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Is Immunity from Law Suits for Workplace Accidents At-Sea in Jeopardy?

In a July 2009 court decision that should interest every mariner and every marine employer (and vessel owner) across Canada, the Newfoundland and Labrador Supreme Court found that a law preventing families of deceased crewmen from suing other workers and employers was ineffective and that their law suit could continue. The ruling would allow not only the families of deceased or injured workers to sue for workplace accidents, but also workers that survive their injuries. Although the court's decision is under appeal and likely headed to Canada's top court, the issue is one that could have a significant impact in the marine industry.

The court's decision was based on the tragedy of the *Ryan's Commander*, a sixty-five foot trawler designed and built short and high out of the water to fit within DFO licencing requirements. In September of 2004, the *Ryan's Commander* capsized on its way into port, killing four crewmen. While the victims were family members of the vessel owners (which would have influenced the typical decision to sue the vessel owner), dependants of two of the deceased crewmen sued the designers, builders and inspectors of the vessel, who in turn claimed they could not be sued because of the immunity provided to other "workers" and "employers" by Newfoundland's workers compensation scheme. The court disagreed, providing further reason for concern that the present immunity from law suits for workplace accidents at-sea may be in jeopardy.

What is the "Bar" Against Suing for Workplace Accidents?

Every province in Canada has worker compensation laws, which act like a public insurance policy to protect workers and employers from the financial consequences of workplace accidents. The workers compensation system is often referred to as a "historic tradeoff", because workers and their dependants, in exchange for giving up the right to sue other workers or employers for injuries or death caused at work, are entitled to some wage loss replacement and rehabilitation benefits regardless of whether the accident was their fault or not. The employers, on the other hand, have to pay into the compensation system whether their employees make a claim or not, but in exchange the employer (and their workers) have immunity from being sued for workplace accidents, even if they are at fault. Many workers, and their dependants, criticize the system for not providing fair or adequate compensation.

B.C.'s first version of the workers compensation system came into force in 1917 with the *Workmen's Compensation Act*. The first B.C. case to deal with the interaction of this provincial law in the context of a maritime accident came in 1919, with the tragedy of the *Princess Sophia*,

which sank in Alaska on its way to Vancouver with the loss of 343 lives. The employer, Canadian Pacific Railway ("CPR"), applied to court for an order preventing the then Workmen's Compensation Board from paying benefits to the dependants of deceased, so that it in turn did not have repay the Board, arguing CPR was a federal business or "undertaking", and the accident occurred outside of the province, so the provincial law did not apply. For reasons similar to those discussed below, the court disagreed and CPR was forced to pay. Today, the provincial system is known as WorkSafe B.C, and has two primary arms, a regulatory branch that deals with workplace safety and accident prevention, and another that deals with injury compensation and rehabilitation.

Why is the Bar Against Law Suits in Jeopardy?

The bar against workers suing other workers and employers for a marine accident is threatened because Canada's *Constitution Act (1867)* divides the power to make laws into areas of federal and provincial jurisdiction which are exclusive to one another, but sometimes conflict. In particular, the federal government has exclusive jurisdiction over national matters like "navigation and shipping", and the provincial government has exclusive jurisdiction over more local matters such as "property and civil rights", which employment law and occupational health and safety in provincial businesses are a part of.

While it is necessary that each of the provincial and federal governments make laws that at times overlap slightly into the other government's jurisdiction (in order to avoid gaps between the laws), the Supreme court of Canada has (most recently in the *Canadian Western Bank* and *Lafarge* cases) restated a series of tests to apply in deciding whether a provincial law is *valid*, *applicable*, or can *operate*, within the federal government's jurisdiction, and vice versa. These tests can be grossly summarized as follows. If the law in question is in *pith and substance* within (meaning primarily concerned with) an area of law the *Constitution* assigns to that government, the law will be constitutionally *valid*, even if it has some incidental effects to the other government's jurisdiction. If this *pith and substance* test does not end the debate, then the court will ask whether there is a conflict between the federal and provincial laws that renders it impossible to comply with both laws, or the provincial law frustrates the purpose of the federal law. If such a conflict exists, or the federal law is frustrated, the federal law is *paramount* and the provincial law is said to be *inoperative*. If there is no direct conflict or frustration, the court will ask if the provincial law impairs a core area of the federal government's jurisdiction that should be immune from this impairment. Only if there is a significant impairment will the offending law be held *inapplicable*.

In a 2009 judgment, the owners of two fleets of B.C. fishing vessels challenged whether the WCB *Occupational Health and Safety Regulation* ("OHSR") applied to their ships (*Pattison and Osprey v. WCB*), providing a key example of how these principles are applied. The vessel

owners argued that the *pith and substance* of the provincial regulations was within the federal realm of navigation and shipping and therefore invalid – the court disagreed and held the regulations were in the nature of occupational health and safety over a provincial fishing fleet, and therefore *valid* provincial law. The owners also argued the regulations were *inoperative* because they conflicted with federal regulations on fish boat safety – the court said that while complying with both laws was expensive, it was possible and therefore there was no conflict. Lastly, the court said that because the regulations were really about occupational safety and not navigation they did not impair a core federal power. A similar decision was reached by in *Mersey Seafoods* where a Nova Scotia fishing company was fined for infractions under the provincial OHSR. While these rulings that provincial health and safety regulations apply to provincial vessels, are not the same as saying the statutory bar against law suits applies to vessels, the same legal tests apply.

