

By: Darren Williams, BSc. LLb.

*Lessons in Legal Liability – the Cap Rouge II*

The purpose of this article is not to describe the tragedy that unfolded in respect of the capsizing of the *Cap Rouge II* in August of 2002 – readers can refer to Jim Crawford’s article “The Risks of Overload” in this month’s edition for details.

Rather, our purpose is to highlight the legal implications of the event and the subsequent safety report, and particularly what it might mean for other mariners and fisherman in the present, and in the future.

Why the sudden interest in this sad accident? The Transportation Safety Board, an independent agency of the Federal Government, recently released their report on the capsizing of the *Cap Rouge II*. This report made findings and drew conclusions about the causes of the accident. It is not the role of the TSB to find fault or assign liability, rather the report seeks to prevent future similar accidents. As Jim Crawford states, the TSB’s primary conclusions of what caused the capsizing were instability due to additional equipment onboard, loss of watertight integrity of manholes, and operation with the deck awash. As with most marine accidents, there were a myriad of other contributing causes.

Interestingly, the TSB made three recommendations as a result of their investigation:

1. The DOT require *all* new *small fishing vessels* of closed construction to submit stability data for approval (a *small fishing vessel* is one that is 15 to 150 tons, less than 24.4 metres and not a sailing ship). *To date, only small fishing vessels engaged in fishing for herring or capelin are required to submit stability data for approval;*
2. All existing small fishing vessels without any approved stability data be subjected to a roll period test no later than their next 4 year inspection; and
3. DOT and the fishing community prepare and comply with a Code of Best Practices, particularly in respect of loading and stability.

What are the legal implications of these recommendations?

In respect of the first and second recommendation, should DOT require by regulation that small fishing vessels submit stability data and/or to a roll period test, and should the owner or master of the vessel fail to do so, a subsequent accident caused by loss of stability will likely expose both master and owner to liability for breach of regulation. The consequence of this breach cannot be determined until the regulation is created, but regulatory sanctions and enforcement for small fishing vessels are notoriously weak.

More importantly, this proposed regulatory requirement will undoubtedly become a part of the owner or master's common law *duty of care*. As discussed in previous articles, the *duty of care* of a person (including a company) is a legal obligation they may have to other persons because of a relationship between them, or the foreseeability that consequences might flow from the actions or inactions of that person. The standard of the mariner's *duty of care* is fluid, and will change depending on who they are, what training they have, the circumstances at hand, and who it is that the duty is owed to.

Above all, if a mariner owes a duty of care, and his conduct falls below the *standard of care*, then he may be liable in negligence. Negligence is probably the most common basis for seeking damages in Court after persons or property have been injured. A finding by the Court that you failed to meet your standard of care (perhaps by not having up to date stability data or a roll period test completed) and that this failure caused injury, may result in a significant award against you. Where claims are made for lost income or lost support, liability is easily in the millions of dollars. In one of the law's sad ironies, damages for wrongful death of children are typically low because there is often no loss of income, presumed or otherwise.

In many onboard accidents, workers compensation law protects masters and/or owners from being sued by workers. However, this exemption only applies where the person injured or killed is a worker. *If the injured party is a guest, passenger or otherwise a non-worker, that party is not prevented from suing the owner or master.* Of the 5 fatalities onboard the Cap Rouge II, 2 were non-workers. If such a case were to happen on your vessel, workers compensation will not protect the master/owner, nor will your personal liability insurance (typically part of your home owners policy) because the accident occurred in respect of a business adventure. Therefore, unless the owner/master has liability insurance in respect of their business, they may be completely exposed to ruinous damages. Although it is rare, occasionally injured parties do not bring a law suit.

In respect of the third TSB recommendation, that a Code of Best Practices be developed, a breach of such a code would not necessarily be a breach of a regulatory requirement or law. This is because "Codes of Best Practices", as they have been developed in other industries, are not laws, but rather guidelines. The fact that the proposed code may only be a guideline does not however prevent it from being used to establish what the proper standard of care of the owner/master is. Liability in negligence may therefore flow from a breach of these guidelines.

If such a Code of Best Practices is eventually developed and implemented, which is highly likely, it is my opinion that small vessel operators will be facing an increasingly stringent duty of care – and perhaps rightly so. Small vessel owners and their associations would be well advised to actively participate in the development of this proposed Code of Best Practices. A failure to do so may result in inappropriate, impractical or even impossible burdens being placed on industry and individuals.

This brings us to the interesting question, what if DOT fails or refuses to implement the recommendations of TSB? What if, for example, an accident similar to the *Cap Rouge II* occurs in 2004 and it is shown that the accident would likely have been prevented had the vessel been forced to undertake a roll period test? Can the government be liable for not implementing these recommendations? The answer to this, in my opinion, comes from the legal principle that a government can be found liable for negligently undertaking an *operational* decision (*how* something is done) but cannot be found liable for undertaking a *policy* decision (*whether* something is done). This is because, in part, the Courts refuse to become involved in politics and budgetary constraints faced by government. The DOT's decision to implement the TSB's recommendations will be a policy decision. Therefore, it is unlikely anyone could successfully sue the government for not adopting the TSB recommendations.

In closing, all mariners and fisherman operating small fishing vessels, particularly those that have been modified since construction, would be well advised to update and submit their stability data with DOT, and/or have a roll period test completed (regardless of whether or not the TSB recommendations are accepted and implemented by DOT). Not only does this make good safety sense, it is also a key step towards fulfilling your *duty of care* and minimizing your liability as a master, owner, or businessperson.

This article and the TSB Report on the *Cap Rouge II* may be found through [www.MarineLaw.ca](http://www.MarineLaw.ca)

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