Liability for Disturbing Marine Mammals

Part I - An Introduction to the Regulatory Offence of "Disturbing" Whales

This is Part I in a series of articles intended to provide boaters with an understanding of what liabilities they may face for disturbing marine mammals, particularly whales. These articles are not intended to be for whale watch operators alone, but for any boater that, from time to time, finds themselves around whales – this would be virtually all of us.

In Part 1 of this series we will look at the nature of a *strict liability* offence and how it relates to charges for disturbing whales. In future articles, we will discuss the results of two cases that are now before Canadian courts and outline how the law has changed as a result.

THE OFFENCE

Currently, the law as it relates to disturbing marine mammals, particularly whales, is embodied by section 7 of the *Marine Mammal Regulations* to the *Fisheries Act*, which states:

> No person shall disturb a marine mammal except when fishing for marine mammals under the authority of these Regulations.

The Canadian Department of Fisheries and Oceans wasted no ink in formulating this regulation. Its predecessor, the *Regulations Respecting the Protection of Cetaceans* was not focused on this concept of "disturb", but rather prohibited persons from "hunting" whales without a permit. Historically, the Court has given "hunting" a wide definition, saying generally, that it is any act or series of acts that tends to disturb, alarm or molest whales.

Readers should note that this regulation applies to all "persons", whether they are at the helm of a whale watch vessel, a tug boat, a sail boat, in a kayak, standing on the dock, or flying an airplane.

THE PENALTY

The primary penalties for disturbing a whale is set out in section 78(a) of the *Fisheries Act*, which states:

> Except as otherwise provided in this Act, every person who contravenes this Act or the regulations is guilty of
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> (*a*) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars and, for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both

Obviously these are very stiff penalties. However, unlike the United States, which takes a much more harsh sentencing approach on similar regulatory offences, Canadian Courts have, thus far, only sentenced parties to fines of $100 and $1,000 for a first offence. To the author's knowledge, no one has been convicted of a second offence. These fines are likely to rise significantly in coming years.

This being said, there are very few cases in B.C. where parties have been charged and convicted of disturbing whales. One reason for this is the vague nature of the word "disturb", and the difficulty in showing that an action or inaction caused the whale to be disturbed. It is, of course, impossible to ask a whale how they felt at the time of the alleged disturbance. To subpoena a whale to testify at trial is a difficult endeavor indeed.

WHAT IS A STRICT LIABILITY OFFENCE?

In laying the groundwork for future discussions on this topic, it is necessary to explain the nature of a charge for disturbing whales, being a regulatory or quasi-criminal offence.

In the typical criminal offence the plaintiff, being the Crown, must prove *beyond a reasonable doubt*, that the accused had the mental intent to commit the crime, and in fact did commit the crime. In legalese, this is referred to as the accused having the *mens rea* and committing the *actus reus.* In defending an accused, a lawyer only needs to raise a *reasonable doubt* that one or both of these things did not exist. Given that the consequence of being convicted of a criminal offence may be jail time, the stringency of the Crown's burden would seem logical.

In terms of non-criminal wrongs (or "torts" as they are called), such as breach of contract or negligence, the plaintiff (who is usually a private party and not the government) need only show *on the balance of probabilities* that the wrong was committed. In other words, the plaintiff need only show that the likelihood that the wrong was committed was 51% or greater. Consequently, the defendant, who must tip the scales in their favour and not just show there is a *reasonable doubt*, has a much tougher job in proving they are innocent.

Regulatory offences, such as disturbing whales, are a combination, or hybrid, of a crime and a tort, and are often called a *quasi-criminal* offence. Once charged, an accused will have to appear in Provincial criminal court, along with parties charged with theft and assault - the last place a boater would think he would end up for getting too close to a whale.

In order to be convicted of the regulatory offence, the Court must be satisfied of the two part test of *strict liability*. First, it must be shown, b*eyond a reasonable doubt*, that the criminal act was actually committed. This can be very hard to do, particularly when it comes to showing that a whale was disturbed. If the Crown is unable to show *beyond a reasonable doubt* that the offence was committed, the Court may find the Crown's case has not been made out and may dismiss the charge.

However, if the Crown is successful in showing that the wrongful act was committed by the accused, or there is some doubt whether this burden has been met, the onus then shifts to the defendant – part two of the *strict liability* test. The defendant is given the opportunity to show, *on the balance of probabilities* that they exercised *due diligence* in avoiding having committed the offence - this is referred to as "the defence *due diligence"*. Basically, the defendant must be able to point to actions taken, or actions avoided, that were intended to reduce the possibility of the offence occurring.

Because of this two-part test for strict liability offences, a discussion of the law of disturbing whales can be broken into two groups – the Crown having to show, *beyond a reasonable doubt*, that the accused actions disturbed the whale, and the accused showing, *on the balance of probabilities*, that they exercised due diligence in not disturbing the whale.

The law of whether any accused actually disturbed a whale is currently unsettled. The first B.C. case where a conviction was entered for disturbing a whale involved a group of tourists at the helm of a zodiac which, among other things, bumped into an orca in the Robson Bight Ecological Park in 1990. Researchers standing on shore testified that the accused was following along within feet of the orca, bumping and "badgering" it. In addressing the difficulty of determining whether the whale had actually been disturbed (that the *actus reus* had been committed) the presiding judge said the following:

> *"I do not believe evidence of a reaction from the whales is necessary to prove an offence under the Regulations….To require evidence that whales were actually disturbed, alarmed or molested would place an unreasonable burden on those who must enforce these laws"*

These are significant words indeed, because in convicting the accused, the Court made the logical jump that bumping into a whale was an obvious disturbance, thereby foregoing direct proof that the whale was disturbed. It is important that this assumption made by the Court likely applies only to the circumstances of that case, where the vessel approached and bumped the whale. In circumstances where the whale approaches a vessel and rubs itself against the hull, it is unlikely the Court would find that the whale was disturbed.

Similarly, many readers will have heard about the woman fined for petting the orca at the Gold River dock. Although the whale came to the dock looking for attention, the Court found that giving the whale attention was a disturbance to it. The Court found so on the basis of the following expert testimony:

> This orca's interactions with people have put this whale at risk of physical harm, and he may also present a threat to human safety in the future. Having lost his natural caution around vessels and people, he is now vulnerable to injury and mortality from accidental collision from boat propellers.

Unfortunately, we are out of room for further discussion in this issue of Boater Life. The topic of disturbing whales is an important social issue for British Columbians and boaters, and deserves further treatment. No doubt significant attention will be given to it by DFO, industry and other interested parties to this issue. In later articles we will discuss further the *defence of due diligence,* and look at changes in the law that may result from cases currently before the Court.