

Many of us have been raised by the adage, "if it isn't broken, don't fix it". Indeed, if something appears to work the way it is, why change it? The answer to this is that there is a danger in adopting or continuing a practice that appears to work without fully accounting for the consequences of its potential failure.

The 1995 decision of the B.C. Supreme Court in *R v. K.*** is a simple and instructive case which demonstrates why, as boaters, we should occasionally take the time to assess our daily practices and ensure that we have not overlooked dangers in favour of maintaining the status quo, mere convenience, or general apathy.

The story behind this interesting case is as follows. In 1992 Mr. R. and his companion chartered a 17-foot Boston Whaler, and employed Mr. K. as a fishing guide for a morning excursion out of Campbell River. The skiff was equipped with a 60 horse outboard, controlled by hand from the stern. The threesome left the dock early with Mr. K. in command in the stern and traveled north for some time before stopping to fish, unsuccessfully, for half-an hour.

The party then traveled south for approximately 20 minutes in search of better fishing grounds. The skiff was cruising at about 15-18 knots. The weather was pleasant and the water was slightly chopping. Otherwise, it was a delightful morning on the water.

Suddenly, the skiff hit a deadhead. The submerged log impacted with the leg of the outboard, throwing Mr. K. forward from his position next to the outboard and onto his face. The impact forced the outboard hard over, and the skiff jugged to port sharply. Mr. R., who was seated in a chair facing astern, was thrown across the skiff, smashing his shoulder into the gunnel. Mr. R. was later to require surgery to his shoulder and missed 18 days of work.

Mr. R. sued Mr. K. and his employer for negligence in causing his injury. Mr. K., his employer and presumably their insurance company, defended, maintaining that there was no negligence and that the accident could not have been avoided.

Before continuing with this story, it is appropriate to explain the essence of a law suit based on negligence. In order for a boater to be liable for injuries arising from negligence, four things must be shown by the claimant:

1. The boater owed a *duty of care* to the claimant;
2. The boater *breached* the duty of care;
3. The boater's breach *caused* the injury; and
4. The injury was a *foreseeable* result of the breach.

In other words, the plaintiff must show that the boater, or fishing guide in this case, owed a *duty of care* to the customer in protecting them from injury, that the guide *breached* this duty by doing something or failing to do something, that this breach actually *caused* the

customer's injury, and that the injury was a *foreseeable* result of the guide doing or omitting to do the alleged negligent act.

In terms of the case of *R. v. K.*, it is clear that the fishing guide owed a duty to the customer to ensure they took steps, or did not fail to take steps, that would prevent injury to the customer. The fishing guide must then show that they did not *breach* the duty of care of a fishing guide. This begs the question, how is this *duty of care* determined?

The most common way of determining what the duty of care is to look to the standard of conduct of fishing guides generally. In part, it is a matter of asking "what is the generally accepted, or customary, practice?". As Justice Henderson stated in *R. v. K.*, "where a defendant has acted in accordance with a customary, general and approved practice in the trade in which he was engaged that will often refute an allegation of negligence. Conformity to a customary practice is *prima facie* evidence that the proper standard of care has been observed".

However, more important for this month's lesson is Justice Henderson's later comment that, "there are exceptional cases in which the court can say that a generally accepted practice is insufficient or unreasonable. If a practice is careless, no amount of repetition will make it a reasonable one". This is why, to repeat one of my opening statements, it is important to assess our daily practices and ensure that we have not overlooked the dangers in what has become an accepted practice.

How did this principle play out in the *R. v. K.* case, and why is it important? In coming to his decision, Justice Henderson found that the outboard engine employed by the defendant had two safety features built into it. The first of these was a kill switch and lanyard designed to be hooked to the clothing of the boat operator. The Court speculated that when Mr. K. pitched forward after the impact, he would have traveled far enough that had the lanyard been attached to him it would have pulled the kill switch on the engine and stopped the motor immediately. Justice Henderson found that had the engine been killed the boat would not have veered out of control and the plaintiff would not have fallen against the gunnel.

The second safety feature of the engine outboard was a throttle screw which, when left loose, would allow the engine to decelerate rapidly as soon as the operator's hand was removed from the throttle handle. Evidence was given by the plaintiff that Mr. K. was driving with this screw tightened up, which prevented a rapid deceleration when his hand left the throttle. Justice Henderson found that had the engine decelerated properly, the period during which the boat was out of control would have been much shorter.

The Court concluded that the use of these two safety measures would have prevented the injuries to Mr. R.

In an attempt to show that the fishing guide had not breached his duty of care, the defendants pointed to the customary practice of local fishing guides. They argued that fishing guides in that area did not usually attach the kill switch lanyard or loosen the

throttle screw. Evidence was given that the lanyard is not used because an accident could be caused if it is pulled out of the engine inadvertently while the boat is traveling fast. The defendants gave examples that this might occur if the guide was to leave his seat quickly to assist with a passenger, or grab a wind-blown hat. The plaintiffs countered this argument by having the defendant admit that, whatever the reason for doing so, leaving one's seat when the skiff is traveling at speed is dangerous and should not be done.

In a further attempt to show that the fishing guide had not breached his duty of care, evidence was led that it is common among fishing guides in the Campbell River area to tighten the throttle tension screw to provide a measure of comfort for the guide's wrist. Unfortunately for the defendant, Judge Henderson did not accept this argument when he stated "I do not consider the avoidance of wrist fatigue a justification for bypassing this safety measure".

In terms then of whether the fishing guide *breached* his duty of care, the Court found that relying on the standard practices among local fishing guides does not mean that this practice is itself not negligent.

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As for the latter two requirements for a finding of liability for negligence (being that the breach *caused* the injury, and that the injury was a *foreseeable* result of the breach), the Court in *R. v. K.* found that the loss of control of the skiff could have been prevented by the operator taking proper precautions, and that hitting a deadhead, losing control of the skiff and a passenger suffering injury were all foreseeable consequences. The Court found Mr. K and his employer guilty of negligence.

In closing, the moral to this month's story is that "doing something the way everyone else is doing it", does not mean that you will not be held responsible if someone suffers injury because of it.

***Although the Court's decision is a public document, the identities of the parties have been omitted as a courtesy. Readers wishing to receive a copy of the decision may contact the author.*