

JOKERS DRINKING BEER IN A MOTOR BOAT

Present and Future Hangovers in Canadian Law of Recreational Watercraft

MARC ISAACS

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Recreational Watercraft

- “Pleasure craft” – “...a vessel used for pleasure and does not carry passengers” – *Canada Shipping Act*
- No commercial or public purpose
- Does not have to be registered
- Used in recreational activities

Recreational Watercraft Industry

- 6 Million people in Canada participate in recreational boating
- Roughly 18% of the Canadian population
- Canadians own 2.9 Million pleasure boats

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Recreational Watercraft Industry Economics

- Big Business in Canada
- 26.8 Billion dollar economic impact
- Over 373,000 jobs
- 10% of Canadian tourism spending

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Boating Fatalities and Injuries

- General trend is that fatalities and injuries decreasing
- 1/3 of all water related deaths attributable to boating
- Mainly recreational, non-professional mariners
- 75% on the lakes and rivers of Canada
- 75% of boating deaths occur in the recreational sector
 - 33% power boating
 - 27% fishing
 - 13% canoeing
- Two provinces, Ontario and British Columbia account for 49%
 - Ontario alone accounts for 28%

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Canoes & Personal Watercraft

- Canoes are a major contributor to fatalities
 - 2nd most common vessel involved in boating deaths
 - 30% of Canada's boating fatalities

- Personal Watercrafts (i.e. See-doo) have the highest overall rate:
 - 11 deaths per 100,000 compared to 6 in 100,000 for power boats

Boating Deaths Victims

- Male (90%)
- 18-34 (50%)

These victims can generate Big Personal Injury awards

Assume:

- Ontario male, 32 years old, married and father of a 3 year old child
- Earning average Ontario Industrial wage of \$43,000 per annum

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Big Personal Injury Award Potential

Statistical life expectancy to 65 is 31.66 years
Actuarial discount rate of 26.5 = \$1,152,750 loss of life time earnings.

Dependency to spouse 70%	800,925
To child to 21 + 4% for 18 years =	<u>29,058</u>
	835,983

General Damages to surviving wife	75,000 +/-
to surviving child	50,000 +/-
Loss of household services	100,000 +/-
Total damages, plus interest and costs	\$1,060,983 +/-

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Boating and Drinking

- Driving and Boating kills
- Alcohol is the primary factor in boat related deaths
- Drinking and Boating is Drinking and Driving

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Alcohol Usage

- 66% of recreational boaters occasionally drink when boating
- 37% *always* drink while boating

Compared to motor vehicles:

15% of all drivers admitted to driving after drinking within past month. Of those:

- 2/3 once or twice
- 16% (or 2.3% of all drivers) more than 4 times in past month
- 6.7% have driven within past year when over limit

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Drowning

- Most common boat related deaths
- 2/3 of all boat drownings - alcohol related
- In Ontario out of 36 boating related deaths 31% were alcohol related
- 81% male, mainly 18 - 24

A typical scenario: The recipe for disaster

- Young males; 18 – 24 years old
- Weekend at the cottage
- Drinking all day or night
- Leaving cottage or restaurant by boat
- Dark, visual and other distractions
- Arrogance (“I’ve been on this lake all my life”)
- High speed

Impairment

- Everyone is different depending on size, weight, body mass, rate of consumption and drinking profile
- There are three factors for developing the Blood Alcohol Content
 1. Consumption – can be controlled
 2. Absorption – can only be marginally controlled i.e. with food
 3. Elimination – cannot be controlled (your liver does it for you)
- The “one drink per hour” rule is very rough and neither accurate nor reliable.
- It applies to a standard drink – which means 3% alcohol (American) beer not 5% Canadian beer.

BAC is cumulative

- 38 year old male
- 5'11
- 168 lbs
- Average social drinker (standard elimination)
- Starts drinking at 7 p.m.
- Drinks 6 Canadian beers between 7 p.m. and 1 a.m. (6 hours)

BAC at 1 a.m.

.088 mg/mL

Over the legal limit



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Criminal Code

- s. 253 makes it a crime to operate a vessel while impaired
- “care or control” whether in motion or not
- “impaired” or over 80 mg/mL BAC
- *Criminal Code* uses wide definition for vessel:
A boat, ship or craft, used or capable of being used, solely or partly for navigation...without regard to method of propulsion.
i.e. a canoe

Provincial Liquor Laws

- Ontario *Liquor License Act* prohibits alcohol on vessels unless sealed or stored in a closed storage compartment.
- To consume alcohol on a boat the boat must have sleeping and cooking accommodations, sanitary facilities, and be at anchor or docked.

Ontario's Impaired Boating Crackdown

- *Highway Traffic Act* relating to impaired driving extends to impaired boating
- Officers may stop vessels to make breath sample demand
- “over 50” results in 3 day Driver’s licence suspension and increased suspensions for subsequent violations
- Conviction under s.253 results in 1 year driver’s licence suspension

QUERY:

- How does the Ontario provincial government in the guise of regulating activity on provincial highways, get the authority to suspend motor vehicle driver's licences for impaired operation of a vessel?

