

**The New *Marine Liability Act*:
Closing the Gaps in Canadian Maritime Law**

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On August 8, 2001, the *Marine Liability Act*, S.C. 2001, c. 6 (the “*Act*”) came into force.¹ The broad purpose of the Act according to government literature is as follows:

1. To adopt a new regime of Shipowner’s liability to passengers and a new regime for apportioning liability.
2. To consolidate existing marine liability regimes to one comprehensive piece of legislation; and
3. To validate certain bylaws and regulations made under *Canada Ports Corporation Act* and the *Pilotage Act*.

The *Act* consists of six parts covering the following substantive matters:

1. Personal Injuries and Fatalities;
2. Apportionment of Liability;
3. Limitation of Liability for Maritime Claims;

¹The Act is the final articulation of *Bill S-2*, which was introduced on January 31, 2001, in the Senate. *Bill S-2* was identical to *Bill S-17*, which was introduced in March 2000, but did not get passed into law prior to the recent Federal Election. *Bill S-2* sped through the Senate and House of Commons and was given Royal Assent on May 10, 2001.

4. Liability for Carriage of Passengers by Water;
5. Liability for Carriage of Goods by Water;
6. Liability and Compensation for Pollution;

Some of the Act is new and brings about some significant change to maritime law. Much of the Act is simply taken from existing legislation such as the *Canada Shipping Act*. So, for example, there are no substantive changes to the law in Canada respecting the general provisions relating to the limitation of liability for maritime claims, or the provisions relating to liability and compensation for pollution.

There are, however, some significant changes. In this regard, there are notable changes and clarifications in the law relating to: personal injury, general maritime tort law, the carriage of passengers and some procedural aspects of the law relating to the carriage of goods. In this presentation, I intend to provide a very general overview and to focus mainly on the changes made in the law.

Part I: Personal Injury and Fatalities

Provisions relating to marine fatalities were previously found in Part XIV of the *Canada Shipping Act*. Those provisions only dealt with wrongful death claims and did not cover in any way claims for personal injury. Those provisions were somewhat dated and certainly varied from provincial laws covering non-marine fatalities. The changes brought about under Part I of the *Act* bring federal maritime law more in line with provincial law on the subject.

The provisions of Part 1 clarify who may sue for personal injury or death in a marine context, and when such suit must be commenced. Under the previous regime suits in relation to a fatal injury could only be brought by a dependant defined as a “wife, husband, parents and children of

a deceased person”. Section 4 of the Act significantly broadens the definition of “dependant” to include the following:

- (a) a son, daughter, stepson, stepdaughter, grandson, granddaughter, adopted son or daughter, or an individual for whom the injured or deceased person stood in the place of a parent;
- (b) a spouse, or an individual who was cohabiting with the injured or deceased person in a conjugal relationship having so cohabited for a period of at least one year; or
- (c) a brother, sister, father, mother, grandfather, grandmother, stepfather, stepmother, adoptive father or mother, or an individual who stood in the place of a parent.

The types of claims that may be brought are also expanded. Under the old regime claims were limited to those brought by a dependant in respect of the death of a person. Under section 6 of the Act claims, in addition to the traditional wrongful death claim, may be brought by a dependent for “their loss resulting from the injury ...”, and under section 6(3) they may also recover “an amount to compensate [them] for the loss of guidance, care and companionship that the dependant could reasonably have expected to receive from the injured or deceased person if the injury or death had not occurred”

Under the old regime a suit for wrongful death had to be commenced within 12 months of the death. Under section 14 of the *Act*, the time for commencing action for personal injury or death is clarified. For personal injury, an action must be commenced within 2 years after the cause of action arose, and for fatalities action must be commenced within 2 years from the date of death. These time limits are more in line with provincial time limits for comparable non-maritime claims.

Part 2: Apportionment of Liability

Part 2 of the *Act* deals with apportionment of fault, joint and several liability, and the right to seek contribution or indemnity. These are concepts that have developed significantly over the

past century in the area of tort law and have been the subject of provincial legislation, but had not previously been dealt with federally except in very limited circumstances.