In the *Ryan's Commander* case the bar to suing another worker and employer was found to be both *inapplicable* and *inoperative* by the court. The court's reasoning was (1) the pith and substance the workers compensation bar was an insurance scheme and within the province's jurisdiction, however (2) the provincial law barring the law suit was in direct conflict with the "right" of a dependant to sue under the federal *Marine Liability Act*, and (3) the bar significantly impaired a core right within federal law to sue for an injury arising from an accident of navigation and shipping. This rationale is similar to reasons why the bar might be struck down in B.C., however, there are additional reasons that the bar might be struck down than those covered in *Ryan's Commander* case. These are discussed below.

Four Other Reasons the Jeopardy is Real

In my view, the jeopardy to the bar against suing for injury suffered by crewmen at sea is significant, but not overwhelming. There are four possible arguments that I view as currently available to workers looking to avoid the bar.

Firstly, the leading B.C. case to uphold the bar (*Labouncane v. Brooks*) is tied, literally, to its facts, and not tested on appeal. This case involved a welder employed by repairer in Prince Rupert to work on a fish boat while it was tied to the dock. Laboucane was injured by an explosion and sued the owner of the vessel. The court found that the circumstances of Laboucane's injuries were "*not integrally connected with maritime matters and does not fall to be resolved under Canadian maritime negligence law*". Laboucane is not a strong case on which to defend the statutory bar because Mr. Laboucane's work was no more related to "navigation and shipping" or maritime activity than was the claim of a dishwasher repairman who may have slipped off the ladder when visiting the vessel while blocked on the hard. Neither were crewmen of the vessel, and neither accident involved navigating the vessel or shipping. In dismissing Laboucane's bid to avoid the bar the court said "*this is a case about an industrial accident, an*

activity which is not sufficiently connected to navigation and shipping that maritime law extends to it. The fact that the incident took place on a vessel is of no relevance to the negligent acts alleged. No negligence is alleged in the operation of the vessel. Nor is it asserted that the negligent activities in any way interfered with navigation or affected the navigability of any waterway". On the other hand, the plaintiffs in the *Ryan's Commander* case were both crewmen of the vessel, and killed while navigating. In this light, there is the possibility of a new genre of claims of true crewmen injured at sea that may be immune from the bar against suing other workers or employers.

The second argument that may lead to the bar failing in some cases arises from the law that injuries or death "*caused by a ship in a collision or otherwise*" (*Federal Courts Act s.22(2)(d)*) forms a maritime lien against the vessel itself, and not just the owner, the employer or another worker. In the case of *Nanaimo Harbourlynx* the court held that because crewmens' work was "*integrally connected to*" the vessel, their wage claim and maritime lien was "*pith and substance related to operation and navigation of the vessel*" and within federal jurisdiction. Given employment relations on a provincial ferry, such as *Harbourlynx,* is arguably even more closely related to provincial jurisdiction over employment and civil rights than injuries occasioned on a vessel might be, it follows from the *Harbourlynx* decision that a maritime lien for injuries while navigating the vessel is pith and substance related to federal jurisdiction, against which the bar is not valid.

The third argument that may lead to the bar failing comes from section 85 of the *Canada Shipping Act 2001*, which provides there is an implied term in every mariner's employment contract that the vessel owner will "*use all reasonable means necessary to ensure its seaworthiness for the voyage*". Section 86 then states that every crew member has a maritime lien against the vessel "*for claims that arise in respect of their employment on the vessel*". As a result, a mariner injured due to an unseaworthy vessel (such as in the *Ryan's Commander* case where the ship was unseaworthy) can be construed as arising from a breach of the employment of the seaman, that also gives rise to a maritime lien. In other words, by casting the injury claim as arising out of the employment of the seafarer, the resulting maritime lien, which includes claim for future lost wages, attaches to the vessel and not just the owner or employer, and as per the *Harbourlynx* decision is in pith and substance a matter of navigation and shipping and therefore immune from the bar. It is also important to appreciate, as another weakness to the bar, that as a maritime lien for injury arising on an unseaworthy vessel follows the vessel into the hands of a new owner, the new owner may not be an "employer" under the provincial law and hence will have no immunity.

The fourth current reason the bar may not be effective against a mariner injured at sea involves the fact that some vessel owning companies hold the vessel for tax planning or other corporate objectives, but lease or charter the vessel out and do not themselves have employees. Because

the definition of "employer" in the WCA is based on the fact the party employs a person (not simply owns an asset), such a vessel owner would not be an "employer" and not have the immunity an "employer" has under workers compensation law. This was essentially the result in the 1977 case of *Pare v. Rail & Water Terminal* where the *Aigle d'ocean* sank in Quebec with the loss of her engineer, whose parents' law suit was allowed to continue despite the Quebec workers compensation bar.

In the end, the Province's appeal to the *Ryan's Commander* decision is likely to be successful if, as happened in the *Pattison* cases, the federal government either declines to support, or argues against, the seaman's position that the provincial law should not apply. The Court in the *Pattison* decision commented that judges should not be overly clever in finding ways to frustrate the cooperation between federal and provincial governments' efforts to coordinate occupational health and safety on vessels, but this statement is far from saying judges should not protect, what some mariners say, is the right to claim for more than the little that the workers compensation system might give them. These same mariners might say the court should not be persuaded that striking the bar will open a floodgate of claims that will cripple employers and their insurers. Only that small percentage of claims where someone other than the worker themselves is at fault for their accident would be claims the court might hear, and only an even smaller percentage of claims where the worker proved negligence on another party would there be any award of damages involved. The court and employers will take further comfort from the *CSA 2001* limitation of liability of one million dollars for accidents on a vessel under 300 tonnes, which lies well below most employers' limits of coverage. This being said, only time, and judges, will tell what happens next.

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