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Pleasure Craft Incidents

- Canadian Maritime Law
 - Federal power over “Navigation & Shipping”
 - uniform throughout Canada
 - includes tort law
- General negligence and tort claims are usually within provincial power as “Property and Civil Rights”
- What does “Navigation and Shipping” include?

Whitbred v. Walley S.C.C. 1990

- Pleasure Craft M/V *Calrossie*
- Single vessel grounding
- Indian Arm Inlet
- Severe Injury (Quadriplegia)
- Defendant vessel operator sought to limit liability under the then *Canada Shipping Act* limitation provisions (about \$100,000.00)

ISSUE: Does Canadian Maritime Law extend to pleasure craft?

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Supreme Court:

Tortious liability in maritime context is included in Canadian Maritime Law

CML extends beyond the ebb and flow of the tide but also to those “directly engaged in the activity of navigation on Canada’s inland waterways”

Not just commercial activity, but all navigation and shipping

Both recreational and commercial vessels operate in same “navigational network” and should be subject to a uniform legal regime.

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Isen v. Simms, S.C.C. 2006

- Single vessel, on land (just out of the water)
- Bungee cord strikes plaintiff in eye
- Bungee cord used solely to secure vessel's engine cover
- Defendant seeks to limit liability (to \$1,000,000.00)

Defendant's theory was:

1) Canadian Maritime law applies to pleasure vessels
(*Whitbred*)

2) Canadian Maritime law applies to land based negligence if connected to maritime activity (*ITO v. Miida*)

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Supreme Court of Canada disagrees

- Incident did not arise out of navigation of the pleasure craft.
- Not a shipping case.
- Federal jurisdiction does not apply to pleasure craft *per se*. Just having a boat involved does not make it a maritime case.
- Focus is on the activity or negligent act. The act complained of must be integrally connected to navigating the pleasure craft such that it is practically necessary for parliament to have jurisdiction.

Maritime & Tavern Liability

- A tavern sells alcohol to a defendant who gets in a boat and speeds away, causing an accident.
- The collision and negligent boating case is governed by Canadian Maritime Law.
- The case against tavern for over-serving alcohol is governed by provincial negligence law.

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QUERY:

A dinner cruise vessel serves alcohol to excess to a patron. The patron gets off the boat and into a vehicle and causes motor vehicle accident.

Is the case against the cruise vessel for over-service governed by Provincial or Federal Law?

- Is not the service of food and beverage to passengers on a vessel is within the scope of “navigation and shipping”?

Can the cruise ship-operator limit its liability?

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Boating Accidents

Standard of Care

- “Reasonably prudent operator of a vessel”
- No clear definition
- May be less than “ordinary reasonable seaman” but more than “reasonable prudent person”
- “Reasonable boatman”

Standard of Care

- The need for uniformity is the basis of federal jurisdiction over pleasure craft
- Both vessels share the same navigational network
- Small Vessel Regulations – prohibit operation “without due care and attention or without consideration for other persons”
- Collision Regulations:
 - fail to keep a proper lookout
 - fail to yield right of way

Competency of Operators of Pleasure Craft Regulations

- By September 15, 2009 all operators of a pleasure craft fitted with a motor will have to have a Pleasure Craft Operator's Card.
 - Obtained through a test – can be done over the internet
- Exception for rental boats, if renter reviews and signs a safety checklist.

Vicarious Owner's Liability

- Provincial motor vehicle laws make owners liable for negligence of their consensual drivers.
- No similar law in Canadian Maritime Law
- Owners can be liable under normal principles of negligence law
 - i.e. negligent entrustment; failure to supervise; failure to instruct
- Owners have obligations under the *Competency Regulations* to not allow people to operate their boats unless they have a Pleasure Craft Operators Card.

Damages

- Customary approaches as in personal injury claims
 - Non Pecuniary General Damages
 - pain and suffering; loss of enjoyment of life etc.
 - Special Damages
 - Past loss of income
 - Expenses incurred (medical, assistance)
 - Provincial Health Insurers (Subrogation)
 - Pecuniary General Damages / Future Damages
 - Future loss of income/ Loss of dependency
 - Future Health Care costs (including Provincial Health Care)
 - Future Loss of Housekeeping, home maintenance
 - Loss of interdependent relationship
 - Dependant's relief claims
 - Case by case approach

Limitation of Liability

- Less than 300 gross tons
- \$1,000,000 limit for all claims
- Commercial or Public Purpose
 - The traditional pleasure craft used for some connection to a business
- Extended applications of Athens Convention

Limitation Periods

- Collision – 2 years
- Dependants' relief claims – 2 years
- Soon to be Amended *Marine Liability Act* – 3 years for all claims under Canadian Maritime Law

Future Issues:

- Legal significance of the failure to have a Pleasure Craft Operator Card
 - Will it be a basis for liability on the operator? On the owner?
- Extension of liability to owners of vessels on various theories
 - Failure to supervise/instruct
 - Entrustment to impaired operators
 - Where will it end?
- Resolving conflicting limitation periods

Future Issues:

- When is an incident involving a pleasure craft sufficiently connected to maritime navigation to be within Canada Maritime Law?
- Ordinary pleasure vessels that have a connection to a public or commercial purpose
- Ontario's extension of Highway Traffic laws to recreational boating.

Thank You

...And leave your beer on the pier



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