Joint and Several Liability

In basic terms, joint liability refers to a situation in which liability is imposed on several persons, e.g. partners, together, so that if one is sued he can insist on the others being joined in the suit. The liability that jointly liable parties share generally entitles any one joint tortfeasor being sued to insist that the other joint tortfeasors be sued as well. A good example of joint liability would be where a passenger ship and another vessel collide and passengers are injured. The vessels would be jointly liable for the personal injury claims.

The concept of several liability refers to a situation where in a judgment against more than one party, arising out of one action, each may be liable for the entire amount of the loss. Several liability permits a wronged party to recover the entire amount of a loss from any defendant against whom he or she chooses to bring an action against. The important point from the claimants' point of view is they can recover, with some exceptions, the full amount from either and so the bankruptcy or insolvency of the other will be visited on the tortfeasor, not the claimant.

Contribution and Indemnity

Contribution is the right of a jointly liable party to demand that another jointly liable party contribute towards the compensation of the victim. This can involve an equal sharing of the loss or the loss may be apportioned between the jointly liable parties according to their degrees of relative fault. A related notion is the concept of indemnity, which refers to the obligation resting on a party to make good any losses another party had incurred by acting for the benefit of former. In certain circumstances, this involves a shifting of loss from a party who is technically

or passively at fault to the party who is primarily or actively responsible for the loss. A good example of such a claim is where a shipowner seeks compensation from stevedores who damage cargo on loading or discharge.

Legal Background

With the exception of the collision provisions found in the *Canada Shipping Act*, there was no federal legislation dealing with apportionment of liability arising in respect of maritime matters prior to the enactment of the *Act*. Under the apportionment provisions of the *Canada Shipping Act* a court could apportion liability for a collision. If the court could not determine a specific apportionment (e.g. 40/60 or 100/0) then liability was apportioned on a 50/50 basis.

Unfortunately, a number of significant Canadian decisions in the late 1980s and the 1990s made it clear that provincial Negligence Acts, which allowed for the apportionment of liability in general tort claims and abolished the prohibition on claims for contribution and indemnity, did not apply to maritime claims². This exposed maritime tort claims to the old common law rules abolished provincially by the Negligence Acts, although fortunately the Supreme Court of Canada showed a general willingness to modernize these old common law rules.

Under the traditional common law regime, a joint tortfeasor was liable to a plaintiff for the entire loss and could not claim contribution or indemnity from another joint tortfeasor. In similar fashion, common law courts developed a severe doctrine with respect to plaintiffs who contributed to the losses they suffered, known as the doctrine of contributory negligence. Under this doctrine, a plaintiff whose negligence contributed in any way to the loss suffered was

² see for example the decisions of the Supreme Court of Canada in *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 and *Monk Corp. v. Island Fertilizers Ltd.*, [1991] S.C.R. 779; *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 and *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

completely barred from recovering any damages regardless of the degree of his fault. So if a plaintiff was only 5 % at fault for their loss, they could not recovery anything under the doctrine of contributory negligence.

Closing the Gaps: The Marine Liability Act

Part 2 of the *Act* goes a long way towards closing the gaps and resolving much of the uncertainty that existed in the realm of maritime negligence law.

Apportionment of Liability

In this regard, section 17(1) of the Act provides for the apportionment of liability. Where a loss is caused by two or more persons, each is liable to degree to which he or she is negligent. Where the respective degrees of fault cannot be determined, their liability is equal. Significantly, the contributory negligence bar to recovery is eliminated. Essentially, this provision codifies the approach taken by the Supreme Court of Canada in *Bow Valley, supra*.

Section 21 abolishes the “last clear chance” rule. This rule was developed to mitigate the effects of the rule barring any recovery resulting where the plaintiff was contributory negligence. Under the “last clear chance” rule, a negligent plaintiff’s recovery was not barred where the defendant had the last clear chance to avoid the accident but failed to do so. Now that the Act apportions liability based on respective degrees of fault this rule is unnecessary.

