C\$5.285 million)	1,000,000 SDR (C\$1,750,000)	1,510,000 SDR (C\$2,642,500)
2001 - 30,000	2,000,000 SDR (C\$3,500,000) plus 800 SDR (C\$1,400) for each ton over 2000	3.02 million SDR (C\$5.285 million) plus 1,208 SDR (C\$2,114) for each ton over 2000	1,000,000 SDR (C\$1,750,000) plus 400 SDR (C\$700) for each ton over 2000	1,510,000 SDR (C\$2,642,500) plus 604 SDR (C\$1,057) for each ton over 2000
30,001 - 70,000	24,400,000 SDR (C\$42,700,000) plus 600 SDR (C\$1,050) for each ton over 30,000	36,844,000 SDR (C\$64,477,000) plus 906 SDR (C\$1,585) for each ton over 30,000	12,200,000 SDR (C\$21,350,000) plus 300 SDR (C\$525) for each ton over 30,000	18,422,000 SDR (C\$32,238,500) plus 453 SDR (C\$793) for each ton over 30,000
over 70,000	48,400,000 SDR (C\$85,400,000) plus 400 SDR (C\$700) for each ton over 70,000	73,084,000 SDR (C\$127,897,000) plus 604 SDR (C\$1,057) for each ton over 70,000	24,200,000 SDR (C\$42,350,000) plus 200 SDR (C\$350) for each ton over 70,000	36,542,000 SDR (C\$63,948,500) plus 302 SDR (C\$529) for each ton over 70,000

#### Table Notes:

- (1) The amounts apply to the aggregate of all claims arising on any distinct occasion.
- (2) The amounts for ships over 300 tons derive from art. 6 of Schedule 1 to the MLA. For ships less than 300 tons, the amount is stipulated in s. 29 of the MLA.
- (3) As of 8 June 2015 the limitation amounts were increased pursuant to SOR/2015-98. These new amounts are indicated in the appropriate column.
- (4) SDRs are converted to CDN\$ at a rate of 1 SDR=CDN\$1.75. This rate does however fluctuate.

### Limits of Liability for Fatalities and Personal Injuries to Passengers

Pursuant to Articles 7 & 8 of the Athens Convention, the liability of a ship owner to each individual passenger for death or personal injury is limited to 175,000 SDR (C\$306,250) and to 1,800 SDR (C\$3,150) for loss or damage to luggage. The overall or global liability of the ship owner for all claims by passengers is 175,000 SDR (C\$306,250) multiplied by the number of passengers the ship is authorized to carry by her certificate. If the ship does not have a certificate, the limitation amount is the greater of 2,000,000 SDR (C\$3,500,000) and 175,000 SDR (C\$306,250) multiplied by the number of passengers on board the ship.