Joint and Several Liability

Section 17(2) provides for joint and several liability and allows one joint tortfeasor to pursue another for contribution or indemnity. In this respect, section 18 establishes the procedural framework for a claim for contribution or indemnity. Under this framework, claims for contribution or indemnity can be brought by adding the other person as a party to a pending

proceeding, by commencing separate proceedings, or, if the other person has settled with the plaintiff, by continuing a pending proceeding or commencing new proceedings.

Section 17(3) of the Act establishes an exception to the joint and several liability rule where a loss is caused by two or more ships and the claim is for the loss of one of those ships, its cargo or other property on board or loss of earnings. In this situation, liability is not joint and several. For this section to apply two conditions must be met: (i) the loss must be caused by two or more ships; and (ii) the claim must not be for personal injuries or fatalities.

Section 20(1) of the Act imposes a one year time limit for a claim for contribution or indemnity. This is dated from the date of judgment or settlement in the main action. Importantly, under section 20(2), a claim for contribution or indemnity is not defeated by any period of limitation or notice provision applicable to the original claim.

Part III: Limitation of Liability for Maritime Claims

Part 3 of the *Marine Liability Act* re-enacts amendments made to Part IX of the *Canada Shipping Act* in 1998, which implemented the 1976 *Convention on Limitation of Liability for Maritime Claims* and the 1996 Protocol which replaced the 1957 Convention. Section 26 of the Act states explicitly that “Articles 1 to 15 of the Convention have the force of law in Canada.” To this end, the 1976 Convention is included in Schedule I of the Act.

The re-enactment of the 1998 amendments has not brought any significant changes in the law in this area. The movement of these provisions from the *Canada Shipping Act* to the Act was simply to consolidate existing liability regimes into one comprehensive piece of legislation.

Part IV: Carriage of Passengers by Water

Part 4 deals with the liability for carriage of passengers by water. Previously, there was no specific Canadian legislation in this area. Rather, passenger carriage was governed, in large part, by the common law.

Part 4 essentially adopts the *Athens Convention* as amended by the Protocol of 1990. Specifically, section 37 of the Act provides that articles 1 to 22 of the *Convention* as amended have the force of law in Canada and specifically applies to the carriage by water under a contract of carriage of passengers from one place in Canada to another place in Canada, either directly or by way of a place outside Canada. The *Act* itself does little more than incorporate the *Athens Convention*.

Part V: Liability for Carriage of Goods by Water:

There are no substantive changes to the former legal regime found in the *Carriage of Goods by Water Act*. The Hague-Visby rules continue to be applicable in Canada. Under the former legislation consideration was to be given by the Minister to the adoption of the Hamburg Rules. That obligation continues with a decision to be made in that respect before January 1, 2005 and every 5 years thereafter.

Procedurally there is one substantial change. Significantly, section 46 provides that in cases where the Hamburg Rules do not apply (in other words in most cases) provision in a contract of carriage requiring adjudication or arbitration in a place other than Canada will have limited application or enforceability. By way of example, in the case of a shipment from Canada to England, if the bill of lading provides for litigation in the English Courts, or arbitration in London, that provision will not be legally binding on the parties. Instead the claimant will, under section 46, be at liberty to commence judicial or arbitral proceedings in Canada where:

- the actual or intended load or discharge port is in Canada;
- the defendant/respondent resides or has a place of business, branch or agency in Canada; or
- the contract was made in Canada.

This provision is significant. It essentially removes the freedom of parties to choose in advance how they wish to resolve disputes. While such a provision might be justified in the context of certain bill of lading transactions, it seems out of place in the context of long-term carriage contracts entered into between significant Canadian shippers and shipowners.

The application of section 46 to pre-*Marine Liability Act* cases was the subject of a Federal Court application in *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. and Danzas (Canada) Limited v. The Owner and All Others Interested in the Ships "Castor" and "Katsugari" et al.*, 2001 FCT 1330, T-2330-00 (2001-12-04) [hereinafter the *Castor* decision]. The dispute in this case arose out of damage caused to a shipment of polished granite loaded in the port of Catania, Italy. The cargo was initially loaded on the vessel "Castor" and later transhipped to the vessel "Katsuragi" in Malta for on-carriage to Halifax, Nova Scotia. The cargo was then transported by rail to Surrey, British Columbia arriving on January 11, 2000. The plaintiffs alleged the cargo was damaged during shipment and commenced an action in the Federal Court of Canada on December 15, 2000.

On February 15, 2001, the defendants associated with the "Katsuragi" filed a motion to stay the proceedings pursuant to s. 50(1) of the *Federal Court Act* based on a jurisdiction clause in the bill of lading, which provided for the exclusive jurisdiction of the Hamburg courts. On March 26, 2001, the defendants associated with the "Castor" filed a similar motion.

At issue in this case was whether the section 46 of the *Act* was applicable to the facts of the dispute thereby rendering the forum selection clause unenforceable. Mr. Justice Gibson, who

heard the motion, noted the *Act* is silent with respect to the application of section 46 to contracts of carriage entered into or completed before the *Act*'s entry into force. He further noted the generally accepted principle of statutory interpretation that legislation is not to have retroactive effect, unless the legislation specifically provides for such effect.

In the *Castor* case, the plaintiffs argued that the applications for a stay of proceedings and the disposition of those applications were relevant facts that were situated in time after the coming into force of the *Marine Liability Act*. Accordingly, the plaintiffs argued that they were not bound by the forum selection clause by reason of the operation of section 46 of the *Act* and the question of retroactive application of the *Act* was a non-issue.

Despite the fact that the damage giving rise to the dispute clearly occurred long before the *Act* entered into force, this reasoning was wholly accepted by Mr. Justice. Gibson. In this respect, Mr. Justice Gibson concluded that “the motion for a stay of proceedings filed by the Katsuragi and *Castor* defendants are relevant facts that are continuing in nature; that is to say, they represent situations that consist of one or more facts that endure over a period of time, such time extending to the time at which they are ultimately disposed of.”³ Due to the fact that the motions were not disposed of at the time the *Marine Liability Act* came into force, Mr. Justice Gibson concluded that section 46(1) of the *Act* applied to the facts matter before him and that its application was neither retroactive nor retrospective in nature.⁴ He further concluded that the rights of the parties under the forum selection clause had not yet “vested” or “crystallized” at the time the *Act* came into force. Consequently, he held that the notion that a court should not interpret section 46 in a way that would impair or interfere with a party’s vested rights had no application to the case before him.

³ *Castor* at para. 21.

⁴ *Castor* at paras. 21 to 23.

The *Castor* decision is presently under appeal. While this decision will only matter in cases which pre-date the Act, it certainly suggests there is a strong desire on the part of the Court to enforce section 46 in the fullest possible way.

Part VI: Liability and Compensation for Pollution

Part 6 of the Marine Liability Act re-enacts the regime established under Part XVI of the *Canada Shipping Act* for liability and compensation for maritime oil pollution. This regime implements the 1969 *Convention on Civil Liability for Oil Pollution Damage* and the 1971 *Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (a.k.a. the Fund Convention) and associated Protocols.

Interestingly, section 49(1) and 49(2) of the *Marine Liability Act* provides that the pollution liability regime established under the act does not apply to offshore oil exploration and production activities. In this respect, section 49 exempts drilling ships that are on location and engaged in exploration or production activities. Similarly, floating storage, production and offloading units are exempted, unless they are carrying oil as cargo to a port or terminal that is outside an offshore oil field.

Conclusion

The new *Marine Liability Act* contains a number of important changes to Canadian maritime law and resolves some existing uncertainty. The new *Act* certainly closes some of the gaps that existed in the area of maritime torts and represents a welcome modernization of the Canadian approach to marine liability. Some of the changes brought about with respect to the carriage of goods, however, might be considered a paternalistic throwback. Specifically, the infringement on the freedom of contract with respect to jurisdiction classes may not be in keeping with a modern approach towards international commerce and shipping.

